



## Responsibilities Arising from Hostage-Taking In Islamic Jurisprudence, International Documents and Afghan Law

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### **Abstract**

The crime of hostage-taking is committed in order to exert pressure on a third party; this crime is considered a crime against national security or a war crime in national and international documents, depending on the case; in Islamic jurisprudence, in accordance with the principle of individuality of crime and punishment, it is considered a crime of ta'zir, hadd, qisas or diyat, depending on the circumstances. The purpose of this article is to explain the responsibilities of governments and hostage-takers for the crime of hostage-taking in order to prevent and scientifically combat the ominous phenomenon of hostage-taking and defend the rights of hostages; the principle of the crime of hostage-taking is that it is intra-border; therefore, it is usually criminalized in the criminal laws of countries; but it may acquire an international aspect with the intervention of a foreign element; the requirements of the time and the circumstances of the victim, such as its occurrence in war conditions, the taking of hostages of persons with international immunity, children and women, etc., may change the nature and responsibilities arising from it; Hostage-taking is specifically criminalized in international documents and Afghan laws, but in Islamic jurisprudence, its rulings are arbitrary and must be extracted through scattered discussions. In this study, after referring to the introductions of the discussion, the types of responsibilities arising from the crime of hostage-taking and the persons responsible for it have been examined by separating the relevant responsibilities, in order to combat the crime of hostage-taking and defend the rights of hostages in a comparative and descriptive-analytical manner.

**Keywords:** *Hostage; Hostage-Taking; Responsibility; Jurisprudence and International Documents*

### **Introduction**

Hostage-taking is a crime against the physical freedom of individuals, and its perpetrator can be a real or legal person who performs it in order to force a third party (whether real or legal, private or public, domestic or international) to perform or refrain from performing an action in order to achieve a goal (whether political or non-political); the importance of this discussion lies in the importance of the subject and its results; Hostage-taking deprives individuals of their right to freedom, which is a natural, human and fundamental right; in many cases, hostages are innocent people who are merely used by hostage-

takers to exert pressure on third parties; therefore, in addition to the responsibilities of hostage-takers, governments are also obliged to secure and guarantee the freedom of citizens and have important responsibilities in this regard. This research defends the physical and mental freedom of hostages and highlights the responsibilities in this regard; because it is assumed that governments and hostage-takers have important responsibilities in this regard according to national, international and Islamic jurisprudence documents; the author has not found any book, article or any other scientific work under the same title (Responsibilities arising from hostage-taking in Islamic jurisprudence, international documents and Afghan law) so far and believes that it is new.

### **Statement of the problem**

Given that responsibility in law is the bridge between the legal event and its result; it can be said that: responsibilities arising from hostage-taking are the obligations that individuals have for the act of hostage-taking; the prevalence of this crime today has endangered national and international security; therefore, the importance of this issue and its necessity are understandable. The spread of various hostage-taking cases in the domestic and international arena, especially in Islamic countries, including Afghanistan, and the need for legislation in the Islamic world to follow Islamic jurisprudence, require that social reactions to this criminal phenomenon be discussed from the perspective of Islamic jurisprudence, international documents, and Afghan law; Studies conducted in this field are mostly in the form of legal articles and have not explained the responsibilities arising from hostage-taking, especially from a jurisprudential perspective, in detail; In this research, an attempt has been made to answer the questions: What are the types of responsibility for the crime of hostage-taking in Islamic jurisprudence, international documents, and Afghan law, and who is responsible? Answer: The theoretical framework of the discussion, after the preliminary discussions, is based on the expression of the perceived responsibilities of each of the hostage takers and the states towards the crime of hostage-taking, and its goal is to achieve justice and ensure the security of the people nationally, cross-border and across time, because the crime of hostage-taking deprives the freedom and physical and spiritual security of citizens and public comfort, and today it is considered one of the concerns of all citizens and the global community.

### **Main question**

What are the common and contradictory points of the responsibilities arising from hostage-taking in Islamic jurisprudence, international documents and Afghan law?

### **Sub-questions**

- 1 - What are the responsibilities of the hostage-takers towards the crime of hostage-taking in Islamic jurisprudence, international documents and Afghan law?
- 2 - What are the responsibilities of the state towards the crime of hostage-taking in Islamic jurisprudence, international documents and Afghan law?

### **Discussion Objectives**

- 1 - Explaining the importance of the issue of hostage-taking and its expansion at the national and international levels,
- 2 - Fighting the crime of hostage-taking in order to achieve security and defend the freedom of the people.
- 3 - Explaining the responsibilities of hostage-takers towards hostages in order to feel and fulfill responsibility.

- 4 - Carrying out preventive and deterrent responsibilities by governments towards the crime of hostage-taking
- 5 - Clarifying research gaps in the application of Islamic jurisprudence with international documents and Afghan law regarding the crime of hostage-taking.

### **The need for research**

The spread of the crime of hostage-taking at the national and international levels, especially in Islamic countries, the importance of the subject, the concern of Muslims, in addition to international treaties and national laws, for jurisprudential theories, the gap in comparative research in this field, special attention to the right to security and freedom of citizens, the value perspective of Islam on human dignity, the sanctity of life, property, reputation and freedom of people, the need to defend the right to security and freedom of people, the emphasis on the harmony of Islamic jurisprudence and Afghan laws with international obligations regarding the principle of personal nature of crime and punishment and the victimization of hostages in the crime of hostage-taking to exert pressure on a third party, and ... necessitate the need to explain the responsibilities arising from hostage-taking in Islamic jurisprudence, international documents and Afghan law.

