

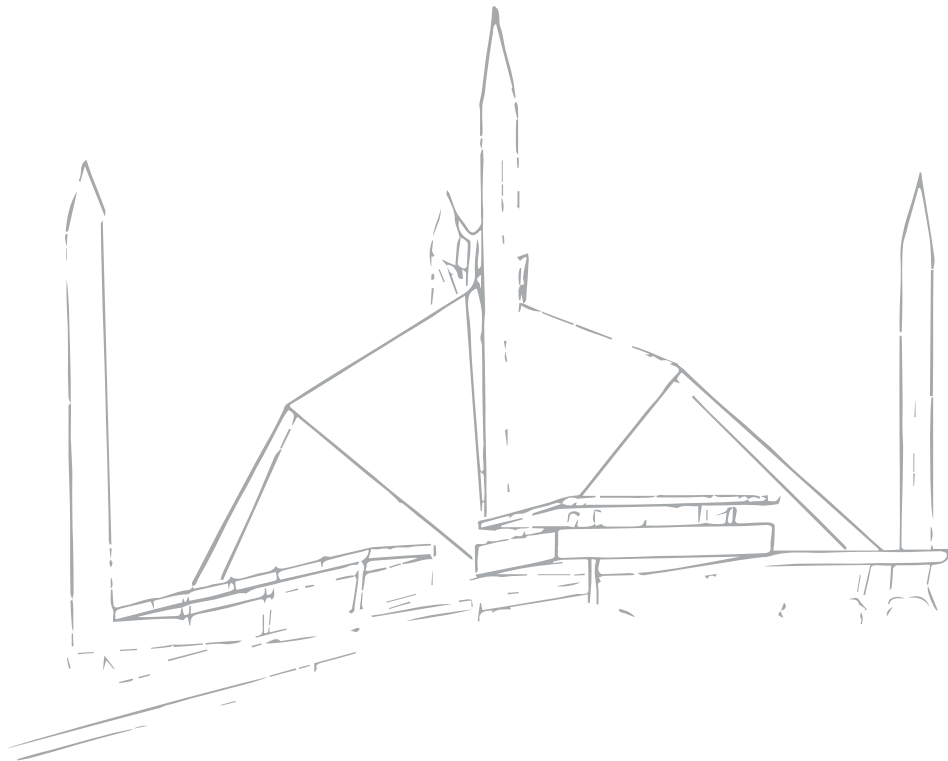


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Compatibility between Modern International Humanitarian Law and Principles of Islamic Law of Conduct of War: A Comparative Analysis

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Abstract

The present study undertakes the comparative analysis of the general principles regulating the behavior of combatants in international humanitarian law and Islamic law. The article explores the fact that the regulation of the behavior of combatants during an armed conflict has a very old Islamic history as compared to the modern-day IHL practices. Its acknowledgment of the notion of military necessity is emphatically conjoined with the observance of elementary considerations of humanity that are the sine qua non for mitigating the unnecessary harm to combatants on one hand and any harm at all to civilians on the other. This balancing effort between the military necessity and humanity finds basis in the objectives of Shari'ah as well. Thus, the wholeness of Islamic law best serves as a model for refining and complementing the modern-day humanitarian regime. Conflicts are indispensable yet they must be conducted humanely. Thus, the present study concludes with the recommendations whereby both the humanitarian regimes can simultaneously be employed and reinforced for maximising the protection they offer.

Keywords: International humanitarian law; Islamic law; Maqasid al-Shari'ah; proportionality; distinction; balance.

1. Introduction

In contemporary times conflicts of different nature are common that have gruesome effects on mankind.¹ Conflicts that know no boundaries can be destructive on a mass scale. Inviolability of human life and dignity is a universal principle recognised in every religion and every legal regime.² This article is an attempt to analyse and compare those general principles of humanitarian law

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¹ Troy E. Smith, "Binary Terror: The Reality of Terrorism in a Virtual World," *American Intelligence Journal* 32 (2) (2015): 131.

² Glenn Hughes, "The Concept of Dignity in the Universal Declaration of Human Rights," *The Journal of Religious Ethics* 39 (1) (2011): 1.

and Islamic law that are applicable once the hostilities have started (*jus in bello*), irrespective of the justification of the use of force which is a distinct field of *jus ad bellum* that is beyond the scope of this article. As a starting point, the origin, sources, and general principles of conduct of hostilities in both Islamic law and humanitarian law (IHL) are discussed. This is followed by the in-depth analysis of the compatibility of general principles under said regimes. Then the central point of reference i.e. how invoking the principles laid down in Shariah can help in alleviating the sufferings resulting from hostilities, especially where it is erroneously interpreted as a reference to the arbitrary exercise of force in the conflicts in a Muslim context, is discussed. Finally, comparing those general principles if the result depicts their identical underlying principle of humanizing conflicts only then the issue of how both of the legal regimes can be simultaneously employed to afford maximum protection to civilians and combatants will be addressed.

The consequences of armed conflicts are not restricted just to the territories of warring states (in case of an international armed conflict, IAC) or the territory of the state where a non-international armed conflict (NIAC) is taking place yet it has an overall global impact.³ So, this calls for a dire need to not just implement the provisions of IHL but to highlight the role played by every religion in minimising the effects of armed conflict. No religion in the world supports the arbitrary use of force rather acknowledges restriction in this regard. The most pressing issue faced by the contemporary world is the compliance with IHL rules by Muslim countries. This is because of the poor governing mechanisms, halted democracy, disrespect of inherent fundamental human rights, and especially because of reliance upon the erroneous interpretation of the provisions of Islamic law. But the compliance is vital not only for survival but also because IHL has the potential of limiting the effects of warfare. The dilemma is that many of the conflicts today are NIACs and the so-called Muslim armed groups involved falsely refers to the provisions of Islamic law as justifications for their acts. So, it is imperative to clarify the real position of Islam in governing the conduct of hostilities during an armed conflict in general (as these principles are the same for both IAC and NIAC). Moreover, this study is different from previous works done in the sense that it did not assess the humanitarian principles in Islam on the

³ M. Cherif Bassiouni, "The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non State Actors," *The Journal of Criminal Law and Criminology* 98 (3) (2008): 172.

standard of IHL because the researcher believes that the humanitarian rules are, without any prejudice, not just the product of the efforts of Henry Dunant (father of modern IHL) rather it is as old as the history of Islam itself. The present-day humanitarian regime reflects those ancient and still equally applicable principles. So it will be an absolute absurdity to standardize the norms of IHL for assessing the position of Islam. Yet they may be compared to assess their objectives which if turn identical will reinforce each other and will be the basis of the widest possible protection. It is reiterated here that the present study will not discuss the justification of the use of force that whether it was legitimate or not under Islamic law or international law yet the discussion will be restricted to the behavior of combatants once an armed conflict has begun.

Contemporary humanitarian law is faced with several issues resulting especially from the asymmetric dynamics of warfare. Though it is comprehensive enough to protect any kind of conflict, a mixture of different situations⁴ or any category of individual yet like any other subfield of public international law IHL is no exception to the criticism for the lacunas in its enforcement mechanisms.⁵ At this very point, the religion has its role-playing and especially when religion is Islam whose followers submit absolutely to the obedience of the Divine Authority.⁶

2. Islamic law of armed conflict

2.1. Attributes of Islamic *jus in bello*

Parallel to the application of secular humanitarian regime other manifestations also emerged that strikes balance between the military necessity (i.e. to weaken the opposite forces renders certain prohibitions legal) and humanity by limiting the means and methods of warfare. One such example is of the Islamic *jus in bello* that dates back to the seventh century to the time of the

⁴ See, for example, Daniela Gavshon, "The Applicability of IHL in Mixed Situations of Disaster and Conflict," *Journal of Conflict & Security Law* 14 (2) (2009): 243-263.

⁵ The reference is made to the loopholes in IHL in this article where research felt it vital to the discussion.

⁶ The supremacy of Word of God is very well explained by Muhammad Qasim Zaman, "The Sovereignty of God in Modern Islamic Thought," *Journal of the Royal Asiatic Society* 25 (3) 2015: 389-418.

Prophet Muhammad, (PBUH). This is marked by the paradigm shift from the nasty conduct of hostilities in the Greek and Roman era to the time of enlightenment with the rise of Islam (the Prophetic era). The fighters of adversaries were guaranteed a certain set of rights coupled with protections provided they behave per the fundamental principles including the distinction between combatants and non-combatants⁷ which forms the basis of the lawful targets of attack and the immunity to women, infirms, children, and the civilian objects.⁸

2.2 Defining and categorization of armed conflicts

There is a dichotomy of armed conflicts recognized by Islamic law. The conflict not of an international character is the wars fought for the preservation and protection of public interest. This involves the conflict against the dissident Kharijites and the rebellions that oppose the imam, the communal interest, and embrace an unacceptable approach (Mazhb).⁹ In contrast, the international armed conflict in Islam encompasses the armed conflict with apostates and polytheists. Concerning the former, it involves the conflict with those individuals declaring themselves Muslims but denouncing later on.¹⁰ Each conflict has some common defined rules and restrictions which are discussed below in the light of sources of Islamic law.

