DISCHARGING THE OBLIGATION:

Muslim Captives and the Principle of Sufficiency in a Globalised World

Asim Qureshi

||| CAGE INTERNATIONAL

||| CAGE INTERNATIONAL

CAGE International is an independent advocacy organisation that aspires to a just world. We challenge War on Terror inspired state oppression and empower communities to dismantle the discourses and policies of the global War on Terror.

Premier Business Centre
47-49 Park Royal Road
London NW10 7LQ
United Kingdom

Helpline: 03000302243
Office: 020 7377 6700
General email: contact@cage.ngo
Media enquiries: press@cage.ngo

CONTENTS

INTRODUCTION

Modernity, the rise of carceral states and the extent of mass incarceration across the world has brought into sharp focus the need for a revisiting of Islamic ethics on carceral practices and ultimately to provide solutions that do not replicate the modern-day long-term warehousing of human beings. Just a cursory look at the situation of prisoners in the U.S. alone should signal how broken systems of imprisonment are, as supermax facilities such as Angola State Prison host modern day gladiatorial contests for the sake of public spectacle and pleasure.[1]

My intention was to write something on political prisoners to understand how a Qur'an-centred ethic might provide solutions to their plight, but this became increasingly complicated the more I attempted to think through the contours of contemporary detention phenomena in light of a classical tradition. The very notion of 'political' is complicated by the way we conceive of those who are subject to a system and structure that encourages their detention. Thus, could the over-criminalisation of black people in the West be considered political as increasing evidence points to their over-targeting compared to other communities for common crimes – many would suggest that such detentions are political due to the structure that sees them as a specific target of criminalisation.[2]

During the late 60s and 70s, the Black Panthers claimed that black people were living under the occupation of the police force as a colony within the U.S.; that discrimination and police brutality in their everyday being was tantamount to being under the same logic of a foreign occupying power. Thus, taking up arms, they chose to train and defend themselves against such excesses, making the claim on arrest, that they were political prisoners.[3] To what extent has there been a continuity from that period to our contemporary moment? Not just a continuity, but a global expansion as states such as the United Arab Emirates and Egypt build supermax prison facilities on the structure of the U.S.-carceral state, with the specific goal of housing detainees they deem to be politically seditious – often a euphemism for those who criticize the state for its oppressive practices.

While Muslims have a duty to provide guidance and respond to the world they live in, regardless of whether it impacts Muslims or not, for the purposes of this article, I want to focus explicitly on thinking through the duty owed to Muslim prisoners – and in particular Muslim political prisoners. There will be a need to expand this article to think about the boundaries of what 'political' means, even for everyday criminal acts, but for the purposes of starting a conversation, I want to focus explicitly on those who are considered prisoners of war, and those who have been detained by states (both Muslim majority and not) for overtly 'political' reasons. Further work will be required to understand what classical punitive carceral measures might look like, as a cursory reading of traditional understandings of incarceration suggest that there is little concept of long-term detention within Islam, rather briefer periods of detention within a panoply of measures that include ta'zir punishments as well as those ordained in the Qur'an Sunnah as hudud. This is all refracted through a lens of justice in Islam that places very high burdens of evidence on criminal acts, choosing instead to suggest an ethic of compassion over criminalisation where possible – particularly in the most severe cases through the maxim: "Avoid imposing criminal sanctions in cases of doubt," as highlighted in the work of the American scholar Intissar Rabb.[4]

I want to focus on three areas: 1. The notion of who a prisoner of war/political prisoner is within a Qur'anic and Prophetic conception of freeing captives; 2. To understand the collective obligation (fard al-kifaya) the global Muslim umma owes to such prisoners – is their detention something that carries weight collectively for the akhira of the believers; and finally 3. To reassess our understanding of who that weight of the obligation might come on first through thinking through modernity and globalization.

