

# HARMONY AND DISSONANCE: UNRAVELING THE THREADS OF WAR - A UNIQUE STUDY OF DIRECT PARTICIPATION IN HOSTILITY IN ISLAMIC AND INTERNATIONAL HUMANITARIAN AFFAIRS

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## **Abstract**

*The phenomenon of direct participation in hostilities (DPH) poses complex challenges at the intersection of Islamic law and international humanitarian law (IHL). This comparative study delves into the norms governing DPH within the context of armed conflict, examining the perspectives offered by Islamic law and IHL. The research explores the conceptualization of DPH in Islamic jurisprudence, analyzing key sources such as the Quran and Hadith, and their application to contemporary armed conflicts. Simultaneously, it investigates the relevant provisions of IHL, particularly the Geneva Conventions and Additional Protocols, which establish the legal framework governing armed conflicts on the international stage. The study aims to identify similarities, divergences, and potential areas of convergence between Islamic law and IHL concerning DPH. It scrutinizes the criteria for distinguishing combatants from civilians, the lawful means and methods of warfare, and the protection afforded to non-combatants. Additionally, the research investigates the role of non-state actors and the application of DPH norms to unconventional forms of warfare, such as asymmetrical conflicts and terrorism. By conducting a nuanced comparative analysis, this study seeks to contribute to a deeper understanding of how Islamic law and IHL address the complex ethical, legal, and humanitarian issues arising from DPH. It also highlights the practical implications of these norms for states, armed groups, and individuals involved in armed conflicts. Ultimately, the research aims to foster dialogue and promote a more comprehensive and inclusive approach to addressing the challenges posed by DPH within the broader framework of international law and human rights.*

**Keywords:** *Combatants, Civilians, Geneva Conventions, Additional Protocols, Scripture.*

## **INTRODUCTION:**

The phenomenon of Direct Participation in Hostilities (DPH) occupies a critical and multifaceted space within the realm of armed conflicts, bringing together diverse legal, ethical, and humanitarian considerations. This study embarks on a comparative exploration of the norms governing DPH, specifically examining the perspectives offered by Islamic Law and International Humanitarian Law (IHL). The intersection of these two legal frameworks provides a compelling backdrop for understanding the complexities surrounding the engagement of individuals in armed conflicts. In contemporary global affairs, armed conflicts take on various forms, from traditional state-centric warfare to asymmetrical conflicts involving non-state actors and instances of terrorism. The rules that delineate the permissible conduct of parties involved in armed conflicts, the protection afforded to civilians, and the status of combatants are fundamental components of both Islamic Law and IHL. By scrutinizing the normative principles of each, this study seeks to unravel the similarities, differences, and potential convergences in addressing the intricate issues associated with DPH. Islamic Law, grounded in the Quran and Hadith, offers a unique perspective on the ethics and regulations surrounding armed conflict. The principles of proportionality, distinction, and the protection of non-combatants are integral to the Islamic legal tradition, shaping the conduct of Muslims engaged in hostilities. Concurrently, IHL, as embodied in the Geneva Conventions and Additional Protocols, provides a comprehensive international legal framework aimed at minimizing the human suffering caused by armed conflicts. This study aims to contribute to the broader discourse on the regulation

of armed conflicts by exploring how Islamic Law and IHL intersect and diverge on issues related to DPH. It addresses critical questions surrounding the identification of combatants, the permissible means and methods of warfare, and the evolving nature of armed conflicts in the contemporary global landscape. Furthermore, the research delves into the application of these norms to non-state actors and unconventional forms of warfare, acknowledging the dynamic nature of modern conflicts. As the international community grapples with the challenges posed by armed conflicts, terrorism, and the protection of human rights, this study endeavors to shed light on the intricate web of norms governing DPH. By fostering a nuanced understanding of the intersections between Islamic Law and IHL, this research aspires to contribute to the development of more inclusive and effective legal frameworks that address the complexities of armed conflicts while upholding humanitarian principles and human dignity.

