

**THE NOTION OF  
DIRECT PARTICIPATION IN HOSTILITIES:  
A COMPARATIVE STUDY  
OF THE NORMS OF  
ISLAMIC LAW  
AND  
INTERNATIONAL HUMANITARIAN LAW**

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of the requirements for the degree of  
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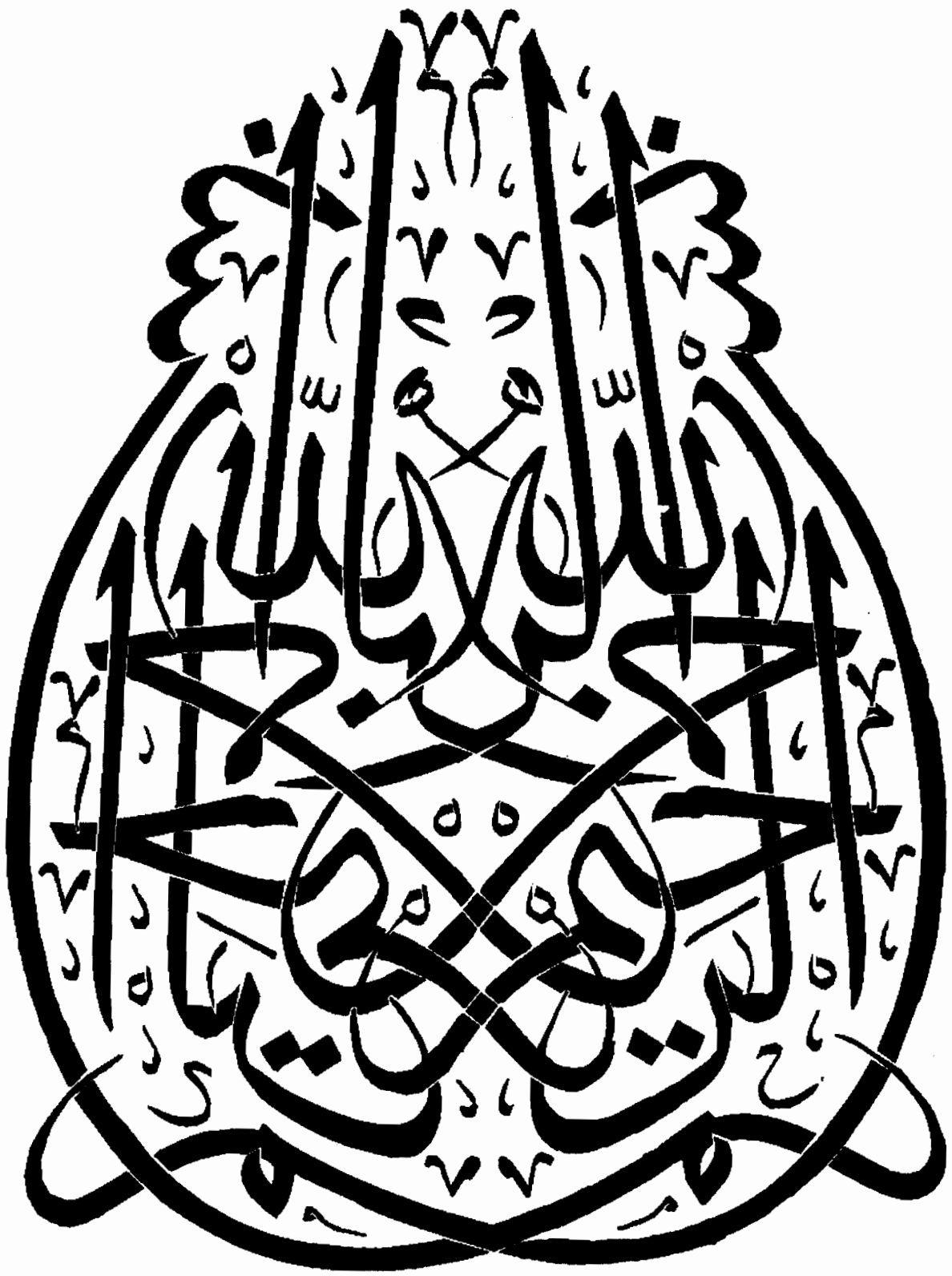


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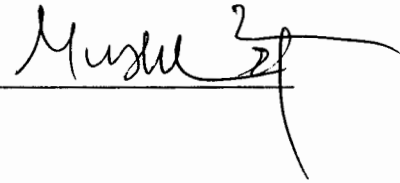
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## **Abstract**

The principle of distinction is one of the fundamental principles of International law in general and International humanitarian law in particular, and this fundamental principle is described in "Article 51(3) of Additional Protocol 1 to the Geneva Conventions". Although there is a general agreement among IHL experts that whoever takes a direct part in hostilities is subject to attack but without properly defining the notion of direct participation in hostilities, various complications may arise in its application. The status of civilians needs attention, because, the definition of the term civilian is itself not clear, particularly in Non international armed conflict. For that purpose ICRC conducted "five expert meetings on the notion of direct participation in hostilities" from 2003-2008, in which many legal and military experts from all around the world were invited to share their views, and finally has published the "Interpretive Guidance on the notion of direct participation in hostilities under IHL" on June 2, 2009, which is meant to serve as a guidance paper for clarifying the notion of direct participation in hostilities as formulated under international humanitarian law (IHL), but it is not a reflection of experts opinions, rather it is the official opinion of ICRC, hence not binding. The commentary and discussions of the legal experts also give some guidance for the clarification of the notion. Protection is given to civilians and people who aid or assist a party to a conflict will be responsible according to the gravity of their act.

On the other hand, a lot of questions have been raised on Islamic Law, especially in respect of IHL, but in reality, unlike Western International Law,

Islamic Law, or *Shariah* is a complete conduct of life, and in matters regarding International Law, and conduct of hostilities it has prescribed the detailed rules, as is the case with other branches of *Shariah* Law. First time in the history of mankind Islamic law, laid down the principles of war and prohibited inhuman and degrading and mal treatment. Rules of Islamic law are very much clear in respect of combatancy status and Muslim jurists have derived detailed rules regarding all the categories of people in respect of war. All the people who participate in war, by any means are declared combatants and rest of all are innocent hence general protection is given to all of them, and specific commands are given for the protection of woman and children etc.



## **List of Abbreviations**

- (1) AP: Additional Protocol.
- (2) CNA: Computer Network Attacks.
- (3) GA: General Assembly.
- (4) GC: Geneva Convention.
- (5) ICJ: International Court of Justice.
- (6) ICRC: International Committee of the Red Cross.
- (7) ICTY: International Criminal Tribunal for Yugoslavia.
- (8) IHL: International Humanitarian Law.
- (9) NIAC: Non International Armed Conflict.
- (10) PMC: Private Military Company[s].
- (11) POW: Prisoner[s] of War.
- (12) PSC: Private Security Company.
- (13) SC: Security Council.
- (14) TMC:
- (15) UN: United Nations.

## **DEDICATION**

My this work is respectfully and humbly dedicated to my parents,

*(My Lord, bestow on them Thy mercy, as they cherished me in [my] childhood).*

**Saqib Jawad**

## **DECLARATION**

### **INTERNATIONAL ISLAMIC UNIVERSITY, ISLAMABAD STATEMENT OF UNDERSTANDING**

I, Saqib Jawad bearing the university registration number 106-FSL/LLMIL/F08, declare in the name of Allah that my thesis entitled,

**“The Notion of Direct Participation in Hostilities: A Comparative Study of the  
Norms of Islamic Law and International Humanitarian Law”,**

Submitted to the Department of Law, Faculty of Shariah and Law, is a genuine work of mine originally conceived and written down by me under the supervision of Professor Muhammad Mushtaq Ahmad, by Allah’s will and approbation.

I do, hereby, understand the consequences that may follow, if the above declaration be found contradicted and/or violated, both in this world and in the hereafter.

**Saqib Jawad**  
LL.M International law  
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November 2010

### Acknowledgment:-

To begin with I would like to recall the words of my respectable teacher Dr. Mahmood Ahmad Ghazi, regarding the situation in which the Muslim World is passing through, a crisis that has several dimensions, and above all is the crises of thought and belief. There is need to understand and implement the principles of Islamic Law, in every Islamic state in general, and in the life of every Muslim in particular.

The first subject of International Law, which I studied was "*Fiqh al Alaqat Al Dawliyya*", taught by Dr. Mahmood Ahmed Ghazi, and it was then, that the first time I thought to study this subject in detail. After that I also studied two courses of Public International Law, in LLB (Hons) from my worthy teacher Prof. Mushtaq Ahmed, and when he taught us this subject in his special comparative teaching method, it further provoked me to know the principles of International Law, and particularly Islamic International Law in every detail. Most importantly, I consider the responsibility and obligation of every Muslim male adult, to be ready at every time for any military expedition and for that purpose every person before taking and complying with this responsibility, must be aware of the rules and principles of war.

Before I conclude, I consider this my utmost duty to express my gratitude and best wishes to all my teachers, who contributed in shaping my life towards the criteria of success laid down by Islam, and to all my friends who gave me a positive and fresh company in my life, and particularly those who supported me in completion of this thesis, although I may not be able to mention them here, and especially to my parents and all

family members and parents, who encouraged me at every step of my life. May Almighty Allah reward them all. Ameen!

#### Literature Review:-

The Muslim jurists are considered the founders of International law, for instance *Muhammad ibne Al Hasan Al Shaybani*, so a lot of classical works have been written by them, but as far as specifically “Direct Participation in Hostilities” is concerned, this topic mainly have been discussed in some famous works and a short introduction about a few of them is produced here:

1. *Sharkh Kitab AL-Siyar Al-Kabir*, by Imam Muhammad Ibn al Hasan Al Shaybani, commentary by Shams al Iimma Al Sarakhsi, is also one of the earliest books of *hanafi* law, written specifically on International law and its commentary has been written by *Muhammad bin Ahmed Al Sarakhsi* and is called *Sharkh Kitab al Siyar al Kabir*.
2. *Al mabsoot*, by Shams al Iimma Al Sarakhsi, is a book of *Fiqh* in *Hanafi* school of thought, in which detailed rules of International law are discussed in *Kitab Al Siyar*.
3. *Al Jihad Fil Islam*, by Sayyed Abu Al Aa\_la Maudodi, is also a good book written comparatively on International law, in which IHL in a bit detail has been discussed and Islamic conduct of war has been described with details and reasons.
4. *Muslim Conduct of State*, written by Dr. Muhammad Hamidullah, is also a very good book in the contemporary era, and was his PHD thesis,

in which Islamic International law in the modern perspective has been discussed in detail.

5. *Al Alaqaat ul Dawliya fil Islam, Muqarinatan Bil Qanun Al Dawli Al Hadith*, by Dr. Wahba Al Zuhaili, is a good book of a renowned contemporary Muslim jurist.
6. *The Shorter book on Muslim International law*, by Dr. Mahmood Ahmed Ghazi, is also a translation and commentary on *Kitab AL-Siyar Al-Saghir*, by *Al Shaybani*, which has been written recently.
7. *Islam ka Qanune Bain al Mamalik*, by Dr. Mahmood Ahmad Ghazi, is a series of lectures delivered by him on Islamic International law.
8. *Jihad Muzahamat Aur Baghawat*, by Muhammad Mushtaq Ahmad, is also currently written by my worthy teacher and most of the issues of my topic have been discussed in it.
9. *Unholy War: Terror in the name of Islam*, recently written by a non Muslim namely Jhon L. Esposito, is also a book, which has discussed the issues of Muslim Conduct of war, especially in the current scenario.
10. *“War and Peace in the Law of Islam”*, by Majid Khadduri, is also a famous book on Islamic International law, written by a non Muslim in which detailed issues of Islamic war and peace have been discussed.

The following main issues will be dealt with in the thesis:

- What is Direct Participation in Hostilities?
- What are the limits and boundaries of direct participation in Hostiles?

- When a person can be said to be directly participate in hostilities?
- What is the basic criterion for declaring an act as direct participation under Islamic International law?

