International Review of the Red Cross (2019), **101** (911), 551–573.
Children and war
doi:10.1017/S1816383119000560

INTERNATIONAL REVIEW of the Red Cross

International humanitarian law, Islamic law and the protection of children in armed conflict

Ahmed Al-Dawoody and Vanessa Murphy*
Dr Ahmed Al-Dawoody and Vanessa Murphy are Legal Advisers in the Legal Division of the International Committee of the Red Cross, where they are responsible for matters related to Islamic law and jurisprudence and the law governing the protection of children respectively.

Abstract
This paper compares how rules of international humanitarian law and rules of Islamic law protect children in armed conflict. It examines areas of convergence and divergence, and areas where there is room for clarification between these two legal systems. This comparative exercise spotlights four key topics marking the wartime experience of children: the unlawful recruitment and use of children by armed forces and armed groups, the detention of children, their access to education, and the situation of children separated from their families.

Keywords: Islamic law, child recruitment, children deprived of their liberty, education, restoring family links, armed conflict, children.

: : : : : : :

* The authors can be contacted at aaldawoody@icrc.org and vmurphy@icrc.org. The views expressed in this article are those of the authors and do not necessarily reflect those of the ICRC.

© icrc 2020

https://doi.org/10.1017/S1816383119000560 Published online by Cambridge University Press

Introduction

Children shoulder a disproportionate human cost of the armed conflicts raging today, as the laws designed to protect them from the worst excesses of war too often fail to do so.[1] This suffering is particularly evident among children living in countries where the majority of the population is Muslim: conflicts such as those in Afghanistan, Somalia, the Syrian Arab Republic and Yemen demonstrate the imperative need to reduce the harm marking the lives of children affected by these wars. To reduce this harm, the law protecting children in war – though existing comprehensively on paper – needs context-specific solutions to counter severely inadequate implementation.

In countries where the majority of the population is Muslim,[2] or where Islam is used as part of the value system of weapons bearers, a number of parties to conflict have expertise in and look to the rules of the Islamic law of war as they fight, and can be more conversant in and loyal to these rules than to the applicable rules of international humanitarian law (IHL).[3] As both legal systems contain provisions that govern the treatment of children in situations of armed conflict, the purpose of this article is to identify complementarities between the two frameworks so as to strengthen weapons bearers' adherence to protective norms, bridging the discourses between the Islamic law and IHL protections of children in order to find mutual reinforcement. We seek to do this in three ways – first, by identifying what IHL says about the protection of children. This is important because IHL norms are not always popularly known, so the discussion of IHL's protective framework herein, presented alongside Islamic law provisions, is intended to raise awareness of these rules. Second, this article similarly identifies what the Islamic law of war says about the protection of children. This is important because the Islamic law of war can play a significant role in influencing the behaviour of warring parties who use it as a source of reference.[4] Organizations such as the International Committee of the Red Cross (ICRC), which seek to ensure that the behaviour of warring parties complies with IHL, are better equipped to enhance respect for the law if dialogue with warring parties starts from a point of mutual understanding; knowledge of how the Islamic law of war regulates the protection of children is a foundational step towards this point.

Third, and most ambitiously, both bodies of law are very much alive, and this discussion seeks to identify mutually reinforcing synergies between them as well as areas for clarification. Various international legal authorities are cognizant of the need to engage with contemporary interpretations of Islamic law in order

1 The UN Secretary-General's annual report on children and armed conflict documented over 24,000 violations by government forces and non-State armed groups in 2018. *Report of the Secretary-General on Children in Armed Conflict*, UN Doc. A/73/907-S/2019/509, 20 June 2019 (Secretary-General's Report), para. 5.

2 The term "Muslim States" is used as shorthand in this article to refer to States where the majority of the population is Muslim.

3 ICRC, *The Roots of Restraint in War*, Geneva, 2018, p. 34.

4 Regarding the influence of local Islamic scholars and legal institutions, as well as global Salafi-Jihadi scholars, on two non-State armed groups in Mali, see *ibid.*, pp. 46–51.

https://doi.org/10.1017/S1816383119000560 Published online by Cambridge University Press

to identify such synergies,[5] and indeed, various Islamic rules and their relationship with international law are being deliberated by both local and international Islamic law authorities and experts.[6] The content of protective norms in domestic-level legislation on the protection of children in armed conflict in States with Islamic law traditions is also subject to development,[7] and accordingly there is room for contemporary debate and exchanges on this content. Just as there is scope for the clarification of legal interpretation of certain Islamic law rules, there is similarly scope for the same in certain areas of IHL – for example, the rules regulating the treatment of children deprived of their liberty in non-international armed conflict (NIAC) is one area that has been identified as meriting further clarification.[8] This article's comparison of the norms protecting children in armed conflict under Islamic law and IHL thus seeks to demonstrate complementarities between these legal traditions, for the purpose of mutual reinforcement.

Continuing the conversation

The focus of this article is the protection of children in armed conflict. To address this topic, it adopts the approach of previous publications addressing Islamic law by

5 For example, the United Nations (UN) Committee on the Rights of the Child has "noted with satisfaction that there were different interpretations of some aspects of the application of Sharia (Islamic law) and that Egypt has adopted an attitude consistent with the spirit of human rights in that regard". Committee on the Rights of the Child, *Consideration of Reports: Egypt Concluding Observations*, UN Doc. CRC/C/15/Add.145, 21 February 2001, para. 56.

6 Saudi Arabia and Oman, for example, have stated that they find the definition of the child within Article 1 of the Convention on the Rights of the Child (CRC) to conform with Islamic law. Saudi Arabia's report to the Committee on the Rights of the Child in 1998 stated that "Article 1 of the Convention on the Rights of the Child is totally in harmony with Islamic law with regard to the definition of the child". See Committee on the Rights of the Child, *Consideration of Reports: Initial Report of Saudi Arabia*, UN Doc. CRC/C/61/Add.2, 29 March 2000, paras 30–32. Regarding its law that sets the age of 18 as the age of legal adulthood, Oman reported that "[t]he Decree is in accordance with the principles of Islamic Sharia": see Committee on the Rights of the Child, *Consideration of Reports: Initial Report of Oman*, UN Doc. CRC/C/78/Add.1, 18 July 2000, paras 13–14. For additional analysis of Islamic law and its relationship with international law, see, for example, Mahmood Monshipouri and Claire L. Kaufman, *The OIC, Children's Rights and Islam*, Danish Institute for Human Rights, Copenhagen, 2017, available at: www.humanrights.dk/sites/humanrights.dk/files/working_papers/2015._matters_of_concern_monshipouri_and_kaufman_feb2015.pdf (all internet references were accessed in November 2019); Nasrin Mosaffa, "Does the Covenant on the Rights of the Child in Islam Provide Adequate Protection for Children Affected by Armed Conflicts?", *Muslim World Journal of Human Rights*, Vol. 8, No. 1, 2011.

7 For example, a child rights bill was drafted in Somalia between 2017 and 2018. This development was noted in the Secretary-General's Report, above note 1, para. 146. Prior to the drafting of this bill, Somalia entered the following reservation when it ratified the CRC in 2015: "The Federal Republic of Somalia does not consider itself bound by Articles 14, 20, 21 of the above stated Convention and any other provisions of the Convention contrary to the General Principles of Islamic Sharia." The principles of Islamic Sharia referenced therein are accordingly of import to the State's interpretation of children's rights.

8 This subject of the legal protection of children deprived of their liberty in NIACs was one of the topics identified for further research, consultation and discussion by the ICRC at the 32nd International Conference of the Red Cross and Red Crescent: see ICRC, *Concluding Report on Strengthening IHL Protecting Persons Deprived of Liberty*, Geneva, June 2015, pp. 44–46, available at: http://rcrcconference.org/wp-content/uploads/2015/04/32IC-Concluding-report-on-persons-deprived-of-their-liberty_EN.pdf.

https://doi.org/10.1017/S1816383119000560 Published online by Cambridge University Press

one of the authors,[9] and builds on the discussion therein of the sources of Islamic law, its characteristics, and the main principles of the Islamic law of armed conflict. The discussion in this article also seeks to inform the dialogue that the ICRC has engaged in over the last two decades with Muslim and other religious scholars regarding humanitarian law, principles and action.[10]

Beyond IHL, plenty of similar work has been undertaken in the field of international human rights law regarding the almost universally ratified 1989 Convention on the Rights of the Child (CRC) and its relationship with Islamic law. The CRC is at once the only international human rights treaty that expressly references Islamic law[11] and, alongside the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the treaty with the greatest number of religion-based reservations amongst Muslim States.[12] With this said, the fact that Muslim countries that did not initially ratify CEDAW were ready to ratify the CRC is arguably indicative of the CRC's potential for accommodation of cultural differences, as well as general agreement between the Islamic legal tradition and the CRC on the overall goal of improving the well-being of children.[13] In its assessments of State party compliance with CRC obligations, and in light of extant Islamic-law-based reservations, the Committee on the Rights of the Child has taken a multifaceted approach to interpretations of the CRC through the lens of Islamic law – it has emphasized areas of consensus, stated a preference for wider interpretations of certain Islamic rules, welcomed interpretations consistent with human rights standards, recommended that relevant States consider the practice of other Muslim States that have been successful in reconciling fundamental rights with Islamic texts, and encouraged an exchange of information on such reconciliations.[14] Aspects of this approach are echoed throughout the present analysis of the protection of children in armed conflict under Islamic law and IHL.

