

Transitional Justice under Shari'ah

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Following the Arab Spring, the governments of Egypt and Tunisia implemented various transitional justice mechanisms, such as truth commissions, reparation programs and prosecutions, which sought to redress the mass human rights violations committed during the uprising. Islam is the predominant religion in both nations, with over seventy million followers in Egypt and close to ten million in Tunisia.¹ Despite a plethora of research and guidance on transitional justice and post conflict reconstruction, scholars have largely ignored the issue in the context of Shari'ah.

Understanding that Islam plays a pivotal role in law and politics in the Middle East, this paper will establish an Islamic legal basis for transitional justice by discussing prosecution, reparations and reconciliation measures under Shari'ah. This paper will place greater emphasis on the above measures because, “[t]he Prophet (peace-be-upon-him) said: If a relative of anyone is killed, or if he suffers *khabl*, which means a wound, he may choose one of three things: he may retaliate, or forgive, or receive compensation. But if he wishes a fourth, hold his hands.”² In doing so, this paper will address the following issues:

- (1) What might the goals and objectives of an Islamic transitional justice institution?
- (2) What are the similarities and differences between the goals and objectives of an Islamic transitional justice institution and classical approaches to transitional justice?
- (3) What are the means and mechanisms, prescribed by Islam, through which states can achieve these objectives?

¹ *Top 50 Muslim Countries*, RELIGION FACTS, http://www.religionfacts.com/islam/places/top_50.htm.

² *Abu-Dawud*, 39:4481.

- (4) What are the similarities and differences between the means and mechanisms of transitional justice prescribed under Shari’ah and those available under classical transitional justice?
- (5) If the means and mechanisms under an Islamic transitional justice institution are effective and efficient at achieving its goals?

Before addressing the above issues, this paper will briefly discuss the various transitional justice mechanisms available under the classical approach. Followed by an in depth analysis of the various remedies under Shari’ah for crimes that are typically perpetrated in the context of transition.

AN OVERVIEW OF CLASSICAL TRANSITIONAL JUSTICE

This paper will use the term “classical transitional justice” to refer to the current, secular approach to post-conflict reconstruction in order to distinguish it from the Islamic approach proposed herein.

I. GOALS AND OBJECTIVES

Transitional justice refers to the ways in which post-conflict and/or transitioning states achieve justice and stability.³ Transitional justice measures promote civic trust, build peace, foster national unity, and strengthen the democratic rule of law through measures that ensure accountability.⁴ The objective and motivation of a given transitional justice institution will determine whether it will take a restorative or a retributive approach.⁵ Whether taking an Islamic approach or a classical approach to transitional justice, the restorative versus retributive justice

³ *What is Transitional Justice?*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, <http://ictj.org/about/transitional-justice>.

⁴ *Id.*

⁵ 1 Lavinia Stan and Nadya Nedelsky, *Encyclopedia of Transitional Justice*, 235.

debate is at the heart of the transitional justice process.⁶ Therefore, discussion of the transitional justice mechanisms available under Shari'ah is impossible without first addressing its stance on the restorative versus retributive justice debate.

The goal of retributive justice is accountability through punishment of individual perpetrators.⁷ Thus, a retributive approach calls for punitive measures directed at the perpetrator himself.⁸ Conversely, restorative justice is more concerned with peace building through reconciliation between the victim, the perpetrator, and the society and healing the wounds suffered by the victims through reparations.⁹ However, under classical transitional justice, these two approaches are not mutually exclusive.¹⁰ Rather, states can establish a hybrid process that would provide for both punishment and restitution.¹¹

For instance, both restorative and retributive approaches to justice were implemented in the former Yugoslavia following the armed conflict and genocide.¹² The UN Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY) to prosecute human rights violators for their crimes.¹³ In addition to the retributive work of the ICTY, various restorative measures were also implemented. These included a reparations program aimed at compensating victims and an effort by the International Commission for Missing Persons to identify and locate missing persons in Bosnia and Herzegovina.¹⁴

II. MEANS AND MECHANISMS

⁶ *Id.*

⁷ *Id.* at 235-36.

⁸ *Id.*

⁹ *Id.* at 236.

¹⁰ *Id.*

¹¹ *Id.*

¹² *The Former Yugoslavia*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, <https://www.ictj.org/our-work/regions-and-countries/former-yugoslavia>.

¹³ *Id.*

¹⁴ *Id.*

Transitional justice includes judicial as well as non-judicial measures aimed at redressing human rights abuses committed either by the former regime or during armed conflict.¹⁵ These measures include, but are not limited to, prosecutions, truth commissions and reparations.

Prosecution and punishment of human rights violators after civil war or authoritarian rule is one of the key transitional justice mechanisms implemented by states.¹⁶ Historically, prosecutions have been effective at deterring future crimes, establishing rule of law, fostering national unity and healing, and strengthen democratic practices.¹⁷ A key assumption behind the practice is that people will not be able to trust the new regime and will lose faith in the legal system if heinous crimes go unpunished.¹⁸

Although punishment of human rights violators is morally sound and effective, states rarely prosecute perpetrators.¹⁹ Post-conflict states often fail to initiate prosecutions because they are fragile and have a greater need for peace than justice.²⁰ In addition, new leaders might be hesitant to hold prosecutions because they had close ties to the former regime and are guilty of violations themselves.²¹ After lengthy periods of authoritarian rule, the state's judiciary may be too weak to try human rights cases.²² Even in the presence of a strong judiciary, the number of violations might be so grave that it might not be able to handle the caseload.²³

For instances, the South African government chose not to prosecute human rights violators of the apartheid era.²⁴ At the time, South Africa was deeply divided among racial lines and many feared that the prosecution of white perpetrators, although justified, would create

¹⁵ *What is Transitional Justice?*, *supra*.

¹⁶ 1 Stan, *supra*, at 57.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 57-58.

²⁴ 2 Lavinia Stan and Nadya Nedelsky, *Encyclopedia of Transitional Justice*, 449.

political instability or even a civil war.²⁵ The white regime, whose members were largely responsible for apartheid crimes, was still in power and their cooperation was necessary for a peaceful transition.²⁶ Faced with the possibility of criminal prosecution, those in power would have fought to prevent South Africa's transition.²⁷ Therefore, South Africa chose peace over prosecutions.