The principle of distinction is one of the fundamental principles of IHL. Its basic aim is to make a clear distinction between combatants and non-combatants or civilians. The function of combatants is to participate in hostilities and it is presumed that non-combatants and civilians will not directly participate in hostilities and for the said reason, they are given protection under IHL. Civilians lose their protection only in case they “directly participate in hostilities”. This principle is contained in “Article 51 (3) of Additional Protocol 1 (AP 1) to the Geneva Conventions”. The Supreme Court of Israel also confirmed this principle in its “Targeted Killing” Judgment in Para 30, which clearly reflects that the principle of distinction is universally accepted principle and part of customary international law.<sup>1</sup> The dilemma is that the term “direct participation in hostilities” has not been defined. The Diplomatic conferences of 1949 and 1974-77 do not provide any guidance or material for defining the concept of “direct participation in hostilities”, however, the preparatory committee of the “Geneva Conventions of 1949”(GCs), and their respective “Additional protocols of 1977” (APs), give some details regarding the notion of “Hostilities”, and “Direct” as against the notion of “indirect participation in hostilities”.<sup>2</sup> So it is very important to elaborate what “Direct Participation in Hostilities” really means .

It is well known that means and methods of today’s warfare have been changed. Private Military Companies (PMCs), non-state actors and non-state armed groups have replaced the regular armed forces and it has become difficult to distinguish between the people directly participating in hostilities and the people who are not so participating. This difficulty also implies the difficulty of distinction between the combatants and noncombatants or civilians.<sup>3</sup>

International law experts are agreed on the point that civilians are protected from any attack and those among civilians who directly participate in hostilities become subject of attack. However, there are various problems in this regard. First problem is that definition of civilians is not clear in IHL. Second and the main problem is that there is no agreed upon definition of „direct participation in hostilities” and most of the times, these problems are faced during non-international armed conflict (NIAC). A civilian who takes up arms will certainly be called to directly participate in hostilities and attacking him will be lawful for the other party, but it is uncertain what are the limits and parameters of “direct participation in hostilities”. It is well established that the notion of „direct participation in hostilities” is not only confined to the persons who take up arms rather certain other categories of persons are also included. On the basis of the same, there are several questions in this regard which need to be answered by the applicable IHL. These include as to whether logistic support by one party to the other or providing intelligence services and information shall be considered „direct participation in hostilities”. Moreover, in recent armed conflicts, mostly non-state actors and PMCs are involved and their status is not clear. All these questions are required to be answered for the proper application of IHL.<sup>4</sup>

The principle of distinction is the fundamental principle of IHL which means that non-combatants or civilians who do not directly participate in hostilities shall be protected in all circumstances and only those people can be attacked who directly participate in hostilities. The civilian population of any of the parties engaged in an armed conflict may show their participation through supply of food, shelter and other such activities but that cannot be termed as „direct participation in hostilities”. Therefore,

it can be said that mere participation in hostilities does not amount to „direct participation in hostilities“ unless the required criteria under IHL is fulfilled.<sup>5</sup>

There is a drastic change in the means and methods of warfare. Responsibility of armed conflict is being shifted to PMCs from the regular armed forces. Non-state actors and levee in mass are mostly seen to be participating in hostilities particularly during NIACs. These non-state actors mostly do not wear uniforms and do not use a distinctive emblem and for the said reason, there is difficulty in distinction between combatants and non-combatants.<sup>6</sup> All these and such like issues are required to be addressed properly and for the said purpose it is imperative to formulate a clear definition of „direct participation in hostilities .“

