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EXECUTING WAR CAPTIVES BASED ON *MASLAHAT*: REFLECTING ON AND CONCLUDING THE CONTEMPORARY DEBATE

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ABSTRACT

The debate on whether war captives may be executed has been a debate among Islamic scholars since the classical era until today. Some say war captives may be executed based on *maslahat,* others say it is categorically impermissible. However, in recent decades, the debate on this matter has entered a new phase, with the opposing sides, i.e., permissible if *maslahat* is present versus the categorically impermissible, but with new arguments emerging aside from the reiteration of some classical arguments. Some of these new arguments are non-contextual, such as new conclusions derived from the known prophetic tradition (*sunnah*) and contextual arguments such as the role of international law vis-a-vis Islamic law. Using the literature review

as the research method this article has examined the contemporary debate and will consider both classical arguments, as well as current contextual arguments, in the light of the *usul al-fiqh*, and how international law (particularly international humanitarian law) should affect Islamic legal rulings. It is concluded that categorically prohibiting the execution of war captives is the weaker position as it relies on an incorrect interpretation of the *dalil* and its unrealistic application in warfare. It is also found that the position permitting captive execution if there is *maslahat* is, despite being often misunderstood, the stronger position, both in terms of the *dalil* and its realistic application in warfare.

Keywords: Islam, jihad, captive, execution, international law.

INTRODUCTION

Can a Muslim leader decide to kill captives held during a war with the enemy? This has become part of a contentious debate since the classical era until today. The classical literature mentions that the *fuqaha* seems to agree that women and children as captives may not be killed, rather the debate is more concerned with the fate of male captives. The *jumhur* of the *fuqaha* says that male captives may be either executed, freed by ransom or gratuitously, or enslaved, based on *maslahat* (Ibn Rushd, 2000). Ibn Rushd mentioned that the *jumhur* of the *fuqaha* allows execution because Prophet Muhammad ﷺ had executed some captives during his time (Ibn Rushd, 2000).

Meanwhile, a minority of jurists say that captives may not be executed as a categorical impermissibility. Their argument is that the verse allowing the execution of captives (Surah 8:67) and the practice of Prophet Muhammad ﷺ have been abrogated (*Mansukh*) by Surah 47:4 (Ibn Rushd, 2000). Ibn Rushd also cited Al-Hasan ibn Muhammad Al-Tamimi who reported a purported ijma' of the *sahabah* that killing captives is not permissible (Ibn Rushd, 2000).

Over a thousand years have passed, and scholarship of the *fiqh al-siyar* or Islamic international law (this especially includes the *fiqh al-jihad,* as classical literature always portrays) seems to suffer from some unfortunate lethargy in the past century (Hamidullah, 2011). However, in the past few decades, there seems to be a sharp increase

in interest to discuss the Islamic laws of *jihad.* This may be partly due to terrorism being a major world issue, and also because so many wars are occurring in the Islamic world. Hence, even the International Committee of the Red Cross or the ICRC has been conducting numerous events with Islamic scholars to discuss the relationship between the International Humanitarian Law (IHL) and the *fiqh al-jihad* to see how both can agree on a middle ground to humanize war (Al-Dawoody, 2019).

One of the topics discussed in both the IHL and *fiqh al-jihad* is the fate of war captives and whether they can be executed. There seems to be a trend, which Nesrine Badawi suggests to be an effect of modern IHL and the inferiority complex among contemporary Muslim scholars (Badawi, 2016), whereby Muslim scholars tend to prefer categorically prohibiting the execution of captives which was classically a minority view. Examples of two scholars holding this view are Shaykh Yusuf Al-Qaradhawy (Al-Qardhawi, 2010) and Muhammad Munir (Munir, 2010). They however, put forth a reason not usually found in classical scholarship (even among those who also categorically prohibit the execution of captive) which is that, when Prophet Muhammad ﷺ executed captives, it was not due to mere belligerency, but for special crimes perpetrated outside of the war.

Utilizing literature research, this article compares the arguments of the opposing sides of this debate from both classical and contemporary scholars. The arguments from both these sides were considered through the method of *tarjih* (choosing the stronger opinion), utilizing not only the science of *usul al-fiqh*, but also contemporary sources of international law (to the extent that it is appropriate). This is because the problem is related to *siyar*, which must consider customary international law and treaties.

Sources of Islamic Law: An Intersection with International Law?

In Islamic law, the Al-Hukkam (the Lawmaker) is only one: Allah (Al-Zuḥaylī, 2011). This means that Allah alone may make law, as is stipulated in Surah Yusuf (12) verse 40:

إِنِ الْحُكْمُ إِلَّا لِلَّهِ

"Legislation is not but for Allah."