2.3 Analysis of fundamental principles of Islamic *jus in bello*

2.3.1 Principle of distinction

A. Non-combatant immunity and the principle of proportionality.—As for conflicts, there is also a dichotomy of individuals called either the protected persons or unprotected persons legally referred to as combatants and non-combatants. From protection, the writer intends to refer to the immunity whereby some individuals like servants, children, women, sick,

⁷ Ahmed Zaki Yamani, "Humanitarian International Law in Islam: A General Outlook," *Michigan Journal of International Law* 7, no. 1 (1985): 189-190.

⁸ Muhammad Munir, "The Protection of Civilians in War: Non-Combatant Immunity in Islamic Law," *Hamdard Islámicus* 34, no. 4 (October-December 2011): 7.

⁹ Yamani, "Humanitarian International Law in Islam: A General Outlook," 193.

¹⁰ *Ibid*, 195.

priests, peasants cannot be, generally, subject to direct attack. The sources which the writer will rely on for establishing the non-combatant immunity are Qur'an, Sunnah, and qawl al-sahabi. The Lawgiver says: "Fight in the cause of God those who fight you, but do not transgress limit; for God loveth not transgressors."¹¹ According to the interpretation of most notable commentators among sahabah and their followers, the war in the first place cannot be initiated by Muslims because it would otherwise amount to transgression (*i'tida'*).¹² In their interpretation, Allah by saying those who wage war against you meant those who participate in such war. Moreover, those who are not in a position to fight must be protected at all times. This viewpoint is substantiated by the traditions of Prophet Muhammad (PBUH), which are discussed in succeeding paras. Besides these prohibitions mutilation is also prohibited in the view of al-Hassan al-Basri. This verse has equal application in Islamic *jus in bello* as well as in *jus ad bellum*. In the jargon of IHL, this is the fundamental principle of distinction which will be discussed later in the discussion on the general principles of IHL.

There are several instances from and sayings of Prophet Muhammad (PBUH) where he reiterated the protections afforded to non-combatant by Qur'an. There are several traditions where Prophet Muhammad (PBUH) was reported to have said about the

¹¹ Al-Qur'an, II: 190.

¹² Among the companions reference is made to 'Abd Allah b. 'Abbas and among the followers of companions (*tabi'un*) to 'Umar b. Abd al-'Aziz. Various interpretations of this verse exist like of al-Rabi' b. Kesam al-Kufi who refers to Chapter IX verse 5 and 6 as superseding the verse 190 stated in the text above and focusing on the totality in fight.

One other interpretation is by Abi al-'Aliya Rafi' b. Mehran who states that for the presence of *'illah* in the verses of chapter 9 Tauba they are absolute as compare to the verse 190 of Chapter II which is conditional for the want of *'illah*. He interprets *i'tida'* as prohibition on fighting against inactives. In the words of Muhammad Abdel Haleem: "Arabic command *la ta'tadu* is so general that commentators have agreed that it includes prohibition of starting hostilities, fighting non-combatants, disproportionate response to aggression, etc. These interpretations are very systematically explained in the article written by Dr. Muhammad Munir titled *The Protection of Civilians in War: Non-Combatant Immunity in Islamic Law* published in *Hamdard Islámicus* in year 2011.

prohibition of killing children and women.¹³ Even in one of the battles, Prophet made their killing prohibited after encountering a slain body of a woman¹⁴ who perhaps would not have participated in the hostilities¹⁵. One report even states that Prophet commanded the Muslim commander who was said to have killed that woman to refrain from doing so and made the killing of 'usafa' (servant) also prohibited in war.¹⁶ By way of analogy, many other individuals are included in the meaning of 'usafa' including medical personnel, and employees taking no active part in hostilities.¹⁷ Moreover, when Muslim troops were ready to fight the invaders from Byzantine, Prophet Muhammad (PBUH) commanded the fighters in the following words:

*"In avenging the injuries inflicted upon us molest not the harmless inmates of domestic seclusion; spare the weakness of the female sex; injure not the infants at the breast or those who are ill in the bed. Refrain from demolishing the houses of the unresisting inhabitants; destroy not the means of their subsistence, nor their fruit-trees and touch not the palm."*¹⁸

There is another hadith whereby restrictions are imposed upon the methods of warfare.¹⁹ These are a few of the evidence from Sunnah whereby it is established that based on the categories of individuals; some of them called the combatants are protected and can't be targeted.

¹³ One such tradition is reported by Imam Ahmad b. Hanbal, *Musnad* (Cairo: Mu'assah al-Qurtabah, n.d.) volume II, 22-23 (ahadith nos. 4739 and 4747).

¹⁴ Muhammad b. Yazid b. Majah, *Sunan* (ed. M. Fo'ad 'Abdul Baqi) (Beirut: Dar al-Fikr, n.d.) volume II, 947 (hadith no. 2841).

¹⁵ Abu 'Ubayd al-Qssam b. Salam, *The Book of Revenue* (translated by Imran Ahsan Khan Nyazee) (Reading: Garnet Publishing, 2002), 36.

¹⁶ Abu Bakr 'Abdur Razzaaq, *Musannaf* (Beirut: al-Maktab al-Islami, 1403) 2nd edition, volume V, 201 (hadith no. 9382). This tradition is also reported in *Sunan* of Ibn Majah (hadith no. 2842), *al-Sunnan al-Kubra* of Imam al-Nasa'i (hadith no. 8625) and others.

¹⁷ For details see Muhammad Khair Haikal, *Al-Jihud wa al-Qital fi al-Siyasah al-Shar'iyah* (Beirut: Dar al-Bayariq, 1996) 2nd edition, volume II, 1247.

¹⁸ Anwar Ahmad Qadri, *Islamic Jurisprudence in the Modern World* (Lahore: Sh. Muhammad Ashraf Sons, 1973), 278.

¹⁹ Muslim b. al-Hajjaj al-Nisapuri, *Sahih Muslim* (ed. M. Fo'ad 'Abdul Baqi) (Beirut: Dar Iha' al-Turath al-'Arabi, n.d.) volume III, 1356 (hadith no. 1731).

Now the immunity enjoyed by civilians during an armed conflict will be established through *qawl al-sahabi*. The ten commandments of Companion Abu Bakar ‘Abd Allah b. Abi Quhafah²⁰ is the most famous and is referred to whenever Islamic *jus in bello* is under discussion. It states: “I enjoin upon you ten instructions. Remember them: do not embezzle. Do not cheat. Do not breach trust. Do not mutilate the dead, nor to slay the women, elderly, and children. Do not inundate a date palm nor burn it. Do not cut down a fruit tree, nor kill cattle unless they were needed for food. Don’t destroy any building. Maybe, you will pass by people who have secluded them in convents; leave them and do not interfere in what they do.”²¹ These principles of non-combatant immunity are general and were found in the instructions of successor Caliphs ‘Umar b. al-Khattab, ‘Uthman b. ‘Affan and ‘Ali b. Abi Talib. Based upon the underlying cause of war Shaybani argued in his book *Kitab al-Siyar al-Kabir* that only those amongst enemies can be killed who are directly participating in armed confrontations.²² There is a consensus amongst the classical Sunni jurists (*jamhore*) on the protective immunity of civilians at times of armed conflict. Some others differ in their modes of interpretation and conclude that it is lawful to kill non-combatants but women and children.

Though the general rule is that non-combatants are protected from direct attacks yet there are three exceptions to it. Firstly, when the ab initio non-combatants start taking part in hostilities, they not only lose their non-combatant (more precisely) civilian status yet also become a lawful target of direct attack. Evidence of it is found in the words of Prophet Muhammad (PBUH) whereby he condemned the killing of a woman for her inability to fight in the battle of Hunayn. It implies that her killing would have been justified if she had participated in the war.²³ There are instances where Prophet Muhammad (PBUH) didn't

²⁰ He was the first successor of the Prophet Muhammad (PBUH). He gave these instructions when Muslim troops were leaving for Syria.

²¹ Abu Bakr al-Ahmad b. al-Hussayn al-Bayhaqi, *Sunnan al-Bayhaqi al-Kubra with al-Jawhar al-Naqi* (ed. M. ‘Abdul Qadar Ata’) (Makkah: Maktab Dar al-Baz, 1994), volume IX, 85.

²² Muhammad b. al-Hasan al-Shaybani, *Kitab al-Siyar al-Kabir*, commentary by Muhammad b. Ahmad al-Sarakhasi (ed. Muhammad Hasan al-Shafi‘i) (Beirut: Dar al-Kotob al-‘Ilmiyah, 1997) volume IV, 96.

