

Protection of Non-Combatants under International Humanitarian Law and Islamic Law: A Comparative Study

Saqib Jawad¹ Saeeda Mirbaz²

Abstract

Non-Combatants have been defined under the Geneva Conventions of 1949 and their Additional Protocols of 1977 and they have been granted protection under the prevailing international humanitarian law (IHL) and their protection has now been universally recognized. However, despite of this protection granted under IHL, non-combatants are found subject to attack under various situations. Moreover, often their killing has been justified during an on-going armed conflict, e.g. in case of collateral damage. Therefore, many complications and complexities are being faced for protection of non-combatants. One of the main reasons for failure of IHL to protect non-combatants in a desired manner is the failure of international community to agree upon a universal and exhaustive definition of non-combatants. Although Geneva Conventions and their Additional Protocols provide legal definition of non-combatants, but when the same is applied on a particular situation, differences have been seen to arise among the international legal jurists with regard to people termed as non-combatants by one nation and combatants, non-state actors or terrorists by the other. On the other hand, Islamic law also distinguishes between the people who are granted protection during an armed conflict and those who are not. Islamic law uses the terminologies of muqatilin and muharibin for those called combatants and ghair muqatilin and ghair muharibin for those who are non-combatants and are protected during an armed conflict. Furthermore, Islamic law of war clearly defines these categories by explaining what is the classification and categories of non-combatants and in which situations they lose their protection even in case of being women and children. Therefore, classification of non-combatants and criteria of their protection provided under Islamic law could be used and applied in IHL for the sake of clarity with regard to classification and protection.

Key Words: International humanitarian law, non-combatants, protection, armed conflict, collateral damage.

Introduction

Armed conflicts and wars remained constant throughout the human life. However, participation in wars and armed conflicts is not unlimited rather has been restricted

¹ Saqib Jawad, Civil Judge-Islamabad, jawadsaqib@yahoo.com

² Saeeda Mirbaz, Civil Judge-Gilgit-Baltistan, saeedamirbazkhan@yahoo.com

with certain rules throughout the history of mankind. Notwithstanding the history of armed conflicts, the prevailing law of armed conflict (LOAC) places certain limits on the categories of persons entitled to take a direct part in armed conflicts. Some persons have been given general entitlement to take part in armed conflicts such as members of the regular armed forces, whereas, some others are only entitled to take part in an armed conflict if they fulfill certain stringent conditions and not otherwise. If the latter category of persons takes part in an armed conflict without fulfilling these conditions, they may be prosecuted for violating the LOAC.³ Therefore, it is important to know who are the persons entitled to take part in hostilities and who are not so entitled. For the said purpose, international humanitarian law (IHL) prescribes three categories of persons:-

- a) **Regular members of the armed forces:** Regular members of the armed forces are all those persons engaged and employed as an army of a state. If they engage themselves in a mission where they are seen to take a direct part in hostilities, they become combatants. The requirement of taking part in hostilities does not necessitate that these members should be engaged in actual fighting. For instance, if a person is acting as a commander of a prisoners of war (POWs) camp, he shall be considered to be actively taking part in hostilities though he is not involved in actual fight, but as a member of regular armed forces engaged in hostilities, he possesses a combatant status. However, there are certain members of the armed forces who are not involved in a combat mission and therefore, they are not considered combatants. These persons are regular members of the armed forces of a state, but special legal regime is applicable on them. Primarily, they are covered by Article 33 of the third Geneva Convention (GC-III) which states that they shall be dealt with under a regime at least as favorable as applicable to POWs.
- b) **Civilians participating in a 'levée en masse':** This category has been created from the experiences of our history and particularly the 1789 French Revolution. In this category, those civilians are also considered combatants, who on the approach of an enemy or invading forces take up arms to defend their land and soil against those invading forces during a short span of time. Though primarily these persons are civilians and are considered so, but even during their resistance against the invading armed forces, according to the LOAC, they need to distinguish themselves from the ordinary civilians and in this regard, in order to qualify the status of POW, they have to fulfill two basic conditions prescribed in Article 4(A)(6) of GC-III which says that:

Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time

³ Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts*, (Oxford: Hart Publishing, 2008), 197-199.

to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.⁴

Thus, carrying arms openly and respecting the laws and customs of war are the two basic conditions that are required to be fulfilled even by the civilians who have had no time to form themselves into regular armed forces and spontaneously take up arms against the invading forces.