This work is intended to resolve the ambiguity, or at last suggest some measures to clarify the notion of direct participation in hostilities, and to point out and highlight the cases which are problematic in defining as directly participating in hostilities.

## Chapter, 1: Introduction:-

### 1.1: Significance and importance of the Subject:-

As has already been discussed that the principle of distinction is one of the fundamental principles of International humanitarian law, and therefore it puts a lot of *emphasis on the distinction* between the combatants and non combatants or civilians is the basic aim of international humanitarian law (IHL). Because the function of combatants is to fully participate in hostilities, and non combatants or civilians are presumed not to be directly participating in hostilities and hence are fully protected from attack. Civilians lose their protection only in case they “directly participate in hostilities”<sup>1</sup>. This principle is contained in Article 51(3) of AP 1 to the Geneva Conventions. This principle is also confirmed by the Israeli Supreme Court confirmed in its Targeted Killing Judgment in Para 30, which is evidence that this principle is totally a norm of customary International Law<sup>2</sup>. So it is very important to elaborate what “Direct Participation in Hostilities” really mean?

Although there is a general agreement among IHL experts that the civilians who directly participate in hostilities are subject to attack but there are various complications in its application. Because there is no precise definition of the term civilian, especially

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<sup>1</sup> <http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609>, last accessed on, 03-09-2009.

<sup>2</sup> Dapo Akande, *Clearing the Fog of War? The ICRC's Interpretive Guidance on Direct Participation in Hostilities*, (Jun 4,2009), <http://www.ejiltalk.org/clearing-the-fog-of-war-the-icrcs-interpretive-guidance-on-direct-participation-in-hostilities/>, last accessed on 03-09-2010.



with regard to the Non international armed conflict. No doubt that a civilian who takes up arms will be directly participating in hostilities and is subject to attack by the other party, but it is uncertain what are the limits and parameters of direct participation in hostilities. Because it is clear that the notion of direct participation in hostilities is not confined merely to those who use arms but it extends beyond that. Therefore whether the logistic support to one party or intelligence service should be considered direct participation in hostilities or not? Moreover in recent armed conflicts particularly when non state actors are engaged, what is the status of private military companies, computer network attacks, and communication networks? Should they be considered direct participation in hostilities? All these questions form basis of IHL, so they must be clarified<sup>3</sup>.

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 and going through these six years of expert discussions and research, 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 international humanitarian law (IHL)<sup>4</sup>.

This "interpretive guidance on the notion of direct participation in hostilities" is not a reflection of experts opinions, rather it is the official opinion of ICRC. Before this guidance paper, some material on the notion of direct participation in hostilities was

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<sup>3</sup> ibid

<sup>4</sup> <http://www.reliefweb.int/rw/lib.nsf/db900SID/SODA-7TJP5H?OpenDocument>, last accessed 19-09-2009.

available in the “ICRC commentary on AP 1 and in the judgment of Targeted Killings Case 2005 held by the Israeli Supreme Court”<sup>5</sup>.

The main aim and purpose of this Interpretive Guidance is to provide some guidance for the clarification of the notion under international humanitarian law (IHL). The 10 recommendations put up in the Interpretive Guidance, including its commentary are not aimed to change or alter the existing principles of IHL, but it is only considered the opinion of ICRC’s legal experts as to how International Humanitarian law can be clarified in the prevailing situation of contemporary armed conflicts<sup>6</sup>.

“The ICRC’s interpretive guidance on the notion of “Direct Participation in Hostilities”, attempts to answer three main questions:

- 1: Who is considered a civilian for the purposes of the principle of distinction?
- 2: What conduct amounts to direct participation in hostilities?
- 3: What modalities govern the loss of protection against direct attack? Which means that when a person is said not to be directly participating in hostilities, and what is the criteria for its determination, and what consequences occur after that<sup>7</sup>.

In the first expert meeting on the notion of “Direct Participation in Hostilities” Participants discussed, was there any difference between “active” or “direct participation

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<sup>5</sup> Dapo Akande, *Clearing the Fog of War*.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

in hostilities". Because the phrase "active participation in hostilities" used in common Article 3 of the Four Geneva Conventions was changed in "direct participation in hostilities" when it emerged in the Additional Protocols of 1977. The commentary to the additional protocols which was confirmed by the International Criminal Tribunal for Rwanda, and the tribunal opined that these two concepts were synonymous to each other. But the committee composed for the purpose of establishment of an International Criminal Court, saw these two concepts as different<sup>8</sup>.

As "means and methods of warfare" have been changed in the contemporary era and behind the regular armed forces, many private security companies and organizations are involved in the battlefield, and nowadays war is conducted in densely populated area and cities particularly by using weapons of mass destruction, the distinction between the combatants and non combatants has become very difficult<sup>9</sup>.

Although the main purpose of the ICRC's guidance paper is to address the definition of civilians for the purpose of determination of protected persons during an armed conflict and distinguishing them from the non protected, it may also be useful for the identification of terrorist elements<sup>10</sup>.

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<sup>8</sup> Summary Report, *Direct Participation in Hostilities under International Humanitarian Law*. (2003), 2, [http://www.icrc.org/Web/ara/siteara0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct\\_participation\\_in\\_hostilities\\_Sept\\_2003\\_eng.pdf](http://www.icrc.org/Web/ara/siteara0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_Sept_2003_eng.pdf), last accessed on 05-09-2010.

<sup>9</sup> Report: Red Cross Task Force Defines "*Direct Participation in Hostilities*" and Protected Civilian Status, (Posted on June 15, 2009), <http://www.ombwatch.org/node/10110>, last accessed 19-09-2009.

<sup>10</sup> Ibid.

The fundamental object of international humanitarian law (IHL) is to give protection to the non combatants or civilians during an armed conflict. Therefore the principle of distinction between the combatants, who are entitled and presumed to directly participate in hostilities, and non combatants who are not entitled or presumed to be directly participate in hostilities is the basic purpose of International Humanitarian Law. The civilian population may be called to have participated in hostilities through supply of weapons, food, shelter, and also by other means including financial, economic and political support, but it is very difficult to determine who is actually or directly participating in hostilities<sup>11</sup>.

Due to 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. 'Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' which was published by The ICRC' in June 2009 is an attempt for such an analysis. Although the guidance paper has no binding value but it may help International Courts and Tribunals in the interpretation of IHL<sup>12</sup>.

Distinction is one of primary principles of IHL. But status of PSC employees is not determined in IHL, whether they are combatants or civilians. The principle of

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<sup>11</sup> Nils Melzer, *The ICRC's Clarification Process on the Notion of Direct Participation in Hostilities under International Humanitarian Law*  
[http://www.oas.org/dil/esp/XXXVI\\_curso\\_The\\_ICRC\\_Clarification\\_Process\\_Nils\\_Melzer.pdf](http://www.oas.org/dil/esp/XXXVI_curso_The_ICRC_Clarification_Process_Nils_Melzer.pdf), last accessed on, 19-09-2009.

<sup>12</sup> Damien J. van der Toorn, *Attorney-General's Department, Commonwealth of Australia, 'Direct participation in hostilities': A legal and practical evaluation of the ICRC guidance*, [http://works.bepress.com/damien\\_van\\_der\\_toorn/1/](http://works.bepress.com/damien_van_der_toorn/1/), last accessed on, 01-10-2009.

distinction is described in both treaty and customary law. Article 51(3) AP 1, describes that; combatants are allowed to take a direct part in hostilities and in response they can be killed or captured, while civilians are not legally permitted to take a direct part in hostilities and therefore it is absolutely forbidden to target civilians during the course of hostilities unless they start taking a direct part in those hostilities. While many prominent states including Israel has not yet ratified AP 1, but the distinction between combatants and civilians is recognized as one of the fundamental principles of IHL and customary International law. Therefore even those states that have not ratified AP 1 are bound by this principle<sup>13</sup>.

IHL does not provide an explicit definition of civilians, rather treaty and customary law defines “combatants” and then requires that a person who is not presumed to be a combatant may be considered a civilian. This brief has created a big confusion about the status of PMC employees, because they may not fulfill all the requirements of a combatant. A PMC employee may be a combatant, or a civilian, or lastly civilian taking a direct part in hostilities<sup>14</sup>.

Another important question is whether the acts of PMC employees are directly attributable to the state or not? Because in case of a war crime it should be determined, who will be held liable in case of a war crime or grave breach of IHL. As mentioned in

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<sup>13</sup> *Program on Humanitarian Policy and Conflict Research, IHL In Israel and Occupied Palestinian Territory*, <http://opt.ihlresearch.org/index.cfm>, last accessed on 25-09-2010.

<sup>14</sup> Ibid

Article 29, of the Fourth Geneva Convention, which states that the acts of agents of a state may be considered acts of that state, or to the occupying power<sup>15</sup>.

Some commentators argue that PMC employees should be considered civilians because under IHL in case of any difference of opinion on the point that, a person is a combatant or a civilian? he should be considered a civilian. But we can analyze that PMC employees carry out a wide range of functions, for instance, using force directly, civilian support, logistic support etc<sup>16</sup>.

So the most important issue is the status of PMC's and their respective employees. The term combatant has been defined in Article 4(A), of the Third Geneva Convention, and whenever the term is generally used, members of regular armed forces are meant. However it may also include those who assist regular forces in conduct of hostilities or "*levee in masse*" as later additional protocols have shown. Under Article 4(A)(2), Combatants are those who satisfy the criteria mentioned as under:-

- 1: "That of being commanded by a person responsible for his subordinates.
- 2: That of having a distinctive emblem.
- 3: That of carrying arms openly.
- 4: That of conducting there operations in accordance with the laws and customs of war"<sup>17</sup>.

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<sup>15</sup> Ibid

<sup>16</sup> Ibid

<sup>17</sup> Ibid

#### 1.4: Islamic Law Perspective:-

Unlike Western International Law, Islamic Law, or *Shariah* is a complete code of life, as it is believed by every believer, and in matters regarding International Law, International relations, and conduct of hostilities, it has prescribed the detailed rules, as is the case with other branches of *Shariah* Law.

According to Jhon L. Esposito, a non Muslim scholar, Islamic Jihad had a long track of violence and terrorism, and its well educated members come from presidential guards, military intelligence, civil servants, university students, and professors<sup>18</sup>. But the allegation seems to be baseless, as will be clarified in the coming passage.

The chief authority in the conduct of war under Islamic Law is the famous tradition of the Holy Prophet peace be upon him, which is narrated in *Al Siyar Al Sagair*, by *Imam Muhammad bin al Hasan Al Shaybani*, who narrates it from *Abu Hanifa*, on the authority of '*alqamah ibn Marthad*' from *Abdullah ibn Baridah*, from his father *Baridah*, who reports:

“Whenever the Messenger of Allah, peace be upon him, sent an army or a group of troops, he used to admonish its leader to fear Allah in his personal behavior, and to be pleasant to the Muslims who accompanied him”. Then he used to say: “Fight in the name of Allah and in the way of Allah; fight only those who disbelieve in Allah. 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

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<sup>18</sup> Jhon L. Esposito, *Unholy War: Terror in the name of Islam*, (New York: Oxford University Press, 2002).

territory to the territory of *Muhajirin*. If they do that, accept it from them 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 Allah 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 *Jizya*. 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 Allah, do not (commit yourselves to) do that. Because you might not know what is the commandment of Allah 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 Allah and the guarantee of His Messenger, peace be upon him, do not give them the guarantee of Allah 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>19</sup>.

In The book, "*Sharkh Kitab Al Siyar Al Kabir, by Imam Muhammad bin Al Hasan Al Shaibani, and commented by Al Sarakhsi*" detailed chapters have been given, about the issue of combatants and non combatants and their legal status. Detailed rules have been laid down, regarding the status of persons during the reign of hostilities, particularly when discussion comes about the people who can be killed during hostilities, and those who are protected from attacks.

A separate chapter has been given about the status of women and such like people, whether they can be killed during hostilities or not? Generally it is believed 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

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<sup>19</sup> Dr. Mahmood Ahmed Ghazi, *The shorter book on Muslim international law, commentary on Kitab AL-Siyar Al-Saghir*, by Imam Muhammad ibn al Hasan Al Shaybani, (Islamabad: Islamic Research Institute, 1998), 43-44.



can be killed during war, and these are not considered among those who directly participate in hostilities<sup>20</sup>. Detailed rules will be discussed in the coming chapters.