9 See Ahmed Al-Dawoody, "Islamic Law and International Humanitarian Law: An Introduction to the Main Principles", *International Review of the Red Cross*, Vol. 99, No. 3, 2017; Ahmed Al-Dawoody, "Management of the Dead from Islamic Law and International Humanitarian Law Perspectives: Considerations for Humanitarian Forensics", *International Review of the Red Cross*, Vol. 99, No. 2, 2018.

10 Regarding the ICRC's approach to this dialogue with experts in Islamic law, see ICRC, above note 3, p. 51, Section 4.6; ICRC, "Niger: Seminar on Islamic Law and Humanitarianism", news release, 25 November 2015, available at: www.icrc.org/en/document/niger-seminar-islamic-law-humanitarianism; ICRC, "Egypt: Continuous Humanitarian Dialogue between the ICRC and Al-Azhar", news release, 24 October 2017, available at: www.icrc.org/en/document/egypt-grand-imam-dr-ahmed-al-tayyeb-al-azhar-willing-support-humanitarians. Regarding dialogue with scholars from other religions, see, for example, ICRC, "Reducing Suffering During Armed Conflict: The Interface between Buddhism and IHL", 25 February 2019, available at: www.icrc.org/en/document/reducing-suffering-during-conflict-interface-between-buddhism-and-international.

11 Article 20 of the CRC makes reference to Islamic law. For a discussion on the significance of this reference, see Kamran Hashemi, "Religious Legal Traditions, Muslim States and the Convention on the Rights of the Child: An Essay on the Relevant UN Documentation", *Human Rights Quarterly*, Vol. 29, No. 1, 2007, p. 196.

12 *Ibid.*, p. 196.

13 See Ann Elizabeth Mayer, "Islamic Reservations to Human Rights Conventions: A Critical Assessment", *Recht van de Islam*, Vol. 15, 1998, pp. 36–37.

14 K. Hashemi, above note 11, pp. 223–224.

https://doi.org/10.1017/S1816383119000560 Published online by Cambridge University Press

Roadmap

This article will discuss four key topics that lie at the heart of the protection of children caught up in armed conflict: the question of age limits for child recruitment and criminal responsibility, the rules governing the detention of children, the protection of access to education, and the protection of children separated from their families. These reflect the ICRC's four priorities in its institutional child protection strategy.[15] In discussing these four topics, a brief overview is given of the relevant rules of IHL, followed by a discussion of related provisions of Islamic law. Analysis is made of areas of convergence and divergence, and areas where there is room for clarification.

It is important to identify areas of convergence because such areas illustrate the common logic of the legal traditions, and this compatibility can be leveraged to strengthen compliance with the substance of the protective norm.[16] It is similarly useful to identify areas of divergence and issues where there is scope for further exchange between IHL and Islamic legal scholars. Understanding how Islamic law and IHL rules differ, and awareness of cultural and traditional norms present in distinct Muslim contexts, are prerequisites for improved communication and informed decision-making in complex humanitarian contexts. Accommodating and respecting Muslim religious norms, where they do not contravene IHL obligations, should ultimately facilitate work to meet the needs of children affected by armed conflict. The identification of divergences is also required to engage in conversation and work together across fields of expertise towards common interpretations; engaging local and international Islamic law institutions and individual Islamic law experts on these challenges can provide Islamic law solutions.[17]

The special protection of children in armed conflict: Four focuses

Before embarking on the discussion of the four focus issues, the first observation that merits emphasis in this comparative study is that both Islamic law and IHL identify children as a category of persons who are placed at particular risk in

15 For further information regarding the ICRC's work on the protection of children in armed conflict, see ICRC, *In Brief: Children in War*, Geneva, 2019, available in Arabic, English, French and Spanish at: www.icrc.org/en/publication/4383-children-war.

16 This potential for mutual reinforcement is illustrated in, for example, Afghanistan's 2018 Policy for Protection of Children in Armed Conflict, approved by the minister of national defence and minister of the interior, which begins with a reference to both Islamic Law and international law as the legal basis for government responsibilities regarding the protection of children in armed conflict: "Based on inherent human rights, Islamic teachings, and established international legal standards, the Ministry of Defence (MoD) will take every necessary step to support the humanitarian treatment and protection of children in various situations arising during armed conflict. The protection of children is one of the Government's basic responsibilities." Afghanistan, "Policy for Protection of Children in Armed Conflict", Ministry of Defence and Ministry of Interior, Kabul, 2018.

17 For an application of this solution-oriented approach to matters related to the management of the dead, see A. Al-Dawoody, "Management of the Dead", above note 9.

https://doi.org/10.1017/S1816383119000560 Published online by Cambridge University Press

situations of armed conflict. In other words, both bodies of law contain the general notion that children are entitled to special respect and protection, in addition to the more general rules which apply to all persons (adult or child) in armed conflict.

Customary IHL provides that children affected by armed conflict are entitled to special respect and protection in situations of both international and non-international armed conflict.[18] This obligation is reflected in the many more detailed rules of the Geneva Conventions and their Additional Protocols that articulate specific measures for the treatment of children,[19] as well as in State practice. This specific respect and protection includes protection against all forms of sexual violence;[20] separation from adults while deprived of liberty unless they are members of the child's family;[21] access to appropriate education, food and health care;[22] evacuation from areas of combat for safety reasons;[23] and the reunification of unaccompanied children with their families.[24] The rationale for this special protection takes heed of the fact that the effects of armed conflict cause children particular harm – the ICRC noted during the drafting of the Additional Protocols that "psychological traumas caused by war often left indelible impressions on them"[25] – and that accordingly, they "require privileged treatment in comparison with the rest of the civilian population".[26] The need for special respect and protection also reflects the reality that children may not have the same capacity to understand the danger and risk inherent in certain situations, such that they must proactively be prevented from becoming engaged in those situations. Regarding the recruitment of children into armed forces, the ICRC commented during the drafting of the Additional Protocols that "although children taking such action ran precisely the same risks as adult combatants, unlike adults they did not always understand very clearly what awaited them for participating directly or indirectly in hostilities".[27]

Islamic law develops sets of frameworks that regulate the rights and duties between different members of society and between the State and its people, on the one hand, and Islamic religious obligations, on the other. One of these frameworks is a set of rules that protects the rights of children, in recognition of their particular

18 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 135.

19 These notably include Articles 23(1), 24 and 50 of Geneva Convention IV (GC IV), Article 77 of Additional Protocol I (AP I) and Article 4(3) of Additional Protocol II (AP II). For an overview of the many other rules, see ICRC, "Legal Protection of Children in Armed Conflict – Factsheet", Geneva, 2003, available at: www.icrc.org/en/document/legal-protection-children-armed-conflict-factsheet.

20 AP I, Art. 77(1).

21 On the treatment of children deprived of their liberty, including their separation from adults, see GC IV, Arts 51(2), 76(5), 82, 85(2), 89, 94, 119(2), 132(2); AP I, Art. 77(3–4); AP II, Art. 4(3)(d).

22 GC IV, Arts 23, 24(1), 38(5), 50, 89(5), 94; AP I, Arts 70(1), 77(1), 78(2); AP II, Art. 4(3)(a).

23 GC IV, Arts 14, 17, 24(2), 49(3), 132(2); AP I, Art. 78; AP II, Art. 4(3)(e).

24 GC IV, Arts 24–26, 49(3), 50, 82; AP I, Arts 74, 75(5), 78; AP II, Art. 4 (3)(b).

25 Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable on Armed Conflicts, Geneva, 1974–1977, Vol. 15, CDDH/III/SR.45, para. 3.