AL-ASIR AND AL-ʻANI

The Qur'an uses the word asir (أسير) to denote those who are under captivity, particularly in relation to war. The HdO Arabic-English Dictionary of Qur'anic Usage provides the iterations of the Arabic root a-s-r as appearing in five different forms six times in the Qur'an. This use includes the uses of the words ta'sir and asir – both of which convey the meaning of captive (or in modern parlance: prisoner of war).[4] While the Qur'anic verses relate to the asir as being those in the custody of Muslims – especially the verses relating to the aftermath of the Battle of Badr, the way that asir has been used in contemporary times has often been in the context of Muslim prisoners being held in captivity by a non-Muslim force. In Bukhari's Sahih collection, in the Chapter on Freeing the Captive (bab fakak al-asir), a hadith of the Prophet Muhammad ﷺ mentions two words in relation to freeing prisoners: al-ʻani and al-asir:

فُكُّوا الْعَانِيَ ـ يَعْنِي الأَسِيرَ ـ وَأَطْعِمُوا الْجَائِعَ وَعُودُوا الْمَرِيضَ
*"Free the captives, feed the hungry and pay
a visit to the sick."* [6]

The word fakk operates before the words al-ʻani or al-asir as an imperative – a command to the believers to free captives. Fakk operates in relation to bondage, so considers that those under a prisoner of war status as being those that require freedom, which may or may not come through the payment of a ransom or a prisoner exchange. There appears to be multiple meanings that can be extracted from fakk as the notion of captivity and bondage straddles both the taking of slaves as well as being held in captivity as a prisoner of war - the Qur'an does not appear to make an explicit distinction between these positions - thus opening itself to multiple interpretations.

Arguing on the use of terminology in modern carceral contexts, Ayah Kutmah captures the ways that political prisoners are understood in the Arab world:

> *The Arabic language is very precise. The vocabulary used to define the English catch-all of "prisoner" is broken down to differentiate detainee, "معتقل/ة," prisoner, "سجين/ة," both often with the additive "political," "سياسي/ة," and captive " أسير/ة." Captivity, أسر, refers to the capture of prisoners of war and is an explicit term for prisoners taken by a foreign power or in a colonial context. By definition and linguistic conventions, Palestinian prisoners taken by the Israeli military occupation are referred to as captives, asra, "أسرى," whereas Arab prisoners imprisoned by their own regimes are deemed political prisoners and detainees.[7]*

In contemporary times, prisoner of war status is largely dictated by the Geneva Conventions - providing international standards by which the detention of those held captive should be treated - completely removing any notion of bondage through slavery. Captivity in detention camps such as those in Guantanamo Bay do not comply with the Geneva Conventions, but can be understood within the general notion of captivity through conflict. A foreign non-Muslim force, in this case the U.S., is holding Muslim prisoners in captivity, thus evoking the imperative that they should be released. However, what does the imperative look like when there is no central Muslim authority

to make representations on the behalf of captives, and that ransoms are no longer accepted as a currency of transfer? This complicates the categories of al-asir and al-'ani. There is one other category that could help to conceptualize who is considered a Muslim captive, that of riqab.

AL-RIQAB

The root r-q-b appears in the Qur'an with the following translations based on seven forms that occur twenty-four times:

> *neck, responsibility; slave, war prisoner; an elevated place, a watching post, to watch, to guard, to regard; to stand in awe of, to show deference, to pay attention to someone.*

There are a range of ways the r-q-b formulation is used by Allah in the Qur'an – but for the purposes of conceptualizing those in captivity, I want to focus on the word riqab – which while translating literally as 'necks' carries the meaning of those being held in slavery. I contacted Professor Muhammad Abdel Haleem about his use of war prisoners as a translation for the riqab and he was generous enough to provide the following explanation:

> *The term 'war prisoner(s)' is modern but it comes under the Arabic/Islamic terminology riqab, the plural of raqaba.*
> *In the Qur'an you can find fakk raqaba/tahrir raqaba.*

The translation and approach taken by Abdel Haleem finds some support within the first 120 years after hijra in the work of al-Zuhri, who used riqab in a wider meaning to also include prisoners of war– a position that was reiterated by Ibn Atiyya later as when citing al-Zuhri. Ibn Qudama also held this view. Rashid Rida attempted to provide a wider meaning still, explaining that all those under the structure of colonialism could be seen as riqab as the word meant freeing them from the oppression of a colonial structure. This was taken even further by Mahmud Shaltut who argued that anyone who was conceptually enslaved to other people's ideas, wealth and authority, could be considered riqab. The positions of Rida and Shaltut were rejected by the late Shaykh Yusuf al-Qaradawi – who argued that this made the meaning of riqab too expansive.