### **Concepts of discussion**

#### **First - Responsibility:**

Responsibility is an Arabic word; In legal terminology, it is considered a link between a legal event (both civil and criminal) and its consequences, as stated: "Responsibility in the general sense means the duty to cause harm, to be accountable before the court and to assume or bear civil, criminal and disciplinary consequences, whether it is a duty or obligation to the victim or the community." (Farajollahi, Reza, 2010; 20).

Normally, responsibility in legal science is used in a restrictive form, and each restriction indicates a type of legal science; because having a right is associated with having responsibility, such as administrative law and administrative responsibility, civil law and civil responsibility, criminal law and criminal responsibility, international law and international responsibility, etc.

#### **Second - Hostage:**

Hostage is an adjective composed of (gro) and (gan) and in the word it is "an object or person who is pledged in exchange for a loan and for security." (Moeen, Mohammad, 2006; 3: 3279). In civil law, it refers to "mortgaged property" (Jafari Langroodi, 2002; 4: 3072). And bail, and in criminal law, it means: "A person kidnapped... in order to force a government or an international governmental organization or a person to do or refrain from doing something" (Crouzon, L. B., translation: 2005; 283).

#### **Third - Hostage-taking:**

The difference between hostage and hostage-taking is that hostage is a noun and refers to an object or person who is held hostage; but hostage-taking is a noun and an infinitive and refers to a specific criminal act or behavior. In the dictionary: hostage-taking is "taking someone or something into possession in exchange for achieving one's desires." (Anwari, Hassan, 2002; 6: 6154). In the idiom: "Taking a person or people hostage has two forms: 1) Kidnapping and then taking the kidnapped person as collateral. 2) Without kidnapping, taking someone or people as collateral, for example, when relations between two states become strained, one prevents the departure of another's nationals from its territory. Therefore, hostage-taking is common than kidnapping." (Jafari Langroodi: 4; 3072). In this regard, Article 270, Paragraph 1 of the Afghan Penal Code states: "A person who, in order to compel the government of the Islamic Republic of Afghanistan, a foreign government, an international organization, or any other natural or legal person, to perform or refuse to perform an act, takes a person hostage and

makes his release conditional on the performance or refusal to perform that act, has committed the crime of hostage-taking.” (Afghan Penal Code 1395, Paragraph 1 of Article 270). Article 1, paragraph 1 of the International Convention against the Taking of Hostages also states: “Any person who, by means of arrest or detention and by threatening to kill, injure or continue to detain another person (hereinafter referred to as a “hostage”), with the purpose of compelling a third party – a State, an intergovernmental organization, a natural or legal person, or a group of persons – to do or refrain from doing any act as an express or implied condition for the release of the hostage – commits the crime of hostage-taking within the meaning of this Convention” (Convention, adopted by the United Nations General Assembly, 17 December 1979).

#### **Fourth - Hostage-taker**

A person who commits the crime of hostage-taking (who takes a person or persons hostage and makes their release conditional on the performance or refusal to perform an act by a third party) is called a hostage-taker.

#### **Fifth - The State**

The state literally means "wealth and property, the opposite of calamity." (Ali Akbar Dehkoda 1385; 1: 1383). And in the term it has three concepts (general, specific and specific); "The state in the general sense includes four basic elements (population, territory, government and sovereignty) and includes all administrative, judicial and legislative organizations, and its clear description is sovereignty and dominance in domestic and international relations." (Nasser Katouzian 1382; 45). The state in the specific sense is synonymous with the executive power. (Ansari Waliullah 1386. 32). The state in the specific sense (state council) means the political layer of the executive power of the country, such as the Prime Minister and the Council of Ministers, and specifically the Cabinet of Ministers. Therefore, when we say "the state has political responsibility before the parliament." (Seyed Abolfazl Qazi, 2004; 130). Or "the government decided to increase its sources of income" (Meysam Mousai, 2007; 4). That is, a part of the executive power that is at the top of the highest decision-making. In this article, and when it is said that the government's responsibilities for the crime of hostage-taking, the government is meant in its general sense and includes all three branches of the country.

#### **Types of Responsibility in the Crime of Hostage-Taking**

In addition to depriving the hostages of their freedom, the crime of hostage-taking also disrupts domestic and international security; Therefore, considering the rights of society, the victim of the crime, and the accused, various responsibilities are raised for hostage-takers as perpetrators of the crime and for governments as responsible for ensuring security for society, regarding the crime of hostage-taking, which are explained below:

#### **First - Responsibilities of Hostage-takers**

In many cases, hostages are innocent people who, by depriving them of their freedom, create pressure on a third party in order to achieve their goals; therefore, hostage-takers bear the following responsibilities for their actions:

##### **A. Criminal Responsibility of Hostage-takers:**

Criminal responsibility in the word: "is synonymous with criminal responsibility and is used against civil responsibility." (Lengroudi Mohammad Jafar - previous - 644 and 645). In terms: "creating a bridge between crime and punishment." (Sabri, 2007; 345). And it has been said: "It is the obligation of a person to bear a criminal punishment when he has disrupted social order through his criminality" (Safaei, Seyyed Hossein and Rahimi Habibollah, 2012; 61). Therefore, criminal responsibility for the crime of hostage-taking is bearing the punishment that the legislator (both divine and social) has prescribed for the perpetrator.