There is a general agreement among all the Muslim jurists that when Muslims reach the battlefield and war is started, only those people are subject to attack and can be targeted who directly participate in hostilities. Attack and killing of non combatants is not allowed according to the teachings of the Holy Prophet, (may peace be upon him). Moreover only those people can be killed during war who are fighting, and on the other hand those who are not directly fighting can not be killed. Saints living separately can not be attacked. Blind will not be killed. Old people and insane persons will not be killed. Women, Children, sick, wounded, and disable persons will not be killed<sup>21</sup>.

But exception of this rule is that if any one of them participates in fighting he can be killed, as mentioned by the jurists ;

“And if they fight will be killed in defense”<sup>22</sup>

Therefore although there is a general agreement among the Muslim scholars that non combatants cannot be killed in the battlefield, however there is also an agreement that if non combatants participate in the war, they can be killed<sup>23</sup>. Dr. *Wahba Al Zuhaili*, states that, the cause of war is repelling of harm, and not the opposition in religion, as stated by *Hnafis*, that the *kuffr* in itself is not the cause of war, and the majority of

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<sup>20</sup> Imam Muhammad ibn al Hasan Al Shaybani, “*Sharkh Kitab Al Siyar Al Kabir*, commentary by *Al Sarakhsi*, (1405, A.H.1415-1428).

<sup>21</sup> Dr. Mahmood Ahmad Ghazi, *Islam ka Qanune Bain al Mamalik*, (Islamabad: Shariah Academy, International Islamic University Islamabad), 338-9.

<sup>22</sup> *Ibid.* 339.

<sup>23</sup> Muhammad Mushtaq Ahmad, *Jihad Muzahamat Aur Baghawat*, (Gujranwala: Al Shariah Academy), 404.

Muslims is agreed upon the fact that the killing of women, children, and saints is not allowed in Islam<sup>24</sup>. However here, it may not be appropriate to discuss detailed rules regarding the cause of war in Islamic law.

According to Dr. Hamidullah, enemy persons have been divided into four kinds, which include, apostates, rebels, highwaymen, pirates and non-Muslim belligerents. From these categories the first three kinds are considered as subjects of the Muslim International law, while the last category comprises of foreigners. But it has to be noted that apostates, rebels and highwaymen, can only be considered as subjects of Muslim International law, when they have sufficient power and control over a particular territory. Otherwise the ordinary criminal law of the residing state will govern their affairs, and there is no concern of Muslim International law in this regard.<sup>25</sup>.

During ancient times, all the major male members of society were considered as combatants, and on the other hand females were considered as non combatants, but can we say that this criterion is correct to be applied to the current situation, or only members of armed forces should be considered combatants<sup>26</sup>. All these issues need to be discussed in details.

According to *Sayyed Abu Al Aa\_la Maudodi*, in his book *Al Jihad Fil Islam*, during the pre Islamic period of Arab there was no distinction between combatants and non combatants. Every person of enemy nation was considered as enemy. Women,

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<sup>24</sup> Dr. Wahba Al Zuhaili, *Al Alaqaat ul Dawliya fil Islam, Muqarinatan Bil Qanun Al Dawli Al Hadith*, 101-102.

<sup>25</sup> Muhammad Hamidullah, *Muslim Conduct of State*, (Lahore: 1961).

<sup>26</sup> Ibid.

children, old people, sick, and wounded, no one was immune from this high handedness. Rather to degrade the enemy, women were specifically targeted during the war, and a nation used to feel proud to take the honor of enemy women. But when Islam came in the World, it prohibited all these evils prevalent in the society, and introduced new rules of war<sup>27</sup>.

The Prophet followed the rule which he himself laid down and after that his companions followed it faithfully. In the campaigns against Byzantines and Persia the Arab commanders addressed their invitations to the enemies, inviting them first to accept Islam or to pay the tribute, before they launched their offensives<sup>28</sup>.

Gradually the army was made more professional, and specially *Umayyads* needed a strong army to suppress civil wars and revolts. Later on the *Abbasid* caliphs distinguished between the regular army which was always active in war and called *murtaziqa*, regularly paid and *mutatawwiya*, voluntarily recruited. Fighting was not as much organized as in the later period but later on the conduct of war was changed as was in the pre Islamic period<sup>29</sup>.

As already has been stated, it is evident from the history that Europe was ignorant of the difference between a belligerent, and a combatant, until the seventeenth century. According to the European jurists, every belligerent was a combatant and as a consequence he can be killed and his property can be taken away irrespective whether he

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<sup>27</sup> Sayyed Abu Al Aa\_la Maudodi, *Al Jihad Fil Islam*, (Lahore: Idara Tarjuman al Quran), 198-199,238.

<sup>28</sup> Majid Khadduri, *War and Peace in the Law of Islam*, (Clark new Jersey: The Lawbook Exchange LTD, 2006), 89-90.

<sup>29</sup> Ibid. 94-95.

was an old man, a child, a woman, sick, or belonged to any other category of non combatants. After that in the seventeenth and eighteenth centuries experts of International Law tried to distinguish between combatants and non combatants, but they did not succeed in framing a clear definition between combatants and non combatants which could be fully observed during the war. In the nineteenth century this issue was solved by declaring that the person who participated in war expeditions was declared as combatant, and the one who did not participate was declared as non combatant. But this solution too was so ambiguous that in details it was difficult to follow it. Later on in Brussels Conference 1874, a clear distinction was drawn between combatants and non combatants, and only those people were considered combatants who:

- 1: "Are being under a command responsible for his subordinates.
- 2: have a distinctive emblem.
- 3: Are carrying arms openly.
- 4: Are conducting there operations in accordance with the laws and customs of war"<sup>30</sup>.

This principle was also included in Hague conferences of 1899, and 1907<sup>31</sup>.

As is the case with all other branches of Islamic Law, the Muslim *Ummah* is facing a great challenge in the discipline of "International Law in general and International Humanitarian law in particular". Especially today a lot of criticism has been leveled towards the policy and the principles regarding the conduct of war under Islamic

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<sup>30</sup> Sayyed Abu Al Aa\_la Maudodi, *Al Jihad Fil Islam*, 238.

<sup>31</sup> Ibid.

Law. Whereas the truth is that the principles of International Law were developed by the Islamic Law itself.

According to Dr. Mahmood Ahmad Ghazi, Western writers generally believe that the Dutch jurist, Hugo Grotius (d. 1645 CE), is the father of International law, and proudly say that the principles of International Humanitarian Law are developed by them. But it is evident from history that until the seventeenth century Europe was ignorant of the difference between a belligerent (*Muharib*), and a combatant (*Muqatil*). According to them, every belligerent was a combatant and as a consequence he can be killed and his property can be taken away irrespective of the fact whether he was an old man, a child, a woman, sick, or belonged to any other category of non combatants. After that in the seventeenth and eighteenth centuries experts of International Law tried to draw a clear distinction between combatants and non combatants, but they did not succeed in framing such a clear definition between combatants and non combatants, which could be fully observed during the war. After that in the nineteenth century this issue was solved by declaring that the person who participated in war expeditions was declared as combatant, and the one who did not participate was declared as non combatant. But this solution too was so ambiguous that in details it was difficult to follow it. Later on in Brussels Conference 1874, a clear distinction was drawn between combatants and non combatants, and only those people were considered combatants who fulfill the four conditions mentioned in the Convention which will be discussed in details in the coming chapters.

Even in the pre Islamic period of Arab *Jahiliyya*, although some customs of International Law were used to be followed, but there was no distinction between

combatants and non combatants. During that period every person of enemy nation was considered as enemy, including women, children, old people, sick, and wounded, and no one was immune from this high handedness. Rather to degrade the enemy women was the special goal of the war, and a nation used to feel proud to target and take the honor of enemy women<sup>32</sup>. But when Islam came in the World, it prohibited all these evils prevalent in the society, and introduced new rules of war. *Shariah* is a complete code of life, and in matters regarding International Law, and conduct of hostilities it has prescribed the rules with every detail, as is the case with other branches of *Shariah* Law. First time in the history of mankind Islamic law laid down the principles of war and prohibited inhuman and degrading treatment, and has provided detailed rules regarding these principles, including the case study, as will be cleared at the end of this work.

So after analyzing the respective concepts of Western International Humanitarian law, we can easily conclude that, the principle of distinction between combatants and non combatants in Western International Law is the product of last three centuries, whereas on the other hand Islamic Law laid down its basic principles for the rights of combatants and non combatants before fifteen centuries when it was revealed and even modern jurists are following those principles in their works.

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<sup>32</sup> Sayyed Abu Al Aa\_la Maudodi, *Al Jihad Fil Islam*, (Lahore: Idara Tarjuman al Quran), 198-199.

## **Chapter No.2; Defining Direct Participation in Hostilities**

As already has been discussed, ICRC tried to define the notion of Direct Participation in Hostilities but until now, no exhaustive definition has been framed which has capability to be observed and applied in the battlefield in order to distinguish a combatant from a non combatant. In spite of that, defining the notion of Direct Participation in Hostilities is very essential for a number of reasons.

### **2.1 Importance of Clarification of the notion Direct Participation in Hostilities;**

The clarification of the notion of Direct Participation in Hostilities became very important, in recent armed conflicts. Particularly civilians are often seen as directly participating in Hostilities in present day armed conflicts. In the recent Gaza conflict, controversy arose whether indiscriminate force was used by Israel against the Palestinians, because the majority of the victims were unarmed civilians in that conflict. On the other hand Israel alleged that the victims were Hamas fighters or other civilians opposing the Israeli forces. In Iraq war after the occupation of USA, militias and other fighters from the common masses of the civilian population took up arms against the occupant forces, and a question arose whether those were participating in hostilities or not. In the same way in Afghanistan, it is very difficult to distinguish between a Taliban fighter and a peaceful civilian, because no distinctive uniform or emblem is prescribed for the fighters. In Sri Lanka, fighter members of Liberation Tigers of Tamil Eelam, mix with civilian population while conducting their operations, and at the time of attack on

them it is very difficult to distinguish between a Tamil guerilla fighter and a peaceful civilian. Precisely describing in almost every recent armed conflict the distinction between a fighter and a peaceful civilian became very difficult because “a person may be a peaceful civilian by day and an active fighter by night”. It is also a common practice in guerilla warfare that combatants again become peaceful civilians after a short time and continue fighting after intervals, making their prosecution very difficult, which may lead to the casualties of innocent civilians<sup>33</sup>. Hence due to the change of phenomena of modern armed conflicts a clear criterion must be laid down to distinguish between a peaceful civilian and a combatant, so that the civilians can be protected from the attacks in an armed conflict.

In modern day armed conflicts, protection of civilians and civilian population has become very important due to the changes and development in the means and methods of attack in the battlefield when modern technology is used employing the weapons of mass destruction. Responsibility of fight has been shifted to the private military security companies by the states and as the members of resistance movements and guerillas use to fight without wearing uniform and use of a distinctive emblem. Moreover these guerillas and *levee in mass* use to find sanctuaries in civilian population and use them as human shield which makes it difficult to distinguish between a peaceful civilian and a

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<sup>33</sup> Toni Pfanner, 31-12-2008 *International Review of the Red Cross* No 872, p. 819-822, Editorial - IRRC December 2008 No 872, <http://www.icrc.org/eng/resources/documents/article/review/review-872-p819.htm>, last accessed on 05-09-2010.



combatant<sup>34</sup>. All these issues indicate an extreme importance of the distinction between a person who is directly participating in hostilities and the one who is not.

There is a general agreement that the civilians who directly participates in hostilities, will be subject to attack, but the definition of civilians in itself is not clear<sup>35</sup>.

The definition of civilians is provided in Article, 50(1), of the first Additional Protocol to the Geneva Conventions, which 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>36</sup>.

So a negative definition has been provided in this Article that the persons not included in the prescribed Articles are to be considered civilians, and for that purpose those Articles need to be discussed.

