

Comparing International Humanitarian Law and Islamic Law on War Captives: Observing ISIS

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Abstract

The Syrian conflict brings warfare to a new level where jihadists have evolved from small terrorist cells into large armed groups. The Islamic State of Iraq and Sham (ISIS) seem to be the most outstanding and eye-catching of all, as they seem to be the strongest and most brutal among them. They have allegedly committed numerous breaches of international humanitarian law (IHL), especially in the treatment of War Captives. This includes summary execution, torture, and even acts of crucifixion. While ISIS claims to follow only Islamic law and dismisses other laws, does this mean that Islamic laws of war are inconsistent with IHL? This article will first examine relevant rules of IHL and Islamic laws of war with a focus on the treatment of war captives, finding that the two laws are generally consistent except for a few points. Then the practice of ISIS regarding the treatment of war captives will be observed, and it will be found that there are numerous evidence of violations towards both IHL and Islamic law.

Keywords: International Humanitarian Law, ISIS, Islamic Law, war captives

Abstrak

Konflik Suriah membawa konflik bersenjata ke level yang baru, di mana kalangan 'jihadis' telah berevolusi dari kantong-kantong teroris kecil menjadi kelompok bersenjata yang besar. Kelompok Negara Islam Irak dan Syam (ISIS), tampaknya menjadi yang paling menarik perhatian dari kesemuanya itu, karena mereka terlihat paling kuat dan juga paling brutal. ISIS telah melakukan berbagai pelanggaran Hukum Humaniter Internasional (HHI), terutama dalam perlakuan terhadap tawanan perang. Ini termasuk eksekusi sewenang-wenang, penyiksaan, dan bahkan penyalipan. Jika mengikuti klaim ISIS bahwa mereka cuma menjalankan syariat Islam, apakah ini berarti hukum Islam bertentangan dengan HHI? Tulisan ini akan membandingkan aturan-aturan terkait perlakuan terhadap tawanan perang dalam HHI dan Hukum Islam, dan menyimpulkan bahwa kedua hukum tersebut secara umum tidak bertentangan kecuali pada beberapa poin saja. Kemudian praktek ISIS terhadap tawanan perang juga akan diamati, dan ditemukan bahwa ada banyak pelanggaran terhadap HHI dan hukum Islam.

Kata Kunci: Hukum Humaniter Internasional, ISIS, Hukum Islam, tawanan perang

Introduction

The Syrian war started from street protests with violent response from the government, and then as violence increased an opposition built up and formed an armed rebellion, both sides supported by numerous states (BBC [B]). The strong religious affiliation of the parties i.e. the Shi'a government against the Ahlus Sunnah wal Jama'ah ('Sunni', for short). rebels, brought a large number of foreigners to join in the fight, and now there are numerous fighting groups (BBC, 2013). Given the situation of armed violence between state forces and non-state organized armed forces, this is a non-international armed conflict. Therefore the Additional Protocol II of the Geneva Conventions 1977, 1949, (AP II). —which Syria is a party to and is also acknowledged as customary international law (Sassoli, 2006; 4.5)—applies to this conflict and binds the Syrian government forces as well as the opposing forces within Syrian territory. This article aims to compare Islamic law and international humanitarian law (IHL). Therefore, it may be preferable to observe the conduct of the self-proclaimed Islamic jihadists rather than the secular Free Syrian Army (DeBeuf, 2013).

Among the jihadist fighters, the strongest group seems to be ad-Dawla al-Islāmiyya fi al'Irāq wa-sh-Shām, or the

Islamic State of Iraq and Sham (ISIS), formerly an offshoot of Al-Qaeda (Al-Tamimi, 2013: 19-20). Both in Iraq and Syria they control large areas of lands where they exercise control and some form of governance, which may be seen as a form of an actual de facto state (Ollivant and Fishman, 2014). This group, like other jihadist groups, denounces the use of any law other than Islamic law. It is this group that will be mainly discussed.

This article will explore the laws regarding jihad and examine how it compares to IHL specifically on the treatment towards war captives.

The main questions that this article will seek are whether (i). the application of Islamic laws of war breach IHL and (ii). the conduct of ISIS compatible with Islamic laws of war and IHL.

This article will focus on IHL only so that areas referring to the international human rights law will not be discussed.