Truth commissions “are [temporary investigative bodies] sanctioned or established by the state; are extrajudicial . . . ; have a retrospective focus; investigate a specific period; are temporary in nature; examine trends/patterns of past human rights abuses, rather than individual cases; and issue a final report, with recommendations regarding appropriate remedies to victims and institutional reforms for society to ensure non-repetition of violations.”²⁸

As an alternative to prosecutions, truth commissions have as their objective the achievement of justice and reconciliation by investigating human rights violations committed over a specific period.²⁹ Truth commissions are typically less expensive than prosecutions and, when implemented properly, they are effective at pursuing justice without compromising peace-building efforts in transitioning states.³⁰

According to the United Nations General Assembly Resolution 60/147 of March 21, 2006, there are five forms of reparations:

(1) [R]estitution, which attempts to restore the victim's pre-violation situation, including ‘restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property;’ (2) compensation, ‘as appropriate and proportional to the gravity of the violation,’ seeks to redress physical and mental harm, lost opportunities, material damages and loss of earning, moral damage, and costs for

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ 1 Stan, *supra*, at 99.

²⁹ *Id.* at 98-99.

³⁰ *Id.* at 99.

legal, expert, medical, psychological, and social services and assistance; (3) rehabilitation, includes medical and psychological care and legal and social services; (4) satisfaction includes measures to cease violations . . . ; and (5) guarantees of non-repetition are broad-scale, wide-ranging social and institutional reform measures, including securing civilian control of the military and ensuring its proceedings follow international standards . . . ³¹

Reparation programs are both punitive and remedial. Their objectives are to deter future human rights violations and to promote healing and reconciliation by remedying past wrongs through monetary compensation and/or services to the victims.³²

RETRIBUTIVE JUSTICE: *HUDUD, QISAS, OR TAZIR?*

Justice plays a central theme in the Qur'an and many Muslims regard it as one of Islam's main objectives. God declares in the Qur'an: "We have already sent Our messengers with clear evidences and sent down with them the Scripture and the balance that the people may maintain [their affairs] in justice."³³ In another passage, God declares "O you who have believed, be persistently standing firm for Allah, witnesses in justice, and do not let the hatred of a people prevent you from being just. Be just; that is nearer to righteousness."³⁴ One can read this passage to mean that justice is an obligation of Islam and that injustice is *haram* or forbidden.

Muslim *fiqh* divides crimes and punishments into three categories: *hudud*, *qisas*, and *ta'zir*.³⁵ *Hudud* crimes, or prescribed offences, cover the five offences of theft, adultery, slander, wine drinking and apostasy.³⁶ A passage from Sahih Abu Dawud states:

Narrated Aisha, Ummul Mu'minin: The Apostle of Allah (peace_be_upon_him) Said: The blood of a Muslim man who testifies that there is no god but Allah and that Muhammad is Allah's Apostle should not lawfully be shed except only for one of three reasons: a man who committed fornication after marriage, in which case he should be stoned; one who goes forth to fight with Allah and His Apostle, in which case he should be killed or crucified or exiled from the land; or one who

³¹ *Id.* at 85.

³² *Id.* at 84.

³³ Qur'an, 57:25.

³⁴ Qur'an, 5:8.

³⁵ Mohammad Hahim Kamali, SHARI'AH LAW: AN INTRODUCTION 188 (2008).

³⁶ *Id.* at 44.

commits murder for which he is killed.³⁷

The Qur'an prescribes *qisas*, or just retaliation, for the crimes of murder, wounding and mutilation. The purpose of *qisas* is the betterment or improvement of the community and its citizens: "And there is for you in legal retribution [saving of] life, O you [people] of understanding, that you may become righteous."³⁸ Lastly, *ta'zir* covers minor transgressions, offenses for which retribution is improper or impossible, and crimes not mentioned in the Qur'an. Unlike *hudud* and *qisas*, there is no fixed punishment for *ta'zir* crimes. Therefore, punishment of *ta'zir* crimes is administered at the judge's (*qadi*) discretion. This paper will determine the effectiveness of *hudud*, *qisas* and *ta'zir* in addressing the crimes most commonly committed during armed conflict. These are: intentional and unintentional killings, torture or malicious injury to persons, rape and sexual slavery, and forced disappearances.

I. *QISAS* CRIMES: MURDER & WOUNDING

Although murder is not a *hadd* crime, Islam considers its commission as *haram*. In Sahih Bukhari, Anas narrates that, "The Prophet was asked about the great sins He said, 'They are to joining others in worship with Allah, to be undutiful to one's parents, to kill a person (which Allah has forbidden to kill), and to give false witness.'"³⁹ Under Shari'ah, it is a sin for a Muslim to take the life of another Muslim: "Abdullah (b. Mas'ud) reported Allah's Messenger (may peace be upon him) as saying: It is not permissible to take the life of a Muslim who bears testimony (to the fact that there is no god but Allah, and I am the Messenger of Allah . . .)"⁴⁰ However, the passage goes on to state three exceptions to this rule: "the married adulterer, a life for a life

³⁷ *Abu-Dawud*, 38:4339.

³⁸ Qur'an, 2:179.

³⁹ *Sahih Bukhari*, 3:48:821.

⁴⁰ *Sahih Muslim*, 016:4152.

[*qisas*] and the deserter of his Din (Islam), abandoning the community.”⁴¹ Therefore, it is permissible under Shari’ah to carry out the death penalty against a non-Muslims as well as a Muslim for committing murder.⁴²

Qisas as a punishment for murder is set out in Surat Al-Baqarah of the Qur’an: “O you who have believed, prescribed for you is legal retribution for those murdered—the free for the free, the slave for the slave, and the female for the female.”⁴³ A strict reading of this passage would suggest that retributive justice is only available in cases where the perpetrator and the victim hold the same status: a woman killing a woman, a slave killing a slave, etc. However, other *surahs* in the Qur’an, along with various *hadiths*, interpret *qisas* for intentional killing to mean a life for a life, generally.