In Article 4, of the Third Geneva Convention, definition of prisoners of war is provided, and Article 4 A 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:

- (1) 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.
- (2) 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

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<sup>34</sup> Ibid

<sup>35</sup> Dapo Akande, *Clearing the Fog of War*.

<sup>36</sup> Article 50 (1). Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

- (a) That of being commanded by a person responsible for his subordinates;
  - (b) That of having a fixed distinctive sign recognizable at a distance;
  - (c) That of carrying arms openly;
  - (d) That of conducting their operations in accordance with the laws and customs of war.
- (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<sup>37</sup>.

In Article 4 A, of the Third Geneva Convention four conditions for the status of combatants are mentioned, which were also mentioned in Hague Convention of 1907, and have been discussed earlier. Every person who fulfills all of these four conditions will be legally considered a combatant and the rules of IHL, will be applicable to him, for instance he will be given the status of the prisoner of war at the time of capture<sup>38</sup>.

But this is also a determined fact that the first two conditions may be suspended in accordance with the situation arising out in an armed conflict. For instance when a certain area is attacked, and the common people, like farmers, students of Universities and colleges, and businessmen etc stood up against the aggressor forces then they all will gain the status of combatants if they fulfill the last two conditions mentioned in Article 4 A, although they may not be under a command responsible for his subordinates and they may not be carrying arms openly. The immediate resistance of people in such a situation

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<sup>37</sup> Article 4 A, Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

<sup>38</sup> Muhammad Mushtaq Ahmad, *Jihad Muzahamat Aur Baghawat*, 304-05.

is called *levee in masse*. This fact has been supported by Article 43, of the First Additional Protocol to the Geneva Conventions, according to which it has been admitted that during an armed conflict it is not always necessary and some times becomes difficult to comply with the condition of distinctive emblem or uniform, hence if a person does not comply with the condition of distinctive emblem but fulfills the last two conditions of the Article, will still be considered a combatant<sup>39</sup>.

So according to Article 4 A (6), of the third Geneva Convention, only two conditions are left for persons Directly participating in hostilities to be considered prisoners of war, and those are;

- 1; "Carrying arms openly, and;
- 2; Respect for the laws and customs of war"<sup>40</sup>.

In Article 43, of First Additional Protocol to the Four Geneva Conventions, definition of armed forces is provided, which states that;

(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.

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<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

(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>41</sup>.

After considering all these aspects we can analyze that no exhaustive definition of Civilians and Civilian population has been provided and in many situations it becomes very difficult to ascertain which Civilians can be said as directly participating in hostilities, and especially during a Non International Armed Conflicts. For instance, those civilians who take up arms openly and start fight against an enemy can easily be termed as directly participating in hostilities, and whenever such a person puts off his arms and becomes peaceful can be said not to be directly participating in hostilities, and all the immunities and protections available for the protected persons can be extended towards him. But despite these clear answers there are some other questions for which no answer has been provided. For instance, what will be the status of civilians, who provide logistic support or shelter to any of the parties engaged in an armed conflict? Moreover it is also unclear whether or not providing intelligence services will fall under directly participating in hostilities? All these issues are of vital importance and need to be settled because the manners of conduct of hostilities have been changed and civilians and civilian population are actively involved in recent armed conflicts<sup>42</sup>. Therefore a detailed study involving the interpretation of different Conventions, their Additional Protocols and customary International law is required for that purpose.

For the purposes of clarification and solution of all these issues, ICRC conducted five expert meetings on the notion of direct participation in hostilities from 2003-2008, in

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<sup>41</sup> Article 43, First Additional Protocol to the Geneva Conventions, 1977.

<sup>42</sup> Dapo Akande, *Clearing the Fog of War*.

which many legal and military experts from all over the World were invited to participate with their views. At last after the lapse of six years of these expert meetings, 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 international humanitarian law (IHL)<sup>43</sup>.

In the first expert meeting on the notion of Direct Participation in Hostilities, 2003, experts analyzed that the interpretation of the situation when a civilian takes a direct part in hostilities is of vital importance, not only in the present phenomena of armed conflicts, but also throughout the history of International Humanitarian Law. They also analyzed that the interpretation of the notion ought not to be restricted merely to the four Geneva Conventions of 1949, or their Additional Protocols of 1977, but the relevant portion of treaty and customary International Law should also be included in its interpretation<sup>44</sup>.

In the "second Expert meeting on the notion of Direct Participation in Hostilities", several experts pointed out that a "Subjective Intent" was a better criteria for declaring an act as Direct Participation in Hostilities, instead of drawing a list of the acts of such a nature. But according to others a subjective intent may produce certain difficulties in the classification of an act as Direct Participation in Hostilities, because it is not an easy task to include the act of each and every individual in a subjective intent definition<sup>45</sup>.

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<sup>43</sup> <http://www.reliefweb.int/rw/lib.nsf/db900SID/SODA-7TJP5H?OpenDocument>, last accessed 19-09-2009.

<sup>44</sup> Summary Report *Direct Participation in Hostilities under International Humanitarian Law*, 2003.

<sup>45</sup> Second Expert Meeting on the *Notion of Direct Participation in Hostilities* Geneva, 2004

In modern day armed conflict when weapons of mass destruction are used by the armed forces and recent Iraq and Afghan wars had witnessed that cities and towns are destroyed in seconds, the notion of Direct Participation in Hostilities became of utmost importance. Moreover resistance and counter insurgency operations also raised these issues because many civilians and non combatants are often seen to be targeted in suicide and car bomb attacks on the enemy.

In the “third expert meeting on the notion of Direct Participation in Hostilities”, one expert pointed out that in counter insurgency operations usually civilians were targeted and not the military personnel. Therefore the clarification of the concept of Direct Participation in Hostilities is very important, especially with regard to Non International armed conflict. Because while conducting attacks, targeted decisions are taken very fast by the soldiers and there is no enough time to seek proper guidance about a target, whether that is legitimate or illegitimate. However targeting legitimate objects is not merely in favor of civilians but it is also beneficial for regular armed forces, because illegitimate killings of civilians compel them to take up arms making them enemy of the targeting powers<sup>46</sup>.

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Summary Report, Co-organized by the International Committee of the Red Cross and the TMC Asser Institute , 3, <http://www.icrc.org/eng/resources/documents/article/review/review-872-p883.htm>, last accessed on 03-09-2010.

<sup>46</sup> “Third Expert Meeting on the *Notion of Direct Participation in Hostilities* Geneva, 23 – 25 October 2005 Summary Report, Co-organized by the International Committee of the Red Cross and the TMC Asser Institute”. 42, <http://www.icrc.org/eng/resources/documents/article/review/review-872-p883.htm>, last accessed on 03-09-2010.

Moreover issues of civil unrest in the population were also discussed, particularly acts performed during riots and hostilities. It was discussed that the classification of an act committed in a riot as Direct Participation in Hostilities was a difficult task. Some experts pointed out that issue will become very ambiguous if such acts were not considered as Direct Participation in Hostilities. While the other side of the picture is that certain other experts introduced certain conditions after meeting which a particular act can be said to be directly participating in hostilities, for instance, the act should be linked with an ongoing combat, and the riot should occur during hostilities<sup>47</sup>.

In the same meeting, in order to ensure compliance with the rules of IHL, and to ensure the protection available for the protected persons, a question was raised that why it is important to determine the acts which constitute Direct Participation in Hostilities? One expert replied that acts constituting direct participation in hostilities, will allow direct attacks on the perpetrators of such acts<sup>48</sup>. Two other aspects were also very important for the classification of an act as direct participation in hostilities, namely, legal regime applicable upon capture, and lack of immunity from prosecution<sup>49</sup>. All the three issues will be discussed in details in coming chapters.

Here the issue of the status of combatant and non combatant also becomes relevant, and certain rights and duties are rendered by IHL for both categories of people in an armed conflict.

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<sup>47</sup> Ibid

<sup>48</sup> Ibid

<sup>49</sup> "Summary Report *Direct Participation in Hostilities under International Humanitarian Law*, 2003".

In the post World War II, Hostages Trial Judgment, it was held that only combatants were allowed to fight and directly participate in hostilities, and will be given the Prisoners of War status, (POWs) if they are captured or surrender, but will not be liable for any offence, because fighting or direct participation in hostilities was not an offence for the combatants. On the other hand if a civilian directly participates in hostilities, he will be considered a war criminal and will be liable for the prosecution and punishment under the relevant laws of war because direct participation in hostilities is not allowed for non combatants or civilians<sup>50</sup>.

## 2.2: The lack of an explicit definition;

The Diplomatic conferences of 1949, and 1974-77, do not provide any guidance or material for defining the concept of direct participation in hostilities, but the preparatory committee of the Geneva Conventions of 1949, and their respective additional protocols of 1977, however provide some guidance of the notion of “Hostilities”, and “Direct” as against the notion of in direct participation in hostilities<sup>51</sup>.

After World War II, in Hostages Trial Judgment, it was recognized 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

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<sup>50</sup> Michael N. Schmitt, *Direct Participation in Hostilities and 21st Century Armed Conflict*, 506, [http://www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/undervisningsmateriale/schmitt\\_direct\\_participation\\_in\\_hostilities.pdf](http://www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/undervisningsmateriale/schmitt_direct_participation_in_hostilities.pdf), last accessed on 10-09-2010.

<sup>51</sup> Jean Francois Queguiner, *Working Paper, Direct Participation in Hostilities under International Humanitarian Law*, [http://www.icrc.org/Web/ara/siteara0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct\\_participation\\_in\\_hostilities\\_Sept\\_2003\\_eng.pdf](http://www.icrc.org/Web/ara/siteara0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_Sept_2003_eng.pdf), last accessed on 05-09-2010.



treatment as prisoners of war and incurs no liability beyond detention after capture or surrender”<sup>52</sup>.

### 2.3: Change of Battlefield and Combat Zones:

It is an established principle of IHL, civilians and civilian population must be protected, while launching an attack. Hence during an armed conflict, it becomes very necessary under IHL, that a clear distinction must be made between innocent civilians and civilian population on the one hand, and legitimate military targets on the other, only military objectives can be held liable for attack. Moreover, while launching attack on a military objective, protection of innocent civilians must also be assured at any cost, and all the precautionary measures are necessary, and if excessive collateral damage is caused to civilians and civilian population, that attack becomes unlawful under IHL, even if launched against a permissive and lawful military target<sup>53</sup>. But here a relevant question arises, that what are military objectives, and what is the criterion for ascertaining the limit, or excess of collateral damage. The answer to these two essential questions is itself not yet clear in IHL.

The change in the battlefield and combat zones, use of technological means of combat, and asymmetric warfare produced a huge impact upon ascertainment of military objectives, and also upon the meanings and definition of direct participation in hostilities,

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<sup>52</sup> Michael N. Schmitt, *Direct Participation in Hostilities, and 21st Century Armed Conflict*, 506, <http://www.marshallcenter.org/mcpublicweb/en/component/content/article/18-cat-bios-command/608-art-bio-command-schmitt.html?directory=44>, last accessed on 05-09-2010.

<sup>53</sup> Marco Sassòli, Background Paper, *Legitimate Targets of Attacks, under International Humanitarian Law*, <http://www.oejc.or.at/recht/Session11.pdf>, last accessed on 03-09-2010.

as it was discussed in the first expert meeting on the notion of direct participation in hostilities, held in 2003<sup>54</sup>. Now the determination of a target being civilian or military became difficult due to change of combat zones, where attacks of different kinds can be conducted against the adversary from any place located in the civilian population.

#### 2.4: “The issue of civilians and civilian participation in hostilities”:

As has already been discussed that a lot of emphasis is given in IHL to the principle of distinction, which aims at the conduct of hostilities by identifying the members of armed forces, directly participating in hostilities, and civilians, who must be protected, from dangers and atrocities of armed conflicts. But when we analyze the history, it often comes clear that the civilians have participated in hostilities, by one way or the other, especially by supply of food, shelter, economic and political support to either of the parties. But these activities remained distant from their participation in hostilities in the battlefield and a very few civilians conducted their operations in the battlefield<sup>55</sup>.