SOURCES OF LAW: ISLAMIC AND INTERNATIONAL LAW

A. International Law and Relation to Islamic Law

The traditionally known sources of international law are international agreements, customary international law, and general principles of law (as primary sources), then past judicial decisions and

the works of the most highly qualified publicists as per Art. 38(1). of the ICJ Statute 1946. More directly relevant to the law governing the conduct of armed conflict, or international humanitarian law (IHL), the central sources would be around the four Geneva conventions of 1949 (GC), with its additional protocols of 1977 and 2005 (AP), customary international humanitarian law.

A question arises: is Islamic law compatible with international law?

None of the sources of Islamic law (e.g. the Qur'an). is mentioned among the sources of international law. However, Islamic law is one of the legal systems represented in the world civilization, which can also be taken as source to derive 'general principles of law recognized by civilized nations' mentioned in Article 38 of the ICJ Statute (Cockayne, 2002: 623).

The GCs mention how mechanisms of accountability will be triggered only in the event of breaches (e.g. Art. 49 of The Geneva Convention I of 1949). It consequently follows that IHL will not be opposed towards Islamic law so long as there are no breaches towards IHL committed. It does not matter how these norms and obligations of IHL are characterized (be it under religious obligations, or whatever), as long as they

are indeed recognized as binding (Cockayne, 2002: 624).

B. Islamic Law and Relations with International Law

Islamic law encompasses every aspect of life and the hereafter –both daily life and worship (Dien, 2004: 35). To understand Islamic law, one should start from the primary sources:

1. The Qur'an

The Qur'an can contain explicit legal rules, and at times merely narratives from which one can conclude or derive legal rules. The primary way to interpret the Qur'an is to interpret based on the Qur'an text itself, then by the sunna, and sometimes by a practice of the Pious Predecessors (the Prophet's companions, and two generations after). Secondly, tafseer can be made by reasoning or ijihad bearing in mind the rules of the Arabic language (Denffer, 2014: 97-104).

2. The Sunna

The Sunna is The Prophet's tradition, consisting of hadith –utterance, acts, and approval by The Prophet, verified and graded based on authenticity (Dien, 2004: 38-39). Other than in itself being a source of law, the Sunna is an authoritative means to interpret the Qur'an.

As the primary sources do not always prescribe clear rulings, or new objects

emerge, scholars make fatwas (rulings). by ijihad. The true sources of law are still the Qur'an and Sunna. Anything from reasoning is the mere tool to further understand the Qur'an and Sunna(Hallaq, 2009: 19 and 40). This is why Islamic rulings, even today, always refer to primary sources.

There are two ways to achieve these kinds of rulings based on reasoning, i.e. Ijma: consensus by the entire Muslim communities represented by the most learned Islamic jurists, or ijihad by individual scholars (Hallaq, 2009: 22 and Dien, 2004:46-47)

Then, after considering all the factors, Islamic law comes down to bring five different legal injunctions on the items: Wajib (compulsory), Mandhub (praiseworthy), Makruh (disliked),Haram (prohibited), and Mubah (permissible).

The question will now be: can Islamic law adopt provisions in IHL?

There are verses in the Qur'an condemning those who use laws other than from Allah (The Holy Qur'an in 5: 44, 45, 47). However, those verses speak of those who blatantly reject the laws of Allah and oppress others from their rights (ibn Kathir [B], 2000: 187-189).

Islamic law also observes the principle of pacta sunt servanda(The Holy Qur'an, 5:

1, 9:4, etc, and Al-Nawawi [B]: hd.1584-1585). Therefore if an Islamic State has ratified/acceded to the GC, it is bound to follow the obligations in that convention. Further, IHL is customary international law so it may be considered as urf which can also be used to derive sources of law (Dien, 2004: 60-61). The key to whether or not Islamic law can recognize IHL is whether or not IHL goes against the Qur'an and Sunna. If it doesn't, Islamic law can recognize it.

RULES REGARDING TREATMENT DURING CAPTIVITY

There are four aspects that will be discussed in this section, namely: permissibility of execution, torture, and cruel treatment, and detainment living conditions.

A. Execution towards Captives

1.Captive Execution by ISIS

Amnesty International or AI (2013: 15), the Human Rights Council or the HRC (2014: 2-3), and numerous other media reports have noted that there have been numerous cases of executions committed by ISIS (some are for crimes not related to war, e.g. adultery, excluded from this article). However, if one ponders further into the incidents, there are two kinds of executions.

The first kind is when the executions are done as the response to certain crimes. An example to this would be the ISIS execution of Sayyed Al-Hadrami which is a leader of Jabhat Al-Nusra (JN). –another jihadist group allegedly for apostasy, upon his confession, as confirmed by witnesses(The Syrian Observer, 2014). It may seem that ‘apostasy‘ here refers to JN attacks towards ISIS. ISIS claimed that JN betrayed and attacked first and labeled it as ‘betrayal and treason’ (Al Jazeera, 2014).

