

Traditional Asian Approaches: A Malaysian View

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Inherited legislation

Although Islam is the religion of the Federation, the law that is applicable and followed in Malaysia (apart from certain family and religious matters affecting the Muslims) is not the Islamic Law. In the field of humanitarian law, the law is contained in legislation based on similar legislation in the United Kingdom. In the United Kingdom the earliest legislation was the Geneva Convention Act, 1911, which prohibits the use without authority of the emblem of the Red Cross on a white background. This Act was enacted as a result of the decision of the United Kingdom to withdraw the reservation it had made to the Geneva Convention of 1906. This Imperial Act was applicable to Penang and Malacca, which were then part of the Colony of the Straits Settlements, and to Sarawak and Sabah (then North Borneo). In the Federated Malay States the legislation was enacted as the Red Cross (Control of Use) Enactment, 1918, which followed the United Kingdom Act of 1911; this was included in the Revised Edition of the Laws of the Federated Malay States, 1955, as Cap. 51. Similar legislation was enacted in Johore (E. 9 of 1918), Kedah (Enactment No. 93), Perlis (Red Cross Enactment, 1936, No. 13 of 1936), Kelantan (Enactment 2 of 1918) and Trengganu (Enactment 16 of 1956).

Subsequently, in 1937 was enacted in the United Kingdom the Geneva Convention Act, 1937, which prohibited the use without authority of certain expressions including the "Red Cross" and the "Geneva Cross". This Act was passed to give effect to article 28 of the Geneva Convention of 1929. This Act also applied in Penang and Malacca, Sabah and Sarawak (then North Borneo) and its provisions were enacted in the Malay States as follows:

- (a) The Geneva Cross (Control of Use) Enactment, 1939, of the Federated Malay States (Enactment No. 5 of 1939).
- (b) The Red Cross and Geneva Cross (Control of Use) Enactment, 1939, of Johore (Enactment No. 5 of 1939).
- (c) The Geneva Cross (Control of Use) Enactment, 1958, of Kedah (Enactment No. 5 of 1958).
- (d) The Red Cross and Geneva Cross (Control of Use) Enactment, 1958, of Perlis (Enactment No. 4 of 1958).
- (e) The Geneva Cross (Control of Use) Enactment, 1958, of Trengganu (Enactment No. 2 of 1958).
- (f) The Geneva Cross (Control of Use) Enactment, 1939, of Kelantan (Enactment No. 20 of 1939).

All the above previous legislation was repealed by the Geneva and Red Cross (Control of Use) Ordinance, 1959, which consolidated the laws on the subject. This in turn was repealed by the Geneva Conventions Act, 1962.

The Geneva principles

The Geneva Conventions of 1949 were given statutory effect in the United Kingdom by the Geneva Conventions Act, 1957, and this Act was followed in the Geneva Conventions Act, 1962, of the Federation of Malaya. This Act has been extended to Sabah and Sarawak by the Modification of Laws (Geneva Conventions) (Extension to Borneo States) Order, 1956 (P.U.100/56).

The Geneva Conventions are traditionally concerned with the protection of all war victims and, by extension, the weaker members of the community who need special care, such as children and old people. In its own defence, the State may be justified in placing restrictions on the free exercise of individual human rights, but any such restrictions must not exceed what is absolutely necessary. The particular function of the Geneva Conventions is to determine the permissible level of restriction, establish regulations for the treatment of men by their fellows, and find a compromise between military requirements and the dictates of present-day conscience.

The principle underlying the Geneva laws may be expressed in the following terms: persons placed *hors de combat* or who take no direct part in the hostilities must be respected and humanely treated. This definition covers members of the armed forces who are out of active service because of wounds, sickness, shipwreck, capture or surrender, and civilians who have no notable influence on their country's military potential.

The First Convention stipulates that wounded or sick members of the armed forces, who are thus without defence, must be respected and protected in all circumstances. That is the cardinal principle of the Convention, from which almost all the other provisions stem. Members of the enemy armed forces who are *hors de combat* must be treated in the same way as those of one's own side, without any discrimination. Any priority in treatment must be granted solely for urgent medical reasons. The lives of the wounded may not therefore be endangered, nor may they be harmed in any way, provided of course that they have renounced fighting.

A zone of immunity is thus established around the wounded, and it may not be breached by weapon or fire. The emblem of a red cross on a white ground is the visible sign of this immunity, which also extends to hospitals or dressing stations in which wounded persons are, to the vehicles which transport them, the staff who look after them and the medical equipment provided for them. Doctors and nurses are protected not as individuals but as medical personnel, because they care for the wounded. In return for the security granted them, they must remain outside the fighting and observe strict military neutrality. Medical personnel who fall into the hands of the adverse Party must be repatriated if they are no longer needed to give assistance to prisoners of war.

The Second Geneva Convention extends the same principles to war at sea.

The Third Convention relates to the treatment of prisoners of war. Members of the enemy armed forces who surrender, including members of organized resistance movements, must be protected and given humane treatment. The camp in which they are interned must meet proper standards of security and hygiene. Prisoners must be able to lead a normal life there. The camps are open to inspection by delegates of the Protecting Power — that is to say the neutral State representing the interests of a belligerent vis-a-vis its adversary — and also by

delegates of the International Committee of the Red Cross. Food must be sufficient to maintain prisoners in a good state of health. They may not be required to perform any work connected with the war effort, or which is dangerous or unhealthy. Prisoners of war are permitted to send and receive family news and to receive relief parcels.