After the end of Cold War era, there is an increasing trend in the battlefield, and many new policies have been adopted for the support of the regular armed forces. Although the use of weapons has become more and more complex in the present era, but besides providing weapons and equipment to the regular army there is an increase in the

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<sup>54</sup> Summary Report *Direct Participation in Hostilities under International Humanitarian Law*, 2003.

<sup>55</sup> Nils Milzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, 11-12, [http://www.icrc.org/eng/resources/result/index.jsp?action=w2g\\_redirect&txtQuery=ICRC\\_002\\_0990.PDF](http://www.icrc.org/eng/resources/result/index.jsp?action=w2g_redirect&txtQuery=ICRC_002_0990.PDF), last accessed on 05-09-2010.

employment of civilian contractors in order to support regular armed forces not only in logistic cells but in the battlefield and combat zones as well<sup>56</sup>.

Many Governments have employed Private Military Security Companies in order to assist their regular armed forces, for instance recently Governements of Siera Leon and Angola have employed such contractors. Such increase of PMC's may often be seen for the purpose of training and logistics, particularly where the states observe that it is not convenient for them to defend or execute military functions themselves through their regular armed forces. This increase may be seen in developed countries as the USA Government have employed hundreds of PMC's to execute its operations in Iraq run the affairs of Balkans<sup>57</sup>.

The current phenomena of the battlefield has been changed, and centers for conduct of hostilities have been shifted from the battlefield to the civilian population areas. Moreover the involvement of civilian and civilians like people became very often in the present day armed conflicts, especially by the employment of private military security company's personnel, including the sources of civilian intelligence during an armed conflict. All these issues have given rise to much difficulty in observing the rules of armed conflict under IHL, especially the principle of distinction, particularly in guerilla warfare when members of armed conflict show themselves as farmers by day and fight like active fighters by night. In this situation civilian population may be in danger of

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<sup>56</sup> *Mercenary / Private Military Companies (PMCs)*,  
<http://www.globalsecurity.org/military/world/para/mercenary.htm>, last accessed on 03-09-2010.

<sup>57</sup> Ibid.

being attacked by any of the parties, and on the other hand the regular forces may not be able to identify their enemy, and they may be targeted by the people to whom they consider peaceful civilians<sup>58</sup>.

This fact has been admitted by the Western scholars, as stated by *Sayyed Maudodi* in his book "*Al Jihad Fil Islam*" who narrates some text 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 vacuum was present because of the fact that the Laws upon which the principle of distinction was established were themselves baseless. This fact has been admitted in "International Law and the World War" by "Garner" 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>59</sup>".

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But according to Oppenheim, as stated in his book, International Law, the reason of non observance of the principle of distinction is based upon the following four factors:

- Use of "Forceful Employment Method", in which a nation is employed in the war in a way that all healthy people go to the battlefield, and instead of them the remaining women and weak men get busy in the preparation of ammunition and such other duties.

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<sup>58</sup> Nils Milzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, 11-12.

<sup>59</sup> Sayyed Abu Al Aa\_la Maudodi, *Al Jihad Fil Islam*, 561-62.

- Use of aircrafts, which are being used not only against the specific military targets but through them attacks are carried out against the communication networks and the lines of transportation as well.
- The released of democratic Governments from the duty of being bound by the opinion of the people who actually elect them.
- The importance of the warfare to economically pressurize the enemy and to destroy its resources<sup>60</sup>.

The presence of large number of Private Military Security Companies is also a big problem towards the defining of Direct Participation in Hostilities. “The total number of USA Private International Security Personnel, range from 15,000 to 20,000, that is almost 15% of the 130,000 total number of USA soldiers, and the Private Military Contractors employed by USA, are not accountable to USA Army”<sup>61</sup>. NATO forces also employed Private Security Personnel in Balkan, but there ratio is only 10% of the regular Military Forces<sup>62</sup>.

#### 2.4.1: Status of Civilian and Their Immunity:

Geneva Convention IV, of 1949, was the first attempt towards the assurance of Civilian immunity and protection. Although it initially contained some gaps but later on when Two Additional Protocols (AP I, and AP II), to the four Geneva Conventions, were introduced, namely AP I, and AP II, they fulfilled the gap left by GC IV, for the purpose

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<sup>60</sup> Ibid. 562-63.

<sup>61</sup> *Mercenary / Private Military Companies (PMCs)*, <http://www.globalsecurity.org/military/world/para/mercenary.htm>, last accessed on 03-09-2010

<sup>62</sup> Ibid.

of civilian immunity and protection, during an armed conflict. Later on AP I was further amended for strict assurance of civilian immunity and protection<sup>63</sup>.

As already has been mentioned that IHL puts a lot of emphasis on the principle of distinction, regarding the persons taking part in hostilities and the persons affected by it, and during an armed conflict an individual can hold only one status of being a combatant or a civilian. Article 48, of AP I, further prescribes that it is the fundamental duty of the parties engaged in an armed conflict to protect the protected persons under this principle of distinction<sup>64</sup>.

In IHL, civilians are generally considered non combatants. The term civilian has been used in all the four Geneva Conventions and their Additional protocols, but no precise definition is provided in this context. Rather a negative definition has been given in Article 50 (1), of AP I, which states that a civilian will be a person who does not fall in the categories of the people mentioned in Article 4(A), (1), (2), (3), and (6) of GC III, or Article 43, AP I<sup>65</sup>.

As far as non international armed conflict (NIAC) is concerned, no commentary is available in the Article 3, common to the four Geneva Conventions, which specifically can define the term civilian in a best possible manner, however the “ICRC study on Customary IHL” states that a combatant is a person who is part of regular armed forces,

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<sup>63</sup> *The Loss of Immunity of Civilians in International Humanitarian Law*, <http://knol.google.com/k/kitti-jayangakula/the-loss-of-immunity-of-civilians-in/1gwpsb0wsfcql/3#>, last accessed on 05-09-2010.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

whereas on the other side, civilian will be a person who shall not be a part of regular armed forces. As it is stated by “International Criminal Tribunal for Rawanda”, (ICTY), in “Blaskic” case that: “Civilian within the meaning of Article 3, are persons who are not, or no longer, members of the armed forces”, which clearly shows that the members of the armed forces withdraw from fighting and start living as peaceful civilians, also are considered civilians and enjoy the immunity extended towards the civilians. Furthermore the “ICRC’s Interpretive Guidance on the notion of Direct Participation in hostilities under International Humanitarian Law” has defined this term on the basis of distinction as occur in international armed conflict and non international armed conflict. Therefore every person who is not a member of the regular armed forces of a party, and not participating in hostilities as *levee en masse* will be considered a civilian, while in non international armed conflict every person who is neither a member of the armed forces of the state, nor a member of any organized armed group will be considered a civilian<sup>66</sup>.

According to the basic principles as envisaged by IHL, only combatants are ought and allowed to directly participate in hostilities, and in consequence they are liable to be attacked, while on the other hand civilians are not allowed and cannot be so attacked. So according to this principle civilians are protected from such an attack and they will run the risk of being attacked by their opponent, only for such time as long as they are directly participating in hostilities. Under Article 51(1), and (3), of AP I, and 13(3), of AP II, civilians have no right to directly participate in hostilities<sup>67</sup>.

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<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

These principles were incorporated into the Additional Protocol I, to the Geneva Conventions, the Article 43.2 of which provides the description of combatant status with regarding the concept of direct participating in hostilities, and it has been mentioned that only the regular armed forces of a state other than medical personnel are combatants in an armed conflict, which means that they are legally entitled to take a direct part in hostilities, and in doing so they have been provided combatant privilege, that they will not be held guilty for merely participating in hostilities, if they have complied with the basic principles of IHL. Another privilege has been given to the civilians in Article 51-3 of AP I, which states that the civilians shall not be attacked as long as they do not take an active part in hostilities, whereas this immunity will be waived when they actually start participating in hostilities<sup>68</sup>.

In the “third expert meeting on the notion of Direct Participation in Hostilities”, it was discussed, that what will be the status of civilians who commit violent acts against other civilians, and whether their commission of violent acts, participation in violent riots and demonstrations, and taking advantage of chaos, when they loot, plunder, and rape other civilians, these acts can be regarded, “Direct Participation in Hostilities” or not? And which law will be applicable to them? Should they be considered members of Armed Conflict, who take a direct part in hostilities and hence they can be attacked in

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<sup>68</sup> Michael N. Schmitt, *Direct Participation in Hostilities, and 21st Century Armed Conflict*, 506, <http://www.marshallcenter.org/mcpublicweb/en/component/content/article/18-cat-bios-command/608-art-bio-command-schmitt.html?directory=44>, last accessed on 05-09-2010.



consequence? Or they will be governed under the national law of the land like other ordinary criminals, containing the principles of enforcement<sup>69</sup>.

## 2.5: Human Shields:-

The concept of using innocent civilians as Human Shields is not new but it has become popular in recent scenario of armed conflict due to wide coverage of media of hostilities, and the means and methods of the using the civilian population as Human Shields is changed according to the change in the means and methods of combat<sup>70</sup>.

Such like situations are also seen in the history, for instance when Serbian people used to take their positions on the bridge of Bilgrade, in order to make them safe from being attacked by bombing of the NATO forces, or when Palestinians used to take shelter near Yasser Arraft Head Quarters in Ramalla in 2003, to prevent any possible aggression which may be committed by the Israeli forces<sup>71</sup>.

According the “Equal Application Principle” every combatant on either side of the parties to an armed conflict is bound by the laws of armed conflict, irrespective of the fact that what was the cause of war and which party is accountable to it. So the IHL, and whole “*Jus in Bello*” is applicable to all those persons who directly participate in hostilities, and it is irrelevant whether they represent an autocracy, democracy, or military

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<sup>69</sup> *Third Expert Meeting on the Notion of Direct Participation in Hostilities*, (Geneva, 23 – 25 October 2005).

<sup>70</sup> Ste'phanie Bouchie' de Belle, *Chained to cannons or wearing targets on their T-shirts: human shields in international humanitarian law*. 884-85, <http://www.icrc.org/eng/resources/documents/article/review/review-872-p883.htm>, last accessed on 03-09-2010.

<sup>71</sup> *Ibid.* 884-85.

rule, or whether one party is representing a state or a community including the International Organizations, whether those are governmental or non governmental<sup>72</sup>.

“The term human shield is used in International Humanitarian Law, when civilians are placed in front of military objective so that the civilian status of those people should abstain the enemy from the attack on the military objective as well”<sup>73</sup>.

In the present day warfare, the use of Human Shields is very common between the parties, for instance, in recent “Operation Iraqi Freedom, 2003”, civilian population has been reported to be used as human shields the parties to encounter the attacks by the adversary. According to the media reports, Iraqi Forces and particularly Paramilitary *Fidayeen* beside sheltering them in densely civilian populated areas, used to force civilians physically, to shelter them, and some other examples are of hiding themselves behind the civilian population including women and children. Before this in 1991, Gulf War, Iraq publicly announced that it will use POW’s as human shields, in order to protect nuclear sites and strategic locations, and for that purpose foreign hostages were intentionally kept near these locations, dams, steel mills, oil refineries and such other places in order to make them safe<sup>74</sup>.

After five expert meetings on the notion of Direct Participation in Hostilities, ICRC, published its report, but most of the legal and military experts who were tasked to help ICRC, in defining properly the concept of direct participation in hostilities, withdrew their names and support from the committee tasked with to frame the definition. They

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<sup>72</sup> Adam Roberts, *The equal application, of the laws of war: a principle under pressure*, 932, <http://www.icrc.org/eng/resources/documents/article/review/review-872-p931.htm>, last accessed on 05-09-2010.

<sup>73</sup> Ibid, 885.

<sup>74</sup> Ibid.

opposed the failure of ICRC, to frame the proper definition of Direct Participation in hostilities, as it applies to the people who voluntarily become human shields during an armed conflict. They were aggrieved with the decision of not including the act of voluntary human shields as direct participation in hostilities, and all the 50, military and legal experts agreed that the civilians who become voluntary human shields will be considered as direct participation in hostilities, and could be declared as legitimate targets during the conduct of hostilities. As the final report of ICRC, defines the phrase: “civilians attempting to shield a military objective by their presence”, and states that these are the persons who are protected from being targeted, and further states that the acts of voluntary human shields cannot be declared as direct participation in hostilities<sup>75</sup>.