²³ Ahmad b. ‘Ali b. Hajar, *Fath al-Bari Sharh Sahih al-Bukhari* (Beirut: Dar al-Ma‘rifah, 1379) volume VI, 147-148.

react to the killing of a blind man and a woman as they participated in the war against Muslims.²⁴

Secondly, the *principle of proportionality* is triggered when targeting the military objectives of the enemy is not possible without the unintentional collateral damage to the non-combatants/civilians. Hence, the civilians could be attacked but it must be proportionate (committing the lesser evil) to the fulfillment of the military necessity, and no superfluous injury be inflicted upon them. The evidence of it is the *hadith* of Prophet Muhammad (PBUH) who while referring to the incidental loss to the non-combatants said: “they are from them²⁵.” As to the protection extended to women and children during an attack, all jurists agree unanimously, yet, the overwhelming majority of jurists consider it lawful to kill them if they participate in war.²⁶ Moreover, the Shari’ah permits the cutting off of needs of basic nature to force combatants to surrender in which civilian population is equally affected.²⁷ In Ta’if the combatants were besieged upon the command of Prophet Muhammad (PBUH) and were attacked by the catapult.²⁸

Lastly, as was asked by Shaybani from Imam Abu Hanifah whether women and children be killed when they are used as a shield by enemy combatants to protect their objects, especially when those shields are Muslims. And the response was “Yes, however, the enemy shall be aimed at and not the children.”²⁹ However, Imam Malik and Awza’i considered it illegal to attack enemies as such since the protection afforded to women and children is absolute.³⁰

²⁴ Shaybani, *Kitab al-Siyal al-Kabir*, volume IV, 190.

²⁵ Sulyman b. al-Ash’ath Abu Dawud, *Sunan* (ed. M. Muhi uddin ‘Abdul Hamid) (Beirut: Dar al-Fikr, n.d.), volume II, 61 (hadith no. 2672).

²⁶ Abu Zakariya Yahya b. Sharaf al-Nawawi, *Sharh Sahih Muslim* (Cairo: Matba’ Mahmud Toufiq, n.d.), volume XII, 48-49.

²⁷ See Al-Qur’an, IX: 5, “and take them and besiege them”.

²⁸ ‘Abdul Malik b. Hisham, *Al-Sira* (Beirut: Dar Ihya al-Thurath al-Arabi, n.d.), volume III, 658.

²⁹ Majid Khudduri, *The Islamic Law of Nations: Shaybani’s Siyar* (Maryland: John Hopkins University Press, 1966), 100.

³⁰ Muhammad b. ‘Ali b. M. al-Shaukani, *Nayl al-Awtar min Ahadith Syed al-Akhyar Sharh Muntaqa al-akbar* (Cairo: Idara al-Taba’a al-Muniriyyah, n.d.) volume VIII. 8, 56.

Targeting civilians in retaliation amounts to intentional murder hence it is prohibited. According to Muhammad b. Ahmad al-QurTubi the reprisal of one wrong should not be extended to his parents, relatives, or sons. The radical terrorist groups today like Al- Qaeda have an anomalous set of rules and use the principle of reciprocity as the justification of attacking a civilian. But it is the wrong usage of this principle because the rule of fiqh is that what is prohibited ab initio cannot be legal in any circumstances. This also leads us to the discussion on the use of nuclear weapons or weapons of mass destruction. Since the employment of these weapons renders the application of the imperative principles of distinction, proportionality, and avoidance of superfluous injuries ineffective thus they are said to be prohibited in the Islamic *jus in bello*. The use of mangonel as a weapon against enemies in the Prophetic era is evidence of the fact that Muslims during his time were allowed only to attack to the necessary extent.

B. No direct attack on civilian objects.—Islam prohibits the destruction of those objects that are essential for survival. One such clear manifestation is the ten commandments of Abu Bakar ‘Abd Allah b. Abu Quhafah whereby he ordered his troops that when they fight they must not inundate the palm tree, or devastate any building, or burn civilization or incur any harm to fruit trees. Attacking the means and objects of subsistence is analogous to *fasad* upon which Qur’an says, “... and do neither evil nor mischief on the (face of the) Earth.”³¹ In his book, Shaybani on the permissibility of taking or leaving the belongings of enemy said, “Muslims can take away enemy’s cows, goats, and other property, or they may leave it because (these) things do not strengthen the enemy to fight (the Muslims).”³² In respect of weapons of attacks, Sarakhasi stated “it is condemnable to leave the weapons or mules (*al-silah wa al-kira*) if the Muslim army seized them because leaving them behind would mean that the enemy could use them again against the Muslims.”³³ It is noteworthy here that absolute destruction has never been asserted by Shaybani or his commentators. This is attributed to Abu Hanifah and his disciples by Ibn Jarir al-Tabari and Imam Shafi’i. In his *Kitab al-Umm*, Imam Shafi’i mentioned that if the “Muslims took under their control booty comprising of property or goats which they could not take away with them; they should slaughter the goats and burn the property and the meat of goats so that the infidels should not

³¹ Al-Qur’an, II: 60.

³² Shaybani, *Kitab al-Siyar al-Kabir*, volume IV, 198.

³³ Ibid.

benefit from them.”³⁴ But what he wanted to transmit was undoubtedly not the absolute destruction as none of his two disciples Shaybani and Abu Yusuf mentioned in any of their writings.

2.3.2 Non-derogable humanitarian considerations

Few of the fundamental guarantees in Islam as to the protection of civilians have been analyzed above. In this part, the Islamic *jus in bello* regarding the treatment of wounded and sick soldiers of enemies at the battlefield or in the sea will be analyzed along with the protection afforded to combatants placed *hors de combat* (those who are no longer able to take part in hostilities: terminology borrowed from IHL). Upon conquering Makkah under the leadership of Prophet Muhammad (PBUH), no harm was inflicted upon any person nor was their property damaged. Besides, an announcement was made on his demand that “wounded shall not be killed, *mudbir* (anyone who turns his back and runs away from fighting) shall not be chased, the prisoner shall not be killed and whosoever shuts his door will be immune.”³⁵ Torturous practices are discouraged by Islam as Prophet Muhammad (PBUH) said, “Verily God will punish those who torture other people in this world.”³⁶ This prohibition is absolute and applies to all categories of individuals at all times. Since owing to sickness and disability, enemy soldiers could no longer take part in the hostilities they would be entitled to the analogous immunity of non-participants. When they fall into the hands of adversaries they enjoy the prisoner of war status (POW) and the incidental guarantees under the *jus in bello*. The treatment afforded to POWs in Islamic law is hereinbelow analyzed.

2.3.3 Prisoners of War: A privileged class of individuals

Making enemies captive is allowed to Muslims only in cases of manslaughter but not in small skirmishes. There are two verses in the Qur’an that relate to the capturing of enemies and thus making them POWs. Firstly, in Chapter 47 Lawgiver states, “Now when ye meet in battle those who disbelieve, then it is the smiting of the necks until there has been a very extensive slaughter, then making fast of bonds; afterward either grace or ransom till the war

³⁴ Muhammad b. Idris al-Shafi‘i, *Kitab al-Umm* (Cairo: al-Matba‘a al-Amiriyya, n.d.) volume XV, 304.

³⁵ Bayhaqi, *Sunan*, volume VIII, 181 (hadith no. 16524).

³⁶ Imam Muslim, *Sahih Muslim*, volume IV, 2017 (hadith no. 2613).

lay down its burdens.”³⁷ In another verse, the only justification of making captives is repeated that “It is not for any Prophet to have captives until there has been a very extensive slaughter in the land.”³⁸ Once the enemy soldiers are made the prisoners then Islam very beautifully lays down the manner of their treatment. This is why the writer termed prisoners as a privileged category of individuals. Justice and compassion are at the heart of Islamic principles. Islam advises Muslims to provide prisoners with more than what they have lost and not to account for the excesses they have made rather forgive them. The Qur’an says in this regard, “Now enjoy what ye have won, as lawful and good, (i.e. according to justice and equity), and keep your duty to Allah.”³⁹ The immediate verse following it states, “O Prophet! Say unto those captives, who are in your hands: if Allah knoweth any good in your hearts, He will give you better than that which had been taken from you, and will forgive you.”⁴⁰ The Prophetic era is the clear manifestation of the teachings of Islam about the treatment of POWs. The end of the War of Badr resulted in captives for whom Prophet Muhammad (PBUH) ordered his fellow Muslims to treat them nicely and “take heed of the recommendation to treat the Prisoners fairly.”⁴¹ And Muslims are demanded by the Lawgiver to feed the prisoners for the sake of Allah that, “(if the righteous shall) feed with food the prisoner, for love of Him, (saying): We feed you, for the sake of Allah only; we wish neither reward nor thanks from you.”⁴² The practice in the Prophetic era was that the expenses of prisoners were borne by Muslims who also provided them with clothes. Muslims were ordered to remove the discomforts and troubles of prisoners.⁴³ While in captives they are entitled to make wills of their property at home. Families cannot be generally separated from each other.

Moreover, Islam pays due regard to the respect of status the prisoners have back in their hometown. Moreover, while in captivity, enemies must be allowed the freedom of practicing their religion and their worshiping places ought not to be destroyed. A conflict does not end with a declaration of such intent rather it ends with the termination of captivity. At this point, there is a

³⁷ Al-Qur’an, XLVII: 4.