A quantitative study conducted in Malaysia among university educated students looking at the categorization of riqab in contemporary times suggested that they weighed more heavily in understanding that those imprisoned as a prisoner of war or by an oppressive ruler should be assisted by attempting to pay their ransom, by working to free them, and to support their families. This contextual understanding of riqab has implications, because it opens itself to the freeing of prisoners becoming a category of the zakat – that the money collected and distributed by the bayt-al-mal should consider imprisoned captives as part of its dispensations. This is perhaps where more scholarly work needs to be conducted in order to develop a more unified understanding of how the category of riqab can be understood in these contemporary times. When I had the chance to speak to the Sudanese scholar Jafar Shaykh Idris on this issue and the use of the zakat for captives, he explained:

> *The basic position related to the giving of the zakat for the release of the prisoners, is that the effort should be made in order to gain their release. With the current context of Muslims prisoners around the world, the zakat can be used with any aspect of work related to freeing the prisoners. Of course there is no guarantee that the prisoner will be released, however the zakat money can go towards working towards that goal inshallah. There is nothing*

wrong with using the zakat money for the purposes of running an
NGO that has this specific role. Allahu A'lam.

In discussion with the Islamic scholar Dr Yusuf Shabbir, who has been researching the status of prisoners for over a decade, this position finds acceptability in the jurisprudence generally in the Hanbali school, and partially within the Maliki school. The Hanafis, Shafi'is, Zahiris and majority of the Malikis do not regard the use of zakat as permissible for the securing of prisoner release. It has been suggested that one way around this is for the family of the prisoner to expend their own financial resources for the securing of a prisoner's release, even coming into debt, then to come into a status where they are able to access the zakat for themselves.

When it comes to Muslim prisoners, whether they are categorized as al-asir, al-'ani or al-riqab, there appears to be a general trend in understanding its application towards those detained in war or those under political forms of detention. There are three categories of detention that then come immediately within the collective concern of Muslims globally:

1 A captive under the military detention of a foreign force or a foreign occupying force. This could include for instance Muslims being detained by a foreign force such as at Guantanamo Bay, or Muslims being detained under military detention in Occupied Palestine.

2 A captive in political detention by a non-Muslim government such as the U.S., UK, France and others. This would include cases of their own nationals such as Ali al-Tamimi, Sami al-Arian, and many others who have been forced to endure politically motivated prosecutions.

3 A captive in political detention by a Muslim majority country, whether they are a national or a foreign national. This might include countries such as Egypt, Tunisia, and Syria, as well as many others.

It is the last of the three categories that is perhaps the most contentious in relation to the categorizations of captives. Without resurrecting an analysis of the religious legitimacy of Muslim-majority governments – it is worthwhile attempting to understand the hostility these nation state governments have towards Muslims, and whether or not one can be understood to be a captive in a Muslim land, as understood within the Prophet's (saws) command to free to prisoner? Unlawful detention has been a regular feature of the lives of public figures who took dissenting views to a Muslim-majority state – the imams of the four madhhabs being the best example. What sort of prisoners were they, political, or another category? The reality is, that they were imprisoned due to their religion, and thus for reasons that were unjust – bringing in responsibility towards them – regardless of the legitimacy of the state. In a contemporary context, it is difficult to make the claim that modern Muslim-majority nation states represent the inheritors of the Caliphal authorities of the past, and so where does that leave those dissidents who are held by a secular state – albeit with the trappings of religious discourse. Ayah Kutmah's essay for the MENA Prison Forum captures well some of the difficulties in understanding different forms of detention dependent on the detaining power or carceral structure:

Such questions are inherently controversial for the potential danger they hold in flattening widely varying differences between a colonial context and an authoritarian one. That is to say that, falsely assuming both systems were created equal, it would merely become a competition of which prison system was "worse," a crude Olympics of pain, with no appreciable discussion of differing aims, structures, roles, or outcomes. It is an abuse exploited by many to compare "humane" colonial systems with "savage" dictatorial ones. Systems of different designs, playing distinct roles in their respective regimes, produce varied outcomes that do not lend themselves to easy comparisons.