#### 2.5.1: General Prohibition on the use of Human Shields:-

The problem and ban on making civilians or civilian population as human shields has been discussed and prohibited under the provisions of Geneva Conventions 1949. This ban was further extended in Additional Protocol 1, of 1977, and according to Article 51(7), of this Additional Protocol:

“The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favor or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations”<sup>76</sup>.

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<sup>75</sup> Richard Landes, *Hamas and Human Shields: Is it a Human Shield, if they're willing?*, <http://www.theaugeanstables.com/2009/09/17/fisking-goldstone-whats-happened-to-this-man/>, last accessed on 03-09-2010.

<sup>76</sup> Ibid. 885-86.

Although the Interpretive Guidance on the notion of Direct Participation in Hostilities has no binding value, but according to ICRC, this document can act as an authority and base for states, nonstate actors, legal experts and jurists, it can be a keystone document to give full protection to civilians and civilian population in a better way<sup>77</sup>.

In the present the effects and dangers of warfare are not limited, and huge violations of International Humaintarian Law have been committed in every region including Pakistan.

As on April 10, 2010, more than 70 innocent civilians were killed and several were injured during an air raid and strikes by the Pakistani jet fighters, in the tribal region near the border of Afghanistan. According to the eyewitness accounts, a bomb was dropped on a house in the remote village of Sara Walla in the Khyber tribal agency. The fighter jets returned two hours later when the villagers were trying to dig out people and recover their dead bodies from the destructed house and more causalities occurred. According to Ikramullah Jan Kukikhel, a tribal elder, of that region, the death toll is likely to reach up to 80. He further told that between 20 and 30 others were injured in the incident, when the house of Hameed Khan Kukikhel was bombed by the jets, killing women, children and elderly people. "All of those killed were civilians, 100% innocent," he told the press<sup>78</sup>.

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<sup>77</sup> Richard Landes, *Hamas and Human Sheilds: Is it a Human Sheild, if they're willing?*

<sup>78</sup> Abdus Sattar Ghazali, *Atrocities Of Pakistan's Mercenary Army*, (17 April, 2010), <http://www.countercurrents.org/ghazali170410.htm>, last accessed on 09-06-2010.

Generally the people belonging to the *Kukikhel* tribe are with the government. Two sons of Hameed Khan Kukikhel, whose house was bombed, were serving in the para-military Frontier Constabulary (FC). He remarked before the press that: “We have never joined the Taliban or any other fundamentalist group. We are normal people who just want peace for the country”,<sup>79</sup>.

However, on the other hand, the Army spokesman Maj. Gen. Athar Abbas denied the fact that any of the dead were civilians, he told that, the army had intelligence that militants were gathering at the site of the strike. But as the army was willing to concede the civilian casualties, an embarrassed civilian administration offered compensation to 71 victims of the tragic incident. As according to a survivor of the attack an official from the administration of Khyber Tribal Agency, visited him and offered him a check of Rs 20,000 (\$220) as a compensation for the loss of his four relatives, including his real brother. These kinds of incidents are very common in the tribal areas of Pakistan, and Pakistan’s mercenary Army is conducting massive military operations against the militants in the tribal region behind the screen or camera, because no journalists are permitted inside the war zone or the affected areas. Reports about the fighting and casualties of the so-called Taliban and army, and the targeted victimization of civilians and civilian population is based on the misinformation and propaganda released by government or military spokesmen<sup>80</sup>.

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<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

persons and their rights outside the realm of conduct of Hostilities, for instance, the status of persons deprived of their liberty<sup>84</sup>.

## 2.7: Islamic Law Regarding the Conduct of Hostilities:-

In 634 A.D., Caliph Abu Bakar, extended the following commands to the Muslim Army, while it was going to invade Christian Syria, that:

“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>85</sup>.”

So detailed rules have been laid down by Islam, for the regulations of its armed forces and their conduct during hostilities. Islam gives complete immunity to non combatants and only combatants are made subject to attack, as it has been discussed in earlier works done by the learned Muslim Jurists. It has been mentioned in “*Sharkh Al Siyar Al Kabir*, by *Imam Muhammad bin al Hasan al Shaybani*” that: Women, children, insane persons, and old people should not be killed during war, as Almighty Allah says in the Holy Quran;

“Fight those in the way of Allah who fight you”<sup>86</sup>.

And these people do not fight. And because Prophet (P.B.U.H), has forbidden the killing

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<sup>84</sup> Ibid, 11.

<sup>85</sup> Malik Bin Anas, *Muatta Al Imam Malik*, Bairut, Lebanon, Dar Ihya Al Turas Al Arabi. *Kitab al-Jihad*.

<sup>86</sup> (*Al-Baqarah* 2:190)

of women, and said that, she was not fighting, find Khalid and tell him that ,do not kill children and slaves<sup>87</sup>.”

The reason of this rule is described that, polytheism although is the biggest crime, but it is the matter between a person and his Lord, and the sentence of such a crime is delayed till the day of resurrection<sup>88</sup>.

After that it is also described that, if any one of them fights, then there is no harm in killing him, because they have directly participated in war, and because killing of a person is allowed who is capable to fight, and from whom fight is expected, so according to this rule one who actually participates in hostilities, his killing is absolutely allowed<sup>89</sup>.

### 2.7.1: War and peace in the *Quran*:

Detailed rules about the war and armed conflict have been described in the Holy *Quran*, and following are important one about the conduct of hostilities.

1. Conflict should be avoided if possible:

“But turn away from them and say “Peace!” (43:89)

It is also stated that:

“But if the enemies incline towards peace, do you also incline towards peace. And trust in Allah! For He is the one who hears and knows all things”. (8:61)

Taking the life of any person without a just reason is absolutely prohibited:

“Take not life which Allah has made sacred, except by way of justice and law:

thus He commands you that you may learn wisdom”. (6:151)

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<sup>87</sup> Muhammad bin al Hasan al Shaybani, commentary, by, Muhammad bin Ahmed Al Sarakhsi, *Sharkh Kitab al Siyar al Kabir*, (vol. 4), 1415.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

Protection and sanctity is provided to every person in the society:

“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” (5:32)<sup>90</sup>.

### 2.7.2: Traditions On the conduct of war:

Many traditions have been quoted, which stipulate the rules and regulations of armed conflict, some examples are;

“Do not kill any old person, any child, or any woman”. (by Abu Dawud, *Bukhari* vol 4, no 258; *Muslim* vol 3, 4319, 4320).

“Do not kill the monks in monasteries; do not kill the people who are sitting in places of worship”. (Musnad of Imam Ahmed Bin Hanbal).

“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 said: “The Prophet has prohibited us from mutilating the corpses of the enemies, and returned the corpses after battle”. (Bukhari; Abu Dawud), <sup>91</sup>.

### 2.7.3: Fundamental Rules of Combat under Islamic Law:

The basic rules of combat as laid down by Islamic Law, are not merely the product of history, rather are explicitly laid out in Islam’s authoritative texts of *Quran*, and *Sunnah*:

The Holy *Quran*, says:

“Fight in the way of God against those who fight against you, but begin not hostilities.

Lo! God loveth not aggressors”. (*Al-Baqarah* 2:190)

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<sup>90</sup> *Islamic Laws of War and Peace*, <http://www.federationpress.com.au/pdf/IslamicLawsonWarPeace.pdf>, last accessed on 09-06-2010.

<sup>91</sup> *Ibid.*



Whenever the Prophet (PBUH), sent his armies for any expedition, he is reported to say;

“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>92</sup>”

It has also been quoted in several traditions that at one occasion, when the fight was over, the Prophet (PBUH), saw a woman who was slain during that battle, upon that he remarked:

“She is not one who would have fought.” After that, he looked at his companions and said to one of them, “Run after Khalid ibn al-Walid (and tell him) that he must not slay children, serfs, or women<sup>93</sup>.”

At another occasion the Prophet (PBUH) has clearly said that:

“Do not kill weak old men, small children, or women<sup>94</sup>.”

When Abu Bakr al-Siddique (R.A), was appointed as the first Caliph of Muslims, the Muslim army was instructed by him in the following words:

“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>95</sup>.”

According to Imam Hasan Al-Basari, a great Muslim jurist, who lived in the second generation of Muslims, following acts will be considered violation of the rules of war Under Islamic Law:

“Mutilation (*muthla*), (imposing) thirst (*ghulul*), the killing of women, children, and the old (*shuyukh*) the ones who have no judgment for themselves (*la ra'y lahum*), and no

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<sup>92</sup> Ibn Kathir, *Tafsir al-Qur'an al-'Azim* (Riyadh 1998) pp.308-9.

<sup>93</sup> Bukhari, *Kitab al-Jihad* hadith: 3052.

<sup>94</sup> The *Sunan* of Abu Dawud, *Kitab al-Jihad*.

<sup>95</sup> Malik Bin Anas, *Muatta Al Imam Malik*, Bairut, Lebanon, Dar Ihya Al Turas Al Arabi. *Kitab al-Jihad*.

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>96</sup>.

All these rules and principles as envisaged by Islamic Law of war, as contained in the authoritative texts of Islamic Law, has made 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 beside human beings even addresses and protects the rights of animals and the natural environment<sup>97</sup>.

#### 2.7.4: The opinions of the medieval jurists:

When the Islamic Empire expanded, new issues were faced by jurists of that age, and a considerable importance was given to the rules of war, by the jurists of that era, and there were various differences of opinion between them according to their own schools of thought. Most of the issues discussed by them in their books and treatises were regarding, the treatment of POW's, the types of weapons which might be allowed, what types of damage might legitimately be inflicted on combatants and their property and similar other issues regarding the conduct of hostilities<sup>98</sup>.

Scope of knowledge was expanded and with the passage of time various disciplines were founded, and jurists also started their work in specialized fields of knowledge.

Al-Mawadi's work, *Al-Akham as-Sultaniyyah*, (The Laws of Islamic Governance), from the 11th century CE devoted a separate chapter to the rules of *jihad*.

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<sup>96</sup> IbnKathir, *Tafsir*, Vol.1, p.308.

<sup>97</sup> *Jihad and the Islamic law of War*, (Jordan: the royal aal al-bayt institute for islamic thought 2009), [http://www.rissc.jo/docs/jihad\\_final.pdf](http://www.rissc.jo/docs/jihad_final.pdf), last accessed on 09-06-2010.

<sup>98</sup> Ibid.

Some of these rules related to 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. Similar rulings about the conduct of hostilities are also found in other classical texts, such as An Nawawi's *Minhaj et Talibin* (a classical text of the Shafii school), dealt with, among other things, the treatment of POW's, in which it has been stated that:

“Of the enemy fighters taken prisoner, the *amir* may decide, according to circumstances whether to:

- Kill them,
- Give them their liberty,
- Exchange them for Muslim prisoners of war,
- Release them for a ransom,
- Reduce them to slavery”<sup>99</sup>.

As according to Shaybani, Abu Hanifa permitted the use of catapults and flooding to defeat the enemy, and allowed other methods which had been rejected and absolutely opposed by other jurists. With the passage of time and because of the change of circumstances, new enemies and new ways of waging war were reflected in the new interpretations of the traditional rules by the jurists of that age, and this process still continues<sup>100</sup>.

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<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

## **Chapter No.3 ; Direct participation in hostilities in Recent Armed Conflicts: “specific challenges”.**

### 3.1; Computer network attack, and computer network exploitation;

#### 3.1.1: Defining Computer Network Attack:

The Computer Network Attacks or CNAs, which may cause an information warfare through hostile online operations to mismanage, hack, disrupt, deny, degrade, or destroy information present in the computers or computer networks of the enemy. The means and methods of these network attacks are several and may vary widely depending upon the nature of such an attack. The main means and methods of computer network attacks include, to gain full access to a computer system in such a way that the person so accessing will have the total control of the system in his hand, and he can transmit viruses in it to destroy or alter the data present in the computers, through the use of logic bombs which may make a computer system hacked, until it is triggered at a specific time, which may has been fixed at the happening of a particular event<sup>101</sup>.