³⁸ Al-Qur’an, VIII: 67.

³⁹ Al-Qur’an, VIII: 69.

⁴⁰ Al-Qur’an, VIII: 70.

⁴¹ Sarakhasi, commentary on *Kitab al-Siyar al-Kabir*, volume I, 189-362.

⁴² Al-Qur’an, LXXVI: 8-9.

⁴³ Buḥkari, LVI: 142.

dispute amongst *fuqaha*. Two ways of terminating captivity are mentioned in Qur'an, firstly, *fida* or ransom, and secondly, *mann* (gratuitous freedom).⁴⁴ Around 70 enemies were made captives after the war of Badr which was the first instance whereby verses were revealed on the occasion of the conduct of Prophet Muhammad (PBUH) in this regard. For being a novel circumstance Prophet sought the advice of his Companions. The majority of them agreed on ransom as it was Muslims' need; however, 'Umar b. al-Khattab took the plea of execution. Prophet Muhammad (PBUH) followed the advice of the majority. The decision of ransoming the captives of Badr was followed by the revelation, in which Allah told,

*"It does not behoove a Prophet to keep captives unless he has battled strenuously on earth. You may desire the fleeting gains of this world-but God desires [for you the good of] the life to come: and God is almighty, wise. Had it not been for a decree from God that had already gone forth, there would indeed have befallen you a tremendous chastisement on account of all [the captives] that you took. Enjoy, then, all that is lawful and good among the things which you have gained in war, and remain conscious of God: verily, God is much-forgiving, a dispenser of grace."*⁴⁵

The most authoritative commentators of Holy Qur'an called these verses to be situation-specific i.e. only applicable to prisoners of Badr and this view is substantiated by the subsequent verse that, "Now when you meet [in war] those who are bent on denying the truth, smite their necks until you overcome them fully, and then tighten their bonds; but thereafter [set them free,] either by an act of grace or against ransom so that the burden of war may be lifted: thus shall it be."⁴⁶ Thus the captivity is time being and is to be terminated on freedom bought by ransom or unconditional or conditional freedom.⁴⁷ Now the modes of termination of captivity from the traditions of Prophet Muhammad (PBUH) need to be analyzed. Eighty Makkans were released *gratis* and are one of the incidents where captivity ends with *mann*.⁴⁸ Another instance of the gratuitous release includes the release of a member of clans of

⁴⁴ Al-Qur'an, XLVII: 4.

⁴⁵ Al-Qur'an, VIII: 67-68.

⁴⁶ Al-Qur'an, XLVII: 4.

⁴⁷ Muhammad b. Ahmad al-Qurtubi, *al-Jami' li Ahkam al-Qur'an* (Cairo: Matba'ah Dar al-Kutub al-MiSriyyah, 1950), VIII: 150.

⁴⁸ Yahya b. Sharaf al-Nawawi, *Sharh Sahih Muslim* (Cairo: Matba'at Mahmud Tawfiq, n.d.), 7: 463.

Hunayn, Hawazin, Banu 'l-MusTaliq, Banu Fazarah, and Yemen.⁴⁹ The Prophetic tradition of pardoning was followed by his successors as well (*qawl al-sahabi*). Al- 'Ash'ath b. Qays was set free by the first Caliph Abu Bakar. Then there is the instance of the pardoning of Iranian commander by second Caliph 'Umar.⁵⁰ He also released thousands of Iraqis who were made captive upon conquest and *jizyah* was imposed on them. The only instance in Islamic history (during the era of Prophet Muhammad (PBUH)) where captivity was terminated by ransom was the prisoners of Badr. Thereafter prisoners were pardoned. Abu 'Ubayd thereupon argued that "the latter precedent from the Prophet (PBUH) is to be acted upon," and the practice of pardoning follows the events of Badr. So unconditional pardoning has mostly been found as a mode of ending the captivation.

It is also important to point here that some pro-execution *fuqaha* ' assert that prisoners should be killed. But their argument is very weak for want of substantial evidence from Sunnah. Throughout the life of the Prophet in which several battles were fought, there are just two to three reported instances where the prisoners were executed. Some reports suggest that out of seventy captives of Badr only two were executed while some reports suggest that only 'Uqbah b. Abu Mu' ayaT was executed⁵¹ and that too for the suffering and persecution by him being a military commander during the first thirteen years of Muslims in Makkah post-migration. Abu 'Ubayd states that 'Uqbah went to the extremes of tormenting Prophet Muhammad (PBUH) especially at the times of offering prayer. So his execution cannot be employed as precedent with regards to the execution of prisoners yet it was an exceptional punishment for the heinous crimes perpetrated against Prophet Muhammad (PBUH). The second such instance found in the life of Prophet was the execution of Abu 'Izzah al-Jumahi following the Uhud battle. He was first captivated after the battle of Badr but was freed on the condition that he will not use his poetry for instigating enemies to wage war against Muslims but he breached it. Thereafter he was made captive again in the battle of *Uhud* and his clemency appeal was rejected by Prophet Muhammad (PBUH) and said that "I swear to God you will not wipe your cheeks in Makkah saying that you have mocked he

⁴⁹ Abu 'Ubayd b. Sallam, *Kitab al-Amwal*, (translation by Imran Ahsan Khan Nyazee) (Reading: Garnet Publishing Ltd., 2002) 116- 120.

⁵⁰ Al- Baladhuri, *Kitab Futuh al-Buldan* (translated by Francis Clark Murgotten) (New York: Columbia University, 1924), II: 118-119.

⁵¹ Isma'il b. 'Umar b. Kathir, *Al-Bidayah wa 'l-Nihayah* (Beirut/Riyadh: Maktabat al-Ma'arif/ Maktabat al-NaSr, 1966), 3:35.

Muhammad twice: A believer never get stung twice from the same burrow,"⁵² and thus was ordered to be executed. One last instance of executing prisoners was at the time of the conquest of Makkah. Excluding some seven to eleven prisoners (charged with horrific crimes against Muslims⁵³), for the rest of the prisoners, Prophet announced a general amnesty. Only one of the left-outs, 'Abd Allah b. KhaTal was executed. He was charged on the accounts of high treason, renunciation of Islam, the killing of a servant, embezzlement of public money, and blasphemy and did not mended his ways thereafter. All in all, during the life of the Prophet there is no such evidence whereby execution solely on the ground of being a prisoner can be established. Moreover, the majority of jurists acknowledge the fact that there was a unanimous discouragement amongst the Companions of Prophet Muhammad (PBUH) on the execution of prisoners.⁵⁴ From the time of Prophet Muhammad (PBUH) till the time of third Caliph 'Umar b. 'Abdul 'Aziz (first century of Islamic military history), at the maximum there are just six to seven cases and in which execution was not on the ground of being a prisoner because it is not an offense per se. PBUH

As regards the freeing prisoners on ransom is concerned, there is a dichotomy in opinions of *fuqaha*'. On one hand, Abu Hanifa rejects the freeing of the enemy on ransom because it will strengthen the enemy manpower and that they must be killed (Qur'an, IX:5), on the other hand, his pupils Abu Yusuf⁵⁵ and Shaybani⁵⁶ agree regarding ransom in necessity. Moreover, they agree on the exchange of Muslim POWs with enemy POWs.⁵⁷ Many jurists argue that the political head of the state has the option of freeing on ransom. According to Abu 'Ubayd, there is only one instance of freeing with ransom where few prisoners of Badr were freed that way yet others who could not pay money were required to teach the children of Muslims to get released

⁵² Abu Bakr Muhammad b. Ahmad b. Abi Sah al-Sarakhsi, *Kitab al-Mabsut*, ed. Samir MuStafa Rabab (Beirut: Dar Ihya' al-Turath al-'Arabi, 2002), 10: 26.

⁵³ Ibn Hajar al-'Asqalani, *Fath al-Bari* (Beirut: Dar al-Ma'rifah, 1379 AH), 4: 60-61.

⁵⁴ Shaybani, *Kitab al-Siyar al-Kabir*, volume IV, 198.

⁵⁵ Ya'qub b. Ibrahim Abu Yusuf, *Kitab al-Kharaj* (Peshawar, Maktabah Faruqiyyah, n.d.), 378.

⁵⁶ Shaybani, *Kitab al-Siyar al-Kabir*, volume IV, 300.

⁵⁷ *Ibid*, 302, 337-378.

from captivity.⁵⁸ As discussed earlier the latter practice of Prophet is an established precedent and must be followed. The latter practice of the Prophet was *mann* or gratuitous freedom. So far Muslim prisoners are concerned they must be free by paying money from *Bayt al-Mal*.⁵⁹ Moreover, Muslims shall take care of the families of Muslim POWs till they are captive (e.g. letter sent by ‘Umar b. ‘Abd al-‘Aziz to the Muslims in captives in Constantinople).