Other cases would be in the detention centers, where captured members of insurgents who fought against ISIS were put to trial before executed. However, these trials lasted less than a minute and did not give a fair opportunity for the captive to respond to the allegations. There were notes of captives coerced for confessions, although the AI report did not mention whether this captive was eventually executed (AI, 2013: 8 and 13).

The second kind execution was done for pragmatic purposes, such as when the ISIS fighters were under heavy attack or when they anticipate a military loss(HRC, 2014:3). Other media reports show ISIS, upon winning a battle, immediately executing all captured enemy soldiers [McClatchy DC [A], 2014).

2.Captive Execution: Islamic Law Perspective

There are a number of different opinions in Islamic law on the permissibility of executing captives. Medieval scholars like Ibn Nuhaas mentions that the Islamic leader may, at his discretion, decide to execute war captives if it is deemed necessary (ibn Nuhaas, nd: 161-162). Jihadist groups (including Al-Qaeda and their offshoots). highly take the reference to Ibn Nuhaas for their war guidelines (Bhatt, 2014: 28), which explains ISIS’s executions, not as sanction towards any particular crime.

However, it has been suggested that Ibn Nuhaas’s opinion was based on necessity and functionality which was highly influenced by the urf of warfare of the middle ages, and therefore is not applicable nowadays (El-Fadl, 2003: 115-116). The actual law as seen in the Holy Qur’an, 47:4 does not mention execution as possible outcome:

—Therefore, when ye meet the Unbelievers (in a fight), smite at their necks; At length, when ye have thoroughly subdued them, bind a bond firmly (on them): thereafter (is the time for). either generosity or ransom: Until the war lays down its burdens...||

One narration –with dubious authenticity— cited anijma of the companions of The Prophet deciding that execution is not allowed (El-Fadl, 2003: 115-116). Along these lines, some modern scholars such as Mawdudi (1980: 36). argued that captives may not be killed at all due to a hadith where The Prophet prohibits and regrets it (see also Al-Bukhari [D], 1979: hd.299). This difference of opinion should be resolved by referring the matter back to the primary sources, as the Holy Qur'an suggests in 4:59. The modern scholar Yusuf Qardhawi has a more 'middle view' on the matter: captives may not be executed except in very exceptional circumstances (Qardhawy, 2010: 708-710). This opinion is the strongest, as it finds more evidence in the primary sources as will be explained as follows.

In the context of war, the Qur'an in 47:4 and 9:4-5 mentions that the killing is permissible during the commencement of battles but should cease when the enemy has stopped fighting or surrendered. Consequently, it is (generally) impermissible and haram to kill the war captives from the defeated or surrendered enemy. The exceptions can be found in the hadith, where war captives who were executed were for very specific crimes (Salahi, 1995: 256-257).

In the aforementioned hadiths and from the Holy Qur'an executions were for the following crimes: persecution towards Muslims, murder, treachery, or a combination thereof. Another one to add would be perhaps one of the most controversial of Islamic law: apostasy, where there is hadith prescribing the death penalty for them (Al-Bukhari [D], 1979: hd.17). Some medieval and modern scholars have understood that the hadith prescribing death penalty for apostasy is limited to apostates who then also commit treason and wage war against the Muslims (Kamali, 1998: 96), as supported by the Qur'an in 2: 256 and the hadith (Muslim [A], 1972: hd.4593 and Abu Dawud, 2008: hd.4351- 4353). As mentioned earlier, it seems that ISIS used this understanding of apostasy against Al-Hadrami. If the sentence was issued following a proper trial (as will be explained later), then this execution is consistent with Islamic law.

One controversial part of the sunna is the fate of the People of Qurayza (Ali, 1999: fn.3701-3704). –a Jewish tribe in Madinah. They were sentenced to have all their combatants executed, women and children sold into slavery, and all properties confiscated (Muslim [A], 1972: hd.4368-4371). This must be understood in its context. During the Battle of the Trenches, the Muslims were almost

exterminated due to the Qurayzabreaching their alliance-pact (ibn Kathir, 2005: 147-148, 152, and 155).