## 1 - Criminal responsibility of hostage-takers in international documents

According to international law, if one of the subjects commits the crime of hostage-taking, he will have international criminal responsibility. "And the meaning of international criminal responsibility is that if one of the subjects of international criminal law commits a violation of one of the rules of international law, the violation of which is considered a crime by the international community, the perpetrator will be considered a criminal and punished, despite the existence of legal conditions." (Tahmasbi, Javad, 2016; 42). The most obvious subject of international law is the states themselves; therefore, with the progress of international criminal law, today, states also have criminal responsibility as legal entities of public law and must bear appropriate punishment according to their dignity; If the word "any person" in paragraph 2 of Article 1 of the International Convention against Hostages, which states: "Any person who: a. Attempts to commit an act of hostage-taking, or b. Participates as an accomplice in a person who has committed or attempted to commit an act of hostage-taking, commits the crime of (hostage-taking) for the purposes of this Convention." (Convention - former - Article 1) is general and includes all natural and legal persons, including the State if it commits the crime of hostage-taking in the international arena; natural persons are also considered subjects of international law in special circumstances (such as when they disrupt international security); And it has been said: "Today, individuals are also considered subjects of international law.... On this basis, in the first international trial in the twentieth century, namely the Nuremberg Trials, the individual responsibility of perpetrators of war crimes was accepted, and real individuals were also considered subjects of international criminal law." (Tahmasbi, 2016; 42.) Therefore, if real individuals commit the crime of hostage-taking in the international arena, which violates one of the international legal documents such as the Statute of the International Criminal Court, the International Convention against the Taking of Hostages, and the Convention of the Organization of the Islamic Conference for the Suppression of International Terrorism, they have international criminal responsibility and are tried and punished based on the aforementioned documents. If Article 25, paragraph 2 of the Statute of the International Criminal Court emphasizes the principle of individual criminal responsibility for natural persons and states: "Everyone who commits any of the crimes within the jurisdiction of the Court shall be individually responsible and shall be punished in accordance with this Statute." (Shariat Bagheri, 2018: 44). Article 2 of the International Convention against the Taking of Hostages obliges countries to impose appropriate penalties for the crime of hostage-taking and states: "Each State Party to the Convention shall, taking into account the nature and severity of the crimes set forth in Article (1), impose appropriate penalties." (1979 Convention, 2). Therefore, the perpetrator of the crime of hostage-taking is punished according to the domestic laws of each country and has criminal liability.

## 2 - Criminal liability of hostage-takers in the criminal laws of Afghanistan

The Afghan legislator, according to Article 2 of the International Convention against the Taking of Hostages; It has criminalized hostage-taking and imposed appropriate punishment for it; as Article 270 of the Afghan Penal Code states: "(1) A person who, in order to force the government of the Islamic Republic of Afghanistan or a foreign government or an international organization or any other natural or legal person to perform or refuse to perform an act, takes a person hostage and makes his release conditional on the performance or refusal to perform it, or threatens to continue to hold or to kill or physically torture the hostage, shall be sentenced to a maximum of 2nd degree imprisonment. (2) If, as a result of committing the crime referred to in paragraph (1) of this article, the hostage-taken person or another person is killed, the perpetrator shall be sentenced to death. (3) If, as a result of committing the crime referred to in paragraph (1) of this article, the hostage-taken person suffers physical or mental harm, the perpetrator shall be sentenced to the punishment of the crime committed, in addition to the punishment referred to in paragraph (1) of this article." (Afghanistan Penal Code 1395; Article 270). Although the principle is that the punishment of an accomplice, deputy, and initiator is one degree lighter than that of a mastermind, the Afghan legislator, regarding the intensification of punishment, in Article 278 of the Penal Code for each accomplice, deputy, initiator, and accomplice of terrorist crimes, which

also includes hostage-taking, says: “Accomplices, deputies, initiators, and accomplices of the crimes listed in this chapter shall be sentenced to the same punishment as the perpetrator of the crime.” It is also emphasized in the Criminal Procedure Code that hostage-taking does not include reductions and pardons. (Afghanistan Criminal Procedure Code 1392; Article 79).

### **3 - Criminal liability of hostage-takers in Islamic jurisprudence**

From a jurisprudential perspective, the crime of hostage-taking is inherently ta'zir and, depending on the case, may result in hand, qisas or blood money; for this reason, if the crime of hostage-taking leads to qisas, blood money or crimes subject to hand; it is sentenced to the punishment of qisas, blood money or had, as determined in Islamic jurisprudence; in other cases, since the act of hostage-taking is associated with treachery, trickery, harassment and kidnapping, it is considered a criminal act and has the nature of ta'zir; and its punishment has been delegated by the Holy Lawgiver to the discretion of the ruler, as some jurists have said: kidnapping is a cause for ta'zir and having a history of kidnapping leads to an increase in punishment (Abdullah bin Abdul Rahman, 10:17). And on this basis, the Afghan Penal Code, which describes Ta'zir crimes, states in Article 591: “A person who kidnaps another person by threat or use of force or other forms of intimidation, or by using poisonous substances or a deadly weapon or firearm, or by trickery and deceit, and demands or receives property or benefits in exchange for his release, shall be sentenced to a long term of imprisonment of not less than twelve years.” If hostage-taking is armed and accompanied by fear and terror, it is an example of war, and if “its harm affects the community.” (Abd al-Rahman 1376 AH. 2; 29) or “it causes insecurity and fear in the community by repetition, it is an example of a corrupter on earth.” (Shirazi, 1427 AH. 2, 389) and is sentenced to one of the four punishments stated for war and corruption on earth (Holy Quran, Ma'idah, 23). Therefore, hostage-takers are jurisprudentially criminally liable in all circumstances.