A more liberal approach is adopted by Islam in the treatment of POWs.⁶⁰ As was discussed earlier Prophet Muhammad (PBUH) divided the prisoners of Badr amongst Muslims and directed them to seek his recommendation in treating prisoners.⁶¹ Thereupon Muslims provided the best food they had to prisoners while they rely themselves on dates only.⁶² And for them, God says, “and who give food- however great be their own want of it – unto the needy, and the orphan, and the captive [saying], We feed you for the sake of God alone: we desire no recompense from you, nor thanks.”⁶³ Food and drinks are considered to be the basic necessity of prisoners. Moreover following the tradition of the Prophet (PBUH) captives must be provided with clothes. Torture is prohibited as those torture people on earth will meet a similar fate.

2.5 Maqasid al-Shari’ah: The Basis of Humanitarian Protections

The discussion on *Maqasid al-Shari’ah* is necessary whenever recourse is made to the Islamic law because all of it is premised on the unanimously agreed purposes that law strives to achieve. The purposes based on inner strength have been classified into three kinds with necessities (*Darurat*) at the top. The other two are the needs and complementary goals. Without the protection and preservation of necessities, there would be complete chaos and

⁵⁸ Abu ‘Ubayd, *Kitab al-Amwal*, 116, 120.

⁵⁹ Abu Yusuf, *Kitab al-Kharaj*, 380.

⁶⁰ James J. Bustuttil, “Slay Them Wherever You Find Them: Humanitarian Law in Islam,” *Revue de Droit Penal Militaire et de Droit de la Guerre* 30 (1991), 113-126.

⁶¹ Abu Ja’far Muhammad b. Jarir al-Tabari, *Tarikh al-Umam wa ‘l-Muluk* (Beirut: Dar al-Kutub al-‘Ilmiyyah, 1407 AH), volume II, 39.

⁶² Shibli Nu’mani and Sayyid Sulaiman Nadvi, *Sirat al-Nabi* (Lahore: al-Faisal Nashiran-i Kutub, n.d.), volume 1, 311.

⁶³ Al-Qur’an, LXXVI: 8-9.

anarchy in the society.⁶⁴ The aims in necessities which shall be protected and preserved at all times include *hifz 'ala al-din*, *hifz 'ala al-nafs*, *hifz 'ala al-nasl*, *hifz 'ala al-'aql*, and *hifz 'ala al-mal*. The supreme interest to protect and preserve is of Islam. For that as a "last" resort war with enemies of religion is demanded. The writer will not go into the discussion on justifications for the use of force as it is beyond the scope of this article. Then come the protection and preservation of life. The Lawgiver had defined rules whereby civilians are to be protected in times of attack and their killing is prohibited as is evidenced from Sunnah as well in details above. Secondly, the family and progeny are demanded to be protected and preserved for which, concerning war, the principle of distinction is laid down in Islamic law and the unbridled warfare have been restricted to means and methods of warfare that will not cause unnecessary sufferings. Thirdly, the intellectual capacity is required to be protected and preserved for which, again Islamic law draws a clear distinction between what is allowed and what is prohibited in war. Lastly, the rules as to the protection of civilian objects, and food necessary for their subsistence aims at fulfilling the necessity of protecting and preserving the property. All in all, in the light of purposes of Islamic law the following acts are deemed permitted at the time of conflict:

- i. It is lawful for a Muslim to injure⁶⁵, kill⁶⁶, pursue⁶⁷ or capture⁶⁸ an enemy combatant. As to the non-combatants they are immune generally yet in some exceptional cases they can be targeted.
- ii. Ruses of war (*Khid'ah*) is permitted as is attributed to Prophet Muhammad (PBUH) in the Muslim military literature.
- iii. The attack and the means and methods of warfare must be proportionate to the direct military *advantage* anticipated.⁶⁹ It is not lawful to cause unnecessary suffering.
- iv. The supplies to enemy combatants can be cut off even if there is some collateral damage as well.
- v. Food and fodder are permitted to be bought from the enemy but if they decline to sell then they can be forced.

⁶⁴ Imran Ahsan Khan Nyazee, *Islamic Jurisprudence* (Islamabad: Islamic Research Institute, 2000), 199.

⁶⁵ Al-Qur'an, VIII: 12.

⁶⁶ Ala' al-Din al-Kasani, *Bada'i' al-Sana'i'* (Beirut: Dar al-Kotob al-'Ilmiyah, n.d.) volume VII, 107.

⁶⁷ Al-Qur'an, XLVII: 4.

⁶⁸ Al-Qur'an, IV: 104; III: 172.

⁶⁹ Sarakhasi, commentary on *Kitab al-Siyar al-Kabir*, volume I, 183.

As to the prohibitions following acts are to be avoided in armed conflicts:

- i. The saying of Prophet Muhammad (peace be on) him that, "Fairness is prescribed by Allah in every matter," prohibits the acts that amount to torture and unnecessary harm must be avoided.
- ii. Those who are no longer participating in the hostilities cannot be attacked including children, women, and those slaves who only accompany their masters and have no involvement in the armed conflict, hermits, blinds, and monks, persons with defective physical or legal capacity.⁷⁰
- iii. Mutilation is prohibited in Islam. POW cannot be decapitated.
- iv. Perfidy and treachery are strictly forbidden.⁷¹
- v. Unnecessary destruction to harvest and cutting of trees is to be avoided.
- vi. Animals of the enemy can only be taken in dire need of food but slaughtering more than needed is not allowed.
- vii. The dignity of even the captured women is inviolable and adultery and fornication are sinful.
- viii. Even in the presence of an agreement clause for killing the enemy hostages in retaliation, Islam forbids the killing of hostages.
- ix. The old tradition of serving the falling enemy's head was brought to end by Islam as it is *makruh* (abominable) and was forbidden by the immediate successor Abu Bakar 'Abd Allah b. Abi Quhafah.
- x. When Muslim prisoners are employed as a shield by enemies
- xi. Genocide or massacre is strictly forbidden. Prophet Muhammad (peace be on) granted general amnesty with six outlaws.
- xii. Killing the relatives of enemies even if those enemies have killed Muslim fellows is forbidden and they can only be targeted when such infliction of harm is unavoidable.
- xiii. Non- participating peasants shall not be killed as they enjoy civilian protection. This immunity extends to traders, businessmen, merchants, and contractors provided they do not take direct part in hostilities.
- xiv. The burning of human beings or animals is strictly forbidden in Islam be it in times of peace or war and be it belongs to enemies.
- xv. A treaty otherwise valid cannot be breached (analogous to *pacta sunt servanda* principle).

⁷⁰ Sahih Muslim (Istanbul ed.), VI, 72.

⁷¹ Tirmidhi, XIX, 48; Abu Dawud, XV, 110.

3. Discussion on general principles of IHL

3.1. Armed conflicts recognized by IHL

Before going into the analysis of general principles of IHL it is important to discuss at this point the dichotomy of conflicts recognized by IHL. Firstly, when an armed conflict is between two State Parties it is termed as an International Armed Conflict (hereinafter referred as IAC).⁷² The relevant Geneva treaty law includes the Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field (hereinafter referred as GC I), the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces in the Sea (hereinafter referred as GC II), the Geneva Convention relative to the Treatment of Prisoners of War (hereinafter referred as GC III), the Geneva Convention relative to the Protection of Civilian Persons in time of War (hereinafter referred as GC IV), and the Protocol Additional to the Geneva Convention of 1949 and Relating to the Protection of Victims of International Armed Conflicts (hereinafter referred as AP I). The national liberation movements are also included in IAC.⁷³ One other category of armed conflict is the Non-International Armed Conflict (hereinafter referred as NIAC) is a conflict not of an international character which means that it is fought between the State and its dissident armed organized group or between such groups only.⁷⁴ The relevant treaty law is Common Article 3 to all Geneva Conventions and the Protocol Additional to the Geneva Conventions and Relating to the Protection of Victims of Non-International Armed Conflicts (hereinafter referred as AP II).

But the demarcation is not as simple as it is defined. Two important concepts here are foreign intervention and spillover. When a third state intervenes in a NIAC then it has the potential of changing the character of the conflict to IAC if it supports the armed groups fighting against the State. Furthermore, if the NIAC extends to the territory of the neighboring state, for instance, the group members hide in neighboring countries after crossing their borders then if that neighboring country did not assent in

⁷² Article 2 of GC I. it also includes the cases of occupation.

⁷³ Article 1 (4) of AP I.

⁷⁴ Article 1 (1) of AP II which also sets out the criteria for the dissident groups. However the immediate sub section excludes the acts of violence and sporadic acts which have not reach the threshold of required intensity.

extraterritorial attacks, it would amount to conflict between states which is a case of IAC.

3.2. Analysis of fundamental principles of modern IHL

The principles governing IHL have a very systematic application. Starting with the primary rule of non-combatant protection and for that, the second principle of precaution to be exercised in planning, plotting, and executing attacks comes into play. At the same time, IHL acknowledges the possibility of incidental harm to civilians and their objects. So albeit the attack intended against military objectives and required caution in terms of methods and means of warfare is exercised, yet in the achievement of objective collateral damage to protected ones is inevitable, the last protection afforded by IHL is proportionality. All these are critically analyzed concerning the relevant treaty and customary rule, resolutions of the Security Council, judicial decisions.