Clarification of the notion of „direct participation in hostilities“ is very much important particularly during recent armed conflicts. As stated earlier, non-state actors and PMCs have further complicated the matter. As a result, sometimes civilians are also targeted on the pretext of non-state actors. For instance, in Gaza conflict, Israel claimed that only Hamas fighters were targeted, whereas, various civilian deaths were reported in international media. If the notion of „direct participation in hostilities“ was clarified, Israel could be held responsible for the deaths of civilians. In Iraq, after the attack and occupation by USA, regular armed forces were defeated and as a result local population and masses of the society took up arms against the invaders. In Afghanistan, situation was the same, because the Taliban did not use uniforms or distinctive emblem and it was difficult to distinguish between a fighter and other people. In Sri Lanka, Tamil fighters use to mix with the civilian population and pretend to be farmers by day but they are fighters by night. All these situations make it difficult to clearly distinguish between the civilians and combatants.<sup>7</sup> Hence, after the change of the means and methods of warfare, it is imperative to devise a clear distinction between combatants and peaceful civilians so that the protected persons should be protected at all cost. The paper will focus on finding a solution in this regard .

It has already been discussed that civilians who do not participate in hostilities are protected, whereas those who so participate will lose their protection as long as they are so participating. However, the definition of civilians is itself not clear and the same is required to be discussed.<sup>8</sup>

Article 50(I) of Additional Protocol 1 (AP I) provides the definition of civilians in negative manner and states that :

“A civilian is any person who does not belong to one of the categories of persons referred to Article 4 A (1), (2), (3), and (6) of the Third Convention and in Article 43, of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian”.<sup>9</sup>

Here, a negative definition of civilians has been provided and accordingly the persons not falling within the categories of persons enumerated in the provisions mentioned in Article 51(1) of AP I are to be considered civilians. For the sake of further clarity, it also seems imperative to discuss all those provisions .

Article 4 of the third Geneva Convention (GC III) provides the definition of prisoners of war (POWs) and states that :

“Prisoners of war, in the sense of present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy :

❖ Members of the armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.<sup>10</sup>

❖ 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 .”

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

(3)Members of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power, and ;

(6) 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 to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of wars .”

The preceding provision provides four basic conditions in order to avail the status of POWs. All these conditions were also present in The Hague Convention of 1907. Thus, according to these provisions, any person who fulfills the criteria prescribed in the above-mentioned Article shall be considered a combatant and will be given status of POW if captured.<sup>11</sup>

Commentators have also provided that in certain situations, existence of all four conditions provided above becomes difficult. They have further stated that during an instant attack, regular armed forces might not be available to respond and in such like situation, common people, like farmers, students and workers take up arms against the aggressors and fight back. These people are called levee in mass. IHL experts agree that in this situation, existence of all four conditions provided in Article 4 (A) above is not possible and thus, it will be sufficient if they fulfill only last two conditions, because wearing uniforms and use of distinctive emblem in this situation is not possible. This condition has further been supported and elaborated in Article 43 of AP

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Therefore, existence of last two conditions provided in Article 4 (A)(6) is sufficient to consider a person to be directly participating in hostilities and these conditions are :

- “ ;1 Carrying arms openly, and ;
- ;2 Respect for the laws and customs of war” .<sup>13</sup>

Apart from that, Article 43 of AP I also defines the armed forces in the following manner :

“ ;(1) The armed forces of a party to a conflict consists of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates, even if that party is represented by a government or an authority not recognized by an adverse party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of International Law applicable in armed conflict .

; (2) Members of the armed forces of a party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities .

; (3) whenever a party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other parties to the conflict” .<sup>14</sup>

Armed forces have been defined in this Article but the definition does not cover all the aspects which need clarification. For instance, though medical personnel and associated staff has been excluded from the category of armed forces, but certain other issues, like non-state actors, PMCs, Computer Network Operators are not discussed and again their status has not been made clear .