- c) Resistance movements and militias not incorporated into the regular army of a belligerent: If militia is formed in regular armies then no question remains of their becoming combatants. However, situations may arise where militias are formed spontaneously on the approach of the army or otherwise, especially in occupied territories. According to LOAC, civilians forming resistance movements and militias, subject to fulfillment of certain strict conditions, may be considered combatants for gaining the status of POW. Article 4(A)(2) in this regard states that:-

Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

- a) that of being commanded by a person responsible for his subordinates;
- b) that of having a fixed distinctive sign recognizable at a distance;
- c) that of carrying arms openly;
- d) that of conducting their operations in accordance with the laws and customs of war.⁵

According to Article 4(A)(2) of GC-III, above-mentioned four conditions are required to co-exist for the purpose of qualifying status of POW and for becoming combatants by militias.⁶

These are three main categories of combatants. The categorization of combatants is also necessary to ensure the protection of non-combatants as the distinction between the two would lead and assist in differentiating between lawful and unlawful targets and for those who may be targeted in one condition, but not in the other. According to this distinction, different terms have been used for non-combatants including innocent and civilians. However, there are certain issues over the definition of all these terms and these issues will be discussed in the paper, but using an inappropriate term might be hazardous as all these terms have different connotations. On the one hand, a civilian might possess a gun and could be a threat to someone else's life or generally recognized an innocent person could be a threat to peace for others and on the other, certain categories of regular armed

⁴ Article 4(A)(6) of Geneva Convention III

⁵ Article 4(A)(2) of Geneva Convention III

⁶ Kolb and Hyde, *An Introduction to the International Law of Armed Conflicts*, 197-199.

forces could be performing peaceful functions without their active engagement in hostilities including members of medical personnel and chaplains. Therefore, restricting the definition of combatants too narrow to the extent of regular armed forces or broadening it unreasonably for including every person threatening peace in this regard is hazardous for the safety and rights of all these persons and proper term to be used appears to be non-combatants, generally denoting those who are not taking an active part in hostilities or an armed conflict.⁷

Significance:

The concept of non-combatant immunity is also relevant with just war theory. Just war theory sets a wide range of criteria in order to declare a war morally justified. In other words, just war theory draws a clear distinction between *jus ad bellum* and *jus in bello*. The former deals with the legal and moral justifications and grounds for entering into a war, while the latter deals with the conduct of war and circumstances and conditions on which a war has to be fought.⁸ For the purpose of ensuring principle of combatant immunity, general principles of international law divide the categories of people into military and civilians. Normally, major categories of military are considered combatants and number of these categories have been listed in Article 50 of Additional Protocol 1 (AP-I). All the categories falling within the ambit of combatants are the legitimate targets and these are the persons who take a direct part in hostilities. On the other hand, those who do not take a direct part in hostilities are immune of any such attack, e.g. civilians and they enjoy the status of immunity under IHL.⁹

However, in certain situations, application of non-combatant immunity becomes complex. With the emergence of new techniques and tactics of warfare and with the engagement of different other segments of society in hostilities, the dynamics of warfare have been changed and it has become difficult to ensure the principle of non-combatant immunity for a number of reasons. Application of IHL has also been questioned in certain other situations e.g. its application on non-state actors. Two incidents have further triggered this discussion. The first of them was the capture of an Israeli soldier Lt. Hadar Goldin in the tunnels of Gaza during Operation Protective Edge and in response of that decision of Israeli military command to apply its General Staff Directive for Contending with Kidnapping Attempts (Hannibal Directive) providing different procedures and methods for preventing and frustrating attempts of Israeli nationals by Hamas fighters. The second incident was the approval and authorization by President Obama to launch

⁷ Lukas Svana, "the principle of non-combatant immunity-Interpretations, Challenges, Suggestions", *Human Affairs*, 2015, 421-429, 422.

⁸ *Ibid*, 421.

⁹ Michael Bothe, "Direct Participation in Hostilities in Non-International Armed Conflict" Expert Paper submitted in Second Expert Meeting on the Notion of Direct Participation in Hostilities", *The Hague*, 25 / 26 October 2004, 3

drone strikes in Iraq and Syria against their fight against the Islamic State in Iraq and Syria (ISIS). Both these incidents and consequent measures resemble with each other in two ways though different in their strategy. It was argued by the supporters of these actions on behalf of both the states that these actions primarily intended to protect civilians and non-combatants and secondly, they were taken within the paradigm of a non-international armed conflict against certain organizations making no distinction between combatants and non-combatants and using civilians as human shields.¹⁰ However, recent on-going armed conflict between Israel and Palestine has unveiled the actual aggression and actual violations of IHL with indiscriminate bombings, destruction of buildings, targeted attacks on hospitals and mass killings of civilians including women and children by the Israeli forces. The strikes are so indiscriminate that even the different bodies of the United Nations are of the view that the acts by Israel would lead to war crimes.¹¹ Therefore, irrespective of the fact as to who is aggressor in violating the principles of non-combatant immunity, proportionality and distinction, these principles must be observed at every cost as they are the fundamental principles IHL.

