A Comparison between International Humanitarian Law and Islamic Laws of War: The Islamic State of Iraq and Sham (ISIS) and Treatment Towards Prisoners of War in Syria *

Abstract

The Syrian conflict brings warfare to a new level. Jihadists have evolved from small terrorist cells into large armed groups, ISIS being the strongest, and have allegedly committed numerous breaches of IHL especially in the treatment of PoWs. While ISIS claims to follow only Islamic law, does this mean that Islamic laws of war is inconsistent with IHL? This article examines ISIS’s treatment of PoWs in the light of relevant rules of IHL and Islamic laws, finding that both laws of war are generally consistent except in certain points and ISIS’ conduct seems to be heavily violating both laws.

Keywords: the Islamic State of Iraq and Sham, International Humanitarian Law, Islamic law of war, prisoners of war, radical Islam

I. 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. 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. 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

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3. Prosecutor v. Dusko Tadic, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, the International Criminal Tribunal for the former Yugoslavia, Decision of 2 October 1995, para. 70
Conventions 1977, 1949, (AP II) – which Syria is a party to⁴ and is also acknowledged as customary international law⁵—applies to this conflict⁶ 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 Islamic “jihadist” fighting groups who intend and have started to build an Islamic state governed by Islamic law, rather than that of the Free Syrian Army who do not share that goal and are more secular.⁷

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/Levant (ISIS), who used to be an offshoot from the extremist group Al-Qaeda.⁸ Before entering the battle of Syria, they were called Islamic State of Iraq as they were and still are fighting in Iraq, where they control large areas of lands (Fallujah, Anbar, Tikrit, Mosul) and currently almost surrounding Baghdad.⁹ In Syria, they also have control over quite a large territory including the province of Ar-Raqqah, exercising control and governance, which may be seen a form of an actual de facto state.¹⁰ This group, like other jihadist groups, denounces the use of any law other than Islamic law.¹¹ It is this group that will be mainly discussed.

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⁶ See Article 1(1) of AP II
¹¹ Official speech by Al-Adnani (ISIS Official Spokesperson) titled “Apologies Amir al-Qaeda”. Audio, transcript, and translation can be found at Pieter van Ostaeyen. 2014. New Audio Message by ISIS Abu Muhammad al-‘Adnani as-Shami – Apologies Amir al-Qaeda (found at
However, Islamic law has been seen in a negative light due to misunderstandings and misinterpretation fuelled further by the 9/11 attack. However, scores of people converting to Islam after searching more about Islam due to the 9/11 incident is a small clue out of many others how Islamophobic messages portrayed by many parties may be incorrect. Numerous *fatwas* (legal rulings and opinions) issued by Islamic scholar have explained such terrorist acts are not actually based upon Islamic law despite the terrorist groups claiming so.

This article will explore one of the hearts of the islamophobic attacks, which is in the laws regarding *jihad*. The word *jihad* linguistically does not always talk about warfare and in fact literally means ‘struggle’ (any kinds of struggle). However, this article will indeed focus on the laws of *jihad* in context of warfare, which is *al-qitaal* which literally means ‘combat’, and examine how it compares to IHL. Of many topics that can be discussed under the laws of war, the treatment towards war captives will be emphasised.

On one hand ISIS claims to follow Islamic law, and on the other hand they are one of the parties to the Syrian conflict and therefore bound by IHL particularly AP II. This article will put their conduct of warfare under the test of both laws. IHL may be highly related to international human rights law (IHR), but to assess the acts of ISIS under IHR and to compare it with Islamic law would require an article of its own. Therefore, the international law aspect of this article will be confined to IHL only and not IHR.

The main questions that this article will answer are the following:

- Would the application of Islamic laws of war breach IHL?

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17 *Ibid*, p.76
- Is the conduct of ISIS compatible with Islamic laws of war and IHL?

The analysis of this article will start by comparing the sources of Islamic law with international humanitarian law, how they relate to each other, and how ISIS are bound by both. Afterwards, there will be a comparison between the rules regulating the conduct of warfare from both sources and ISIS’s compliance.

The area of rules that this article will focus on would be the various aspects related to the treatment towards war captives during captivity, in particular: execution towards captives, torture and cruelty, detainment living conditions, and termination of captivity. As the conflict is still ongoing and the facts on the ground are very blurred, this article will rely on what information it can find up until 25 June 2014.

It will be found that Islamic laws of war related to the treatment towards war captives generally do not contradict international humanitarian law except in some particular points, and that there are indications that ISIS does indeed violate both of those laws.

II. 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.18 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,19 at times cross-referencing to human rights laws,20 etc.

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.

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18 Article 38(1) of the Statute of the International Court of Justice 1946 (ICJ Statute)
19 Sassoli, Note 5, Chapter 4: pp. 3-14
20 Ibid, Chapter 14: pp.1-20
civilization, which can also be taken as source from which to derive ‘general principles of law recognized by civilized nations’ as per Article 38(1)(c) of the ICJ Statute.\textsuperscript{21}

The GCs mention how mechanisms of accountability will be triggered only in the event of breaches.\textsuperscript{22} 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.\textsuperscript{23}

\textbf{B. Islamic Law and Relations with International Law}

To its believers, Islam is a complete way of life, and its law encompasses every aspect of life including the hereafter (both daily life aspects and worship)\textsuperscript{24} including laws governing the conduct of warfare.

To understand Islamic law, one should start from the sources. The primary sources of Islamic law are as follows:\textsuperscript{25}

\textit{The Qur’an}

The Qur’an is believed to be the Arabic verbatim of Allah’s (God) words to Muhammad the Final Prophet of Islam\textsuperscript{26} through the Angel Gabriel.\textsuperscript{27} The Qur’an is preserved both in writing and through oral memory tradition, and codified around a decade after The Prophet’s death, the same Arabic text is held by Muslims today.\textsuperscript{28}

The Qur’an as a source of law sometimes contains explicit legal rules, sometimes it contains narratives from which one can conclude or derive legal rules. On the whole, however, the


\textsuperscript{22} Articles 49, 50, 129 and 146 respectively of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I), the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II), the Geneva Convention relative to the Treatment of Prisoners of War (GC III), the Geneva Convention relative to the Protection of Civilian Persons in Time of War (GC IV) respectively

\textsuperscript{23} Cockayne, Note 21, p.624


\textsuperscript{25} \textit{Ibid}, p.36

\textsuperscript{26} hereinafter The Prophet

\textsuperscript{27} Ahmad Von Denffer. 2014. \textit{Ulum al Quran: An Introduction to the Sciences of the Quran}. Leicestershire: The Islamic Foundation, pp.6-7

\textsuperscript{28} \textit{Ibid}, pp.10-38
verses of the Qur’an are understood by means of tafseer (interpretation). The primary way is to interpret based on the Qur’an text itself, then by the sunna, and sometimes by practice of the Pious Predecessors (the Prophet’s companions, and two generations after). Secondarily, tafseer can be made by reasoning (ijtihad, which will be explained later) bearing in mind the rules of the Arabic language.

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). As mentioned, other than in itself being a source of law, the Sunna is an authoritative means to interpret the Qur’an. Since the Sunna comprises of reports of various incidents in the life of The Prophet, it consists of narratives and stories from which legal rulings are not always clear but can be concluded from the overall report.

It is imperative for Muslims to follow these primary sources—depending on the degree of disobedience, failing to do so would make one a disbeliever.

