

Debates on the Rights of Prisoners of War in Islamic Law

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Abstract

This paper explores the rights of protection available to the prisoners of war under Islamic law. It analyzes the differences of opinion among the early fuqahā' regarding the POWs. The paper finds that the Qur'an mentions only two ways to terminate captivity, that is, mann (freedom gratis) and fidā' (ransom) (Qur'an 47: 4) a verse that was not superseded; that ransom was taken by the Prophet only from the POWs of Badr whereas the general practice of the Prophet (peace be on him) and his caliphs was to set POWs free without any condition or ransom. Non-Muslim states used to ask for ransom for the release of Muslim or non-Muslim POWs. In addition, enslavement of POWs as well as their execution had never been the general practice in Islam. Slaying the POWs had been very rare in Islamic military history. Finally, the Prophet and his caliphs had exchanged POWs on some occasions. Majority of classical Muslim jurists seem to have generalized exceptional cases regarding the execution and enslavement of POWs. The question of treatment has been debated particularly with reference to the Lā'ihah for the Mujāhidīn, a document issued by the Taliban in Afghanistan in 2010. The paper argues that The Taliban have created new rules for terminating the captivity of POWs but have wrongly attributed them to Islamic law.

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Introduction

One of the most contentious questions that faced the early Muslim jurists was: what rules apply to the prisoners of war? This question has also attracted the attention of modern authors writing specifically on Prisoners of War

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(hereafter POWs) and on the subject of war and peace and International laws in general.¹ Some articles on Islamic *jus in bello* or Muslim conduct of war have also dealt with the issue of POWs but such studies are not comprehensive. There are only a few specific but not exhaustive studies on POWs in Islam; they either rely on secondary sources² or fail to elaborate the complex rules regarding the POWs and do not analyze the reasons behind the differences of

¹ A complete bibliography of all the works on Islamic *jus in bello* is beyond the scope of this work. The most cited works written in English include Majid Khadduri, *War and Peace in the Law of Islam* (Baltimore: The John Hopkins Press, 1955) and his "Islam and the Modern Law of Nations," in *American Journal of International Law*, 50: 2 (1956), 353-372. With regard to Islamic laws of war and peace most Western scholars draw upon the writings of Khadduri. See, for example, James J. Busuttill, "Slay Them Wherever You Find Them: Humanitarian Law in Islam," in *Revue de Droit Pénal Militaire et de Droit de la Guerre*, 30 (1991), 113-126; Karima Bennounne, "As-Salamu 'Alaykum? Humanitarian Law in Islamic Jurisprudence," *Michigan Journal of International Law*, 15: 4 (1993-1994), 605-643. Bennouni's article is mostly based on Ahmed Zaki Yamani, "Humanitarian Law in Islam: A General Outlook," in *Michigan Yearbook of International Legal Studies*, 7 (1985), 189-215, and, to some extent on, Khadduri. Yamani's article is by far the best in this field with the only shortcoming that he does not refer to the sources for all citations. Anisseh Van Engeland "The Differences and Similarities between International Humanitarian Law and Islamic Humanitarian Law: Is there Ground for Reconciliation?" in *Journal of Islamic Law and Culture*, 10: 1 (2008), 81-99 relies on Bennouni's above mentioned article. John Kelsay in his several works (e.g., "Islam and the Distinction between Combatants and non-Combatants," in James Turner and John Kelsay, eds. *Cross, Crescent and Sword* (Westport: Greenwood Press: 1990), 197-220; and his "Al-Shaybani and the Islamic Law of War," *Journal of Military Ethics*, 2: 1 (2003), 63-75) also relies on Khadduri. A recent work in Arabic language is 'Āmir al-Zammālī (ed.), *Maqālāt fī 'l-Qānūn al-Duwalī al-Insānī wa 'l-Islām*, 2nd ed. (Cairo: ICRC, 2007). This publication has put together 15 essays previously published in the *International Review of the Red Cross* on the various aspects of Islamic *jus in bello* and in some cases its comparison with international humanitarian law. Most of the essays are based on original sources. Other noteworthy works based on original sources include Gerhard Conrad, "Combatants and Prisoner of War in Classical Islamic Law: Concepts Formulated by Hanafi Jurists of the 12th Century," in *Revue De Droit Pénal Militaire et de Droit de la Guerre*, XX: 3-4 (1981), 271-307; Khaled Abou El Fadl, "Saving and Taking Life in War: Three Modern Muslim Views," in *The Muslim World*, LXXXIX: 2 (1999), 158-180; Syed Serajul Islam, "Abu Ghraib: Prisoner Abuse in the Light of Islamic and International Law," *Intellectual Discourse*, 15: 1 (2007), 15-19. This is a very short but a very good work; and Ellah Landau-Tasserou, "Non-Combatants" in *Muslim Legal Thought*, Research Monographs on the Muslim World, Series No. 1, Paper no. 3, December 2006 (Washington: Hudson Institute, 2006), 1-25. In this paper the author has attempted to generalize the exceptional views of Muslim jurists regarding Islamic *jus in bello*.

² There are two articles that fall in this category. These are: first, Yadeh Ben Ashoor, "Islam and International Humanitarian Law," in *International Review of the Red Cross*, 20: 215 (1980), 59-69, and secondly, Troy S. Thomas, "Prisoners of War in Islam: A Legal Inquiry," in *Muslim World*, 87: 1 (1997), 44-53. The first article briefly discusses the interpretation of the Qur'anic verses regarding POWs. Unfortunately, the author does not give references of several works discussed in his article. The second article is based on secondary sources but the author has given only a summary of Islamic law regarding POWs.

opinion among the early *fuqahā'* on the subject.³ A comprehensive work on this subject is still awaited.

Recent studies have dealt with the issues of the definition of POWs and their treatment. Since Muslim states do not follow the rules of Islamic *jus in bello* and thereby there are no codes to consider in academic studies, the only code that is relevant in our discussion is the *Lā'ihah* for the *Mujāhidīn*, a document issued on May 29, 2010 by the Taliban in Afghanistan⁴ as it is the most important document by a non-state Islamic actor of our times.

The present essay defines POW as those fighters who are captured while taking part in actual combat. The essay discusses the following significant questions about the POWs: What is the fate of POWs in Islamic law and what was their fate in Islamic military history? Are there only three options, i.e., *mann*, setting them free (without any condition) *fidā'* (ransom or attaching conditions) and 'exchanging POWs' available to the political authority or whether two more options — execution and enslavement — are also available to it? How should the POWs be treated in captivity? Do the non-state Islamic actors, especially the Taliban in Afghanistan follow the rules of Islamic *jus in bello* regarding the treatment of POWs? (hereafter the *Lā'ihah*). These are some of the questions that are explained in this work, however, other related issues are also discussed wherever necessary. The work uses mainly the Qur'ān, the *Sunnah*, and his first four successors, the opinions and interpretations of the *fuqahā'* regarding the treatment of POWs.

The Rules about the Prisoners of War

Taking captives is legal according to the Qur'ān: "And take them captive, and besiege them" (Qur'ān 9: 5) and "And then tighten their bonds." (Qur'ān 47: 4) According to Muslim *jurists*, the political authority has to decide the disposal of POWs in the best interest of the Muslim community. However, the *fuqahā'* are divided as to the choices that are available to the Muslim state to terminate captivity. Some jurists restrict the Imām — the head of Muslim state — to *fidā'* — ransom and *mann* — grant of freedom gratis; some dismiss

³ A good work is Gerhard Conrad, "Combatants and Prisoners of War in Classical Islamic Law: Concepts formulated by Hanafi Jurists of the 12th Century," 271–307, especially 284–296. In this work the author discusses the status of POWs according to the 12th century Hanafi jurists. He considers the execution of the combatants of Banū Qurayzah as the general rule applicable to all POWs. Moreover, the author does not discuss the opinions of non-Hanafi *fuqahā'*.

⁴ Its full name is 'The Islamic Emirate of Afghanistan *Lā'ihah* [rules] for the *Mujāhidīn*.' The last version is published on May 29, 2010. References in this work are made to the last edition. The author has a copy of the *Lā'ihah*. For details, see, Muhammad Munir, "The Layha for the Mujahideen: an analysis of the code of conduct for the Taliban fighters in Afghanistan under Islamic law," in *International Review of the Red Cross*, 93: 881 (2011), 81–102.

the *mann* and accept other solutions; yet others give the political authority to choose between execution, freedom, ransom, exchange or enslavement. Details of these differences are analyzed below.

(A) *Execution of POWs: Exception or a General Rule?*

The Ḥanafī jurists argue that the political authority has three options to terminate the captivity of POWs. These are execution, enslavement, and setting them free with the condition that they should pay *jizyah* (poll-tax). There is disagreement among them about ransom which will be explained later.⁵

Whatever the case, it is undeniable that both ransom and exchange of the POWs were practiced by the Prophet (peace be on him) himself when he exchanged one non-Muslim with two Muslim captives. Similarly, he exchanged a non-Muslim woman with many Muslim captives. According to Imām Muḥammad b. al-Ḥasan al-Shaybānī (d. 189/804), the famous disciple of Abū Ḥanīfah who codified the *corpus juris* of the Ḥanafī school, freeing POWs is allowed if the political authority considers it to be in the interest of the community because the Prophet (peace be on him) had set Thumāmah b. Athāl (d. 11/633) free. The Ḥanafī scholars also agree that non-Muslim POWs may all be freed provided both their persons as well as land are subjected to *jizyah* and *kharāj* respectively as ‘Umar b. al-Khaṭṭāb (d. 23/644), the second caliph, did with the people of Iraq.⁶ Thus, the Ḥanafīs leave the fate of POWs to the discretion of the political authority, expecting it to do what is best for the Muslim community.

According to the majority of jurists — Shāfi‘īs, Ḥanbalīs, Ja‘fariyyah, Zāhiriyyah and Awzā‘ī, the political authority has the following options: execution, enslavement, *mann* (releasing them *gratis*), and *fidā* (ransom or releasing after a condition or a promise).⁷ According to the Mālīkī school, the options available are: execution, enslavement, *mann*, *fidā*, and imposing *jizyah* on them.⁸ It is interesting to examine the arguments of the *fuqahā*’ regarding their disagreement on the question of the POWs.

⁵ See, the section on ransom below.

⁶ ‘Alā’ al-Dīn Abū Bakr al-Kāsānī, *Badā’i’ al-Ṣanā’i’* (Beirut: Dār Iḥyā’ al-Tuārth al-‘Arabī, 2000), 6: 94.

⁷ Muḥammad al-Sharbīnī al-Khaṭīb, *Mughnī ‘l-Muḥtāj ‘alā Sharḥ al-Minbāj* (Cairo: Maṭba‘at al-Ḥalabī, 1933), 4: 228; Muḥammad Aḥmad b. ‘Alī b. Aḥmad b. Ḥazm, *al-Muḥallā* (Cairo: Munīr al-Dimashqī, 1352 AH), 7: 309, 346.

⁸ Muḥammad b. Aḥmad b. Rushd, *The Distinguished Jurist’s Primer: A Translation of Bidāyat Al-Mujtabid*, henceforth, *The Distinguished Jurist’s Primer*, trans. Imran A. K. Nyazee (Reading: Garnet Publishing Ltd., 1994), 1: 456; Muḥammad b. Aḥmad b. Juzayy, *al-Qawānīn al-Fiqhiyyah* (Beirut: Dār al-Kutub al-‘Ilmiyyah, n. d.), 99; Aḥmad b. Idrīs al-Qarāfī, *Kitāb al-Furuq: Anwār al-*

The Qur'ān mention only two ways to end captivity, that is, *mann* (grant of freedom *gratis*) and *fidā* (ransom) (47: 4). The first option (mentioned in *al-Anfāl*, 8: 67–68) refers specially to the captives of Badr in the second year of *hijrah* in which Muslims had taken some 70 non-Muslims as captives. The occasion for the revelation of these verses was the conduct of the Prophet (peace be on him). Since this was the first time that the Prophet (peace be on him) had faced this situation, he consulted his Companions. The majority opined that they be ransomed because the Muslims needed material help at that time. 'Umar b. al-Khaṭṭāb, however, pleaded that they be executed. The real problem was that there was no clear Divine directive regarding POWs. The Prophet followed the advice of the majority.⁹ It is reported by 'Alī b. Abī Ṭālib (d. 40/661) that the Prophet (peace be on him) put two options before his Companions.¹⁰ In another *ḥadīth* regarding the spoils of war, the Prophet (peace be on him) states that “he has been blessed with five things which were not bestowed on any Prophet before him, One of these is that spoils acquired from disbelievers were not lawful for others, but they were made lawful for his community (*ummah*).”¹¹ However, no revelation attesting to it being lawful had been made till then.

