

AN APPRAISAL OF THE ISLAMIC LAW OF *QITAL* (ARMED CONFLICT)  
AND ITS PROTECTION OF WAR CAPTIVES\*

**Abstract**

This article examines whether the Islamic law of *qital* (armed conflict) adequately provides for the protection of war captives with clear references to the Prophet Muhammad (PBUH) during the early battles of Islam. Based on the authority of Quran 47:4, the article finds that the taking of war captives is legally permissible and that the ultimate provision is that they are to be treated as humanely as possible. Besides, the article examines the various options regarding the termination of captivity status as put forward in Quran 47:4. It also examines the position of juristic scholars on the termination of Prisoners of War Status as it relates to the Islamic law of *qital*. The article finds that the activities of various Islamist groups do not adhere to any of the humanitarian values prescribed in the Quran, by the Prophet Muhammad (PBUH), and the consensus of most scholars. The article concludes by finding that even though there exist various juristic opinions on all of the rights accorded to war captives and the termination of captivity status, the Islamic law of *qital* is at the centre of all of such provisions and adequately provides for the protection of war captives.

**Keywords:** Islamic law, Protection of war captives, International humanitarian law, Prisoner of war, *Qital*, Armed conflict

**1. Introduction**

In recent times, the violent and barbaric acts of extremist groups like Al Qaeda, the Taliban, the Islamic State of Iraq and Boko Haram amongst others, have become rampant. While the atrocities committed by these groups are against core fundamental humanitarian values, they also grossly violate the guiding principles of Islam. These groups have allegedly committed these inhumane violations in the name of Islam. Since most adherents of Islam view the religion to be a complete code of life – a recipe for social and moral behaviour<sup>1</sup>, this article seeks to investigate and analyse what the Islamic law of *qital* provides for the protection of war captives. One of the manifest by-products of warfare, inter alia, are war captives or prisoners of war. The designated status of ‘prisoner of war’ is arguably a modern concept. Nonetheless, for this article, ‘prisoner of war’ refers to soldiers or combatants captured during or immediately after warfare. In the context of seventh-century Arabia, ‘combatants’ were generally regarded as males above the age of puberty and capable of engaging in warfare<sup>2</sup>. Following this, women and children who were captured could not be thought of as combatants or prisoners of war. They were rather to be enslaved or exchanged for Muslim prisoners<sup>3</sup>. With prisoners of war, comes several controversial issues, especially issues regarding what should be done to them, how they are to be treated and how to terminate their status of captivity. In the light of terminating their captivity status, are they to be set free, killed or ransomed? Whilst according permission to Muslims to fight in self-defence, the Quran equally, enjoins Muslims to observe the humanitarian rules of warfare to mitigate human suffering<sup>4</sup>. Having said that, this article, with references to the practice of Prophet Muhammad (PBUH), will examine whether the Islamic law of *qital* adequately provides for the protection of war captives.

**2. The Sources of Islamic Law**

The four major agreed-upon sources of Islamic law are the Quran, the *Sunnah*, *ijma* (consensus of opinion) and *qiyas* (analogical deductions). The hierarchy of these sources is based on Quran 4:59, which reads, ‘O you, who believe, obey Allah and obey the Messenger and those in authority among you. Then if you quarrel about something, revert it to Allah and the Messenger’. ‘Obey Allah’ refers to the first source, the Quran whereas, ‘Obey the Messenger’ refers to the *Sunnah* of the Prophet Muhammad (PBUH). ‘Those in authority among you’ authorises the consensus of the jurists, that is, *ijma*. The last part of the verse substantiates *qiyas*. The first two sources are very often referred to as the revealed, divine or primary sources. The last two are often regarded as non-revealed or rational sources. Accordingly, these are the chief sources consulted for this article. In addition to this are the practices of the first four Caliphs, which are not necessarily binding, but reflect a first-hand understanding of the Quran and the *Sunnah*, which are very highly regarded.

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<sup>1</sup>Javaid Rehman, *International Human Rights Law* (1st edn, Longman 2003).

<sup>2</sup>Salaymeh Lena. ‘Early Islamic Legal-Historical Precedents: Prisoners of War’. *Law and History Review*, vol. 26, no. 3, 2008, pp. 521–544, <[www.jstor.org/stable/27641606](http://www.jstor.org/stable/27641606)> accessed on the 7<sup>th</sup> of May, 2017.

<sup>3</sup>Al-Shafi’I, *Al-Umm*, Vol. 4, p. 260; al-Nawawi, *Al-Majmu*, vol. 21, p. 81 ct. in Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan, 2011) 136