### **B - Civil liability of hostage-takers**

Civil liability is a bridge between causing harm to another and compensating for the damage; And its definition states: “Civil liability is: obliging individuals in society to compensate for damage caused to other individuals, property, or animals.” (Tabrizi, 1419 AH, p. 267.) In other words: “In any case where a person is forced to compensate another person for damage, they say that he has civil liability towards him.” (Katouzian, 1393; 1; 34). Therefore, if during the hostage-taking process, financial damage or loss is caused to the hostages or any other person and there is a causal relationship between the damage caused and the act of hostage-taking, the hostage-takers are obliged to compensate for the damage and have civil liability in accordance with international documents, Islamic jurisprudence and Afghan laws as follows:

#### **1 - Civil liability of hostage-takers in international documents**

Paragraph 2 of Article 75 of the Statute of the International Criminal Court regarding compensation for victims states: “The Court may directly issue an order against the convicted person and determine the appropriate manner of compensating the victims or in relation to them, including restitution, compensation or restitution. The Court may, if necessary, order that payments related to compensation be made through the trust fund referred to in Article 79. ....” (Shariat Bagheri, 124); Paragraph 1 of Article 85 of the same statute also states: “Anyone who has suffered harm from illegal arrest and detention shall have the right to claim compensation.” (Baqeri Sharia, 138.) Which also includes the illegal detention of hostages; therefore, hostage-takers, in addition to criminal liability, have civil liability and are required to compensate for the damage.

#### **2 - Civil liability of hostage-takers in Afghan laws**

Article 3 of the Afghan Penal Code has introduced one of the objectives of this law as “compensation for damage resulting from the commission of a crime”; and Article 14 of the Penal Code emphasizes that: “(1) A person who is punished in accordance with the provisions of this law, if he has obtained money through a crime, shall be sentenced to return the property in kind, and if the property is

not available, to return its equivalent or its price to the owner. (2) A person who has caused damage as a result of committing a crime shall, in addition to the legally specified punishment, be sentenced to compensation for the damage incurred, both material and moral. This provision shall also apply in cases where the law does not explicitly order compensation for damage. (3) The amount of damage incurred and its compensation shall be determined by experts in the relevant field, who shall be determined by the competent court. (Penal Code, Article 14.) Also, paragraph 3 of Article 281 of the Afghan Penal Code regarding the crime of financing terrorism, one of the examples of which is hostage-taking, states: "The application of monetary penalties contained in this article shall not prevent the application of the punishment and compensation for damage contained in the relevant legislative documents to legal persons in relation to the crime of financing terrorism." (Penal Code, paragraph 3; 281).

### **3 - Civil liability of hostage-takers in Islamic jurisprudence**

Based on the jurisprudential rules: no harm, usurpation, waste, causation, encroachment and neglect, wrongful collection, and unauthorized management of other people's property, if the hostage-taker causes material harm to the hostage or any other person, he is obliged to compensate for the damage caused. For example, according to the rule of no harm, no one has the right to harm another and if he does, he is civilly liable, meaning he must compensate for the damage caused to another; (Gilani, 1407 AH, 395). Also, according to the rule of waste, a person who destroys another person's property in any way is a guarantor. (Ansari, 1410 AH, Vol. 5, p. 216). That is, he is civilly liable and is obliged to compensate for the damage.

### **C - The moral responsibility of hostage takers**

Hostage takers are not only legally responsible for their behavior towards hostages from a social perspective and against public opinion, but they also have a moral responsibility before God and before their conscience; "Moral responsibility is realized when a person must be accountable in the court of the Almighty Creator or before their conscience; the realm of moral responsibility includes not only a person's words and actions, but also his or her thoughts, so having bad thoughts about others is ugly and unacceptable." (Taheri, 1418; 2: 215.) If the behavior of the hostage takers causes the hostages' dignity and reputation to be damaged, they are obligated to restore their social standing and credibility. Therefore, hostage takers have a moral responsibility and should not behave in such an ugly manner with the hostages that they will be condemned before God, public opinion, their own conscience, and in the divine court.

### **1 - The moral responsibility of hostage takers in international documents**

According to international documents, human beings have dignity. As stated: "Whereas recognition of the inherent dignity and worth of all members of the human family and of their equal and inalienable rights is the foundation of freedom, justice and peace in the world; Whereas disregard for and contempt for human rights has led to barbaric acts which have outraged the conscience of mankind, and whereas the advent of a world in which human beings shall enjoy freedom of expression and opinion and freedom from fear and want has been proclaimed as the highest aspiration of mankind; ... Whereas the peoples of the United Nations, having reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women, have in the Charter of the United Nations declared and determined to promote social progress and to achieve better standards of life in increasing freedom. Therefore, hostage-takers are obliged to preserve the human dignity of hostages and to treat them with due humanity. As Article 5 of the Universal Declaration of Human Rights states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

### **2 - The moral responsibility of hostage-takers in Islamic jurisprudence**

In the Holy Quran, God Almighty has appointed man as His vicegerent and successor for the development of the earth and has considered man to have high scientific capacity and dignity and has

given him superiority over many of His creatures. And this dignity exists for all humanity, including those who have been taken hostage, and is worthy of respect for everyone, including hostage takers; therefore, hostage takers are obliged to treat hostages humanely and to avoid any behavior that is contrary to their fundamental rights, human rights, and human dignity; from an Islamic perspective, even a dead person is worthy of respect, and insulting the dead is forbidden; as is well known, the Prophet of Islam was proud of the respect for the corpse of a Jew, and in response to a person who objected, he said: "Everyone should respect the corpse, regardless of the religion or nation to which it belonged; but the reckoning of that corpse is with God" (Sarfajo, 1385; 32).