The Fourth Convention of 1949 is entirely new and was intended to fill a regrettable gap, following the bitter experience of the Second World War. Civilians are not involved in the fighting and may never be attacked; on the contrary, they must be respected and protected and always treated humanely. Any civilians deprived of their liberty for any reason will enjoy a status similar to that of prisoners of war. All internment camps are to be open to inspection by representatives of the Protecting Power and the International Committee of the Red Cross. As far as possible, the civilian population in occupied countries must be able to continue to lead a normal life. Deportation, pillage and the taking of hostages are specifically forbidden. Personal honour, family rights and religious convictions must be safeguarded.

A series of general Articles specifies that the provisions of the four Geneva Conventions are to apply not only in the case of an international conflict which has been properly declared, but wherever *de facto* hostilities between two States have caused casualties, whatever the form of armed intervention and whatever it is called, whether the war be just or unjust. Moreover, civil war is no longer left completely outside humanitarian law. Article 3, which is a complete innovation in international law, provides that the basic principles of the Geneva Conventions — those which ensure respect for the human person — shall be applied in all circumstances. This refers to respect for the wounded, protection against killing and against torture, the taking of hostages and the passing of sentences by a court which is not regularly constituted.

Lastly, control over the application of the Conventions has been strengthened. If there is no Protecting Power, the belligerents must appoint a substitute, which may be either a neutral State or a humanitarian organization such as the International Committee of the Red Cross.

The provisions of the First Protocol adopted in 1977 relating to civilians are geared to the humanitarian interests of the civilian population. Thus Article 51 includes a few regulations which are extremely significant from the humanitarian point of view. It makes *inter alia* the following provisions: (i) it forbids indiscriminate attacks “which employ a method or means of combat which cannot be directed at a specific military objective” (para 4(b)); (ii) regarding “incidental civilian losses”, it specifies the principle of proportionality, prohibiting, among other things, attacks “which may be expected to cause incidental loss of civilian life . . . which would be excessive in relation to the concrete and direct military advantage anticipated” (para 5(b)); (iii) it prohibits the use of civilians to render “certain points or areas immune from military operations” (para 7).

No less important are the provisions that define military objectives (Art 52, paras 2 and 3) and protect special categories of objects (Arts 53, 54 and 56) as well as the natural environment (Art 55), and the rules of military operations to spare the civilian population as much as possible (Arts 57 and 58). The provisions on non-defended localities and demilitarized zones (Arts 59 and 60),

as well as the rules on relief in favour of the civilian population (Arts 68–71) and on the treatment of persons in the power of a party to the conflict (Section III) are also quite momentous. Finally, all the provisions forbidding reprisals against civilians or civilian objects mark a major turning point in the development of the humanitarian law of armed conflict: they represent a decisive and lasting advance that no one is likely to question in the future.

Malaysian legislation

The Geneva Conventions have been acceded to by Malaysia in 1962 but Malaysia has not so far acceded to the Protocols of 1977.

Section 3 of the Geneva Conventions Act 1962 provides that:

“Any person, whatever his citizenship or nationality, who, whether inside or outside the Federation, commits or aids, abets or procures the commission by any person of any such grave breach of any of the Geneva Conventions referred to in the following articles:

- (a) Article 50 of the First Convention;
- (b) Article 51 of the Second Convention;
- (c) Article 130 of the Third Convention; or
- (d) Article 147 of the Fourth Convention,

shall be guilty of an offence and on conviction thereof:

- (i) in the case of such a grave breach involving the wilful killing of a person protected by the convention in question shall be sentenced to imprisonment for life;
- (ii) in the case of any other such grave breach shall be liable to imprisonment for a term not exceeding fourteen years.’

Articles 99–108 of the Geneva Conventions relating to the treatment of prisoners of war have been implemented in sections 4–7 of the Malaysian Geneva Conventions Act, 1962, as follows:

“4. (1) The Court before which

- (a) a protected prisoner of war is brought up for trial for any offence; or
- (b) a protected internee is brought up for trial for an offence for which that court has power to sentence him to death or to imprisonment for a term of two years or more,

shall not proceed with the trial until it is proved to the satisfaction of the court that a notice containing the particulars mentioned in sub-section (2), so far as they are known to the prosecutor, had been served not less than three weeks previously on the protecting power and, if the accused is a protected prisoner of war, on the accused and the prisoners’ representative.

(2) The particulars referred to in sub-section (1) are:

- (a) the full name and description of the accused, including the date of his birth and his profession or trade, if any, and, if the accused is a protected prisoner of war, his rank and army, regimental, personal or serial number;
- (b) his place of detention, internment or residence;
- (c) the offence with which he is charged; and
- (d) the court before which the trial is to take place and the time and place appointed for the trial.

(3) For the purposes of this section a document purporting

- (a) to be signed on behalf of the protecting power or by the prisoners' representative or by the person accused, as the case may be; and
- (b) to be an acknowledgment of the receipt by that power, representative or person on a specified day of a notice described therein as a notice under this section,

shall, unless the contrary is shown, be sufficient evidence that the notice required by sub-section (1) of this section was served on that power, representative or person on that day.