In the current military doctrine, methods and means of warfare have been changed, and new concepts emerged in the contemporary armed conflict. “Computer Network Attacks” have been defined as:

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<sup>101</sup> “Michael N. Schmitt,

*Wired warfare: Computer network, attack and jus in bello*, (RICR Juin IRRC June 2002 Vol. 84 No 846 365)”,

“[http://www.icrc.org/Web/eng/siteeng0.nsf/3e02cd6224ce0af6012568b20048a62f/e4e4a03de3be1211c1256bf900332f62/\\$FILE/365\\_400\\_Schmitt.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/3e02cd6224ce0af6012568b20048a62f/e4e4a03de3be1211c1256bf900332f62/$FILE/365_400_Schmitt.pdf)”, last accessed on 18-06-2010.

"Actions taken to affect adversary information and information systems while defending one's own information and information systems," IO encompasses operations security (OPSEC), psychological operations (PSYOP), military deception, electronic warfare, physical attack, and computer network attack (CNA). Some of these disciplines are as old as warfare itself<sup>102</sup>."

### 3.1.2: Applicability of humanitarian law to computer network attacks:

The main question dealing with CNAs is that whether or not these Computer Network Attacks are subject to IHL, because there is no provision in IHL, including the four Geneva Conventions and their Additional Protocols which specifically deals the issues if CNAs, or information warfare. The main reason behind this fact is that, the concept of Computer Network Attacks and information warfare originated after the promulgation of basic documents of IHL, and upon this fact a lot arguments are being raised, that the existing treaty law is not applicable to the parties engaged in such kind of conflict. Another argument is also raised that IHL, will be applicable only in those means methods of warfare which are physically launched, while CNAs are not kinetic strike, hence they are not included in the definition of armed conflict, so not subject to International Humanitarian Law<sup>103</sup>.

But all these arguments can be easily rebutted. The main argument against the applicability of IHL, that the existing treaty law is silent on the subject, can be rebutted

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<sup>102</sup> "William J. Bayles, *The Ethics of Computer Network Attack, From Parameters*, (Spring 2001)", 44-58. <http://www.iwar.org.uk/iwar/resources/ethics-of-cna/bayles.htm>, last accessed on 15-07-2010

<sup>103</sup> "Michael N. Schmitt, *Wired warfare: Computer network attack and jus in bello*".

through the applicability of the Martens Clause, which has been included within well settled principles of IHL, and states that:

“If a situation is not covered by an international treaty or agreement, civilians and combatants remain under the protection and according to the principles of international humanitarian law, which are derived from established customs of international law, the principles of humanity, as derived from the dictates of public conscience will apply”<sup>104</sup>.

By this principle all the events and occurrences during armed conflict are subject to the application of humanitarian law. Because no vacuum can be left without the applicability of any law. Moreover after accepting the international customs as a source of international law, as has been laid down in Article 38 of the Statute of the International Court of Justice also denies the contention of inapplicability of IHL, on the basis of specific *lex scripta*<sup>105</sup>.

### 3.1.3: Combatants and military objectives in Computer Network Attacks:

As it has already been determined that there cannot be any situation occurring during an armed conflict, which may be left from the applicability of International Humanitarian Law, so all the members participating actively or directly in these computer network attacks will be subject to International Law, applicable during an armed conflict. While launching these kinds of hostile acts against the adversary combatants, for instance after controlling the navigational system or air traffic system, being used for military purposes, and causing it to transmit false navigational information to all the system connected with that, and in consequence causing the aircrafts or military ships like marines and submarines to crash, is no doubt a permissible act under

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<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

International Humanitarian Law. Moreover generally the definition of military objectives has been provided in Article 52 of Additional Protocol I as “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite advantage”. Therefore according to this definition all the military equipments and facilities, with the exception of medical equipments and religious items, all others are military objectives, and launching a computer network attack against them will be lawful under IHL. But where this difference is not obvious then it becomes complicated to determine that which targets are subject to a computer network attack. For instance banks can be attacked, and their system and data can be destroyed, because wealth of these banks have been utilized by a party for its military sustainability? Same rule will apply to the ministry responsible for taxation, and the stock exchange of a country, because they are the key figures behind the sustainability of economy and finance of a country. Similar issues are also of a great controversy in this regard<sup>106</sup>.

But the main principle to conclude all the above discussion is that, whether or not the launched computer network attack would cause injury, death, damage or destruction. If it is determined, then further issues will become easy to be determined, and declaring an object as a legitimate target for computer network attacks will be an easy task. But if the main purpose of these attacks is to cause mere inconvenience, not employing physical destruction or harm, then it will not be considered an attack, and such kinds of acts will be permissible, regardless of the object being targeted, whether that was a military object or not. For example, “during the Kosovo war, Serbian State television station were

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<sup>106</sup> Ibid.

targeted by CNA rather than physical weapons during NATO strikes on Belgrade in April 1999, but in those attacks there might had been no physical injury, death, damage or destruction”. Under these, irrespective of the fact that whether the object targeted was a civilian or military object, or civilian life and property have been damaged, every kind of criticism was ignored and no responsibility was undertaken. Moreover no importance was given to these allegations, including the litigation initiated in the European Court of Human Rights<sup>107</sup>.

The application of *jus in bello* in armed conflict and particularly regarding CNAs is a critical issue, and during an armed conflict most of the International scholars focus their attention on the application of existing targeting rules, including the principles of “military objective, distinction, proportionality, and unnecessary suffering”. But the discussion of these issues in CAN is somewhat complex. As this is an important question that how and against whom CNAs may be lawfully conducted and by whom they may be lawfully executed? As states now have started construction CNA arsenals, what International legal obligations will be applied both to states as well as for the individuals who undertake CNA duties? As the determination of the status of POW, is a critical aspect as described under Third Geneva Convention 1949<sup>108</sup>.

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<sup>107</sup> Ibid.

<sup>108</sup> Sean Watts, *Combatant Status and Computer Network Attack*, <http://www.vjil.org/wp-content/uploads/2010/01/VJIL-50.2-Watts.pdf>, last accessed on 15-07-2010



### 3.1.4: State Capacity for Computer Network Attacks:

In the recent era many authors have quoted interesting examples:

“For instance a party may bring the enemy to his knees without firing a shot, instead rendering him defenseless and harmless by destroying his information infrastructure through computer network attacks. The weapons of computer network attack include "chipping" by inserting malevolent code into hardware during manufacturing, programming "back doors" to allow external control of a computer, and disseminating computer viruses. Generally these weapons are not visible and threatening, but they may cause highly destructive deadly effects”<sup>109</sup>.

On the basis of these perceptions all the nations are adding the capability of computer network attacks to their arsenals, increasing their military capacity. “During the Kosovo war, the United States launched limited electronic attacks on Serbian computers containing banking records of Serbian leaders”. But the United States was not the only state having this capability. Moreover, “in 1995, the National Security Agency and Department of Energy estimated that more than 120 nations already had some sort of computer attack capability, and were able to use it at any moment”. The People's Republic of China reportedly has concentrated on numerous types of "dirty war" or "asymmetric attacks" in today's military warfare, which is aimed at the use of computer viruses, indulge “China's technologically advanced enemies into "political and economic crisis”<sup>110</sup>.

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<sup>109</sup> “William J. Bayles, *The Ethics of Computer Network Attack, From Parameters*, (Spring 2001)”, 44-58. <http://www.iwar.org.uk/iwar/resources/ethics-of-cna/bayles.htm>, last accessed on 15-07-2010

<sup>110</sup> Ibid.

Moreover on August 8, 2008, Russian armed forces entered the separatist Georgian region of South Ossetia. Simultaneously, Russian aircraft bombed the region and conducted targeted flights over other Georgian territory. But what was important in the present armed conflict was the campaign of CNAs which accompanied the Russian invasion, which took control of all the Georgian government websites and defaced it, denying web-based communications between the Georgian Government and the Georgian population. Later reports revealed that the CNA campaign was launched which preceded the physical invasion by Russia after as much as twenty four hours and that hackers may have launched computer network operations as early as July 20<sup>th</sup> against the enemy. Although the allegations of these CAN attacks were leveled against the Russian Government, but the no evidence was collected, and the exact source of these attacks was not identified<sup>111</sup>.

The people who are involved in cyber crimes are aware of the fact that they may be held liable for their activities, and may lawfully be prosecuted and punished. But the problem arises when these cyber crimes are committed on the command of states to conduct hostile military actions. At this moment it also becomes difficult to distinguish between a conventional cyber crime, and a Computer Network Attack, constituting hostile acts under the law of armed conflict. Although the fact is not agreed upon by the legal experts, but an attack on the computer network of the adversary, or on the infrastructure that depends on these computer networks, will be considered a computer network attack within the law of war as a military assault. While the activities of private internet users remain at their own risk, and they may lawfully be held liable for penalty

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<sup>111</sup> Sean Watts, *Combatant Status and Computer Network Attack*.

under the criminal law of their respective country. But if an act is deemed to have constituted a war crime, then they may be held liable both under the domestic criminal law, and the law of armed conflict or IHL<sup>112</sup>.

Here the question arises that if a private internet user is captured then what will be his status, i.e. if he is captured as an ordinary criminal then will be punished under the prevailing criminal law, but if he is given the status of POW, then in that case he will have no right to engage counsel for the purpose of challenging his detention and protection for his rights. The prisoner in this case, will be held in custody and will be given the status of POW, but his detention is allowed until the hostilities end<sup>113</sup>.

However a private internet user and launching an attack, may be declared as unlawful belligerent and may be held liable for the punishment of that offence. So all the users launching an attack through internet may be held liable either in one capacity or the other. Both of these categories may also be held liable for war crimes according to their nature of attack, for instance, if a virus is launched in the computer system of a hospital, in order to disrupt and destroy its services, may be considered as if such attack is physically launched at the same site through the use of conventional weapons, and being unlawful under International Humanitarian Law would constitute a war crime<sup>114</sup>.

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<sup>112</sup> "H. Hoffman, Michael, *The legal status and responsibilities of private internet users under the law of armed conflict: A primer for the unwary in the shape of law to come*", "<http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/wasglo2&div=24&id=&page=>", last accessed on 03-09-2010.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

### 3.2: New Trends of Armed Conflict and Islamic Law of War:-

In the present era, Islamic Militant Groups have become the main target of the allied forces especially engaged in the war against terrorism. According to them, Islamic militant groups are using, along with the warfare tactics of ancient times, advanced technologies to carry out their operations. This has been noticed because, they have conducted their operations against their opponents with high visibility, high value targets, with the use of small teams, which have produced high value results with proportionately little expenditure, and all of this is done without being engaged in direct attacks against the adversary. It has been examined that attacks have been carried out, to destroy and disrupt the technologies of cyber law. The Westerns say that although the War on Terrorism is not explicitly restricted to Islamic terrorism alone, Islamic terrorism is arguably the greatest current direct threat to our national security. They have noticed that the World wide web is already in great use by the Islamists and their sympathizers. There are hundreds of "jihadi" sites online, which contain Jihadi literature and also militant data. The news, articles, and updates are also available on these sites, along with the justifications regarding the operations conducted in the Middle East, West and throughout the world. Editorials and commentary of religious leaders, photographs of atrocities committed by the adversary, are also available. Moreover militants use computers to conduct surveillance and to create targeting packages and submit it to their leadership for operational approval. As it has been observed that prior to carrying out the operations, Al-Qaeda conducts surveillance of the target, and enter the location without suspicion.

These results are forwarded to Al-Qaeda HQ for approval, through prepared photographs, and computer assisted design/computer assisted mapping software<sup>115</sup>.

On the other hand, USA and other Western states are facing a big threat from Iran. In their view Iran is highly motivated for developing a cyber attack capability. As after World War II, Iranian leaders had aligned themselves with the Western World. But this relationship was changed when the Shah of Iran was overthrown in 1979. Moreover, the United States has labeled Iran that it an active support of terrorism in the World, and the US government is trying to impose more strict sanctions. Iran has also established military development relationships with other nonwestern military powers throughout the world, in order to save herself. These countries include Russia, North Korea, and China<sup>116</sup>.