### **3 - The moral responsibility of hostage takers in Afghan law**

Article 29 of the Afghan Constitution states: "Torture of a person is prohibited. No person may torture or order another person, even for the purpose of discovering the truth, even if he is under investigation, arrest, detention, or sentenced to a penalty." (Afghanistan Constitution, Article 29) It is obvious that criminal law is the support and guarantor of the implementation of all branches of law, including fundamental rights. In the event of a violation of the fundamental, natural, and human rights and the inherent and human dignity of hostages by the hostage-takers, in addition to criminal and civil liability, they also bear moral responsibility and restore their dignity. And conversely, the hostage-takers' efforts to respect the human dignity of the hostages, based on paragraphs 5 and 6 of paragraph 2 of Article 213 of the Penal Code, which emphasize that if they try "to prevent the consequences of the crime committed" (Penal Code 213; 2; 5) or to "voluntarily compensate for the damage caused or eliminate the harm caused by the crime" (Penal Code 213; 2; 6), they benefit from a reduction in punishment; just as in traffic crimes, based on paragraph 2 of paragraph 1 of Article 223 of the Penal Code, aiding and abetting the injured person is considered a factor in reducing the punishment.

### **Second - Responsibility of States for the Crime of Hostage Taking**

The crime of hostage taking disrupts social security, and ensuring social security is one of the main and fundamental duties and responsibilities of states. As Article 75, Paragraph 3 of the Constitution of Afghanistan considers "ensuring public order and security" as one of the duties of the government, and Article 5 of the same law states: "Implementing the provisions of this Constitution and other laws, defending independence, national sovereignty and territorial integrity, and ensuring the security and defense capability of the country are among the fundamental duties of the state." Therefore, the responsibility of states for the crime of hostage-taking, in international documents, Islamic jurisprudence and Afghan laws, is as follows:

#### **A - The responsibility of states for the crime of hostage-taking in international documents**

The member states of the International Convention against the Taking of Hostages have the following judicial responsibilities for the crime of hostage-taking:

##### **1 - Legislative responsibility**

Regarding the criminalization of hostage-taking, Article 2 of the International Convention against the Taking of Hostages states: "Each state party to the Convention shall impose appropriate penalties, taking into account the nature and severity of the crimes set forth in Article (1)." (Law on the Accession of the Government of the Islamic Republic of Iran to the International Convention against the Taking of Hostages, Article 2).

##### **2 - Responsibility to prevent the crime of hostage-taking**

Given that preventing the crime of hostage-taking is easier and less costly than suppressing it, States Parties to the International Convention against the Taking of Hostages are required to take preventive measures in this regard, as Article 4 of the said Convention states: "States Parties to this



Convention shall cooperate in the prevention of the crimes set forth in Article (1), in particular in the following cases:

A - They shall take all executive measures to prevent the commission of the aforementioned crimes in their territory, in order to prevent the commission of the aforementioned crimes in their territory or outside their territory, including measures to prevent the illegal activities of individuals, groups and organizations to encourage, incite, organize or attempt to commit acts of hostage-taking in their territory.

B - They shall exchange information and coordinate in order to take administrative and other appropriate measures to prevent the commission of these crimes. (Act of Accession (former) Article 4.)

### **3 - Responsibility to facilitate the situation of hostages**

If, despite preventive measures, the crime of hostage-taking is committed domestically or internationally, the first and most important responsibility of States is to facilitate the situation of hostages. Assistance to the hostage as a victim of the crime whose life, property and sometimes his reputation and dignity are directly endangered is the human and legal duty of every person, especially States. As Article 3 of the International Convention against the Taking of Hostages states: "1 - A State Party to the Convention, in whose territory a hostage is being held by the hostage-taker, shall take all appropriate measures to facilitate the situation of the hostage and in particular to ensure his release and, after his release, to facilitate his departure at an appropriate time. 2 - If the offender, as a result of hostage-taking in a State Party, has obtained an object or thing that is under the custody of that State, the State Party shall return it as soon as possible to the hostage or to the third party referred to in Article (1) and, where appropriate, to the competent authorities. (Act of Accession ... (former) Article 3.)

### **4 - Responsibility for the arrest of the accused and cooperation in its extradition**

The importance of the law lies in its implementation, so the responsibility of the states in the enforcement capacity, after paying attention to facilitating the hostage situation, is to detain the accused while respecting his rights, and the country that is obliged to detain the accused for the crime of hostage-taking must cooperate with the relevant countries in this regard; as Article 6, paragraph 1 of the International Convention against the Taking of Hostages states: "1 - If circumstances so require, any State Party in whose territory the accused of hostage-taking is present may, in accordance with its national law, detain him or take other measures to ensure his presence for an appropriate period of time in order to be able to conduct criminal proceedings or negotiate his extradition. The State Party to the Convention must immediately conduct preliminary investigations into this matter." (Act of Accession - former - Article 6.) It should be noted that, pursuant to Article 7 of the Constitution, the Government of Afghanistan is also obliged to comply with this international treaty; According to the teachings of jurisprudence, hostage-taking and deprivation of freedom of innocent people are examples of wrongdoing; therefore, arresting the accused of hostage-taking and cooperating with the relevant countries in this regard is considered a religious duty due to the obligation of preventing wrongdoing; as the Holy Quran says: "Let there be made of you a nation that will make good and forbid evil, and it is they who will be successful." (The Holy Quran, Al-Imran, 104). And cooperating with the international community in the fight against the crime of hostage-taking is an example of cooperation and cooperation in good deeds that the Holy Quran has commanded. (The Holy Quran, Al-Ma'idah 2).