To say that Allah is the only source of law, it means that any law must be based on revelations (*wahy*), whether it be through the *Kalamullah* or through the *sunnah* of Rasulullah ﷺ (Muhammadin, 2021). The Qur'an and Sunnah provide guidance for everything in life. However, they do not always offer any specific rulings, but instead contribute general principles for humanity to follow. Therefore, it is necessary for the 'ulama to make *ijtihad*, which means an effort to derive knowledge of legal rulings through an interpretation of the Qur'an and Sunnah (Nyazee, 2003).

Therefore, after over a thousand years of Islamic intellectual heritage, the *fuqaha* of the *madhahib* (schools of jurisprudence) would develop and perpetuate legal rulings from one generation to another in a long tradition of legal scholarship (Mohamad, 2016). The *fuqaha* would do what the 'ulama of any other branch of Islamic sciences would do, i.e., to be critically aware in meeting contemporary challenges faced by the Muslim. While guarding the corridors of Islamic teachings, the rich heritage of established Islamic knowledge is also shared with others (Harris, 2012).

One of the branches of the *fiqh* or Islamic law is the *fiqh al-siyar* or Islamic international law. It begun from the practice of Prophet Muhammad ﷺ's conduct of war and peace (Abdul Malik, 2016). Classical scholars then formulated it into rules pertaining to how the Dar al-Islam should interact with the Dar al-Harb, and in the context of the contemporary world to advise on how these rules would regulate how Muslims and Muslim nations interact with other peoples and nations (Muhammadin, 2021). Therefore, it is inevitable that Muslims must also obey the sources of international law, such as treaties and customary international law (Hamidullah, 2011), although surely only to the extent that they provide benefits for the Muslims, and as long as they do not contradict Islamic teachings (Muhammadin, 2021).

The last line of the above paragraph is very important because we have two extremes on this matter. On the one hand, we have those who reject contemporary international law entirely, like Abu Muhammad Al-Maqdisi (Al-Maqdisi, 2005). This is a wrong position not only because it dismisses a legitimate source of legal obligations in Islam (i.e. treaties), but also it would prevent the Muslims from reaping the benefits that may be found in some international law instruments such as environmental protection agreements and sanitary standards (Muhammadin, 2021).

On the other hand, we also have some academics like Ebrahim Afsah who has claimed that Islam should just forsake the Sharia altogether and fully submit to international law (Afsah, 2008). This stance is wrong because it incorrectly and unjustly assumes that the current secular Western-style Euro-centric international law is universal while it is not. This stance is also a belief considered as a major *kufr* (Muhammadin & Mohd Kamal, 2019). In this camp, we also have some scholars who perhaps have good intentions but, as explained by Nesrine Badawi, have fallen into a defeatist mentality and inferiority complex (Badawi, 2016).

Therefore, the proper way to deal with international law is to take the 'middle path'. Those that contradict Islamic teachings should be discarded, while those consistent with Islamic teachings and beneficial for the Muslims must be embraced (Muhammadin, 2021). This is done firstly, by applying the Shari'ah properly with the correct methodology, then secondly by applying international law only when necessary and after critically filtering it with an Islamic worldview.

The *Nasikh-Mansukh* Argument by the Classical Scholars

The *nasikh mansukh* and *ijma* 'arguments are essential to explore first because they are the main arguments of the classical scholars who categorically prohibit the killing of captives. At the same time, it is interesting that the *mansukh* argument is not often cited by contemporary scholars who share the same stance on the matter at hand. This research begins with the *nasikh-mansukh* argument.

The *nasikh-mansukh* argument, as explained earlier, centers around two verses. The first verse is what some scholars see as the foundational basis to justify killing captives, which is Surah Al-Anfal (8) verse 67:

مَا كَانَ لِنَبِيٍّ أَنْ يَكُونَ لَهُ أَسْرَىٰ حَتَّىٰ يُثْخِنَ فِي الْأَرْضِ ۚ تُرِيدُونَ عَرَضَ الدُّنْيَا وَاللَّهُ يُرِيدُ الْآخِرَةَ ۗ وَاللَّهُ عَزِيزٌ حَكِيمٌ

"It is not for a prophet to have captives [of war] until he inflicts a massacre [upon Allah's enemies] in the land. You [i.e., some Muslims] desire the commodities of this world, but Allah desires [for you] the Hereafter. And Allah is Exalted in Might and Wise."[1]

These scholars then contrasted the aforementioned verse with another verse, which is Surah Muhammad (47) verse 4:

[1] This article uses the "Saheeh International" translation of the Qur'an.