26 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, para. 4544.

27 Official Records of the Diplomatic Conference, above note 25, para. 7.

https://doi.org/10.1017/S1816383119000560 Published online by Cambridge University Press

vulnerability and their role as the future of society. This is reflected in the preamble of the Organization of the Islamic Conference (OIC) Covenant on the Rights of the Child in Islam, which further points out that Islamic efforts to protect children "contributed to the development of the 1989 United Nations Convention on the Rights of the Child".[28] Islamic law thereby establishes that safeguarding children is the responsibility of their parents and the State.

More specifically, in the Islamic law of armed conflict, children recurrently surface as the prime example of a protected category of civilians in the deliberations of the classical Muslim jurists. Importantly for this article, the work of the classical Muslim jurists from the seventh and eight centuries still forms part of the rules of the Islamic law of armed conflict referred to today; we therefore refer to them throughout. In Hadith (reported sayings, deeds and tacit approvals of the Prophet Muhammad) collections and the Islamic legal compendia, the Prophet Muhammad prohibited targeting five categories of civilians in armed conflict: women, children, the clergy, the aged, and the *usafā* (those hired by the enemy to perform services on the battlefield, but who do not take part in active hostilities).[29] Based on the rationale behind the prohibition on targeting these categories – i.e., civilian status and exposure to distinct risks in situations of armed conflict – classical Muslim jurists have subsequently extended this list.[30] But of relevance for our purposes, children have long been provided with special protection, because of the fact that they are (usually) not combatants and because of their distinct vulnerability. For example, among the Hadiths prohibiting harm to these categories are the following: "Do not kill an aged person, a young child or a woman";[31] "Do not kill children or the clergy";[32] and "Do not kill children or *usafā*."[33] On this basis, when it came to protecting non-combatants, the Companions of Prophet Muhammad followed his example; for instance, the first caliph Abū Bakr (d. 634) instructed his army commander: "Do not kill a child or a woman."[34] And in keeping with this tradition, Article 3(a) of the Cairo Declaration on Human Rights in Islam, adopted by foreign ministers at the OIC on 5 August 1990, reaffirmed: "In the event of the use of force and in case of armed conflict, it is not permissible to kill non-belligerents such as old men,

28 The preamble of the OIC Covenant on the Rights of the Child in Islam also refers to the child as "the vanguard and maker of the future of the Ummah [Muslim nation]". The Covenant was adopted by the 32nd Islamic Conference of Foreign Ministers in Sana'a, Republic of Yemen, in June 2005. The authors of the present article did not ascertain the number of States bound by the Covenant.

29 See Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations*, Vol. 2, Palgrave Series in Islamic Theology, Law, and History, Palgrave Macmillan, New York, 2011, pp. 111–114.

30 *Ibid.*, pp. 114–116.

31 Aḥmad ʻAbd al-Raḥmān al-Bannā al-Sāʻatī, *Badāʼiʻ al-Manan fī Jamiʻ wa Tartīb Musannad al-Shafiʻī wa al-Sanan: Mudhayla bi-al-Qawl al-Ḥasan Sharaḥ Badāʼiʻ al-Manan*, 2nd ed., Vol. 2, Maktabah al-Furqān, Cairo, 1983, p. 12.

32 Ṣādīq ibn Ḥasan ibn ʻAli al-Ḥusseini al-Qannūji al-Bukhārī Abū al-Ṭayyib, *Al-Rawḍah al-Nadiyyah Sharaḥ al-Durar al-Munīryyah*, Vol. 2, Idārah al-Ṭibāʻah al-Munīrīyah, Cairo, p. 339.

33 *Ibid.*, p. 339.

34 ʻAbdullah ibn Abī Shaybah, *Al-Kitāb al-Muṣannaf fī al-Aḥādīth wa al-Āthār*, Vol. 6, Dār al-Kutub al-ʻIlmiyyah, Beirut, 1995, p. 478.

https://doi.org/10.1017/S1816383119000560 Published online by Cambridge University Press

women and children."[35] In short, and albeit in a general sense, both IHL and the Islamic law of armed conflict start from the point that children must be explicitly singled out for protection from the effects of war.

Questions of age: Definition, recruitment, and criminal responsibility

This section of the discussion pertains to three separate questions of age – the age under which an individual is defined as a child, the age at which a child may lawfully be recruited into armed forces or armed groups, and the minimum age of criminal responsibility. It is perhaps the most technical element of this article, but also of wide-ranging significance on the ground as it determines who benefits from the protection of the laws governing children in armed conflict. For the sake of clarity, it is worth emphasizing that international law deals separately with the age under which persons are defined as "children", the age of lawful child recruitment, and the minimum age of criminal responsibility – in other words, international law foresees the possibility that children above a certain age (but still legally defined as children) may be prosecuted and may be lawfully recruited into armed forces or armed groups. This is evident in domestic legal systems, as well as in the CRC. Article 1 of the CRC defines a child as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier", while Article 38(3) of the CRC sets the age of lawful recruitment into armed forces at 15 (a standard subsequently raised for States party to the Optional Protocol on the Involvement of Children in Armed Conflict),[36] and Article 40(3)(a) leaves the age of minimum criminal responsibility to the discretion of States (though the Committee on the Rights of the Child's General Comment No. 24 sets an international standard of 14 years for the minimum age of criminal responsibility[37]).

The separation of the definition of a child from the matters of lawful recruitment and prosecution is significant from a humanitarian standpoint, because even when children can be lawfully recruited into armed forces or armed groups, and even when they can be lawfully prosecuted for crimes committed, they nevertheless continue to benefit from certain legal protections as long as they are under the age of 18.[38] In sum, the definition of who has the status of being a "child" is not tied to criminal responsibility nor age of lawful recruitment in international law, and accordingly these three questions of age are addressed separately below.

35 OIC, Cairo Declaration on Human Rights in Islam, 5 August 1990, available at: www.refworld.org/docid/3ae6b3822c.html.

36 This age was subsequently raised in Articles 2, 3(1) and 4(1) of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2000. The age of lawful recruitment is set at 18 years of age by Article 22(2) of the African Charter on the Rights and Welfare of the Child, 1990.

37 Committee on the Rights of the Child, "General Comment No. 24 on Children's Rights in the Child Justice System", UN DOC. CRC/C/GC/24, 2019, paras 21–22.

38 For example, all children facing criminal charges are entitled to the rights set out in Article 40 of the CRC, as well as the other rights in this convention unless an age limit is otherwise stipulated in a given provision.

https://doi.org/10.1017/S1816383119000560 Published online by Cambridge University Press

The definition of a child

IHL treaties do not define the terms "child" or "children" – while some rules apply to "children" without further qualification, others specify that they apply to certain categories of children, in particular those under 12,[39] those under 15,[40] or newborn babies.[41] There are also a number of rules that extend protections specifically to persons under the age of 18.[42] Beyond IHL treaties, international practice generally – and the CRC specifically – recognizes that persons under the age of 18 are children, unless otherwise stipulated.[43]

Defining the terms "child" and "orphan", and determining the age until which an individual is a child, have been important issues from the very beginning of the emergence of Islamic law. These definitions trigger the initiation and termination of certain rights and duties, and can determine when individuals become legally and religiously responsible for their actions. For example, Article 6 (b) of the Cairo Declaration on Human Rights in Islam states that "[t]he husband is responsible for the support and welfare of the family"; the identification of the age of the child is necessary here, because the father is financially responsible for male children until they reach the age of maturity. Put simply, an "orphan" is a person whose parents died while he or she was still a child, and because the status of "orphan" comes with specific legal rights in Islamic law, the age until which an individual is an "orphan" is important. With this said, determining the age of a child has been a complicated and controversial issue among Muslim jurists.

Generally speaking, in Islamic law, a child is someone who has not attained puberty. But reaching the age of puberty differs from one person to another and from one culture to another, and Islamic scholars and legal systems have set different standards. While the age of puberty discussed in the context of child recruitment is set at 15 (discussed in greater detail below), Abū Ḥanīfah (d. 767), the eponymous founder of the Ḥanafī school of law, raises the threshold of the age of puberty to 18 for boys and 17 for girls. Notably here, Abū Ḥanīfah drops the age of puberty for girls by one year because, he puts forward, they grow physically and mentally earlier than boys. This position is reflected in the lower

39 See GC IV, Art. 24 (identification of children under 12).

40 See *ibid.*, Arts 14 (hospital and safety zones to protect different categories of persons, including children under 15), 23 (free passage of humanitarian assistance for some categories of persons, including children under 15), 24 (measures to ensure that orphans and children separated from their families who are under the age of 15 are not left on their own), 38 (same preferential treatment for alien children under 15 as for nationals), 50 (maintenance of preferential measures in regard to food, medical care and protection adopted prior to occupation for children under 15), 89 (additional food for interned children under 15); AP I, Art. 77, and AP II, Art. 4(3) (prohibition of recruitment and participation in hostilities for children under 15).