Thus, when the Prophet (peace be on him) decided to ransom the POWs of Badr, the verses 8: 67–68 revealed. God told him:

It does not behove a Prophet to keep captives unless he has battled strenuously on earth. You may desire the fleeting gains of this world — but God desires [for you the good of] the life to come: and God is almighty, wise. Had it not been for a decree from God that had already gone forth, there would indeed have befallen you a tremendous chastisement on account of all [the captives] that you took. Enjoy, then, all that is lawful and good among the things which you have gained in war, and remain conscious of God: verily, God is much-forgiving, a dispenser of grace.

The Companions thought that some of the non-Muslims would become Muslims when freed. In the absence of a decisive textual evidence proving that

Burūq fī Anwā' al-Furūq, Muḥammad Aḥmad Sirāj and 'Alī Jum'ah Muḥammad, eds., 2nd ed. (Cairo: Dār al-Salām li 'l-Ṭibā'ah wa 'l-Nashr wa 'l-Tawzī' wa 'l-Tarjamah, 1428/2007), 3: 17.

⁹ Muslim b. Ḥajjāj, *Ṣaḥīḥ Muslim*, Kitāb al-Jihād wa 'l-Siyar, Bāb al-Imdād bi 'l-Malā'ikah fi Ghazwah Badr wa Ibāḥat al-Ghanā'im (Riyadh: Dār al-Salām, 1419/1998), 782.

¹⁰ Mufti [Muftī] Muḥammad Shafi' [Shafi'], *Ma'ārif al-Qur'ān [Ma'ārif 'l Qur'ān]*, Muḥammad Shameem [Shamīm] and Muḥammad Wali [Walī] Raazi [Rāzī] (trans.) (Karachi: Maktaba-e-Darul-'Uloom, n.d.), 4: 274.

¹¹ See Abū 'Abd Allāh Muḥammad b. Ismā'il al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, Kitāb al-Ṣalāh, Bāb Qawl al-Nabī Ju'ila li 'l-Ard Masjidā (Riyadh: Dār al-Salām, 1419/1999), 76. Muslim b. al-Ḥajjāj, *Ṣaḥīḥ Muslim*, Kitāb al-Masājid wa Mawāḍi' al-Ṣalāh, Bāb al-Masājid wa Mawāḍi' al-Ṣalāh, 212.

the spoils were permissible, the slightest turn of thought towards material gain was considered an act of disobedience. This verse simply urges Muslims to fight hard during the war and that there should be no captives for Muslims before *ithkhān* that is killing the enemy and weakening them. Thus, it is to emphasize killing of non-Muslims in war.¹² Imām Fakhr al-Dīn al-Rāzī (d. 606/1210) in *al-Taḥfīr al-Kabīr* argues that the warning given in the verse above does not mean that captives shall not be taken at all.¹³

According to authoritative commentators of the Holy Qurʾān, these verses were revealed only for that specific occasion, and this point is supported by the subsequent Qurʾānic revelation on prisoners.

Now when you meet [in war] those who are bent on denying the truth, smite their necks until you overcome them fully, and then tighten their bonds; but thereafter [set them free,] either by an act of grace or against ransom, so that the burden of war may be lifted: thus [shall it be]. (Qurʾān 47: 4)

This verse forbids execution and describes captivity as a temporary state, which must give rise to either unconditional or conditional freedom or freedom bought with ransom.¹⁴ Abū ʿUbayd al-Qāsim b. Sallām (d. 229/837) reports that the verses 8: 67–8 were revealed on the day of the Battle of Badr when Muslims were numerically weak. When the Muslims increased in number and their power grew God revealed: “[set them free] either by an act of grace or against ransom, so that the burden of war may be lifted.”¹⁵

The contention of the Ḥanafī *fuqahāʾ* that the verse 47: 4 about *mann* and *fidāʾ* is superseded by the verse 9: 5. (“Kill the non-Muslims wherever you find them”)¹⁶ is not tenable because it is necessary for the abrogating and the abrogated to contradict each other which is not the case here. The verse 9: 5, therefore, must be understood in that particular historical context. As a matter of fact verses 9: 1–15 were revealed in the context of the breach of the treaty of

¹² See, “Asrā” in *al-Mawṣūʿah al-Fiqhiyyah* (Kuwait: Wazārat al-Awqāf wa al-Shuʿūn al-Islāmiyyah, 1425/2004), 4: 194–223, at 195–96.

¹³ Fakhr al-Dīn al-Rāzī, *Mafāṭih al-Ghayb* known as *al-Taḥfīr al-Kabīr* (Cairo: Maṭbaʿat al-Khayriyyah, 1307 AH), 15: 200.

¹⁴ According to Imām al-Qurṭubī, the people mentioned in 47: 4 against whom war is waged are those with whom the relations are hostile. He refers to ʿAlī b. Muḥammad al-Māwardī (d. 450/1058) and Abū Bakr Muḥammad b. ʿAbd Allāh b. al-ʿArabī (d. 637/1240) who state that 47: 4 means that the relations are not peaceful because no peace treaty has been signed with them. See, Muḥammad b. Aḥmad al-Qurṭubī, *al-Jāmiʿ li Ahkām al-Qurʾān* (Cairo: Maṭbaʿah Dār al-Kutub al-Miṣriyyah, 1950), 8: 150.

¹⁵ Abū ʿUbayd reports this on the authority of Ibn ʿAbbās. Abū ʿUbayd b. Sallām, *Kitāb al-Amwāl*, trans. Imran A. K. Nyazee (Reading: Garnet Publishing Ltd., 2002), 116.

¹⁶ See, al-Kāsānī, *Badāʾiʾ al-Ṣanāʾiʾ*, 6: 94.

Ḥudaybiyyah by the non-Muslims of Makkah.¹⁷ The Makkans were given four months to surrender or to face the consequences. They surrendered without a fight. This is the reason why those pagans and other non-Muslim groups who had not breached their covenants were excluded from this treatment.¹⁸ The context of 9: 5 also becomes clearer when it is read with 9: 7–8. Thus, the contention that 47: 4, about *mann* and *fidā'* is abrogated is not correct. Neither is verse 8: 67–8 abrogated because the treatment of prisoners in this verse is made conditional subjecting it to the commitment of bloodshed in the land.¹⁹ To schematize, once the power façade of the disbelievers had been broken through a thorough weakening of their power, Muslims have the option of releasing prisoners against ransom, or setting them free without any ransom. This view is supported by the instructions of the Prophet. While conquering Makkah, he made the following statement, “Slay no wounded person, pursue no fugitive, execute no prisoner; and whosoever closes his door is safe.”²⁰

‘Alī b. Abī Ṭālib, Al-Ḥasan b. al-Ḥasan al-Baṣrī (d. 110/728), Ḥammād b. Abī Sulaymān (d. 120/737),²¹ Muḥammad b. Sīrīn (d. 110/728), Mujāhid b. Jabr (d. 103/721), ‘Abd al-Mālik b. ‘Abd al-‘Azīz b. Jurayj (d. 150/767), ‘Aṭā’ b. Ābī Rabāḥ (d. 114/732)²² and Abū ‘Ubayd ibn Sallām were against the execution of POWs.²³ According to ‘Imād al-Dīn Ismā‘īl b. ‘Umar Ibn Kathīr (d. 774/1373), “[T]he head of the Muslim state has to choose between *mann* and *fidā'* only. He is not allowed to execute them.”²⁴ Abū’l Walīd Muḥammad

¹⁷ See, my “Public International Law and Islamic International Law: Identical Expressions of World Order,” in *Islamabad Law Review*, 1: 3–4 (2003), 369–431, at 375.

¹⁸ Qur’ān 9: 4.

¹⁹ Some Qur’ān commentators give a rather strange opinion about the Qur’anic verses on *jibād* and POWs. See, for example, Brian Bertosa, “The Treatment of Prisoners of War and Non-Combatants in The Qur’an,” in *Canadian Military Journal*, 8: 1 (2007), 19–26, available at <<http://www.journal.forces.gc.ca/vo8/no1/bertosa-eng.asp>> (last visited 31/01/09). Bertosa supports the view held by Firestone that no Qur’anic passages on warfare take precedence over any others. See, Reuven Firestone, *Jihad: The Origin of the Holy War in Islam* (New York: Oxford University Press, 1999), 84.

²⁰ Abū ‘l-‘Abbās Aḥmad b. Jābir al-Balādhurī, *Kitāb Futūḥ al-Buldān*, trans. Philip Khuri Hitti (New York: Columbia University, 1916), 1: 66.

²¹ Muḥammad b. al-Ḥasan al-Shaybānī, *Kitāb al-Siyar al-Kabīr*, commentary Abū Bakr al-Sarakhsī, ‘Abd Allāh Muḥammad Ḥasan al-Shāfi‘ī (ed.) (Beirut: Dār al-Kutub al-‘Ilmiyyah, 1997), 3: 124. Al-Shaybānī mentions that al-Ḥasan al-Baṣrī only allowed the execution of POWs during war while Ḥammād b. Abī Sulaymān used to condemn their execution after the war. See, *ibid.*, 3: 124.

²² Abū Bakr al-Jaṣṣās, *Aḥkām al-Qur’ān*, ed. Sidqī Muḥammad Jamīl (Beirut: Dār al-Fikr, 2001), 3: 582.

²³ Abū ‘Ubayd b. Sallām, *Kitāb al-Amwāl*, 120, 121.

²⁴ ‘Imād al-Dīn Ismā‘īl b. ‘Umar b. Kathīr, *Tafsīr al-Qur’ān al-‘Azīm* (Cairo: Maṭba‘at al-Manār, 1346 AH), 4: 221.

Ibn Rushd (d. 594/1198) also mentions that “[A] number of jurists did not permit executing the prisoners of war. Al-Ḥasan b. Muḥammad al-Tamīmī (d. 656/1258) stated consensus (*ijmāʿ*) of the Companions on this view.”²⁵ Abū ʿl-Aʿlā Mawdūdī also considers the execution of POWs as prohibited.²⁶

The conduct of the Prophet (peace be on him) and his Caliphs regarding the termination of the captivity of POWs is very important. There are many incidents of *mann*: Eighty Makkan fighters, including Thumāmah b. Athāl were released *gratis*.²⁷ Similarly, all the fighters belonging to the clans of Hawāzin,²⁸ Ḥunayn, Banū ʿl-Muṣṭaliq,²⁹ Banū ʿl-Anbār, Banū Fazārah, and Yemen were also set free *gratis*.³⁰ Abū Bakr, the first Caliph after the Prophet released Al-ʿAshʿath b. Qays (d. 35/656). ʿUmar, the second Caliph, pardoned Hurmuzān (d. 23/643), — an Iranian commander, who was captured and brought to him.³¹ He also set free thousands of Iraqis when that country was conquered and he decided to impose *jizyah* on them.

Abū ʿUbayd argues that ransom was taken only from the POWs of Badr and was *never* taken again. Later on the Prophet used to pardon the prisoners.

²⁵ Abū ʿl-Walīd Muḥammad b. Rushd, *The Distinguished Jurist's Primer*, 1: 456.

²⁶ See, Abū ʿl-Aʿlā Mawdūdī, *al-Jihād fi ʿl-Islām* (Lahore: Idārah Tarjumān al-Qurʿān, 1980), 231, 249. Muḥammad Khayr Haykal opines in his comprehensive treatise that execution is also one of the available options. See, Muḥammad Khayr Haykal, *al-Jihād wa ʿl-Qitāl fi ʿl-Siyāsah al-Sharʿiyyah*, 2nd ed. (Beirut: Dār al-Bayāriq, 1996), 1545–1548.

²⁷ Muslim, *Ṣaḥīḥ, Kitāb al-Jihād wa ʿl-Siyar, Bāb Rabṭ al-Asīr wa Jarwāz al-Mann ʿalayh*; Yaḥyā b. Sharaf al-Nawawī, *Ṣaḥīḥ Ṣaḥīḥ Muslim* (Cairo: Maṭbaʿat Maḥmūd Tawfiq, n.d.), 7: 463.

²⁸ Similarly, at the time of the Battle of Hawāzin, when some of Companions refused to set the captives free without taking any consideration, they were paid by the Prophet himself. Ḥanafi scholars treat the incident of payment by the Prophet to mean that the Companions were the owners of the POWs. However, if initially the POWs were enslaved, they were subsequently released as *mann*. The Jews of Khaybar were set free but *jizyah* was imposed on them as they remained citizens of the Muslim state.