حَتَّىٰ إِذَا لَقِيتُمُ الَّذِينَ كَفَرُوا فَضَرْبَ الرِّقَابِ حَتَّىٰ إِذَا أَثْخَنتُمُوهُمْ فَشُدُّوا الْوَثَاقَ فَإِمَّا مَنًّا بَعْدُ وَإِمَّا فِدَاءً حَتَّىٰ تَضَعَ الْحَرْبُ أَوْزَارَهَا ۚ ذَٰلِكَ وَلَوْ يَشَاءُ اللَّهُ لَانتَصَرَ مِنْهُمْ وَلَٰكِن لِّيَبْلُوَ بَعْضَكُم بِبَعْضٍ ۗ وَالَّذِينَ قُتِلُوا فِي سَبِيلِ اللَّهِ فَلَن يُضِلَّ أَعْمَالَهُمْ

"So when you meet those who disbelieve [in battle], strike [their] necks until, when you have inflicted slaughter upon them, then secure [their] bonds, and either [confer] favor afterwards or ransom [them] until the war lays down its burdens. That [is the command]. And if Allah had willed, He could have taken vengeance upon them [Himself], but [He ordered armed struggle] to test some of you by means of others. And those who are killed in the cause of Allah - never will He waste their deeds."

According to these scholars, comparing these two verses, it is clear that Surah Muhammad (47) verse 4 stipulates the options a Muslim leader can take towards war captives and execution is not among them. Therefore, they conclude that execution is no longer an option as the ruling is now abrogated (Ibn Rushd, 2000).

Nonetheless, a further examination would reveal that this *nasikh-mansukh* argument has some major flaws. This is explained as follows:

First, it must be proven that Surah Al-Anfal (8) verse 67 was *mansukh*. Evidence could either be an explicit *hadith* mentioning that the verse was indeed abrogated, or that the texts (whether *Qur'an* or *sunnah*) are irreconcilably contradictory to each other (Nyazee, 2003). In this case, there is no explicit evidence of the *nasakh*. Rather, there is merely an assumption of these jurists because the subject matter in the verses seems to be contradictory.

However, as explained by Al-Tabari, these verses do not even contradict each other at all (Ath-Thabari, 2007). Surah Muhammad (47) verse 4 does not mention other treatments to captives other than through release or ransom, but it is not limited to those only either. An example of a similar situation is Surah Al-Nisa' (4) verse 101, which mentions that shortening *salat* (qasr) is done in fear, but it is known that *qasr* can be done while traveling, even without fear and this is based on other evidence, i.e., the *sunnah* (Al-Naysābūrī, 2007). In the case at hand, the evidence of captive execution is also from the *sunnah*, whereby many captives have been killed. One such example would be the execution of the captives from Banu Qurayzha, after the Battle of Ahzab (Al-Bukhārī, 1997).

Second, the chain of events would instead make *nasikh-mansukh* an argument in favor of the permissibility of killing captives. Al-Tabari notes that some of the early scholars actually say that Surah Muhammad (47) verse 4 was also abrogated by other verses, such as Surahs Al-Tawbah (9) verse 5 and Surah Al-Anfal (8) verse 57, all pointing to the permissibility of killing captives (Ath-Thabari, 2007). This opinion is also weak due to similar reasons stated in the previous point above. These verses do not seem to abrogate 47:4 because there is no contradiction, as the latter is applied in specific situations, while the former is a general ruling during warfare (*takhsis*).

Nonetheless, Surah Muhammad (47) verse 4 was actually revealed in the aftermath of the battle of Badr, and not very long after Surah Al-Anfal (8) verse 67 was revealed (ibn Kathir, 2003). The reality is that Prophet Muhammad ﷺ has fought numerous battles after Badr (which is the first major battle), and the Prophet has executed captives as indicated earlier. Therefore, if Surah Muhammad (47) verse 4 indeed prohibited the killing of captives, then it has been abrogated by the *sunnah* of Prophet Muhammad ﷺ.

An important point must be made regarding the Banu Qurayzha execution because it seems to be a major piece of evidence to support the permissibility of killing captives. Some scholars, such as Barakat Ahmad (Ahmad, 1979) and Arafat (Arafat, 1976) have suggested that the incident never happened at all and was a fabricated part of Islamic history. More contemporary academics, for example. Muhammad Munir (Munir, 2011) has attempted to apply the claims made by Barakat Ahmad and Arafat and to argue in favor of the categorical impermissibility of killing captives. Barakat Ahmad and Arafat, in their claim, rely on the following two points: (a) criticizing some historians like Ibn Ishaq and Al-Waqidi who are unreliable narrators of history, and (b) multiple minor questions of factual plausibility, such as the impossibility of burying too many bodies in one city (i.e., Madinah). On the other hand, a proper ḥadīth analysis would show a large number of credible narrators (beyond Ibn Ishaq and Al-Waqidi) who have narrated the incident, and they have posed questions of factual plausibility which do not negate the occurrence of the said incident (Muhammadin & Nashrullah, 2021). Therefore, the point stands.

The Claim of *Ijma'*: A Critical Appraisal

The claim of ijma' is another argument suggested by some classical scholars. However, unlike the *nasikh-mansukh* argument above, this *ijma'* argument has been cited quite often by some contemporary academics both Muslim and otherwise such as Golvach (Golvach, 2016), Munir (Munir, 2010), and (Salaymeh, 2016).