41 See AP I, Art. 8 (newborn babies to have the same protection as the wounded and sick).

42 GC IV, Arts 51 (prohibition of compulsion to work in occupied territory), 68 (prohibition of pronouncement of the death penalty on persons under 18 at the time of the offence); AP I, Art. 77 (prohibition of execution of the death penalty on persons under 18 at the time of the offence); AP II, Art. 6 (prohibition of pronouncement of the death penalty on persons under 18 at the time of the offence).

43 Article 1 of the CRC defines a child as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".

https://doi.org/10.1017/S1816383119000560 Published online by Cambridge University Press

minimum age of marriage for girls than boys in some Muslim-majority States, including some who do not follow the Ḥanafī school of law.[44] This disparity in age limits for boys and girls diverges from IHL and international human rights law, which do not set different age limits for boys as compared to girls. Beyond the Ḥanafī school of law, the jurists of the Mālikī school of law[45] posit various thresholds for the age of puberty: while most of them put it at the age of 18, some say 16, 17 or 19. Islamic legal discourse is thus unsettled as to the age of puberty following which a person is no longer a "child", but the work of the jurists considered for the purposes of this article places this age variously between 15 and 19.

The lawful age of recruitment

Prohibitions on the recruitment and use of children in hostilities are contained in a number of international IHL and international human rights law instruments, as well as customary law. Though it is not the purpose of this article to delve into the detail and debate of the complex set of standards that apply to the recruitment and use of children,[46] a brief overview of the relevant obligations governing the age at which it is lawful to recruit children into armed forces or armed groups is provided here to facilitate a comparison with Islamic law. Generally speaking, IHL and human rights instruments set three different levels of protection. Additional Protocol I (AP I), Additional Protocol II (AP II) and the CRC prohibit the recruitment of children below the age of 15.[47] Raising this protection, the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict prohibits the *compulsory* recruitment of persons under 18 into armed forces,[48] requires States Parties to raise the minimum age from 15 for *voluntary* recruitment into armed forces,[49] and prohibits non-State armed groups from recruiting (on a forced or voluntary basis) children under the age of 18.[50] Most progressively, the African Charter on the Rights and Welfare of the Child prohibits all recruitment under the age of 18.[51]

44 Attesting to this disparity in the lawful age of marriage between girls and boys, the World Policy Center maintains databases on the minimum age of marriage for girls, the minimum age of marriage for boys, and gender disparity in the legal age of marriage, available at: www.worldpolicycenter.org/topics/marriage/policies.

45 The Mālikī school of law is predominant in countries such as Mauritania, Morocco, Tunisia, Algeria, Libya, Sudan, the United Arab Emirates and certain States in West Africa.

46 For a more detailed discussion of the applicable rules, see Sylvain Vité, "Protecting Children during Armed Conflict: International Humanitarian Law", *Human Rights and International Legal Discourse*, Vol. 5, No. 14, 2011, pp. 23–29.

47 Article 77(2) of AP I binds parties to IACs; Article 4(3)(c) of AP II binds parties (State and non-State) to NIACs; Article 38(3) of the CRC binds States party to the CRC.

48 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2000, Art. 2.

49 *Ibid.*, Art. 3(1).

50 *Ibid.*, Art. 4(1).

51 African Charter on the Rights and Welfare of the Child, 1990, Art. 22(2).

https://doi.org/10.1017/S1816383119000560 Published online by Cambridge University Press

The age of lawful child recruitment is also addressed quite explicitly in the Islamic law of armed conflict. There is a Hadith attributed to ʻAbd Allh ibn ʻUmar (d. 693) in the Hadith collections of Al-Bukharī (d. 870), the most authentic of the six canonical Hadith collections for the Sunni Muslims, in which ibn ʻUmar narrated:

> Allah's Apostle called me to present myself in front of him on the eve of the battle of Uḥud, while I was fourteen years of age at that time, and he did not allow me to take part in that battle, but he called me in front of him on the eve of the battle of the Trench when I was fifteen years old, and he allowed me [to join the battle]. Nafiʻ said, "I went to ʻUmar bin ʻAbdul Aziz who was Caliph at that time and related the above narration to him. He said, 'This age [15] is the limit between childhood and manhood', and wrote to his governors to give salaries to those who reached the age of fifteen."[52]

Based on this Hadith, jurists from the Shafiʻī[53] and Ḥanbalī[54] schools of Islamic law – as well as the Ḥanafī[55] Iraqi jurists Abū Yūsuf (d. 798), the first to hold the position of *qāḍī al-quḍāh* ("judge of the judges" or chief justice) in Islamic history, and al-Shaybānī (d. 805) – took the position that the age of 15 is the age of puberty for both male and female persons. Therefore, as indicated in this Hadith, 15 years is the age required for lawful recruitment into fighting forces, and consequently also the age at which a *ḥarbī* (an enemy belligerent) can be targeted. Notably, the Hadith addresses an example of voluntary child recruitment, and therefore, *a fortiori*, forced recruitment below the same age is prohibited. It should be pointed out here, however, that there seems to be some inconsistency on behalf of ibn ʻUmar, the narrator of this Hadith, because the battle of the Trench took place in 627, two years after the battle of Uḥud, which took place in March 625. This means that ibn ʻUmar was aged 16 and not 15 when he was permitted to join the battle – on this basis, the argument could be made that the lawful age of child recruitment in the Islamic law of armed conflict may be 16. This is higher than the age of 15 set out in the Additional Protocols to the Geneva Conventions. With this nuance, the Islamic law of armed conflict and the Additional Protocols converge on the age of 15 – at the very minimum – as the age of lawful recruitment of children into armed forces.

The discussions on the minimum age limit of recruitment for the battle of Uḥud address a context that can be described in modern IHL terms as international armed conflict (IAC) – i.e., fighting between a Muslim State and a non-Muslim State. The same minimum age limit therefore applies to intra-Muslim fighting, because the Islamic rules of engagement in the case of intra-Muslim armed

52 Available at: www.sahih-bukhari.com/Pages/Bukhari_3_48.php.

53 The Shafiʻī school of law is predominant in States such as Yemen, Jordan, Palestine, Lebanon, Somalia, Djibouti, the Maldives, Indonesia, Malaysia, Brunei, Singapore, the Philippines and Thailand.

54 The Ḥanbalī school of law is predominant in States such as Saudi Arabia and Qatar, and to a lesser extent in the other Gulf States.

55 The Ḥanafī school of law is predominant in countries such as Syria, Egypt, parts of Iraq, Turkey, the Balkan States, Pakistan, Afghanistan, Bangladesh and India.

https://doi.org/10.1017/S1816383119000560 Published online by Cambridge University Press

rebellion (akin to the IHL equivalent of NIAC) are more protective than the Islamic law equivalent of IAC rules.[56] And beyond the debate regarding age, it is unequivocal that the above-mentioned Hadith unequivocally prohibits recruitment of children into a Muslim army. This prohibition is affirmed in Article 14 of the Rabat Declaration on Child's Issues in the Member States of the Organization of the Islamic Conference, which

> [s]trongly condemn[s] any recruitment and use of children in armed conflict contrary to international law, and urge[s] all parties to armed conflicts who are engaged in such practices to end them and to take effective measures for the rehabilitation and reintegration of such children into society.[57]

This declaration was adopted by the ministers in charge of child affairs in the member States of the OIC, and the heads of Arab, Islamic and international governmental and non-governmental organizations taking part in the First Islamic Ministerial Conference on the Child, held in the Kingdom of Morocco in 2005, in cooperation and coordination between the Islamic Educational, Scientific and Cultural Organization, UNICEF and the OIC.