As the primary sources do not always prescribe clear rulings, or new objects emerge, scholars make fatwas (rulings) by ijtihad. The true sources of law are still the Qur’an and Sunna. Anything from reasoning is mere tool to further understand the Qur’an and Sunna. 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:

- **Ijma** (consensus): consensus by the entire Muslim communities represented by the most learned Islamic jurists, deciding by ijtihad

- Individual **ijtihad**: done in absence of ijma.

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29 Denffer, Note 27, pp.97-102
30 Ibid, pp.103-104
31 Dien, Note 24, p.38-39, and ibid, pp.7-8
33 Hallaq, Note 12, p.19
34 See: The Holy Qur’an, note 9
35 Hallaq, Note 12, p. 40
36 E.g. the Fatwa of the National Shari’a Council, Majelis Ulama Indonesia No. 02/DSN-MUI/IV/2000
37 Dien, Note 24, p. 46-47
38 Hallaq, Note 12, p. 22
To make rulings, there are a number of methods. The first would be *Qiyas* (analogy from existing primary sources).\(^{39}\) In doing *Qiyas*, a jurist will consider *Istihsan* (juristic preference),\(^{40}\) and *Maslaha* (public interest for this life and the hereafter) in accordance with the *maqasid shari’ah* (purpose of the law): to protect the life, religion, wealth, mind, and lineage.\(^{41}\) Other considerations used is *Sadd ad-Dhara’i* (preventing evil), i.e. something normally lawful will be prohibited if it provides means to prohibited things.\(^{42}\) *Urf* (customary rules) are also considered if consistent with primary sources.\(^{43}\)

Then, Islamic law comes down to five different legal injunctions:\(^{44}\)

- *Wajib* (compulsory): punishments if abandoned, and rewards if committed
- *Mandhub* (praiseworthy): rewards if committed, no punishments if abandoned
- *Makruh* (disliked): no punishment if committed, but rewards if abandoned
- *Haram* (prohibited): punishment if committed, rewards if abandoned, and
- *Mubah* (neutral): those not belonging to the category above

As time goes by, there are four schools of interpretations, namely: Hanafi, Maliki, Shafi’i, and Hanbali\(^{45}\) which still exist until today.

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

There are verses in the *Qur’an* condemning those who use laws other than from Allah.\(^{46}\) However, from the hadith we find that those verses speak of those who blatantly reject the laws of Allah and oppress others from their rights.\(^{47}\)

Islamic law also observes the principle of *pacta sunt servanda*\(^{48}\) and violating it is prohibited.\(^{49}\) Therefore if an Islamic State has entered into an international convention (e.g.

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\(^{39}\) Hallaq, Note 10, p.22-23

\(^{40}\) Dien, Note 24, p.57

\(^{41}\) Hallaq, Note 12, p.25

\(^{42}\) Dien, Note 24, p. 62-63

\(^{43}\) *Ibid*, p.60-61

\(^{44}\) *Ibid*, pp.96-99

\(^{45}\) Hallaq, Note 12, p.31

\(^{46}\) The Holy Quran 5: 44, 45, and 47

the Geneva Conventions 1949), it is bound under Islamic laws to follow the obligations in
that convention.

Further, AP II as customary international law\footnote{Article 1(1) AP II, see also Sassoli, Note 15, p.3} might be considered as *urf* which can also be
used to derive sources of law The key to whether or not Islamic law can recognize IHL is
whether or not IHL goes against the *Qur’an* and *Sunna*. If IHL is consistent with the *Qur’an*
and *Sunna*, then it is not impossible for Islamic law to recognize it.

## III. RULES REGARDING TREATMENT DURING CAPTIVITY

There are four aspects that will be discussed under this section, namely: permissibility of
execution, torture and cruel treatment, detainment living conditions, and termination of
captivity, comparing the acts of ISIS to Islamic law and IHL.

### A. Execution towards Captives

1. Captive Execution by ISIS

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,\footnote{AI, Note 51, p.14} excluded from this article). However,
if one ponders further into the incidents, there are two distinct characteristics to be observed.


\footnote{Ibid, Al-Nawawi, Hadith No. 1584, and The Holy Qur’an, 63:1-3}

\footnote{Al, Note 51, p.14}
The first characteristic is when the executions are done as 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\(^{54}\) allegedly for apostasy, upon his confession as confirmed by witnesses.\(^{55}\) It may seem that ‘apostasy’ here refers to JN attacks towards ISIS, and Al-Hadrami was one of JN’s leaders. ISIS claimed that JN betrayed and attacked first\(^{56}\) and labelled it as ‘betrayal and treason’\(^{57}\) despite both groups initially being allies in the war under the banner of Al-Qaeda.\(^{58}\)

Other cases would be trials in the detention centres. AI reported that there were 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 fair opportunity for the captive to respond to the allegations.\(^{59}\) There were notes of captives coerced for confessions,\(^{60}\) although the AI report did not mention whether this captive was eventually executed.

The second characteristic of execution is when they are done not as punishment for crimes. The HRC reports list a number of instances of captive execution done for pragmatic purposes, such as when the ISIS fighters are under heavy attack or when they anticipate a military loss.\(^{61}\) Other media reports show ISIS, upon winning a battle, immediately executing all captured enemy soldiers.\(^{62}\)

2. Captive Execution: Islamic Law Perspective

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\(^{54}\) Al-Tamimi, Note 8

\(^{55}\) The Syrian Observer. 2014. *ISIS Kills Nusra Front Emir in Raqqa* (found at http://www.syrianobserver.com/News/News/ISIS+Kills+Nusra+Front+Emir+in+Raqq accessed 22 May 2014 at 8.28pm)


\(^{58}\) Al-Tamimi, Note 8

\(^{59}\) Amnesty, Note 51, p.13

\(^{60}\) Ibid, p.8

\(^{61}\) HRC, Note 52, p.3

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.\textsuperscript{63} Jihadist groups (including Al-Qaeda and their offshoots) highly take reference to Ibn Nuhaas for their war guidelines,\textsuperscript{64} 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 \textit{urf} of warfare of the middle ages, and therefore is not applicable nowadays.\textsuperscript{65} The actual law as seen in the \textit{Qur’an} does not mention execution as possible outcome:

\begin{quote}
“\textit{Therefore, when ye meet the Unbelievers (in 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…”}\textsuperscript{66}
\end{quote}

The \textit{ijma} of the companions of The Prophet also decided similarly, that captives are either to be set free by ransom or without ransom, and execution is not allowed.\textsuperscript{67} Along these lines, some modern scholars such as Mawdudi argued that captives may not be killed at all due to a hadith where The Prophet prohibits\textsuperscript{68} and regrets\textsuperscript{69} it.