(4) In this section the expression "prisoners' representative" in relation to a particular protected prisoner of war at a particular time means the person by whom the functions of prisoners' representative within the meaning of article 79 of the convention set out in the Third Schedule were exercisable in relation to the prisoner at the camp or place at which that prisoner was, at or last before that time, detained as a protected prisoner of war.

(5) Any court which adjourns a trial for the purpose of enabling the requirements of this section to be complied with may, notwithstanding anything in any other written law, remand the accused for the period of the adjournment.

5. (1) The Court before which

- (a) any person is brought up for trial for an offence under section 3; or
- (b) a protected prisoner of war is brought up for trial for any offence,

shall not proceed with the trial unless

- (i) the accused is represented by counsel; and
- (ii) it is proved to the satisfaction of the court that a period of not less than fourteen days had elapsed since instructions for the representation of the accused at the trial were first given to the counsel,

and if the court adjourns the trial for the purpose of enabling the requirements of this sub-section to be complied with, then, notwithstanding anything in any other written law, the court may remand the accused for the period of the adjournment.

(2) Where the accused is a protected prisoner of war, in the absence of counsel accepted by the accused as representing him, counsel instructed for the purpose on behalf of the protecting power shall, without prejudice to the requirements of paragraph (ii) of sub-section (1), be regarded for the purposes of that sub-section as representing the accused.

(3) If the court adjourns the trial in pursuance of sub-section (1) by reason that the accused is not represented by counsel, the court shall direct that a counsel be assigned to watch over the interests of the accused at any further proceedings in connection with the offence, and at any such further proceedings, in the absence of counsel either accepted by the accused as representing him or instructed as mentioned in subsection (2), counsel assigned in pursuance of this sub-section shall, without prejudice to the requirement of paragraph (ii) of sub-section (1), be regarded for the purposes of that sub-section as representing the accused.

(4) Counsel shall be assigned in pursuance of sub-section (3) in such manner as the Minister may by order prescribe, and any counsel so assigned

shall be entitled to be paid out of moneys provided by such sums in respect of fees and disbursements as the Minister may by regulations prescribe.

6. (1) Where a protected prisoner of war or a protected internee has been convicted and sentenced to death or to imprisonment for a term of two years or more, he may appeal against such conviction and sentence imposed upon him, and the time within which he must give notice of appeal shall, notwithstanding anything in the written law relating to such appeals, be the period from the date of his conviction or, in the case of an appeal against sentence, of his sentence to the expiration of ten days after the date on which he receives a notice given

- (a) in the case of a protected prisoner of war by an officer of the Armed Forces of the Federation;
- (b) in the case of a protected internee, by or on behalf of the governor of the prison in which he is confined,

that the protecting power has been notified of his conviction and sentence; and in a case to which the foregoing provisions of this sub-section apply, a reference to the period aforesaid shall be substituted for any reference to the period of fourteen days after the date of such decision in sub-section (1) of section 20 of the Courts Ordinance, 1948.

(2) Where after an appeal to the Court of Appeal the sentence on a protected prisoner of war or a protected internee remains a sentence of death, or remains or has become a sentence of imprisonment for a term of two years or more, the time within which he may apply for special leave to appeal to the Yang di Pertuan Agong under sub-section (2)(c) of section 3 of the Appeals from the Supreme Court Ordinance, 1958, shall be six weeks from the date on which the convicted person receives a notice given in accordance with paragraph (a) or paragraph (b) of sub-section (1), as the case may be, that the protecting power is notified of the decision of the court.

7. (1) It shall be lawful for the Minister in any case in which a protected prisoner of war or a protected internee is convicted of an offence and sentenced to a term of imprisonment, to direct that there shall be deducted from that term a period not exceeding the period, if any, during which that person was in custody in connection with that offence, either on remand or after committal for trial (including the period of the trial), before the sentence began, or is deemed to have begun, to run.

(2) It shall be lawful for the Minister in a case where he is satisfied that a protected prisoner of war accused of an offence has been in custody in connection with that offence, either on remand or after committal for trial (including the period of the trial), for an aggregate period of not less than three months, to direct that the prisoner shall be transferred from that custody to the custody of an officer of the Armed Forces of the Federation and thereafter remain in military custody at a camp or place in which protected prisoners of war are detained, and be brought before the court at the time appointed by the remand or acquittal order."

Part III of the Geneva Conventions Act, 1962, deals with the prevention of abuse of Red Cross and other emblems. It gives effect to Articles 53 and 54 of

the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. This Part of the Act has to be read in conjunction with the Malaya Red Cross Society (Change of Name) Act, 1975, which prohibits the use without authority of the emblem of a red crescent on a white background and the words "Bulan Sabit Merah" or "Red Crescent". That Act also changed the name of the former Malaysian Red Cross Society to the Malaysian Red Crescent Society. The objects of the Society as set out in section 5 of the Malaysian Red Cross Society (Incorporation) Act, 1965, are as follows:

- “(a) in time of peace or war, to carry on and assist in work for the improvement of health, the prevention of disease and the mitigation of suffering throughout the world;
- (b) in time of war, to furnish voluntary aid to the sick and wounded both of armies and non-belligerents, to prisoners of war and to civilian sufferers from the effects of war, in accordance with the spirit and covenants of the Geneva Convention for the amelioration of the conditions of the wounded and sick in armed forces in the field, signed at Geneva on the twelfth day of August, nineteen hundred and forty-nine;
- (c) to perform all the duties devolved upon a national society by each nation which has acceded to the said Convention.”