The age of minimum criminal responsibility

While both IHL and the CRC foresee the possibility that children above a certain age may be prosecuted for criminal acts,[58] neither specifies a minimum age of criminal responsibility (MACR). Beyond treaty text, in its General Comment No. 24, the Committee on the Rights of the Child observes that "the most common minimum age of criminal responsibility internationally is 14" and therefore encourages States to increase their MACRs to at least 14.[59] In practice, domestic legislation varies considerably on the MACR, and consequently children of varied ages face criminal prosecution in contemporary armed conflicts.[60] Where a child has committed a crime, international law prescribes certain standards for juvenile

56 For further information, see, for example, Ahmed Al-Dawoody, "Internal Hostilities and Terrorism", in Niaz A. Shah (ed.), *Islamic Law and the Law of Armed Conflicts: Essential Readings*, Edward Elgar, Cheltenham, 2015; Mohamed Badar, Ahmed Al-Dawoody and Noelle Higgins, "The Origins and Evolution of Islamic Law of Rebellion: Its Significance to the Current International Humanitarian Law Discourse", in Ignacio de la Rasilla and Ayesha Shahid (eds), *International Law and Islam: Historical Explorations*, Brill's Arab and Islamic Laws Series, Leiden, 2018; Ahmed Al-Dawoody, "Conflict Resolution in Civil Wars under Classical Islamic Law", *Peace Review: A Journal of Social Justice*, Vol. 27, No. 3, 2015, 2015.

57 OIC, Rabat Declaration on Child's Issues in the Member States of the Organization of the Islamic Conference, 8 November 2005, available at: www.refworld.org/docid/44eb01b84.html.

58 See CRC, Art. 40(1); AP I, Arts 77(4–5); AP II, Art. 6(4).

59 Committee on the Rights of the Child, above note 37, paras 21–22.

60 In 2019, the UN Global Study on Children Deprived of Liberty estimated that at a minimum, 35,000 children were deprived of liberty in the context of armed conflict, including in Iraq and Syria. Though the number of these children facing criminal charges is not specified by the Global Study, reports have indicated that many have faced prosecution in Iraq. See *Report of the Independent Expert leading the United Nations Global Study on Children Deprived of Liberty*, UN Doc. A/74/136, 11 July 2019 (Global Study Report), para. 68.

https://doi.org/10.1017/S1816383119000560 Published online by Cambridge University Press

justice,[61] on the basis that while they may have committed a crime, children nevertheless remain entitled to certain treatment by the State on the basis of their status as children.

Arguably reflecting a similar recognition that children can retain their status as children while being capable of discernment meriting legal responsibility, in the lengthy deliberations over the definition of the child and the corresponding applicable Islamic rules, Muslim jurists make a distinction in some rules between *al-ṭifl al-mumayiz* and *al-ṭifl ghayr al-mumayiz* (a discerning and non-discerning child). Beyond this, and as is the case for non-Muslim States, there is disparity in the minimum age of criminal responsibility set by national legislation in different Muslim States, with ages ranging from as young as 7 up to 16.[62]

Another Islamic legal nuance exists regarding whether to calculate the age according to the solar or lunar calendar. For example, the Algerian, Egyptian and Libyan penal codes calculate the age of criminal responsibility according to the solar calendar as stipulated respectively in Articles 3, 94 and 13 of the codes,[63] while Article 147 of the Iranian Islamic Penal Code reads: "The age[s] of maturity for girls and boys are, respectively, a full nine and fifteen lunar years."[64] Notably, as a result of this nuance, if the age limit of 15 for child recruitment mentioned in the Hadith above is calculated according to the lunar calendar, it would be 14 years and seven months.

Towards higher standards of protection

The variation in age standards discussed above is a reflection of the development of these norms in varied historical periods, and across different regions and social, cultural and legal traditions in Muslim States. At the same time, there have been, and will continue to be, efforts in Muslim States to raise the threshold of minimum age for child recruitment, the minimum marriageable age, and the MACR. The goal of these attempts is to improve the protection of children, whether in armed conflict or in peacetime. This was also the goal behind Prophet Muhammad's rejection of ibn 'Umar's attempt to join the Muslim army at the battle of Uḥud, wherein he was considered by the Prophet to be fit for fighting only after he had reached the age of 15 (according to ibn 'Umar's words, or 16

61 See, notably and *inter alia*, CRC, Art. 40; Committee on the Rights of the Child, above note 37; UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), 1985; UN Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules), 1990. For a more comprehensive overview of juvenile justice standards, see UN Interagency Panel on Juvenile Justice, *Compendium of International Instruments Applicable to Juvenile Justice*, Lausanne, 2014, available at: www.eda.admin.ch/dam/Weltkongress%20zum%20Jugendstrafrecht/en/Tdh-Compendium-instruments-justice-juvenile_EN.pdf.

62 The Child Rights International Network maintains a database of States' minimum ages of criminal responsibility; for examples of MACRs in Muslim States, among others, see: https://archive.crin.org/en/home/ages/asia.html.

63 Jiddi al-Ṣādiq, "Mas'ūliyal al-Ṭifl al-Jazā'iyyah fī al-Sharī'ah al-Islāmiyyah wa al-Taqnīn al-Jazā'irī wa al-Lībī", *Dirāsat Qānūniyah*, No. 13, undated, pp. 174–175.

64 Iran, Islamic Penal Code, 20 November 1991, available at: www.refworld.org/docid/518a19404.html.

https://doi.org/10.1017/S1816383119000560 Published online by Cambridge University Press

according to calendar calculations). To be clear, however, if it is decided by Muslim jurists or military, health or psychology experts that raising the threshold of the minimum age of recruitment from 15 is necessary because children are physically and mentally unprepared for the risks inherent in joining armed forces, then there is nothing in Islamic law that would prevent this change. This is because the rationale for raising this age limit is the same rationale that was used for the rejection of ibn ʻUmar's participation in hostilities at the battle of Uḥud when he was aged 14. It is also worth pointing out here that classical Muslim jurists agree that the applicability of a ruling depends on the existence of its *raison d'être*, as expressed in the famous Islamic legal maxim: *al-ḥukm yadūr maʻ al-ʻillah*[65] (the ruling evolves with its effective cause).

The diversity of Islamic rules and (sometimes daunting, yet rich) details pertaining to questions of age can be confusing to non-specialists when it comes to applying these rules on the ground. Such diverse Islamic legal rulings are the product of Muslim jurists' attempts to regulate their distinct contexts in accordance with Islamic values, using Islamic legal tools and methodologies. Ultimately, Muslim authorities, including those that are State and non-State parties to a conflict, can choose more protective interpretations in cases of the existence of conflicting rules, and can do this through domestic codification and accession to international treaties.

Children deprived of their liberty

The deprivation of liberty (or "detention") of children, including Muslim children, in situations of armed conflict is a feature of numerous contemporary conflicts.[66] In 2018 and 2019, reacting in particular to children deprived of their liberty as conflicts raged in Syria and Iraq, the UN Security Council, the UN Secretary-General and the UN Global Study on Children Deprived of their Liberty emphasized the need to uphold international standards governing the treatment of children detained in the context of armed conflicts, highlighting the particular vulnerability of children associated with groups designated as "terrorist".[67] This section deals with the content of these standards under IHL and Islamic law.

Under IHL, children may be detained for reasons related to an armed conflict either on account of their own conduct or status,[68] or because members

65 See, for example, ʻAbd al-Karīm Zīdān, *Al-Wajīz fī Uṣūl al-Fiqh*, 5th ed., Mu'assasah al-Risālah, Beirut, 1996, pp. 201–204; ʻAbd al-Wahhāb Khallāf, *ʻIlm Uṣūl al-Fiqh*, Dār al-Ḥadīth, Cairo, 2003, pp. 71–75.

66 Regarding the detention of children for alleged or actual affiliation with armed groups in Iraq, Syria, Nigeria and Somalia, see Secretary-General's Report, above note 1, paras 12–13. See also Global Study Report, above note 60, para. 68.

67 UNSC Res. 2427, 9 July 2018, paras 19–20; Secretary-General's Report, above note 1, paras 12–13; Global Study Report, above note 60, paras 68–71, 73, 132–143. The ICRC has also raised concerns regarding the treatment of children in the foreign fighter context in Iraq and Syria: see the sub-chapter on the status and protection of foreign fighters and their families in ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2019, p. 51, available at: https://rcrcconference.org/app/uploads/2019/10/33IC-IHL-Challenges-report_EN.pdf.

