CHAPTER NINETEEN

TAKING OF HOSTAGES

1. INTERNATIONAL CRIMINAL LAW

In the old system of international law the taking of hostages during or after a war was a legitimate right of the conflicting parties.¹ The purpose of the taking of hostages was mainly to force the other party or parties to fulfil their obligations. The taking of hostages was especially practised after the end of a war. The practice was abolished during the nineteenth century. This did not however mean that states did not resort to the taking of hostages in order to impose their military, political or economic interests on other states.²

Despite the fact that there is an international convention criminalizing the taking of hostages, the practice has been continued not only through individual's and organization's actions but also under the order of those states which are also the permanent members of the United Nations. The former Union Soviet Socialist Republic and the United States took hostages against one another's policy, who were only released after certain political agreements were reached. The International Convention Against the Taking of Hostage was adopted in 1979. The Convention prohibits the taking of hostages and recognises it as an international crime.³

---

¹ Crimes of taking hostages and crimes against internationally protected persons are basically similar.

² For detail analysis of this international crime see Malekian, *International Criminal Law*, vol. II pp. 1–27.

³ The International Convention Against Hostage Taking reads that:

Article 1: 1. Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or judicial person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commit the offence of taking of hostages "hostage-taking" within the meaning of this Convention.

2. Any person who:

(a) Attempts to commit an act of hostage-taking, or

(b) Participates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking likewise commits an offence for the purpose of this Convention.

However, there is no special reference to this international crime in the Statute of the ICC.

2. ISLAMIC INTERNATIONAL CRIMINAL LAW

Under the traditional system of Islamic international criminal law, like the system of international law, hostages might be taken if the taking of hostages is stated in an agreement for the purpose of implementing its provisions. Parties to an agreement stated that they could kill hostages if such provisions were disregarded by another party. In practice, the provisions of such agreements were repeatedly violated by the parties. Moreover, 'Bonne foi pour perfidie vaut mieux que perfidie pour perfidie'.⁴ According to the Prophet, "Restitue le dépôt à qui s'est fié à toi et ne trahis point qui te trahit."⁵ In general, the practical application of the law sometimes took priority over its definite application.

2.1. *Principle of Inviolability*

Killing hostages was recognised as against the principal philosophy of Islamic law and the formulation of any provision in a treaty concerning the killing of hostages when the provisions of the treaty were violated, was therefore due to the maltreatment and threatening of Muslims by other parties. Furthermore, the imposition of such a provision for the killing of hostages was practically invalid due to Islamic international criminal law. The beginning of hostilities between the parties to an agreement was a strong reason for Muslims to immediately and safely return all hostages to their homeland in order to fully respect family unity. For confirmation of this, 'Les hostilités ouvertes, on met les otages en liberté mais s'ils sont

---

Article 2: Each State Party shall make the offences set forth in article 1 punishable by appropriate penalties which take into account the grave nature of those offences.

Article 3: 1. The State Party in the territory of which the hostage is held by the offender shall take all measures it considers appropriate to ease the situation of the hostage, in particular, to secure his release and, after his release, to facilitate, when relevant, his departure.

2. If any object which the offender has obtained as a result of the taking of hostages comes into the custody of a state Party, that State Party shall return it as soon as possible to the hostage or the third party referred to in article 1, as the case may be, or to the appropriate authorities thereof.

⁴ Rechid, 'L'Islam et le Droit des Gens', p. 433.

⁵ Id.

des hommes faits, il est obligatoire de les faire parvenir jusqu'à leurs lieux de sûreté; si ce sont des femmes ou des enfants, il est d'obligation de les ramener jusque dans leurs familles.⁶

According to a significant principle of Islamic international criminal law, even though Muslim hostages could have been killed and were killed by unbelievers or non-Muslims, Muslims should not kill hostages because of the very important function of the principle of inviolability and philosophical spirit of pure Islamic law. Thus, killing hostages was not recognised by the provisions of Islamic international criminal law and was therefore illegitimate.⁷

2.2. Principle of Integrity

Although Islamic international criminal law places a heavy weight on the principles of proportionality and reciprocity, the implementation of these principles may not, in certain circumstances, be permitted which may involve a threat to the life of hostages.⁸ The conclusion is that Islamic international criminal law prohibits the killing of hostages for the purpose of revenge or retaliation and this principle is well consolidated in the second source of Islamic law i.e. *Sunnah*.⁹ Furthermore, this principle was not even suspended in the time of armed conflict, and hostilities between two nations. Disregarding the provisions of a treaty did not either excuse the killing of hostages. For this reason, "if hostages are exchanged, and the rebels murder the loyal hostages, the rebel hostages may not be punished even when that had been agreed upon, for the guilt is not theirs personally but of their government."¹⁰ Essentially, Islamic international criminal law does not permit the imposition of provisions which may go against the fundamental principles of humanity and violate the personal integrity of hostages. In other words, the philosophy of the principle of natural law took priority, in certain circumstances, to the principle of *de lege lata*. For this reason, "killing enemy hostages, even if those of the Muslim state have been murdered by the enemy, and

⁶ Id.

⁷ Id.

⁸ One of the cases of taking of hostages is the occupation of the American Embassy in Teheran by Iranian students in 1979. They were later released after political negotiations between the American and Iranian authorities. See Malekian, *International Criminal Law*, vol. II, pp. 31–32.

⁹ See chapter nine.

¹⁰ Hamidullah, *The Muslim Conduct of State*, p. 174.

even if there is express agreement that hostages may be beheaded in retaliation”¹¹ is forbidden and considered one of the gravest breaches of the principles of Islamic international criminal law.

---

¹¹ Lost.