Allah states in the Qur’an: “And We ordained for them therein a life for a life, an eye for an eye, a nose for a nose, an ear for an ear, a tooth for a tooth and for wounds is legal retribution.”⁴⁴ Furthermore, according to Sahih Bukhari, Anas bin Malik narrated:

A Jew crushed the head of a girl between two stones, and the girl was asked, "Who has done that to you, so-and-so or so and so?" (Some names were mentioned for her) till the name of that Jew was mentioned (whereupon she agreed). The Jew was brought to the Prophet and the Prophet kept on questioning him till he confessed, whereupon his head was crushed with stones.⁴⁵

This passage is significant for two reasons. First, it demonstrates that retaliation is still available as a remedy even if the victim and the perpetrator do not hold the same status. The perpetrator in the above passage was a Jewish man and, although we do not know her religion, the victim was a girl. Secondly, the *hadith* suggests that in cases of intentional killing, it is permissible to slay the perpetrator in the same manner he slew his victim. Considering that in

⁴¹ *Id.*

⁴² *Id.*

⁴³ Qur’an, 2:178.

⁴⁴ Qur’an, 5:45.

⁴⁵ *Sahih Bukhari*, 9:83:15.

pre-Islamic Arabia, an attack against one's tribesman was as an attack on the tribe itself, a more accurate interpretation of the verse in Surat Al-Baqarah is that there should be some measure of equality in retaliation.⁴⁶ Therefore, Shari'ah forbids blood feuds leading to mass retaliation against an entire tribe for the murder of a single tribesman.

Only intentional murders are punishable under Shari'ah. In Surat Al-Nisa of the Qur'an, God states:

And never is it for a believer to kill a believer except by mistake. And whoever kills a believer by mistake - then the freeing of a believing slave and a compensation payment presented to the deceased's family [is required] unless they give [up their right as] charity. But if the deceased was from a people at war with you and he was a believer - then [only] the freeing of a believing slave; and if he was from a people with whom you have a treaty - then a compensation payment presented to his family and the freeing of a believing slave. And whoever does not find [one or cannot afford to buy one] - then [instead], a fast for two months consecutively, [seeking] acceptance of repentance from Allah. And Allah is ever Knowing and Wise.⁴⁷

One can read this passage to mean that unintentional killing of civilians during war or civil unrest is not punishable by death. Regarding slaves as a form of currency, a state might set up a reparations program to compensate the victims' families if the perpetrators were state actors. However, perpetrators independent from the state—rebel fighters, protesters, etc.—would have to pay compensation to the victim's family. This amount would be less than the blood money (*ad-diyat*) amount for the victim because compensation for unintentional killings is valued at the price of a slave. Assuming slaves were a form of currency, the last sentence in the above verse could mean that those without means to pay compensation need not pay. Instead, all they need to do is seek forgiveness from God through fasting. In fact, in Saudi Arabia, princes often pay the *diyat* on behalf of culprits who are without means.⁴⁸

⁴⁶ Karen Armstrong, *ISLAM: A SHORT HISTORY* 19 (2007).

⁴⁷ Qur'an, 4:92.

⁴⁸ Siti Zubaidah Ismail, *The Modern Interpretation of the Diyat Formula for the Quantum of Damages: The Case of*

The above verse from Surat An-Nisa is followed by: “But whoever kills a believer intentionally - his recompense is Hell, wherein he will abide eternally, and Allah has become angry with him and has cursed him and has prepared for him a great punishment.”⁴⁹ Thus, intentional killing is a far greater offense under Shari’ah.

Although eyewitnesses are not required for intentional killings, according to a passage in Sahih Muslim, the Prophet Muhammad required fifty oaths—swearing that one’s testimony is true—for establishing responsibility for murders and blood money (*ad-diyat*).⁵⁰ The sin that accompanies wrongful convictions in Islam discourages prosecution in cases where there is the slightest doubt as to the defendant’s guilt: “He who killed a human being without the later being guilty of killing another or of spreading disorder in the land should be looked upon as if he had killed all of mankind.”⁵¹

II. HADD, HIRABAH & MASLAHA: RAPE & SEXUAL SLAVERY

Rape and sexual assault are the most controversial and widely debated crimes under Shari’ah. While there is wide consensus among clerics and scholars that adultery and fornication between two consenting adults is punishable under Shari’ah, many Muslim scholars and theologians remain divided as to the proper punishment for the crime of rape and sexual slavery under Shari’ah.

In Arabic, rape is translated as *zina bi al-ikrah*, which literally means forcible unlawful sexual intercourse.⁵² The Qur’an mentions rape or unlawful sexual intercourse in the Surat An-Nisa:

Homicide and Personal Injuries, 26 ARAB LAW QUARTERLY 361, 361-79 (2012).

⁴⁹ Qur’an, 4:93.

⁵⁰ *Sahih Muslim*, 016:4119.

⁵¹ Qur’an, 5:32.

⁵² Dr. Azman Mohd Noor, *Punishment for Rape in Islamic Law*, SLASH DOCS 1 (Jan. 12, 2012, 8:06 AM), <http://www.slashdocs.com/myxqs/punishment-for-rape-in-islamic-law.html>.

And [also prohibited to you are all] married women except those your right hands possess. [This is] the decree of Allah upon you. And lawful to you are [all others] beyond these, [provided] that you seek them [in marriage] with [gifts from] your property, desiring chastity, *not unlawful sexual intercourse*. So for whatever you enjoy [of marriage] from them, give them their due compensation as an obligation. And there is no blame upon you for what you mutually agree to beyond the obligation. Indeed, Allah is ever Knowing and Wise.⁵³

The nature of transitional justice measures implemented by a State in accordance with Shari'ah will depend on that State's perspective on Islam. Therefore, this paper will discuss the two main perspectives on rape: rape as *zina bi al-ikrah* and rape as *hirabah*.

A. RAPE AS *ZINA BI AL-IKRAH*

The treatment of rape, or *zina bi al-ikrah*, as a subset of *zina* is primarily because both crimes involve sexual intercourse.⁵⁴ The legal meaning of *zina* requires unlawful intercourse that results in actual penetration (*hal nakattaha*).⁵⁵ Sunnah Abudawud outlines the elements of the crime of *zina* and the prescribed punishment:

Narrated AbuHurayrah: A man of the tribe of Aslam came to the Prophet (peace_be_upon_him) and testified four times against himself that he had had illicit intercourse with a woman, while all the time the Prophet (peace_be_upon_him) was turning away from him. Then when he confessed a fifth time, he turned round and asked: Did you have intercourse with her? He replied: Yes. He asked: Have you done it so that your sexual organ penetrated hers? He replied: Yes. He asked: Have you done it like a collyrium stick when enclosed in its case and a rope in a well? He replied: Yes. He asked: Do you know what fornication is? He replied: Yes. I have done with her unlawfully what a man may lawfully do with his wife. He then asked: What do you want from what you have said? He said: I want you to purify me. So he gave orders regarding him and he was stoned to death.⁵⁶

All the major schools of Islamic thought hold the above definition of unlawful sexual intercourse to be true, with slight variations.