68 Aside from criminal grounds for the deprivation of liberty, in exceptional circumstances, GC IV allows States Parties to deprive certain persons of their liberty for imperative reasons of security (Art. 78,

https://doi.org/10.1017/S1816383119000560 Published online by Cambridge University Press

of their family are detained.[69] In addition to the key protections that IHL provides to any person deprived of their liberty, specific rules are in place to protect children in this particularly vulnerable situation. First, whether interned in international or non-international armed conflict, children must be lodged in quarters separate from those of adults, except where families are accommodated together.[70] Second, they are entitled to tailored age-appropriate treatment when interned: in situations of IAC or occupation, Geneva Convention IV (GC IV) provides as a general rule that "proper regard shall be paid to the special treatment due to minors";[71] more specifically, that interned children must continue to have access to education, as well as to special playgrounds for sport and outdoor games;[72] and that internees under the age of 15 years are entitled to additional food in proportion to their physiological needs.[73] In situations of NIAC, the requirement of humane treatment established in Article 3 common to the four Geneva Conventions requires a context-specific assessment of the concrete circumstances of the internee which includes their age,[74] and Article 4(3)(d) of AP II confirms that children under the age of 15 who have fought with armed groups continue to benefit from special care and aid when captured. Finally, rules of IHL applicable in both international and non-international armed conflict provide that the death penalty may not be carried out, or pronounced, on persons who were under 18 at the time of the offence.[75]

To examine the rules on the detention of children under the Islamic law of armed conflict, it is useful to borrow the classical caliphate paradigm in which all Muslims were united under the rule of one government. This paradigm divides our discussion into two sets of different Islamic rules applicable to the detention of children in cases of international and non-international armed conflicts: the treatment upon capture of non-Muslim children (in the equivalent of IACs), and the treatment of Muslim children (in the equivalent of NIACs). Under this classical paradigm, an IAC was a conflict between Muslims and non-Muslims. In these conflicts, captured women and children of the defeated party to the conflict were enslaved or exchanged for prisoners of war (PoWs). It is critical to emphasize that this paradigm has arisen from events taking place in the seventh

applicable to persons in occupied territories) or if the security of the Detaining Power deems it "absolutely necessary" (Art. 42, applicable to aliens in the territory of a party to the conflict). On detention outside a criminal process in NIAC under Article 3 common to the four Geneva Conventions, see ICRC, *Commentary on the First Geneva Convention*, Cambridge University Press, Cambridge, 2016 (ICRC Commentary on GC I), paras 717–728.

69 For example, Article 82(2) of GC IV permits internees to "request that their children who are left at liberty without parental care" be interned with them, and Article 89(5) foresees the possibility that a mother may be interned with children she is nursing.

70 ICRC Customary Law Study, above note 18, Rule 120. See also GC IV, Art. 82(2); AP I, Art. 77(4–5).

71 GC IV, Art. 76.

72 *Ibid.*, Art. 94(2–3). GC IV also encourages parties to conflicts to conclude agreements for the release, repatriation or return to places of residence or accommodation in a neutral country of certain categories of internees, including children (Art. 132(2)).

73 *Ibid.*, Art. 89(5).

74 ICRC Commentary on GC I, above note 68, para. 553.

75 GC IV, Art. 68(4); AP I, Art. 77(5); AP II, Art. 6(4).

https://doi.org/10.1017/S1816383119000560 Published online by Cambridge University Press

and eighth centuries, so while enslavement may not have been prohibited in international relations at the time, the consensus among Islamic scholars today is unequivocally that such practice in conflict is abhorrent; this view is held by all except a minority of Islamic armed groups. With this disclaimer, what can be observed is that the capture of non-Muslim children was nevertheless governed by certain rules.

In such contexts, non-Muslim "enemy" women and children were not kept in the contemporary equivalent of camps: they were integrated into society as slaves living under Muslim rule. This is because the PoW status only applied to male adult combatants; women and children were not to be interned by the Muslim detaining power. Until they could be integrated into society, certain standards can be discerned for the treatment of these women and children: members of the same family could not be separated (as discussed below),[76] and humane treatment was required to be provided to all detainees. On this latter point, the treatment provided to PoWs in the Battle of Badr in March 624 AD forms the basis of the Islamic rules on the treatment of persons deprived of their liberty in the context of armed conflict (PoWs or others). These rules include that detainees must be provided with shelter, food, water and clothing if need be, on the basis that they must be protected from heat, cold, hunger and thirst; and that they must be protected from any kind of inhumane treatment[77] or torture aimed at obtaining military information about the enemy, as indicated by Imām Mālik (d. 795). Historical and more recent examples illustrate respect for this standard of humane treatment: when the Muslim leader Ṣalāḥ al-Dīn al-Ayyūbī (d. 1193) was unable to feed the large number of detainees who had fallen under his control when he reclaimed Al-Aqsā Mosque, he chose to release them rather than leave them unfed.[78] Likewise, Troy S. Thomas, a retired US Air Force colonel, pointed out that "[a]s evidenced by the treatment of Taliban POWs at the prison in Mazar-i-Sharif, Muslim commanders have proven willing to free prisoners when they could no longer provide for their basic care".[79] Accordingly, while these standards of humane treatment in the Islamic law of war were developed for adult male PoWs, on the basis that the treatment of children must be at least as favourable as that afforded to adults, the basic needs of all non-Muslim children must be met if they are captured in armed conflict.

As stated above, however, the ancient practice was to enslave non-Muslim children, and this involved integration into Muslim society. This practice led classical Muslim jurists of the time to develop sets of rules addressing the religion

76 See ʻAbd al-Ghanī Maḥmūd, *Ḥimāyat Ḍaḥāyā al-Nizāʻāt al-Musallaḥah fī al-Qānūn al-Dawlī al-Insānī wa al-Sharīʻah al-Islāmiyyah*, ICRC, Cairo, 2000, p. 39; Zayd ibn ʻAbd al-Karīm al-Zayd, *Muqaddimah fī al-Qānūn al-Dawlī al-Insānī fī al-Islām*, ICRC, 2004, pp. 39, 77.

77 See, for example, Troy S. Thomas, "Jihad's Captives: Prisoners of War in Islam", *U.S. Air Force Academy Journal of Legal Studies*, Vol. 12, 2003, p. 95.

78 Dalīlah Mubārikī, "Ḍawābiṭ al-ʻAlāqāt al-Dawliyyah fī al-Islām Zaman al-Ḥarb", *Majallah Kulliyyat al-ʻUlūm*, 4th year, 9th ed., 2004, p. 206.

79 T. S. Thomas, above note 77, p. 95. Thomas also served in the White House from 2013 to 2017 on the National Security Council as special assistant to the president for national security affairs, senior director for defence policy, and director for strategic planning.

https://doi.org/10.1017/S1816383119000560 Published online by Cambridge University Press

of these children. If children were separated from their parents, such as in the case of dead or missing parents, they were to be raised as Muslims. But if children were in the company of one or both of their parents, then with the exception of the jurist al-Awzāʿī (d. 774), the majority of classical Muslim jurists agreed that they should retain the religion of their parents.[80] This indicates a concern for the children's right to religion, and respect for the role of their parents in this regard. It is similar to the stipulation in AP II that children shall receive an education, including religious and moral education, in keeping with the wishes of their parents.[81] For our interpretive purposes, and with acknowledgement that the premise of integrating enslaved children into society is a non-starter, respect for the maintenance of a child's religious identity is of relevance for children in the power of an enemy force in conflicts today.

By contrast with these classical Islamic rules on the treatment of captured non-Muslim children (i.e., in the Islamic law equivalent of IAC), the Islamic rules on non-international (i.e., intra-Muslim) armed conflict are significant here because among the ten most salient rules that distinguish these NIAC rules from IAC rules are: (1) Muslim women and children cannot be enslaved; and (2) after the cessation of hostilities, captured rebels must be released.[82] This means that in theory, according to classical Islamic law, Muslim children cannot be detained for reasons related to armed conflict.[83] But in any case, in line with the general Islamic law rules requiring the humane treatment of detainees and the special protection provided to non-Muslim children in the event of armed conflict, *a fortiori*, Muslim children who are detained for reasons related to an armed conflict would be required to receive at least the same humane treatment in detention as their non-Muslim counterparts.

This exploration reveals clear divergences as well as certain areas of accord. The IHL and Islamic law of armed conflict rules evidently differ considerably on the issue of children deprived of their liberty: IHL considers this circumstance expressly and without adverse distinction based on religion, unlike the Islamic legal sources discussed above, which instead – and with a necessary reminder that these sources date from the seventh and eighth centuries – address the enslavement of non-Muslim children following capture in armed conflict, and do not foresee the detention of Muslim children. Certain similarities can nevertheless arguably be discerned by analogy to the Islamic law of armed conflict rules governing the

80 Muwaffaq al-Dīn ʿAbd Allah ibn Aḥmad ibn Qudāmah, *Al-Mughnī: fī Fiqh al-Imām Aḥmad Ibn Ḥanbal al-Shaybānī*, Vol. 9, Dār al-Fikr, Beirut, 1984, p. 215; Sobhi Mahmassani, "The Principles of International Law in the Light of Islamic Doctrine", *Recueil des Cours*, Vol. 117, 1966, p. 306.