²⁹ The captives of Muṣṭaliq were first distributed among the Companions but later, when the Prophet married Juwayriyah bint al-Ḥārith (d. 50/670), the daughter of the leader of the tribe, Muṣṭaliq, the Companions set the captives free. So, it is at one time an instance of enslavement as well as *mann*. However, the later conduct will be regarded as paradigmatic. There are two reports about the marriage of Juwayriyah with the Prophet. According to the authentic report, her father got her released but subsequent to her release she decided to marry the Prophet (peace be on him). See, Shibli Nuʿmānī and Sayyid Sulaimān Nadvī, *Sīrat al-Nabī* (Lahore: al-Faisal Nāshirān-i Kutub, n.d.), 1: 252–53.

³⁰ Abū ʿUbayd b. Sallām, *Kitāb al-Amwāl*, 116–120.

³¹ He was arrested by Abū ʿUbaydah, the Muslim commander, and was sent to ʿUmar who asked Hurmuzān to “speak.” He said, “Shall I speak as a live man or as a dead man?” ʿUmar replied, “Speak. Fear not.” ʿUmar spared him despite the fact that Hurmuzān had killed al-Barāʾ b. Mālīk and Majzaʾah b. Thawr al-Sadūsī. See, Al-Shaybānī, *Kitāb al-Siyar al-Kabīr*, 2: 49. Also See, Al-Balādhurī, *Kitāb Futūḥ al-Buldān*, trans. Francis Clark Murgotten (New York: Columbia University, 1924), 2: 118–119.

“The later precedent from the Prophet (peace be on him) is to be acted upon,” he says, and as we know, the practice of pardoning by the Prophet belongs to the period after Badr.³² This shows that the general practice of the Prophet (peace be on him) and his Caliphs was to set POWs free without any condition. It is also clear that verse 47: 4 was not superseded as the general practice of the Prophet (peace be on him) had been to grant pardon to POW’s.

The pro-execution *fuqabā’* have very few instances of Sunnah to support their opinion. In the entire life of the Prophet (peace be on him) there are only three or four instances in which a POW was executed. It is reported that out of the 70 captives in Badr only two, ‘Uqbah b. Abū Mu‘ayṭ was executed after having been taken captive. According to some reports al-Naḍr b. al-Ḥārith was also executed. However, Ibn Kathīr argues that only ‘Uqbah was executed and that Naḍr was killed during the war.³³ It is noteworthy that ‘Uqbah was executed because of the crimes he had committed incessantly against the Prophet (peace be on him) and the Muslim community for 13 years during the period when Muslims were persecuted in Makkah. According to Abū ‘Ubayd, ‘Uqbah was a leading enemy who had tortured the Prophet (peace be on him) while Naḍr used to ridicule the Qur’ān and the Muslims. ‘Uqbah went to extremes in tormenting the Prophet (peace be on him). He asked the Prophet when the latter ordered his execution, “Will you kill me, O Muḥammad, out of all Quraysh?” The Prophet replied: “Yes. Do you know what this man did to me? He came upon me when I was prostrate in prayer behind the shrine of Ibrāhīm, placed his feet on my neck and pressed, and he did not remove them until I thought my eyes would bulge. And at another time he brought the gestation sac of an ewe and threw it on my head when I was prostrate in prayer, and then Fāṭimah came and washed it off my head.”³⁴ Muḥammad b. Ishāq (d. 149/767) reports that ‘Uqbah even spat in the Messenger’s face.³⁵ The execution of ‘Uqbah did not constitute a precedent as regards the Imām’s right to execute prisoners, but it was considered a punishment given to ‘Uqbah for his heinous crimes against the Prophet, thus treated as an exceptional case.

³² Ibid., 116, 120.

³³ Ismā‘īl b. ‘Umar b. Kathīr, *Al-Bidāyah wa ‘l-Nihāyah* (Beirut/Riyadh: Maktabat al-Ma‘ārif/Maktabat al-Naṣr, 1966), 3: 35.

³⁴ ‘Alī b. Abī Bakr Nūr al-Dīn al-Haythamī, *Bughyat al-Bāḥith ‘an Zawā‘id Musnad al-Ḥārith*, Ḥusayn Aḥmad Ṣāliḥ al-Bākīrī (ed.) (Madinah: Markaz Khidmat al-Sunnah wa al-Sīrah al-Nabawīyyah, 1992), 2: 698, *ḥadīth* no. 685; and Abū ‘Ubayd, *Kitāb al-Amwāl*, 130, n. 24. Also see, Bukhārī, *Ṣaḥīḥ al-Bukhārī*, Kitāb al-Jihād [wa ‘l-Siyar], Bāb al-Du‘ā’ ‘alā ‘l-Mushrikīn bi ‘l-Hazīmah wa ‘l-Zalzalah, 484.

³⁵ A. Guillaume, trans., *The Life of Muḥammad: A Translation of Ishāq’s Sirat Rasūl Allāh*, 21st impr. 2007 (Clarendon: Oxford University Press, 1955), 164.

The second person who was executed after the battle of Uḥud — the second battle between the Muslims and the non-Muslims — was Abū ‘Izzah al-Jumaḥī. He was taken captive first in the battle of Badr but was released on the condition that he will stop blasphemous poetry against Islam, will not encourage non-Muslims through his poetry to wage war against Muslims and that he will never join the rank of those who were fighting against the Muslims. He breached that promise and was taken captive once again in the Battle of Uḥud. He pleaded for mercy with the Prophet who said: “I swear to God you will not wipe your cheeks in Makkah saying that you have mocked Muḥammad twice: A believer never gets stung twice from the same burrow.”³⁶ The Prophet (peace be on him) ordered his execution.³⁷

As mentioned above, the last prisoners of war (the third time in the life of the Prophet) were executed at the conquest of Makkah. The Prophet announced general amnesty for everyone who put down his arms but excluded seven to eleven persons,³⁸ all of whom were accused of horrendous crimes against the Muslim state and its citizens before their captivity.³⁹ All these persons could have been punished by a tribunal should there have been one at the time. However, only one person, ‘Abd Allāh b. Khaṭal was executed. He had been a Muslim and a Companion of the Prophet (peace be on him) in

³⁶ Aḥmad b. al-Ḥusayn al-Bayhaqī, *Al-Sunan al-Kubrā*, ed. Muḥammad ‘Abd al-Qādir ‘Atā’ (Makkah: Maktabah Dār al-Bāz, 1414/1994), 9: 65, *ḥadīth* no. 17807.

³⁷ Abū Bakr Muḥammad b. Aḥmad b. Abī Sahl al-Sarakhsī, *Kitāb al-Mabsūt*, ed. Samīr Muṣṭafā Rabāb (Beirut: Dār Iḥyā’ al-Turāth al-‘Arabī, 2002), 10: 26.

³⁸ Apart from ‘Abd Allāh b. Khaṭal, they included ‘Abd Allāh b. Abī Sarḥ (the foster brother of ‘Uthmān — the future third Caliph). He had been one of the scribes in Madīnah but reverted into his ancestral faith and started campaigning against Islam in Makkah. Maqīs b. Ṣabābah, who came to the Prophet (peace be on him) and was given blood money for the mistaken killing of his brother, but he still killed the accused, fled to Makkah and reverted to his ancestral faith. All of them were thus proclaimed offenders who were wanted in the Muslim state for the crimes they had committed before. Another person’s name was al-Ḥuwayrith b. Nuqayz, who personally tormented the Prophet (peace be on him) in Makkah; Sārah, who was involved in spying against the Muslim state when she was given a secret letter by Ḥātīb b. Abī Balta‘ah which was retrieved by ‘Alī when he was dispatched by the Prophet (peace be on him) to prevent Sārah from taking it to the infidels in Makkah. She also reverted to her pre-Islamic faith. Others were ‘Ikrimah, the son of Abū Jahl, Ṣafwān b. Ummayyah, the poet Ibn al-Izra‘ī, Hīnd — the wife of Abū Sufyān — who had mutilated the dead body of the Prophet’s uncle Ḥamzah, in the Battle of Uḥud. The two concubines of ‘Abd Allāh b. Khaṭal known for their blasphemous poetry and entertainment of their master, were also in this list. They were either accused of killing innocent Muslims or of apostasy or of spying on the Muslim state or tormenting the Prophet (peace be on him), or mutilation. Moreover, some of these crimes were crimes against individual Muslim citizens while the crimes of others were against the state.

³⁹ The Prophet (peace be on him) said about these proclaimed offenders: “Kill them even if they are hanging from the ghalāf (cover) of K‘abah.” See, Ibn Ḥajar al-‘Asqalānī, *Fatḥ al-Bārī* (Beirut: Dār al-Ma‘rifah, 1379 AH), 4: 60–61; Ibn Kathīr, *Al-Bidāyah wa ‘l-Nihāyah*, 6: 297–299.

Madīnah and was sent by him to collect *zakāb* from a certain tribe. The Prophet (peace be on him) sent a servant with him to serve him. ‘Abd Allāh killed that servant on the pretext of having cooked bad food for him, went to Makkah, renounced Islam, embezzled the money he had collected and bought two concubines who would sing blasphemous songs against Islam and Muslims. He opened a new front of animosity and hatred against Muslims and joined the enemy, thus committing high treason. He was executed, probably also because he did not apologize for his hateful actions. The Prophet (peace be on him) might have pardoned him as well like so many others who mended their ways. All other persons wanted by the Muslim state were pardoned by the Prophet (peace be on him) when they or their next of kin approached the Prophet for pardon.

It should be clear from the above that execution of POWs was never an *established rule* during the time of the Prophet. Probably Al-Ḥasan b. Muḥammad al-Tamīmī was first to state that the Companions of the Prophet (peace be on him) were unanimous on the prohibition of the killing of POWs.⁴⁰ Ibn Rushd agrees with this opinion.⁴¹ This is also the opinion of great many classical jurists such as ‘Abd Allāh b. ‘Umar (d. 73/692), Al-Ḥasan al-Baṣrī (d. 346/957), ‘Aṭā’ b. Abī Rabāḥ, Ḍaḥḥāk b. Muzāḥim al-Hilālī (d. 100/718) and Ismā‘īl b. ‘Abd al-Raḥmān al-Suddī (d. 127/744).⁴² Muḥammad b. Aḥmad al-Qurṭubī (d. 671/1272) mentions that, according to these scholars, verse 47: 4 superseded verse 9: 5, thus the political authorities are not allowed to kill POWs at all.⁴³

According to al-Ḥillī of the Shi‘ah Imāmiyyah, the Imām has only three options: *mann*, *fidā’* (ransom either for money or enemy’s POWs) and enslavement.⁴⁴ The Shi‘ī jurists consider execution illegal in captivity⁴⁵ as their killing was allowed on account of their aggression and fighting, as Allah says,

⁴⁰ See, al-Shaybānī, *Kitāb al-Siyar al-Kabīr*, 2: 261.

⁴¹ Ibn Rushd, *Bidāyat al-Mujtahid*, 1: 369.

⁴² See, al-Qurṭubī, *al-Jāmi‘ li Ahkām al-Qur‘ān*, 8: 151.

⁴³ *Ibid.*, 8: 151. This view is surprising because *Sūrah* 47 was revealed before Badr and *Sūrah* 9 was revealed after the Truce of Ḥudaybiyyah.

⁴⁴ See, Najm al-Dīn al-Muḥaqqiq al-Ḥillī, *Sharā‘i‘ al-Islām*, ed. Sayyid Sādiq al-Shirāzī (Beirut: Dār al-Qārī, 2004), 1: 251; and Sa‘īd b. Ḥabbāt al-Rāwandī, *Fiqh al-Qur‘ān*, ed., al-Sayyid Aḥmad al-Ḥusaynī (Qum: Maṭba‘at Āyat Allāh, 1405 AH), 1: 347; Zayn al-Dīn b. ‘Alī al-Shahīd al-Thānī, *Al-Rawḍah al-Bahīyyah fī Sharḥ al-Lam‘ah al-Dimashqiyyah* (Beirut: Dār Iḥyā’ al-Turāth al-‘Arabī, 1983), 1: 222.

