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However, despite this clear Qur’anic command on captives by the third century of Hijra, the majority of Muslim jurists (al-Shafi’i, Maliki, Hambali, Al-Awza’i, Abū Thawr) assert that it is up to the Muslim political authority (Imam) to decide which option is serving the best interest for Muslim among four available choices: freeing, ransoming, execution or enslavement (the so-called Muslim best interest approach).<sup>130</sup> Abū Hanifah dissents by arguing that the only available options are execution or enslavement. He does not suggest other options like releasing the captive by grace or ransom, asserting that returning the captives to the enemy would only strengthen them.<sup>131</sup> Interestingly, the earliest Muslim jurists like Ibn ‘Abbās, ‘Abd Allāh ibn ‘Umar, Ḥasan al-Basrī, and Aṭā’ Ibn Rabbah argue that the only available option for the Muslim political authority (Imam) is by releasing them, either by the act of grace or payment of ransom, as mentioned in the Qur’an (47:4). Al-Hasan ibn Muḥammad al-Tamīmī, as quoted by Ibn Rushd in *Bidāyah*, even said that this option is “the consensus of the Companions of the Prophet.”<sup>132</sup> In addition, Shi’i jurists like al-Hillī concur with this opinion.<sup>133</sup>

The reason for these different rulings among jurists is that there is an apparent contradiction, at least on the surface, between verses in the Qur’an and the contradictory reports regarding the Prophet’s practice. It has been agreed that the Prophet freed the captives of the Badr war by pardon or ransom. However, some reports are mentioning the exception: at least two of the captives, al-Naḍr bin al-Hārith, and ‘Uqba bin Abū Mu‘āyṭ, were

129. See, e.g., Muhammad Munir, *Debates on the Rights of Prisoners of War in Islamic Law*, 49 ISLAMIC STUDIES 463, 492 (2010); 2 YÜSUF AL-QARAḌĀWĪ, FİQH AL-JIHĀD: DIRĀSAH MUQĀRANAHA LI-AḤKĀMIHI WA FALSAFATIHI FĪ ḌAW’ AL-QUR’ĀN WA-AL-SUNNAH 955 (al-Ṭab’ah 1 ed. 2009).

130. See, e.g., 1 AL-TANÜKHĪ, *supra* note 39, at 501–03; ABĪ ‘UMAR YÜSUF ‘ABD ALLĀH IBN ‘ABD AL-BARR, KITĀB AL-KĀFĪ FĪ FİQH AHL AL-MADĪNAH AL-MĀLIKĪ 467 (Muḥammad Āḥīd Al-Mawrītānī ed., 1978); 3 MUHAMMAD IBN AL-ḤASAN AL-SHAYBĀNĪ, KITĀB AL-SIYAR AL-KABĪR 124–27 (Abī ‘Abdullah Muhammad Ḥasan Ismā’īl ed., 1997); 5 AL-SHĀFĪ’Ī, *supra* note 37, at 602; AL-ṬABARĪ, *supra* note 37, at 141–46; Munir, *supra* note 129, at 465–66; LENA SALAYMEH, THE BEGINNINGS OF ISLAMIC LAW: LATE ANTIQUE ISLAMICATE LEGAL TRADITIONS 67–69 (2016).

131. AL-ṬABARĪ, *supra* note 37, at 145; AL-DAWOODY, *supra* note 25, at 137.

132. 2 IBN RUSHD, *supra* note 63, at 333.

133. Munir, *supra* note 129, at 486; SALAYMEH, *supra* note 130, at 44.

executed. In other battles like the Ḥunayn (6,000 captives) and the battle against Banū Qurayzah (600 to 900 combatants were taken captive), the Prophet enforced a different ruling: pardoning and execution, respectively. As asked by contemporary scholars like Munir and Salaymeh, the question is whether the execution of prisoners is an exceptional rule or part of the established norm.<sup>134</sup> Let us discuss Munir's conclusion briefly.

Munir argues that in the first century of Islam, from the Prophet's time until the period of Umār Ibn' Abd al-'Azīz, there were only six or seven cases of prisoner execution. In addition, the execution of al-Hārith and 'Uqbah is unrelated to their captivity, but rather it was because of their grave crime against the Prophet and Muslims previously in Mecca. Furthermore, Munir asserts, the execution of Banū Qurayzah is historically unreliable, or even if we accept the reports, the execution (some scholars instead describe it as 'the massacre') has solely relied on their Jewish law, decided by their arbiter, Sa'd ibn Mu'ādh. Based on this evaluation, Munir concludes that the only option for treating prisoners in Islamic law is by releasing them.<sup>135</sup>

Munir's conclusion may go too far. His elaboration is correct but one-sided. His discussion on prisoners' issues is imbalanced and tends to avoid juristic opinions that contradict his conclusion. While he briefly acknowledges the majority opinion, he fails to elaborate on those opinions and instead digs into one side of the tradition to find support for his conclusion: that Islamic law prohibits all treatment other than releasing the captive by grace. While I understand that Munir's purpose is to reinterpret tradition and make Islamic law relevant in modern times, his approach is incorrect. His conclusion that Islamic law allows only releasing the prisoner is dictated by his understanding of the modern law of war, and he uses it as a benchmark when he evaluates the tradition.