Taking Kutmah's call to not flatten different contexts seriously, it is important that we apply a considered understanding to each jurisdictional issue, but from the standpoint of a Qur'anic ethics, as opposed to a liberal understanding of human rights – a form of rights that sanctify the solidity of a state above all other considerations – what Wael Hallaq refers to as the "enshrined state as the new god." In this regard, how do we understand the thousands of political detentions that took place under military control in Egypt after the massacre at Rabaa in 2013? How do we understand political detentions in Saudi Arabia? Can the Saudi state be considered a Muslim authority for Muslims, not just in Saudia Arabia, but across the Muslim world? Referring to the Salman regime as wali al-amr, as some religious scholars and authorities are liable to do, masks the historical understanding of such governance structures, but also the fundamental identity of contemporary nation states. Ultimately, it could be said that due to the fundmental injustice of these nation/client-states, there is little difference between political detentions in Guantanamo Bay or Saudi Arabia – the fundamental status of the prisoner does not change. These are contentions that require further answers, because the plight of political detentions is very real across the Muslim world, and to refuse to enter into a conversation about the status of those detentions through a Qur'anic lens, is to deny that the Qur'an has something relevant to say on our contemporary understanding of what captivity means. This is something that requires a great deal more scholarship, and scholarly consensus.

THE PRINCIPLE OF SUFFI-CIENCY – THE FARD AL-KIFAYA

While I had looked into the matter at the beginning of my work – now over twenty years ago – I decided to again revisit what it meant to discharge the obligation towards captives. However, before doing so, I believe it is important that we understand what it means to actually relieve the fard al-kifaya – a concept that is largely misunderstood. Although the there are many definitions, one of the most useful in the English language is provided by Dr Hashim Kamali in his book, Principles of Islamic Jurisprudence, where he states,

> *Wajib kafa'i consists of obligations that are addressed to the community as a whole. If only some members of the community perform them, the law is satisfied and the rest of the community is absolved of it. For example, the duty to participate in jihad (holy struggle), funeral prayers, the hisbah, (promotion of good and prevention of evil), building hospitals, extinguishing fires, giving testimony and serving as a judge, etc., are all collective obligations of the community, and are thus wajib (or fard) kafa'i. Thus when a person dies leaving no property to meet the cost of his burial, it is the wajib kafa'i of the community to provide it and to give him a decent burial. Only some members of the community may actually contribute toward the costs, but the duty is nevertheless discharged from the whole of the community. The merit (thawab), however, only attaches to those who have actually taken part in discharging the wajib kafa'i duty.*
>
> *The collective obligation sometimes changes into a personal obligation. This is, for example, the case with regard to jihad, which is a wajib kafa'i, although when the enemy attacks and besieges a locality it becomes the personal duty of every resident to defend it. Similarly, when there is only one mujtahid in a city, it becomes his personal duty to carry out ijtihad.*

The principle here is one of sufficiency. In order for the kifaya to be met, it has to be fulfilled/discharged by the community, even to the most minimum standard that is required. In the case of the funeral prayer, as long as a few people perform it, it has been completed. In jihad, once enough of the community repel an attack, then again it has been completed. However, and this matter has been widely commented on by the scholars of the four major Sunni schools, if the attack has not been repelled, then those neighbouring the area come under an individual duty to assist (fard al-'ayn), until the sufficiency needed to repel an attack has been reached.

This understanding of the kifaya is well formulated by the Hanafi jurist Ibn Abidin who explained the following in the context of jihad:

Jihad becomes fard al-'ayn if the enemy attacks one of the borders of the Muslims, and it becomes fard al-'ayn upon those close by. For those who are far away, it is fard al-kifaya, if their assistance is not required. If they are needed, perhaps because those nearby the

attack cannot resist the enemy, or are indolent and do not fight jihad, then it becomes fard al-'ayn upon those behind them, like the obligation to pray and fast. There is no room for them to leave it. If they too are unable, then it becomes fard al-'ayn upon those behind them, and so on in the same manner until the Jihad becomes fard al-'ayn upon the whole Ummah of Islam from the East to the West.

What then of the Muslim captives? To what extent are they owed a duty of care from the community, and at what point can we as a community claim that our obligations to them have been fulfilled?