Other than the treachery, there was another uniqueness to the circumstances. This sentence was imposed by Sa'd bin Muadh (leader of the People of Aws, an ally to the Qurayza), an arbitrator which has been agreed by the Qurayza. However, the Muslim regime applies Jewish law to Jewish people (ibn Kathir [B], 2000: 184-189). as part of the as part of the Sahifat al-Madinah –a treaty between different groups in Madinah including the Muslims and the Jewish and is the constitution for the city. This is the treaty that the Qurayza betrayed. It is therefore not surprising that Sa'd's judgment was a sentence prescribed by Jewish law (see Deuteronomy, 20: 13-14), as acknowledged by the leaders of the Qurayza themselves (ibn Kathir, 2005: 170).

Having that said, it can be concluded that ISIS execution which was carried out following Ibn Nuhaas's opinion (i.e. those committed by necessity). is not in accordance with Islamic law. However, the execution towards Al-Hadrami and also other captives after sanctioned by trials may seem to be in accordance with Islamic law, as they were in response to certain crimes.

It must be noted, however, that there are major critics to how these jihadist groups in declaring others as apostates with a very loosely and incorrectly understood methodology (Bhatt, 2014: 43). ISIS in particular seems to feel that they have rights to make such declaration and thus wage war against other Muslim groups especially because they feel like they have established a dawlah or state which incurs authority (Al-Tamimi and Spyer, 2014). Among the groups, they declare as apostates would be the Ikhwanul Muslimeen in Egypt and the entire Syrian opposition who are also Sunni Muslims (Al-Akhbar English, 2014).

It would require a comprehensive analysis to properly understand the concept of dawlah Islamiyah and can ISIS act as an proper authority for the Muslims. This article is not the proper avenue for this. However, it may suffice to say that the looser the understanding of 'apostasy' is, then the more people could fall into this category and get executed.

Islamic Law also encourages avoiding punishment and promotes reconciliation and repentance instead (see: The Holy Qur'an 5:34, Muslim [A], 1972: hd.4205, An-Nasa'i, 2007: hd.No. 4072-4074, etc). For crimes mentioned by The Holy Qur'anin 5:33, repentance is barred punishment if done before the alleged

criminal is defeated or captured as the next ayat shows.

There is a difference in opinion whether repentance simply requires ceasing their criminal activities or should it also require that criminal to also surrender themselves to the Muslim leader (ibn Rushd, 2000: 550). However, repentance should include undoing the wrong and seeking forgiveness from those wronged (Shafi, 2006: 526). Therefore, it may seem that the stronger opinion is one that requires surrender.

No reports show that ISIS hunts down their enemies who have ceased the crimes, as the cases mentioned earlier were alleged active crimes. However, there are reports showing that ISIS accepts the defection of enemies from their original group (who fights against ISIS). or otherwise pledged allegiance without necessarily participating combat within ISIS ranks which may be a sign of repentance by surrender and making amends.

Further, there are hadith mentioning how punishment must be averted if possible (e.g. Muslim [A], 1972: hd.4196, 4205-4206). Reconciliation and pardoning are encouraged between the accused and victim's family to prevent punishment (An-Nasa'i, 2007: hd.4785, 4788, and 4882-4886). There has not been any

information of ISIS practicing this in the context of war.

There is another test to consider whether the executions were lawful under Islamic law, which is the principles of fair trials. As this refers more to international human rights law, it will be excluded. However, further references can be found in the works of scholars such as Hussein (2003), Al Alwani and DeLorenzo (A and B, 1995), Bassiouni (2014), etc.

3.Captive Execution: IHL Perspective

The GC gives no clear prohibition on execution, except for some restrictions. Examining Common Article 3(1)(a). and 3(1)(d), there are prohibitions of murder and sentencing/executing prisoners of war without proper trial. The AP II in Articles 6(2). and 6(4). says that persons below 18 years, pregnant women, or mothers of young children may not be given the death penalty.

The GC III in Articles 99-101 and 107 further prescribes: (1). non-retroactivity, (2). the possibility of sentence reduction, (4). applicability of the same punishment for the Detaining Power's soldiers committing the same offense, and (5). communication with the Protecting Power regarding the sentence.

A fair trial is also a requirement, but as it relates more to international human

rights law then it will be excluded from the analysis.

A particular emphasis need to be given to Article 100 of the GC III where the death penalty has to be prescribed in the national laws of the Detaining Power. However, during the occupation, Article 64 of the GC IV rules that the penal laws that previously applied to the area should remain in force except for special security needs of the occupying force. Technically it would be therefore unlawful for ISIS to replace Syrian law with Islamic law. However, some of the war-related crimes punishable by death in Islamic law coincides with Syrian law i.e. murder, treason (including apostasy). as per Articles 535, 263-266 of the Penal Code No. 148 of 1949 of Syria.

