

DETENTION IN ARMED CONFLICT UNDER ISLAMIC INTERNATIONAL HUMANITARIAN LAW

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During the Prophet Muhammad (s.a.w.) period, States were categorised only into two, namely, Muslim State which is called "Darul Islam", and Non-Muslim State which is called "Darul Kufri". Therefore, the only situation considered as Non-International Armed Conflict (NIAC) is the war against "Kharijites and Bugaat". All the rules and regulations concerning detainees of war against "Kharijites and Bugaat" are covered under the Islamic jurisprudence. According to the Muslims jurists, the prisoners of war during battles are detained until the leader (Imam) decides that what the best approach is, where they may be released for nothing in return, or kill the men who are threatening Muslim Nation, or killing those have been committed atrocious crimes against the Muslim nation, or may slave them, both men and women. Accordingly, this paper analyses the legal position on the issues of detention in armed conflict under Islamic International Humanitarian Law (IIHL).

INTRODUCTION

Islamic International Humanitarian Law (IIHL) provides comprehensive rules regarding the relation between Islamic States and non-Muslim States during the war and peace. It has elaborated and setting up of rules concerning the resort to war (*jus ad bellum*), treaties, the conduct of war (*jus in bello*) in the modern and contemporary of the International Humanitarian Law (IHL), especially who should not be killed during the course of war, and what objects should be protected, rights of prisoners of war termination of their captivity, and the effects of war.

Islam also deals apparently with rebels "Kharijites and Bugaat" during NIAC, and apostates in the time of International Armed Conflict (IAC) with a set of binding rules for guiding the Islamic State; and deal

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with the non-Muslim citizens of a Muslim State. This was also the subject matter of *Al-Siyar* of Imam Al-Shaibani in the early Islam on “how to deal with foreigners, particularly business men from non-Muslim Nations who visits the Muslim territory and entity for business, or requested asylum or protection from Muslim individual or State; immunity of diplomats and envoys; territorial jurisdiction, and a host of other issues that are important for conducting the foreign affairs of a Muslim State in international foreign issue”. These rules were predicted to be fully authorised by the Muslim State, and where to have the status of other rules of the Islamic International Law (IIL).¹

The most important things is to understand the legal framework of the IHL which regulates detention in armed conflict whether IAC or NIAC. However, there are many maturities that think will have an impact on the rules and regulations of arrest and detention in IHL during NIAC. In Islam, detention is recognised as a necessary lawful and legitimate component of military operations. But there remain serious legal gaps under IHL regarding how the detention should be conducted in the NIAC, those between States and non-State armed groups which is the battle between the State and “Kharijites and Bugaat”.

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In the early Islamic history, detention during NIAC was rare and the only situation can be recalled is that of “Kharijites and Bugaat” rebels. However, the IHL does not mention that the “Kharijites and Bugaat” have been detained as prisoners of war during the battle with Muslim States. In IHL, there was no distinction as to whether an armed conflict is an IAC² and a NIAC.³ Nevertheless, all the armed conflicts are considered as IAC, and therefore, the only situation to be considered as NIAC is the war against the “Kharijites and Bugaat”.⁴ They are Muslims from the same nation who rebels against the ruling of government (*Imam*). This situation may concenter as a NIAC in IHL, otherwise, all the Islamic armed conflict are IAC not NIAC. Accordingly, any rebellious act against the government (*Imam*) is considered as a NIAC.

DETENTION IN INTERNATIONAL ARMED CONFLICT UNDER ISLAMIC INTERNATIONAL HUMANITARIAN LAW

There were many IAC occurred during the Prophet Muhammad (*s.a.w.*) period, and continue to the succession of the “Kilaphahs” Abubakar (*r.a.*), Umar (*r.a.*), Usman (*r.a.*), and Ali (*r.a.*).⁵ There are only two states during the Prophet Muhammad (*s.a.w.*) period mainly; Muslims State which is called “*Darul Islam*”, and non-Muslims State which is called “*Darul Kufri*”. All the IAC happened between these two major parties.⁶ For instance, the battles with the State of Rome and the State of Persia during the Prophet Muhammad (*s.a.w.*) period, and Umar (*r.a.*) against the State of Persia, and Abubakar (*r.a.*) against the State of Rome are considered as the IACs occurred in the early Islamic history between the two States, i.e., Muslim State and non-Muslim State.