Local case law

The question of the application of the Geneva Conventions 1949 has been raised in a number of cases in Malaysia and Singapore.

In *Public Prosecutor v Oie Hee Koi and Associated Appeals* ([1968] 1 MLJ 148), the accused were Malaysian Chinese, born or settled in Malaysia but whose nationality had not been proved. They were all captured during the Indonesian Confrontation campaign against Malaysia having landed and infiltrated into Malaysian territory either by boat or by parachuting. They were armed and accompanied by Indonesian military personnel. All the accused were tried, convicted and sentenced to death for offences under the Internal Security Act, ss 57 and 58. Except in one case (*Teo Boon Chai v P.P.*), none of the accused claimed during the trial that he was to be treated as a prisoner of war. They appealed to the Federal Court, which dismissed all but two appeals, i.e. *P.P. v Oie Hee Koi* and *Public Prosecutor v Ooi Wan Yui* ([1966] 2 MLJ 83). In these two cases, the Federal Court allowed the appeals on the ground that as they had not been proved to be persons owing allegiance to Malaysia, they were entitled to the protection of the Geneva Convention. The Public Prosecutor in those two cases and the other accused appealed to the Privy Council.

In the Privy Council, the accused argued (a) that the provisions of the Geneva Convention were also applicable to Malaysian nationals or persons owing allegiance; (b) that any contrary customary international law denying the status of prisoners of war to such individuals had been abrogated by the Geneva Convention; (c) that the convictions under section 58 of the Internal Security Act (consorting with persons carrying or having possession of arms or explosives in contravention of section 57(1)) were bad because the only persons they consorted with were Indonesian soldiers who were not persons to whom section 57 applied.

It was held by the Privy Council (Lord Guest and Sir Garfield Barwick

dissenting) that (1) the Geneva Convention does not extend the protection given to prisoners of war to nationals of the detaining power. The same principle applies to persons who, though not nationals of, owe a duty of allegiance, to the detaining power; (2) the Geneva Convention had not changed or abrogated customary international law on this question; (3) no question of mis-trial exists where the accused did not raise a doubt whether they were entitled to treatment as protected prisoners of war and where no claim had been made to provide any basis for the court to apply; no burden lay on the prosecution, but the onus was on the accused to prove that they were so entitled; and (4) the convictions under section 58 of the Internal Security Act cannot stand where the persons whom the accused were alleged to have consorted with were Indonesian soldiers. Members of regular forces fighting in enemy country are not subject to the domestic criminal law. The Internal Security Act is part of the domestic law and not directed at the military forces of a hostile power attacking Malaysia.

Lord Guest and Sir Garfield Barwick (dissenting) were of the view that there is no rule of international law which suggests that the national laws may not be applied to armed forces of an enemy which invade the national territory. The Convention itself sets the only limitation upon the operation of national law in relation to captured enemies. That they may be tried for breaches of the national law is basic to the structure of the Convention: it merely seeks to place procedural limitations on their trial.

In the case of *Teo Boon Chai v Public Prosecutor*, where the accused, at the trial, claimed he was not a Malaysian nor an Indonesian citizen and therefore was entitled to be treated as a prisoner of war, it was held by the Privy Council (Lord Guest and Sir Garfield Barwick dissenting) that there was a mis-trial. The claim, having been made to the court, was sufficient to raise a doubt whether he was a protected prisoner or not. The court should have treated him as a prisoner of war for the time being and either proceeded with the determination whether he was or was not protected, or refrained from continuing the trial in the absence of notices.

In *Stanislaus Krofan and Another v Public Prosecutor* ([1967] 1 MLJ 133), the accused were Indonesians who were captured in Singapore and were found to be in possession of explosives. Although they were in civilian clothing, they claimed that they were members of the armed forces of Indonesia and under orders of their superiors to set up explosives at certain strategic points in Singapore. They were charged and convicted for offences under section 57(1)(b) of the Internal Security Act. The substantive issue in the case was again whether members of the armed forces of a party to the conflict who enter enemy territory dressed in civilian clothes to commit acts of sabotage are prisoners of war in the sense of the Geneva Convention.

The Federal Court in Singapore held that the appellants were not entitled to prisoner of war status and stated that a regular combatant who divested himself of his most distinctive characteristic, his uniform, for the purpose of spying or sabotage thereby forfeited his right on capture to be treated as a prisoner of war. The Federal Court referred to the Hague Regulations, the U.K. Manual of Military Law and the case of *Ex parte Quirin* (317 US 1; 87 Law Ed 3 (1942)) to show that, prior to the Geneva Convention, prisoner of war status could not be claimed by regular combatants who were disguised to act as spies or saboteurs.

Turning to the Geneva Convention, the Federal Court felt that the definition in Article 4A(1) did not in any way alter the unprotected position of the "soldier" spy or the "soldier" saboteur. Wee Chong Jin CJ said: "The conditions of modern warfare are not such as to make the spy or the saboteur any less dangerous or more easily distinguishable or more easily apprehended than at the time of the Hague Regulations".