It is understandable why this argument is appealing. *Ijma'*, if proven, is a very strong and conclusive binding source of Islamic law (Al-'Uthaymin, n.d., p. 98). Scholars even put it among other primary sources of Islamic law, alongside the Qur'an and Sunnah (Nyazee, 2003). Their *dalil* is, among others, an authentic *hadith* (this narration has week chains, but the 'ulama have noted that the different chains can support each other and elevate its status of authenticity) where Prophet Muhammad ﷺ said that his ummah will not agree or achieve consensus over an error (Al-Shāṭibī, n.d.). Additionally, to further emphasize the seriousness of the matter, the act of contradicting or rejecting a clear *ijma'* is tantamount to disbelief or *kufr* (Alī Ḥasan, 1415 H).

An ijma' means a consensus among all of the 'ulama of the Muslims in one period of time (Al-Utsaimin, 2008). This is then, in turn, binding upon the Muslims after such an *ijma'* has been reached. Abdul Wahhab Khallaf mentions two kinds of *ijma'*. The first type is *ijma' sharih* where all the 'ulama in one period have voiced their opinion towards a matter and it is clear that all of these opinions clearly are in agreement with each other. As pointed out earlier, it is this *ijma'* that is undoubtedly an imperative source of Islamic law after the Qur'an and Sunnah (Khallaf, 2005). The second type is *ijma' sukuti*, in which some of the 'ulama voiced the same opinion and other 'ulama are silent. The *fuqaha* differ on whether *ijma' sukuti* has the same legal effect as *ijma' sharih* (Khallaf, 2005). The Hanafi scholars say that both have the same legal effect, as silence may constitute an agreement. It is unthinkable that no scholar voices their disagreement towards an opinion they disagree with, especially if such opinion is popular. While the majority says they are not the same because it may be unfair to ascribe an opinion to the silence of the persons concerned.

However, if we analyze the claim of *ijma'* of the impermissibility of killing captives, there are some problems.

First, the *sahabah* actually did execute captives. It was narrated that Abu Bakr instructed Khalid ibn Al-Walid to execute the men of Banu Hanifah (As-Sallabi, 2013). Also, it was narrated that Umar ibn Al-Khattab instructed Sa'd ibn Abi Waqqas to kill captives when the latter march out to conquer Iraq (As-Sallabi, 2007). These are only two among so many instances to indicate the practice of the *sahabah* in executing captives.

There are indeed narrations of other *sahabah*, such as Ibn 'Umar, who rejected the execution of captives (Al-Wā'ilī, 1440 H). Nonetheless, as there were numerous other practices of the *sahabah* executing captives, this at best only indicates the existence of a difference of opinion at the time. Weighing the stronger opinion is another issue. However, as far as an *ijma'* claim goes, the existence of a difference of opinion (at the time of the occurrence of the acclaimed ijma) is the conclusive evidence that no *ijma'* has occurred (Al-'Uthaymin, n.d.). After all, there cannot be a consensus as long as there is a dissenting opinion.

Second, the timing of the claim of *ijma'and* the time of the actual *ijma'* makes the claim dubious. The *sahabah* themselves lived in the 1st century of the Hijri, and the last *sahabah* (Abu Qilabah Abdullah ibn Zayd) passed away in either 104, 105, or 107 Hijri (Al-Dhahabī, 1422 H). They were involved in numerous wars and, as pointed out earlier, had dealt with captives before. If there was an *ijma'* on such an important subject, it would surely be known. Yet, why was the claim of *ijma'* first made by a scholar who was only born hundreds of years later?

This purported *ijma'* seems to surround a narration reported by just one man, which was Al-Hasan ibn Muhammad Al-Tamimi who was born in Iraq, year 355 Hijri (Al-Dhahabī, 1405 H). In the gap between all those hundreds of years, it appears that none of the major Imams mentioned the *ijma'*, such as Imam Al-Shafi'i (Syafi'i, 2004), Imam Malik (Anas, 1992), and not even Imam Al-Shaybani who wrote his *magnum opus* Kitab *Siyar Al-Kabir,* and who completely dominated the issue with the fiqh of jihad (Al-Sarakhsī, 1971). This silence adds to the dubiousness of the claim that an *ijma'* on such an important topic has indeed occurred.

Third, from an *'ilm al-riwayah* perspective, the narration cannot be accepted. Al-Hasan ibn Muhammad Al-Tamimi is a scholar of Islam,

but his credibility as a narrator had been called into question among the ‘ulama of hadith (Al-Dhahabī, 1405 H). In addition, it is hard to find any *sanad* of the narration he reported, and this two to three century gap between Al-Hasan and the alleged ijma’ makes this a very serious case of *inqita‘* (broken chain).

Hence, at the end of the day, the claim of *ijma‘* is simply not true and cannot be a basis for legal rulings.