The Quran has mentioned to a possibility for occurring a battle against the State of Persia and Rome, where Allah (*s.w.t.*) says: “...Say to the Desert-Arabs who lagged behind, ‘You will be called against a people of great might; you will fight them, unless they submit. If you obey, God will give you a fine reward. But if you turn away, as you turned away before, He will punish you with a painful punishment’” (Al-Fath, 16). The people of great might in the verse are referring to Persians. In addition, the Quran also states in another statement by referring to the battle between the State of Persia and the State of Rome Allah (*s.w.t.*) says: “...The Romans have been defeated. In a nearby territory, but following their defeat, they will be victorious. In a few years, the matter is up to God, in the past, and in the future. On that day, the believers will rejoice. In God’s support, he supports whomever He wills. He is the Almighty, the Merciful” (Ar-Rum, 1-5).

DETENTION IN NON-INTERNATIONAL ARMED CONFLICT UNDER ISLAMIC INTERNATIONAL HUMANITARIAN LAW

As it is mentioned earlier, the only situation to be considered as a NIAC is the war against the “Kharijites and Bugaat” due to the

following reason: (1) the Kharijites are Muslims from the same nation claims apostasy in government (*Imam*);⁷ and (2) Bugaat also are Muslims from the same nation who rebels against the ruling of the government (*Imam*) without claim apostasy. This fight resorts to wrong interpretation such as (a) for interruption to injustice; (b) desire in wealth; or (c) desire and differences to rule government.⁸

These situations may be considered as NIACs in IIHL. This statement has been highlighted in a Quranic verse in which Allah (*s.w.t.*) says: “And if two parties of believers fight against each other make peace between them; then if after that one of them transgresses against the other, fight the party that transgresses until it returns to the command of Allah. Then if it returns, make peace between them with equity, and act justly. Verily, Allah loves the just” (Al-Hujurat, 49:9).

RULES OF DETENTION IN TIME OF INTERNATIONAL ARMED CONFLICT UNDER ISLAMIC INTERNATIONAL HUMANITARIAN LAW

There are two types of detainees in time of IAC under IIHL such as prisoners of war detainees and civilian detainees. The rules and regulations of the two types of the detainees concerning prisoners of war in Islam are covered by the IIHL. According to the IIHL, the detainees are detained until deciding that what the best approach is. Practices of the Prophet Muhammad (*s.a.w.*) were “ransom them for money, or exchange them for Muslim prisoners, or release them for nothing in return, or distribute them among the Muslims as slaves, or kill the men who are threatened Muslims,⁹ or who have been committing atrocious crimes against Muslims, those who are prominent in killing Muslims during the battles”. The real purpose behind detaining prisoners by Muslims is to be protected from their evils.¹⁰

The second parts of detainees are civilians, those who are women and children. Those civilians are civilians of enemy accompanying with the belligerents for services during the battle. The Prophet Muhammad (*s.a.w.*) forbade killing the latter, i.e., women and

children.¹¹ The Prophet Muhammad (*s.a.w.*), after the battle of Badr, some prisoners were executed for their earlier atrocious crimes committed in Mecca. However, some of them were given options: “convert to Islam to get their freedom or paying ransom to get their freedom”.¹² In relation to the statements elaborated above, there are some Quranic verses in which Allah (*s.w.t.*) says: “...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 the war lays down its burdens. Had God willed, He could have defeated them Himself, but He thus tests some of you by means of others. As for those who are killed in the way of God, He will not let their deeds go to waste” (Muhammad, 47:4). “...O Prophet! Say to those you hold prisoners, ‘If God finds any good in your hearts, He will give you better than what was taken from you, and He will forgive you. God is Forgiving and Merciful” (Al-Anfal, 8:70). “...It is not for a prophet to take prisoners before he has subdued the land...” (Al-Anfal, 8:67).

RULES OF DETENTION IN TIME OF NON-INTERNATIONAL ARMED CONFLICT UNDER ISLAMIC INTERNATIONAL HUMANITARIAN LAW

All rules and regulations concerning detainees of war of “Kharijites and Bugaat” are covered by the opinion of the Muslims Jurists under Islamic jurisprudence. According to the Muslims jurists, the prisoners of war in NIAC are detained until leader (*Imam*) decides what the best approach is. However, they may be release for nothing in return, or kill the men who are threatening Muslims nation, or who have been committed atrocious crimes against Muslims nation. Nonetheless, there is no ransoming or exchanging or distributing for slavery in prisoners of war of “Kharijites and Bugaat”, where is not permissible to having slavery between the Muslims. “Kharijites and Buaat” are Muslims not polytheists, could not slave their prisoners¹³ and women and children of “Kharijites and Bugaat” also cannot be killed or slave them.¹⁴