To this point, it does not appear that there is any contradiction between the Islamic laws of war and IHL, and ISIS execution of Al-Hadrami and captives with trials may seem lawful. Ibn Nuhaas's opinion, on the other hand, with a liberally understood rule 'can execute whenever the Muslim leader sees fit', is unlawful in IHL. Therefore, ISIS execution of captives without trial is unlawful.

However, while there is no categorical prohibition on executions, there are requirements. It is these requirements that have to be examined to see whether there

are any contrasts between both laws and to judge ISIS's acts.

a. Appeals, Sentence Reduction, and Possible Pardon

It has been shown that Islamic law does recognize the possibility of pardon, but there is no clear precedent on sentence reduction except small hints (Bassiouni, 2014: 124). For example in the case of Banu Qurayza, Jewish law from the Torah in Deuteronomy 20: 13-16 shows the judgment passed by Sa'd bin Mu'adh applies for distant cities while the Qurayza lived in the same city as the Muslims. The punishment for near cities in Jewish Law is complete extermination.

On rights to appeal, GC IV requires mechanisms of appeal either through court or by petition. As mentioned, Islamic law does not traditionally recognize appeals in court but it can be adopted, and petitioning for pardon is possible. Other than ISIS accepting defection of JN fighters (arguably a case of pardon), there is no information on the practice of this.

b. Death Penalty only for the Most Serious Punishments

This is excluded from this article's analysis as this is more of a question of international human rights law.

B. Torture and Cruel Treatment

1. Torture and Cruel Treatment by ISIS

While essentially being part of international human rights law, the case of torture and cruel treatment when committed against war captives would be a serious issue in IHL. In summary, reports from AI, HRC, and other media show that ISIS has committed the following acts to captives: Beating and flogging, Pulling out nails, Electrocutation, Crucifixion, etc.

For the beating and flogging, the testimonials recorded by AI (2013: 11 and 15). mentioned victims screaming in pain. The reports also mention the flogging done with arms raised until armpits shown (a detail which will be important later). These acts were done either for interrogation purposes or no particular purpose at all. Crucifixion was mentioned in the ‘torture’ section of the Human Rights Council Report (HRC, 2014: 4). However, the fact is that the persons were executed first for sabotage before the crucifixion (Al-Tamimi and Spyer, 2014), therefore cannot classify as torture.

2. Torture and Cruel Treatment: Islamic Law Perspective

From a very powerful hadith: —..Allah would torment those who torment people in the world (without genuine reason). (Muslim [C], 1972:

hd.6327-6328). it is very clear that there is a general prohibition of torture in Islamic law. There are some exceptions where the inflicting pain is permissible, but with various limitations. These lawful pain inflicting finds its way in corporal punishments for categories of offenses as follows: hudud offenses: crimes prescribed in the Qur’an supplemented with hadith (Bassiouni, 2014: 133). , Qisas or retaliation: inflicting the damage inflicted, which can be forgiven (The Holy Quran in 5:45, or Ta’zir: crimes not prescribed in the Qur’an but by the judge or the leader of the Muslims (Bassiouni, 2014: 141).

While there is no limit to the extent of damage that Qisas may bring, since it really depends on what damage was inflicted on the victim in the first place, there are very strict limitations as to how flogging may be performed. The head and genitals may not be hit, and the pain must be distributed so it does not concentrate. Further, the flogger must not expose his armpit as to reduce the pain, and no open wound may be caused (Rahman, 1982: 794). The cane used to flog also must not be an object which is too hard (Malik, 1992: 41.12).

As the reports show, ISIS seems to be violating Islamic law through acts of torture in detainments. Many of the acts of torture seem to be without purpose, and

even those arguably committed as punishments seem to not be carried out properly.

Another possible time where corporal punishment may arguably be done is in obtaining information. As a general rule, the hadith prohibits coercion to obtain information related to crime (Abu Dawud, 2008: hd.4369). However, a minority of medieval scholars like Ibn Hazm and Ibn al-Qayyim argued that it is possible to beat suspected thieves to recover stolen goods, but this requires that the suspect is notoriously deceitful and treacherous and a very high likelihood that this suspect is indeed the culprit. These scholars argue that the confessions may be still inadmissible in court, but the stolen goods found can be used as evidence (Al-Alwani and DeLorenzo[A], 1995: 245). However, this opinion is weak in basis from the primary sources and goes against the majority.