⁴⁵ The Shi‘ah jurists distinguish between the situation when a combatant is taken captive while the war is still going on and after the war is over. In the former situation he can be executed but in the second case execution is illegal. Al-Ḥillī, *Sharā‘i‘ al-Islām*, 1: 250–251. If a POW is unable to go back to his country (after he is set free), he shall not be executed. *Ibid.*

“but if they fight against you, slay them.”⁴⁶ When they cannot fight because they are taken captives, then their killing too is prohibited.⁴⁷

Abū Bakr, the first Caliph after the Prophet (peace be on him), had executed only one POW during his reign. Abū Mūsā al-Ash‘arī (d. 41/662 or 52/672) executed an enemy commander who requested pardon for his soldiers but not for himself. Similarly ‘Umar b. ‘Abd al-‘Azīz (d. 101/720) executed only one POW. Abū Yūsuf Ya‘qūb b. Ibrāhīm (d. 183/798) reports that Ḥajjāj b. Yūsuf (d. 95/714) consulted ‘Abd Allāh b. ‘Umar about executing a POW. The latter recited the verse: “Thereafter, either generosity or ransom” and declined to execute him.⁴⁸

This means that in the first one hundred years of Islamic military history, that is, from the time of the Prophet (peace be on him) till the time of Caliph ‘Umar b. ‘Abdul ‘Azīz, there were only six or seven even if we were to accept the spurious, reports of such executions.

According to Abū Yūsuf and Sarakhsī, only the head of the Muslim state can decide to execute any POW [even if he is guilty of crimes against the State].⁴⁹ Imām Sarakhsī insists that even the commander-in-chief of the army cannot execute a POW,⁵⁰ because execution of a POW is not a prescription and to be a prisoner is not an offence *per se*. In other words, the execution of a POW is an extraordinary act — an act of *siyāsah*⁵¹ which can only be exercised by the head of the Muslim state and only in extraordinary cases.⁵² According to Muhammad Hamidullah, capital punishment for POWs is permissible only in extreme cases of necessity and in the higher interests of the state.⁵³ In case the prisoner has not committed any criminal act before captivity, the Imām

⁴⁶ Qur’ān, 2: 191.

⁴⁷ Al-Qurtubī, *al-Jāmi‘ li Ahkām al-Qur’ān*, 8: 151.

⁴⁸ See, Ya‘qūb b. Ibrāhīm Abū Yūsuf, *Kitāb al-Kharāj* (Peshawar: Maktabah Fārūqiyyah, n. d.), 379. According to another report, Khālīd b. al-Walīd sent a captive to Ibn ‘Umar so that he might execute him. Ibn ‘Umar said, “By God I swear that I shall not execute a bound man.” See, ‘Abd b. Ḥumayd b. Naṣr al-Kassī, *Al-Muntakhab min Musnad ‘Abd ibn Ḥumayd* (Cairo: Maktabat al-Sunnah, 1988), 239, meaning that he did not have the right to execute the man after he was taken prisoner and bound fast because the man’s fate was then to be decided by the Imām.

⁴⁹ Abū Yūsuf, *Kitāb al-Kharāj*, 378, 380.

⁵⁰ Al-Shaybānī, *Kitāb al-Siyar al-Kabīr*, 4: 313–14.

⁵¹ *Siyāsah* means, literally, ‘policy’ and it comprises the whole of administrative justice which is disposed of by the sovereign and by his political agents, in contrast with the ideal system of the *Sharī‘ah* which is administered by the *qāḍī*. The *mazālīm* courts and the institution of *muhtasib* are examples of *siyāsah* in the early justice system of the ‘Abbasids.

⁵² See, Muḥammad Ṭal‘at al-Ghunaymī, “Nazarah ‘Ammah fī ‘l-Qānūn al-Dūwali al-Insānī al-Islāmī,” in *Maqālāt fī ‘l-Qānūn al-Dūwali al-Insānī wa ‘l-Islam*, 48.

⁵³ Muhammad Hamidullah, *The Muslim Conduct of State*, 5th ed. (Lahore: Sheikh Muhammad Ashraf Publishers, repr. 1996), 216.

will have no authority to order his execution. The argument of public interest of Muslims to justify the prisoner's execution is unacceptable because a prisoner's release who is not known to have threatened Islam or Muslims cannot harm Muslim public interest. Let us now examine some of the historical events that the pro-execution jurists have cited as precedents.

The instance of the alleged execution of the combatants of Banū Qurayzah is frequently cited as an *example* to justify the execution of POWs. Ibn Ishāq reports that Banū Qurayzah committed treachery, betrayed Muslims during the battle of *ahzāb*, breached the treaty between them and their Muslims, and supported building a large anti-Muslim coalition (*ahzāb*) headed by the infidels of Makkah. This was against the treaty they had concluded with the Muslims in Madinah and which laid down that both sides shall defend the city together against any external attack. Once the battle of *Ahḏāb* was over, Muslim army besieged the forts of Banū Qurayzah who eventually surrendered and were taken captives by the Muslim army and their fate was referred to an arbitrator — Sa'd b. Mu'ādh who was the head of Aws tribe and a former ally of Banū Qurayzah. It is reported that he decided that "their combatants should be executed, their women and children enslaved, and their properties be divided among Muslims."⁵⁴ According to Ibn Ishāq, some 600 to

⁵⁴ Ibn Ishāq has narrated the story in minute detail. See, A. Guillaume, *The Life of Muhammad*, 461–467. Sa'd's ruling but not the details of the episode is also reported by the compilers of *ahādīth* with some conflicts in reports. See, al-Bukhārī, *Ṣaḥīḥ al-Bukhārī*, Kitāb al-Jihād [wa 'l-Siyar], Bāb idhā nazal al-'Aduww 'alā Ḥukm Rajul, 502. Muslim b. al-Ḥajjaj, *Ṣaḥīḥ Muslim*, Kitāb al-Jihād wa 'l-Siyar, Bāb Jawāz Qitāl man naqaḍ al-'Ahd wa Jawāz Inzāl Ahl al-Ḥiṣn 'alā Ḥukm Ḥākim 'Adl Ahl li 'l-Ḥukm, 784. The words of *Ṣaḥīḥ Bukhārī* and *Ṣaḥīḥ Muslim* are identical. Also see, Muḥammad b. 'Īsā al-Tirmidhī, *Jāmi' al-Tirmidhī*, Abwāb al-Siyar 'an Rasul Allāh ṣallā Allāh 'alayh wa sallam, Bāb mā jā' fi 'l-Nuzūl 'ala 'l-Ḥukm, 384. The wording of Tirmidhī is a bit different. It is reported that Sa'd ordered the killing of their 'men' (and not their combatants) and enslavement of their 'women' (children are not mentioned) so that they could assist Muslims. Tirmidhī's report puts their number at 400; Abu Bakr 'Abd al-Razzāq b. Hammām al-Ṣan'ānī, *Al-Muṣannaḥ*, Ḥabīb al-Raḥmān al-A'zamī (ed.) (Beirut: al-Maktab al-Islāmī, 1392/1972), 5: 371. The report in *al-Muṣannaḥ* is identical with the one in *Bukhārī* and *Muslim*. Ishāq b. Ibrāhīm al-Marwazī, *Musnad Ishāq ibn Rābwayb*, 'Abd al-Ghafūr 'Abd al-Ḥaqq Ḥusain Burr al-Balūshī (ed.) (Al-Madīnah al-Munawwarah: Maktabat al-Imān, 1410/1990), 2: 547. Aḥmad b. Muḥammad b. Ḥanbal al-Shaybānī, *Musnad Aḥmad Ibn Ḥanbal*, Abū 'l-Mu'āṭī al-Nūrī (ed.) (Beirut: 'Ālam al-Kutub, 1419/1998), hadīth nos. 14832 (14773), 24799 (24295) and 25610 (25097), 3: 350, 6: 56, 142. The words of the first report are similar to that of Tirmidhī with the only difference that the latter mentions the enslavement of children as well. Aḥmad also puts their number at 400. 'Abd Allāh b. 'Abd al-Raḥmān al-Dārimī, *Sunan al-Dārimī* (Damascus: al-Maṭba'ah al-Ḥadīthah, 1349 AH), 2: 238. Dārimī mentions that they were 400. Some commentators of *hadīth* have completely relied on Ibn Ishāq regarding the incident of Banū Qurayzah, such as Badr al-Dīn al-'Aynī, *Umdat al-Qarī Sharḥ Ṣaḥīḥ al-Bukhārī* (n.p: Dār al-Fikr, n.d.), 17: 192. Badr al-Dīn mentions that according to Ibn Ishāq, they were either 600 or 900 (*wa qīla*). Ḥamzah Muḥammad Qāsim puts their number at between 600 and 800; mentions

900 combatants were executed in the market place in Madīnah in special trenches dug for them.⁵⁵

The credibility of the mass execution of all the combatants as reported by Ibn Ishāq has been questioned, however. A full-scale criticism of the story of executions is beyond the scope of this work, but some of the important points are summarized here. Mālīk b. Anas called Ibn Ishāq a *dajjāl* (charlatan);⁵⁶ Ibn Ishāq's report is also unreliable because he generally provides *isnād* for his reports but on such a crucial matter as execution of Banū Qurayzah he does not provide any *isnād*.⁵⁷ It is quite significant that the execution of Banū Qurayzah is not reported in Jewish sources, such as Samuel Usque's book *A Consolation for the Tribulations of Israel – Third Dialogue* which is a classic of

that they were imprisoned in one house called Dār bint al-Ḥārith in Madīnah; trenches were dug; and that all of them (combatants) were executed by 'Alī b. Abī Ṭālib and Zubayr b. al-'Awwām only. Ḥamzah Muḥammad Qāsim, *Manār al-Qārī Sharḥ Mukhtaṣar Ṣaḥīḥ al-Bukhārī*, 'Abd al-Qādir al-Arnā'ūt and Bashīr Muḥammad 'Uyūn (eds.) (Damascus: Maktabat Dār al-Bayān and Maktabat al-Mu'ayyad, 1990), 4: 354–357. The author does not cite any source but it is known that this detail is available in Ibn Ishāq's *Sirah*.

⁵⁵ A. Guillaume, *The Life of Muhammad*, 464. Should the whole story be considered authentic the ruling seems to be in accordance with the Jewish law. According to King James Version, "When thy Lord hath delivered it unto thy hands, thou shalt smite every male therein with the edge of the sword. But the women, and the little ones, and the cattle, and all that is in the city, even all the spoil thereof, shalt thou make unto thyself." See, *Denterouomy* 20: 10–14 (New York: Gideons International, 1987), 230; see also, *The Holy Scriptures according to the Mosoretic Text* (Philadelphia: The Jewish Publication Society, 1953), 237; and *Good News Bible (Today's English Version)* (Glasgow: Harper Collins, 1976), 191. Although they were punished for their treachery but this is how the people of a besieged city are treated when captured by Jews. Leaving aside the heinous deed of treachery of which they were guilty, it is clear that if they had triumphed over the Muslims they would have dealt with them exactly in the same manner. Should the whole story, as reported by Ibn Ishāq, be considered true, then can the decision of an arbitrator chosen by the Banū Qurayzah to decide the dispute between them and the Muslims be an example of executing POWs; can a single incident be treated as a *general* rule; and can the ruling of an arbitrator be accepted as the general and established *conduct* of the Prophet (peace be on him) and his Caliphs? Our answer is in the negative. This ruling of the arbitrator cannot be raised to the status of a rule because this was simply an act of arbitration. The Banū Qurayzah received the punishment of their treachery according to their own law. The Prophet (peace be on him) never opted for arbitration regarding the enemy POWs on any other occasion.

⁵⁶ See, Ibn Sayyid al-Nās, *'Uyūn al-Athar fī Funūn al-Maghāzī wa al-Shamā'il wa 'l-Siyar* (Cairo: Maktabat al-Qudṣī, 1356 AH)1: 11, 16; See also, Aḥmad b. Ḥajar al-'Asqalānī, *Tabḍīb al-Tabḍīb*, Khalīl Shihā, 'Umar al-Salāmī, and 'Alī b. Mas'ūd (eds.) (Beirut: Dār al-Ma'rifah, 1996), 5: 27.

⁵⁷ See, Barakat Ahmad, *Muhammad and the Jews: A Re-Examination* (Delhi: Vikas Publishing House, 1979), 13. The author argues that several reliable reporters like al-Zuhri and Qatadah appear during the narrative but they report only "minor details, not the major events." Ibid.

Jewish martyrology.⁵⁸ One wonders how such an important episode could be missing in this work.

Two modern authors, Barakat Ahmad⁵⁹ and W. N. Arafat⁶⁰ have categorically rejected the mass execution story. They have pointed out inner contradictions in Ibn Ishāq's account. Their arguments may be summarized as follows: first, both authors question the speech of Ka'b b. Asad, the head of Banū Qurayzah who is reported to have given three alternatives to his people: (1) that since Muḥammad was a Prophet therefore they should follow him. They rejected it. (2) He told them that they should kill their wives and children and fight the Muslims. This plan was also rejected by the Qurayzah. (3) The last alternative given by Ka'b was to fight the Muslims on the night of Sabbath. The Qurayzah also rejected this.⁶¹ It is difficult to believe that the Qurayzah knowingly rejected the Prophet and that 600 to 900 men were going to fight an army of 3000 soldiers, who had returned victorious from the Battle of *alḥzāb*.⁶² Secondly, the contents of the speech of Ka'b are identical to the contents of the speech of the leader of the Jews at the fort of Masada.⁶³

⁵⁸ See, Samuel Usque, *A Consolation for the Tribulations of Israel – Third Dialogue*, Gershon I. Gelbart (trans.) (New York: Gershon I. Gelbart Memorial Fund, 1964).