Commentators on Article 5 of the Geneva Convention have pointed out the inadequacy of the article in its reference to "a competent tribunal". The question arises as to who must raise the doubt. The best person to do so would be the accused or his counsel, if he has one. It is in this respect that there is need to remember Article 127 of the Convention which provides that "the High Contracting Parties undertake in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries and in particular to include the study thereof in their programmes of military and if possible, civil instruction, so that the principles thereof may become known to all their armed forces and to the entire population".

Religious underpinnings

Perhaps it would help in the appreciation and acceptance of the Geneva Convention to know that its principles are certainly in accord with the teachings of Islam and those of the other major religions practised in the Federation.

In the Holy Quran, Allah says: "And indeed the differences of your languages and colours. Lo! herein indeed are portents of the mastery of the Creator for men of knowledge" (Surah Rum (30):22). People in this world are of different colours, races and nationalities and it is unfortunate that these differences of race, colour and nationality have been accentuated and exaggerated so that at times one race or nation has claimed and sought to have superiority over other races and nations. Mankind has thus been divided into more or less closed compartments or groups and nations, and misunderstandings and differences have arisen between them. The Holy Quran, however, emphasises the fact that despite the differences in colour, race and nationality, mankind is one common brotherhood and that the peoples of the world should work together for the common good of mankind. Such differences are only convenient labels by which we may know one another — they should not cause division and enmity between us. Thus Allah says in the Holy Quran: "O Mankind! We created you from a single pair of a male and a female and made you into nations and tribes, that you may know each other, not that you may despise one another" (Sura Hujurat (49):13).

Islam emphasises the universal brotherhood of mankind. It teaches that all human beings are descended from the same couple. The Holy Quran says: "O Mankind! Be careful of your duty to your Lord who created you from a single being and from it created its mate and from them twain hath spread abroad a multitude of men and women" (Sura Nisaa (4):1).

Islam teaches us too that mankind is one community. The Holy Quran says: "Mankind was one community" (Surah Baqara (2):213). And "Lo! this your community is a single community and I am your Lord and Cherisher; so worship me" (Sura Anbiya (21):92).

No special honour is accorded to any race or nation. Honour is only due to the

one who is the best in the remembrance of Allah and in the performance of his duties to Allah and mankind. In the Hadith, the Holy Prophet is reported to have said: “The whole universe is the family of Allah. So the most beloved in the sight of Allah is he who does good to His family.”

Islam teaches that no nation has any inherent superiority over other nations. It therefore condemns all wars or acts of aggression for the purpose of asserting the supposed superiority of any nation. The Holy Prophet is reported to have said: “He is not one of us who calls others to help him in tyranny and he is not one of us who dies while assisting his tribe in injustice.”

Even differences in religion should not create division between us. Islam enjoins toleration towards the believers of other religions. The Holy Quran says: “Lo! those who believe in that which is revealed unto thee Muhammad and those who are Jews and Christians and Sabeans — whoever believeth in God and the Last Day and doth right — surely their reward is with Allah and there shall be no fear come upon them neither shall they grieve” (Sura Baqarah (2):62). And again: “Lo! those who believe and those who are Jews and Sabeans and Christians — whoever believeth in God and the Last Day and doth right — there shall be no fear come upon them neither shall they grieve” (Sura Maida (5):72). The Muslims are enjoined to say: “Say we believe in Allah and that which is revealed unto us and that which was revealed unto Abraham and Ismail and Isaac and Jacob and the Tribes and that which Moses and Jesus received and that which the Prophets received from their Lord. We make no differences between any of them for we submit unto Allah” (Sura Baqarah (2):136). The attitude of Muslims towards the peoples of other faiths is thus defined in the Holy Quran: “Say: I worship not that which you worship. Nor will you worship that which I worship. Unto you your religion and unto me my religion” (Sura Kafirum (109)). Islam in fact believes in the unity of all religions as they all have a common source in the Almighty Creator. It believes too that Messengers have been sent to all parts of the world and it teaches us to believe in all the Messengers and all the revealed books whether the original revealed books are found or not and whether the history of such messengers are preserved or not. Islam goes further and instructs us not to differentiate between any such messengers.

Although Islam has sometimes been connected with war and the sword, the norm in Islam is peace. The name given to the religion itself literally means peace and the traditional salutation of a Muslim is *Assalamualaikum* — peace be upon you. People are warned not to create mischief and disturb peace. The Holy Quran says: “Do not make mischief on the earth when order has been established therein” (Sura A’raf (7):56). And further: “And remember the benefits you have received from Allah and refrain from evil and mischief on the earth” (Sura A’raf (7):74).

Those who break Allah’s covenant after it is ratified and who sunder what Allah has ordered to be joined and do mischief on earth, these “cause loss only to themselves” (Sura Baqara (2):27). And: “Tumult and oppression are worse than slaughter” (Sura Baqara (2):19).

The blame is only against those who oppress them with wrongdoing and rebel in the land denying right and justice: “For such there will be a grievous penalty” (Sura Shura (42):42). And: “Withhold not things justly due to men or do evil in the land making mischief” (Sura Shu’araa (26):183).

Islam places a high value on human life. Slaughtering of the individual is considered to be slaughtering of the whole nation. The Holy Quran says: “If any one slew a person — unless it be for murder or spreading mischief in the land — it would be as if he slew the whole people; and if anyone saved a life, it would be as if he saved the life of a whole people” (Sura Maida: 35). And: “Nor take life which God has made sacred — except for just cause” (Sura Bani Israil (17):33).