### **5 - Criminal liability of the state in case of committing the crime of hostage-taking**

States, institutions, departments and organizations of the state have the legal personality of public law. The civil liability of states is an accepted matter; The criminal responsibility of states is debatable, but "today, in a just penal system, it is unacceptable that a person or persons should be free from criminal responsibility and be self-willed based on their political or social status" (Sultani, 2012; 21). Therefore, international documents have also recognized the criminal responsibility of states, as stated in the preface to the Rome Statute of the Court: "This Statute aims to end immunities for the commission of the most

serious international crimes. Today, anyone, in any position, with any attire, and in any position, is held responsible for crimes committed, and this responsibility not only includes superior officials for crimes they order to be committed, but also causes responsibility for crimes committed by subordinates.” (Aghaei Jannat Makan, 2007; 224) Therefore, administrative and security officials of countries cannot, under the pretext of having a legal personality under public law; Not being a supervisor and being an agent will escape responsibility for hostage-taking; rather, the supervisor and the agent, regardless of their legal status, will be punished separately.

Considering that Article 7 of the Constitution of Afghanistan states: “The State shall observe the Charter of the United Nations, international treaties, international covenants to which Afghanistan has acceded, and the Universal Declaration of Human Rights”; and considering that Afghanistan signed the Statute of the International Criminal Court on February 10, 2003 and pledged to abide by it, and considering that in the event of a conflict between ordinary laws and the Constitution, the Constitution takes precedence, it can be concluded that the Government of Afghanistan has also recognized the criminal liability of legal entities under public law and government officials for crimes that fall within the jurisdiction of the International Criminal Court, including hostage-taking. Therefore, Afghan authorities are criminally liable for the crime of hostage-taking in actions taken on behalf of the State.

Some jurisprudential data also indicate the acceptance of criminal liability for legal entities of public law and government officials in Islamic jurisprudence, such as paying blood money from the treasury "if the execution of hadd or ta'zir results in murder; or in a case where a Sharia judge rules in accordance with Sharia standards and after its execution his error is discovered." (Lankarani, 1, 526). It is obvious that the mistakes of the judge in the aforementioned cases are in the acts that the judge has committed in the name and on behalf of the judicial system and under the title of his legal personality; and assuming that we follow the theory of blood money as punishment, the punishment in the aforementioned cases and similar cases, such as in the crime of hostage-taking, the judge's mistake in the ruling causes the death of the hostage, the Islamic state is obliged to compensate the judge's mistake from the treasury as punishment; which results in the acceptance of the state's criminal liability, according to Islamic jurisprudence.

## **B - Responsibilities of the Afghan government regarding the crime of hostage-taking according to domestic laws**

The Afghan government has the following responsibilities regarding the criminal phenomenon, including hostage-taking:

### **1 - Legislative responsibility**

Legislative responsibility indicates that governments must enact and promulgate laws and regulations in order to ensure order and security, establish justice, and realize social interests. The Afghan government is required to enact laws in all necessary cases based on Article 92 of the Constitution. Regarding the criminalization of hostage-taking, according to Article 2 of the International Convention against the Taking of Hostages, every member state of the Convention, including Afghanistan, is required to enact appropriate penalties.

### **2 - Fair trial of hostage-takers**

Paragraph 4 of Article 2 of the Criminal Procedure Code of Afghanistan states that one of the goals of this law is “a fair trial in which no innocent person is punished and no criminal is spared from legal prosecution.”, which also includes the crime of hostage-taking.

### **3 - Ensuring the security of citizens against the crime of hostage-taking**

According to paragraph 8 of Article 2 of the Criminal Procedure Code of Afghanistan, one of the goals of this law is “ensuring public order and security and the rule of law in the country.”; and paragraph

3 of Article 3 of the Afghan Penal Code also states that “ensuring criminal justice and maintaining public order and security” is one of the goals of this law for all crimes, including hostage-taking.

#### **4 - Ensuring individual freedoms against the crime of hostage-taking**

According to Article 24 of the Constitution of Afghanistan: “Freedom is a natural human right. This right has no limits except for the freedom of others and public interests, which are regulated by law.” Therefore, the right to freedom is one of the fundamental rights of citizens, and the crime of hostage-taking is considered a crime against the freedom of individuals, and the state is responsible for ensuring the fundamental rights of individuals in society.

#### **5 - Preventing the commission of hostage-taking**

Clause 9 of Article 2 of the Afghan Criminal Procedure Code has introduced one of the goals of this law as “preventing the commission of crimes and violations of the law”; which also includes the crime of hostage-taking.

#### **6 - Reforming and educating hostage-takers**

Clause 5 of Article 3 of the Code has considered “reforming and re-educating the perpetrator of the crime” as one of the important goals of this law because the citizens of the country are the children of this land and in all circumstances, the country needs their existence, especially since a large part of the accused and convicted of crimes are the young generation, who are considered active and productive. This responsibility of the government also includes hostage-takers.

### **C - The responsibility of governments towards hostage-taking in Islamic jurisprudence**

From a jurisprudential point of view, religion and Sharia are not only for expressing the relationship between the individual and God, but the most important part of it is explaining the relationship between the individual and society. Therefore, it has been said: “From the perspective of Islam, the path is the path of God, and that is all, and the destination is God, nothing else, but the path of God passes through the people.” (Motahhari, 1372; 2; 135). It has been quoted from Amir al-Mu'minin that: The existence of an Imam and a good leader is a necessity in society so that everyone, good and bad, can feel comfortable under its shadow (Nasir al-Din Muhammad 1429; 506). From a jurisprudential perspective, governments have important responsibilities towards social norms, some of which are mentioned below:

#### **1 - Legislative responsibility**

The Prophet of Islam, as an Islamic ruler, has the position of legislative authority, and the position of legislative authority in Islam means the position of legislating and stating the dos and don'ts in the individual and social behavior of human society in the direction of religious education and leading society towards transcendent perfections and values, and preventing corruption and destruction. One of the important actions of the Prophet of Islam (PBUH) after entering Medina and establishing the government was the establishment of a social law called the Islamic Solidarity Covenant; in which social relations, security issues, and good relations with allies of Jews and Christians are stated; and it is known as the first basic law of Islam. (Mubarakpuri, 2015; 305). It has been said: “Take what the Prophet gives you and abstain from what he forbids you; That is, the commands and prohibitions of the Prophet should be the standard and criterion of law among you; and fear Allah, for Allah is severe in punishment.” (The Holy Quran, Al-Hashr, 7). Therefore, the position of prophethood is the position of legislation and lawmaking; the result is that from a jurisprudential point of view, one of the responsibilities of governments in preventing and combating crime, including the crime of hostage-taking, is the responsibility of legislation.