⁵³ Qur'an, 4:24 (emphasis added).

⁵⁴ Noor, *supra*, at 1.

⁵⁵ *Abu-Dawud*, 38:4414.

⁵⁶ *Id.*

According to the Hanafites, *zina* is “unlawful vaginal intercourse with a living woman who is not a right-hand possession, not in the quasi-ownership of the man or not freely married or quasi-married in an Islamic state.”⁵⁷ The Malikites, Shafites and Hanbalites define *zina* as “the unlawful and mutually consensual vaginal or anal intercourse between a man who is sane and who reached the age of puberty and a woman who is not in his ownership.”⁵⁸ Therefore, this definition could cover male victims of rape.

Rape as *zina bi al-ikrah* is different from *zina* itself, because *zina bi al-ikrah* is a physical assault that causes bodily harm and sometimes death.⁵⁹ Furthermore, whereas *zina* is a violation of the rights of Allah, rape is both a violation of the rights of Allah and the rights of a human being.⁶⁰ Jurists who classify rape as *zina bi al-ikrah* prescribe the same punishment for rape as they do for the *hadd* of *zina*.⁶¹ The *hadd* penalty for *zina* is death by stoning for the married and 100 lashes and possible deportation for the unmarried.⁶² In chapter 3 of Kitab Al-Hudud in Sahih Muslim, Ubada b. as-Samit reported:

Allah’s Messenger as saying: Receive (teaching) from me, receive (reaching) from me. Allah has ordained a way for those (women). When an unmarried male commits adultery with an unmarried female (they should receive) one hundred lashes and banishment for one year. And in case of married male committed adultery with a married female, they shall receive one hundred lashes and be stoned to death.⁶³

However, only the perpetrator of rape receives the *hadd* punishment for *zina*, not the victim.⁶⁴

⁵⁷ Noor, *supra*, at 2 (quoting Muhammad ibn Mukram ibn Manzur al-lfriqi, Egyptian lexicographer (d 711 AH/1311 CE), *Lisan al-‘Arab*, (Beirut: Dar Sadir, 1956)).

⁵⁸ Noor, *supra*, at 2.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Noor, *supra*, at 2 (quoting al-Suyuti, Jalal ad-Din ‘Abd al-Rahman ibn Abi Bakr (d 190 AH/1505 CE), *al-Ashbar wa al-naza’ir*, (Beirut: Dar al-Kitab al-‘Arabia, 1987) at 458).

⁶³ *Sahih Muslim*, 17:4191.

⁶⁴ Noor, *supra*, at 2-3.

Jurists who classify rape as a nonconsensual form of *zina* also apply the testimonial requirement of the *hadd* of *zina* to *zina bi al-ikrah*. In order to convict an accused of *zina*, the victim must bring forth the testimony of four male eyewitnesses. God prescribes the testimonial requirement for *zina* in Surat An-Nur of the Qur'an:

Those who commit unlawful sexual intercourse of your women, bring against them four [witnesses] from among you. And if they testify, confine the guilty women to houses until death takes them or Allah ordains for them [another] way. And the two who commit it among you, dishonor them both. But if they repent and correct themselves, leave them alone. Indeed, Allah is every Accepting of repentance and Merciful.⁶⁵

The total number of witnesses required changes based on the sex of those who are testifying. This is because the testimony of a woman is half that of a man's. The status of women as witnesses appears in Surat Al-Baqarah of the Qur'an, which states, "And bring to witness two witnesses from among your men. And if there are not two men [available], then a man and two women from those whom you accept as witnesses - so that if one of the women errs, then the other can remind her."⁶⁶ In addition, according to a passage in Sahih Bukhari, "The Prophet said, 'Isn't the witness of a woman equal to half of that of a man?' The women said, 'Yes.' He said, 'This is because of the deficiency of a woman's mind.'"⁶⁷

Under this approach, the victim could be liable for slanderous accusation (*qadht*), which is a *hudud* crime, if she fails to produce four male eyewitnesses.⁶⁸ Punishment for slanderous accusation is based on a passage in Surat An-Nur of the Qur'an, which states: "Why did they [who slandered] not produce for it four witnesses? And when they do not produce the witnesses, then it is they, in the sight of Allah, who are the liars."⁶⁹ God in Surat An-Nur of the Qur'an

⁶⁵ Qur'an, 4:15-16.

⁶⁶ Qur'an, 2:282.

⁶⁷ *Sahih Bukhari*, 3:48:826.

⁶⁸ Noor, *supra*, at 1.

⁶⁹ Qur'an, 24:13.

stated that, “Indeed, those who [falsely] accuse chaste, unaware and believing women are cursed in this world and the Hereafter; and they will have a great punishment.”⁷⁰ Another verse in Surat An-Nur prescribes the punishment for slanderous accusation: “And those who accuse chaste women and then do not produce four witnesses - lash them with eighty lashes and do not accept from them testimony ever after. And those are the defiantly disobedient.”⁷¹ Although the above passages only refer to chaste women, jurists have interpreted it to apply to men as well.

B. RAPE AS *HIRABAH*

The modern approach has been to classify rape as *hirabah*, which is also a *hudud* crime.⁷² Under this approach, the judge or *qadi* will convict the perpetrator as an outlaw and one who threatens the peace and security of the community.⁷³ Surat Al-Ma'idah of the Qur'an outlines the punishment for *hirabah*:

Indeed, the penalty for those who wage war against Allah and His Messenger and strive upon earth [to cause] corruption is none but that they be killed or crucified or that their hands and feet be cut off from opposite sides or that they be exiled from the land. That is for them a disgrace in this world; and for them in the Hereafter is a great punishment, [e]xcept for those who return [repenting] before you apprehend them. And know that Allah is Forgiving and Merciful.⁷⁴

Unlike the *hadd* of *zina*, there are multiple penalties available for the *hadd* of *hirabah*: (1) death penalty, (2) crucifixion, or (3) exile. Depending on the judicial system of a country, either the jury or the *qadi* will determine whether to execute or banish the perpetrators of rape under *hirabah*. More importantly, there is mercy for perpetrators who turn themselves in before they are accused or apprehended. Since the verse does not specify the punishment for those who repent, sentencing will be at the *qadi*'s discretion.