<sup>4</sup>Quran 2:190

### 3. Rules on the Prisoners of War

Quran 47:4<sup>5</sup> appears to be the most normative evidence of prisoners of war in the Quran. Accordingly, one can assert that under the Islamic law of *qital*, it is legally permissible to take captives or prisoners of war. Prisoner of war status entails special rules, the rules relating to the treatment of the prisoners of war, their rights, and responsibilities of their captors towards them, from the moment of capture onwards. Prisoner of war status begins from the very moment of capture. A capture may arise from the forcible overpowering of an enemy combatant, or through his voluntary surrender<sup>6</sup>. However, the taking of captives is one thing. As stated earlier, Muslims have certain duties towards captives. The first and foremost obligation is that prisoners of war must be treated humanely. The fundamental Islamic principles include and supports respecting the dignity and integrity of the human person from the moment of captivity until their final release<sup>7</sup>. Such an act has been compared to a charitable act<sup>8</sup>. Islamic tenets advocate for the avoidance of all manner of unnecessary suffering. The prisoners of war must be provided with all their necessary needs, such as food and drink. The jurist Abu Yusuf remarks that prisoners of war must be fed and treated well until a decision is reached regarding their status. He contends that prisoners of war are not to be charged for food, but must bear the cost and responsibility for such expenses<sup>9</sup>. To articulate this point, at the Battle of Badr, the Prophet ordered his fellow warriors to show goodwill towards the prisoners of war<sup>10</sup>. Abu Aziz Ibn Umayr Ibn Hashim, one of the prisoners of Badr, narrated on how the Muslims, following the Prophet's instructions, treated him well during his captivity. He affirmed that they catered for him and gave him food to eat<sup>11</sup>. Allah also makes this humane requirement. Providing for this, the Quran reads, 'And they feed the needy, the orphans and the captives (out of their food), despite their love for it (saying), we feed you for the sake of pleasing God; we do not wish reward or gratitude from you'<sup>12</sup>. Supporting this point, Ibn Al-Humam stated that, 'it is not permitted to kill prisoners of war by starvation. He contends that where there is a shortage of food and Muslims cannot provide food for the war captives, the captives must be released<sup>13</sup>. Not only are they to be fed, but they must also be clothed if need be and protected from the heat, cold, hunger, thirst, and any kind of torture<sup>14</sup>. Ali b. Hasan b. 'Asakir (s.570/1175) quotes the Prophet saying, 'If a nobleman falls into your hands, treat him well'<sup>15</sup>. In the case of Banu Quraiza, when the captives were detained and facing the high temperature of the summer, the Prophet ordered his companions to shelter the captives from the heat<sup>16</sup>. In this regard, Muslim scholars are unanimous as to the illegality of inflicting degrading or inhuman treatment on enemy prisoners of war<sup>17</sup>.

Furthermore, it is prohibited to torture enemy prisoners of war to acquire military information. However, there appears to be one recorded incident, when a prisoner of war was beaten to force him to reveal military secrets, and which could be taken by some Islamic scholars as evidence that Islam permits the coercion of prisoners of war. This event took place before the Battle of Badr, when the Muslims captured a slave of Bani Al Hagag, who was with the Quraish as a water carrier. He was interrogated about Abu Safyan, to which he replied, 'I have no idea about Abu Safyan and his companies'. When they thought he was lying, they beat him. He then replied, 'I know Abu Safyan'. In all of this, the Prophet was absent. When the Prophet was made aware of this, he hastened his prayer and said to his companions, 'When he told the truth you punished him and when he told lies, you

<sup>5</sup> 'When you encounter those who disbelieve, strike at their necks. Then, when you have routed them, bind them firmly. Then, either release them by grace, or by ransom, until war lays down its burdens ...'

<sup>6</sup> Ibn al-Qayyim, *Zad al-Ma'ad*, op cit, p. 405. see also, al-Kasani, op cit, vol 7, p 121.

<sup>7</sup> Mahmoud, Henaaiet Dahaia Al Nezaat almosallahala Fee Al Kanoon Al Dowaly Al Insany Wa Al Shar-iah Al Islamiah (The Protection of Victims of Armed Conflicts in International Humanitarian Law and Islamic Shari'a), Cairo, 2000, p. 36.

<sup>8</sup> El-Dakkak, 'International Humanitarian Law Lies between the Islamic Concept and Positive International Law', *International Review of the Red Cross*, 1990, p. 110

<sup>9</sup> Al-Atvsary, *A Collection of the Qur'anic Rule*, Vol. 19, 1967, p. 129; see also Hamidullah, cit. supra note 48, p. 222.

<sup>10</sup> Ben Ashoor, *Islam and International Humanitarian Law*, (International Review of the Red Cross, 1980) p. 61 ff, p. 64

<sup>11</sup> Guillaume, *The Life of Muhammad*, p.309. Cited in Ahmed Al-Dawoody, *The Islamic Law of War* (1st edn. Palgrave Macmillan US 2011) 139.

<sup>12</sup> Quran 76:8

<sup>13</sup> Ibn At-Humam, op cit, vol 5, p 477.

<sup>14</sup> Hammidullah, *Muslim Conduct of State*, p.215; al-Buhuti, *Kashshaf al-Qina'*, Vol.3, p.53 Ct. in Ahmed Al-Dawoody, *The Islamic Law of War* (1st edn, Palgrave Macmillan US 2011) 139.

<sup>15</sup> Ismâ'il b. Muhammad al-'Ajlunî al-Jarrâhî, *Kashf al-Khafa' wa Muzil al-Ilbas \* amma Ishtahar min al-Ahâdith 'alâ Alsinat al-Nâs*, 2nd ed. (Beirut: Dâr al-Kutub al-'Ilmiyyah, 1988), 1: 115. Ct. in MUNIR, MUHAMMAD. 'Debates on the Rights of Prisoners of War in Islamic Law.' *Islamic Studies*, vol. 49, no. 4, 2010, pp. 463–492., www.jstor.org/stable/41581120.

<sup>16</sup> A]-Sarakhasi, al-Siyar, op cit, vol 3, p 1029. See also, A]-Shwkani, op cit, vol 8, p25.