81 AP II, Art. 4(3)(a). See also Articles 14(1) and 14(2) of the CRC on the child's right to freedom of religion and respect for the rights and duties of parents and legal guardians in the child's exercise of that right.

82 Though some argue that they should be released when they no longer have *shawkah* (organized force) – i.e., when they do not constitute a danger.

83 See, for example, Muḥammad ibn Idrīs al-Shāfiʿī, *Al-Umm*, 2nd ed., Vol. 4, Dār al-Maʿrifah, Beirut, 1973, p. 218; Muwaffaq al-Dīn ʿAbd Allah ibn Aḥmad ibn Qudāmah, ʿ*Umdah al-Fiqh*, ed. ʿAbd Allah Safar al-ʿAbdalī and Muḥammad Dughaylib al-ʿUtaybī, Maktabah al-Ṭarafayn, Taif, undated, p. 149; Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law*, Cambridge University Press, Cambridge, 2006, pp. 152, 160; A. Al-Dawoody, above note 29, pp. 163–167.

https://doi.org/10.1017/S1816383119000560 Published online by Cambridge University Press

treatment of captured adult male combatants – these require that detainees must be provided with shelter, food, water and clothing, and prohibit inhumane treatment and torture.[84] Given that these Islamic law rules apply to adult male detainees, they would also apply – at a minimum – to any children detained in the context of armed conflict. Additional areas of similarity with IHL are the obligations to respect parents' wishes with regard to a child's religion, and the principle of non-separation of families, which the Islamic law of armed conflict articulates regarding captured non-Muslim children (discussed below). With these diverging and converging areas loosely identified, it is clear that there is room for discussion on specific issues including, though not limited to, whether and how the humane treatment standards set out by the Islamic law of armed conflict for captured adult male combatants could be tailored more specifically to the treatment of both Muslim and non-Muslim children who are deprived of their liberty for reasons related to an armed conflict.

Access to education

IHL contains a family of rules which aim to ensure that in situations of international and non-international armed conflict, education can continue and students, educational personnel and educational facilities are protected.[85] In situations of IAC, the Geneva Conventions and AP I specifically address the need to facilitate access to education in the following situations: for all children under 15 orphaned or separated as a result of war;[86] for civilian internees, notably children and young people;[87] in situations of occupation;[88] in circumstances involving the evacuation of children;[89] and for any person who is a PoW.[90] In NIAC, AP II requires that children must receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care.[91] Indeed, State practice indicates the inclusion of access to education in the special respect and protection to which children are entitled under customary law.[92]

The Islamic law sources consulted for this article emphasize the general importance placed on education, and reveal one example specific to armed conflict. In a general sense, Islamic scriptural sources as well as international Islamic conventions and declarations put great emphasis on the importance of education. The Prophet Muhammad is reported to have said that seeking

84 A. Al-Dawoody, above note 29, pp. 136–141.
85 For further detail on the protection of education by rules of IHL, see the sub-chapter on access to education in ICRC, above note 67, pp. 36–39.
86 GC IV, Arts 13, 24.
87 *Ibid.*, Arts 94, 108, 142.
88 *Ibid.*, Art. 50.
89 AP I, Art. 78.
90 Geneva Convention III, Arts 38, 72, 125.
91 AP II, Art. 4(3)(a).
92 ICRC Customary Law Study, above note 18, Commentary on Rule 135.

https://doi.org/10.1017/S1816383119000560 Published online by Cambridge University Press

knowledge is an obligation on every Muslim, male and female.[93] In 1990, the Cairo Declaration on Human Rights in Islam established the provision of education as a duty for society and the State in Article 9. Other instruments also establish the right of children to receive an education: Article 12 of the 2005 Covenant on the Rights of the Child in Islam reaffirms the OIC States Parties' commitment to the provision of "compulsory, free primary education for all children on equal footing"; and Article 2(4) makes it clear that one of its objectives is

> to provide free, compulsory primary and secondary education for all children irrespective of gender, color, nationality, religion, birth, or any other consideration, to develop education through enhancement of school curricula, training of teachers, and providing opportunities for vocational training.

In the same vein, the 2005 Rabat Declaration calls upon the member States of the OIC, in Articles 15 and 17, to double their efforts to ensure the provision of quality education, and reaffirms in Article 16 the commitment to achieving gender equality in education.

A prime example, and perhaps the earliest example in Islamic history, that shows the importance of education specifically in the event of armed conflict is that Prophet Muhammad set free a number of the seventy prisoners of war taken at the Battle of Badr in March 624 AD in exchange for teaching ten Muslim children to read and write. Thus, while the rules of IHL are more specific in their requirements that the education of children be protected from disruption in situations of armed conflict, it is clear that the importance of a child's access to education is a notion shared by both legal traditions. On this basis, there is room for further discussion among IHL and Islamic scholars regarding how the protection of education in armed conflict is articulated in Islamic scholarship.

Beyond the IHL rules specifically addressing access to education, and of central importance to the protection of education in armed conflict, students, education providers, schools and other education facilities are also protected as civilians and civilian objects under IHL.[94] This means that they cannot be directly targeted unless and for such time as they directly participate in hostilities (for civilians)[95] or become a military objective (for civilian objects).[96] Even in the event that students, teachers, schools or other educational facilities do become military targets, all feasible precautions must be taken to avoid or, at minimum, minimize incidental harm to civilian students and educational personnel and

93 Hadith 224, in Muḥammad ibn Yazīd ibn Mājah, *Sunan Ibn Mājah*, ed. Muḥammad Fū'ād 'Abd al-Bāqī, Vol. 1, Dār Iḥyā' al-Kutub al-'Arabiyyah, Cairo, undated, p. 81.

94 Accordingly, they benefit from the general protection that IHL extends to civilians and civilian objects, as laid out in a number of treaty and customary law provisions: Common Art. 3 to the Geneva Conventions; AP I, Arts 48, 49 50, 52, 53, 57, 58; AP II, Arts 4, 13, 16; 1954 Hague Convention and 1999 Second Protocol; ICRC Customary Law Study, above note 18, Rules 1–24, and see also Rules 38, 40.

95 AP I, Art. 51; ICRC Customary Law Study, above note 18, Rule 6. See also Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009.

96 AP I, Art. 52; ICRC Customary Law Study, above note 18, Rule 10.

https://doi.org/10.1017/S1816383119000560 Published online by Cambridge University Press

facilities, and attacks expected to cause excessive incidental harm are prohibited.[97] Finally, parties to an armed conflict have obligations to take all feasible precautions to protect the civilian population (including students and teachers) and civilian objects under their control (such as schools) *against* the effects of attack.[98] This obligation must be taken into account if a party to the conflict is considering using a school building for military purposes.

Similarly, under the Islamic law of armed conflict, whether in situations of international or non-international armed conflict, civilians and civilian objects cannot be deliberately harmed or damaged. While the Islamic law of armed conflict does not protect "schools" by name (indeed, at the time these rules were established, education was not delivered via the modern school system in place today), as civilian objects, education facilities are nevertheless protected by the detailed rules developed by classical Muslim jurists to ensure the protection of civilian persons and civilian objects in the context of the wars of the seventh and eighth centuries. The renowned jurist al-Awzāʿī (d. 774) not only prohibited deliberate attacks on civilian objects of the non-Muslim enemy during the course of hostilities, but also argued that such an act shares one of the core elements of the crime of terrorism under Islamic law (*ḥirābah*). He pointed out that *takhrīb* (deliberate/excessive destruction) of enemy property constituted *fasād* (destruction, damage), which is a Qur'anic figurative description of one of the core elements of the crime of terrorism under Islamic law. An explanation of the Islamic worldview helps here in understanding the gravity of this crime: since everything in this world belongs to God, and human beings – as His successors on Earth – are entrusted with the responsibility of ʿ*imārah al-ʿārḍ* (contributing to human civilization), accordingly, attacks on civilian objects in the course of hostilities are prohibited on Islamic legal grounds. In sum, IHL and Islamic law bear a fundamental similarity in that both protect civilian objects, such as schools and other educational facilities, from attack.