In this regard, International Committee of the Red Cross (ICRC) conducted several expert meetings to clarify the notion of „direct participation in hostilities”. The first question before the first expert meeting was that is there any difference between „active” and „direct participation in hostilities”? The discussion originated for the reason that the phrase „active participation in hostilities” discussed in Common Article 3 was changed into „direct participation in hostilities” as mentioned in APs. The judicial opinions were distinct on this issue. Commentary to the APs which was also adopted by International Criminal Tribunal for Rwanda (ICTR) confirmed that both these concepts were identical. However, Committee set up for the establishment of International Criminal Court (ICC) suggested that both these concepts were distinct.<sup>15</sup>

The difficulty arising in the distinction between the peaceful civilians and irregular forces including private military security companies, made it necessary to analyze and determine the notion of “direct participation in hostilities” as it is used in IHL.<sup>16</sup> Moreover, the difficulty arising out on the basis of difference between combatants and peaceful civilians on the one hand and non-state actors, PMCs and people providing logistic support on the other, made it necessary for the experts to clarify the notion of „direct participation in hostilities .”

In the post-World War II Hostages Trial Judgment, it was held that only combatants are entitled to fight and “directly participate in hostilities”. If they surrender or are captured during hostilities, they

are also entitled for POW status. Combatants are also immune from prosecution by the adverse party if they are captured. However, the case is different with the civilians. Civilians are not allowed to take a direct part in hostilities and they can be prosecuted if captured.<sup>17</sup> On this point, it was held that :

“The rule is established that a civilian who aids, abets or participates in the fighting is liable to punishment as a war criminal under the law of wars. Fighting is legitimate only for the combatant personnel of a country. It is only this group that is entitled to treatment as prisoners of war and incurs no liability beyond detention after capture or surrender”.<sup>18</sup>

This rule enunciates that civilians are not allowed to directly participate in hostilities. However, as already discussed, both the terms „civilians“ and „direct participation in hostilities“ are not clear and unless they are clearly defined, this problem cannot be solved especially during NIAC. For instance, civilians who take up arms openly and start fighting against an enemy can easily be termed as “directly participating in hostilities” and whenever such a person puts off his arms and becomes peaceful, he cannot be said to be “directly participating in hostilities”. In this situation, that person is entitled for all the privileges and guarantees provided under IHL which can be extended to him. However, again the problem lies with the „civilians“. Especially when a civilian or civilian population provides logistic support to either of the warring parties or provides intelligence information or like services. In these situations, application of IHL is unclear because all these concepts have not been defined properly.<sup>19</sup>

For the solution of the problem, ICRC organized five expert meetings on the “notion of direct participation in hostilities” from the years 2003-2008, in which legal jurists and military experts of different countries were invited to participate. Finally, at the end of these meetings, the ICRC has published the “Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL” on June 2, 2009, which is intended to clarify the “notion of direct participation in hostilities” under IHL.<sup>20</sup>

This “interpretive guidance on the notion of direct participation in hostilities” cannot be said to be the opinion of experts rather it is official opinion of ICRC which is neither agreed upon by the experts nor binding .

Prior to this guidance paper, the material on the notion of “direct participation in hostilities” was available in the “ICRC commentary on AP 1 and in the judgment of Targeted Killings Case 2005 held by the Israeli

Supreme Court”.<sup>21</sup> The fundamental aim of this guidance paper is to provide some guidance on the notion of „direct participation in hostilities“. As stated above, this is official opinion of ICRC and cannot be said to be a binding law and contributory to the existing IHL, rather it is just for the guidance and in future, binding principles can be drawn on the basis of the same. Primarily, this interpretive guidance paper has tried to answer three main questions :

:1“Who is considered a civilian for the purposes of the principle of distinction ?

:2What conduct amounts to direct participation in hostilities ?

:3What modalities govern the loss of protection against direct attack?”.<sup>22</sup>

However, since the guidance paper is not a binding document, therefore, all the issues still need to be responded and for a proper response, various concepts including the notion of „direct participation in hostilities“ needs to be clarified .