<sup>17</sup> BEN ASHOOR, 'Islam and International Humanitarian Law', *International Review of the Red Cross*, 1980, p. 61 ff, p. 64.

believed him'<sup>18</sup>. This incident has led some scholars to contend that it is permissible to torture prisoners of war to obtain military intelligence. Expressing such a view, Imam Al Nawawi opined that the precedent provides evidence of the permissibility of beating an unbeliever who has no protection contract, even if he is a prisoner<sup>19</sup>. However, the majority of Muslim scholars hold contrary opinions to the extent that it is forbidden to torture prisoners of war as a means of forcing them to divulge military secrets. When Malik was asked about the Islamic ruling on torture of enemy prisoners to obtain military intelligence, he replied that he has never heard of its permissibility under Islam<sup>20</sup>. In advancing this notion, such scholars contend that Islam forbids torture and mutilation, especially since the Prophet has said, 'God will penalize in the hereafter those who penalize people in this life'<sup>21</sup>. Moreover, they assert that the torture of prisoners of war contradicts the general command of the Prophet to treat prisoners of war well<sup>22</sup>. Following all these and concerning the referred precedent, the Prophet's statement, 'When he told the truth you punished him and when he told lies you believed him', appears to suggest that the Prophet thought that torture could not necessarily achieve the perceived purpose because it may lead to deception or it could lead to harm rather than profit. Hence it is tenable to posit that the Prophet disapproved of torturing. It is with this in mind, alongside the Prophet's command that Prisoners of war be treated well, as well as the consideration that Muslim captives will also receive such treatments from the adversary, that Islam forbids the torture of prisoners of war to obtain military intelligence. Nonetheless, there is no prohibition on obtaining military intelligence from war captives through valid and legal means such as by discussion, interviews and questioning as it is suggested that the Prophet in the above incident was able to obtain the correct information from the captive because he interviewed the captive<sup>23</sup>.

Additionally, as at the practice existing when Islam emerged, prisoners of war were considered to be at the mercy of the individuals who captured them. However, it was subsequently revealed that Allah says, 'And know that out of all the booty that ye may acquire (in war), a fifth share is assigned to Allah, and to the Messenger, and to near relatives, orphans, the needy, and the wayfarer'<sup>24</sup>. Likewise, the practice and general Command of the Prophet supported the good treatment of war captives and prohibited the violence towards captives before they were brought to Dar al-Islam, where their case was to be decided upon by the head of the Islamic State or his representative. Moreover, it has been stated that the Prophet barred fighters from killing the captives of their comrades<sup>25</sup>. Accordingly, majority of Muslim jurists, opine that once in captivity, the prisoners of war are to be considered as prisoners of the State as opposed to prisoners of individuals or military units that have captured them<sup>26</sup>. Ibn Al-Human of the Hanafi School noted that 'No combatant has the right to execute a prisoner of war merely by his decision, because the choice is for the head of the Islamic state<sup>27</sup>. In support of this is Ibn Rushd, who argues that according to Islamic law, a person qua prisoner should not be killed. As the basis of his argument, he records the consensus of the Companions of the Prophet to this effect<sup>28</sup>. Shafi also posits that a Muslim who kills a prisoner of war before his case has been decided by the head of the Islamic state deserves to be punished<sup>29</sup>. Moreover, Al-Qadea Abu Yaela of the Hanabli School confirmed that as soon as the adversary has been captured, his fate rests with the head of the Islamic State and not the individual<sup>30</sup>. From the foregoing, it can thus be stated that the captor possesses no right to kill his captive and would be punished if he does so. Nonetheless, some Islamic scholars opine that it is permissible for a Muslim fighter to kill a prisoner he captures. Articulating this point, Al-Kasani stated that the killing of captives is permissible, regardless of whether they were brought to Dar al-Islam or not, since they are not immune. Nevertheless, anyone who hurts a captive that the Islamic head of state has issued a decision on is liable for his action<sup>31</sup>. Altogether, although it was initially permissible to kill war captives, this position has changed and it is believed that the fate of a war captive rests with the head of an Islamic

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<sup>18</sup> Muslim, vol 12, p 125. See also, Abu Dawood, op cit, vol 3, p 78.

<sup>19</sup> Al-Nawawi, al-Sharah, op cit, vol 12, p125.

<sup>20</sup> Al-'Abdari, Al-Taj wa al-Iklil, Vol. 3 p. 353; al-Zuhayli, Athar al-Harb fi al-Islam, p.415 ct. in Ahmed Al-Dawoody, *The Islamic Law of War* (1st edn, Palgrave Macmillan US 2011) 139.

<sup>21</sup> Al-Bukhari, op cit, vol 6, p 149.

<sup>22</sup> Al-Zuhaili, Athar Al Harb, op cit, p41 1.

<sup>23</sup> Ibn Hisham, op cit, p 114. See also, Alsumaih, *Prisoners of war*, op cit, p82.

<sup>24</sup> Quran 8:41.

<sup>25</sup> Ibn Qudamah, al-Muqni, op cit, vol 8, p 398. See also, Al-Zuhaili, Athar al-Harb, p 417, footnote 2.

<sup>26</sup> Rudolph Peters (1996), *Jihad in Classical and Modern Islam*, Markus Wiener Publishers: Princeton, p.147.

<sup>27</sup> Ibn Al-Humam, op cit, vol 4, p306.

<sup>28</sup> Dr. Muhammad Hamidullah, *Muslim Conduct of State: being a treatise of Muslim public international law, consisting of the laws of peace, war and neutrality, together with precedents from orthodox practice and preceded by a historical and general introduction* (M. Ashraf, 1945) 206.

<sup>29</sup> Al-Khateeb, Mohammad Al-Sharbeni, Mugni Al-Muhtai Ela-Mereaft at-Fad aj-MajahA, Cairo, Matbat Mustafa al-Babi al-Halabi, 1377 A. H/ 1958 A. D, vol 4, p228.

<sup>30</sup> Ibn Qudamah, at-Muqni, op cit, vol 8, p 398.

<sup>31</sup> Al-Kasani, op cit, vol 7, pp120-121.

State or his representative and that the interest must stem from the interest of the Islamic nation (Umah). Moreover, if the fate of war captives were left to their captors, it is submitted that there would be chaos. Likewise, it could lead to a counter effect amongst the adversary who also may have Muslims as captives of war. In this regard, it seems acceptable to opine that once in captivity, the prisoners of war are to be considered as the prisoners of the state as opposed to individuals.