The ISIS practice torture for confession was not to obtain information for the investigation of something else. Therefore, this is a violation of either interpretation of Islamic law even loosely when interpreting the minority opinion to go beyond recovering stolen goods.

Another very controversial way of ‘corporal’ punishment would be crucifixion on a wooden prop. The Qur’an

prescribes as this alternative punishment for —..those who wage war against Allah and His Messenger, and strive with might and main for mischief through the land..” (The Holy Quran, 5:33), which means waging war against the Muslims and aggravated by terrorizing, plundering, and cruel murdering (ibn Kathir [B], 2000: 161-163).

Crucifixion in Islam does not nail the person’s hands and feet as mentioned in the New Testament, in John 20: 25-27. The practice of crucifixion does not exist in the primary sources, and scholars differ in their ijihad between crucifixion until death by starvation, crucifixion then execution on the wooden prop, or executed first before crucified (ibn Rushd, 2000: 548). It may seem that ISIS follows the third interpretation (Al-Tamimi and Spyer, 2014). which may be the strongest opinion bearing in mind the prohibition against torture, at least compared to the first of the three opinions. However, one may argue that the penalty is inappropriate as the ‘crime’ was merely an act in combat by the enemy (i.e. planting improvised explosive devices on ISIS vehicles). and does not fulfill the aggravating requirements as mentioned in the previous paragraph.

3. Torture and Cruel Treatment: IHL Perspective

The term ‘torture’ is an infliction of severe pain or suffering, for a number of purposes, i.e. interrogation, punishment, coercion, and intimidation (Article 1[1] of the Convention Against Torture 1982). When torture is committed during wartime by one of the parties to the armed conflict, it is a war crime (Articles 8[2][a][ii] and 8[2][c][i] of the Rome Statute [1998]). As it has been shown, Islamic law is in agreement with this, thus the act of torture by ISIS is a violation of both laws.

While Article 2(2). of the CAT further understands that there are no exceptional circumstances that would justify torture, recent developments post 9/11 may suggest new developments. Dershowitz (2002), for instance, proposed a ‘torture warrant’. The argument is that if a person withholds information that may lead to an imminent terrorist attack that may kill many innocent civilians, then by necessity it should be legal to torture the said person. However, this argument is a mere proposal on how to develop the law, and not what the law is.

Another proposition suggests that torture may be done as an imperative necessity and later being a justification to exclude criminal responsibility rather than legalizing it (Lord Phillips in *The Telegraph*, 2006). However, such argument

would require imminence of the threat and not to mention actual certainty that the person actually has and will provide the correct information, which is very rare to happen on the field (Gaeta, 2004: 791).

In this particular point, following the ECtHR cases, there is a little conflict with the minority and weaker opinion of Islamic law. It has been shown how a small minority of Islamic scholars allowing torture for cases in some circumstances, but perhaps interpreted a bit further to include more grave matters similar to Dershowitz and Lord Phillips (e.g. finding spies or saboteurs etc).

When corporal punishment in Islam is brought to the discussion, classifying it as torture is difficult. In the first layer, because the CAT and the ICCSt (in crimes against humanity). requires that the infliction of pain is not inherent to lawful sanctions as explained in Element 3 of Article 7(1)(f). of the ICC Elements of Crime. However, as a war crime in the ICCSt, this element was not discussed even in the ad-hoc tribunals (Dormann, 2004: 59). Yet the provisions in the CAT are a source of law under Article 21(1)(b). ICCSt. It is common sense that pain is inherent in corporal punishment and the Qisas, and in Islamic law, such kinds of punishments are legal and prescribed. However, IHL allows disciplinary

punishments but prohibits corporal punishments towards war captives (Article 85 and 87 of GC III). This is where Islamic law is in conflict with IHL, but it does not yet amount to war crimes. Therefore, if ISIS flogged anyone for a prescribed punishment, it is not an act of torture but it is nonetheless illegal under IHL.

As a second layer consideration, even if one argues that no form of corporal punishment is lawful anyway since AP II stipulates that “...the following acts against the persons referred to in paragraph 1 are and shall remain prohibited....(a)... any form of corporal punishment...” (Article 4[2] of AP II), there is still a minimum threshold of pain and suffering inflicted for the acts to be qualified as torture. The threshold is only possible to be satisfied in the case of Qisas since it is a retaliatory punishment that depends on how painful the damage was inflicted in the first place. Torture requires act has to be severe and —causing great suffering or serious injury to body or health. There is no clear standard of severity to classify as torture (Dormann, 2004: 52). The ECtHR in the *Selmouni v. France* in para 100 case mentioned:

—..it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects

and, in some cases, the sex, age, and state of health of the victim, etc.