Children separated from their families

When a child is separated from their family in a situation of armed conflict, IHL contains rules that seek both to ensure that the child's needs are met while they are separated, and to re-establish contact and ultimately achieve the reunification of family members when possible. In IACs, among other relevant obligations, parties must ensure that children under the age of 15 who are orphaned or separated from their families as a result of the war "are not left to their own resources and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances".[99] This requires parties to take measures related to, *inter alia*, the child's food, clothing, accommodation and

97 AP I, Arts 51, 57; ICRC Customary Law Study, above note 18, Rules 14–21. See also Rome Statute of the International Criminal Court, 1998, Arts 8(2)(b)(ix), 8(2)(e)(iv).

98 AP I, Art. 58; ICRC Customary Law Study, above note 18, Rules 22–24.

99 GC IV, Art. 24(1).

https://doi.org/10.1017/S1816383119000560 Published online by Cambridge University Press

medical needs.[100] Beyond these provisions related to child welfare, Article 26 of the GC IV and Article 74 of AP I provide for steps to be taken to facilitate the reunion of families separated in armed conflict.[101] In NIACs, AP II specifies that "all appropriate steps shall be taken to facilitate the reunion of families temporarily separated".[102] More generally, it is a rule of customary IHL that family life must be respected as far as possible,[103] and this requires, to the degree possible, the maintenance of family unity, contact between family members and the provision of information on the whereabouts of family members.[104]

Islamic sources make it abundantly clear that it is the obligation of the parents, the State and Muslim society at large to take care of children and provide for their basic needs. Two sets of rules illustrate this. First, the notion of the maintenance of family unity present in IHL rules[105] is similarly reflected in Islamic sources: classical Muslim jurists affirmed the importance of keeping children with their parents, as well as, more generally, with members of the same family. Abū Ayyūb al-Anṣāri (d. 674), born in Medina in Saudi Arabia and buried in Istanbul, reported that he heard Prophet Muhammad saying: "Whoever separates between a mother and her children, God will separate between them and their loved ones on the day of Judgment."[106] More specifically, classical Muslim jurists are unanimous that, during captivity of male PoWs or enslavement of women, members of the same family must not be separated: these jurists prohibited the separation of children from their parents, grandparents or siblings, and some also prohibited their separation from other members of the extended family.[107] Both bodies of law therefore contain a duty for belligerents to avoid, as far as possible, separating members of a family in their power. In addition, IHL contains the stipulation that parties to conflict must take steps

100 Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, Vol. 4: *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, Commentary on Art. 24 (1), p. 187.

101 For other rules relevant to the maintenance and restoring of family links, see GC IV, Arts 25, 49(3), 50, 82 (2); AP I, Arts 75(5), 78.

102 AP II, Arts 4(3), 4(3)(b).

103 ICRC Customary Law Study, above note 18, Rule 105.

104 *Ibid.*, Commentary on Rule 105.

105 In addition to the provisions regarding the facilitation of the reunion of dispersed families, see GC IV, Arts 49(3), 82(2–3), and AP I, Art. 75(5), regarding the duty to avoid, as far as possible, the separation of family members.

106 Hadith 1566, in Muḥammad ibn ʻIsā Al-Tirmidhi, *Sunan Al-Tirmidhi, wa huwa Al-Jāmiʻ al-Ṣaḥiḥ*, Vol. 4, Maṭbaʻah al-Ḥalabī, Cairo, 1962, p. 134.

107 See, for example, Muḥammad ibn Abī Bakr ibn Qayyim al-Jawziyyah, *Jāmiʻ al-Fiqh*, ed. Yusrī al-Sayyid Muḥammad, Vol. 4, Dār al-Wafā', Al-Manṣūrah, 2000, p. 70; Z. ibn ʻAbd al-Karīm Al-Zayd, above note 76, pp. 39–40, 77; Muḥammad Ḥammīdullāh, *Muslim Conduct of State: Being a Treatise on Siyar, That Is, Islamic Notion of Public International Law, Consisting of the Laws of Peace, War and Neutrality, together with Precedents from Orthodox Practice and Preceded by a Historical and General Introduction*, rev. & enl. 5th ed., Sh. Muhammad Ashraf, Lahore, 1968, p. 215; Troy S. Thomas, "Prisoners of War in Islam: A Legal Inquiry", *The Muslim World*, Vol. 87, No. 1, 1997, p. 50; T. S. Thomas, above note 77, p. 95; Saleem Marsoof, "Islam and International Humanitarian Law", *Sri Lanka Journal of International Law*, Vol. 15, 2003, p. 26; C. G. Weeramantry, *Islamic Jurisprudence: An International Perspective*, Macmillan, Basingstoke, 1988, p. 135.

https://doi.org/10.1017/S1816383119000560 Published online by Cambridge University Press

to reunify families temporarily separated, and this area would benefit from further exchange between scholars from both legal traditions.

Second, the various obligations contained in IHL regulating the care of unaccompanied children find harmony in the Islamic legal tradition's framework governing the care of children, albeit without the specificity of application in armed conflict. According to Islamic law, there is a certain framework of financial rights and obligations of family members whereby children must be taken care of. But in addition to this, and in the absence of such family members, Islamic law affirms the State's obligation, and that of society at large, to take care of children; because of their even greater vulnerability, orphaned children receive a special status of protection, respect and care. Indeed, from a moral pre-Islamic Arab tradition (which was incorporated into the Islamic legal tradition), giving refuge and protection to the oppressed, the vulnerable and those who seek it is an obligation incumbent on Muslims, and this is relevant in cases where a party to a conflict finds an unaccompanied child in its power.[108] In short, both IHL and Islamic law affirm the obligation of the State to provide for the care of unaccompanied children, though IHL does so specifically in situations of armed conflict while Islamic law does so in more general terms.

Conclusion

The present discussion is an illustration of two distinct legal systems, each with its own sources, history and contexts, yet both sharing the same humanitarian imperative to protect children suffering in war. Both IHL and Islamic law begin from the point that children must be explicitly singled out for protection from the effects of armed conflict. Both provide that the age of 15 – at the very minimum – is the earliest at which a child can be recruited to armed forces; both establish a requirement of humane treatment for individuals detained in armed conflict; both reflect the notion of the importance of a child's access to education (albeit not specifically in situations of armed conflict in the Islamic legal sources consulted for this article); and both require the avoidance, as far as possible, of separation of family members in situations of armed conflict. There is ample room for further discussion – avenues of further work could include, for example, whether and how the humane treatment standards set out by the Islamic law of armed conflict for captured adult male combatants could be tailored more specifically to the treatment of both Muslim and non-Muslim children who are deprived of their liberty for reasons related to an armed conflict; and how Islamic law might complement IHL's specific obligations as to the protection of education, the facilitation of the reunification of families temporarily separated,

108 See, for example, Ghassan Maârouf Arnaout, *Asylum in the Arab-Islamic Tradition*, Office of the UN High Commissioner for Refugees (UNHCR), Geneva, 1987; Ahmed Abou-El-Wafa, *The Right to Asylum between the Islamic Shari'ah and International Refugee Law: A Comparative Study*, UNHCR, Riyadh, 2009, available at: www.unhcr.org/4a9645646.pdf.

https://doi.org/10.1017/S1816383119000560 Published online by Cambridge University Press

and the care of unaccompanied children in situations of armed conflict. While reflecting on these synergies and avenues for further work, we also must emphasize that obligations in IHL are not "optional" – parties to armed conflict are at all times legally bound by the applicable IHL.

The foregoing discussion is an effort to provide a point of departure for future work and more detailed discussion between scholars and practitioners in the fields of IHL and Islamic law. At times, we have reached for simplicity and have made analogies in the name of distilling some clarity from this comparative exercise. Due to the usual constraints of time and resources, we are conscious that we have dealt in stark brevity with subjects that affect the lives of thousands of children every day. We are also cognizant that the content of the norms discussed here represents a certain interpretation of IHL, and a certain interpretation of the Islamic law of armed conflict – there are of course many others. We nevertheless aim for this exercise to feed further discussion, and we look to the views and expertise of others on this subject of pressing practical import. This dialogue can serve to disseminate key protective norms – both IHL and Islamic law are quite specialized, technical fields of expertise, so awareness-raising exercises are just as crucial as substantive debate over their content. This dialogue also bears the potential to influence the development and clarification of both IHL and Islamic law, both of which have long adapted to changing contexts on modern battlefields; Islamic law, unlike Islamic theology, is flexible in many of its rules and responds to changing realities and contexts. It also has great impact on the daily lives of hundreds of millions of Muslims, and can therefore contribute alongside IHL to the alleviation of the suffering of victims of armed conflicts.

https://doi.org/10.1017/S1816383119000560 Published online by Cambridge University Press