The Holy Quran also says: “And if they incline to peace, incline thou also to it and trust in God” (Sura Anfal (8):61).

Unfortunately war is sometimes unavoidable and the Holy Quran therefore has many verses on war. Among them are: “Fight in the path of Allah against those who fight against you but do not commit aggression. Lo! Allah loves not the aggressors” (Sura Baqara (2):190). “Sanction is given [to fight] to those who are fought against because they have been wronged; and God indeed is able to give them victory” (Sura Hajj (22):39). “[There are] those who have been expelled from their homes in defence of right — for no cause except that they say ‘Our Lord is God’. Did not God check one set of people by means of another, there would surely have been felled down monasteries, churches, synagogues and mosques, in which the name of God is commemorated in abundant measure. God will certainly aid those who aid His cause” (Sura Hajj (22):40). “And why should you not fight in the cause of God and of those who being weak are ill-treated (and oppressed). Men, women and children whose cry is ‘Our Lord rescue us from this town, whose people are oppressors and raise for us from Thee one who will protect and raise for us from Thee one who will help’ ” (Sura Nisaa (4):75). And: “Thereupon when you meet the unbelievers in fight smite at their necks; at length when you have subdued them bind a bond firmly on them; thereafter is the time for either generosity or ransom; until the war lays down its burdens” (Sura Muhammad (47):4).

Lest it be misunderstood, it must be emphasised that Islam emphasises freedom of conscience and belief: “There is no compulsion in religion. The right direction has become distinct from error” (Sura Baqara (2):256). “Say you who reflect faith! I worship not that which you worship. Nor will you worship that which I worship. And I will not worship that which you have been wont to worship. Nor will you worship that which I worship. To you be your religion and to me mine” (Sura Kafirun (109)).

One significant difference between the rules of international law and the Islamic Law relating to war is that while the rules of international law are based on conventions and agreements which have no legal sanction, the rules which are to be found in the Islamic Law are in the nature of law, because they are the injunctions of God and His Prophet, which are followed by the Muslims in all circumstances, irrespective of the behaviour of the enemy.

1. Amelioration of the condition of the wounded and the sick in armed forces in the field

“Do not attack a wounded person” said the Prophet. This means that the wounded soldiers who are not fit to fight nor actually fighting, should not be attacked.

“No prisoners should be put to sword” said the Prophet. The Prophet has prohibited the killing of anyone who is tied or in captivity.

We find that as early as the time of the Prophet, women took part in battles as nurses, transporters of the wounded and the dead.

In the *Sahih Al-Bukhari* (a well known collection of *hadith*), there is a chapter on the treatment of the wounded by the women during the holy battles (56:67). Ar-Rubayya binti Mu'awidh narrated: "We were in the company of the Prophet providing the wounded with water and treating them and carrying the killed to Medina from the battle field". Ar-Rabi binti Mu'awidh also narrated: "We used to take part in the holy battles with the Prophet by providing the people with water and serving them and bringing the killed and wounded back to Medina". Muhammad Ash-Shaibany, a disciple of the great Hanafi Imam, Abu Hanifah, allows young women to volunteer in military expeditions: "A free woman may lawfully go on military expeditions along with near relatives in order to nurse the wounded; but she should not go without the permission of her near relatives, be she of advanced age or young".

2. *Respect for the dead*

Respect is always to be paid to the dead. Mutilation of enemy dead is forbidden. Dead bodies of the fallen enemy as well as those of Muslims are to be buried. If the enemy requests the handing over of the body of some dead person on either side it may not be refused. Severing the head of some fallen enemy and sending it to some higher Muslim authorities is regarded as improper and disliked, and the first Caliph Abubakar issued orders forbidding it.

In the battle of Uhud, the disbelievers mutilated the bodies of the Muslims who had fallen on the battle field by cutting off their ears and noses, and threading them together to put around their necks as trophies of war. The abdomen of Hamza, the uncle of the Prophet, was ripped open by the Quraysh, his liver was taken out and chewed by Hind, the wife of Abu Sufyan, leader of the Makkan army. The Muslims were naturally enraged by this horrible sight. But the Prophet asked his followers not to mete out similar treatment to the dead bodies of the enemies. It is recorded that "the Prophet has prohibited us from mutilating the corpses of the enemy" (Sunan Abu Daud).

In the battle of the Trench (5 A.H.) a very renowned and redoubtable warrior of the enemy was killed and his body fell in the trench which the Muslims had dug for the defence of Medina. The unbelievers presented ten thousand dinars to the Prophet and requested that the dead body of their fallen warrior may be handed over to them. The Prophet replied: "I do not sell dead bodies. You can take away the corpse of your fallen comrade".

3. *Forbidden acts in warfare*

Unnecessary cruel and torturous ways of killing are forbidden. The Prophet is reported to have said: "Fairness is prescribed by God in every matter; so if you kill, kill in a fair way".

In the *hadith* there is a saying of the Prophet that "Punishment by fire does not behove anyone except the Master of the Fire, i.e. God" (Sunan Abu Daud).

Abu Hurairah narrated: "The Messenger of Allah sent us on a mission and said: 'If you find so and so and so and so, burn both of them with fire'. When we were about to depart the Messenger of Allah said: 'I have ordered you to burn so

and so and so and so, and it is none but Allah who punishes with fire, so if you find them kill them' ” (Sahih Al-Bukhari, Vol 4, at 160).