Concerning female captives, rape is not allowed and having sex out of marriage is also an offence under the Islamic law of qital. Accordingly, it does not matter whether intercourse took place during war or after the war. It is a crime regardless. However, the Quran permitted the Prophet Muhammad (PBUH) to have sexual intercourse with female war captives after they were divided as war booty and assumed the role of bondswomen. Quran 33:50 states: 'O Prophet, we have made lawful for you all your wives whom you have given their dowers and those (bondswomen) whom you own, out of the captives...'. According to Usmani, this verse was specifically provided for the prophet and since the death of the Prophet, is no longer applicable<sup>32</sup>. Despite this, there does not appear to be an account of the Prophet Muhammad (PBUH) having sexual intercourse with a prisoner of war before marrying her<sup>33</sup>. Some commentaries have asserted that despite the Quranic limitation of four wives, this was perhaps the reason why the Prophet had more than four wives. Having said that, Muslim combatants were not allowed to have sexual intercourse with war captives. This does not mean that Muslims were barred from having sexual intercourse with their slave women. Thus, the two issues, although closely related, must not be confused. The Quran enjoins Muslims to 'Guard their private parts' except 'from their wives or from those (bondswomen who are) owned by their hands, as they are not to be blamed<sup>34</sup>. However, those who seek (sexual pleasure) beyond that are the transgressors'<sup>35</sup>. On the other hand, however, the Quran in verse 4:25 permits Muslims to marry believing slave girls. When female war captives are divided as war booty, they become bondswomen of the owner. And both of this status have different rules. Quran 4:25 permits marrying slave girls, not having sexual intercourse with war captives. Consequently, a Muslim combatant is not allowed to have sexual intercourse with a captured girl<sup>36</sup>. In enunciating this point, Mawardi notes that adultery or fornication even with captured women is impermissible and is punishable by hadd (fixed penalties for certain offences in which the judge has no discretion) punishment<sup>37</sup>. On one occasion, the Muslim fighters were allowed to have sexual intercourse. This was at the battle of Al-Mustaliq. Based on this, some commentaries advocate for its permissibility. However, the majority of opinion holds that the Prophet himself did not have sexual intercourse with the captives and that, that incident is an isolated incident which does not create any binding precedent since the Prophet did not give express permission. Both Shaybani and Al-Mawardi have stated that after this incident, Quran 24 was revealed to prohibit and ban sex outside of marriage. Very closely related is the issue of the marriage of one or a couple of wedded prisoners. If a married woman is captured alone, there appears to be unanimity as to the dissolution of that marriage by jurists. On the other hand, if a married man is captured alone, his marriage will not be dissolved. Should both the husband and wife be captured together, unlike Abu Hanifah and al-Awzai, al-shafi'i, Abu Thawri, al-Layth, and al-Thawri argue that the marriage should be dissolved<sup>38</sup>.

Equally, with regards to the religion of the captives, scripturally, the Quran 2:256 says, 'let there be no compulsion in religion'. Nonetheless, there appear to be different views on this issue. Some scholars believe that Quran 2:256 has been abrogated since the Prophet compelled Arabs to accept Islam as a religion. To further support the abrogation of Quran 256:6, they contend that some verses in the Quran command Muslims to fight unbelievers. For instance, Quran 9:73, which reads, 'O Prophet! Strive hard against the unbelievers and the Hypocrites, and be firm against them' and Quran 9:123, which says, 'O ye who believe! Fight the unbelievers who gird you about, and let them find firmness in you: and know that Allah is with those who fear Him'. However, according to Ibn Taimiah, the majority of scholars do not regard this verse as abrogated or stipulated, but rather, consider it to be a general text. Consequently, he does not believe that it compels anyone to adopt Islam. That said, it is difficult to determine categorically, what the stance on compelling captives of war to convert to Islam is. Nonetheless, depending on the particular school of thought employed captives may either be compelled to practice Islam or be

<sup>32</sup> Mufti Muhammad Taqi Usmani, *The Meaning of the Noble Quran*, Vol. 2 (Maktabah Ma'arifur Qur'an; 1st edition, 2006) in Niaz A Shah, *Islamic Law and the Law Of Armed Conflict* (1st edn, Routledge 2011) 46.

<sup>33</sup> Niaz A Shah, *Islamic Law and the Law Of Armed Conflict* (1st edn, Routledge 2011) 46.

<sup>34</sup> Quran 23:5 – 6 .

<sup>35</sup> Quran 23:7; 70:31.

<sup>36</sup> Shaybani, M (1996) *The Islamic Law of Nations: Shaybani's Siyar*, trans. Majid Khadduri, Baltimore, Md.: Johns Hopkins University Press p. 126. Ct. in Niaz A Shah, *Islamic Law And The Law Of Armed Conflict* (1st edn, Routledge 2011) 47.

<sup>37</sup> Mawardi, A.H. (2005) *Al-Ahkam as-sultaniyyah (The Islamic Laws of Governance)*, trans. A Yate, London: Ta-Ha Publishers. p. 81 Ct. in Niaz A Shah, *Islamic Law And The Law Of Armed Conflict* (1st edn, Routledge 2011) 47.

<sup>38</sup> Ibn Qudamah, *Al-Mughni*, Vol. 9, p.215; Mahmassani, *The Principles of International Law in the Light of Islam Doctrine*, p.306; and Al-Qanun wa al-Alaqaq, p.253 ct. Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan, 2011) 140.

allowed to practice their religion. To provide a clearer understanding, it seems that if children are captured, that is, if neither of their parents is captured with them, they are to grow as Muslims. On the other hand, however, if children are captured alongside their parents, apart from Abd al-Rahman al-Awzai, majority of jurists agree that they are to retain the religion of their parents<sup>39</sup>. Moreover, there is agreement amongst the jurists to the extent that during the prisoner's captivity, members of the same family should not be separated; children should not be taken apart from their parents, grandparents or siblings<sup>40</sup>.