Dormann (2004: 53-54). mentions that ‘beating’ has been noted as one of the examples of severity required, citing inter alia:

- ECtHR in the *Aksoy v. Turkey* Case, para 60: Beating was only one of the form of torture that the applicant suffered, apart from electric shocks, slapping, etc, resulting in a bilateral brachial plexus injury, which is a damage to the certain parts of the spinal nerves (Anwar et al, 2012:176).

- The Human Rights Council in the *Muteba v. Zaire* Case para 10.2, *Estrella v. Uruguay* para 1.6, and *Lopez Burgos v. Uruguay* para 2.3. On all cases, the beating was just one of the numerous forms of torture and ill-treatment received in certain lengths of time. There is no description of actual damage suffered, except *Lopez Burgos* who had a broken jaw and eardrum perforation.

- Report by the Special Rapporteur appointed pursuant to Commission on Human Rights Res. 1985/33, para 119: Beating is among the methods of, if it causes: wounds, internal bleeding, fractures, cranial traumatism, or certain nerve damages.

Essentially, the aforementioned list mentions prolonged infliction of pain of various means which in many of those cases causing much physical damages and injury. Therefore, assuming to dismiss the first layer argument, corporal punishment in Islamic law still does not fulfill the threshold of severity required in torture. This is not consistent with the rules of IHL, but it does not yet amount to serious violations (with qisas as a possible exception, depending on the case).

The evidence show that the acts of ISIS, even in cases of prescribed punishments, may have been exceeding the severity threshold by electrocuting and causing injuries of various degrees. Therefore, ISIS has violated IHL.

As for the case of crucifixion, whichever interpretation of Islamic law used may be a war crime. While crucifixion is not torture as they are legal sanctions in Islamic law, they may possibly fall under war crimes of —Committing outrages upon personal dignity, in particular, humiliating and degrading treatment in Article 8(2)(c)(ii). of the ICCSt. This crime causes real and lasting suffering from humiliation or ridicule, as the Alekovski Trials Judgment in the ICTY in 1999 says in para 56. Even the interpretation used by ISIS (which seems to be the strongest opinion). could classify

in this war crime, the ICCSt notes that the ‘victims’ of this crime could include dead bodies, as footnotes of the first element of Article 8(2)(c)(ii). of the ICC Elements of Crime show.

Arguments can be made that, while the desecration of dead bodies is a violation of IHL (Article 17 of GC I), Article 8(2)(c)(ii). of the ICCSt was based on just one post-World War II case law (Dormann, 2004: 314). Therefore, one may wonder whether this really represents customary international law which would require uniformity of state practice (Shaw, 2008: 74).

Other scholars interpretations of crucifixion could classify as inhumane treatment depending on its severity. Executing on the wooden prop (depending on the treatment of the victim while on the prop). could inflict less suffering than the other alternative i.e. starving the person to death. This is for judges to determine on a case per case basis (Dormann, 2004: 315).

C. Detainment Living Conditions

1. Detainment Living Conditions by ISIS

The official reports by AI and HRC, in describing ill-treatment towards captives, focus almost entirely on particular acts of torture and physical/mental abuse by the ISIS guards and officials. There is

minimum description of the detainment facilities without mentioning whether they are good or poor, except one case in the AI report of a person detained in a bathroom and prolonged solitary confinement. There is no mention of food arrangements, overcrowding, filth, or others, but the AI report does mention some buildings used for detention including the governor building basement, a ‘U shaped building’, some buildings used by the previous government, and a hospital (AI, 2013: 6-7). This is while other AI and HRC reports usually mention these issues very thoroughly if violations are found (see e.g. Amnesty International, 2005).

Individual media reports hint a few instances: a person chained to a wall for five days without food and water, a cell deprived of sunlight, persons blindfolded for days, cells containing twenty to thirty-five detainees (but did not compare to size of cells or mention overcrowding), and obstructing prayer of Muslim captives (see for example Huffington Post, 2014, and Daily Star, 2014). The author did not find any further information.

2. Detainment Living Conditions in Islamic Law

It is clear from the sunna that it is wajib to treat the war captives well and respectfully during captivity, as it was a clear cut order by The Prophet in a number

of hadiths after battles and also as one of his dying messages (ibn Kathir [A], 2000: 289). Captives should not suffer the heat of the sun in the hot desert, and were detained in the houses of the Muslims or sometimes in masjids (Gilani and Islam, 2009: 12-13). Food, clothing, and healthcare of the captives were the responsibility of the Muslims, and humiliation of captives is prohibited. This treatment is despite the previous extreme persecution towards the Muslims (Salahi, 1995: 92-102).