This difference of opinion, should be resolved by referring the matter back to the primary sources, as the \textit{Qur’an} suggests in 4:59:

\begin{quote}
“\textit{...If ye differ in anything among yourselves, refer it to Allah and His Messenger, if ye do believe in Allah and the Last Day: That is best, and most suitable for final determination.”}
\end{quote}

\begin{itemize}
\item \textsuperscript{63} Ibn Nuhaas. \textit{The Book of Jihad: Mashari Al-Ashwaq Ila Masari Al-Ushaq Wa Mutheer Al-Gharaam Ila Daar Assalaam (English Translation by Noor Yamani)}, (found at http://api.ning.com/files/qnlii5STwXWJllDpiD8eR4ZJaMEo/iAeChqROisCh9REBFkr*W8vLdvlgQU-DjaJtNHTh1BG5Tmz20bVZDZmrci6TNPb5IEYS/MashariAlAshwaqilaMasarialUshaaqRevisedEdition.pdf accessed 6 May 2014 at 7.36pm), pp.161-162
\item \textsuperscript{66} The Holy Qur’an, 47:4
\item \textsuperscript{67} El-Fadl, Note 65
\item \textsuperscript{68} Abul A’la Mawdudi. 1980. \textit{Human Rights in Islam}. Leicester: The Islamic Foundation, p.36
\item \textsuperscript{69} Muhammad bin Ismail bin Al-Mughirah Al-Bukhari (Compiler). 1979. \textit{Sahih Al-Bukhari Vol. 9 (English Translation by Muhammad Muhsin Khan)}. Lahore: Kazi Publications, Hadith No. 299
\end{itemize}
The modern scholar Yusuf Qardhawi has a more ‘middle view’ on the matter: captives may not be executed except in very exceptional circumstances.\(^70\) This opinion is the strongest, as it finds more evidence in the primary sources as will be explained as follows.

In general, killing is prohibited in Islam with only a few exceptions, including as penalty for the most serious crimes.\(^71\) Another exception would be self-defence, as mentioned in a hadith.\(^72\) However, those references talk about the prohibition of killing fellow believers and not in instance of war either. Would war time references rule differently?

In 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. In fact, as previously mentioned, in the Qur’an 47:4 only two options are given for the captives: release with or without ransom. The exceptions can be found in the hadith, where war captives who were executed were for very specific crimes.\(^73\) Although, one may also argue that Mawdudi’s position is also correct along these lines, as the captives are not executed simply because of their status of captivity.

In the aforementioned hadiths and from the Qur’an,\(^74\) 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 death penalty for them.\(^75\) 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,\(^76\) as supported by some verses from the Qur’an\(^77\) and hadith.\(^78\). As mentioned earlier, it seems that ISIS used this

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\(^71\) The Holy Qur’an, Qur’an e.g. in 4:92-93, 5:32, , see also: M. Cherif Bassiouni. 2014. *The Shari’a and Islamic Criminal Justice in Time of War and Peace*. New York: Cambridge University Press, p.175

\(^72\) Al-Nawawi *Riyadhus Vol II*, Note 48, Hadith No. 1356


\(^75\) Al-Bukhari *Vol. 9*, Note 69, Hadith No. 17


\(^77\) The Holy Qur’an 2: 256

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— a Jewish tribe who lived in Madinah. They were sentenced to inter alia have all their combatants executed, women and children sold into slavery, and all properties confiscated. This must be understood in its proper context, and only the execution will be discussed in this article. During the Battle of the Trenches, the entire Muslim population was facing threat of extermination by an army five times larger than their own from one direction. The Qurayza betrayed a treaty with the Muslims, which and attempted a pincer attack which would have actualized the extermination towards the Muslims.

Other than the treachery, there was other uniqueness to the circumstances. This sentence was imposed upon the Qurayza by Sa’d bin Muadh, an arbitrator which has been agreed by the Qurayza (chosen because he was the leader of the People of Aws, an ally to the Qurayza). It has always been clear to the Qurayza, however, that mass execution was likely. However, the Muslim regime applies Jewish law to Jewish people as part of the as part of the Sahifat al-Madinah—a treaty between different groups in Medinah including the Muslims and the Jewish and is 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, as acknowledged by the leaders of the Qurayza themselves.

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.

English by Ahmad Hasan). Riyadh: Darussalam, Hadith No. 4351-4353 (Additional note: Al-Sijistani is known more by his first name Abu Dawud rather than his last name as other scholars usually are), and The Holy Qur’an 5:33


80 Muslim, Note 78, Hadith No. 4368-4371


82 Ibid, p.160

83 Ibid, p. 164

84 Kathir Tafseer Vol. 3, Note 47, pp.184-189

85 Salahi, Note 73, pp.222-223


87 Kathir The Life Vol. 3, Note 81, p.170
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.\(^{88}\) ISIS in particular seem 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.\(^{89}\) Among the groups they declare as apostates would be the Ikhwanul Muslimeen in Egypt\(^{90}\) and the entire Syrian opposition who are also Sunni Muslims.\(^{91}\)

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 there have been an extensive number of rulings (fatwa) classifying these jihadists as deviants and Khawarij or rebels against the legitimate Muslim community, criticizing their methodology including. These fatwas come from various schools of Islamic thoughts.\(^{92}\) Further, fellow jihadist scholars have issued fatwas specifically against ISIS such as Abu Baseer Al-Tartousi\(^{93}\) and even the pro Al-Qaeda scholar Abu Muhammad al-Maqdisi.\(^{94}\) The looser the understanding of ‘apostasy’ is, then the more people could fall under this category and get executed.

There is another test to consider whether the executions were lawful under Islamic law. The previous references mention only about how the law was applied when the facts have already

\(^{88}\) Bhatt, Note 64, p.43
\(^{90}\) Van Ostaeyen, Note 11
\(^{91}\) Al-Akhbar English. 2014. Information Indicates Father Paolo Dall’Oglio is Alive and in ISIS Captivity (found at http://english.al-akhbar.com/node/20110 accessed 27 June 2014 at 00.48am)
\(^{92}\) Salafi movement: Muhammad Nasir ud-Deen al-Bani. Warning Against the Fitnah of Takfeer (found at http://abdurrahman.org/faith/warningTakfirAlbani.html accessed 21 June 2014 at 00.05am) and Sufi movement: Muhammad Tahir-ul-Qadri. Fatwa on Terrorism and Suicide Bombing (found at http://www.quranandwar.com/FATWA%20on%20Terrorism%20and%20Suicide%20Bombings.pdf 21 June 2014 at 00.09am), see also generally: Bhatt, Note 64
\(^{93}\) Abu Baseer Al-Tartousi. 2014. A Declaration Regarding the Fighting Between the ISIS and the Mujahideen of Al-Sham (found at http://www.abubaseer.bizland.com/hadath/Read/hadath%20101.pdf accessed 21 June 2014 at 9.52pm)
been established\(^{95}\) or confessed to.\(^{96}\) If the facts are still contended, Islamic law requires certain principles of fair trial, before a judge who has been appointed, as follows:\(^{97}\)

- The principle of legality, as emphasized in the *Qur’an*\(^{98}\) and *hadith*,\(^{99}\) how people are not punished for laws that were not instated yet or even laws that the persons were genuinely unaware of.