Also, where captives cannot be transported to Islamic territories, according to Peters, the Maliki jurists opine that food, water and other necessities must be left with them so that they will not die of cold or hunger. If this cannot be fulfilled from the seized enemy property, then the Moslem treasury (bayt al-mal) must provide for this<sup>41</sup>. Contrariwise, al-Shaybani holds that the head of state should kill the men and hire transportation for the women and children<sup>42</sup>. However, because of the prohibition of the killing of women and children, Ibn Mawdud suggests that they should be left to die. His justification is that if they are kept alive the children would one day grow up and fight against the Muslims, while the women may also produce children who may fight against the Muslims one day<sup>43</sup>. Altogether, these approaches are significant in some respects. The Maliki school has a more relaxed and ethical approach. On the other hand, both Shaybani and Mawdud, present very debatable views, which some may regard as un-Islamic.

Finally, Muslim soldiers are enjoined to respect the dignity of prisoners as well as their status. One hadith reads thus, 'Pay respect to the dignity of a nation brought low'. Moreover, most jurists agree that the prisoners of war should not be exploited for labour. There is no evidence to this extent, nor is forced labour mentioned in the Quran. Nonetheless, a prisoner can be disciplined for a breach of administrative rules. The punishment for such breach must be commensurate with the violation. Also, an escaped prisoner of war, who is later recaptured, may not be punished for the attempted escape or his actions after reaching Dar al-Harb. However, he may be punished for the minor offence of breaching parole, unless he is killed in the process of fleeing, while still in Dar al-Islam.

#### **4. Terminating Captivity**

As earlier stated, according to the majority of Muslim jurists, it is the political authority or the Islamic head of state that must ultimately decide what is to be done with a prisoner of war. Captivity does not necessarily divest the prisoner of his status as a combatant. Innately, the prisoner is treated as a combatant who has become incapable of fighting because he has fallen captive. As such, the prisoner's status must be terminated by some action<sup>44</sup>. According to Quran 47:4, Muslims are obliged, after the cessation of hostilities, to free their prisoners of war either freely or for ransom. Quran 47:4 provides the most extensive instructions of all the verses regarding terminating the captivity of prisoners. It is explicitly clear from this verse that nothing other than a gratuitous release or payment for ransom is envisaged. Yet, despite the relative clarity of this injunction, there appears to be a division amongst the fuqaha regarding what should be done to the captives. Some jurists restrict the head of the Muslim state to fida (ransom) and mann (grant of freedom gratis); some dismiss the mann and accept other solutions; yet others give the political authority the choice of choosing between ransom, a grant of freedom, execution, exchange or enslavement<sup>45</sup>. According to Ahmed Al-Dawoody, the parties to this controversy can generally be divided into three main categories: according to the first group, including Ibn Abbas, Abs Allah ibn Umar, al-Hasan al-Basri, Ata, Said ibn Jubayr, Mujahid and al-Hasan ibn Muhammad al-Tamimi, who were among the companions of the Prophet, the Islamic ruling on prisoners of war is restricted to releasing them either freely or in exchange for ransom as stipulated in Quran 47:4. Moreover, this group argues that this verse abrogated all the other options followed by the Prophet, namely execution and enslavement.

The second group, the Hanafi Jurists, argue that the political authority has three options in terminating the captivity of prisoners of war. These are execution, enslavement, and setting them free with the condition that they pay jizyah. This position appears to be in stark contradiction with the opinions of the first group. The rationale for Abu Hanifa's opinion is that releasing the enemy prisoners, either freely or in exchange for Muslim prisoners would strengthen the enemy. With regards to the condition of jizyah, the argument espoused is that the political

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<sup>39</sup> Ibid.

<sup>40</sup> Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan, 2011) 140.

<sup>41</sup> Peters, *Islam and Colonialism*, p. 23; Saqr, Al-'Alaqa al-Dawliyyah, p. 111 ct. Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan, 2011) 140.

<sup>42</sup> Al-Shaybani, Al-Siyar, p. 109; Johnson, *The Holy War Idea*, p. 124 ct. Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan, 2011) 140.

<sup>43</sup> Ibn Mawdud, Al-Ikhtiyar, Vol. 4. P.134.

<sup>44</sup> Ahmed Zaki Yamani, 'Humanitarian International Law in Islam: A General Outlook', 7 *Mich. YBI Legal Stud.* 189, 216 (1985).

<sup>45</sup> Munir Muhammad. 'Debates on the Rights of Prisoners of War in Islamic Law.' *Islamic Studies*, vol. 49, no. 4, 2010, pp. 463–492., [www.jstor.org/stable/41581120](http://www.jstor.org/stable/41581120).

authority is entitled to free the prisoners, but they must stay in the Islamic state and pay the jizyah. This is because if they are allowed to return to their state, they could strengthen the enemy.

The third group, the majority of Muslim jurists, including the Shafi'is, the Malikis, the Hanbalis, al-Awzai, Abu Thawr, and al-Thawri have a wider pool of options that the political authority can choose from in regards to terminating the prisoners of war status. They posit that the political authority can execute some or all of the prisoners, enslave them, set them free, and exchange them for Muslim prisoners or money. Also, the Malikis opined that the prisoners of war should be permitted to stay in the Islamic State in return for the payment of jizyah. According to some commentaries, it is claimed that Malik, the eponymous founder of the Maliki School, unlike the other jurists of his school, rejected the gratuitous release of prisoners.