:1.4Islamic Law Perspective :

It is alleged mostly by non-Muslim scholars that violations of IHL and acts of terrorism are mostly committed by Muslims. Jhon L. Esposito in this regard says that “Islamic Jihad had a long track of violence and terrorism, and it’s well-educated members come from presidential guards, military intelligence, civil servants, university students, and professors”.<sup>23</sup> However, the allegation is baseless as Islamic law contains detailed rules on war and Islamic armies had a long history to follow these rules. At the first place, these rules are contained in the Holy Qur“ān and the Traditions of the Holy Prophet (SAW). Secondly, if on a certain issue, no text is found in the Holy Qur“ān or the Traditions of the Holy Prophet (SAW), then the Muslim jurists solve the same on the basis of principles of Islamic law (Islamic jurisprudence). It will be further clarified from the following text .



### WAR AND PEACE IN THE HOLY QUR'ĀN :

The first authority containing rules of war is the Holy Qur'ān. Islamic law first of all prohibits war but allows rather encourages it at various other places when there is need to wage war. Rules of war have been described at various places and following are some of these rules: "But turn away from them and say „Peace!“".<sup>24</sup> At another place Almighty ALLĀH says :

“But if the enemies incline towards peace, do you also incline towards peace. And trust in ALLĀH! For He is the one who hears and knows all things”.<sup>25</sup> With regard to the rules relating to beginning with war, the Holy Qur'ān says :

“Fight in the way of God against those who fight against you, but begin not hostilities. Lo! God loveth not aggressors”.<sup>26</sup>

It has also been provided that taking the life of any person without a just cause is strictly prohibited : “Take not life which ALLĀH has made sacred, except by way of justice and law : thus He commands you that you may learn wisdom”.<sup>27</sup>

Islamic law also provides protection and sanctity of life of every person who falls within the category of protected persons :

“If anyone killed a person not in retaliation for murder or for his spreading evil in the land, it would be as if he killed the whole of mankind. And if anyone saved a life, it would be as if he saved the whole of mankind”.<sup>28</sup>

The above-mentioned verse of the Holy Qur'ān makes it clear that Islamic law gives absolute and ultimate sanctity to the human life and killing a single person without a just cause is like killing entire humanity.<sup>29</sup>

### TRADITIONS OF THE HOLY PROPHET (SAW) ON THE CONDUCT OF WAR :

The main authority containing detailed rules of Islamic law on war is the famous tradition of the Holy Prophet (SAW), which is narrated in “Al- Sīyār Al- Saḡhīr, by Imām Muhammad bin al-Ḥassan al-Shaybānī”, who narrates it from “Abū Ḥanīfah, on the authority of „Alqamah ibn Marthad from „Abdullah ibn Barīdah, from his father Barīdah”, who reports: “Whenever the Messenger of Allāh, peace be upon him, sent an army or a group of troops, he used to admonish its leader to fear ALLĀH in his personal behaviour, and to be pleasant to the Muslims who accompanied him”. Then he used to say: “Fight in the name of ALLĀH and in the way of ALLĀH; fight only those who disbelieve in ALLĀH. Do not misappropriate; do not commit treachery; do not mutilate (the dead); and do not kill a child. When you meet the polytheists who are your enemy invite them to Islam. If they accept Islam, accept it from them and hold yourselves back from them. Then, invite them to move over from their territory to the territory of Muhājirīn. If they do that, accept it from them and hold yourselves back from them. In case they do not, tell them that they are like other non-resident Muslims; they shall be subject to the injunctions of ALLĀH applicable to other Muslims; however, they shall have no share in fay” of the state or in the spoils of war. If they refuse (to accept Islam), invite them to pay Jizyah. If they do that accept it from them, and hold yourselves back from them. When you lay siege to the people of

a fort or a city and they ask you to allow them to surrender, subject to the commandment of ALLĀH, do not (commit yourselves to) do that. Because you might not know what is the commandment of ALLĀH regarding them. Rather bring them to the acceptance of your own decision, and decide about them according to your own opinion. When you lay siege to the people of a fort or a city and they ask you to grant them the guarantee of ALLĀH and the guarantee of His Messenger, peace be upon him, do not give them the guarantee of ALLĀH or the guarantee of His Messenger, Peace be upon him, rather grant them your own guarantee and the guarantee of your forefathers for it is less grave if you were to fail to fulfill your guarantee and your fathers guarantee”.<sup>30</sup>