⁵⁹ Ahmad, *Muhammad and the Jews*, 10–24, 67–94.

⁶⁰ W. N. Arafat, "New Light on the Story of Banū Qurayza and the Jews of Medina," *Journal of the Royal Asiatic Society of Great Britain and Ireland*, 2 (1976), 100–107.

⁶¹ See the full story in A. Guillaum, *The Life of Muhammad*, 461–62.

⁶² Ahmad, *Muhammad and the Jews*, 74. Ahmad argues that since the Maccabean revolt (175–135 B.C.) a rule has been promulgated that the preservation of life overrides the observance of the Sabbath. He asserts that the speech of Ka'b was either imaginary or distorted by later tradition (76). He mentions that the episode of the Qurayzah requesting to consult Abū Lubābah b. al-Mundhir who pointed his hand towards his throat signifying slaughter is not true either because it would mean that the fate of Qurayzah was already decided by the Apostle and Abū Lubābah already knew it. In addition, when Aws were asked by the Apostle to decide the fate of Qurayzah and they chose Sa'd b. Mu'adh who had earlier been deputed by the Apostle to go to Banū Qurayzah and reminded them about the treaty and when the Jews told him that they had no agreement or understanding with the Prophet he reviled them and they reviled him. Ahmad opines that by the time Sa'd arrived to rule, the news of his intention to sentence them to death had spread and yet he goes through the formalities of asking the Aws if they would accept his judgment and these very people who had asked for kind treatment for the Qurayzah say "Yes." Afterwards he asks the Prophet the same question although his opinion was known to Abū Lubābah who has already communicated it to Banū Qurayzah. Nevertheless the Prophet says "Yes." Consequently, Sa'd's judgment was prearranged which is impossible (79, 80).

⁶³ Arafat, "New Light on the Story of Banū Qurayza and the Jews of Medina," 106. Arafat argues that the number of those killed at Masada was 960 in total, that the number of *sicarii* (dagger men) who were killed numbered 600, and that at the time of despair they were addressed by their leader Eleazar precisely the way Ka'b addressed his people. According to Arafat, the descendants of Jews who fled south to Arabia after the Jewish wars preserved the story and "superimposed details of the siege of Masada on the story of the siege of Banu Qurayza" (106, 107). Ahmad disagrees with Arafat although Ibn Ishāq narrated reports from the children of

Thirdly, the actual execution raises many questions as there is no unanimity in the reports.⁶⁴ Fourthly, how could such a large number of captives—600 to 900 men, their women and children⁶⁵ be taken to Madīnah without any resistance and incarcerated in one house — Dār Bint al-Ḥārith?⁶⁶ Fifthly, the whole tribe could not be given the punishment for the wrong of their leaders. Finally, how could the pagans and the *munaḥfiqūn* remain muted about this episode? Ahmad concludes that Ibn Ishāq's account of the mass execution of the punishment of the Banū Qurayzah "is a plethora of self-contradictory statements."⁶⁷

Jewish converts it did not make much difference in the shaping of the story. He argues that 'Aṭīyyah al-Quraḏī is the only Jewish convert from whom Ibn Ishāq has narrated a report on this story.

⁶⁴ One report says that "the men should be killed;" another report mentions that "combatants should be killed." This would exclude sick, infirm, old, and other adult male population. Another version says that "the Apostle has ordered that every adult of theirs should be killed;" yet another report says that "those should be killed over whom the razor had passed." The last report is from 'Aṭīyyah al-Quraḏī who was from Banū Qurayzah and who says that since the razor had not passed him he was not killed. See, Abū Dāwūd Sulaymān b. al-Ash'ath, *Sunan Abī Dāwūd*, Kitāb al-Ḥudūd, Bāb fi 'l-Ghulām Yuṣīb al-Ḥadd (Riyadh: Dār al-Salām, 1420/1999), 619.

⁶⁵ In a small family of those days if every family had four children the total number would be 3,600.

⁶⁶ The forts of Banū Qurayzah were at a distance of about 5 to 6 hours from the centre of Madīnah. See, Ahmad, *Muhammad and the Jews*, 82. Ahmad argues as to why were the captives taken to Madīnah as they could have been executed in their own forts and why were new trenches dug for them when trenches were already dug by Muslims to defend Madīnah against *aḥzāb?* (ibid., 83). The two executioners, 'Alī b. Abī Ṭālib and Zubayr b. al-'Awwām who have never been reported to share their experiences with anyone afterwards makes the story more doubtful (ibid., 83). A massacre in the middle of the town where people lived must have created health hazards but Ibn Ishāq or any other reporter has not reported anything in this regard. See, Ahmad, *Muhammad and the Jews*, 82 and Arafat, "New Light on the Story of Banū Qurayza and the Jews of Medina," 105.

⁶⁷ Ahmad, *Muhammad and the Jews*, 89. For more details of accusations against Ibn Ishāq, see, Abū Yūsuf Ya'qūb b. Ṣufyān, *al-Ma'rifa wa 'l-Ta'rikh*, Akram Ḍiyā' al-'Umarī (ed.) (Beirut: Mu'assasat al-Risālah, 1981), 3: 32; See, Al-Khaṭīb al-Baghdādī, *Ta'rikh Baghdād* (Cairo: Maktabat al-Khānjī, 1931), I: 224. He is also accused of Shī'ī leanings, Qadarī beliefs, *tadlis* in transmission, of playing with cocks, transmission of unreliable traditions, and transmission of *ṣifāt* traditions. See, Muḥammad b. Uthmān al-Dhahabī, *Tadhkirat al-Ḥuffāz*, Zakariyyā 'Amīrāt (ed.) (Beirut: Dār al-Kutub al-'Ilmiyyah, 1998), 1: 130; See, Abū Bakr al-Bayhaqī, *al-Asmā' wa 'l-Ṣifāt*, 'Abd Allāh b. Muḥammad al-Ḥāshidī (ed.) (Jeddah: Maktabat al-Siwādī, n.d.), 2: 319–320; Shams al-Dīn Muḥammad Aḥmad b. 'Uthmān al-Dhahabī, *Siyar A'lām al-Nubalā'*, Shu'ayb al-Arna'ūt (ed.) (Beirut: Mu'assasat al-Risālah, n.d.) 13: 44, 67; See also, 'Abd al-Rahmān b. Abī Hātim, *al-Jarḥ wa 'l-Ta'dil* (Beirut: Dār Iḥyā' al-Turāth al-'Arabī, 1952), 7: 191–94.

M. J. Kister has scornfully attacked the views of Arafat and Ahmad, especially the latter,⁶⁸ however, there are so many problems with this work.⁶⁹

⁶⁸ M. J. Kister, "The Massacre of Banu Qurayza: A Reconsideration of a Tradition," in *Jerusalem Studies in Arabic and Islam*, 8 (1986), 61–96, at 68, especially at 64–81.

⁶⁹ Kister discusses the rivalry between Mālik and Ibn Ishāq and degrades Mālik (Ibid., 75–80) which is very unfair. He mentions many Muslim jurists, such as Shāfi'ī, Abū 'Ubayd, Ibn Ḥazm, Shaybānī, and al-Māwardī to prove that they have generalized the outcome of Qurayzah's episode (Ibid., 66–74). The author treats the treaty between the Prophet (peace be on him) and the Qurayzah not as a real treaty (Ibid., 82, 83). He tries to prove that it was a "precarious, crude, incomplete agreement" (Ibid., 82). He mentions that the Prophet (peace be on him) forced the Banū Qurayzah to conclude an agreement (Ibid., 83). He opines that it was not an agreement of peaceful co-existence (Ibid.). He calls the episode of Qurayzah sending supplies to the *ahzāb* that eventually ended up in the Muslim camp as a help to the Muslims (Ibid., 86–7). He does mention that the Qurayzah invited *munāfiqūn* from Madīnah and gave them refuge in their stronghold (Ibid., 88). However, on the one hand, Kister relies on Ibn Ishāq and Wāqidi to support the view that the mass execution took place, but on the other hand he makes new allegations that cannot be supported even by these two authors. Moreover, Kister mentions that only the combatants were executed but his title suggests that the whole tribe was executed. We have submitted above that there are inner contradictions in Ibn Ishāq's account. On the other hand, Abū 'Abd Allāh Muḥammad b. 'Umar al-Wāqidi (d. 207/822) is regarded by the Sunnī *'Ulamā' al-Rijāl* (scholars of *Ḥadīth* transmitters) and the *Muḥaddithūn* (scholars of *Ḥadīth*) as unreliable. Scholars in the West accept al-Wāqidi as reliable and a valuable source for the life of the Prophet (peace be on him) and for the period immediately following his death, whereas Muslim scholars, by and large, consider him as a story-teller. Western scholars who defend al-Wāqidi include, J. Wellhausen, *Muhammad in Medina* (Berlin: 1882), 11–28, and Joseph Horowitz, "The Earliest Biographies of the Prophet and the Authors," translated from the German by M. Pickthall, in *Islamic Culture*, 2: 4 (1928), 495–526. Al-Wāqidi, *Kitāb al-Maghāzī*, ed. Marsden Jones (Clarendon: Oxford University Press, 1966), 29–34; M. J. Kister, "The Massacre of the Banū Qurayza: A re-examination of a tradition," 68; and Rizwi S. Faizer, "Muhammad and Medinan Jews: A Comparison of the Text of Ibn Ishaq's *Kitab Sirat Rasul Allah* with Al-Waqidi's *Kitab al-Maghazi*," in *International Journal of the Middle Eastern Studies*, 28: 4 (1996), 463–489. Sayyid Salman Nadvi mentions that al-Wāqidi has very few supporters but the list of those who reject him is very long and include Imām al-Shāfi'ī, Aḥmad b. Ḥanbal, Yaḥyā b. Ma'īn (d. 233/847). Nadvi, "Muḥammad ibn 'Umar al-Wāqidi (130–207/747–822) between two Opposing Views," paper presented in International Seminar on Modern Trends in Sirah Writing, 26–28 March 2011 arranged by HEC, IRD, and IRI, at Islamabad, p. 3. Also see, W. N. Arafat, "New Light on the Story of Banū Qurayza and the Jews of Medina," 100–107. Arafat argues that Ibn Ishāq has fabricated stories in his *Sirah* (Ibid., 101). He is also called a *kadhāb* (liar), who is not considered trustworthy; is a Shī'ī; is known for fabricating *ahādīth* and distorting historical facts and so on; See, 'Abd al-Raḥmān b. Abī Ḥātim al-Rāzī, *Kitāb al-Jarḥ wa al-Ta'dīl*, 7: 192; Muḥammad b. Ḥabbān al-Bustī, *Kitāb al-Majrūḥīn min al-Muḥaddithīn wa 'l-Du'afā' wa al-Matrūkīn*, Maḥmūd Ibrāhīm Zāyid (ed.), 2nd ed. (Ḥalab: Dār al-Wa'y, 1402 AH), 2: 290. There is unanimity among the Sunnī scholars of *Ḥadīth* that Wāqidi had fabricated *ahādīth*. See, Al-Dhahabī, *Siyar A'lām al-Nubalā'*, 4: 454–467; Muḥammad b. Aḥmad al-Dhahabī, *Mizzān al-'itidāl fi Naqd al-Rijāl*, 'Alī Muḥammad al-Bajawī (ed.) (Sangla Hill: al-Maktabah al-Athariyya, n. d.), 663–666. For further accusation against Wāqidi see, 'Alī b. al-Husayn b. 'Asākir, *Ta'rikh Madīnat Dimashq*, 'Umar b. Gharāmah al-'Umrawī (ed.) (Beirut: Dār al-Fikr, 1997), 54: 434; Aḥmad b. 'Alī al-Khaṭīb al-Baghdādī, *Ta'rikh Baghdād* (Beirut: Dār al-

Friedmann adds another option, namely forcible conversion of prisoners of war to Islam.⁷⁰ However, he fails to provide any credible evidence in favour of his assertion. “The Qur’an and its commentators,” admits Friedmann, “were mainly interested in the question whether prisoners of war should be killed, used for ransom or unconditionally released.”⁷¹ In extra-Qur’anic literature some attention is given also to the possibility of their conversion.⁷² All that Friedmann has found is a report in which the Prophet was seen smiling. When he was asked by his Companions about the reason of his smile, he said that he saw people let into Paradise in fetters. When asked who those people were, he said: “(They were) people whom the Emigrants took prisoners and caused them to embrace Islam.”⁷³ All that is available in Islamic military history is that out of all the captives of Badr, ‘Abbās b. ‘Abd al-Muṭṭalib (d. 32/653) — Prophet’s uncle — accepted Islam when during his captivity he closely saw the conduct of Muslims. This can never be considered as an instance of forced conversion, which is absolutely not acceptable in Islam; and this is not a general rule followed by Muslims. Friedman’s addition is, therefore, out of place and this *ḥadīth* is blown out of proportion.