- Presumption of Innocence, as the *hadith* prescribes the onus of proof on the claimant.\(^{100}\)

- Equality before the law, as mentioned in the *Qur’an and hadith*.\(^{101}\)

- Rights to a defence, as prescribed in the *hadith*.\(^{102}\) Defence counsels, though, was unknown in the early Islamic age. However, a famous early Islamic scholar (Imam Abu Hanifa) ruled that it is permissible to have a legal representative in court and this opinion was followed by many jurists\(^{103}\) and we can see this permissibility evolve as a right in Islamic courts today..\(^{104}\)

Rights to appeal find no basis in the primary sources, other than pardoning by a Muslim leader as the Prophet has done on a number occasions (which is not a judicial act but rather a discretion).\(^{105}\) Some have noted that this is because, historically, the Islamic judiciary was more of a religious nature and not designed to be hierarchical\(^{106}\) and the appeal system used in religious courts nowadays (e.g. in the Kingdom of Saudi Arabia and in the Republic of

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95 Salahi, Note 73
96 Muslim Vol. 3, Note 78, Hadith No. 4196, 4205-4206, and 4368-4371
97 See Kathir *Tafseer Vol. 3*, Note 47, pp.222-223, and Abu Dawud, Note 78, Hadith No.3586 and 3575
102 Abu Dawud Vol. 3, Note 78, Hadith No.3575-3577
104 Article 4 of the Law of Criminal Procedure, Royal Decree No. M/39 (28 Rajab 1422 H.) or KSA LCP
Indonesia)\textsuperscript{107} is a more secular development when Islam interacted with diverse cultures and civilizations.\textsuperscript{108} However, there is nothing in the Qur'an or Hadith that rejects appeal mechanisms, therefore these developments can be part of urf.\textsuperscript{109}

Considering these requirements, there are some evidences that ISIS has failed to provide fair trial in sanctioning execution (including coerced testimonials, no rights of self-defence, etc). Therefore, there are strong indications that these acts are against both Islamic law and IHL. However, it must be noted that there is evidence that ISIS applies equality before the law, since it has been noted to sanction their own members for crimes against civilians including some high officials (unrelated to war but example of ISIS general policy)\textsuperscript{110} and sometimes joining common court between different jihadist groups to put unlawful murders to trial.\textsuperscript{111}

As a final note, Islamic Law also encourages avoiding punishment and promotes reconciliation and repentance instead.\textsuperscript{112} Personal repentance is always open until the soul has reached the throat on one’s death bed, as mentioned in the Qur’an\textsuperscript{113} and hadith.\textsuperscript{114} But to what extent does personal repentance affect criminal responsibility? For crimes mentioned in The Qur’an in 5:33,\textsuperscript{115} repentance is bars punishment if done before the alleged criminal is defeated or captured.\textsuperscript{116}

\textsuperscript{107} E.g. Article 9 of the KSA LCP, and Article 60B(1) of the Indonesian Law No. 50 of 2009 on Religious Court Amendment

\textsuperscript{108} Shapiro, Note 106, p.381, and Bassiouni The Shari’a, Note 71, p.124


\textsuperscript{110} Al Arabiya News. 2014. ISIS Fires Aleppo Emir for Threatening Man (found at http://english.alarabiya.net/en/News/2014/06/19/ISIS-fires-Aleppo-emir-for-threatening-old-man-in-video.html accessed 24 June 2014 at 8.38pm) and AI, Note 51, p.10,

\textsuperscript{111} Official speech by Al-Adnani titled “Then let us invoke the curse of Allah upon the liars” translation can be found at Abu Ziyaad. 2014. Shaykh Adnani’s Speech (found at http://abuziyaad.wordpress.com/2014/03/08/shaykh-adnanis-speech-isiss-spookesman/ accessed 28 June 2014 at 9.36)

\textsuperscript{112} The Holy Qur’an 5:34, Muslim Vol. 3, Note 78, Hadith No. 4205, Ahmad bin Sh’aib bin Ali An-Nasa’i (Compiler). Sunan An-Nasa’i Vol. 5 (English Translation by Nasiruddin al-Khattab). Riyadh: Darussalam, Hadith No. 4072-4074, see also Kathir Tafseer Vol. 3, Note 47, pp. 166-167

\textsuperscript{113} The Holy Qur’an 11:3, 24:31, 66:8, 110: 3, etc


\textsuperscript{115} See: Kathir Tafseer Vol. 3, Note 47, pp. 161-163

\textsuperscript{116} The Holy Qur’an 5:34
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.\textsuperscript{117} However, the companions of the Prophet understood that if a sin involves wronging others then repentance should include undoing the wrong and seeking forgiveness from those wronged.\textsuperscript{118} 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 (i.e. persons allegedly caught in treason etc). 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\textsuperscript{119} which may be a sign of repentance by surrender and making amends.

Further, there are \textit{hadith} mentioning how punishment must be averted if possible.\textsuperscript{120} Reconciliation and pardoning is encouraged between the accused and victim’s family to prevent punishment.\textsuperscript{121} There has not been any information of ISIS practicing this in context of war.

3. Captive Execution: IHL Perspective

The GC gives no clear prohibition on execution, except for some restrictions. Examining Common Article 3, there are prohibitions of murder and sentencing/executing prisoners of war without proper trial.\textsuperscript{122} AP II says that persons below 18 years, pregnant women, or mothers of young children may not be given death penalty.\textsuperscript{123} The GC III further prescribes:

\begin{itemize}
\item\textsuperscript{117} Ibn Rushd. 2000. \textit{The Distinguished Jurist’s Primer Vol II} (English Translation by Imran Ahsan Khan Nyazee). Reading: Garnet Publishing, p.550
\item\textsuperscript{118} Muhammad Shafi. 2006. \textit{Ma’arifl Qur’an Vol. 8} (English Translation by Muhammad Hasan Askari and Muhammad Shamim, Revision by Muhammad Taqi Usmani). Karachi: Maktaba e Darul Uloom, p. 526
\item\textsuperscript{120} An-Nasa’i Vol. 5, Note 112, Hadith No. 4785, 4788, and 4882-4886
\item\textsuperscript{121} Articles 3(1)(a) and 3(1)(d)
\item\textsuperscript{122} Articles 6(2) to 6(4)
(1) non-retroactivity,\textsuperscript{124} (2) considering non-allegiance in context of international armed conflict (which is not applicable in the context of non-international armed conflict, since fighting against the legitimate government is usually a political crime)\textsuperscript{125} (3) 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.\textsuperscript{126}

A fair trial, in summary, would include: a regularly constituted court, established by law, independence and impartiality, presumption of innocence, information on the nature and cause of accusation, necessary rights and means of defence, trial without undue delay, interpreter assistance, examination of witnesses, presence of the accused at the trial, public proceedings, and non-\textit{nebis in idem}.\textsuperscript{127} Failure to follow these rules would constitute a war crime, as per Article 8(2)(c)(iv) of the Rome Statute (ICCSt).

A particular emphasis need to be given to Article 100 of the GC III where death penalty has to be prescribed in the national laws of the Detaining Power. However, in case of 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).\textsuperscript{128}

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.

\textsuperscript{124} with reference to Article 99 of GC 3


\textsuperscript{126} Articles 99-101 and 107


\textsuperscript{128} Articles 535, 263-266 of the Penal Code No. 148 of 1949 of Syria
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 for pardon, but there is no clear precedent on sentence reduction. However, there may be hints to it in the case of the Qurayza. The judgment passed by Sa’d bin Mu’adh\(^{129}\) applies for distant cities\(^{130}\) while the Qurayza lived in the same city as the Muslims. The punishment for near cities in Jewish Law is complete extermination.\(^{131}\)

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 practice of this.

b. Principles of Fair Trial

It has been seen that generally there seems no conflict between Islamic Law and international standards of fair trial.\(^{132}\) However, there may be a few points that could potentially be in tension.