Apart from that, there are many other Traditions which contain the detailed rules on the conduct of war and include :

“Do not kill any old person, any child, or any woman”.<sup>31</sup>

“Do not kill the monks in monasteries; do not kill the people who are sitting in places of worship”.<sup>32</sup>

“Do not attack a wounded person; No prisoner should be put to the sword .”



“The Prophet prohibited the killing of anyone who is tied or in captivity”. The Companions of the Holy Prophet (SAW) in this regard said :

“The Prophet has prohibited us from mutilating the corpses of the enemies, and returned the corpses after the battle”.<sup>33</sup>

It has also been reported that whenever the Holy Prophet (SAW) sent Muslim armies for any expedition, he is reported to have said :

“Go in the name of God. Fight in the way of God (against) the ones who disbelieve in God. Do not act brutally. Do not exceed the proper bounds. Do not mutilate. Do not kill children or hermits.”<sup>34</sup>

It is also reported that in one of the wars, the Holy Prophet (SAW) saw a woman killed during war and he thereupon said :

“She is not one who would have fought.” After that, he looked at his companions and said to one of them, “Run after Khālīd ibn al-Walīd (and tell him) that he must not slay children, serfs, or women.”<sup>35</sup>

For the protection of women and children, the Holy Prophet (SAW) is also reported to have said :

“Do not kill weak old men, small children, or women ”.

After the appointment of Abū Bakr al-Ṣiddīque (R.A.) as the first Caliph, he while addressing to the Muslim armies said :

“I instruct you in ten matters :”

“Do not kill women, children, the old, or the infirm; do not cut down fruit-bearing trees; do not destroy any town; do not kill sheep or camels except for the purposes of eating; do not burn date-trees or submerge them; do not steal from the booty and do not be cowardly”.<sup>36</sup>

Moreover, in “634 A.D.” when the Muslim armies marched to invade Christian Syria, Caliph Abū Bakr al-Ṣiddīque, is reported to have extended the following commands :

“Do not commit treachery, nor depart from the right path. You must not mutilate; neither kill a child or aged man or woman. Do not destroy a palm tree, nor burn it with fire and do not cut any fruitful tree. You must not slay any of the flock or the herds or the camels, save for your subsistence. You are likely to pass by people who have devoted their lives to monastic services; leave them to that to which they have devoted their lives.”<sup>37</sup>

Imām Ḥassan Al-Baṣarī, a renowned Muslim jurist, says that following acts shall be considered unlawful under Islamic law :

“Mutilation (Muthlah), (imposing) thirst (Ghalīl), the killing of women, children, and the old (Shūyūkh) the ones who have no judgment for themselves (lā rā’y lahum), and no fighters among them; (the killing of) monks and hermits, the burning of trees, and the killing of animals for other than the welfare (or Eating)”.<sup>38</sup>

All these rules and principles regarding Islamic Law of war are prescribed in the authoritative texts of Islamic Law and they make it clear that the Islamic law of war prohibits “naked aggression, inflicting any harm on non-combatants, excessive cruelty even in the case of combatants, and besides human beings even addresses and protects the rights of animals and the natural environment”.<sup>39</sup>

Thus, it has become clear from the above-mentioned instances that Islamic law has laid down detailed rules on the law of war, which can also be called Islamic IHL. It has also become clear that Islamic law gives complete immunity to non-combatants and protects them in every case. The categories of protected persons have been described in details under Islamic law and these rules can be found in earlier works of Muslim jurists. It has been mentioned in “Sharah al-Sīyar al-Kabīr, by Imām Muhammad bin al-Ḥassan al-Shaybānī” that: “women, children, insane persons, and old people should not be killed during the war”.<sup>40</sup>