Non-Combatant Immunity:

It is now well settled that rule of non-combatant immunity shall be applied to all those non-combatants and civilians who do not take a direct part in hostilities. In case civilians or other non-combatants start taking part in hostilities, they lose their protection and in that case attacking them is justified under IHL as they are no longer non-combatants. Historically, many instances are available where civilians and non-combatants start taking a direct part in hostilities and lose their immunity in consequence and Rwandan genocide in 1994 is one of those examples. Therefore, the first task is to clearly define and categorize combatants and non-combatants and the other task is to define their status as to whether their status has been changed under special circumstances, for instance, in case of their participation in hostilities. It is also to be ascertained as to what is the threshold of their participation in hostilities. Another important question arising here is as to whether non-combatant immunity is absolute and permanent or could be sacrificed in special circumstance.¹² The effect of both interpretations would be different as in the former case all non-combatants and civilians shall be immune from attack unless they start taking a direct part in hostilities meeting the required threshold

¹⁰ Hilly Moodrick-Even Khen, "Reaffirming the Distinction between Combatants and Civilians: the Cases of Israeli Army's "Hannibal Directive" and the United States' Drone Airstrikes against ISIS", *Arizona Journal of International & Comparative Law*, Vol. 33, No. 3, 765-766.

¹¹ Mersiha Gadzo and Virginia Pietromarchi, "Israel-Hamas war live: 195 killed, 120 missing in strikes on Gaza's Jabalia" *Al-Jazeera*, 02 Nov. 2023, available at [Israel-Hamas war live: 195 killed, 120 missing in strikes on Gaza's Jabalia | Israel-Palestine conflict News | Al Jazeera](#), last accessed on 02-11-2023.

¹² Svana, "the principle of non-combatant immunity-Interpretations, Challenges, Suggestions", 426

and even could not be killed in case of collateral damage or otherwise. While in the latter case, they could be attacked in all extraordinary circumstances without following a stringent criterion.

The LOAC thus prohibits attacking and making all the non-combatants as object of an attack during an armed conflict. IHL also requires that they shall be protected against any injury not incidental to an armed attack directly launched against a military target. It is also provided that when circumstances permit, advance warnings should be given to all non-combatants before launching any such attack where their life and property is at risk with the exception that such warnings would not be required where circumstances turn otherwise on the approach of the enemy involving a surprise attack or where security of the attacker is compromised due to these warnings. Apart from these obligations of the attacker, it is also the affirmative duty of a party to an armed conflict to remove all its civilians, non-combatants under its control and other wounded, sick, shipwrecked and POWs from the epicenter and radius of an attack by the enemy. Deliberate use of all these categories as a human shield is prohibited under IHL. Moreover, if the presence of any or all of these categories is confirmed, despite of application of principle of proportionality in case of collateral damage and incidental injury, attack would not be prohibited with the condition that it is primarily directed against a lawful target.¹³

Definition of Combatants:-

The concept of combatants and non-combatants is not as much complicated in international armed conflicts (IACs) as compared to non-international armed conflicts (NIACs). With regard to IAC, provisions of GC-III have already been discussed above. As far NIAC is concerned, Common Article 3 of the Geneva Conventions and Additional Protocol II (AP-II) refer to ‘armed forces’ and AP-II also refers to ‘dissident armed forces and other organized groups’, but these terms have not been further defined either in the Geneva Conventions or their Additional Protocols. The state armed forces may be considered combatants with the exception of medical personnel and chaplains, but the concept of dissident armed groups is not clear and thus poses a threat to the definition of combatants and consequently to the principle of distinction. However, it is clear that persons lose their protection once they take a direct part in hostilities including amongst the civilians and non-combatants and they are also often referred to be combatants. For instance, in a resolution for respect of human rights during armed conflicts adopted in 1970, the UN General Assembly referred them as “combatants in all armed conflicts”. The term combatant was also used in the Cairo Declaration and Cairo Plan of Action for both types of conflicts i.e. IACs and NIACs. However, it

¹³ A. R. Thomas & James C. Duncan (eds.), “Non-Combatants” in *Annotated Supplement to The Commander’s Handbook on the Law of Naval Operations*, 481-82.

is also argued that the term ‘combatants’ has been used for these people only in a generic perspective, but legally they are not combatants and would not be given POW status if captured.¹⁴ This interpretation appears to be bias and based on the notion that all organized armed groups fighting against the invading forces, particularly in Iraq, Syria, Afghanistan and Palestine, should not be extended rights of combatants.