3.2.1 Balancing military necessity and humanity: A *grund norm*

The essence of IHL is the maintenance of balance between humanitarian considerations and military necessity. Thus it acknowledges the use of force where such use is inevitable and to cause injury, destruction, or death thereof and to derogate from certain principles applicable at the time of peace. But this does not mean the command is given a blank cheque (*carte blanche*) for waging arbitrary war. Rather, certain limitations should be placed in the exercise of authority by not only restricting the means and methods of warfare⁷⁵ but also by affording protections to categories of individuals. It is stated in Hague Regulations of 1899 and 1907 that “the right of belligerents to adopt the means of injuring the enemy is not unlimited.”⁷⁶ Hague Regulation IV, according to the International Court of Justice (ICJ) has emerged

⁷⁵ Means refer to weapons and methods, generally, refer to tactics.

⁷⁶ Convention with Respect to the Laws and Customs of War on Land of 1899 (hereinafter referred as Hague Regulation II) annex art. 22; Convention Respecting the Laws and Customs of War on Land of 1907 (hereinafter referred as Hague Regulation IV) annex art. 22. Cross-reference: article 35 (1) of AP I: “In any armed conflict, the rights of the Parties to the conflict to choose methods or means of warfare is not unlimited.”

as customary law.⁷⁷ Every rule of IHL is a dialectical compromise between the opposing concerns. Marten clause inserted in the Hague Regulation IV also conjoins the military necessity with the humanity, as it states that:

“Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”

International law is permeated by the elementary considerations of humanity.⁷⁸ Being human is given but keeping our humanity is a choice. IHL ensures human treatment to all categories of individuals as its birth was an effort for ameliorating the sufferings of the injured participants of the Battle of Solferino in 1859.⁷⁹ Those who are not taking a direct part in hostilities are to be humanely treated.⁸⁰ Even if the necessity demands conflict the warfare has to be restricted. This balancing requirement is well articulated in article 16 of the Lieber Code of 1863 which states that “Military necessity does not admit of cruelty—that is, the

⁷⁷ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (2004) ICJ 136, 172; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion (1996) ICJ 226, 257. Its customary nature was also discussed in the Nuremberg Trials of 1947.

⁷⁸ Corfu Channel case: *UK v. Albania* (1949) ICJ 4, 22.

⁷⁹ Henry Dunant wrote a book titled *A Memory of Solferino* in 1863 after witnessing the horrors of Solferino war and presented his idea that efforts are needed in two areas. Firstly there shall be a neutral organisation with the objective of extending support to victims of war irrespective of their participation in war and secondly there should be the legislation for mitigating the effects of war. For his contributions he is called by many the “Father of IHL.”

⁸⁰ See for example, common article 3 to all Geneva Conventions; article 75 (1) of AP I; article 4 (1) of AP II; article 5 and 27 para.1 of GC IV; article 22 of Lieber Code; para. 4 of Memorandum of Understanding on the Application of IHL between Croatia and the Socialist Federal Republic of Yugoslavia of 1991; para. 1 of Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina of 1992; section 7.1 of UN Secretary-General’s Bulletin of 1999; para. 10 of Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of IHL of 2005.

infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility that makes the return to peace unnecessarily difficult. Here, the principle of proportionality is also relevant whereby the coercive response should not outweigh the intended military aim that is to weaken the forces of the adversary but not to exterminate them.⁸¹ The principle of distinction and the discussion on collateral damage is also relevant here. So it is not possible to distinguish them satisfactorily as they are not separable rather correlated concepts. The writer for ease of analyzing covers all the general principles of IHL under the main head of principle of balance between humanity and military necessity and is analyzed below.

3.2.2 Principle of distinction: A restriction to unbridled hostilities

For the very first time, the principle of distinction was laid down in the St. Petersburg Declaration which states while defining military objective as “[the] only legitimate object which State should endeavor to accomplish during war is to weaken the military forces of the enemy.”⁸² Thereafter though no explicit principle of distinction was a part of Hague Regulations yet a reference to it was made in article 25 whereby it is prohibited to attack by any means the civilian undefended objects including their dwellings and buildings. Articles 48, 51 (2), and 52 (2) of AP I which are without any reservation agreed upon codifies the distinction principle (since any such reservation which undermines the very object of a treaty is not allowed⁸³). Here it is important to mention that this prohibition extends to both offensive and defensive attacks.⁸⁴ The negation of such an attack

⁸¹ Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (New York: Cambridge University Press, 2004), 12.

⁸² *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight* (1868) preamble. The said declaration will hereinafter referred as St. Petersburg Declaration as is popularly named.

⁸³ Statement made at the Diplomatic Conference leading to the adoption of the Additional Protocols in Mexico.

⁸⁴ AP I, article 49.

by any side to the armed conflict constitutes a war crime.⁸⁵ The significance of this principle can be assessed from the fact that though some states are not the party to Additional Protocols to Four Geneva Conventions yet their military manuals do incorporate the distinction rule.⁸⁶

During the conduct of hostilities, the distinction is to be made by the parties to the conflict between combatants and non-combatants and between civilian objects and military objectives. Non-combatants include civilians, as well as the soldiers, place *hors de combat* (out of combat). However civilian immunity is qualified as when they start taking an active part in hostilities they lose the civilian status for time being and thus are no more entitled to civilian protections under IHL. It is an undisputed rule of IHL that protection is afforded to civilians against the dangers arising from military direct attacks, “unless and for such time as they take a direct part in hostilities.”⁸⁷ The Israeli military court reiterated that the non-combatant immunity based on the principle of distinction is a cornerstone of IHL.⁸⁸ In other words, this principle is a cardinal and intransgressible principle of IHL.⁸⁹ The principle of distinction is equally applicable in NIAC.⁹⁰ UN Security Council has repeatedly condemned the killing of civilians in the armed conflicts with special reference to Yemen, Iraq, Syria,

⁸⁵ *Rome Statute of International Criminal Court*, article 8 (2) (b) (i).

⁸⁶ Amongst the States not ratified AP I the most notable is the United States Military Manual. Other examples include that of United Kingdom, France, Indonesia, Israel, Sweden and Kenya.

⁸⁷ *AP I*, article 51 (3); *AP II*, article 13 (3);

⁸⁸ *Military Prosecutor v. Omar Mahmud Kassem et al.* (1969) file no. 4/69 decided by Israeli Military Court sitting in Ramallah.

⁸⁹ The principle of distinction as a customary norm was discussed in the *Legality of the Threat or Use of Nuclear Weapons* (1996) ICJ 2 (Advisory Opinion).

⁹⁰ See, for example, article 13 (2) of *AP II*; article 3 (7) of *Amended Protocol to the Convention on Certain Conventional Weapons* of 1980 (hereinafter referred as CCW); preamble of *The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction* of 1997 (commonly referred as Ottawa Convention); *Rome Statute of International Criminal Court* article 8 (2) (e) (i) (hereinafter referred as ICC Statue). And the leading judgments in which applicability of distinction principle was discussed in detail are: ICTY, *Prosecutor v. Dusko Tadic* (1994) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction); ICTY, *Prosecutor v. Martić* (1996) (Review of Indictment); ICTY, *Prosecutor v. Zoran Kupreškić et al.* (2000) Judgment.

Palestine, Rwanda, Somalia, Afghanistan, and few others.⁹¹ Thus, the unbridled cruelty has been limited by the balancing requirement. The principle of proportionality (will be discussed in detail below) determines the placement of fulcrum whereby both opposite poles (necessity and humanity) could be balanced.⁹²

The contemporary asymmetric warfare has shifted the paradigm of war that was once fought on the battlefield at distance from the densely populated civilian population but is now taking place in the center. This has led to the frequent involvement of civilians in military operations. Many private security and law enforcement agencies today have been included in the realm of armed conflicts due to the outsourcing of functions that were once considered the sole prerogative of armed forces of a state in the case of IAC. These have made the application of the principle of distinction extremely doubtful. So, civilians are vulnerable to direct attack owing to anomalous war-like situations.

3.2.3 Principle of Proportionality: The Balancing of Torques

The differentiation principle, as aforementioned, requires the exercise of caution in distinguishing between combatants and non-combatants and their objects respectively.⁹³ But this distinction is not as simple as it seems. In conventional warfare, the intermingling of civilians with combatants and their objects makes it difficult to distinguish between them or where military aim cannot be achieved except by causing suffering to otherwise protect which raises the concern of breach of non-combatant immunity.⁹⁴ This triggers the application of the proportionality principle and the relevant test would be whether the actions in terms of their nature and extent were proportionate to the

⁹¹ UN Security Council Resolutions 564, 771, 794, 819, 853, 904, 912, 913, 918, 925, 929, 935, 950, 978, 993, 998, 1001, 1019, 1041, 1049, 1050, 1072, 1073, 1076, 1089, 1161, 1173, 1180, 1181.

⁹² Myers S. McDougal, Florentino P. Feliciano, *The International Law of War: Transnational Coercion and World Public Order* (New Haven: Yale University Press, 1961), 523.