In every book of classical jurisprudence, one can find discussion on the power of Muslim authority to decide the captives' fate. When Saḥnūn (d. 240/854), the ninth century Maliki jurist, discusses prisoners' treatment, it seems that the rule is simple and unquestionable: a captive can be executed. He refers to several precedents such as the execution of sixty people of Banū Qurayza, the execution of 'Uqbah ibn Mu'ayṭ after the battle of Badr, the execution of a prisoner from al-Khazar (the Turk) by 'Umar ibn 'Abd al-'Azīz, and the practices of Muslim commanders such as Abū 'Ubayda

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134. Munir, *supra* note 129, at 463; Salaymeh, *supra* note 27, at 525–29.

135. Munir, *supra* note 129, at 490–92.

and ‘Iyād ibn ‘Uqbah when subjugating the Byzantine town.<sup>136</sup> In *al-Mudawwana*, he does not even mention the dissenting opinion regarding this, nor mention the Qur’anic norms on the treatment of prisoners. Saḥnūn’s approach, in which he simply mentions the precedent that supports his argument, should remind us of Munir’s approach of our time.

Likewise, Al-Shāfi‘ī, concurring with the majority opinion, argues that the Muslim authority shall decide the best choice for Muslims between execution, releasing by grace, or ransom. He further argues that execution is permissible, mainly based on a consideration that it will strengthen the religion of God and weaken the enemy. It seems, for al-Shāfi‘ī, the enemy’s debilitation is one of the main reasons for allowing execution. Ransoming and pardoning are allowed if the Muslim authority sees that it will lead to their acceptance of Islam or ending their hostility to Muslims. For al-Shāfi‘ī, it is unfavorable to release captives based on other interests.<sup>137</sup> Those who are enslaved or taken for ransom become part of the spoils of war and should be distributed according to the law of the spoils. Women and children taken in Muslim captivity, for al-Shāfi‘ī, are considered the property of Muslims. They shall not be executed.<sup>138</sup>

Furthermore, in *al-Muhadhab*, al-Shīrāzī mentioned that three Badr captives were executed, instead of two as mentioned in other reports: Muṭ‘ām ibn ‘Adī, al-Naḍir Ibn al-Hārith, and ‘Uqbah ibn Abī Mu‘ayt.<sup>139</sup> He also reported that Abū ‘Izza al-Jumahī, a captive of Uhud battle, and Ibn Khaṭāl, a captive during the conquest of Mecca, were executed. Thus, in his report, four individuals were executed under the Prophet’s order during the Prophet’s time.<sup>140</sup> However, he also emphasizes that releasing the captives by grace or ransom is permissible based on Qu’ran 47:4. It implies that for al-Shīrāzī, this verse is not abrogated by the “sword verses.” He also discusses the rules on the captive who become Muslim in his captivity. He argues that by becoming a Muslim, the captive must be exempted from execution. However, the captive still faces three possibilities: servitude, grace, or ransom. On this issue, according to al-Shīrāzī, jurists have different opinions. On one hand, while the captive may still be enslaved, other options are dropped. On the other hand, some jurists argue that the captive cannot be enslaved but may still face ransoming or releasing by

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136. As we discussed, the number of captives of Banū Qurayza is debatable. Here, in his *al-Mudawwana*, we have information that the number of captives is only sixty people instead of six hundred. 1 AL-TANŪKHĪ, *supra* note 39, at 502–03.

137. 5 AL-SHĀFI‘Ī, *supra* note 37, at 637–38.

138. *Id.*

139. 5 AL-SHĪRĀZĪ, *supra* note 39, at 258–61.

140. *Id.* at 259–60.















spends a great deal of her wealth to aid the enemy or to incite enmity against Muslims, she can be killed as well.<sup>159</sup>

Muslim jurists often elaborate in a rather bizarre hypothetical situation to discuss legal issues. In this regard, some jurists, for example, argue that a man with no right hand and with no legs shall be protected while a man with no left hand and has one leg may be killed/targeted because the right arm is the main strength of the body. This example also explains that Muslim jurists quite often push the threshold of protection to a minimum limit and give more room for military interest by elaborating on many exceptions.

While this logic has brought these jurists to a more restrained approach concerning individuals' protection, it is not the case for property protection. Their reasoning seems to have led them to conclude that all destructive methods may be permissible if it is advantageous militarily for Muslims.

Along with these two lines of approaches, we have also discussed al-Awzā'ī's opinions on the issue of protection briefly. Al-Awzā'ī's legal arguments seem to be more restrained than both the rational and the traditional jurists. Modern scholars have difficulty fitting al-Awzā'ī into their categorization, but usually, he is considered a traditionalist because he relied a lot on a living tradition while occasionally used rudimentary logical reasoning.<sup>160</sup> From our discussion, al-Awzā'ī, who lived during the Umayyad but survived the Abbasid revolution, who also lived in the frontier area (Syria), surprisingly proposed a much less hawkish approach, compared to other schools. Unfortunately, the elaboration of his juristic thoughts on this issue is hindered by the fact that none of his treaties reach us, other than the fragments preserved by other jurists. But from knowing al-Awzā'ī's opinion (also other jurists like Abū Thawr), we may hypothesize that the evolution toward the advancement of Muslim military interests is evolving along with the line of the conquest and political expansion (of the Abbasid period).

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159. 2 AL-SHAYKH NIẒĀM, AL-FATĀWĀ AL-HINDIYYA 113 ('Abd al-Laṭīf 'Abd al-Raḥmān ed., 2000); IBN QUDĀMA, *supra* note 37, at 215.

160. Steven C. Judd, *Competitive Hagiography in Biographies of al-Awzā'ī and Sufyān al-Thawrī*, 122 J. OF THE AM. ORIENTAL SOC'Y 25, 25-27 (2002).