⁷⁰ Qur'an, 24:23.

⁷¹ Qur'an, 24:4.

⁷² Noor, *supra*, at 3

⁷³ *Id.*

⁷⁴ Qur'an, 5:33-34.

Those who classify rape as *hirabah* interpret the term *al-fasad* or the act of causing corruption and mischief on earth to encompass any violent act that causes chaos, including usurping the property and honor of others.⁷⁵ The Malikites define *hirabah* as an act of aggression that infringes on another's honor and the taking of property by force. Due to several similarities between rape and *hirabah*, the Malikites believe that the classification of rape as *hirabah* is more appropriate than *zina*. For example, rape is similar to the taking of property by force because the victim's sexual autonomy and, in some cases, virginity is forcefully taken. Both crimes have elements of physical assault, torture, and usurping. Lastly, they both cause disorder and chaos in the community.

Some jurists prefer to prosecute rape as *hirabah* because it does not require *zina*'s high standard of proof.⁷⁶ Even though courts accept eyewitness testimony to prove rape under *hirabah*, they do not require the testimony of four male eyewitnesses as they would for the crime of *zina*.⁷⁷ The victim may prove the offence by offering circumstantial evidence and expert testimony.⁷⁸ In addition, the plaintiff may also offer forensic and DNA evidence.⁷⁹ Besides lowering the burden of proof for victims of rape, prosecution of rape as *hirabah* is more focused on the intent and act of the perpetrator instead of on the absence of the victim's consent.⁸⁰ Rape as *zina*, on the other hand, requires the lack of consent for prosecution or else both parties are guilty of adultery.⁸¹ Lastly, courts do not factor in the victim or the perpetrator's marital status when determining the penalty for *hirabah*.⁸²

⁷⁵ Noor, *supra*, at 4 (quoting al-Tabari, Abu Ja'far Muhammad ibn Jarir *Jami' al-bayan 'an ta'wil al-Qur'an* (Beirut: al-Dar al-Shamiyaa, 1997) Vol 10 at 257).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* (citing Dr. 'Andul 'Aziz al-Qadir, 8 *Ata* 594 (Beirut: Dar al-Kutub al-'Ilmiyya 1997).

C. MARRIAGE AND ENSLAVEMENT OF FEMALE CAPTIVES OF WAR

There is no question that Shari'ah forbids rape, either as *zine bi al-ikrah* or as *hirabah*.

However, it permits the taking of female captives as brides or as slaves. Surat Al-Haqqah of the Qur'an states:

But let them who find not [the means for] marriage abstain [from sexual relations] until Allah enriches them from His bounty. And those who seek a contract [for eventual emancipation] from among whom your right hands possess - then make a contract with them if you know there is within them goodness and give them from the wealth of Allah which He has given you. And do not compel your slave girls to prostitution, if they desire chastity, to seek [thereby] the temporary interests of worldly life. And if someone should compel them, then indeed, Allah is [to them], after their compulsion, Forgiving and Merciful.⁸³

Although this verse acknowledges the practice of enslaving female captives of war, it also grants them some rights. These include the right to contract for their emancipation and respect for their desires to remain chaste. In Sahih Bukhari, Ibn Muhairiz states how the Prophet Muhammad told his men that there is no need for them to seek his permission before having sex with their captives:

I entered the Mosque and saw Abu Said Al-Khudri and sat beside him and asked him about Al-Azl (i.e. coitus interruptus). Abu Said said, "We went out with Allah's Apostle for the Ghazwa of Banu Al-Mustaliq and we received captives from among the Arab captives and we desired women and celibacy became hard on us and we loved to do coitus interruptus. So when we intended to do coitus interruptus, we said, 'How can we do coitus interruptus before asking Allah's Apostle who is present among us?' We asked (him) about it and he said, 'It is better for you not to do so, for if any soul (till the Day of Resurrection) is predestined to exist, it will exist.'⁸⁴

A passage in Sahih Muslim also demonstrates the practice of having intercourse with female captives:

Abu Sa'id al-Khudri (Allah her pleased with him) reported that at the Battle of Hanain Allah's Messenger (may peace be upon him) sent an army to Autas and encountered the enemy and fought with them. Having overcome them and taken

⁸³ Qur'an, 24:43.

⁸⁴ Sahih Bukhari, 5:59:459.

them captives, the Companions of Allah's Messenger (may peace be upon him) seemed to refrain from having intercourse with captive women because of their husbands being polytheists. Then Allah, Most High, sent down regarding that: "And women already married, except those whom your right hands possess (iv. 24)" (i.e. they were lawful for them when their 'Idda period came to an end).⁸⁵

This passage can be read to mean that sex with female captives is lawful because they are "those whom your right hands possess," or slaves. The Prophet Muhammad himself engaged in the practice of taking female captives as slaves. In Sahih Bukhari, Abdul Aziz states that the Prophet took Safiyah, the daughter of Huayy and wife of a Jewish Rabbi named Kinana, captive after conquering the village of Khaibar:

Anas said, 'When Allah's Apostle invaded Khaibar, we offered the Fajr prayer there yearly in the morning when it was still dark. The Prophet rode and Abu Talha rode too and I was riding behind Abu Talha. The Prophet passed through the lane of Khaibar quickly and my knee was touching the thigh of the Prophet. He uncovered his thigh and I saw the whiteness of the thigh of the Prophet. When he entered the town, he said, 'Allahu Akbar! Khaibar is ruined. Whenever we approach near a (hostile) nation (to fight) then evil will be the morning of those who have been warned.' He repeated this thrice. The people came out for their jobs and some of them said, 'Muhammad (has come).' (Some of our companions added, "With his army.") We conquered Khaibar, took the captives, and the booty was collected. Dihya came and said, 'O Allah's Prophet! Give me a slave girl from the captives.' The Prophet said, 'Go and take any slave girl.' He took Safiya bint Huyai. A man came to the Prophet and said, 'O Allah's Apostles! You gave Safiya bint Huyai to Dihya and she is the chief mistress of the tribes of Quraiza and An-Nadir and she befits none but you.' So the Prophet said, 'Bring him along with her.' So Dihya came with her and when the Prophet saw her, he said to Dihya, 'Take any slave girl other than her from the captives.' Anas added: The Prophet then manumitted her and married her." Thabit asked Anas, "O Abu Hamza! What did the Prophet pay her (as Mahr)?" He said, "Her self was her Mahr for he manumitted her and then married her." Anas added, "While on the way, Um Sulaim dressed her for marriage (ceremony) and at night she sent her as a bride to the Prophet. So the Prophet was a bridegroom and he said, 'Whoever has anything (food) should bring it.' He spread out a leather sheet (for the food) and some brought dates and others cooking butter. (I think he (Anas) mentioned As-SawTq). So they prepared a dish of Hais (a kind of meal). And that was Walrma (the marriage banquet) of Allah's Apostle."⁸⁶

⁸⁵ *Sahih Muslim*, 8:3432.