The concept of protection of non-combatants is not a new concept rather its roots are traced back in Roman and medieval times where the excesses of wars were controlled under the concept of chivalrous warriors prevailing at that time. All the scholars of international law recognize the importance of this concept starting from Saint Augustine to Kofi Annan.¹⁵ However, despite of their recognition of protection of non-combatants, the concept of combatancy remained controversial for the reason that certain people were of the view that every citizen has the right to fight for his nation and country. This concept was inspired by the ideology of patriotism and nation state system also supported it, while on the other hand, certain other persons were of the view that wars should be fought by organized armies under a particular leadership and the idea of unorganized armies is not practical and becomes problematic during various situation arising out of an armed conflict. This classification has some material impacts on the conduct of war. Professional and organized armies were said to be more prone to the adherence of rules of international humanitarian law (IHL) on the basis of their training and self-accountability mechanism. This approach also helped in enhanced protection of civilians on the basis of distinction between civilians and regular armed forces.¹⁶

With the emergence of new techniques on the basis of technology development, another problem is being faced across the world with regard to protection of non-combatants and distinction between combatants and non-combatants. Modern warfare in the shape of new tactics, means and methods of warfare has blurred the distinction between combatants and non-combatants. Regular armies have been assisted and sometimes operated through private military companies and therefore, their identity has also become a controversial topic. Moreover, modern means and methods of warfare including the use of artificial intelligence, unmanned vehicles and computer network attacks have also become a major concern with regard to distinction between combatants and non-

¹⁴ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Volume I, (Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, Sao Paulo, Delhi, Cambridge University Press, 2005), 12.

¹⁵ Emily Kalah Gade, “Defining the Non-Combatant: How do we Determine Who is Worthy of Protection in Violent Conflict?”, *Journal of Military Ethics*, Vol. 9, No. 3, 2010, 219.

¹⁶ Colonel K.W. Watkin, “Combatants, Unprivileged Belligerents and Conflicts in the 21st Century”, Program on Humanitarian Policy and Conflict Research at Harvard University, Background Paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Cambridge, January 27-29, 2003, 6.

combatants.¹⁷ Therefore, defining combatants and non-combatants has itself become a major challenge for today's world and the same is required to be discussed for clarification.

By clarifying as to what is meant by combatants on the one hand and non-combatants on the other is a difficult task. Both these categories of people are involved in different tasks including from providing protection and aid to the one party to the evacuation to the other and from logistic support to actual participation in combat zone. According to general principles of international law, non-combatants simply mean who is not currently and actively fighting. However, a few scholars have mixed up the term non-combatants with the term civilians according to their usage in ordinary terms and in media reports. Whereas, the law makes distinction between civilians and on-combatants and different rules are applicable on both these classes and categories of people. Civilians at times become combatants and lose their protection accordingly. For instance, civilians engaging in the production and supply of machines of war to either of the parties, or acting as spies lose their protection for their acts of war. Moreover, there are certain other persons who become combatants. For instance, children acting as soldiers, other civilians acting as militias and insurgent groups lose their protection as civilians and become combatants. However, for the purpose of meeting that criteria, certain conditions prescribed under IHL must be fulfilled. A few (so called) scholars have also declared that Palestinian children throwing stones on Israeli forces during Intifada have also become combatants but, as already discussed, IHL lays down certain standards for declaring a person as a combatant and the same cannot be done at the wish of either of the parties.¹⁸ However, on the basis of above-mentioned discussion, it can be inferred that categories of non-combatants and civilians have been mixed up which is against the settled principles of IHL and on the other hand, certain categories have been declared combatants that too without following the fundamental principles and at the whims of any of the interested party which is not only against the spirit of international law rather has eluded the basic principles with regard to distinction between combatants and non-combatants.

As discussed in the previous sections, the basic provisions dealing with the definition of combatants and non-combatants are contained in IHL comprising of the Geneva Conventions, 1949 and their Additional Protocols of 1977. Normally non-combatants are called 'protected persons' in various instruments of IHL and in this regard, Geneva Convention IV (GC-IV) and Additional Protocol I (AP-I) to the Geneva Conventions provide a clear definition of protected persons. Article 3 of GC-IV in this regard states that "persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and

¹⁷ Gade, "Defining the Non-Combatant".