The Prophet’s Practice: The New Argument and its Viability

In the previous section on *nasikh-mansukh,* the practice of Prophet Muhammad ﷺ has been explained as evidence that the permissibility to execute captives has never been abrogated and thus, still stands. Based on this practice of Prophet Muhammad ﷺ, classical scholars throughout the ages have deduced that it is therefore, permissible to execute war captives if there is *maslahat* in doing so (Ibn Rushd, 2000).

However, as also explained earlier, recent decades reveal a new argument for the anti-execution side; execution is categorically impermissible except for perpetrators of serious crimes, because (according to them) that was the practice of the Prophet ﷺ (Munir, 2010). Among the evidence are the fates of Nadr ibn al-Harith and ‘Uqbah ibn Abu Mu‘ayt , who were executed after the battle of Badr for what they have done to the Muslims back in Makkah. Additionally, the Banu Qurayzha men were executed due their very dangerous acts of treason (Al-Mubārakfūrī, 1427 H).

What is intriguing about this new argument is that it is non-contextual. What this means is that, this particular argument does not involve any new developments, such as contemporary international law (which will be discussed in a separate section later), or new technology that would have changed the circumstances from which to derive legal rulings. Rather, this new argument is based on the practice of Prophet Muhammad ﷺ which has been known since over a thousand years ago, but only until the recent decades did anyone seem to come up with such a conclusion. This consequently suggests that all the *fuqaha* for over a thousand years have been making the wrong conclusion. This itself is dubious for the same reason why *ijma* is a binding source of Islamic law, which is the impossibility of all Muslims in one period

(let alone over a period of a thousand years) to all be mistaken. With this *ijma* logic, if no Muslims have ever come up with a particular argument for a matter which is not new (i.e., old matter, no new circumstances), then such argument simply cannot be true.

Be that as it may, a further examination of the argument will reveal its problems. This new argument seems to rely on a presupposition that if the Prophet ﷺ responded to an issue in a particular way, then any other way is not permissible. This is a problematic presupposition because such a rigid interpretation of the *dalil* without room for flexibility (in other words, "if that's what the Prophet ﷺ did, that is all you are allowed to do"), usually only applies for rulings related to the Rights of Allah such as ritual worship or *'ibadah mahdah* (Al-Shathri, 1426 H), or forms of *hudud* punishments ('Awdah, 2003).

While it is true that the *sunnah* of Prophet Muhammad ﷺ is a binding source of Islamic law, legal rulings are still derived based on what the *'illah* or underlying legal cause is (Nyazee, 2003). This can make the ruling not exactly the same as the *dalil*, but similar in terms of legal cause. For example, Prophet Muhammad ﷺ always pays *zakat* with certain goods and never with money, but some of the *fuqaha* (a powerful minority) allow paying *zakat* with money because they find the *'illah* of the *zakat* obligation is the prescribed value to be paid (Al-Nawawī, 2009). In the context of *jihad,* it seems that there are no authentic *hadith* prohibiting killing sick (incapacitated) males and the Shafi'is would perhaps allow killing them as their position is that, during war, all non-Muslims could be killed except a specific exception could be found in the *dalil* (Ibn Rushd, 2000). However, the majority *fuqaha* disagree and say that they share the same *'illah* with the other persons prohibited to be killed in war, i.e., that they do not participate in combat (Al-Dawoody, 2011).

More examples can be cited because there is endless *ijtihad* like this in all books of fiqh in almost all themes (perhaps a bit less in *'ibadah mahdah*). The point is that even if the practice of Prophet Muhammad ﷺ shows that all executed war captives were perpetrators of certain crimes, it does not necessarily indicate that only such criminals may be killed. It will depend on what the *'illah* is.

The identification of *'illah* in the matter of captive execution can be determined by considering the practice of Prophet Muhammad ﷺ in

jihad holistically, not partially, especially relating to the taking of a life. The original rule regarding taking lives (killing) is that it is impermissible, unless there is a lawful reason to take that life (Al-Shathri, 1426 H). As mentioned earlier, the Shafi‘ has said that a state of war is one of the lawful reasons to take the lives of non-Muslims, and even then unless a specific exception is found (Ibn Rushd, 2000). Meanwhile, the majority is careful to determine that the exceptions are not limited to the specific excluded category (e.g., women, children, the decrepit, hired serfs) but the *‘illah* is that there is no necessity to kill them. On the contrary, the enemy forces which may be killed are those who are necessary to be killed (Al-Dawoody, 2011; Azzam, 1993).

To speak of necessity is to speak of *maslahat*, which is a recurring (and even main) theme in *fiqh al-jihad* (Al-Dawoody, 2011). Other than the determination of legitimate attack targets, *maslahat* is the basis for so many other rulings in *jihad*. The determination of whether to conduct offensive *jihad* depends on *maslahat* (Al-Qardhawi, 2010). The determination of the division of war booty, after considering some prescribed divisions (i.e., *khums*), is based on *maslahat* (Muhammadin, 2021, p. 53). Even in determining whether to release captives with ransom or gratuitously (for those who follow the *nasikh-mansukh* argument), it is again based on *maslahat* (Ibn Rushd, 2000). The reason to argue that the ruling of execution is also based on *maslahat,* as is the position of the majority *fuqaha*.