TREATMENTS OF PRISONERS OF WAR UNDER ISLAMIC INTERNATIONAL HUMANITARIAN LAW

Under IIHL, all the prisoners of war must be guarded and not ill-treated. Islam regulates that the prisoners of war must be fed and clothed, whether by the government or by the individuals who has custody of the prisoner. This position is supported by the verse of the Quran¹⁵ which mentions: "...and they feed, for the love of Him, the poor, and the orphan, and the captive" (Al-Insan, 76:8). The Muslim jurists hold that women and children of prisoners of war cannot be killed under any circumstances, regardless of their faith, or opinions. However, the women and children belong to the idolaters may be enslaved, freed or ransomed.¹⁶ Women and children of "Kharijites and Bugaat" cannot be detained.¹⁷

The Prophet Muhammad (*s.a.w.*) gave special concerns for prisoners of war. One of the prisoners that have been detained in Badr battle said: "May Allah have mercy to Muslims, they feed us with the best food than their food, their sons come to us to remove the worries and put the happy in us".¹⁸ With regard to the issues of slavery, there is nothing stated in the Quran and also there is no evidence to show that the Prophet Muhammad (*s.a.w.*) himself took prisoners of war as slaves. In fact, the Prophet Muhammad (*s.a.w.*) was the one who has urged and encouraged to free all slaves during epoch of ignorance.¹⁹

CONCLUSION

In a nutshell, under the IIHL, the detainees of IAC may be subjected to ransom for money, or exchange them for Muslim prisoners, or release them for nothing in return, or distribute them among the Muslims as slaves, or kill the men who threaten Muslims. However, there is no ransoming or exchanging or distributing for slavery of prisoners of war from NIAC.

Notes

- 1 Muhammad Munir, *Islamic International Law (Siyar): An Introduction*, 1.

- 2 Alwaqidi, Almagaazi, (Beirut, Lubnan: DarulAalami, 2nd edn, 1989), vol. 2, 188.
- 3 Burhanuddeen, Tabsiratul Hukkaam, (Alqahira, Misra: Maktabatul Kuliyyahtul Azhariyyah, 1st edn, 1986), vol. 2, 139.
- 4 Alkawardi, Al-AhkamulSultaniyyah, (Alqahirah: Darul Hadith), 94.
- 5 Muhammad Bin Abdulwahab, Mukhtasar Seeratul Rasuul (S.A.W.), (Assau'diyyah: Wizaratul Shuunil Islamiyyah, 1st edn, 1418 H), 300.
- 6 Muhammad HaidarulAbadi, Majmuatul Wasaa'iq Assiyasiyyah, (Beirut, Lubnan: Darul Nafais, 6th edn, 1407 H), 410.
- 7 Abdulqahir Bin Tahir, Alfarqu Bainal Firaq, (Beirut, Lubnan: Darul Aafaq Aljadeed, 2nd edn, 1977), 55.
- 8 Alkinani, Taharirul Ahkaam, (Adauhah, Qatar: Darul Saqafah, 1988, 3rd edn.), 140.
- 9 Assarkasi, Sharhu Assiyar Al-Khabir, (Assharikatul Sharqiyyah, 1971), vol. 1, 158.
- 10 Alkawardi, Al-Ahkamul Sultaniyyah, 88.
- 11 Alkinani, Taharirul Ahkaam, 191.
- 12 Muhammad Bin Abdulwahab, Mukhtasar Seeratul Rasuul (S.A.W.), (Assau'diyyah 1418 H), 159.
- 13 Ibrahim Muihammad Al-Jamal, Arriqu Fi Aljahiliyyah Wal Islam, (Assau'diyyah, Medina: Aljamiatul Islamiyyah BilMadinah Al-Munawwarah), 52.
- 14 Aliyu Bin Nayef Al-Shahuud, Alkhulasa Fi Ahkamul Asraa. (2012), vol. 2, 72.
- 15 Ibid., 144.
- 16 Ibid., 77.
- 17 Annuhas, Almashariq Al-Ashwaq, vol. 2, 104.
- 18 Al-Bukhari. Sahihul Bukhari. Babul Kiswah Lil-Usara. vol. 4, 60.
- 19 Ibrahim Muihammad Al-Jamal, Arriqu Fi Aljahiliyyah Wal Islam, 145.



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