To sum up the above discussion, we conclude that POWs were never executed. Historically, some six or seven of them were executed during the first 100 years because those individuals had committed serious crimes against the Muslims state or its citizens before their captivity.

Fikr, n.d.), 3: 16; Yūsuf b. Ibrāhīm al-Mizzī, *Tabdhīb al-Kamāl fī Asmā’ al-Rijāl*, Bashshār ‘Awwād Ma’rūf (ed.) (Beirut: Mu’assasah al-Risālah, 1992), 26: 182; Al-Dhahabī, *Siyar A’lām al-Nubalā’*, 9: 455; Aḥmad b. Shu’ayb al-Nasā’ī, *Al-Dhu’afā’ wa ‘l-Matrūkīn*, Būrān al-Ḍanāwī and Kamāl Yūsuf al-Ḥūt (eds.) (Beirut: Mu’assasah al-Kutub al-Thaqāfiyyah, 1987), 217; Muḥammad b. ‘Amr b. Mūsā b. Ḥammād al-‘Uqaylī, *al-Dhu’afā’ al-Kabīr*, ‘Abd al-Mu’ṭī Amin Qal’ajī (ed.) (Beirut: Dār al-Kutub al-‘Ilmiyyah, n.d.), 4: 107–108; See also, Rizwi S. Faizer, “The Issue of Authenticity Regarding Traditions of al-Waqidi as Established in His *Kitab al-Maghazi*,” *Journal of Near Eastern Studies*, 58: 2 (1999), 97–106.

⁷⁰ Yohanan Friedmann, *Tolerance and Coercion in Islam: Interfaith Relations in the Muslim Tradition* (Cambridge: Cambridge University Press, 2003), 107, 115.

⁷¹ But this is because these were the available options and forced conversion was not an option available to the *Imām*.

⁷² *Ibid.*, 118.

⁷³ Nūr al-Dīn ‘Alī b. Abī Bakr al-Haythamī, *Majma’ al-Zawā’id wa Manba’ al-Fawā’id* (Beirut: Dār al-Fikr, 1412 AH), 5: 601; Aḥmad b. Ḥanbal, *Musnad*, 5: 256, *ḥadīth* no. 22257. He also refers to a solitary opinion of Abū Bakr al-Jaṣṣāṣ — the Ḥanafī scholar who opines that “war with Arab infidels and non-Arab People of the Book will continue till they embrace Islam or its supremacy.” See, Abū Bakr al-Jaṣṣāṣ, *Aḥkām al-Qur’ān*, 3: 584. I have explained this *ḥadīth* elsewhere. See, my “Public International Law and Islamic International Law: Identical Expressions of World Order,” *Islamabad Law Review* 1: 3–4 (2003), 398–403.

(B) IHL on the above situations

Let us see whether POWs, who are accused of crimes against the state and of war crimes of the type mentioned above, can be prosecuted under International Humanitarian Law (IHL) or not? The Geneva Convention III relative to the Prisoners of War of 1949 adopted a similar view in its Article 85 which gives the detaining power the right to prosecute a POW for acts committed prior to his captivity against (the Detaining Power's) law. Under Article 118 of the Geneva Convention III, the prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.⁷⁴ However, there is always a problem with the interpretation of 'cessation of active hostilities.' Releasing POWs on promise is possible, under Article 21 of Geneva Convention III, if the laws of the Detaining Power allow the same, for the release on parole or promise. Article 21 states that the prisoners released under these conditions will be bound, on their personal honour, to scrupulously fulfil, both towards the Power on which they depend and the Power which has captured them, the engagement of their paroles or promises. Thus, honesty is very essential to the successful application of humanitarian rules.

Under Article 109 and 110 of the Geneva Convention III relative to the Prisoners of War, sick, wounded, — who are not likely to recover within one year may be repatriated during the hostilities. Thus, any armistice agreement, or any suspension of hostilities for an indefinite period, entails the obligation to release and repatriate POWs.⁷⁵

(C) *Is Ransom still an Option?*

We have discussed above whether ransom was an option available to the head of a Muslim state or not and whether the execution of POWs is a general rule or an exception. In this section the opinions of *fuqahā'* regarding ransoming POWs are discussed. As mentioned above, the Ḥanafites disagree on ransom (*fidā'*) or releasing them by charging them money. Abū Ḥanīfah does not allow ransom (releasing them for money) because this will strengthen the enemy and also because the Qur'ānic verse 9: 5 calling for the killing of the enemies is general in its meaning. It says, "And so, when the sacred months are over, slay those who ascribe divinity to aught beside God wherever you may come upon them, and take them captive, and besiege them, and lie in wait for

⁷⁴ See also, Articles 109 and 111 of Geneva Convention III of 1949.

⁷⁵ Article 100 of Geneva Convention III of 1949 talks about death sentence for a POW. For the text of the Convention see, A. Roberts and R. Guelff, *Documents on the Laws of War* (Oxford: Clarendon Press, 1982), 215–270. See also, Nigel Rodely, *The Treatment of Prisoners under International Law* (Oxford: Clarendon Press, 1987).

them at every conceivable place.” However, his two top disciples, Abū Yūsuf⁷⁶ and Shaybānī⁷⁷ allow it.⁷⁸ Shaybānī agrees to this if necessary. Both agree to exchanging POWs with POWs of the enemy.⁷⁹ Surprisingly, the Ḥanāfi scholars argue that verse 47: 4, which mentions *mann* and *fidā*’ is superseded; nevertheless, they agree at the same time that *fidā*’ (ransom) is allowed if the political authority considered it to be appropriate or if the Muslims were desperate and needed money.⁸⁰

There are two questions that the vantage point of the Hanafites raises. First, how can a superseded rule be applied? Secondly, what are the options available to the head of the Muslim state regarding POWs? Regarding the first point, it is submitted that, despite the fact that the above scholars must be held in high esteem, it appears to be a ‘pick’n mix’ approach, which is arbitrary and not sound. To answer the second question, we must understand the nature of *al-siyāsah al-shar‘iyyah* (the administration of justice according to the *Sharī‘ah*) in Hanafite jurisprudence.

Ransom is one of the options available to the political authority according to Imām Mālik b. Anas (d. 179/795), Muḥammad b. Idrīs al-Shāfi‘ī (d. 204/820), Sufyān b. Sa‘īd al-Thawrī (d. 161/778) and Abū ‘Abd al-Raḥmān al-Awzāi‘ (d. 157/774). Abū ‘Ubayd differs with them saying that the Prophet (peace be on him) exercised this option only once in his life. He ransomed the POWs of the battle of Badr discussed above and only a few of them bought freedom with money whereas those who could not pay were required to teach Muslim children as payment get their freedom. His latter practice was that of *mann* (setting them free *gratis*), and this latter precedent shall prevail.⁸¹ This view has the support of ‘Abd Allāh b. ‘Abbās (d. 68/687), ‘Abd Allāh b. ‘Umar, Ḥasan al-Baṣrī, and ‘Atā’ b. Abī Rabāḥ. On the one hand, they consider verse 47: 4 not abrogated and that the conduct of the Prophet was that he had set free and exchanged prisoners as mentioned above. The Prophet (peace be on him) released Thuāmah b. Athāl (the leader of Yamāmah) without receiving anything in return. Similarly, a man named ‘Amr b. Sa‘dī was released without any ransom. Some 6,000 combatants of Ḥunayn were

⁷⁶ Abū Yūsuf, *Kitāb al-Kharāj*, 378.

⁷⁷ See, Al-Shaybānī, *Kitāb al-Siyar al-Kabīr*, 4: 300.

⁷⁸ Al-Kāsānī, *Badā‘i‘ al-Ṣanā‘i‘*, 6: 95.

⁷⁹ In *Kitāb al-Siyar al-Kabīr*, al-Shaybānī mentions four rules for ensuring the release of a Muslim captive: (a) initially this should be done without paying anything to the enemy; (b) if something is to be paid to them, it should be in the form of cash; (c) if they do not accept cash, they may be given weapons; (d) finally, as a last resort, their captives may be released in order to get our own captives released by them. See, *al-Siyar al-Kabīr*, 4: 302, 337–38, 4: 337–38.

⁸⁰ Al-Shaybānī, *Kitāb al-Siyar al-Kabīr*, 4: 300; and al-Sarakhsī, *al-Mabsūt*, 10: 26.

⁸¹ Abū ‘Ubayd, *Kitāb al-Amwāl*, 116, 120.

not only set free but each one of them was given a special Egyptian suit as well.⁸² ‘Umar b. al-Khaṭṭāb ordered Abū ‘Ubaydah, his commander, to release the captives of Tustar.⁸³ He also wrote to his commander to release the captives of Aḥwāz⁸⁴ and Manadhir⁸⁵ when they were captured.

Muslim *fuqahā*’ argue that if a Muslim POW is taken captive by the non-Muslims, Muslims must seek his release by paying money from the *Bayt al-Māl* (state’s treasury).⁸⁶ ‘Umar b. ‘Abd al-‘Azīz ordered that non-Muslim subjects, taken prisoners by the enemy, should be ransomed and liberated on government expenses as would Muslim subjects.⁸⁷

Balādhurī reports two incidents of ransom. He mentions that Abū Bakr returned the captives of al-Nujayr on ransom receiving 400 *dirhams* for each head.⁸⁸ He also reports that in the year 100, when ‘Abd al-‘Azīz was the Caliph, the Greeks launched a naval attack on al-Lādhiqiyyah (now a Syrian city). They destroyed the city and took its inhabitants prisoners. ‘Umar asked the Greek ruler to accept ransom for the Muslim prisoners. But this was not carried out until after his death in the year 101 when Yazīd b. ‘Abd al-Mālik (d. 105/724) was the Caliph.⁸⁹ Contrary to the opinion of the many Muslim scholars discussed above, these reports reveal that ransom seems to have been a customary international legal norm as it was practiced by the then Muslim state as well as its neighbours.

The Muslim state has to take care of the families of Muslim soldiers when taken POWs by a non-Muslim state. ‘Umar b. ‘Abd al-‘Azīz sent a letter to the Muslim prisoners of war in Constantinople and told them:

You consider yourselves to be prisoners of war. You are not. You are locked in the cause of Allah. I would like you to know that whenever I give something to the Muslims I give more and better to your families and I am sending so and so with 5 *dinars* for each one of you and if it wasn’t that I fear the Roman dictator would take it from you I would have sent more. I have also sent so and so to secure the release of every single one of you regardless of what the cost would be. So rejoice! Al-salāmu Alaykum.⁹⁰

⁸² See, Shibli and Nadvī, *Sīrat al-Nabī*, 1: 368.

⁸³ Al-Balādhurī, *Futūḥ al-Buldān*, F. C. Murgotten (trans.), 2: 119.

⁸⁴ *Ibid.*, 112–113.

⁸⁵ *Ibid.*, 114.

⁸⁶ Abū Yūsuf, *Kitāb al-Kharāj*, 380.

⁸⁷ Ibn Sa’d, *Ṭabaqāt*, 26: 272.

⁸⁸ Al-Balādhurī, *Kitāb Futūḥ al-Buldān*, Philip Khuri Hitti (trans.), 1: 174.

⁸⁹ *Ibid.*, 220.

⁹⁰ Abū Zakariyyā b. Nuḥās al-Dimashqī al-Dimyāṭī, *Mashārī‘ al-Asḥwāq ilā Maṣāri‘ al-‘Ushshāq wa Mutbīr al-Gharām ilā Dār al-Salām*, Idrīs M. ‘Alī and M. Khālid Istanbūlī (eds.), 3rd ed. (Beirut: Dār al-Bashā‘ir al-Islāmiyyah, 2002), 2: 831–832.