The book contains a separate chapter on the issue as to whether women, children and like people can be killed during war. It is general principle that “women, children, insane, and old people cannot be killed”, because of the general principle that only combatants and persons “directly or actively participating in hostilities” can be killed during war, and these are not considered among those who “directly participate in hostilities”.<sup>41</sup>

On the basis of these principles, it is agreed upon by the Muslim jurists that under Islamic law, only combatants can be killed and noncombatants including women, children, religious people, old, blind, sick and wounded cannot be killed. So all the categories of protected persons prescribed by IHL have already been considered by Islamic law and protection has been provided to them.<sup>42</sup>

However, there are various exceptions in this regard. The first exception is that if any of the protected persons fights, he can be killed. The principle of IHL that if any one among the civilians directly participates in hostilities, he loses his protection is compatible with this rule. The Holy Prophet (SAW) is reported to have said about such people :

“ And if they fight will be killed in defense”.<sup>43</sup>

It is now clear that only combatants can be targeted and non-combatants cannot be killed during war. This principle is also related with the cause of war under Islamic law. Dr. Wahbah al-Zūḥaīlī in this regard says that cause of war in Islamic law is not kuffr rather it is war itself. Moreover, even the jurists who are of the opinion that the cause of war in Islamic law is kuffr, they are also of the opinion that women and children cannot be killed on the basis of general protection provided to them under Islamic law.<sup>44</sup> Whereas, majority of the Muslim jurists say that women, children, old and other categories of protected persons cannot be killed.<sup>45</sup> Rules of NIAC have also been discussed by the contemporary Muslim scholars. Dr. Hamīdullāh in this regard says that enemies of a Muslim state are divided into four categories which are apostates, rebels, highwaymen and non-Muslim belligerents. According to him, first three categories can form subject of Muslim international law provided that they should hold sufficient power in this regard. The last of these categories is considered foreigners.<sup>46</sup> These rules of Muslim international law are also derived from the classical texts of Islamic law .

It is well known that previously only male members of a state or society use to participate in hostilities and females were not considered combatants. However, the means and methods of today's warfare have been changed and today females are also seen equally participating in hostilities, rather at times they have become active members of the regular armed forces. This change in the warfare also brought a major change in the rules of war. Islamic law, therefore, also prescribed that if any or more of the protected categories, including women, participate in hostilities, they will lose their protection and the same rule has been adopted by IHL<sup>47</sup>

Sayyid Abū al-„Alā Maūdūdī in this regard says in his famous book *al-Jihād Fil Islām* that in the pre Islamic era of Jāhīlīyah, there was no distinction between combatants and non-combatants. Women, children, old, sick and wounded were not immune from any attack nor there was any responsibility for the aggressor in this regard. The enemy forces use to feel proud in shedding the blood of the people of adversary without any distinction. Enemy forces use to feel proud in taking the honor of enemy women.<sup>48</sup> However, when Islam came and rules of Islamic law were introduced, it prohibited all these evils and extended protection to noncombatants and abolished all methods of inhumane treatment.<sup>49</sup>

The Holy Prophet (SAW) prescribed rules on the conduct of war which were followed by him during his lifetime. Thereafter his Companions followed the same. It was also a rule for the Muslim armies that whenever they intended to invade a territory or fort, they use to first invite them to Islam, if refused then to pay Jizyah and as a last resort, to fight. These principles were followed by the Muslim armies in their expeditions against Byzantine, Persia and Central Asian territories.<sup>50</sup> With the passage of time, Muslim armies were regularized but the same rules remained applicable. After the Four Caliphs, Umayyads organized their armies and they were separated from the ordinary people. „Abbāsids thereafter further organized them and also divided their armies into different categories which included *Mūtāzīqā* (regularly paid armies and *Mūtaṭaw“īyyah* (voluntarily recruited armies). In this manner, regular armed forces were formed but the rules of war introduced by Islamic law fourteen hundred years ago are still applicable.<sup>51</sup>