## **2 – Enjoining what is right and forbidding what is wrong**

From a religious perspective, the command to pray, which is the most important divine obligation, is aimed at preventing evil (and crime, oppression, etc.) (The Holy Quran, Al-Ankabut 45). Also, enjoining what is right and forbidding what is wrong, which is another important obligation in Islam, has the nature of preventing and deterring crime; and based on the guardianship of faith, all believers, male and female, are obligated to accept and adhere to them, just as they are obligated to enjoin what is right and forbid what is wrong (The Holy Quran, Surah At-Tawbah 71), because if accepting and accepting them is not obligatory, then obliging them to enjoin what is right and forbid what is wrong would be futile; the issue of preventing disorder and crime and combating it is so important from a religious perspective that the Holy Quran says that you should be made into a nation that all enjoin what is right and forbid what is wrong; that is, they enjoin what is right and forbid what is wrong among themselves (The Holy Quran, Al-Imran 104). The history of the official and governmental organization of Islam and Islamic governments shows that one of the important departments of the government has been the Department of Accountability and Accountability, whose function has been to implement and enforce the command of good and forbid evil in order to prevent crime; it is obvious that the crime of hostage-taking is an example of evil and the Islamic state is obliged to fight against it.

## **3 - Ensuring security**

"From the perspective of the martyred professor Morteza Motahari (may Allah have mercy on him), the criminal provisions and penal laws of Islamic law are like a medicine (although bitter) that is used for recovery. Just as a patient needs treatment, the society that has committed a crime also needs reform, and since crime is caused by humans, criminals must stop doing wrong, otherwise the security of the community and the individual will be destroyed. Since the existence of security and government is the basis of the stability of any society, criminals must be confronted. However, this work is not possible only through education and training, but one should not neglect the implementation of punishment in addition to it; Because the main purpose of punishment is to prevent the criminal from repeating the crime, and this cannot be done unless the punishment is applied in proportion to the crime. The words of those who talk about punishment are as baseless as the words of some who say that only education should be provided. The middle way is to reform the criminal along with his discipline." (A group of authors, 39-40: 328.) Therefore, the most important responsibility of governments from a religious perspective is to provide security through education, fighting crime, and reforming criminals, which also includes the crime of hostage-taking.

## **4 - Establishing justice**

Observing justice both eliminates the grounds for disorder and crime and also fights against it, meaning it has both a preventive and deterrent nature; The importance of justice is such that according to the Prophet of Islam, the stability of the government is considered to be in the shadow of observing justice, and he said: The government remains stable with disbelief, but it does not remain stable with oppression (Mazandarani, 9, 365). From a jurisprudential point of view, the purpose of the Islamic government is to establish justice, as it has been said: "The Islamic government was legislated to implement and enforce the rulings of Islam and establish justice among the Muslim people." (Montazeri 1409; 2, 395.) Islam considers observing justice in the smallest unit of society, which is the family, necessary, and the Messenger of Allah (PBUH) ordered parents to observe justice towards their children. (Shirazi, 1429; 3, 530).

Therefore, establishing justice and observing it in order to prevent and combat crime, including the crime of hostage-taking, is one of the most important duties of the Islamic government and jurisprudential orders.

## 5- Crime prevention

From a jurisprudential perspective, it has been stated: “By strengthening faith, educating properly, reforming society, and eliminating the causes and motivations for crime, the rate of crime can be reduced to some extent, and these methods should be used.” (A group of authors, *Bitā*; 39-40, 318.) And many of Islam’s propaganda and guidance programs are aimed at preventing crime, including hostage-taking.

## 6- Protecting the freedom of individuals

From a jurisprudential perspective, protecting the lives, property, honor, and freedom of citizens (which also includes hostages) is the most important duty of statesmen, as stated: “And the rights of subjects over the ruler are three: first, protecting life, property, honor, and dignity. Second, freedom in manners, conduct, and manners. Third, we take care of their needs in terms of health, hygiene, housing, food, and alleviation of poverty,

shelter, and hardship; and we also take care of their spiritual needs such as the health of the soul and spirit, faith, and the preservation of their beliefs and spiritual and spiritual desires, and facilities in temples, mosques, and worship, and in general, facilitating access to the authentic culture of Islam (all of which are included in our material and spiritual needs). (Tehranī, 1421: 112).

### Common and contradictory points of responsibilities arising from hostage-taking

Common and contradictory points of responsibilities arising from hostage-taking, in Islamic jurisprudence, international documents, and Afghan law, are as follows:

#### First - Common points

1- The prohibition of hostage-taking is recognized in Islamic jurisprudence, Afghan law, and international documents; from a jurisprudential perspective, hostage-taking is an example of harm and oppression to others, which is definitely forbidden and is subject to the jurisprudential rule of *Ta’zīr* for every forbidden act. (Yazdi, 1406; 4: 236.) And it is punishable by *Ta’zīr*. As per the International Convention Against Hostage-Taking and Article 270 of the Afghan Penal Code, it is also legally prohibited and recognized as a crime.