⁹³ Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Oxford: Oxford University Press, 2004), 82; Chirs af Jochnick and Roger Normand, "The Legitimation of Violence: A Critical History of the Laws of War," *Harvard Law International Journal* 35 (1994): 29.

⁹⁴ Gardam, *Necessity, Proportionality and the Use of Force by States*, 7.

anticipated military objective?⁹⁵ Thus the proportionality requirements, as said before, serves the function of fulcrum for balancing the two opposing forces of necessity and humanity.⁹⁶ The legal basis of the principle of proportionality can be found, primarily, in article 51 (5) (b) of AP I while defining indiscriminate attacks include: “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”⁹⁷ The shortcoming of this article is that it only describes the standard against which attacks are to be carried out yet it is silent as to who is responsible to ensure compliance with the proportionality principle. Other legal instruments also upheld the prohibition against the attack which renders the required distinction ineffective.⁹⁸ Though no explicit reference is made to the principle of proportionality in the case of *NIAC* in *AP II* yet its preamble does indirectly refer to it due to its inherent nature. In recent times it is made the substantive part of modern treaties.⁹⁹ Most significantly this principle also forms the essential part of customary law.¹⁰⁰

The term “concrete and direct military advantage” is interpreted by *ICRC* as an advantage “substantial and relatively close, and that advantages which are hardly perceptible and those

⁹⁵ Craig J.S. Forrest, “The Doctrine of Military Necessity and the Protection of Cultural Property during Armed Conflicts,” *California Western International Law Journal* 37 (2) (2007): 194

⁹⁶ UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004), 25.

⁹⁷ Prohibition against indiscriminate attacks is repeated in article 57 (2) (a) (iii) of AP I.”

⁹⁸ Article 3(3) (c) of the *Protocol II* to CCW; article 8(2) (b) (iv) of *ICC Statute*; section 6(1) (b) (iv) of *UN Transitional Authority East Timor (UNTEAT) Regulation* of 2000.

⁹⁹ Article 3(8) (c) of *Amended Protocol II* to CCW; Memorandum of Understanding on the Application of IHL between Croatia and the SFRY, para. 6; Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina, para. 2.5; San Remo Manual, para. 46(d); article 15 of Lieber Code; article 24(4) of Hague Rules of Ari Warfare of 1923; article 20(b)(ii) of ILC Draft Code of Crimes against the Peace and Security of Mankind of 1996. Moreover the Military Manuals of various countries incorporates the principle of proportionality.

¹⁰⁰ See, ICRC, Rule 14. *Proportionality in Attack*, Customary IHL Database.

which would appear only in long term should be disregarded.”¹⁰¹ The proportionality criteria were laid down in *Galic case* which states that, inter alia, “In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.”¹⁰² Prohibiting the use of weapons resulting in indiscriminating attacks the ICJ held that “the very nature of nuclear weapons, and the high probability of an escalation of nuclear exchanges, means that there is an extremely strong risk of devastation. The risk factor is said to negate the possibility of the condition of proportionality being complied with. The Court does not find it necessary to embark upon the quantification of such risks; nor does it need to enquire into the question of whether tactical nuclear weapons exist which are sufficiently precise to limit those risks: it suffices for the Court to note that the very nature of all nuclear weapons and the profound risks associated therewith are further considerations to be borne in mind by States believing they can exercise a nuclear response in self-defense in accordance with the requirements of proportionality.”¹⁰³ Shortly, from the above discussion, it is established that the decision of proportionality demands assessment. But the question here arises whether such assessment should be subjective or objective? In the *Galic case*, the ICTY applied the reasonable person test whereby it held that assessing the proportionality of attack depends on the examination that “whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.”¹⁰⁴ This has now been established as the popularly employed standard of a *reasonable military commander*.¹⁰⁵

¹⁰¹ Yves Sandoz; Christophe Swinarski; Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: ICRC, 1987), § 2209.

¹⁰² ICTY, *Prosecutor v. Stanilav Galic* (2003) IT-98-29-T (Judgment), § 58.

¹⁰³ ICJ, *Advisory Opinion in Legality of the Threat or Use of Nuclear Weapons*, para 43.

¹⁰⁴ ICTY, *Prosecutor v. Stanilav Galic* (2003) IT-98-29-T (Judgment).

¹⁰⁵ Ian Henderson; Kate Reece, “Proportionality under International Humanitarian Law: The “Reasonable Military.

Commander” Standard and Reverberating Effects,” *Vanderbilt Journal of Transnational Law* 51 (2018): 835.

Here again, the issue is the same as that emanates from the wars being fought in the cities. By estimation, approximately 2/3rd of the world population is expected to live in urban cities by 2030. Conflicts have moved into the living areas and cities have changed into battle zones. The armed conflicts fought from and in urban areas have a huge impact on civilians and civilian objects. The provision of health services is halted, communication infrastructures are destroyed, access to basic facilities including clean drinking water and education stops, and most significantly it results in internal displacement which has its negative socio-economic impacts. The protected civilians become vulnerable to direct attacks. The situation deteriorates when the adverse party uses explosive weapons in the densely populated cities resulting in an indiscriminate attack that undermines the very protections of IHL. Moreover, another dark aspect of it is how to categorize those who are civilians in the daylight and fighters in dark. These asymmetries have ended in grave violation of IHL. These challenges faced by IHL need a satisfactory redressal.

3.2.4 Principle of Precaution: A sine qua non for attack

IHL bounds the attacker withers undertaking the feasible and reasonable precautions in attack. This care and caution are to be exercised not only throughout the attack but also in the stages of planning, deciding, and launching an attack.¹⁰⁶ It is interrelated with the principle of distinction afore discussed. Attackers are required to spare the protected individuals and objects in the conduct of hostilities.¹⁰⁷ This protection is also extended to the civilians and their objects in NIAC.¹⁰⁸ Moreover, this precaution principle has evolved as a customary norm not only because it fleshes out the general principles which pre-exist but also because no state including those who have not yet ratified AP I have not contested it. When in an attack against military objectives loss is incurred onto civilians then ICTY noted that “international law contains a general principle prescribing that reasonable care must be taken in attacking military objectives so that civilians are not

¹⁰⁶ Article 24 (2) of the Draft of AP II.

¹⁰⁷ Article 57 (1) and (4) of AP I. Also, stated in the preamble of the Convention on Cluster Munitions of 2008; article 2 (3) of Hague Convention (IX) of 1907

¹⁰⁸ See, for example, Article 13 (1) of AP II which states that “The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations.”

needlessly injured through carelessness.”¹⁰⁹ Moreover refereeing to the Martens clause the tribunal held that: “The prescriptions of ... [Article 57 of the 1977 Additional Protocol I] (and of the corresponding customary rules) must be interpreted to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, to expand the protection accorded to civilians.”¹¹⁰ Furthermore, it is a customary rule of IHL that the combatants have to exercise the feasible precaution for minimizing the injury to civilians and their objects if such harm is inevitable for the attainment of the military objective.¹¹¹

Sates have interpreted the term feasible attack to include only those precautions which are practicable in the given circumstances and taking into account the military and humanity considerations.¹¹² The issue here is that who is responsible in the event it is established the authority fails to exercise required precaution? After much debate, it was opined by several states that this responsibility lies on the shoulder of such a commander who has the prerogative of canceling or suspending the attack.¹¹³ Moreover, such a responsible commander needs to take the best available intelligence information through all reasonable means in this regard. This principle is conjoined with the responsibility in terms of target verification¹¹⁴, assessment of the attack aftermaths¹¹⁵, target selection¹¹⁶, warning¹¹⁷, control to be exercised

¹⁰⁹ ICTY, *Kupreškić case* (2000), para. 524.

¹¹⁰ *Ibid*, para. 525.

¹¹¹ Jean-Marie Henckaerts; Louise Doswald-Beck, *Customary International Humanitarian Law* (Volume I: Rules) (Cambridge: Cambridge University Press, 2005), Rule 15.

¹¹² To quote some see the state practices of Algeria, Australia, Belgium, Canada, France, Italy, India, United States, United Kingdom and Spain.

¹¹³ For example, Declaration made by Switzerland upon signature and reservation made upon ratification of Additional Protocol I and then at the Diplomatic Conference that led to its adoption; Statement made by Austria at the Diplomatic Conference leading to the adoption of APs and the UK's reservations and declarations made upon ratification of AP I.

¹¹⁴ Customary IHL, Rule 16.

¹¹⁵ *Ibid*, Rule 18.

¹¹⁶ *Ibid*, Rule 21.

¹¹⁷ *Ibid*, Rule 20.

during the attack¹¹⁸ , and the choice of means and methods of warfare¹¹⁹.