¹⁸ *Ibid*, 220.

those placed hors de combat ... shall in all circumstances be treated humanely”. Moreover, Article 15 of the same Convention provides protection to different categories of persons which include “(a) wounded and sick combatants or non-combatants; (b) civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character”. Part 3 of Article 3 also deals with the humane treatment of different classes of protected persons. According to various scholars, AP-I provides more broader categories of civilians and in other words, the term civilian has been extended to various categories of persons in a broader way and according to this Protocol, the term civilian can be applied to the persons directly linked with the armed forces, persons accompanying the armed forces without being regular members of those forces, civilians acting as members of military aircraft crews, released prisoners of war and other civilians who have taken or are taking direct part in hostilities without being in a combatant status. These definitions further show that civilians can also take a direct part in hostilities during certain situations and in these situations, they lose their protection under the law. For instance, in Rwandan War, approximately 200,000 civilians took part in hostilities, killings and massacres and these members on both sides were civilians.¹⁹ These instances reflect that sometimes civilians also assume the role of combatants. Therefore, the status of civilians could be changed keeping in view their status, whereas, status of non-combatants remains the same until they do not take a direct part in hostilities and become combatants.

The above-mentioned definitions reflect that the terms protected persons and civilians are used with different meanings. Protected persons are, in other words, non-combatants and different rules of IHL are applicable on them. Non-combatants are protected under different set of laws for instance, the Hague Draft Rules of Aerial Warfare provide certain protections for non-combatants while civilians are generally protected under the provisions of GC-IV and Additional Protocols 1 and 2 of 1977. Therefore, both these terms i.e. non-combatants and civilians are though used interchangeably, but both these terms have different connotations under the relevant law and both of them are dealt with under different set of rules of IHL. Therefore, focus of this paper is not on the protection of civilians rather on the protection of non-combatants and only the relevant law and rules dealing with the protection of non-combatants shall be discussed here.²⁰

In order to differentiate between combatants directly participating in hostilities and non-combatants not doing so, category or in other words, threshold of the war or hostilities is also required to be determined. War is not a fight between individuals; rather it is a series and systemic set of events thorough planning and

¹⁹ Ibid, 226.

²⁰ Ibid, 227.

organization.²¹ Therefore, war between individuals or different groups does not constitute the required threshold or hostilities for the purpose of determination of persons as combatants or non-combatants rather it should be planned, organized and should fulfill the required threshold. On the basis of the same, a lot of discussion has been conducted on the definition of armed conflict. Though the scholars of international law as well as international courts, tribunals and other international bodies almost agree on the definition of international armed conflict (IAC), but as far as non-international armed conflict (NIAC) is concerned, all these bodies as well as international scholars have differed over its definition. The definition of armed conflict itself demands a detailed discussion for which a separate study is required. However, at the moment, it suffices to say that the basic threshold of armed conflict must be fulfilled for the purpose of determination of different categories of persons including combatants, non-combatants and civilians.

Protection of Non-Combatants:-

Normally parties do not make any distinction during a war and they apply lethal force against each other. However, *jus in bello* requires that there should be a standard for the purpose of distinction between combatants and non-combatants. Here a question arises as to who are the legitimate targets and are not immune to be killed during war. The scenario in this regard differs from case to case basis. For instance, the case of combatants is different from the civilians who, for the time being, take a direct part in hostilities and the people who do not take any such part in hostilities in order to protect themselves. Therefore, protection of non-combatants differs from case to case basis and sometimes non-combatants lose their protection till the time of their participation in hostilities while regaining the same after they end to take part in hostilities.²²

Right to protection of non-combatant is a right recognized by international humanitarian law (IHL) and international human rights law (IHRL). Human rights are inherent rights of all human beings on the basis of simple characteristic of being a human without any distinction on the basis of race, sex, color, religion, ethnicity or region. These rights are guaranteed and protected under various IHRL instruments. These instruments cast a duty on states to act in certain ways or to refrain from acting in certain other ways in order to protect these human rights of individuals and groups. Human rights stipulated in these instruments are envisaged rights and duties and they shall be protected and observed by the host state. In other words, in light of rights and duties contained in IHRL instruments,

²¹ Michael Howard and Peter Paret (eds.), *Carl Von Clausewitz on War*, (New Jersey: Princeton University Press, 1989), 94.