2- According to Islamic jurisprudence, Afghan law, and international documents, the criminalization of hostage-taking and the determination of the punishment are left to the rulers of the countries; Because from a jurisprudential perspective, hostage-taking is essentially a penal offense, and the type and amount of punishment have been left to the discretion of the ruler by the Holy Law. Article 2 of the International Convention against Hostage-Taking also obliges member states to criminalize it, and paragraph 1 of Article 2 of the Afghan Penal Code emphasizes that “this law regulates penal offenses and penalties.”

3 - Based on Islamic jurisprudence, Afghan law, and international documents, hostage-taking is essentially a crime against the freedom of individuals, but it may lead to other crimes such as murder, torture, sexual assault, etc.; in which case it becomes a reason for aggravating the punishment.

4 - Based on Islamic jurisprudence, Afghan law, and international documents, in the crime of hostage-taking, innocent people are directly targeted as a secondary target; but the main goal of the perpetrators is to exert pressure on a third party.

5 - If material damage is caused to the hostages or a third party as a result of hostage-taking, the perpetrator, in addition to criminal liability, also has civil liability according to Islamic jurisprudence, Afghan law, and international documents.

6 - According to Islamic jurisprudence, Afghan law, and international documents, hostage-takers also have a moral and human responsibility in their treatment of hostages, and compliance or non-compliance with this responsibility is effective in mitigating and intensifying the punishment.

### **Second - Points of Difference**

1 - In international documents and Afghan law, hostage-taking is an absolute and general crime, and there are no restrictions or exceptions to prohibit it; however, in Islamic jurisprudence, there is an exception to it, and that is the matter of retaliation, which is prescribed based on the noble verse 194 of Surah Al-Baqarah, and the word (who) in it has a general meaning and says: Whoever (whether real or legal, private or public rights) violates and oppresses you, you shall not (in defense) retaliate or violate; The rule of retaliation itself has regulations and exceptions; justice must be observed in retaliation and aggression is prohibited. For this reason, if the enemy attacks Muslim women and children, Muslims cannot attack the enemy's children, women, and elderly in retaliation. (Tabari, Bitā, 3; 563). "In addition to being applicable to civilians, this prohibition also includes destroying buildings, cutting down trees and animals, blocking water for infidels, poisoning water, and anything else." (Firoozabadi, 47; 1394; 131). Retaliation is for legitimate defense and has no meaning or application in illegitimate matters such as adultery, swearing, and mutilating human bodies. Regarding the document that permits taking hostages for legitimate defense in the Prophetic tradition (PBUH), there is a hadith narrated by Imran bin Husayn who "narrates: Banu Amir captured two of the companions of the Prophet (PBUH) and he captured a person from Thaqif. One day, the Prophet (PBUH) passed by him while he was being held captive. He said to him: O Muhammad, for what crime am I being held captive? He said: For the crime of your allies, namely Banu Amir, who captured two Muslims." (Tabasi, 1427; 80-81).

2 - In international documents and Afghan law, hostage-taking is considered a specific criminal law; which is specifically defined and criminalized under the specific title of hostage-taking and its dimensions have been discussed; But in Islamic jurisprudence, it is considered an indefinite criminal law; because it is not discussed under the specific title (hostage-taking) in Islamic jurisprudence and its rulings are not specifically stated, therefore its rulings are a matter of interpretation that must be extracted and inferred from scattered cases.

### **Discussion results**

1 - According to Islamic jurisprudence, international documents and Afghan law, protecting human life is of particular importance, and hostage-taking is one of the sinister security and political phenomena that threatens the safety of individuals. Therefore, according to Islamic jurisprudence, international documents and Afghan laws, hostage-taking is an illegal act that is contrary to human principles, and its commission by any person, whether natural or legal, results in various responsibilities.

2 - According to Islamic jurisprudence, Afghan criminal law and international documents, the perpetrator of the crime of hostage-taking, in addition to criminal liability and punishment, is also civilly liable and obliged to compensate for the damage caused if his action causes financial loss to the hostage or a third party. He is also morally responsible and is obliged to treat the hostage humanely and, if the hostage's social reputation is tarnished, is obliged to restore his reputation.

3 - The responsibilities of the state towards the crime of hostage-taking based on Islamic jurisprudence include legislative responsibility, reviving good and forbidding evil, ensuring security, establishing justice, preventing crime, preserving the freedom of hostages, preventing the commission of crime and reforming and educating criminals; in Afghan laws, they include: legislative responsibility, fair trial, ensuring security, securing individual freedoms, preventing the commission of crimes and lawbreaking, and reforming and educating criminals; And in international documents, they include: preventing crime, facilitating the hostage situation, detaining the accused, and cooperating with relevant countries in combating the crime of hostage-taking.

4 - The criminal liability of governments, institutions, departments, and government organizations that have a legal personality under public law is debatable; there are cases of jurisprudential data indicating the acceptance of criminal liability for legal persons under public law and government officials in Islamic jurisprudence. Article 85 of the Afghan Penal Code denies the criminal liability of having a legal personality under public law (the government), but international documents accept it, and the commitment of the Afghan government in Article 7 of the Constitution to international obligations and the primacy of the Constitution over ordinary laws results in a conclusion that the Afghan legislator must also be committed to it.

### **Recommendation**

Given that the dimensions of hostage-taking responsibilities are detailed in international documents and briefly stated in Afghan law, but are not specifically stated in Islamic jurisprudence, but rather should be extracted through jurisprudential teachings; it is recommended that the Afghan legislator examines the issue in detail and Islamic jurists examine it specifically and infer and state its rulings in different cases in an argumentative manner from jurisprudential sources.

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