Al Dawoody further stipulates that the permissibility of the execution of prisoners in principle, as suggested by the majority of jurists in cases where it serves the Muslim interest, is based on the instances of the execution of three male Meccans: al-Nadir ibn al-Harith and Uqubah ibn Mu'ayt, taken prisoner at the Battle of Badr and Abu Azzah al-jumahi, captured at the battle of Uhud. Abu Azzah was initially part of the prisoners captured at Badr and was freed by the Prophet on the condition that he would not fight against the Muslims again. However, he was again captured at Uhud and that was when he was executed. However, it is claimed that these executions were not based on their prisoner of war status, but their excessive persecution of, and hostility towards the Muslims during the Meccan period, which have been classified as war crimes. There does not appear to be any other instances of prisoners by Muslims during the Prophet's lifetime. As a result, because of the rarity of executions of prisoners, jurists commonly agree that it is prohibited for the Islamic state to execute enemy hostages under its control, even if the enemy slaughtered the Muslim hostages it held. Here some jurists refer with pride to the precedent of the Caliph Muawiyah ibn Abi Sufyan when he refused to execute the Roman hostages under his control after the Roman emperor had broken the treaty with the Muslims by executing the Muslim hostages he held. Nonetheless, there are still contrary opinions. For instance, Ash-Safi'i and Abu Yusef<sup>46</sup> advocate for killing if it benefited Muslims by strengthening God's religion and weakening his enemy. However, disagreeing with this notion, Ahmed Yamani suggests that as long as the public interest of Muslims is not harmed by the release of the prisoner, the prisoner should be released<sup>47</sup>

Whatever the case, it is indisputable that both ransom and exchange of the prisoners of war were carried out by the Prophet himself. Ransom took many forms. Often, it was money, property, armaments or munitions<sup>48</sup>. In some cases, ransom involved some form of work. For instance, the Prophet Muhammad (PBUH) released seventy prisoners taken in the Battle of Badr, while the Muslims were still at war with the Quraish<sup>49</sup>. Their release was conditional on the charitable work of the Quraish, who were instructed to teach young boys to read and write<sup>50</sup>. If monetary, the ransom could be paid out of the prisoners pocket or out of the enemy state's treasury. Similarly, the practice of exchanging prisoners was also a common practice of the prophet and involved exchanges on all levels, from one-for-one exchanges to those that freed thousands<sup>51</sup>. During such a transfer, the Muslim state is responsible for the safe passage of the prisoner. The gratuitous release, as earlier stated, is recommended by Islamic law and can atone for many types of sins<sup>52</sup>. Such a release can take place at any point during the war even though the Quran advocates for such a release at the end of the war. There are many incidents of gratuitous release that took place during the Prophet's lifetime. For example, six thousand prisoners were set free following the battle of Hunain, with no ransom collected<sup>53</sup>. In fact, the Prophet compensated 'all those who were not willing to part with their booty of slaves' out of the public treasury.

## 5. Islamist Groups and their Treatment of War Prisoners

In recent times, the world has felt the scourge of Islamic religious radicalism. Amongst the proponents of such groups are Al Qaeda, the Taliban, the Islamic State of Iraq and Syria (ISIS), Boko Haram, Hezbollah and the IS

<sup>46</sup> Ahmed Zaki Yamani, 'Humanitarian International Law in Islam: A General Outlook', 7 *Mich. YBI Legal Stud.* 189, 216 (1985); Abu Yusef (d. 182 H/798 A.D.) was a Hanafi jurist and chief *Qddi* (judge) of the *Caliphs* al-Mahdi and *Harun al-Rashid*.

<sup>47</sup> *Ibid.* 211 – 12 .

<sup>48</sup> Hisham M. Ramadan, *Understanding Islamic Law* (1<sup>st</sup> ed. Lanham (Md.): Altamira Press, 2006)

<sup>49</sup> Mulana Muhammad Ali, *The Religion of Islam: A Comprehensive Discussion of the Sources, Principles and Practices of Islam* (Lahore: Ahmadiyyah Anjuman, 1990) 434.

<sup>50</sup> *Ibid.*, 434.

<sup>51</sup> Dr. Muhammad Hamidullah, *Muslim Conduct of State: being a treatise of Muslim public international law, consisting of the laws of peace, war and neutrality, together with precedents from orthodox practice and preceded by a historical and general introduction* (M. Ashraf, 1945) 212

<sup>52</sup> Troy S. Thomas, *Jihad's Captives: Prisoners of War in Islam, Department of Defense*, Washington Dc. 20301, 2005.

<sup>53</sup> Mulana Muhammad Ali, *The Religion of Islam: A Comprehensive Discussion of the Sources, Principles and Practices of Islam* (Lahore: Ahmadiyyah Anjuman, 1990) 434.