²² Richard J. Arneson, "Just Warfare Theory and Noncombatant Immunity", *Cornell International Law Journal* Vol. nn, 106.

obligations of states are threefold i.e. obligation of states to respect human rights, obligation to protect and obligation to fulfill. Obligation to respect means the states shall refrain from curtailing or interfering in the enjoyment of human rights. Obligation to protect means the states must protect individuals and groups from the abuses of human rights and obligation to fulfill means that the states must take positive steps to ensure the enjoyment of human rights by the individuals and groups. Under the principles of IHRL, individuals and groups are though given these rights under different IHRL instruments, but they are also responsible to protect the human rights of others.²³

On the other hand, IHL also protects individuals and groups in a different way. Although use of force is permitted under IHL in certain circumstances, but IHL limits this use of force and violence against the persons who do not take a direct part in hostilities on the one hand and also limits this use of force only to the extent to weaken the military force of the adversary on the other, thus striking a balance between the two approaches of humanity and military necessity. However, the basic criteria of protection differs both under IHL and IHRL. IHL is based on the principle of distinction between combatants and non-combatants on the one hand and legitimate and illegitimate targets on the other. Whereas, IHRL protects all the individuals and groups in all the circumstance and the distinction introduced by IHL is alien to IHRL.²⁴ On the basis of the same, one could be a lawful target under IHL, but not under IHRL. We can also say that in certain situations, combatants are also protected under IHRL who are the lawful targets under IHL.

The primary purpose of IHL, therefore, is to curtail human sufferings from the effects of war by making distinction between lawful and unlawful targets and to restrict the means and methods of warfare. However, to curtail unnecessary sufferings of combatants in also one of the fundamental principles of IHL as described by the International Court of Justice (ICJ) in Nuclear Weapons Advisory Opinion.²⁵ With regard to restriction on the use of weapons of mass destruction, the principle was initially codified in the Lieber Code which prohibited use of poison during combat.²⁶ Thereafter, St. Petersburg Declaration specifically addressed this issue and demanded ban on the use of weapons “which uselessly aggravate the suffering of disabled men or make their death inevitable”.²⁷ Article

²³ United Nations, International Legal Protection of Human Rights in Armed Conflict, United Nations Human Rights Office of the High Commissioner, New York and Geneva, 2011, 14-15.

²⁴ *Ibid.*

²⁵ Legality of the Threat or Use of Nuclear Weapons, (Advisory Opinion) (1996) ICJ Rep. 226, Separate Opinion of Judge Guillaume (5).

²⁶ Michael N. Schmitt, Charles H.B. Garraway and Yoram Dinstein, “the Manual on the Law of Non-International Armed Conflict With Commentary”, International Institute of Humanitarian Law, 2006, 12.

²⁷ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, St Petersburg, 29 November / 11 December 1868.

23 of the Hague Regulations, 1899 also prohibited use of “arms, projectiles, or materiel of a nature to cause superfluous injury”.²⁸ In 1907, the translation from the original text of this Article provided “calculated to cause unnecessary suffering”.²⁹ However, the latter connotation appears to be introduced by the parties interested and willing to employ the weapons of mass destruction and nuclear weapons.³⁰

The findings of ICJ with regard to use of nuclear weapons are primarily based on the provisions of IHRL and not IHL. In its findings, ICJ held that the provisions of International Covenant on Civil and Political Rights (ICCPR) remain in field even during an on-going armed conflict. It further observed that these provisions cannot be derogated under international law except under Article 4 which allows some provisions to be derogated during the time of public emergency “which threatens the life of the nation” and not in ordinary circumstances. As Article 6 of ICCPR provides that “no one shall be arbitrarily deprived of his life”, therefore, use of weapons of mass destruction and nuclear weapons would result in loss of life of several people who shall be deprived of their life arbitrarily and without being lawful targets.³¹

Therefore, it could be concluded that IHL and IHRL both set of rules extend protection to non-combatants though in different ways and with different standards. Normally, during an armed conflict, parties apply and the international community talks about the compliance of the principles of IHL during an armed conflict. Though standards of IHL are flexible as compared to IHRL, but even if the compliance is made of the principles of IHL, a lot of sufferings could be curtailed and on-going armed conflict between Palestine and Israel is the recent example where the international community has failed even to ensure the compliance of IHL and civilians and non-combatants including women and children are being targeted by Israel without observing the basic principles of distinction and proportionality.

Islamic law on the Protection of Non-Combatants:-

The basic principles in Islam regarding distinction between combatants and non-combatants are derived from the holy Quran and Sunnah of the holy Prophet (ﷺ). The leading verse in this regard as considered by various scholars of Islamic law is:-

“Fight in the cause of Allah those who fight you and do not transgress limits; for

²⁸ Article 23 of the Hague Regulations, 1899.

²⁹ Ibid.

³⁰ Schmitt, “the Manual on the Law of Non-International Armed Conflict With Commentary”.