(D) *Enslavement*

According to Abū ‘Ubayd, enslaving POWs was not the Sunnah (practice) of the Prophet. ‘Umar b. al-Khaṭṭāb liberated the slaves of pre-Islamic times and returned them and their children to their relatives. He paid 400 *dirhams* or five camels per slave and set them free and said, “An Arab shall not be enslaved.”⁹¹ Enslavement was not a general rule and the enslavement of the women and children of Banū Qurayzah was the result of arbitration. The Prophet (peace be on him) did not enslave the POWs in other battles. Caliph ‘Umar’s opposition to enslavement is well-known. It is quite surprising that the majority of Muslim scholars argue that the enslavement of enemy’s women and children is one of the options available to the Muslim ruler, in addition to *mann* and *fidā*.⁹² However, to support their view they cite only one single incident i.e. of Banū Qurayzah. The decision of the arbitrator was only for that specific case and was binding on the parties only. It cannot be extended beyond that. In addition, this decision was according to the Jewish laws as explained above and this is why they accepted the decision.⁹³ Another possible reason for their enslavement was that they had no one to take care of themselves. Therefore, enslavement was better option for the women and children of Banū Qurayzah in those circumstances but this decision cannot be extended to other situations.

According to Wahbah al-Zuhaylī, the enslavement of women and children was based on reciprocity and this custom existed from pre-Islamic

⁹¹ Abū ‘Ubayd, *Kitāb al-Amwāl*, 135.

⁹² Khadduri discusses the fate of the children of Banū Qurayzah as the general rule when he says that captured women and children (*sabāyā*) were considered part of the spoils of war (*ghanimah*), and could be divided and enslaved. See, Khadduri, *War and Peace*, 119. However, as stated above, an exception cannot be generalized and the latter practice of the Prophet (peace be on him) and his caliph must be taken to prevail over a single incident of arbitration.

⁹³ According one report, the POWs of Hawāzin were released after embracing Islām. But according to another report three individuals refused to release their share of the booty. See, Abū ‘Ubayd, *Kitāb al-Amwāl*, 117–118. The POWs of Banū ‘l-Muṣṭaliq were only temporarily enslaved if it can be called enslavement and the rule of *mann* was applied to them subsequently. Furthermore, Muslim *fuqahā*’ also apply the rules of *ghanimah* (spoils of war) and *fay*’ (booty) to war captives. That is why they say that if the ruler has to do *mann*, he has to pay compensation to the *mujāhidīn* unless they themselves waive their right. At the same time, the *fuqahā*’ state that the *Imām* — head of Muslim state, has the options to pardon, ransom, exchange and so on regarding the POWs as discussed above. Thus, on the one hand, they give the *Imām* the right to decide the fate of POWs and on the other hand, they seem to suggest that individual soldiers have to decide themselves as is seen in the above two cases. To resolve this issue it is necessary to consider the above two incidents, i.e. the temporary enslavement of the POWs of Hawāzin and Muṣṭaliq, as time specific rather than as the general rule. Consequently, the *Imām* has to decide the fate of the POWs.

times. Since it was a very wide-spread practice. Islam alone could not prohibit it because it needed reciprocity from other communities. Therefore, enslavement was a customary international law at that time.⁹⁴ Zuḥaylī seems to have the problem of slavery (which was universally practiced at that time) in mind and not the enslavement of women and children as discussed in the Islamic *jus in bello*. Shaybānī mentions that treaties might be entered into by two parties to a conflict regarding the conduct of war. One provision he discusses is that captives should not be killed. Another provision is that captives should not be taken at all.⁹⁵ By the same analogy, one can safely presume that if it is mentioned in the treaty that captives will not be enslaved, it will be binding on both Muslims and non-Muslims.

When one goes through any work, whether classical or modern, it is always argued that enslavement is one of the options available to the Muslim authority. However, it is disappointing to see that the scholars base their argument on the decision of the arbitration with regard to Banū Qurayzah, as discussed above. Notwithstanding my other reservation about this argument the following question still remains unanswered: Can the enslavement of POWs be legalized merely on the single precedent of the enslavement of Banū Qurayzah women and children? Is it not that these scholars fail to differentiate between POWs and non-combatants; Islam does not allow killing non-combatants during or after the war. The combatant has no immunity. If this distinction is taken into account, then we will not be using one argument to prove another point.

The Treatment of POWs⁹⁶

Islamic law contains very liberal provisions about the treatment of POWs during captivity.⁹⁷ The Prophet (peace be on him) divided the captives of POWs of Badr among his Companions asking them to, “Take heed of the recommendation to treat the prisoners fairly.”⁹⁸ Consequently many Muslim families remained content with dates and offered the prisoners the best food

⁹⁴ Wahbah al-Zuḥaylī, *Āthār al-Ḥarb*, 4th ed. (Beirut: Dār al-Fikr, 1992), 420.

⁹⁵ Al-Shaybānī, *Kitāb al-Siyar al-Kabīr*, 1: 213.

⁹⁶ See, Muḥammad al-Saʿīd al-Daqqāq, “al-Qānūn al-Duwalī al-Insānī bayn al-Mafhūm al-Islāmī wa ʿl-Qawāʿid al-Waḍʿiyyah,” in *Maqālāt fi al-Qānūn al-Duwalī wa ʿl-Islām*, 71–72; Usāmah Damj, “al-Qānūn al-Duwalī al-Insānī fi ʿl-Tashrīʿ al-Islāmī,” in *ibid*, 254; James Busuttill, “Slay Them Wherever You Find Them: Humanitarian Law in Islam,” 123; and A. Guillaume, *The Life of Muhammad*, 311.

⁹⁷ Al-Daqqāq, “Al-Qānūn al-Duwalī al-Insānī bayn al-Mafhūm al-Islāmī wa ʿl-Qawāʿid al-Waḍʿiyyah,” 71–72.

⁹⁸ Abū Jaʿfar Muḥammad b. Jarīr al-Ṭabarī, *Taʾrīkh al-Umam wa ʿl-Mulūk* (Beirut: Dār al-Kutub al-ʿIlmiyyah, 1407 AH), 2: 39; *ibid.*, 1: 1337–8.

they had while they ate only the dates.⁹⁹ The Qur’ān praised their behaviour in these words: “and who give food — however great be their own want of it — unto the needy, and the orphan, and the captive, [saying], “We feed you for the sake of God alone: we desire no recompense from you, nor thanks.”¹⁰⁰ The Prophet is reported to have said, “Recommend to one another that prisoners be well treated.”

Food and milk were brought from the Prophet’s house to Thumāmah b. Uthāl.¹⁰¹ The Prophet, while himself visiting a captive, was told by that he needs food and drink. He replied that these are your basic needs.¹⁰² Thus, food and drink are considered as the basic needs of a captive. POWs must also be given clothing as the Prophet had provided the captives of Badr. They cannot be held responsible for mere acts of belligerency according to Muslim jurists. They should not be exposed to heat and cold and all discomfort shall be removed. According to Sarakhsī, the POWs have the right to dispose of their property at home¹⁰³ and a mother POW must not be separated from her child.¹⁰⁴ The POWs must be respected according to their ranks. Thumāmah b. Athāl, who was the head of his tribe, was given food and milk from the Prophet’s home. Impressed by this generous treatment, he accepted Islam. The Prophet is reported to have said, “Be kind to a dignified man who has lost his status.”¹⁰⁵ ‘Alī b. Ḥasan b. ‘Asākir (d. 570/1175) quotes the Prophet saying, “If a noble man falls into your hands, treat him well.”¹⁰⁶ It follows that Islamic law favours that amenities be commensurate with the status of the captive, as long as the minimum human consideration is assured to all.

Ibn Rushd argues that according to Islamic law, a prisoner qua prisoner cannot be killed. He records the consensus of the Companions of the Prophet (peace be on him) to this effect.¹⁰⁷ Before any decision is taken on the fate of the prisoners by the *Imām* — the head of the Muslim state, they need certain guarantees to protect them during the transition. The person and honour of a prisoner must be respected. They shall not be tortured. The Prophet is reported to have said: “God will torture those who torture people on earth.”¹⁰⁸

⁹⁹ See, Shibli and Nadvī, *Sīrat al-Nabī*, 1: 311.

¹⁰⁰ Al-Qur’ān 76: 8–9.

¹⁰¹ Muḥammad b. ‘Alī al-Shawkānī, *Nayl al-Awṭār* (Cairo: al-Maṭba‘ah al-‘Uthmāniyyah, 1957), 7: 303.

¹⁰² *Ibid.*, 307.

¹⁰³ Al-Sarakhsī, *Al-Mabsūt*, 10: 229.

¹⁰⁴ *Ibid.*, 241–3.

¹⁰⁵ Ismā‘īl b. Muḥammad al-‘Ajūnī al-Jarrāhī, *Kashf al-Khafā’ wa Muḥsil al-Ilbās ‘ammā Ishtahar min al-Aḥādīth ‘alā Alsinat al-Nās*, 2nd ed. (Beirut: Dār al-Kutub al-‘Ilmiyyah, 1988), 1: 115.

¹⁰⁶ *Ibid.*

¹⁰⁷ Ibn Rushd, *Bidāyat al-Mujtahid* (Cairo: Muṣṭafā al-Bābī, n.d.), 1: 35.

¹⁰⁸ Muslim, *Saḥīḥ, Kitāb al-Birr wa ‘l-Ṣīlah wa al-Ādāb, Bab al-Wa‘d al-Shadīd li man ‘adhdhab al-*

Having analyzed the debates about the rights of POWs in the Islamic history and legal tradition, now we turn to a recent document on the fate of POWs.

The Fate of POWs under the *Lā'ihah* for the *Mujāhidīn*¹⁰⁹

Before discussing the *Lā'ihah* document it is important to analyze the nature of the conflict in Afghanistan. The Taliban in Afghanistan are fighting the International Security Force for Afghanistan (ISAF) which is mandated by the Security Council. Although the conflict there is internal it is internationalized. The conflict in Afghanistan is an armed conflict and the Taliban qualify as what is known as a 'non-state actor.' According to the International Criminal Tribunal for the former Yugoslavia (ICTY), "An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."¹¹⁰ Moreover, the Taliban are 'well organized,' have a 'hierarchical structure,' and the conflict has reached a certain 'level of intensity.'¹¹¹ The Taliban claim that the *Lā'ihah* had been prepared in consultation with the top *muftīs* (juris-consults), scholars, specialists and experts and is based on Islamic law.¹¹² We have, however, to check the Islamicity of this claim.

As far as the fate of POWs under the *Lā'ihah* is concerned, POWs are classified into different categories: First, soldiers, police and other officials of the Afghan regime are classified as a category who may be released without any condition or exchanged or released after they provide a credible guarantee but they cannot be ransomed. The governor has the authority to decide their fate. They may only be executed or given *ta'zīr* punishment if authorized by the *Imām* [the head of the *Ṭālibān*] or his deputy or the provincial *qāḍī* but the governor has to decide the same if no *qāḍī* is appointed.¹¹³ Second, all types of

Nās bi ghayr Haqq, 1141.

¹⁰⁹ This section is based on my, "The *Layha* for the *Mujahideen*: an analysis of the code of conduct for the Taliban fighters in Afghanistan under Islamic law," International Review of the Red Cross, 93: 881 (March 2011), 81-102.

¹¹⁰ Prosecutor v. Tadic, ICTY Case No IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para. 70.

¹¹¹ The International Court of Justice (ICJ) has on many occasions given its opinion on the criterion of intensity with respect to armed attacks. For the first time, the Court discussed it in the Nicaragua case (par.191) and later on in the Oil Platform case (para. 64). In both these cases, the ICJ underlined the distinction of armed attacks from other attacks by referring to the criterion of intensity.

¹¹² The *Lā'ihah*, preamble, 4.