Guard Corps, to mention a few. The most prominent in terms of their activities and responsibility for the most deaths in recent years has been the Taliban, ISIS, the Khorasan Chapter of ISIS and Boko Haram<sup>54</sup>. However, this section will focus squarely on the activities of ISIS<sup>55</sup> and Boko Haram<sup>56</sup>, to appraise their activities especially as they relate to war captives and prisoners of war. Accordingly, the question to be asked, is whether it can be said that these 'so-called' Islamist groups have adhered to the various Islamic humanitarian rules analysed above. Until its defeat, ISIS systematically committed torture, mass rapes, forced marriages, ethnic cleansings, genocides, slavery, and mass murder; including punishments such as beheadings, crucifixions, mutilation and dismemberment<sup>57</sup>. These egregious, inhumane and barbaric acts were mostly committed against its captives. Amongst those who heavily suffered these treatments were the Peshmerga fighters who were captured during battle. ISIS also attacked the Northern Iraqi Ninewah province and abducted thousands of Christians, Yazidis, Shi'a Shabaks and Turkmens for their distinct religious belief and practice<sup>58</sup>. ISIS never implemented any gratuitous release despite being the most recommended Quranic and prophetic choice. Although some Yazidis were ransomed, ridiculous amounts of money running into millions of Dollars were demanded from their families. The partisans of the group also enforced enslaved women to convert to Islam. Those who converted were forcefully married off, while the ones who refused were held in sexual slavery<sup>59</sup>. Additionally, reports suggest that ISIS killed and maimed hundreds of war prisoners in Tikrit, Awenat-Slahaddin, Riyadh, Rashad-Kirkuk and other cities<sup>60</sup>. In doing this, the group often published photographs and videos of such executions. For instance, in late August 2014, ISIS executed more than 200 government soldiers after seizing a military airbase in Tabqua, al-Raquuah<sup>61</sup>. Also, in February 2015, ISIS released a video in 2015 of a Jordanian pilot Muath al-Kasabeh being burnt to death. The group also released a video of two Turkish Soldiers being burnt alive in Aleppo in December 2016. The case of Boko Haram is not any different and operates on similar ideologies held by ISIS<sup>62</sup>. Like ISIS's treatment of its so-called prisoners and captives, the group also engages in slavery, mass rape, genocide, mass murder, including beheadings, mutilations and dismemberments of its captives, sexual slavery, forced conversion and forced marriages<sup>63</sup>. In a widely reported incident in April 2014, the group kidnapped over 276 schoolgirls from a government-owned girl's school in the town of Chibok, in Northern Nigeria. Its leader in a video and internet feed maintained that the girls would be enslaved and involuntarily married off to Boko Haram fighters<sup>64</sup>. Since then, the group has continually effected its horrific policies.

The justifications espoused for the various operations carried out by not only groups like ISIS and Boko Haram but almost all Islamist militia groups, come from a hardline perspective on the ideologies of the Quran, Hadith

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<sup>54</sup> This is according to the 2019 recent report of the Global Terrorism Index <http://visionofhumanity.org/app/uploads/2019/11/GTI-2019web.pdf>

<sup>55</sup> ISIS emerged from the dismantling of Al Qaeda in Iraq and known as ad-Dawlah al-Islāmiya fi'l-'Irāq wa-sh-Shām ('the Islamic State of Iraq and Syria (or the Levant)'—'ISIS' or 'ISIL' in English or 'DAESH' in Arabic). ISIS in an unexpected and expeditious series of military campaigns, took immediate strides to upstage Al Qaeda as the frontrunner of the jihadist movement globally. It did this by capturing and taking for itself, large swaths of territory in Iraq and Syria under a self-proclaimed caliphate which had as its caliph, Abu Bakr al-Baghdadi, an official who, according to prototypical Islamic political theory and practice, was to be obeyed by all Muslims.

<sup>56</sup> Boko Haram, a West African insurgency grew out of an organization known as *Jamā'at Ahl as-Sunnah lid- Daw'wah wa'l-Jihād* ('People Committed to the Propagation of the Prophet's Teaching and Jihad') and was founded in 2003 in northeast Nigeria by the late Mohammed Yusuf and now led by Abubakr Shekau, Although Boko Haram has not sought recognition as a State, it has also taken control of large swaths of territory in northern Nigeria, Cameroon, and Niger and its behaviors have involved widespread pillage and destruction of Muslim and Christian communities in those areas, with indiscriminate killing and kidnapping of large numbers of innocents.

<sup>57</sup> Amnesty International, *Escape From Hell: Torture and Islamic Slavery in Islamic State Captivity in Iraq*

<sup>58</sup> <'Iraq crisis: Islamic State accused of ethnic cleansing'>. *BBC News*. 2 September 2014 (Accessed on the 20<sup>th</sup> May 2020); <'Document – Iraq: Ethnic Cleansing On Historic Scale: The Islamic State's Systematic Targeting Of Minorities In Northern Iraq'>. >Amnesty International. September 2014. (Accessed on the 20<sup>th</sup> May 2020)

<sup>59</sup> Amnesty International, *Escape from Hell: Torture and Islamic Slavery in Islamic State Captivity in Iraq*

<sup>60</sup> UNAMI and OHCHR, 5 June–5 July 2014: 10-11; UNAMI and OHCHR, 6 July–10 September 2014: 6

<sup>61</sup> UNHRC, 14 November 2014: 11-12; UNHRC, 5 February 2015: 29; Westall and Karouny, 2014).

<sup>62</sup> Human Rights Watch, *World Report 2015: Nigeria* (Jan. 2015), <<http://www.hrw.org/world-report/2015/country-chapters/nigeria>> (Accessed on the 25<sup>th</sup> of May 2020)

<sup>63</sup> *Missing Childhoods: The Impact of Armed Conflict on Children in Nigeria and Beyond*, UNICEF (2015), <[http://www.unicef.org/media/files/Child\\_Alert\\_MISSING\\_CHILDHOODS\\_Embargo\\_00\\_01\\_GMT\\_13\\_April.pdf](http://www.unicef.org/media/files/Child_Alert_MISSING_CHILDHOODS_Embargo_00_01_GMT_13_April.pdf)> (Accessed on the 21<sup>st</sup> of April 2020)

<sup>64</sup> Lynn, L. Taylor, *Boko Haram Terrorism: Reaching Across International Boundaries to Aid Nigeria in the Humanitarian Crisis*, 21 *ILSA J. INT'L & COMP L.* 1, 7 (2014) (citing Nigeria: Boko Haram Admits Abducting Schoolgirls, *BBC NEWS* (May 5, 2014, 13:17 BST), <<http://www.bbc.com/news/world-africa-27284264>> (Accessed on the 21<sup>st</sup> of April 2020)