For trials without undue delay, the hadith had the trials and executions done promptly while the GC III requires more technicalities.\(^{133}\) On legal counsel, Islamic law does not see it as a compulsory requirement.\(^{134}\) On legal proceedings in general, Islamic law has no elaborate court procedures in the Qur’an and hadith.\(^{135}\)

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\(^{129}\) The Torah, Deuteronomy 20: 13-14

\(^{130}\) The Torah, Deuteronomy 20: 15

\(^{131}\) The Torah, Deuteronomy 20: 16

\(^{132}\) Bassiouni, *The Shari’ah*, Note 71, p. 125, see also Al-Awlani and DeLorenzo *Part One*, Note 81, and Al-Awlani and DeLorenzo *Part Two*, Note 103

\(^{133}\) Articles 101 and 107 of GC III: A minimum period of six months and communication exchanges

\(^{134}\) Taha J. Al-Alwani and Yusuf Talal DeLorenzo *Part Two*, Note 109, pp.239-240

\(^{135}\) Shapiro, Note 106, and Bassiouni *The Shari’ah*, Note 71
The aforementioned matters are resolved by virtue of urch development and are practiced by many Islamic states today. However there are evidences of ISIS violations of these rules as mentioned in the previous subsection, with the addition of not providing the items mentioned in the previous paragraph.

c. Death Penalty only for the Most Serious Punishments

Unlike the principles of fair trial which finds its way in the sources of IHL as well as IHR and citing each other, crimes that are punishable by death have no particular requirements in IHL as it does in IHR. This is excluded from this article’s analysis.

B. Torture and Cruel Treatment

1. Torture and Cruel Treatment by ISIS

In summary, reports from AI, HRC, and other media show that ISIS has committed the following acts to captives:136

- Beating and flogging
- Pulling out nails
- Electrocution
- Crucifixion
- Prolonged solitary confinement

For the beating and flogging, the testimonials recorded by AI137 mentioned victims screaming in pain. The reports also mention the flogging done with arms raised until armpits shown138 (a detail which will be important later). These acts were done either for interrogation purposes139 or no particular purpose at all.140 Crucifixion was mentioned in the ‘torture’

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137 AI, Note 51, p. 11 and 15
138 Ibid, p.8
139 Ibid
140 Ibid

Vocative, Note 136
section of the Human Rights Council Report. However, the fact is that the persons were executed first for sabotage before crucifixion, 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” it is very clear that there is a general prohibition of torture in Islamic law. It is even unlawful to torture animals. Another hadith with similar narration but with additional context may imply that there are possible exceptions i.e. proper reasons to inflict pain: “...Allah would punish those who torment people in this world (without any genuine reason)”. It is correct for one to infer from that hadith that there may be lawful reasons to inflict pain on persons. However, there are various limitations imposed in inflicting pain.

These lawful pain inflicting finds its way in corporal punishments for categories of offences as follows:

a. *hudud* offences: crimes prescribed in the *Qur’an* supplemented with hadith, such as flogging for fornicators and persons drinking intoxicants

b. *Qisas* or retaliation: if a person inflicts certain damage to another then the victim can either retaliate by inflicting the same damage or forgive. In the previous subsection it has been shown how forgiveness is preferable and encouraged.

c. *Ta’zir* crimes: crimes not prescribed in the *Qur’an* but by the judge or the leader of the Muslims which’s punishment may include flogging by maximum of ten (10) lashes.

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141 HRC, Note 52, p.4
144 Abu Dawud *Vol. 3*, Note 78, Hadith No. 5248
145 Muslim *Vol 4*, Note 143, Hadith No. 6327
146 Bassiouni *The Shari’a*, Note 71, p.133, see also: *The Holy Qur’an*. 2:216, 24:2, Muslim *Vol. 3*, Note 78, Hadith No. 4226-4233
147 The Holy Qur’an, 5:45
148 Bassiouni *The Shari’a*, Note 71, pp. 141-142
149 Muslim *Vol. 3*, Note 78, Hadith No. 4234, and Al-Bukhari *Vol. 8*, Note 101, Hadith No. 831-832
While there is no limit to the extent of damage that *Qisas* may bring, since it really depends on what damage was inflicted to the victim in the first place, there are very strict limitations as to how flogging may be performed:

- The *hadith* prohibits hitting persons the face.\(^\text{150}\)
- The *hadith* requires that item used for flogging should not be a hard object, so it will reduce the pain.\(^\text{151}\)
- The flogging may not result in any wound. This is inferred from the *Qur’an* because the word used for ‘flogging’ in the *Qur’an* is *jaldah*, which is therefore understood that the flogging should not break the skin.\(^\text{152}\)
- While striking the lash, to reduce the pain from angle of strike the armpit of the flogger may not be exposed (practice of companions of The Prophet).\(^\text{153}\)
- The lashes should be directed to different parts of the body except the head and genitals, so the pain is not concentrated at one body part (practice of companions of The Prophet).\(^\text{154}\)

As a display of a correct way of flogging under Islamic law, one can see an example conducted by ISIS against a fornicator in this footnote.\(^\text{155}\) 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.\(^\text{156}\) 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

\(^{150}\) Al-Bukhari *Vol. 8*, Note 101, Hadith No. 734 and Abu Dawud *Vol. 3*, Note 78, Hadith No. 4478  
\(^{153}\) Ibid  
\(^{154}\) Ibid  
\(^{156}\) Abu Dawud *Vol. 3*, Note 78, Hadith No. 4369
suspect is notoriously deceitful and treacherous and a very high likeliness that this suspect is indeed the culprit.\textsuperscript{157} Confessions obtained by duress are still inadmissible in trials but if the stolen goods are found, this can be used for trials.\textsuperscript{158} However, this opinion seems weak as it not only goes against the majority and has no direct evidence in the Qur’an and the Sunna\textsuperscript{159} which explicitly prohibits torture in general and coerced testimonial.

The ISIS practice torture for confession was not to obtain information for 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 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.”,\textsuperscript{160} which means waging war against the Muslims and aggravated by terrorizing, plundering, and cruel murdering.\textsuperscript{161}

Crucifixion in Islam does not nail the person’s hands and feet as mentioned in the Bible.\textsuperscript{162} Practice of crucifixion does not exist in the primary sources, and scholars differ in their \textit{ijtihad} between: crucifixion until death by starvation, crucifixion then execution on the wooden prop, or executed first before crucified.\textsuperscript{163} It may seem that ISIS follows the third interpretation\textsuperscript{164} 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 fulfil the aggravating requirements as mentioned in the previous paragraph.

3. Torture and Cruel Treatment: IHL Perspective

\begin{itemize}
\item \textsuperscript{157} Taha J. Al-Alwani and Yusuf Talal DeLorenzo Part Two, Note 103, p.245
\item \textsuperscript{158} Ibid
\item \textsuperscript{159} Ibid
\item \textsuperscript{160} The Holy Qur’an 5:33
\item \textsuperscript{161} Kathir \textit{Tafseer Vol. 3}, Note 47, pp.161-163
\item \textsuperscript{163} Ibn Rushd, Note 117, p.548
\item \textsuperscript{164} Al-Tamimi and Spyer, Note 89
\end{itemize}
The term ‘torture’ is an infliction of severe pain or suffering, for a number of purposes, i.e. interrogation, punishment, coercion, and intimidation.\(^{165}\) There is no question that the prohibition against torture is universally recognized. The CAT, to this date, has been ratified by 155 states.\(^{166}\) Further, great scholars\(^{167}\) and case laws\(^{168}\) have noted that this prohibition is not only customary international law but also a *jus cogens* norm which is non-derogable.\(^{169}\) When torture is committed during wartime by one of the parties to the armed conflict, it is a war crime.\(^{170}\) 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 the CAT further understands that there are no exceptional circumstances that would justify torture,\(^{171}\) recent developments post 9/11 may suggest new developments. Dershowitz, 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.\(^{172}\) This concept of ‘torture warrant’ is similar to what was practiced in England a few centuries ago.\(^{173}\) However this argument is a mere proposal on how to develop the law, and not what the law is.