⁸⁶ *Sahih Bukhari*, 1:8:367.

A passage in Sahih Abu Dawud tells the story of how the Prophet obtained Juwairiyah of the tribe Banu Mustaliq:

Narrated Aisha, Ummul Mu'minin: Juwayriyyah, daughter of al-Harith ibn al-Mustaliq, fell to the lot of Thabit ibn Qays ibn Shammās, or to her cousin. She entered into an agreement to purchase her freedom. She was a very beautiful woman, most attractive to the eye. Aisha said: She then came to the Apostle of Allah (peace_be_upon_him) asking him for the purchase of her freedom. When she was standing at the door, I looked at her with disapproval. I realized that the Apostle of Allah (peace_be_upon_him) would look at her in the same way that I had looked. She said: Apostle of Allah, I am Juwayriyyah, daughter of al-Harith, and something has happened to me, which is not hidden from you. I have fallen to the lot of Thabit ibn Qays ibn Shammās, and I have entered into an agreement to purchase of my freedom. I have come to you to seek assistance for the purchase of my freedom. The Apostle of Allah (peace_be_upon_him) said: Are you inclined to that which is better? She asked: What is that, Apostle of Allah? He replied: I shall pay the price of your freedom on your behalf, and I shall marry you. She said: I shall do this. She (Aisha) said: The people then heard that the Apostle of Allah (peace_be_upon_him) had married Juwayriyyah. They released the captives in their possession and set them free, and said: They are the relatives of the Apostle of Allah (peace_be_upon_him) by marriage. We did not see any woman greater than Juwayriyyah who brought blessings to her people. One hundred families of Banu al-Mustaliq were set free on account of her.⁸⁷

Sahih Bukhara also mentions Juwairiya:

Narrated Ibn Aun: I wrote a letter to Nafi and Nafi wrote in reply to my letter that the Prophet had suddenly attacked Bani Mustaliq without warning while they were heedless and their cattle were being watered at the places of water. Their fighting men were killed and their women and children were taken as captives; the Prophet got Juwairiya on that day. Nafi said that Ibn 'Umar had told him the above narration and that Ibn 'Umar was in that army.⁸⁸

From a purely textualist perspective, Shari'ah does not prohibit sexual relations with female captives, whether or not you marry them. Many extremists have relied on these hadiths to justify the raping of women during war. Salafi Sheikh Yasir al-Ajlawni issued a fatwa in 2013 stating that, "it is legitimate for Muslims waging war against [President] Assad . . . to capture

⁸⁷ *Abu-Dawud*, 29:3920.

⁸⁸ *Sahih Bukhari*, 3:46:717.

and have sex with Alawites and other non-Sunni, non-Muslim women.”⁸⁹ However, Sheikh al-Ajlawni and his followers are in the minority. Most Muslims understand that these hadiths reflect the customs and norms of the early Islamic community and not those of contemporary Islam.

This paper argues that an Islamic transitional justice institution would punish the enslavement and rape of female captives through the practice of *maslaha*. *Maslaha*, meaning public interest, is the practice of prohibiting or permitting something based on whether or not it serves the public welfare.⁹⁰ In applying the concept of *maslaha* to the issue of sex with slaves and female captives, it is possible to argue that such acts should be punishable under Shari’ah because they go against public interest.

Restorative Justice: *Ad-Diyat, Sulh, & Truth Commissions*

Although the Qur’an prescribes the law of retribution for acts of murder, it also recommends forgiveness. God states in the Qur’an, “O you who have believed, prescribed for you is legal retribution for those murdered . . . But whoever overlooks from his brother anything, then there should be a suitable follow-up and payment to him with good conduct. This is an alleviation from your Lord and a mercy.”⁹¹ Allah also states in the Qur’an: “And We ordained for them therein a life for a life . . . But whoever gives [up his right as] charity, it is an expiation for him. And whoever does not judge by what Allah has revealed – then it is those who are the wrongdoers.”⁹²

I. RECONCILIATION AND TRUTH SEEKING: *SULH*

⁸⁹ Cheryl K. Chumley, *Islamic Cleric Decrees it OK for Syrian Rebels to Rape Women*, WASHINGTON TIMES, <http://www.washingtontimes.com/news/2013/apr/3/islamic-cleric-decrees-it-ok-syrian-rebels-rape-wo/>.

⁹⁰ Kamali, *supra*, at 265.

⁹¹ Qur’an, 2:178.

⁹² Qur’an, 5:45.

Islamic writings describe reconciliation as flowing from the mercy of Allah—his willingness to forgive the repentant.⁹³ However, forgiveness is conditional upon repentance of the perpetrator.⁹⁴ The Prophet Muhammad also encouraged mercy by asking the victim or the victim’s family four times if they are willing to forgive before allowing retribution:

“I was with the Prophet (peace-be-upon-him) when a man who was a murderer and had a strap round his neck was brought to him. he then called the legal guardian of the victim and asked him: Do you forgive him? He said: No. He asked: Will you accept the blood-money? He said: No. He asked: Will you kill him? He said: Yes. He said take him. When he turned his back, he said: Do you forgive him? . . . After repeating all this [four times], he said: If you forgive him, he will bear the burden of his own sin and the sin of the victim. He then forgave him.”⁹⁵

Another example of mercy can be found in Sahih Abu Dawud: “The Prophet (peace_be_upon_him) Said: The disputants should refrain from taking retaliation. The one who is nearer should forgive first and then the one who is next to him, even if (the one who forgives) were a woman.”⁹⁶ A passage from Sahih Bukhari’s Book on Peacemaking states,

Narrated Anas: It was said to the Prophet Muhammad “Would that you see Abdullah bin Ubai.” So, the Prophet Muhammad went to him, riding a donkey, and the Muslims accompanied him, walking on salty barren land. When the Prophet Muhammad reached Abdullah bin Ubai, the latter said, “Keep away from me! By Allah, the bad smell of your donkey has harmed me.” On that an Ansari man said [to Abdullah], “By Allah! The smell of the donkey of Allah’s Messenger is better than you smell.” On that a man from Abdullah’s tribe got angry for Abdullah’s sake, and the two men abused each other which case the friends of the two men to get angry, and the two groups started fighting with sticks, shoes and hands. We were informed that the following Divine Verse was revealed [in this concern]: “And if two groups of Believers fall to fighting, then make peace between them.”⁹⁷

The passage is referring to a verse from Surat Al-Hujurat of the Qur’an, which states:

⁹³ Daniel Philpott, *What Religion Brings to the Politics of Transitional Justice*, 61 JOURNAL OF INTERNATIONAL AFFAIRS 93, 98 (2007).