Having said all that, what appears to be the strongest *‘illah* of the ruling of captive execution specifically, (and *fiqh al-jihad* generally) is *maslahat.* A possible question then, is whether *maslahat* in killing war captives is only permissible when the said captives have committed specific crimes. This is answered in the next section. However, it may seem that the contemporary anti-execution scholars did not arrive at their conclusion based on *maslahat*. As explained above, they are usually very clear about their stance, and explicit in saying that killing captives are categorically impermissible based on their own interpretation of the Prophet’s practice. They also often cited their purported view of the *ijma* as additional evidence.

Maslahat as Basis to Execute Captives: Unpacking the Misunderstanding

Badawi explains that there are numerous scholars who take a ‘lets-satisfy-the-West’ position on issues related to Islam and international law (Badawi, 2016). Perhaps her language is too strong, especially

towards eminent scholars of Islam such as Shaykh Wahbah Al-Zuhayli and Shaykh Muhammad Abu Zahrah whom she has criticized. Nevertheless, her concerns are legitimate.

As explained earlier, there are some Muslims who have responded to developments in international law with a 'defeatist mentality' which reflected their own inferiority complex. What Badawi meant was that there are some people whose minds are too full of fear of being accused of being 'inhumane' and 'against international law' that they end up conjuring a dishonest selective notion of Islamic teachings (Badawi, 2016). So, if cases are emerging that apparently seem 'inhumane', these people would perhaps be the first to condemn it without first making sure they understand what they are condemning.

What seems to be the problem with the contemporary scholars who categorically reject captive execution is the wanton killing of captives. Such wanton killing may have been allegedly committed by terrorist groups like ISIS or Boko Haram. What it seems is that these scholars are misled to think that 'permitting captive execution if there is *maslahat*' means that captives may be wantonly executed at the whim of their captors. Thereafter, they respond by categorically prohibiting executing captives, the only exception being when the captives have committed serious crimes (Munir, 2010), which is a very narrow interpretation of permissibility.

However, this cannot be further from the truth. This is because it is a serious misunderstanding that will lead to considerable *muḍarat* in the implementation of the fiqh of jihad during warfare as will be explained below.

The correct understanding is, when the *jumhur* of the *fuqaha* say that leaders may execute captives based on the interest of the Muslims, they refer to *maslahat* (exigency). As is shown below, *maslahat* does not limit captive execution for only perpetrators of severe crimes, nor does it open doors to wanton killing captives either.

The idea of *maslahat* is to attain benefits and remove harm, preserving the aims and purposes of the *Shari'ah* (Al-Ghazālī, 1324 H; Rizkiah & Muhammadin, 2020). As stipulated in the Qur'an, Surah Al-Anbiya (21) verse 107:

وَمَا أَرْسَلْنَاكَ إِلَّا رَحْمَةً لِلْعَالَمِينَ

"And We have not sent you, [O Muḥammad], except as a mercy to the worlds."

Maslahat is so essential that all of the Shari'ah revolves around it (Al-Shathri, 1426 H), and sophisticated sciences such as the *Maqasid al-Shari'ah* are formulated to further elaborate *maslahat* (Ashur, 2006). Hence, when the majority of the classical *fuqaha* say executing captives is permissible based on *maslahat*, they actually refer to the comprehensive Islamic sciences related to the subject.

Thus, when some contemporary scholars point out that Prophet Muhammad ﷺ only execute captives as punishment due to specific crimes, it is not incorrect to say that this is one of the manifestations of *maslahat*. All parts of Islamic teachings are founded upon *maslahat* (Al-Ghazālī, 1324 H), and the implementation of punishment for crimes as prescribed by the *Shari'ah* is surely included in that (Al-Lāḥim, 2011). In this sense, no 'ulama would disagree with the permissibility of executing perpetrators of terrible crimes.

Problems start when some contemporary scholars limit the execution of captives only to perpetrators of crimes, which necessarily excludes *maslahat* reasons to execute captives beyond the commission of crimes by said captives. *Maslahat* is much broader than that, although certainly not infinitely broad. Rejecting this categorically would result in a conclusion bringing about *muḍarat* to the implementation of *fiqh al-jihad* during warfare.