³¹ United Nations Human Rights Office of the High Commissioner, “Persons Hors de combat in Non-International Armed Conflicts”, 2007, 3

Allah loveth not transgressors".³²

There are two main interpretations of this verse. In one of the opinions, scholars say that this verse was superseded by other verses of the holy Quran directing the Muslims to slay the pagans. However, according to the other view, this verse was not superseded and the other verses for slaying the pagans were for those who broke covenants with the Muslims and waged war against them. Scholars of this opinion are of the view that those who waged war against you means those who fight you and the people who do not fight including, women, children, monks, elderly, peasants, servants etc. cannot and do not normally fight. Therefore, in ordinary circumstances, they cannot be fought with and thus are protected in Islamic law.³³ On the basis of this interpretation, scholars of Islamic law are of the opinion that Islamic law also recognizes the distinction between combatants and non-combatants well before IHL wherein principles were introduced after the revelation of the Holy Quran more than 1400 years ago.

Therefore, we can say that in Islamic law, all the categories of non-combatants have been granted protection during an armed conflict. However, since the times of Prophet Muhammad (ﷺ), focus has been on women, children and other main categories of non-combatants. Classical Muslim jurists have also discussed these categories with their primary focus on women and children and their protection has been well recognized under Islamic law since 7th and 8th centuries. Since the advent of Islam in the era of Prophet Muhammad (ﷺ), teachings and directions have been given regarding protection of these non-combatants and civilians. The Prophet Muhammad (ﷺ) primarily prohibited targeting five categories of civilians and non-combatants during an armed conflict which include, women, children, the clergy, the aged and the *Usafa*. Last of them has been interpreted by the Muslim scholars as those who have been hired by the enemy to perform certain functions during the battlefield, but they do not take a direct part in hostilities. Based on the rationale behind protection of these categories, classical Muslim jurists have also extended this list to all those persons who do not take a direct part in hostilities on the ground that at that time, apart from these categories, all others, including all male members of a society were supposed to take a direct part in hostilities and thus, the primary purpose is the protection of non-combatants and therefore, everyone not taking a direct part in hostilities is protected under the law. However, women and children were provided special protection and in this regard, various traditions of the holy Prophet (ﷺ) specifically provide instructions for their protection, for instance "do not kill an aged person, a young child or a woman", "do not kill children or the clergy" and "do not kill children or *usafa*". On the basis of these traditions, companions of the holy Prophet (ﷺ) followed him in this

³² Surah Al-Baqarah: 190.

³³ Muhammad Munir, "the Protection of Civilians in War: Non-Combatant Immunity in Islamic Law", *Hamdard Islamicus*, Vol. XXXIV (4), 9-10.

regard and the first Caliph Abu Bakr (R.A.) while sending Muslim armies to certain expeditions instructed them “do not kill a child or a woman”. Based on these teachings and commandments, Muslim scholars have agreed on the protection provided to non-combatants under Islamic law. On the basis of these teachings and guidelines of Islamic law, while adopting the Cairo Declaration on Human Rights in Islam, Article 3(a) of the Declaration provided that:-

“In the event of the use of force and in case of armed conflict, it is not permissible to kill non-belligerents such as old men, women and children”.

Based on above, we can say that it is not first time that IHL has introduced the rules regarding conduct of war and provided protection to non-combatants, rather the same was provided by Islamic law in a clear form centuries before the emergence of IHL.³⁴

However, despite of agreement of the Muslim scholars on the protection of non-combatants with regard to the fact that they could not be targeted, Muslim jurists have disagreed on their killing. For instance, all the Muslim scholars agree that women and children cannot be targeted unless they fight, but according to some of them despite of prohibition of targeting them, they could be killed during war. For instance, Shafi and Sarakhsi are of the opinion that women and children cannot be targeted, but they can be killed during war. They primarily relied upon the hadith of the holy Prophet (ﷺ) when the holy Prophet (ﷺ) was asked about the night raids and in consequence of killing of women and children and as to whether the raiders would be held accountable for their killing and he replied, “they are from them”. On the basis of this tradition, they are of the opinion that women and children can be killed during the process of war but could not be targeted. Muslims scholars have also differed on the use of weapons of non-discriminatory nature. Shafi and Sarakhsi are also of the opinion that weapons such as hurling machines could be used against the enemy if they are hiding in a fort along with women and children. They have also provided that burning of palm trees could also be done during the process of fighting. However, scholars have differed on the killing of old men and cutting of trees. Hanafis are of the opinion that old men could not be killed on the basis of express prohibition of their killing by the holy Prophet (ﷺ). However, Shafi is of the opinion that old men could be killed during war and in this regard he has relied on an incident where a person of more than one hundred and fifty years was killed during a battle fought at the time of the holy Prophet (ﷺ), but he did not denounce it.³⁵

Keeping in view the above-mentioned principles based on the holy Quran,

³⁴ Ahmed Al-Dawoody and Vanessa Murphy, “International humanitarian law, Islamic law and the protection of children in armed conflict”, *International Review of the Red Cross*, (2019), 101 (911), 551–573, 557-58.