⁹⁴ *Id.*

⁹⁵ *Abu-Dawud*, 39:4484.

⁹⁶ *Abu Dawud*, 39:4523.

⁹⁷ *Sahih Bukhari*, 3:53:2.

And if two factions among the believers should fight, then make settlement between the two. But if one of them oppresses the other, then fight against the one that oppresses until it returns to the ordinance of Allah. And if it returns, then make settlement between them in justice and act justly. Indeed, Allah loves those who act justly.⁹⁸

According to another passage from the Book of Peacemaking in Sahih Bukhari, Um Kulthum bint ‘Uqba heard the Prophet Muhammad say, “He who makes peace between the people by inventing good information or saying good things, is not a liar.”⁹⁹ One can read this passage to mean that peace building is more important than truth seeking under Shari’ah. However, truth and justice are still valued under Shari’ah. In fact, witnesses are encouraged to speak the truth when testifying: “The Prophet said thrice, ‘Should I inform you out the greatest of the great sins?’ They said, ‘Yes, O Allah’s Apostle!’ He said, “To join others in worship with Allah and to be undutiful to one’s parents.’ The Prophet then . . . said, “And I warn you against giving a false witness,’ and he kept on saying that warning till we thought he would not stop.”¹⁰⁰

II. BLOOD MONEY: MURDERS AND MALICIOUS WOUNDING

Although retributive justice is available as a remedy under Shari’ah, it is not the sole or even preferred means of punishment for the crimes of murder and wounding. Even in cases of homicide, the victim’s family is encouraged to accept the blood money (*ad-diyat*) over retaliation. The offender may even be pardoned without paying blood money should the victim’s family renounce retaliation and grant forgiveness.¹⁰¹ This might be because under Shari’ah the wishes of the victim and the victim’s family trump public concerns and state objectives.

According to various *hadiths*, blood money, rather than retaliation, is the recommended punishment for unintentional killings. “. . . [I]f anyone is killed accidentally, his blood-wit

⁹⁸ Qur’an, 49:9.

⁹⁹ *Sahih Bukhari*, 3:49:857.

¹⁰⁰ *Sahih Bukhari*, 3:48:822.

¹⁰¹ Tahir Wasti, *The Application of Islamic Criminal Law in Pakistan: Sharia in Practice*, 64 (quoting Sir Seyed Ahmad, *Tasfir-ul-Quran*, 279 (Lahore, 1989)).

should be one hundred camels: thirty she-camels which had entered their second year, thirty she-camels which had entered their third year, thirty she-camels which had entered their fourth year, and ten male camels which had entered their third year.”¹⁰² A passage in Sahih Bukhari makes it clear that the victim’s family must ask for a reasonable *diya*: “The Verse, ‘Then the relatives should demand blood-money in a reasonable manner,’ means that the demand should be reasonable and it is to be compensated with handsome gratitude.”¹⁰³ The passage is referring to a verse in Surat Al-Baqarah of the Qur’an.¹⁰⁴

Unlike the system in place before Islam, blood money is available to both Muslim and non-Muslim victims: “For the children of Israel the punishment for crime was Al-Qisas only (i.e. the law of equality in punishment) and the payment of blood money was not permitted as an alternative. But Allah said to this nation (Muslims): ‘O you who believe! Qisas is prescribed for you in case of murder,’”¹⁰⁵

The general reparations amount, or blood money, was set at a hundred camels for a life.¹⁰⁶ However, this amount has changed over time. According to Sahih Abu Dawud, “[t]he value of the blood-money at the time of the Apostle of Allah (peace_be_upon_him) was eight hundred dinars or eight thousand dirhams, and the blood-money for the people of the Book was half of that for Muslims.”¹⁰⁷ However, Umar fixed the *diya* “value for those who possessed gold at one thousand dinars, for those who possessed silver at twelve thousand (dirhams), for those who possessed cattle at two hundred cows, for those who possessed sheep at two thousand sheep, and for those who possessed suits of clothing at two hundred suits.”¹⁰⁸ One can read this passage

¹⁰² *Abu-Dawud*, 39:4526.

¹⁰³ *Sahih Bukhari*, 9:83:20.

¹⁰⁴ Qur’an, 2:178.

¹⁰⁵ *Sahih Bukhari*, 9:83:20.

¹⁰⁶ *Malik’s Muwatta*, 43:43.1.1.

¹⁰⁷ *Abu-Dawud*, 39:4527.

¹⁰⁸ *Id.*

to mean that the rate of *diya* is not set in stone but changes with the times. In fact, every Islamic state has its own valuation system for *ad-diyat*.

Another factor that goes into determining the blood money amount besides the type of injury is the sex of the victim. Under Shari'ah, women were entitled to 1/3 to 1/2 of that of a man's blood money.¹⁰⁹ For instance, in Iran, the blood money for a Muslim man is valued at 675,000,000 IRI Rials and "it is the standard against which the values of all other categories of persons are measured."¹¹⁰ Under Article 544 of Iran's Islamic Penal Code, the blood money for the murder of a Muslim woman is half that of a Muslim man.¹¹¹ With regard to bodily injury and wounding, Article 544 states, "The *diya* of [harms to] limbs and bodily abilities, up to one third of the full *diya*, is the same for man and woman; however if it reaches, or exceeds, one third of the full *diya*, the *diya* of woman shall be decreased to half."¹¹²

III. BLOOD MONEY: FORCED DISAPPEARANCES

Forced disappearances and abductions have plagued the Arab Spring states. Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance defines forced disappearances as "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State . . . followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person . . .