It is forbidden to kill non-combatants. Women, minors, servants and slaves who accompany their masters but do not take part in actual fighting, the blind, monks, the very old, those physically incapable of fighting, the insane or delirious, are authoritatively included among the non-combatants. The Prophet forbade the killing of women and children, but an exception is recognised in the case of night raids, when it is not possible to distinguish between the combatants and non-combatants. Killing peasants when they do not fight is forbidden. Traders, merchants, contractors and the like, are to be spared if they do not take part in actual fighting.

Islam has drawn a clear line of distinction between combatants and non-combatants. As far as non-combatants are concerned, such as women, children, the old and the infirm, the instructions of the Prophet are as follows: “Do not kill any old person, any child or any woman” (Sunan Abu Daud). “Do not kill the monks in monasteries”. And: “Do not kill the people who are sitting in places of worship” (Ibn Hanbal, Musnad).

It is narrated on the authority of Abdullah that a woman was found killed in one of the battles fought by the Messenger of Allah (Peace be upon Him). He disapproved of the killing of women and children (Sahih Muslim, Siddiqui transl, Vol 3, at 946; Sahih Al-Bukhari, Khan trans, Vol 4, at 159). It is narrated by Ibn Umar that a woman was found killed in one of the battles: so the Messenger of Allah (May peace be upon Him) forbade the killing of women and children (Sahih Muslim, *ibid*; Sahih Al-Bukhari, *op. cit.*, 160).

Devastation, destruction of harvest, cutting trees unnecessarily, are forbidden. In the Holy Quran, God has condemned these: “When he holds authority he makes effort in the land to cause mischief in it and destroy crops and cattle. But Allah loves not mischief” (Surah Baqara: 205).

In his instructions to Abdul Rahman ibn Auf, the Prophet is reported to have ordered: “Do not commit breach of trust nor treachery nor mutilate anybody nor kill any minor or child”.

The Caliph Abubakar in his instructions to Usamah wrote: “I enjoin upon you ten commandments. Remember them. Do not embezzle, do not cheat, do not break trust, do not mutilate, do not kill a minor child or an old man of advanced age or a woman, do not hew down a date palm nor burn it, do not cut down a fruit tree, do not slaughter a goat or cow or camel except for food. Maybe you will pass near people who have secluded themselves in convents, leave them and their seclusion”. In his instructions to Yazid bin Abu Sofian he wrote: “Do not kill any old man or woman or minor or sick person or monk. Do not devastate any population. Do not cut a tree except for some useful purpose. Do not burn a palm tree or inundate it. Do not commit treachery, do not mutilate, do not show cowardice and do not cheat”.

Umar, the Second Caliph, in his instructions ordered: “Do not show cowardice in an encounter. Do not mutilate when you have power to do so. Do not commit excess when you triumph. Do not kill an old man or a woman or a minor but try to avoid them at the time of the encounter of the two armies and at the time of heat of victory and at the time of expected attacks”.

Adultery and fornication even with captive women were forbidden. As regards

a free enemy or man, the violator is to be stoned to death or whipped according to whether he is married or unmarried. If, however, he is a captive, he is to receive discretionary punishment (*ta'azir*) and to be fined.

4. *Treatment of prisoners of war*

The Holy Quran says: "Therefore when you meet those who disbelieve in fight, smite at their necks; at length when you have thoroughly subdued them, then bind a bond firmly on them; thereafter is the time for either generosity or ransom until the war lays down its burdens" (Sura Muhammad (47):4).

According to Muslim Law, a prisoner qua prisoner cannot be killed. This does not preclude the trial and punishment of prisoners for crimes beyond the rights of belligerency. According to Abu Yusuf, a prisoner might be killed only in the interest of Islam, although he records many opinions of high authority that their killing is disliked (*makruh*). According to Sarakhsi, even the Commander in Chief cannot order a prisoner to be killed; only the Head of State can decide to put to death some particular prisoner. In short, capital punishment for prisoners of war is permissible only in extreme cases of necessity and in the higher interests of the State.

There were liberal provisions regarding treatment during captivity. As regards the prisoners at the Battle of Badr, the Prophet ordered: "Take heed of the recommendation to treat the prisoners fairly". We are told that as a result many Muslim soldiers contented themselves with dates and fed the prisoners in their charge with bread. Prisoners must be fed and well treated until a decision is reached regarding them. Prisoners are to be protected from heat and cold. If they have no clothes, these must be provided. We read in the Sahih Al-Bukhari: "Jabir bin Abdullah narrated that when it was the day of the battle of Badr, prisoners were brought including Al-Abbas who was undressed. The Prophet looked for a shirt for him. It was found that the shirt of Abdullah ibn Ubai would do, so the Prophet let him wear it". If the prisoners were in trouble or difficulty, this was to be resolved as far as possible. A prisoner has the right to draw up wills for his property at home. Such wills would be communicated to the enemy authorities through a proper channel. Among prisoners a mother is not to be separated from her child nor other near relatives from each other.

The position and dignity of prisoners are to be respected according to individual cases. There is no evidence in early Muslim history of exacting labour from prisoners. If they tried to escape or otherwise violate discipline they might be punished.