OBLIGATION TO THE CAPTIVES

There are many statements from the Sunnah and the scholars of the past that highlight the importance of assisting Muslim prisoners. However, we first need to contextualize the environment in which that assistance is given, particularly in relation to the modern crisis we face in relation to Muslim captives around the world.

Traditionally, the idea behind freeing prisoners can occur through the paying of a ransom to the opposing force in order to secure their release, through prisoner exchange, and even via release through jihad – all of which have been mentioned as options within the jurisprudential literature. According to the hadith narrated by Saeed, the Prophet ﷺ said, "Indeed it is obligatory upon the Muslims to free their captives or to pay their ransoms." There are a number of similar hadiths which convey the same sense of duty.

The obligation is on freeing the prisoner, as per the Prophet's instruction. However, the means by which that takes place would have been through a rescue attempt, political pressure, the writing of a letter (to at least ameliorate their condition), or a ransom to be paid for release. Al-Qurtubi explains this point in further detail, highlighting specifically where the kifaya becomes applicable:

> Our scholars have said that ransoming the prisoners with money is wajib (obligatory), even if one dirham does not remain in the Islamic Treasury. Ibn Khuwaiz Mindad has confirmed the existence of verses of the Quran that indicate the obligation of releasing the prisoners. It has also been narrated from the Messenger of Allah ﷺ that he ransomed the prisoners and ordered others to do so as well. This has also been the course taken by the Muslims and their consensus is that it is incumbent to free the prisoners by taking money from the Islamic Treasury, and if that is not possible, then it becomes obligatory as a collective duty: if one person executes it, the sin is lifted from the shoulders of the rest of the Muslims.

The position taken by al-Qurtubi was backed by many scholars, including Ibn Hajar al-Asqalani,

> The statement of Imam al-Bukhari, 'The Chapter on Freeing Prisoners' refers to freeing them from the hands of the enemy by money or by other means. The word 'Al-Fakak', where the [Arabic letter] fa from the word has a fatha (it is also permissible for it to take a kasra), means to free. This word is mentioned in two hadiths. The first one is the hadith of Abu Musa: "Free the prisoner." Ibn Battal said that freeing the prisoners is obligatory as a collective duty (fard al-kifaya). This opinion is also held by the majority of the scholars.

While discussions regarding the kifaya in the body of Islamic literature have focused on the jihad itself rather than the obligations to the individual prisoners, Imam al-Nawawi links the two and explains how the duty informs the way in which Muslim states and

communities should respond:

> *If the enemy capture a Muslim or two, then is it equivalent to invading a Muslim land? There are two opinions on this. The first opinion is no, because the troubling of one Muslim soldier is insignificant. The other more correct opinion of the two is yes, because the sanctity of a single Muslim is greater than the sanctity of an entire state. Therefore, if the Islamic State is close to the location where the prisoner was captured, then it should release the prisoner and exact a fine from those who have captured him. (Otherwise, paying the ransom money is wajib (obligatory) if we can free the prisoner by such means).*

Again, while the broad emphasis in Islamic scholarship was on freeing prisoners through military campaigns, exchange agreements, or ransom, there is a recognition that as part of the obligation of fulfilling the kifaya, all available options must be pursued. In conclusion to the discussion on the kifaya, Islamic scholarship has identified that assistance to the captives must continue until their release, meaning that the entire Muslim community is responsible until that goal has been achieved.

GLOBALIZATION OF THE SUFFICIENCY

If the kifaya places extra emphasis on those closest to a situation, then how can we understand that closeness in a globalised world, where nation states and national borders dictate so much of the freedom of movement? The physical location where a person is born, the type of nationality they have, the size of their income, and the relative political freedom they live in could all be contributing factors to understanding how they might be obliged to fulfil a kifaya.

It is here that I want to hypothesise a theory that may add a layer to the way in which the fard al-kifaya turning into a fard al-'ayn has traditionally been understood. We currently live in a globalised world where our potential to impact on those thousands of miles away, can take place through the telephone, an email, Zoom, or any other manner of communication devices. Those Muslims, particularly within the western world, who have access to resources and opportunities which may not be available to others in different locations – might come under great scrutiny by Allah for not involving themselves in the affairs of the ummah. As one example, our access to superfast fibre-optic broadband makes a significant difference compared to those still running on 3G connections. The ease of access we have to resources might place separate burdens on us compared to others.