and Sharia law<sup>65</sup>. Additionally, these groups claim to represent the true hope of the Islamic religion, acting in the best interest of Islamic societies throughout the world. But is true? To grasp this, the Salafist tradition in Islamic history must be understood<sup>66</sup>. There are many schools of thought on Salafism. Nevertheless, all schools embrace violence and martyrdom as the ultimate struggle and sacrifice that promises special rewards in paradise (Jannah). Groups like ISIS and Boko Haram are examples of what one may refer to as the ‘militant’ or ‘jihadi’ Salafism, which sees war as a necessary instrument to change the current world order where America and the West are seen as the spearhead in an all-out war against Islam and Muslims. It seeks to establish a truly Islamic polity, a caliphate on the model of the ‘Abassid Caliphate’ of the eighth century, a territory where all Muslims could live if they desired, and impose strict adherence to Islamic law as it existed during those times on all who reside there. To many, however, this brand of Islam is extremist and represents a deviation from the true teachings and values of Islam. Accordingly, various governments, scholars and proponents of Islam, have criticised this ideology and approach as unjustified, irrational, barbaric and un-Islamic<sup>67</sup>. In particular, the treatment of war captives or prisoners of war by these groups does not adhere to any of the humanitarian values prescribed in the Quran, by the Prophet Muhammad (PBUH), and the consensus of most scholars. The numerous violations point to a blatant disregard towards inhumane treatment, cruel treatment and the general prohibition against torture. Moreover, it points to the misappropriation and misinterpretation of Islam’s scriptures and the guiding tenets to suit political and personal inclinations without recourse to their contexts and provisions.

## 6. Conclusion

All things considered, it is submitted that the Islamic law of qital to a very large extent has in place mechanisms for the protection of war captives. Nonetheless, there appears to be a varying number of opinions on all of such issues amongst the various jurist-scholars. Notwithstanding, there appears to be unanimity of the majority of juristic opinions that war captives are to be protected and treated humanely and with dignity. With the status of prisoner of war, there are fundamental questions regarding how they should be treated. Essentially, because prisoners of war are captives does not entail that they should be treated less than humanely. As such, at the heart of the rules and provisions discussed above is a fundamental requirement to treat prisoners of war humanely and with dignity. Muslims are altogether enjoined to avoid causing unnecessary suffering. Consequently, at the most basic, prisoners of war should be fed, sheltered and catered for as commanded and evidenced in Quran 76:8. Moreover, the prisoners of war must not be tortured. The Prophet Muhammad (PBUH), very clearly exemplified this with the incident involving the slave captured from Bani Al Hagag, enjoining that Muslim combatants were not to torture captives, to which he proclaimed, ‘God will penalize those who penalize others’. Besides, the laws of qital forbid sexual intercourse with captured women. Anyone who rapes a captured woman would be deemed to have committed a war crime under the Islamic laws of qital. As well, children are to be handled with care and must not be separated from their parents if captured together. Moreover, they must not be compelled to convert their religion since Allah has very clearly provided rules to that extent. Furthermore, at all times the political authority of the Islamic State is in charge of the captives and at no point is an individual or a captor to assume such a role. They must also not be killed save for the decision of the political authority in the interest of the Muslim community. Additionally, the Islamic law of qital provides for the termination of prisoner of war status. Although there are a varying number of disagreements as to the options available to a political authority, it appears that fundamentally, the Quran provides for the free release of captives or a ransomed payment. The practices of the

<sup>65</sup> April Nees, *New Development: Boko Haram: A Textbook Case for Designation as a Terrorist Organization and its Terroristic Threat to International Religious Freedom*, 14 RUTGERS J. L. & RELIG. 498, 503 (2013)

<sup>66</sup> A full discussion of the history of Salafism is beyond the scope of this Article, although a brief overview will be provided here. The Salafi ideology follows a literalist interpretation that follows al-salaf al-salih (the first three generations of Muslims). It focuses on tawheed (monotheism and God’s absolute authority), the principle of sanctity with a clear dichotomy, ‘us’ and ‘them’ that rejects non-muslims (in many cases everyone and everything that is non-salafi). This ideology also rejects secular democracy as full-fledged tyranny and applies a clear moral framework governing relation between Muslims and non-Muslims. Accordingly, it embodies the ideal of creating a salafi vanguard. A group of forerunners that propagates, protects and defends the straight path of the Prophet and where da’wah plays an important role in the conversion of non-Muslims into Muslims. A forefront as a defence against Western secular norms and values. Salafi-jihadism follows the same ideology as Salafists, but views violence as a necessary instrument to change the present world order.

<sup>67</sup> Wael B. Hallaq, *Shari’a: Theory, Practice, Transformations* 330, N.38 (2009) (Citing Al-Mawsu’A Al-Fiqhiyya, Xvi, 151); Muhammad Munir, *Debates on the Rights of Prisoners of War in Islamic Law*, 49 ISLAMIC STUDIES 436, 486 (2010) (arguing that Islamic law, based on statements of the Prophet Muhammad (PBUH), prohibits the execution of prisoners of war and requires fair and humane treatment; also citing the opinions of the jurist Ibn Rushd, who held that the person and honor of the prisoner must be respected and this prohibits torture) (citing ‘Qur’an 76:8-9, which lauds the behavior of Muslim families after the Battle of Badr, who ate only dates so that prisoners they were in charge of could enjoy healthy meals); see also Mohamed El Zeidy, *Prisoners of War: A Comparative Study of the Principles of International Humanitarian Law and the Islamic Law of War*, 9 INT’L. CRIM. L. REV. 623 (2009) (arguing that the International Humanitarian Law and the Islamic Law of War are remarkably similar on the question of the treatment of prisoners).



Prophet Muhammad (PBUH) also appear to be in line with the Quran. Executions were a rarity in the lifetime of the Prophet and as such do not appear to be an option amongst the majority of jurists. The activities of Islamist groups like ISIS and Boko Haram, which purport to base their actions on the authority of the Quran are not in any form or manner Islamic, but appear to be a selective reading of the Quran to fulfil selfish personal and political agendas while disregarding the prescribed humanitarian values of Islam.