¹¹³ The *Lā'ihah*, section 10.

contractors, suppliers, drivers, personnel of security companies,¹¹⁴ even those contractors who recruit workers, constitute another category that may either be lawfully killed or summarily executed or given death sentences by the *qāḍī* if arrested.¹¹⁵ Third is the category of captured foreigner non-Muslim combatant whose punishment is decided by the *Imām* or his deputy, who may authorize execution or exchange or release or ransom.¹¹⁶ Finally, the category of hostages who are suspected to be enemy combatants or other officials; they can be killed if during their transportation to a secure place the *Mujāhidīn* come under attack.¹¹⁷ As stated above, the execution of POWs was not an option available to the Muslim state and only three persons were executed during the time of the Prophet because of their heinous crimes against the Muslim state before their captivity. The *Lā'ihah* provides execution as one of the options, such as, in case of Afghan soldiers, security officers, police, foreign soldiers and the only option for contractors, suppliers, drivers, and those providing similar services. Moreover, it provides for the killing of those POWs who could not be taken to a secure place. These rules are not based on Islamic *jus in bello*. It is worth noting that the punishment for the second category mentioned above, i.e., contractors, suppliers and drivers, was beating or imprisonment in the 2006 edition (section 10); in 2009 they were treated at par with Afghan soldiers and there was a remote possibility of execution if authorized by the *Imām* (Sections 8 and 21); in 2010 the *mujāhidīn* are supposed to kill them in ambush, and if arrested, the *qāḍī* has to give them death sentence. There is no need of referring them to the *Imām* or his deputy.¹¹⁸ The 2010 rule has no equivalence in cruelty because it does not treat such persons as POWs or captives entitled to any privileges. Thus, in a period of four years the rules (which are claimed every time to be based on Islamic law) were changed three times. It is clear that the Taliban have created and subsequently changed the rule of killing contractors and drivers and have attributed it to Islamic law. In Islamic law they come under 'servants' whose killing is strictly prohibited. The Prophet has said this in the strongest terms,

¹¹⁴ It is important to note that Private Military Contractors (PMCs), also known as Private Military Firms (PMFs) — that are mostly employed in Iraq and Afghanistan, and despite their employment in (more often than not) combat action role (such as securing military logistic lines/oil lines or interrogation of detainees), are not covered by the existing modern day IHL, reflecting the grey area of the law.

¹¹⁵ The *Lā'ihah*, section 11 read with sections 24 and 25.

¹¹⁶ *Ibid.*, section 12.

¹¹⁷ *Ibid.*, section 13.

¹¹⁸ In IHL contractors who supply to the army as well as drivers are treated as POWs under Article 4(4) of the Geneva Convention III of 1949.

“never, never to kill a woman and a servant.”¹¹⁹ Moreover, the Taliban allow acts of perfidy, such as, suicide attacks¹²⁰ and combating while feigning to be civilian.¹²¹ As I have discussed elsewhere, at least five crimes are committed under Islamic law in a suicide attack in which a combatant (bomber) is feigning to be a civilian. These are: killing civilians, mutilating their bodies, breaching the trust and confidence of enemy soldiers and civilians,¹²² committing suicide,¹²³ and destroying civilian properties.¹²⁴

¹¹⁹ Al-Shaybānī, *Kitāb al-Siyar al-Kabīr*, 4: 186; Abū Bakr ‘Abd al-Razzāq, *al-Muṣannaf, Kitāb al-Jihād, Bāb Qat’ al-Shajar fī Arḍ al-‘Aduww*, 5: 201; Muḥammad b. ‘Abd Allāh al-Khaṭīb al-Tabrīzī, *Mishkāt al-Maṣābiḥ*, Sa‘īd Muḥammad al-Laḥḥām (ed.) (Beirut: Dār al-Fikr, 1411/1991), 2: 393. Abū ‘Abd Allāh Muḥammad b. Yazīd b. Mājāh, *Sunan, Kitāb al-Jihād, Bāb al-Ghārah wa ‘l-Bayāt wa Qatl al-Nisā’ wa ‘l-Sibyān* (Riyadh: Dār al-Salām, 1420/1999), 410. Aḥmad b. Shu‘ayb al-Nasā‘ī, *al-Sunan al-Kubrā, Kitāb al-Siyar, Bāb Qatl al-‘Asīf*, ‘Abd al-Ghaffār Sulaymān al-Bundārī and Sayyid Kasrawī Hasan (eds.) (Beirut: Dār al-Kutub al-‘Ilmiyyah, 1411/1991), 5: 186–87. Abū Bakr Aḥmad b. al-Ḥasayn Bayhaqī, *Ma‘rifat al-Sunan*, M. ‘Abd al-Qādir ‘Aṭā’ (ed.) (Makkah: Maktabat Dār al-Bāz, 1414/1994), ḥadīth no. 5643; Abū Bakr Aḥmad b. al-Ḥusayn al-Bayhaqī, *Sunan al-Bayhaqī al-Kubrā* with *al-Jawhar al-Naqī, Kitāb al-Siyar, Bāb al-Mar’ah Tuqātil fa Tuqtal*, M. ‘Abd al-Qādir ‘Aṭā’ (ed.) (Makkah: Maktab Dār al-Bāz, 1994), 9: 83. This ḥadīth is also quoted with slightly different words in Abū Ja‘far al-Taḥāwī’s *Sharḥ Ma‘ānī ‘l-Āṭḥār* (Beirut: Dār al-Kutub al-‘Ilmiyyah, n.d.), 3: 222. There is another version of this report which says: “Never, Never to kill children and a servant.” Ibn Mājāh, *Sunan, Kitāb al-Jihād, Bāb al-Ghārah wa ‘l-Bayāt wa Qatl al-Nisā’ wa ‘l-Sibyān*, 410.

¹²⁰ The *Lā‘iḥah*, section 57.

¹²¹ *Ibid.*, section 81.

¹²² Perfidy or breaching the trust and confidence of the enemy is strictly prohibited in Islamic law. The Prophet and his Successors (Caliphs) have repeated this prohibition on numerous occasions. On one such occasion, the Prophet said: “... Fight yet do not cheat, do not breach trust, do not mutilate, do not kill minors.” Muḥammad b. ‘Alī al-Shawkānī, *Nayl al-Awṭār* (Lahore: Ansār al-Sunnah al-Muḥammadiyyah, n.d.), 7: 246. On another occasion, while instructing the army led by ‘Abd al-Rahman b. ‘Awf, he said: “... [N]ever commit breach of trust, nor treachery, nor mutilate anybody nor kill any minor or woman. This is the demand of God and the conduct of His Messenger for your guidance.” ‘Abd al-Malik b. Hishām, *al-Sīrah al-Nabawīyyah*, Muṣṭafā al-Saqqā *et al.* (eds.) (Beirut, Dār al-Ma‘rifah, n.d.), 2: 632. For details, see, my “The Prophet (peace be upon him)’s Merciful Reforms in the Conduct of War: The Prohibited Act,” *Insights*, 2: 2–3 (2010), 221–260.

¹²³ Committing suicide is strictly prohibited in Islamic law. Suicide in Islamic law is intentional self-murder by the believer. There is a ḥadīth *qudsī* — a statement of the Prophet (peace be on him) ascribed to God himself — in which he says that a wounded man takes his own life. God then says, “My servant anticipated my action by taking his soul (life) in his own hand; therefore, he will not be admitted to paradise.” Al-Bukhārī, *Ṣaḥīḥ, Kitāb al-Janā‘iz, Bāb mā Jā’a fī Qātil al-Nafs*, 219. In another saying of the Prophet (peace be on him) he has given a stern warning to a person committing suicide, stating that the wrongdoer would be repeating the suicidal act endlessly in hell and would reside in hell for ever. *Ibid.*

¹²⁴ For details see, my “Suicide Attacks and Islamic Law,” in *International Review of the Red Cross* 90: 869 (2008), 71–89. The perpetrators of 9/11 in the United States not only committed mass murders but when they disguised themselves as lawful visitors, they are guilty of perfidy in Islamic law.

The *Lā'ihah* prescribes the punishment of *ta'zīr* for POWs. As should be known to any student of Islamic law, *ta'zīr* has never been discussed by Muslim jurists as a possible punishment for POWs. Muslim jurists discuss *ta'zīr* only when they discuss the system of Islamic criminal justice. *Ta'zīr* literally means deterrence. Technically it means the power of the *qāḍī* to award discretionary and variable punishment.¹²⁵ *Ta'zīr* offences are those that are not included in *ḥudūd*, *qiṣās*, or *siyāsah* offences. Penalties for *ta'zīr* may be imprisonment, physical chastisement, compensation, and fines or a combination of any two of these penalties. The prosecution and penalty of *ta'zīr* offences are discretionary as opposed to *ḥudūd* which are mandatory. No *ta'zīr* penalty can be greater than a *ḥadd* penalty. Under the *Lā'ihah*, *ta'zīr* penalty is imposed by the *Imām* or his deputy or the (provincial) *qāḍī* and a *ta'zīr* punishment does not include ransom or fine.¹²⁶ If we accept *ta'zīr* as a punishment for captives (which, as we have submitted, is wrong), then what has the so-called *Imām* or his deputy to do with its application? The Taliban have not only invented a novel and new mode of punishment in their *Lā'ihah* but its application is also done in a novel way. *Ta'zīr* as a punishment for POWs or its method of application are pure Taliban inventions and have no basis in Islamic law.

Conclusion

There is disagreement among classical Muslim jurists regarding the fate of POWs. The Qur'ān mentions only two ways to end captivity: *mann* (freedom *gratis*) and *fidā'* (ransom) in verse 47: 4. The contention that 47: 4 is superseded by verse 9: 5 is not sustainable because there is no contradiction between the two verses. In almost all campaigns, such as in the case of Thumāmah b. Uthāl, 80 Makkan fighters,¹²⁷ the fighters of Hawāzin, Khaybar, Ḥunayn, Makkah, Banū 'l-Muṣṭaliq, Banū 'l-Anbār, Fazārah, and Yemen, POWs were set free *gratis*.

According to Abū 'Ubayd ransom was taken only from the POWs of Badr and was *never* taken again. Later on, the conduct of the Prophet was to pardon the prisoners of war. He argues that "The later precedent from the Prophet (peace be on him) is to be followed." He says the practice of

¹²⁵ See, this author's "Is Zina bil jabr a Hadd, Taz'ir or Siyasa Offence? A Reappraisal of the Protection of Women Act 2006 in Pakistan," in *Yearbook of Islamic and Middle Eastern Law*, 14 (2008–2009), 95–115, at 115.

¹²⁶ See, the *Lā'ihah*, Introduction, section 2.

¹²⁷ Muslim, *Ṣaḥīḥ*, Kitāb al-Jihād wa 'l-Siyar, Bāb Qawl Allāh Ta'ālā "wa huwa 'l-ladhī kaffa Aydiyahum 'ankum....," 811. Imām al-Nawawī, *Sharḥ Ṣaḥīḥ Muslim*, 7: 463.

pardoning by the Prophet came after Badr.¹²⁸ This shows that the general practice of the Prophet (peace be on him) and his successors was to set POWs free without any condition, ransom or anything else. The execution of three or four POWs during all the campaigns of the Prophet was because of the grave crimes they had committed against the Islamic state before their captivity. The execution of the combatants of Banū Qurayzah was the result of the arbitration between them and the Muslims and not a punishment prescribed anywhere for POWs in Islamic law. According to Imām Abū Yūsuf and Abū Bakr al-Sarakhsī, only the head of the Muslim state can decide to execute a particular POW [even if he is guilty of crimes against the State].¹²⁹ Imām al-Sarakhsī insists that even the commander-in-chief of the army cannot decide to execute a POW.¹³⁰ Now how can one say that execution is a general rule? It seems to be the *exception of the exception* (if the expression is correct). The Geneva Convention III relative to the Prisoners of War of 1949 adopts a similar view in its Article 85 which gives the Detaining power the right to prosecute a POW for acts committed prior to his captivity against (the Detaining Power's) law.

Balādhurī reports that Abū Bakr returned the captives of al-Nujayr by ransom. There are two examples of ransom in the entire military history of classical Islām. The overwhelming practice of the Prophet and his successors was to release POWs without any ransom. Historically, however, the Muslim state had to pay ransom to get its captives, both Muslims and non-Muslims, released from captivity in Non-Muslim states. In the year 100, 'Umar b. 'Abd al-'Azīz offered ransom, which his successor paid to the Greeks to secure the release of Muslim prisoners. It is the duty of the Muslim state to secure the release of its citizens — whether Muslims or non-Muslims. It means that non-Muslim states also asked for ransom to release POWs of Muslim state whether they were Muslims or non-Muslims.

Exchanging POWs has been occasionally practiced by the Prophet and is allowed in Islamic law. Enslavement of POWs had not been an option exercised by the Muslim state as the only example cited by the pro-enslavement *fuqahā'* is the enslavement of the women and children of Banū Qurayzah and the two incidents of Hawāzin and Muṣṭaliq which probably resembled enslavement (for a while). However, this reasoning cannot be accepted because, as stated above, the punishment of the Banū Qurayzah was the result of arbitration and cannot be extended beyond that particular episode. Moreover, the enslavement of women and children cannot be used as

¹²⁸ Ibid., 116, 120.

¹²⁹ Abū Yūsuf, *Kitāb al-Kharāj*, 378, 380.

¹³⁰ Al-Shaybānī, *Kitāb al-Siyar al-Kabir*, 4: 313–14.

an argument for enslavement of POWs. In the case of both Hawāzin as well as Muṣṭaliq the POWs were eventually released *mann*.

There are very liberal provisions about the treatment of POWs in Islām. They shall be provided every possible facility they need such as food, drink, clothing, and all other necessities of life.

* * *