In the Holy Quran the righteous are described as those who "feed for the love of Allah, the indigent, the orphan and the captive, saying 'We feed you for the sake of Allah alone; no reward do we seek from you nor thanks'" (Sura Dahr (76):8).

There is no verse in the Holy Quran directly permitting enslavement although there is indirect mention of it. In practice, there were a few instances where captives were enslaved. Although Islam has not abolished slavery, it has done much to minimise it. The Prophet decreed that no Arabs could be enslaved. The Caliph Umar issued orders that peasants, artisans and professionals of belligerent countries should not be enslaved. The Holy Quran exhorted liberation of slaves and provided that the income of the Muslim State should partly be allotted for the

ransom of slaves: “Alms (*zakat*) are for the poor and the needy and those employed to administer the funds; for those whose hearts have been recently reconciled to truth; for those in bondage and in debt; in the cause of Allah; and for the wayfarer” (Sura Tauba (9):60). It must be remembered that “slave” in Islam does not convey the same idea as in other civilisations. For a slave of a Muslim has a right to equality with his master, in food, clothing and dwelling.

The Holy Quran has recommended the gratuitous release or the release of prisoners of war on ransom when hostilities cease: “Thereafter free them gratuitously or on ransom” (Sura Muhammad (47):4).

We read that the Prophet used to liberate prisoners with various kinds of ransom and compensation. Some were required to teach Muslim boys reading and writing; sometimes money in gold or silver was demanded; sometimes other goods, for example spears, were accepted. There are also many instances where prisoners were released gratuitously.

5. *Medical services*

Medical service is regarded as purely humanitarian. Doctors and nurses are never harmed if they do not resist; they might be captured. As early a jurist as Ash-Shaibany (d. 189 A.H.) mentions neutral and even non-Muslim ambulance services, and medical help for Muslims. There are records of hospitals, nurses and arrangements for the transport of the wounded and the dead in the battle of Uhud, Khandaq and others. The armies of the Caliph Umar too were provided with medical men.

6. *Civil wars*

The Holy Quran says: “And if two parties of Believers fall to fighting, then make peace between them. And if one party of them does wrong to the other, fight you that which does wrong till it returns unto the Ordinance of God: then if it returns make peace between them justly and act equitably. Lo! God loves the equitable” (Sura Hujurat (49):9). And: “The believers are naught else than brothers. Therefore make peace and reconciliation between your two contending brothers and observe your duty to Allah that you may obtain mercy” (Sura Hujurat (49):10).

According to Al-Mawardi, the punishment of rebels in Muslim Law is not capital — they may be killed only on the battlefield at the time of combat. Generally this is true, but As-Sarakshi has said that on certain occasions, as for example when the rebellion is not yet completely subdued, the rebel prisoners may be killed, if they remain obstinate and their repentance is not established. The aim of the fight with rebels is to prevent them from disturbing peace and order, and not to kill them and exterminate them..

Rights of full belligerency are conceded by Muslim Law to rebels. The judgment of the courts in a rebel state will be regarded as lawful and valid, and will not be upset even if the country is subdued, unless it is shown that the decision is contrary to Muslim Law. Similarly, if the rebels collect revenue or other taxes, the people will be released from their obligation and upon reconquest the Muslim State may not exact the same taxes again.

Rebels have special privileges as compared with foreign enemies. No tribute can be taken from rebels, if for some reason the Muslim State is willing to make

peace with them. Save in defence, weapons unnecessarily destructive are not to be used against rebels.

Ali, the fourth Caliph, says regarding a rebel force: "When you defeat them, do not kill their wounded, do not behead the prisoners; nor pursue those who return and retreat; do not enslave their women, do not mutilate their dead, do not uncover what is to remain covered, do not approach their property except what you find in the camp of weapons, beasts, male or female slaves; and the rest is to be inherited by their heirs according to the Writ of God".

Their dead are to be buried. Their prisoners are not generally to be beheaded and, if they convincingly promise to behave in future like loyal and law abiding subjects, they ought even to be immediately released. No ransom may be demanded for the release of prisoners. Rebel prisoners, Muslims or non-Muslims, may not be enslaved.

7. *Quarter*

The Holy Quran says: "And if any one of the associators [non-Muslims] seeks your protection, then protect him so that he may hear the word of God and afterward escort him to where he can be secure" (Sura Tauba (9):6).

This is the justification for quarter, that is, the practice of refraining from opposing them (that is the belligerents) through killing or capturing for the sake of God.

Quarter might be granted to enemy persons when they solicit it individually or in a group. Quarter might also be given to enemy persons without their soliciting it, through a general proclamation. So that at the time of the conquest of Mecca, the prophet made it known that all those persons will be safe who entered the courtyard of the *Kaaba* or the house of their chief, Abu Sufyan, or who shut up the door of their houses or laid down their arms.

According to a *hadith* of the Prophet, even the lowest of the Muslims can give quarter which will be binding on the Muslim State. The right is therefore possessed not only by the combatants, but even by others incapable of fight, by the sick and the blind, by slaves and by women.

Although Islam is the religion of the Federation, other religions are allowed to be practised in peace and harmony and there are many followers of the Hindu, Buddhist and Christian religions in Malaysia. The followers of these religions too stress human values and the kindness and charity to friend and foe. It is important that law should not only be enacted but should be accepted by the people in a country, and in this respect the principles enshrined in the Geneva Conventions are readily acceptable by the peoples in Malaysia.