³⁵ Nesrine Badawi, “Islamic Jurisprudence and the Regulation of Armed Conflict”, *Harvard University, Program on Humanitarian Policy and Conflict Research*, 2009, 9-10.

sayings of the holy Prophet (ﷺ) and opinions of Muslim jurists, we can say that generally jurists are of the opinion that women, children and old men cannot be targeted, but in accordance with above-mentioned opinions of jurists, they could be killed during war. Al-Sarakhsi is of the opinion that old men could not be targeted in ordinary circumstances, but if such person or people help the enemy in planning etc. they can be targeted. Al-Sarakhsi primarily considers three types of people immune from attack during an armed conflict namely, women, children and old men and according to him, other categories are not protected from being targeted despite of having been mentioned in various traditions including the clergy and *usafa*. The difference is primarily based upon the difference of Muslim jurists regarding *jus ad bellum* under Islamic law. Those who consider that cause of war in Islam is disbelief, have restricted the categories of protected persons only to the extent of people expressly prohibited to be targeted during war. However, those who consider that the cause of war in Islamic law is fight against aggression by the adversary or against the hostilities initiated by the other party, they have extended the list of protected persons to all those who do not fight including the people having mental or physical disability, farmers, craftsmen, monks and traders. According to minority view of the Muslim jurists, only women, children and the clergy are protected and apart from them, all others are liable to be targeted unless they accept Islam or to pay *jizyah*. However, according to majority view, cause of war in Islam is aggression as mentioned above and explained by Muhammad Munir while interpreting the basic verse of *Surah Al-Baqarah* in light of opinions of the Muslim jurists and on the basis of the same, they have extended the immunity of and protection to all of the above-mentioned categories with little difference over the categories of protected persons.³⁶

Conclusion

IHL primarily deals with the conduct of war and contains relevant rules in this regard. Provisions of IHL primarily contained in the four Geneva Conventions of 1949 and their two Additional Protocols of 1977 provide the protection of non-combatants on the one hand and civilians on the other. However, both these terms have not been defined with a unanimously agreed upon definition and despite of defining them, there is difference of opinion among the international jurists over several categories of persons as to whether they could be termed civilians, non-combatants or otherwise. Lack of clear definition of several of these persons entails their vulnerability during an armed conflict and failure to clearly define them makes them vulnerable of being targeted.

On the other hand, Islamic law of armed conflict provides general protection to women and children. With regard to other categories of non-combatants,

³⁶ Nesrine Badawi, "Islamic Jurisprudence and the Regulation of Armed Conflict", Harvard University, Program on Humanitarian Policy and Conflict Research, 2009, 9-10.

Muslim jurists have differed in their opinions. Although women, children, old men, the clergy and usafa have been given protection in accordance with above-mentioned sayings of the holy Prophet (ﷺ), but Muslim scholars have though agreed on the protection of women and children, but differed with regard to protection of other categories from the above. This difference appears to be based firstly on the cause of war in Islamic law and secondly due to not providing immunity to these categories at certain other times and they have interpreted that the protection provided to them in various sayings of the holy Prophet (ﷺ) was not general rather specific. However, according to majority view of Islamic law as per opinions of Muslim scholars, not only these categories are entitled for protection under Islamic law rather they have further extended these categories to all those people who do not ordinarily take a direct part in hostilities.

Another aspect of the two set of rules is that IHL allows collateral damage. Though the term is alien to Islamic law, but at times, a few Muslim scholars have made a distinction between targeting non-combatants and killing them. According to them, targeting non-combatants is prohibited, but they could be killed in compelling circumstances, i.e. where the distinction between them and the actual combatants is not possible and the scenario becomes similar to the situation of collateral damage provided and explained under IHL.

However, since there is no difference of opinion in Islamic law over the definition of combatants and non-combatants and the same have been explained while considering each one of them separately and as the contemporary Muslim scholars can also judge the modern categories on the touchstone of earlier categories of protected persons defined under Islamic law, hence, in order to clarify the issue of definition of non-combatants in IHL, reference could be made to the principles of Islamic law.