Another proposition which may, at a glance, seem compatible to the existing law. As Lord Phillips says, torture may be done as an imperative necessity and later being a justification to exclude criminal responsibility rather than legalizing it.\(^{174}\) This argument may, to some

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\(^{165}\) Article 1(1) of the Convention Against Torture (CAT, 1982)


\(^{168}\) Such as the Pinochet case: R. v Bow Street Stipendiary Magistrate Ex. P. Pinochet Ugarte (No. 3) [2000] 1 A.C. 147

\(^{169}\) See Bassiouni *International*, Note 167, at p.67, see also Article 53 of the VCLT

\(^{170}\) Articles 8(2)(a)(ii) and 8(2)(c)(i) of the Rome Statute (1998)

\(^{171}\) Article 2(2) of the CAT


extent, find justification in the ICCSt.  

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. Even in an actual event of facing imminent threat to life, the European Court of Human Rights (ECtHR) have held in the Gafgen v. Germany Case – also citing numerous other case laws arguing similarly.

One may wonder, however, how the aforementioned ECtHR judgment(s) would fare when compared to the aforementioned ICCSt provision which explicitly excludes events of imminent threat to life from criminal responsibility. 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 Islam generally does not allow torture for information except arguably for cases where the defendant is well known of being treacherous and untrustworthy, where coercion may only be used to recover stolen goods, 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. However, as a war crime in the ICCSt, the element discussed in the previous paragraph is not discussed and none of the ad-hoc tribunals discussed it. Yet the provisions in the CAT are a source of law under the ICCSt and should therefore apply nonetheless. 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. This is where Islamic law is in conflict with

175 Articles 31(1)(c) and 31(1)(d) of the ICCSt
177 Application No. 22978/05, Judgment of 1 June 2010, paras 87 and 107
178 See Note 175
179 Element 3 of Article 7(1)(f), ICC Elements of Crime
180 See Article 8(2)(a)(ii)-1 and 8(2)(c)(i)-4 both in the ICCSt and ICC Elements of Crime
182 Article 21(1)(b) of the ICCSt
183 Article 85 and 87 of GC III
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...”, 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. The ECtHR in the Selmouni v. France 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 mentions that ‘beating’ has been noted as one of the examples of severity required, citing inter alia:

- ECtHR in the Aksoy v. Turkey Case. Beating was only one of the form of torture that the applicant suffered, apart from electric shocks, slapping, etc, resulting in in a bilateral brachial plexus injury, which is a damage to the certain parts of the spinal nerves.

- The Human Rights Council in the Muteba v. Zaire Case, Estrella v. Uruguay, and Lopez Burgos v. Uruguay. On all cases, beating was just one of the numerous forms of torture and ill treatment received in certain lengths of time. There is no

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184 Article 4(2) of AP II, with emphasis added
185 See again Article 1(1) of the CAT and Article 130 of GC 3
186 Dormann, Note 181, p.52
187 Application No. 25803/94, Judgment of 28 July 1999, para 100
188 Dormann, Note 181, pp. 53-54
189 Application No. 21987/93, Judgment of 18 December 1996, para 60
190 Muteba v. Zaire, Communications No. 124/1982 (views adopted on 24 July 1984, 22nd session), para 10.2
191 Estrella v. Uruguay, Communications No. 74/1980 (views adopted on 29 March 1983, 18th session), para 1.6
192 Lopez Burgos v. Uruguay, Communications No. R. 12/52 (views adopted on 29 July 1981, 36th session), para 2.3
description of actual damage suffered, except Lopez Burgos who had a broken jaw and eardrum perforation.

- The Report of the Special Rapporteur on Torture.\textsuperscript{194} Beating is among the methods of torture (which includes lashing), 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 fulfil 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 \textit{qisas} as a possible exception, depending on the case).

The evidences 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 \textit{“Committing outrages upon personal dignity, in particular humiliating and degrading treatment”}.\textsuperscript{195} This crime causes real and lasting suffering from humiliation or ridicule.\textsuperscript{196} 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.\textsuperscript{197}

Arguments can be made that, while the desecration of dead bodies is a violation of IHL,\textsuperscript{198} the preparatory committee (PC) of the ICCSt based this on just one post-World War II case law.\textsuperscript{199} Therefore, one may wonder whether this really represents customary international law.

\begin{itemize}
\item \textsuperscript{194} Report by the Special Rapporteur, Mr. P. Kooijmans, appointed pursuant to Commission on Human Rights Res. 1985/33, para 119
\item \textsuperscript{195} Article 8(2)(c)(ii) of the ICCSt
\item \textsuperscript{196} Prosecutor v. Zlatko Aleksovski, Trial Chamber, \textit{Judgment}, the International Criminal Tribunal for the Former Yugoslavia, Judgment of 25 June 1999, para 56
\item \textsuperscript{197} Footnote 57 to the first element of crime to Article 8(2)(c)(ii) of the ICCSt
\item \textsuperscript{198} Article 17 of GC I
\item \textsuperscript{199} Dormann, Note 181, p.314
\end{itemize}
which would require uniformity of state practice and opinion juris.\textsuperscript{200} Lack of state practice would cast serious doubt as to whether such a norm is indeed a customary rule, except in case of overwhelming opinion juris.\textsuperscript{201} Although, on the other hand, the PC in the same note acknowledged that the victim need not to be aware of the humiliation (referring to mentally handicapped or unconscious persons).\textsuperscript{202}

The other interpretations of crucifixion could classify as inhumane treatment i.e. ‘…serious mental or physical suffering or injury or constitutes a serious attack on human dignity…’\textsuperscript{203} 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.\textsuperscript{204}

C. Detainment Living Conditions

1. Detainment Living Conditions by ISIS

Official reports by AI and HRC,\textsuperscript{205} 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.\textsuperscript{206} 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

\textsuperscript{202} Dormann, Note 181, p.315
\textsuperscript{204} Dormann, Note 181, p.315
\textsuperscript{205} See Notes 51 and 52 generally
\textsuperscript{206} AI, Note 51, p.7, and 11-13
used by the previous government, and a hospital.\textsuperscript{207} This is while other AI and HRC reports usually mention these issues very thoroughly if violations are found.\textsuperscript{208}

Individual media reports hint a few instances: a person chained to a wall for five days without food and water,\textsuperscript{209} a cell deprived of sunlight,\textsuperscript{210} 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.\textsuperscript{211} The author did not find any further information.