.."¹¹³

The Prophet Muhammad would often pay *diya* for intentional killings where the perpetrator was unknown:

¹⁰⁹ *Malik's Muwatta*, 43:43.6.4b.

¹¹⁰ *Islamic Penal Code of the Islamic Republic of Iran –Book One & Book Two*, IRAN HUMAN RIGHTS DOCUMENTATION CENTER, (Apr. 4, 2013), http://www.iranhrdc.org/english/human-rights-documents/iranian-codes/3200-islamic-penal-code-of-the-islamic-republic-of-iran-book-one-and-book-two.html#.U1AgAijb__d.

¹¹¹ *Id.* (citing MAJMU'AH QAVANINI JAZAI [CODE OF CRIMINAL LAW] Tehran 1381 [2002] Article 544 (Iran)).

¹¹² *Id.*

¹¹³ *International Convention for the Protection of All Persons from Enforced Disappearance*, UNITED NATIONS HUMAN RIGHTS, <http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCEDOld.aspx>.

Bushair b. Yasar reported that 'Abdullah b. Sahl b. Zaid and Muhayyisa b. Mas'ud b. Zaid, both of them were Ansar belonging to the tribe of Banu Haritha, set out to Khaibar during the lifetime of Allah's Messenger (may peace be upon him). There was peace during those days and (this place) was inhabited by the Jews. They parted company for their (respective) needs. 'Abdullah b. Sahl was killed, and his dead body was found in a tank. His companion (Muhayyisa) buried him and came to Medina, and the brothers of the slain 'Abd al-Rahman b. Sahl. and Muhayyisa and Huwayyisa told Allah's Messenger (may peace be upon him) the case of 'Abdullah and the place where he had been murdered. Bushair reported on the authority of one who had seen Allah's Messenger (may peace be upon him) that he had said to them: You take fifty oaths and you are entitled to blood-wit of (one) slain among you (or your companion). They said: Messenger of Allah, we neither saw (with our own eyes this murder) nor were we present there. Thereupon (Allah's Messenger is reported to have said): Then the Jews will exonerate themselves by taking fifty oaths. They said: Allah's Messenger, how can we accept the oath of unbelieving people? Bushair said that Allah's Messenger (may peace be upon him) paid the blood-wit himself.¹¹⁴

Thus, one could argue that in Islamic states, a successive regime would be responsible for paying the *diyya* in cases of forced disappearances committed by the former regime, even though they had no hand in the crime.

CONCLUSION: APPLICATION

An Islamic transitional justice institution would allow for both retributive and restorative justice, depending on the violation. The approach would depend on the victims and the victim's families, if deceased. This is because, under Shari'ah, only the victim or his family (if deceased) may opt for restorative justice in place of retribution. Moreover, restorative justice is not available as a remedy for *hudud* crimes—crimes and punishments prescribed by the Qur'an. This would include the crime of rape, whether classified as *zina bi al-ikrah* or *hirabah*. Lastly, retribution and restorative justice are mutually exclusive under Shari'ah. Whether a state implements a restorative or retributive approach will depend on the wishes of the victims'

¹¹⁴ *Sahih Muslim*, 016:4123.

families. Classical transitional justice, on the other hand, permits the implementation of hybrid processes that simultaneously provide both punishment and restitution.¹¹⁵

The transitional justice mechanisms available under an Islamic approach are somewhat similar to those found under classical transitional justice. Similarly, under Shari'ah, transitioning states can prosecute and punish perpetrators for intentional killings and rape. Furthermore, they can establish reparations programs for forced disappearances, intentional and unintentional killings, and bodily harm. Truth commissions are the only major transitional justice mechanism absent under an Islamic approach. However, a state could establish truth commission through *maslaha*. If prosecutions are absent, a state could (in the interest of public welfare) establish a truth commission that would organize and oversee the country's reparations program.

States that have banned the death penalty might frown upon the *qisas* punishment for the commission of intentional killings. Compared to the light penalties for unintentional killing, which are repentance, the freeing of slaves or half of the *diya* amount, a death sentence seems too harsh. Furthermore, any punishment that is based solely on the perpetrator's intent rather than on the harm suffered is less effective at achieving justice. How would one distinguish between intentional and unintentional deaths in the context of civil war? Since civilians by nature of their status are more often the victims of unintentional killings, would the state categorize the deaths of unarmed civilians as unintentional and the deaths of armed combatants and state troops as intentional? A state can simply receive a lighter sentence and avoid accountability by claiming the consequences of their actions were unintended. The fact that certain killings were unintentional should never be a defense. The fact the *diya* for unintentional killings is half of that for intentional killings suggests that the lives of the victims are somehow worth less.

¹¹⁵ 1 Stan, *supra*, at 236.

If the families of the deceased choose to forgive, they would receive half the *diya* amount if the victim was a woman. A reparations program organized along gender lines is certainly unjust. Moreover, families have to choose between prosecution and reparations—they cannot have both. Since the loss of property and one’s livelihood is common in times of war, a family might feel pressured to accept the blood money in order to stay alive. Lastly, reparations programs alone are not effective at addressing mass killings that constitute war crimes or crimes against humanity. The grave nature of these crimes requires condemnation through punishment if similar acts are to be deterred and justice to be served. Therefore, an Islamic approach to intentional and unintentional killings would be less effective than the classical approach.

However, an Islamic approach to transitional justice could be effective at addressing rape. In the context of armed conflict and violent regime change, opposing forces often use rape as a weapon of war. The purpose behind the practice is to suppress opposition movements. Sexual assault and rape during conflict are committed on a much larger scale, with numerous perpetrators and countless victims. Therefore, treating rape as *hirabah* rather than *zina* would be more effective at achieving justice. The four-male-eyewitness requirement under *zina* would make prosecution of perpetrators almost impossible if not extremely difficult. However, states can overcome this burden by categorizing rape as *hirabah*. Furthermore, *hirabah* would not only cover the perpetrators themselves, but the commanders and state leaders who advocated if not directly ordered the rape of civilians. This approach could arguably be effective at deterring state actors from using rape as a weapon of war. The only downside to classifying rape as *hirabah* is the absence of reparations or *ad-diyat* for the victims.

As for sexual slavery, although Islam does not ban the practice, a state could encourage the prohibition of sexual slavery in times of war through the practice of *maslaha*. However, some

have justified the practice because the Qur'an does not classify it as *haram*. An Islamic approach to sexual slavery will very much depend on an individual state's stance on the practice.