Further, there are intriguing mandub provisions supplementing the wajib rules particularly regarding providing food: to provide the captives better than what the captors enjoy themselves.

The evidence of this is as follows. The Holy Qur’an says in 76:8: “.And they feed, for the love of Allah, the indigent, the orphan, and the captive.” Further, the general context of the ayahs in 76:6-22 deeply elaborates how heavily rewarded these acts are. The hadith shows that this verse of the Qur’an has revealed in connection an act of providing the poor, orphans, and captives, equal amounts of food, and such acts were praiseworthy (Guezzou, 2008: 245).

The Holy Qur’an in 76: 8 puts ‘captives’ together in the same criteria as the ‘poor and orphans’, which should be fed as well as possible. The way to

understand this is clearer when put to practice by the companions of The Prophet. When instructed to treat the captives well, the companions of The Prophet gave preference to the captives over themselves when serving food (ibn Kathir [A], 2000: 289). The captives were surprised with the serving of with luxurious meals of the time which even the captors themselves did not (Gilani and Islam, 2009: 13).

Observing acts of ISIS in this respect, apart from the torture and executions explained in the previous sections, there are minimum reports of violations of Islamic law regarding detainment conditions. This may indicate that the violations might not necessarily represent the general policy of ISIS. As for the mandub provisions, there are no indications of ISIS following them.

There are general rules requiring respects to religion, although nothing specific on captives. Imposing faith and insults are prohibited (see the Holy Quran in 2: 256 and 6:108). The practice of the companions also show respect to other faiths in conquered areas (Redha, 1999: 88 and 164). It is very ironic that there are reports of ISIS obstructing the act of worship of fellow Muslims and therefore violating this rule (Daily Star, 2014).

3. Detainment Living Conditions in International Law

As a general rule, Article 13-14 of GC III demands humane treatment and respect. Acts of torture and other cruel treatments are both violations of this provision. There is no disagreement between IHL and Islamic law here, and the previous subsection has explored ISIS violations.

When elaborated further, the rules in GC III regarding quarters, food, and clothing seem to be much more elaborate in text rather than that of Islamic law, but as a general principle, there seems no disagreement. Article 25 requires the conditions of quarters for captives to be as favorable as those of the captors. Early Islamic tradition did not have prisons, but there is nothing against designating special buildings as long as they follow the general guideline of the well and respectful treatment. There are only a few indications of ISIS violations in providing proper quarters for captives, but there is little information how it compares to the quarters of ISIS fighters.

Article 26-27 of GC III also requires proper food and clothes for the captives. This is consistent with the previously mentioned wajib rule in Islamic law and definitely, does not prohibit the mandub provision relating to food. There is little information indicating violations in ISIS

practices in providing food or clothing, as it was in the case of quarters. Health and hygiene within detention facilities must also be guaranteed (Articles 28-29 of GC III). Islamic law, although does not provide rules as elaborate as IHL, also demands the same. In providing health, there is a report of captives treated for their injuries inflicted while captured (Al-Monitor, 2014). but nothing more. As for the matter of hygiene, there is no information except the report of a captive held in a bathroom. It has been shown as well how, as a general rule, Islamic law is consonant with IHL in requiring the respect of religion as per Article 34 of GC III. Therefore, ISIS violation towards Islamic law in this matter is a violation towards IHL as well.

One other requirement in IHL is that captives may not be detained in areas where they may be exposed to the fire of combat zones, or otherwise used as human shields (Article 23 of GC III). Islamic law has a general policy of protecting captives from harm, so it can be inferred that the rules are consistent with IHL. The AI

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report does seem to show that some known ISIS detainments are in areas under ISIS controlled (i.e. not contested). Al Monitor (2014). also, mentions ISIS detainment facilities in areas which were eventually overrun by other fighters, but this report did not mention whether or not an attack of such gravity to the area was expected.

Conclusion

From the analysis, it has been shown how there is a general compatibility between IHL and Islamic law in the treatment of war captives, albeit some disagreements in certain areas. A number of items should be subject to further research. However, in seeing the conduct of ISIS claiming to be an Islamic State, it may seem that there have been numerous indications of violations by ISIS. Some of them are due to ISIS interpretation of Islamic law, such as the case of execution of captives. Numerous violations, however, are blatant disregard towards either law such as the general prohibition against torture and cruel treatment.

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