It may well be that those 'closest' to an issue, may now actually be thousands of miles away. When we think about those detained in secret prisons in Somalia, it is possible individuals living in London, who are better placed to assist, may have a greater responsibility to do so than those Muslims living in Djibouti, Ethiopia, Madagascar, or even internally in Somalia itself. We need more scholarship in this area, as I feel that offloading the responsibility of fulfilling the community obligations on those 'closest', is no longer tenable in the modern world in which we live. Those who hold British or American passports, have close to unlimited access to countries across the world, as their passports enable them to travel more freely – do they then share a greater burden of responsibility due to their rizq and their capacity to involve themselves in international issues? The ultimate aim is to free the prisoner, that for that to occur, all methods must be adopted by those who are first closest to the issue, whether family members or members of the person's community – but based on capacity, the obligations can emanate quickly across the world.

Relying on the Muslims living in Cuba, Caribbean islands, or indeed on the US mainland itself may be the correct orthodox position in relation to relying on those on who it has become fard al-'ayn to make a difference to the captives detained in Guantanamo Bay – but such an assessment would betray a lack of understanding of the boundaries of a world built on a legal regime of national belonging.

I will ultimately leave rulings to our scholars in terms of building our understanding, this hypothesis is to start the conversation, so that we understand how we should respond to oppression and clear violations of human dignity and freedom. In a world that has been structured in the way we see today, the rights we have towards Muslim prisoners cannot be disaggregated from our ethical obligations to the oppressed and

dispossessed within the ummah. There is a case to be made that if anything, the extent of political detentions across both the East and West is indicative of the malaise in our ability to organise a just future for ourselves – an indication of the ill-health of our regimes. Representing political captives provides a platform to seek a form of accountability from the state, one which places the life and sanctity of a single Muslim at the forefront of our minds. Whether we classify them as al-asir, al-'ani or al-riqab (the last really on in the case of the Hanbali school) – they have obligations that stem from a Qur'anic and Prophetic duty, that we cannot simply afford to reduce in priority.

ENDNOTES

1 Angola Prison Rodeo, http://www.angolarodeo.com/

2 Alexander M (2012) The New Jim Crow: Mass Incarceration in the Age of Colorblindness, The New Press, pp.55-56

3 Bloom J & Martin WE (2016) Black Against Empire: The History and Politics of the Black Panther Party, University of California Press, p.2

4 Rabb I (2015) Doubt in Islamic Law: A History of Legal Maxims, Interpretation, and Islamic Criminal Law, Cambridge University Press, p.16

5 Badawi E & Abdel Haleem M (2008) HdO Arabic-English Dictionary of Qur'anic Usage, BRILL, p.650

6 Sahih Al Bukhari 3046

7 Kutmah A (2023) "Prisoner" and "Captive:" Defining Positionality and Conceptualizing Carceral Regimes in the Arab World, MENA Prison Forum

8 Badawi E & Abdel Haleem M (2008) HdO Arabic-English Dictionary of Qur'anic Usage, BRILL, p.376

9 Email exchange – RE: Riqab translation, From: Muhammad Abdel Haleem to Asim Qureshi

10 Ibn Atiyyah (2001) Tafsir Ibn Atiyyah: Al-Muharar al-Wajiz, v.2, p.81

11 Ibn Qudamah (1999) Al-Mughhin, Dar Alam al-Kutub, p.322

12 This entire paragraph is a summary of an excellent literature review by Ismail Y, Awang AB and Sarif SbM (2020) Re-categorizing Recipients of Zakat under Riqab for sustainable development goals, International Journal of Zakat and Islamic Philanthropy, Vol2:1, pp.126-127

13 Ibid, p.129

14 CAGE (2014) Zakah and the forgotten Islamic obligation towards prisoners

15 Hallaq H (2018) Restating Orientalism: A Critique of Modern Knowledge, Columbia University Press, p.100

16 Khallaf, 'Ilm, p. 109; Qasim, Usul, p.218; Abu 'Id, Mabahith, p.69

17 Hashiyah ibn Aabidin, 3/238

18 Al-Qurtubi, 2/26

19 Fath al-Bari, 6/167

20 al-Raudah, 10/216