3.2.5 Prisoners' treatment under IHL

GC III is a convention explicitly dealing with the prisoners of war which is a term used only in IAC. The status determination criteria for combatant status is laid down in Article 4 (A) of the said convention which includes that when the members of armed forces inclusive of the militias and volunteer groups in forces, resistant armed groups, forces regularly recruited in armed forces which shows allegiance towards government not recognized by adverse Party, *levee en masse* falls into the hands of the adverse party then they are the prisoners of war and they should be duly treated. It is one of the three combatant privileges accorded by IHL.¹²⁰ If there is a doubt as to the prisoner status of an individual detained till the time his actual status is determined by a competent tribunal he is to be given the protections of status he is claiming.¹²¹ The onus of proof lies on the Detaining Power and in absence of any successful rebuttal such an individual is presumed to be a prisoner of war.¹²² When an enemy combatant is captured he is to be treated humanely without any prejudice on any basis¹²³, protected from any harm¹²⁴ and public curiosity¹²⁵, provided with food, medical assistance, and clothing¹²⁶, be afforded the judicial guarantees of a fair trial¹²⁷, and cannot be made an experimental group for any medical or scientific research. Informing the detainee of the charges against him is his inherent right unless the same is done for some penal reasons.¹²⁸ Then he must be given the right of a fair trial for which access to

¹¹⁸ Ibid, Rule 19.

¹¹⁹ Ibid, Rule 17.

¹²⁰ The combatant privileges are three fold: firstly, combatant has a right to take direct part in hostilities and cannot be later on prosecuted for mere participation unless committed some war crime including perfidy, secondly, they are the lawful targets of direct attack, and thirdly, when they fell into the hands of enemies they afforded the POW status.

¹²¹ Article 5 (2) of GC III.

¹²² This presumption is reflected in the article 45 (1) & (2) of AP I.

¹²³ Article 16 GC III.

¹²⁴ Ibid, article 19.

¹²⁵ Ibid, article 13.

¹²⁶ Ibid, article 20.

¹²⁷ Ibid, article 84.

¹²⁸ Article 75 (3) of AP I.

counsel is necessary.¹²⁹ Except for the details necessary for their identification they cannot be coerced to spill other information.¹³⁰ As soon as the hostilities end the POWs are to be released without any justifiable delay.¹³¹ But here the concern arises for individuals detained such as those belonging to the Taliban which if released as required will pose a great threat to the Detaining Power. And another debate is the status of unlawful belligerents once they are captured and how they will be protected if they are negated the status of civilians or combatants correspondingly the status of prisoners of war. So there are several pressing debatable issues concerning the determination of prisoner status and the protection thereof.

4. Compatibility Test of Islamic *jus in bello* and IHL

The hands of its fighters have always been cuffed by Islam. These limitations have given the war an ideological cum ethical dimension.¹³² Long before the codification of IHL in Geneva Law, its protections in basic form could be found in the Islamic teachings.¹³³ The compatibility of both the humanitarian regimes will now be tested in parts from the general discussion done in detail above.

- a. Concerning aims and principles, both legal systems converge for the attainment of peace and to mitigate the sufferings of war in necessity.
- b. There is a slight difference in the nature of necessary attacks in international law and Islam. In event of military necessity, the limited attack is permissible while in Islamic law the same is not mere permission rather an obligation,

¹²⁹ For further details, see, the ICRC Commentary on article 75 (4) of AP I.

¹³⁰ Article 17 of GC III. What is lawful to inquire is the capturer's name, date of birth, rank and serial number.

¹³¹ Article 118 of GC III. Although if the detainee is charged with some offences then it is an exception to repatriation rule as per article 119 of GC III.

¹³² Mustansir Mir, *Jihad in Islam*, in the *Jihad and its Times Dedicated to Andrew Stefan Ehrenkreutz*, ed. Hadia Dajani Shakeel and Ronald A. Messier (Ann Arbor: University of Michigan, 1991), 114.

¹³³ Hamed Sultan. *The Islamic Concept of International Humanitarian Law in International Dimensions of Humanitarian Law*, Jiri Toman (ed.) (Paris: UNESCO, 1988), 33.

although both are conjoined with humanitarian considerations.¹³⁴

- c. The attacks on the non-combatant objects and buildings are prohibited in binding terms in both legal systems. Moreover, both of them upheld the obligation to spare those who are out of combat including medical and religious personnel. Perfidy that is hiding the combatant status to unlawfully gain the trust of the enemy and then attack him is strictly forbidden in both legal systems. The usage of means and methods of warfare are also restricted and no superfluous injury can be inflicted.
- d. Mutilation is prohibited in both legal systems.
- e. The proportionality balancing test in Islam weighs the expected good out of war and the evil or harm likely to cause (which has already been discussed as IHL's general principle). Thus only if the harm to be corrected outweighs the harm likely to cause to protect only then such an attack can be executed.
- f. The modern interpretation of Islamic *jus in bello* in affording protections does not differ in Muslims and non-Muslims because the sole criterion is of public welfare (*maslahah*) and administration of justice.¹³⁵ These protections are also indiscriminately accorded by IHL.
- g. Respecting the dignity and fundamental rights of Prisoners of War is demanded in both legal regimes, yet from the discussion on the treatment of prisoners of war, a difference in the termination of captivity in Islamic law and IHL can be argued but that difference, according to the majority of jurists, does not exist. Since only a few like Imam Abu Hanifa favors the killing of prisoners of war so to curtail the manpower of the enemy instead of freeing them on ransom. They argue it, as already referred, to the tradition found in the life of Prophet Muhammad (PBUH) where he ordered the execution of just a few prisoners but it is established in the detailed discussion above that those enemies were executed for other offenses and that the latter practice was of gratuitous release. However, about the general treatment of prisoners of war, once they are captured, both IHL and Islamic law are on the same plane.

¹³⁴ This point has been raised since there is some overlapping between *jus ad bellum* on *jus in bello*.

¹³⁵ Public welfare and justice are always the overriding principles.

Though difference exists but that do not materially affect the application of general principles, there are, broadly speaking, similar protections like the distinction between combatants and non-combatants based on which civilians and their objects are to be spared, treatment of prisoners of war, and their repatriation, property protection including the environment. Not only in terms of protection there is coherency but also in the terms of responsibility and punishment for those who violate such rules. The researcher is of the view that especially in NIAC the protections and general principles are not only coherent with IHL but also surpasses it. Even in the Human Rights and Humanitarian gatherings it has never been argued that Islamic standards at times of war different rather their congruence has always been stressed. As has already been mentioned in beginning Islamic law reiterates the honoring of treaties¹³⁶ whereby the treaties signed by state *plenipotentiaries* bind its citizens. Thus even the compliance of Geneva Law is religiously binding on the so-called Muslim combatants who have made their manuals inconsistent with the basic teachings of Islam that are in line with IHL.¹³⁷

5. Conclusion and Recommendations

This leads to the conclusion that the only difference lies in the release of prisoners and that too to the claim of a faction of jurists. Nevertheless, it can rightly be concluded that both legal systems complement each other; thus it is in line with the argument from where this article started and now recommendation will be made for maximising the output in terms of their application.

The compatibility of Islamic *jus in bello* and IHL albeit some disagreements in few areas exhibits the universality of the general principles of conduct of war. But in the Muslim world, the gap between theory and practice needs to be bridged. For that, firstly, the dissemination of the knowledge of Islamic rules governing the hostilities conjoined with the study of IHL is necessary not only in educational institutions but also to all the relevant stakeholders including law enforcement agencies. Secondly, the pressing issues of the modern world in the Muslim context should be talked about instead of just discussing past events. Researchers should be carried out on contemporary challenges the most notable being the ISIS and other extremist

¹³⁶ Al-Qur'an, V: 1; IX: 4.

¹³⁷ However, some neo-classical scholars who constitute a minority argues that Islam and international law are irreconcilable. Yet there arguments are baseless.

terrorist groups. Moreover, the religious scholars and institutions must spread the actual word of God and promote respect for the laws that are consistent with Islam even if such laws are mostly codified by the West. Other platforms can be fruitfully employed for promoting the convergence of Islamic jus in bell and IHL. Muslims should be educated and make aware of the fact that the underlying IHL principles are deeply rooted in the injunctions of Islam which are binding upon them in any case. It is important to make them realize this because, like any other subfield of Public International law, IHL does face huge criticism on its enforcement mechanisms and doubting its sanctity as law or terming it as a subfield of positive morality. Moreover, the application of IHL is doubted by many in the modern asymmetric war fares for instance there is a huge debate on the legal implications of the activities of Al-Qaeda and Taliban. These lacunas can be effectively filled by religion and especially when such religion is Islam to which its subjects surrender. Legislators and judiciary are equally responsible in the Muslim countries. Islamic clerics must be engaged in joint conferences and workshops with IHL experts. So, IHL and Islamic law owing to their consistency in the underlying aim can jointly be employed for maximising the protections they offer as the sum is greater than its parts. Lastly, if people follow the words of ‘Ali ibn Abi Talib that, “There are two types of people: your brothers in religion or your peers in humanity,”¹³⁸ then there can be no violation of IHL.

¹³⁸ ‘Ali ibn Abi Talib, *Nahj al Balaghah*, ed. Sobhi Salih (4th edition) (Cairo: Da‘r al-Kita‘b al-Mas‘ri, 2004), 427.