With the expansion of Islamic empire, new issues were also faced and addressed by Islamic law. These included treatment of POWs, weapons allowed during warfare, threshold of damage to be inflicted on the combatants, threshold and permissibility of collateral damage etc. All these and the like issues



were addressed by Islamic law and they can be found in the books written on Islamic law of war, Jihād or Sīyr.<sup>52</sup>

“Al-Māwardī’s work, al-Aḥkām al-Sultānīyyah, (The Laws of Islamic Governance)”, written in 11th century, has devoted a separate chapter on the issue of Jihād. Rules discussed in this book deal with “the organization of the army and the duties of the commander and some to the division of captured booty and the rules of conduct of warfare”. Same rules can be found in other classical books like “al-Nawawī’s Minhāj al-ṭālībīn (a classical text of the Shā’fī school)”, which among other issues, deals with “the treatment of POW’s”. The book also states that when combatants of the enemy are taken as POW, the commander of the Muslim armies or Amīr has a right to decide to :

- “Kill them ,
- Give them their liberty ,
- Exchange them for Muslim prisoners of war ,
- Release them for a ransom ,
- Reduce them to slavery”.<sup>53</sup>

As according to “al-Shāybānī”, “Abū Ḥanīfah permitted the use of catapults and flooding to defeat the enemy and allowed other methods which had been rejected and opposed by other jurists”. With the passage of time and because of the change of circumstances, new trends in war have emerged and accordingly new discussions continued at that time period and this process still continues.<sup>54</sup>

#### CONCLUSION:

In a nutshell, we can say that Islamic law introduced detailed rules of war fourteen hundred years ago unlike IHL which is product of the 19th and 20th century. Moreover, these rules of Islamic law are still applicable .

It is also well known that until the 17th century, Europe was not aware of the distinction between a belligerent (Muḥarib) and a combatant (Muqātil). According to Sayyid Maudūdī, it has been admitted by Western scholars. In this regard, he writes in his book “Al-Jihād Fil Ḥisāb” while narrating from “International Law” by “Berkin Head” who states that: “unfortunately, the way in which World War is fought, reveals the fact without any doubt that the principle of distinction between the civilians and armed forces is in danger of being abolished”. This fact has been admitted in “International Law and the World War” by “Garner” who says that :

“When we compare the Articles of the Hague Convention 1907, with the circumstances of 1914-18, World War, then it should be kept in mind that all the people who participated in World War, did not ratify the Convention, so the determination of the fact, that whether the rules prescribed by the Convention are binding or not, was doubtful”.<sup>55</sup>

The above-mentioned text shows that there was no distinction between combatants and non-combatants in the West until the 17th and 18th century. In other words, there was no distinction between combatants on the one hand and women, children, old, sick and wounded on the other. During this period, Europe started recognizing the distinction between combatants and non-combatants but no rules in this regard were prescribed until the 19th century, when people participating in wars were considered combatants and the rest non-combatants. However, the definition was so ambiguous that practically it was difficult to follow it. Finally, in the Brussels Conference 1874, it was laid down that the people who fulfill the four conditions of Article 4(A) supra were considered combatants and the rest non-combatants.<sup>56</sup> This principle was also included in The Hague Conferences of 1899 and 1907 and later in the Geneva Conventions of 1949 .

Finally, we can conclude that IHL is the product of last three centuries, whereas, Islamic IHL was founded more than fourteen hundred years ago. It is also evident that various concepts have not been properly defined under IHL, including definition of civilians and the notion of „direct participation in hostilities“. On the other hand, Islamic law has prescribed all the categories of protected persons in details and clearly distinguishes between combatants and non-combatants. Even the rules have been prescribed when non-combatants lose their protection. Rules of modern armed conflicts have also been derived by contemporary Muslim jurists and guidance can be taken for properly framing the rules of IHL on the basis of Muslim international law .

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