Classical literature gives some notable examples of *maslahat*. Imam Al-Shaybani explains how male captives shall be executed if the Muslim army does not have the logistics to transport them back to the Muslim lands (Al-Sarakhsī, 1971). This is perfectly understandable because if they are released they might join their comrades (since they are still located in enemy territory) and attack the Muslims, this time probably knowing more about the strength of the Muslim forces after being held in captivity. In another scenario, some contemporary academics mention that the execution of captives by Muslims will not be preferable if it may lead to the execution of Muslim captives by the enemy in retaliation (El-Fadl, 1999). There is little to no *maslahat* in executing the captives in such a situation. Hence, it will be *makruh* (disliked) or perhaps even *haram* (impermissible) to execute captives. Likewise, the threat to execute captives may be a reasonable means to prevent the enemy from executing Muslim captives, or maybe it can be done as revenge if the enemy has done it first.

A more contemporary illustration of the case is as follows. Suppose a situation where a Muslim army has managed to capture a large

number of enemy soldiers. Not long after, they receive news that another large enemy force is approaching to attack them. Retreating is not always possible and having captives would definitely slow the Muslims down. The first possibility is to release the captives, who will inevitably join their comrades and increase the enemy strength with power and information. The second possibility is to keep the captives, which is also a risk because it would be difficult for a Muslim army to guard enemy captives while at the same time fighting an incoming enemy. Even worse, the captives might take advantage of the divided attention of the Muslims and attack from within.

This may be a situation of emergency (*darurah*), where the Muslims will have to execute the captives in order to avoid the greater risk of their own destruction. The permissibility of committing otherwise impermissible deeds due to an emergency (proportionally, of course) is a well-established principle in Islamic law (Zaydan, 2015). This is applicable to all areas of Islamic law. Those who categorically reject captive execution would inevitably suggest that Islamic law demands the Muslim army to compromise their own lives, and possibly the other Muslims and lands they were probably supposed to defend. In other words, it is as if they are preferring to inflict greater harm to the Muslims than lesser harm, which makes no sense.

Therefore, there may be different situations in a war where *maslahat* may call for the killing of captives. Perhaps it could be in retaliation for a specific crime committed by that captive, during an emergency to prevent them from re-joining the enemy and increasing its strength in a counter attack, or many other valid reasons. Neither of the aforementioned opinions involves the sheer whims and fancies of blood thirsty terrorists. Rather, they are realistic necessities in combat and are guided by the *Shari'ah*. On the other hand, the position that categorically prohibits the execution of captives would open the door towards much *muḍarat* in the implementation of *fiqh al-jihad* in the situations as explained earlier. This may impose an unrealistic burden on Muslim armies when they are put in very difficult situations.

Defining Maslahat in the Contemporary World

Modernity has its own effect on the development of Islamic sciences, and the *fuqaha* must adapt by developing legal rulings which help the Muslims attain *maslahat* within the ambit provided for in the *Shari'ah*. It has been mentioned that the science of *maslahat* and *maqasid al-shari'ah* have developed into very sophisticated sciences.

New considerations must be made because different possibilities have emerged due to the changing circumstances of Muslims and humanity nowadays. It must be noted that, no matter how the world develops, the standard of *maslahat* is not taken from one's own rationale, but from the Shari'ah itself (Nyazee, 2003). Some try to mix in Bentham's utilitarianism, but this is inappropriate due to the contradicting epistemologies between utilitarianism and the Shari'ah (Al-Būṭī, 1973; Setia, 2016).

In the past, the narration of 'Umar instructing Sa'd to kill captives explicitly notes the *maslahat* in it. 'Umar said that executing captives may instill fear in the enemy (As-Sallabi, 2007). When an enemy has lower morale, it means that there is a stronger chance to defeat them. However, this was an incident in a distant past. Does such *maslahat* exist today?

It is perhaps true that some enemies (perhaps not all) would be terrified and lose morale when the Muslims execute some captives. However, today is a world with sophisticated IHL (1949) conventions, the United Nations, and various other things. More perspectives need to be taken into account and contextualized as they weigh into the *maslahat* vantage point.

First, Muslim nations may be already bound to IHL conventions that prohibit the execution of captives except for specific crimes such as the third Geneva Convention 1949, although there may be a bit of problem when speaking of non-state armed groups who have never ratified these conventions (Kotlik, 2012). Meanwhile, treaty obligations must be fulfilled except when their terms contradict the Shari'ah (Ibn Taymiyyah, 1426 H). Hence, the question now is whether such a provision is against the Shari'ah.

As explained previously, to execute is an option and not an obligation. Therefore, at face value the Geneva Convention provision above does not contravene the Shari'ah. What may seem to be a problem is that, alike the anti-execution scholars, it also prohibits execution by *maslahat* other than specific crimes perpetrated by the captives. However, this does not seem to be a problem because emergency situations also have their leeway in international law, because the commissioning of crime under duress is exempted from criminal liability as per Article 31(1)(d) of the Rome Staute 1998.