2. Detainment Living Conditions in Islamic Law

It is clear from the \textit{sunna} that it is \textit{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.\textsuperscript{212} 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 \textit{masjids} (places of worship).\textsuperscript{213} Food, clothing, and healthcare of the captives were responsibility of the Muslims, and humiliation of captives is prohibited.\textsuperscript{214} This treatment is despite the previous extreme persecution towards the Muslims.\textsuperscript{215}

\begin{flushleft}
\footnotesize
\textsuperscript{207} \textit{Ibid}, pp.6-7
\textsuperscript{209} Vocative, Note 136
\textsuperscript{210} Huffington Post. 2014. \textit{Inside an ISIS Prison: A Syrian Doctor Shares His Story and Appeals to the World for Help} (found at \url{http://www.huffingtonpost.com/chris-looney/inside-an-isis-prison-a-s_b_4906840.html} accessed 26 June 2014 at 2.51pm)
\textsuperscript{214} Gilani and Islam, \textit{Ibid}
\textsuperscript{215} Salahi, Note 73, pp.92-102
\end{flushleft}
Further, there are intriguing *mandub* provisions supplementing the *wajib* rules particularly regarding providing food for the captives. Evidences of *mandub* provisions are rules from the sources of Islamic law mentioning how praiseworthy certain deeds are or mentioning acts done or approved by The Prophet, but those deeds are not prescribed or commanded or cursed upon violations. The evidences will show that when it comes to providing food, Islamic law adds a different degree of generosity: to provide the captives better than what the captors enjoy themselves.

While *wajib* rule is to treat the captives well and respectfully, the *mandub* rule brings it further. The *Qur’an* says:

“A Fountain where the Devotees of Allah do drink, making it flow in unstinted abundance. .... And they feed, for the love of Allah, the indigent, the orphan, and the captive,”

The general context of the verses deeply elaborates how heavily rewarded these acts are. The *hadith* shows that this verse of the *Qur’an* was revealed in connection an act of providing the poor, orphans, and captives, equal amounts of food, and the Prophet mentioning how praiseworthy such act was. There is an abundance of *Qur’an* verses and *hadith* mentioning the virtues of caring for the poor and orphans and cursing those who do otherwise. The *Qur’an* in 76: 8 puts ‘captives’ together in the same criteria as the ‘poor and orphans’. 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. The captives were surprised with the serving of with luxurious meals of the time which even the captors themselves did not enjoy (e.g. milk and bread, while the captors only had dates).

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216 Dien, Note 24, p.98-99
217 The Holy Qur’an, 76:6
218 The Holy Qur’an 76:8, with emphasis added
219 The Holy Qur’an, 76: 6-22
222 Kathir *Tafseer Vol. 10*, Note 212
223 Gilani and Islam, Note 213, p. 13, see also: Salahi, Note 73, p.257
It should be noted that although *mandub* provisions are not compulsory (as laws usually are understood to be),\(^{224}\) they are important as righteous Muslims would strive and compete to achieve these extra rewards.\(^{225}\)

These provisions can also be concluded to include prohibition against torture and cruel treatment, which is certainly not a well and respectful treatment as required. The previous subsection has explored ISIS’s violation of Islamic law in that respect. However, in condition of living during detainment, there are minimum reports of violations of Islamic law. 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\(^{226}\) and insults\(^{227}\) are prohibited. The practice of the companions also show respect to other faiths in conquered areas.\(^ {228}\) It is very ironic that there are reports of ISIS obstructing the act of worship of fellow Muslims and therefore violating this rule.\(^{229}\)

3. Detainment Living Conditions in International Law

As a general rule, Article 13-14 of GC III demands humane treatment and respect. Further, acts of torture and other cruel treatments are both violations of this provision.\(^{230}\) 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 either. IHL requires the conditions of quarters for captives to be as


\(^{225}\) See The Holy Qur’an, 57: 20-21 and 76: 6-22

\(^{226}\) The Holy Qur’an 2: 256

\(^{227}\) The Holy Qur’an 6: 108


\(^{229}\) Daily Star, Note 211

\(^{230}\) See Delalic, Note 203, para 544
favourable as those of the captors. 231 While early Islamic tradition did not have prisons, there is nothing against designating special buildings as long as they follow the general guideline of well and respectful treatment. There are only a few indications of ISIS violations in providing proper quarters for captives, but there is no information how it compares to the quarters of ISIS fighters except some hints from social media posts from a jihadist in Syria mentioning that mujahideen (fighters) sleep in apartments, abandoned homes, and in the streets (without mentioning which group of jihadists this refers to). 232

IHL also requires proper food and clothes for the captives. 233 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 detainment facilities must also be guaranteed. 234 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 235 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. 236 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. 237 The primary sources of Islamic law do not mention anything about this matter, most possibly because in the time of The Prophet captives are release very soon after cessation of hostilities (which will be explained later) thus was never faced enemy counter-attack with prisoners at hand. However there is a general policy of protecting captives from harm, so it can be inferred that

231 Article 25 of GC III
233 Articles 26-27 of GC III
234 Articles 29-30 of GC III
236 Article 34 of GC III
237 Article 23 of GC III
the rules are consistent with IHL. The AI report does seem to show that some known ISIS detainments are in areas under ISIS controlled (i.e. not contested).\textsuperscript{238} Another report mentions ISIS detention facilities in areas which were eventually overrun by other fighters,\textsuperscript{239} but this report did not mention whether or not an attack of such gravity to the area was expected.

D. Termination of Captivity

1. Termination of Captivity by ISIS

There are some known instances of release of war captives by ISIS or other reports indicating their general policy in the matter. The first is when ISIS captures civilians with allegations of treachery with enemy forces, but later finds that the civilian is innocent.\textsuperscript{240} The release, mentioned by ISIS as ‘exile’, was conducted by transporting the person to a safe area in Turkey and given back what is left from his possessions and also given some money.

The second practice is shown by a report of ISIS demanding ransom from the country of origin of the captive in question. One report shows demand of $100,000 ransom for Armenian captives, or else the captives in question would be executed,\textsuperscript{241} while another report shows a general practice of demanding ransom for captives.\textsuperscript{242} The latter report mentions journalists being captured and demanded ransom, not enemy soldiers. To discuss the legality of capturing non-combatants for ransom is to discuss the general rules on treatment towards non-combatants during war in Islamic law, which is beyond the scope of this article. The author submits this report as an indicator of ISIS general policy of demanding ransom.

The third practice is not an example from the Syrian conflict but in the Iraq war between ISIS and the Iraq government of Maliki, which the author submits only as example of ISIS general policy. This practice is a report of ISIS accepting the ‘repentance’ of captured Sunni Muslim

\textsuperscript{238} AI, Note 51, pp.6-7
\textsuperscript{239} Al-Monitor, Note 235
\textsuperscript{240} Huffington Post, Note 210
\textsuperscript{241} Al-Monitor, Note 235
\textsuperscript{242} McClathy DC. 2014. Analysts: Ransom Helps Militant Group in Syria Pay for 4-Front War (found at http://www.mcclatchydc.com/2014/04/21/225086/analysts-ransom-helps-militant.html accessed 28 June 2014 at 2.05am)
soldiers in the ranks of the captured Iraq army, who then joined ISIS. There has been a similar case in Syria cited before, but those repented were not yet under captivity.

Other than those already mentioned, captivity under ISIS rule seems to terminate either when captives managed to escape or be set free due to ISIS forces being driven out of the area, or where the captives themselves were terminated (i.e. executed).

2. Termination of Captivity in Islamic Law

It is the opinion of Ibn Nuhaas that the leader of the Muslims can choose four ways to end captivity: execution, slavery, and release with or without ransom. However the Qur’an in 47: 4 seems to only accommodate the last two options, and it has been discussed how execution is not a valid discretion of the Muslim leader.