Therefore, what seems to be blocked by the Geneva Conventions are only captive executions by *maslahat* which are non-emergency (or non-*darurat*), for example, the 'Umar example above. If it is not an emergency, it means that it may be needed (*ḥajiyat*), and it does not endanger anyone not to have them (Nyazee, 2003). Additionally, if the enemy unjustly executes the Muslim captives first, contemporary international humanitarian law may provide room for the Muslim army to justifiably retaliate in kind, as long as (a) it is a last resort, (b) proportional to what the enemy did, (c) decided by the highest leader, (d) stop when the enemy stops, and (e) the object of reprisals are not civilians (Henckaerts & Doswald-Beck, 2005). It seems then that, to a large extent, Muslim interests are pretty much accommodated.

Second, one must consider how the international legal order today works. The international adverse reaction towards violations of international humanitarian law, especially if committed on a large scale, may be very strong and realistically detrimental. When the international community's big powers, for better or worse, decide to punish a nation or a group, they would do so with great might. There is much ongoing debate on the extent in which the United Nations (especially the UN Security Council) is biased in performing its duties (Anghie, 2004; Deplano, 2015), when the organization itself has quite a dark history in its establishment (Wilcox, 1945). However, the reality remains that the UN comprise certain member states which wield a massive amount of political, economic, and military strength.

In the past, as explained by El-Fadl in the foregoing discussion, it was considered not preferable to execute captives if it would lead to other Muslims being executed afterward (El-Fadl, 1999). In a different but related contemporary issue, Abdullah Azzam ruled during the Afghan-Soviet war that enslaving Soviet women (as an option other than execution) is impermissible due to the fear of the Soviets retaliating in a worse way ('Azzām, n.d.). The idea is that, if a permissible option leads to greater harm towards the Muslims, there is no *maslahat* (and there is even *muḍarat*) in taking that option.

As an alternative solution to the issue at hand, the existing international mechanism may provide some other political and legal alternatives to respond to crimes committed by enemy forces. The UN and the International Criminal Court, for example, provide either soft or hard power against enemies of the Muslims who may be perpetrating

serious crimes. As explained earlier, there are some major problems in the UN, but there are also on most occasions when the organization has performed its duties responsibly (Benson & Kathman, 2014; Deplano, 2015). The Bosnian Muslims have been (to some extent, and not without terrible incidents too) saved when NATO stepped in with their military might and the UN established ad-hoc tribunals to punish those who were responsible, although the NATO intervention had terrible geopolitical repercussions as well (Kuperman, 2008). On the other hand, the Palestine quagmire has time and again been very disappointing. There has been only been slow and meaningless change in the state of affairs regarding the Palestinian issue, as many would argue, despite the recognition of the state of Palestine by the UN General Assembly in 2012 and the recent ICC proceedings (Allen, 2020; Mason, 2021).

In this respect, it may seem that the example of *maslahat* in 'Umar's instruction might not be easily applicable today, considering the potential backlash from the international community. This has much to do also with the lack of strength of the Muslim nations in the current international political arena. However, this is not about 'Umar being incorrect in his judgement. Rather, the circumstances surrounding the decisions are different, making it necessary to adjust. However, this is not to deny that there may be other circumstances when there is *maslahat* in killing captives.

One would reasonably regret the direction of some works which seem to define *maslahat* as "shaping an Islam palatable to Western audiences". The problem with this is not only the academic dishonesty that has led to a distorted and incorrect perception of Islam. Rather, the problem is also that it becomes too easy for armed chair commentators to speak of *maslahat* in the form of a beautiful utopian peace, holding hands with people from all faiths and colors while smiling and singing "Heal the World". They cannot relate to and therefore, ignore the stark reality of Muslim armies who are actually currently engaged in fighting and risking their lives on the battlefield.

CONCLUSION

In the end, there are at least two things to conclude regarding the ruling on captives. First, the stronger opinion is that captives may be executed if there is *maslahat* to do so. Second, the *maslahat* as a basis

of execution is not equal to wanton killing. Rather, *maslahat* considers a deeper understanding of both the primary sources of Islamic law, as well as the realities of warfare which is a major factor in determining legal rulings. It also must consider international law obligations and political circumstances.

The opinion of those who categorically prohibit execution seems to be neither correct nor realistic, both in terms of primary sources of Islamic law, as well as the realities of warfare and contemporary situations. These scholars provide only one exception, justifying captive execution only if the said captive has committed heinous crimes. Their logic is "if the Prophet only executed captives when they committed specific crimes, then we may only execute captives when they committed specific crimes also."

If one applies the aforementioned logic to almost every other context, one might be labelled as a *'Wahhabi*' (surely in a derogatory way). This is an issue of *mu'amalah* instead of ritual worship, so the *shari'ah* is not constricted on matters like this. War inevitably involves killing, where difficult decisions must be made when the lives of many are at stake and the situation of captives is very precarious. This is why *maslahat* is seen as the foundation of the *shari'ah* and is an important principle in the conduct of *jihad*. Many rulings are open to various possibilities of interpretation, depending on the given circumstance, but all must be within the ambit of the *shari'ah.*

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