The option of slavery is a topic that deserves a research of its own, but in summary from primary sources of Islamic law: slavery rules are unlike other known concepts of slavery (e.g. prohibition in slave abuse and overburdening, masters must assist slaves in heavy works, slaves can be appointed as leaders, etc), high rewards in releasing slaves or sometimes compulsory (e.g. in case of abuse), and the purpose is not to institute slavery but to gradually abolish pre-existing structures which has been achieved.

It may seem that ISIS follows this and does not take slaves.

The remaining two options i.e. release either with or without ransom, before discussed further, requires the cessation of hostilities. This requirement need not to be the actual end of war in general, but the cessation of specific battles as the sunna shows e.g. the Battle of Badr, Battle of the Trenches, etc, while the Muslims were in constant state of war (starting with the Battle of Badr until the Conquest of Makkah).

In the practices of captive release by ISIS in the first instance (set free upon trial), it is not clear as to whether it happened after the cessation of hostility at least in that particular area. This is because there are numerous areas

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244 E.g. Daily Star Note 211 and Al Monitor Note 235


246 Murphy and El-Zeidy, Note 213, at p. 646
in Syria where hostilities occur and some areas which may be relatively safe. However, the released captive in the report did not mention hearing gunshots.

The second instance (in process of negotiating ransom) did not show whether the ransom negotiations were concluded, but did seem that they occurred while the area was in hostility. The report of the general policy of ransom demanding does not show any instances of release circumstances thus cannot be assessed. The third instance (mass repentance in Iraq) was indeed after the cessation of hostility and after the enemy has been subdued.

After the cessation of hostilities, as mentioned, the captives can be released either with or without ransom. From the sunna, especially after the Battle of Badr, there has been four different practices. The primary practice was ransom by money, then there was ransom by providing basic education to some Muslims who were illiterate (based on necessity at the time, therefore is arguably flexible depending on the situation), exchange of captives, and setting free without ransom for those who cannot afford to pay ransom (presumably illiterate as well).

The record shows that after every other battles fought by the Muslims, there was no case of ransoming i.e. release of captives were all without ransom. On this basis, some scholars such as Abu ‘Ubayd argued that more recent practices should abrogate earlier ones. However, this is a mere practice of the Prophet which does not contain any prohibition to take ransom, and not to mention that the option of ransom is in the Qur’an. Without any prohibitive language one cannot therefore declare taking ransom as haram, so Abu ‘Ubayd’s argument only reveals which act is mandub (i.e. releasing without ransom).

While ISIS acts may not be what is preferable, but demanding ransom for release of captives are not unlawful under Islamic law.

3. Termination of Captivity in International Law

Provisions relating to termination of captivity are stipulated in GC III, particularly in Article 118(1): Prisoners of war shall be released and repatriated without delay after the cessation

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247 See BBC Syria, Note 10
248 Salahi, Note 73, pp. 261-265
251 Dien, Note 24, p.98
of active hostilities. The next paragraph of the same article mentions that release of captives must be done despite absence of peace treaties or perhaps even ceasefire agreements, so long as the cessation of hostilities have occurred.

What ‘cessation of active hostilities’ means is not clear and the commentaries are silent. To this issue, Lauterpacht argued that what is meant by ‘cessation’ cannot be merely suspension but must be termination of hostilities. There is some logic behind this since the suspension of hostilities would imply a prospect of resumption of hostilities. While one of the important purposes of keeping enemy soldiers in captivity is to reduce the general fighting capacity of the opponent by isolating some of their forces, releasing prisoners after every suspension of hostilities would defeat the purpose of capturing them in the first place. Others argue that the termination of hostilities (e.g. peace treaties) does not guarantee that either party will not re-attack, just like how the Revolutionary United Front attacked the government of Sierra Leone again not so long after the Lome Accord peace agreement was signed. However, one can also argue that as far as sensible expectation goes, resumption of hostilities is more reasonably implied in ‘suspension’ rather than ‘termination’ of hostilities.

Despite the debate, neither side would rule out the legality of releasing captives during suspension of hostilities. One may argue that hastening the release of captives is indeed in the spirit of the GC II provisions, and reinforcing the enemy may be just a loss of the detaining power. Therefore, Islamic law is generally consistent with IHL by requiring release after suspension of hostilities, although this runs the risks of resumption of hostilities before the release takes place. For Muslims, the loss of reinforcing the enemy is compensated by a greater goal. Muslims believe showing kindness during captivity brings rewards from Allah, and further there is virtue in da’wa (calling others to Islam) which can be in form of

254 Murphy and El-Zeidy, Note 213, p. 636
256 Murphy and El-Zeidy, Note 213, p. 636
257 The Holy Qur’an 3: 104, Al-Nawawi Riyadhus Vol II, Note 48, Hadith No. 1379
examples (e.g. kindness and justice during captivity). Because of this, at the time of The Prophet, a number of people embraced Islam.

One potential conflict between IHL and Islamic law would be ransom demands. While nothing in IHL prohibits ransom, it may delay the release of captives since the Sunna does not prohibit ransom despite not preferring it. This is especially true if hostilities have terminated. Ransom demands for captives may be very close to the war crime of taking hostages which requires persons being detained and that there are conditions to their release. However, this crime requires that the hostages are civilians or those unlawfully detained while this article limits itself to war captives.

Following Lauterpacht’s argument, ISIS does not yet have the obligation to release their captives. Time will tell whether they will act consistently with IHL upon the termination of hostilities, or whether they will still exist at that point.

IV. 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. Examples of these would be the prohibition to execute captives except for special crimes, the general prohibition of torture, proper detainment living conditions, and release upon cessation of hostilities. Towards these laws, 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 under Ibn Nuhaas’s opinion which is a weaker opinion and does not represent the majority position of Islamic law. Numerous violations, however, are blatant disregard towards either law such as: the general prohibition against torture and cruel treatment, and failing to provide some elements of fair trial.

There are only a few points where Islamic law and IHL are not compatible. One case is the crucifixion punishment where some interpretations are a violation of IHL but only a war crime under the ICCSt (not necessarily so in customary international law), which is one that
ISIS follows, and the other interpretations would more likely fall under cruel treatment. Another case is corporal punishment which is also prohibited in IHL, but mostly not yet a war crime. Some are only incompatible if Islamic law only relies on the primary sources, but can very well adapt through *ijitihad* to be compatible such as requiring defence counsels during trial and appeals. In these cases, ISIS’s practice may very well be consistent with Islamic law but violating IHL.

However, ISIS does not violate everything. Some cases of execution are done for specific crimes which seem to be consistent with Islamic law and IHL, there are evidences of applying equality before the law in trials, and indications of poor living conditions in detainment facilities might not represent the general policy of ISIS. Further, it has been mentioned that there were some reports and claims that ISIS members were punished for violations which include trials for unlawful murder.

ISIS claims to denounce any law other than Islamic law. However, they should live up to their claim in sticking to Islamic law and follow stronger and majority positions when finding differences of opinion. If ISIS could do this, then it would at least minimize so much harm even from an IHL perspective. Although, seeing the roots of where they came from (Al-Qaeda) and the ease in which they denounce groups of different methodologies (e.g. the Ikhwaanul Muslimeen), one would reasonably be pessimistic of such prospect.