The reality is that the Muslim law of war was promulgated earlier than Western International law. According to some scholars, although new developed and interpretation may be required in light of existing rules, especially with regard to modern armed conflicts, but almost all Western rules and principles of International Law, are found within it. The general rules of Muslim law state that no harm should be done to a person who is not involved in war by any means. But after analyzing this prohibition, it will be revealed that the concept of combatants and non combatants, is not synonym as it is used in International law. On the other hand, Islamic law guarantees all pther people who do not participate in hostilities, that no harm should be done against them, or no

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<sup>115</sup> "Examining the cyber capabilities of Islamic Terrorist Groups, (2003, Technical Analysis Group Institute for Security Technology Studies at Dartmouth College)", [http://www.paysontechnology.com/terrorist\\_cyber\\_capabilities/terrorist\\_cyber\\_capabilities.html](http://www.paysontechnology.com/terrorist_cyber_capabilities/terrorist_cyber_capabilities.html), last accessed on 27-08-2010.

<sup>116</sup> Jason P. Patterson Lieutenant, United States Navy, Matthew N. Smith Lieutenant, United States Navy, "Developing a Reliable Methodology for Assessing the Computer Network Operations, Threat of Iran", "<http://www.fas.org/irp/eprint/cno-iran.pdf>", last accessed on 27-08-2010.

attack will be permissible on them, which includes all people about whom the opinion of Muslim jurists is that they are immune from attack. Muslim jurists started their debates on the issue of non combatants after the second year of Hijra, and Muslim jurists prohibited any harm done against non combatants on the basis of their personal judgment, on the sayings of the Prophet (PBUH), and the first two caliphs, *Abu Bakr*, and *Umar* (R.A). The sayings of the Holy Prophet (PBUH), that no person should be killed in any way if there is no just reason to kill him, and these sayings are considered an authority on the prohibition of killing innocent people. But this is the general rule, and the prohibition of killing all these people will be governed under this rule as long as they are not participating in war. In the use of legal language, we can say that, at the end of second year of Hijra, a concept flourished that although every non combatant was protected and immune from attack, but this immunity was not as such complete, rather he was protected under the dictates of Almighty Allah. As a result of this if any one from within the Muslims harms the non combatants of the enemy, he owes no compensation or punishment for such an act, but his act will be a sin punishable in hereafter<sup>117</sup>.

### 3.3: The use of weapons of mass destruction under Islamic Law:-

Some work has been done on the use of weapons of mass destruction in Islamic law. According to Professor Sohail Hashmi;

“There has been no systematic work by Muslim scholars on the ethical issues surrounding the use of nuclear, chemical and biological weapons, despite the fact that several Muslim states possess at least some of these weapons. But There is a general agreement that nuclear weapons should only be used as a deterrent and a second strike

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<sup>117</sup>Ella Landau-Tasseron, “*Non-Combatants*” in “*Muslim Legal Thought, Centre of Islam, Democracy, and the Future of La Landau-Tasseron*”, (2006, Hudson Institute), [http://www.currenttrends.org/docLib/20061226\\_NoncombatantsFinal.pdf](http://www.currenttrends.org/docLib/20061226_NoncombatantsFinal.pdf), last accessed on 27-08-2010.

weapon. But some of the contemporary Muslim scholars have argued that since the enemies of Islam possess such weapons, Muslim countries are justified in acquiring them also<sup>118</sup>.

For the abovementioned argument, Muslims and their states may acquire the technology for the destruction of the computer network, and such other installations of their enemies, and may launch such attacks, at least as a measure of reprisal or deterrence.

### 3.4: Private Military Security Companies and Private Contractors:

No provision of International Humanitarian law has specifically defined the term, "Private Military Company", and the synonym term, i.e mercenary has been defined in "Article 47 of the 1977 Protocol 1 Additional to the Geneva Conventions of 1949". There is no adverse legislation to the mercenaries, rather the existing of the mercenary activities have been recognized in this protocol, and attempts have been made to define and codify the definition and status of mercenaries, in the context of international humanitarian law. UN Convention has also focused on the mercenary actions carried on in different parts of the World, in violation of International Humanitarian Law<sup>119</sup>.

Increase number of Private Military Security personnel have been noted in the forces of different countries and especially the developed countries. For instance, USA has employed private military security personnel who are between 15,000 to 20,000, in number, and this number is 15 percent of the total US number, which is 130,000 soldiers. But the key point is that these private contractors have no accountability to the US military and they are free to carry out their operations. On the other side international

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<sup>118</sup> "Islamic laws on War and Peace",

"<http://www.federationpress.com.au/pdf/IslamicLawonWarPeace.pdf>", last accessed on 25-07-2010.

<sup>119</sup> Ibid.

organizations also have started employment of private military contractors, for instance, the use of these private military soldiers by NATO forces was witnessed in Balkans. Moreover almost all the intergovernmental organizations and NGO's including UN have employed such private military soldiers to provide them security and support. But in this case the ratio of private military soldiers as compared with the regular armed forces is less which amounts to almost 10 percent of the total forces<sup>120</sup>.

The demand for private military services is increasing day by day; and one of the main reasons is that the expenditure occurring on the employment of these private military companies is much lower than that of regular armed forces, and most important cases are those in which a government along with or without its regular armed forces employs a private military company to help it in a conflict, as USA have practiced it in Iraq, and the governments of Sierra Leone and Angola have done. But as the PMC's employed by USA have been exempted from accountability so there are some important issues of human rights, sovereignty and accountability which need to be examined in details<sup>121</sup>.

#### 3.4.1: Rules of Mercenaries Contained in "Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977":-

Definition and some of the rules have been laid down in the "Additional Protocols of the 1949, Geneva Conventions", for instance "Article 47, of the first Additional Protocol", lays down that:

1. "A mercenary shall not have the right to be a combatant or a prisoner of war.
2. A mercenary is any person who:

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<sup>120</sup> Ibid.

<sup>121</sup> *Mercenary / Private Military Companies (PMCs)*



- (a) Is specifically recruited locally or abroad in order to fight in an armed conflict;
- (b) Does, in fact, take a direct part in the hostilities;
- (c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- (d) Is neither a national of a Party to the conflict nor a resident of territory controlled by a party to the conflict;
- (e) Is not a member of the armed forces of a party to the conflict; and
- (f) Has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces”<sup>122</sup>.

Some other documents have also been concluded between the contracting parties regarding the conduct of mercenaries in an armed conflict.

### 3.4.2: International Convention against the Recruitment, Use, Financing And Training of Mercenaries, 4 December 1989:-

Article 1 of this convention defines the term mercenary containing only small difference from that of Additional Protocol I, in the following words:-

For the purposes of the present Convention,

1. “A mercenary is any person who:
  - (a) Is specifically recruited locally or abroad in order to fight in an armed conflict;
  - (b) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;
  - (c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
  - (d) Is not a member of the armed forces of a party to the conflict; and
  - (e) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

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<sup>122</sup> Additional Protocol I of 1977, to the Geneva Conventions of 1949.

2. A mercenary is also any person who, in any other situation:

(a) Is specifically recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:

(i) Undermining the territorial integrity of a State;

(ii) Overthrowing a Government or otherwise undermining the constitutional order of a State; or

(b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;

(c) Is neither a national or a resident of the State against which such an act is directed;

(d) Has not been sent by a State on official duty; and

(e) Is not a member of the armed forces of the State on whose territory the act is undertaken”<sup>123</sup>.

But despite of all these precise rules, the legal environment of IHL, in (PMCs) are currently operating is called a "legal vacuum". And the reason for this is that no legislation in the laws of war is available on direct participation by non state actors, and PMCs. Because as no clear rights and duties of private contractors have been provided, so they consider themselves outside the ambit of civilians and combatants, and undertake no responsibility for their acts committed during hostile actions. It has been argued by some people that the main feature which distinguishes private contractors from combatants and civilians is that they are not involved in combat operations. This, the argument describes the difference between a soldier and a contractor and lays down that the former be regarded by IHL as a combatant while the latter be considered, as civilians or a civilian taking part in hostilities, depending on the circumstances of an armed conflict. So as a

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<sup>123</sup> Majors S. Goddard, Maj. Ra Inf, “*The Private Military Company: A Legitimate International Entity within Modern Conflict, A thesis presented to the Faculty of the U.S. Army Command and General Staff College in partial fulfillment of the requirements for the degree of, Master of Military Art and Science (General Studies)*. (Kansas : Fort Leavenworth, 2001)”,

“<http://www.globalsecurity.org/military/library/report/2001/pmc-legitimate-entity.pdf>”, last accessed on 05-09-2010.

result of their joint deployment in the field sometimes the distinction between a soldier and a contractor becomes impossible especially for the enemy. Because of the fact that the activities carried out by these contractors are similar as that of regular forces, and they like them wear uniforms, bear weapons, and carry out their functions in the same manner as guided by the armed forces. For instance, it has been noticed in the recent conflicts that PMCs and regular armed forces conduct their operations in the same sphere, and a growing number of attacks have also been noticed on private military contractors because they are categorized like regular forces of a party to an armed conflict by the adversary. As according to the British private military company “Armor Group”, in 2006, in its operations being carried out in Iraq, out of its 1,184 convoys, 450 were subjected to hostile actions, mostly roadside bombs, small-arms fire, and mortar attacks. On the other hand, there are various instances when unlimited force was used by private military contractors also occur frequently, as in one example “17 Iraqi civilians were killed by Blackwater employees in late 2007. The Blackwater guards were protecting a US State Department delegation going to a meeting with USAID humanitarian aid officials in Baghdad. After some weeks of this incident, two Armenian Christian women in Baghdad were mistakenly killed by the private military employees of the Australian-run, Singapore-registered and Dubai-headquartered Unity Resources Group security firm”. All these incidents show that there is lack of application of IHL, on private military security companies<sup>124</sup>.

In the report presented to the English Parliament, it has been remarked by the secretary of State that:

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<sup>124</sup> “*Private Military Contractors and Combatancy Status Under International Humanitarian Law*”, [http://law.huji.ac.il/upload/Richmond\\_Barak\\_Private\\_Military\\_Contractors\\_and\\_Combatancy\\_Status.doc](http://law.huji.ac.il/upload/Richmond_Barak_Private_Military_Contractors_and_Combatancy_Status.doc), last accessed on 15-06-2010

“We conclude that the lack of centrally held information on contracts between Government Departments and private military companies is unacceptable. We recommend that the Government take immediate steps to collect such information and to update it regularly. We further recommend that in its response to this Report the Government publish a comprehensive list of current contracts between Government Departments and private military companies and private security companies, and provides the information requested by the Committee in the Chairman’s letter of 18 June to Denis MacShane, which is reproduced in full at page Ev.44 (paragraph 17)”<sup>125</sup>.

After the presentation of this report recommendations have been given to make British private military security companies, valuable and legitimate organizations for the security and defence of the country along with the regular armed forces.

### 3.4.3: The Legal Status of Private Military Contractors under the Laws of War:

Some legal experts argue that because the links existed between mercenaries and private military contractors, who are employed to wage war and earn money, the legal regime which is applicable to mercenaries should also be extended to private military companies and contractors. According to them, there is difference between a contractor and a mercenary, and these contractors are not considered mercenaries due to a number of reasons, and the fundamental is that, the definition of mercenary under Article 47 of Additional Protocol I to the Geneva Conventions is drafted so narrowly that it does not include PMCs in itself, and it would rarely fall under its scope. In the efforts undertaken by the “International Committee of the Red Cross (ICRC) and the TMC Asser Institute”, to clarify the notion of direct participation in hostilities, after analyzing the concept of

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<sup>125</sup> “*Ninth Report of the foreign affairs committee, Private Military Companies, Session 2001-2002, Response of the secretary of state for foreign and commonwealth affairs*”, “<http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmselect/cmfaaff/922/92203.htm>”, last accessed on 05-09-2010.

private military contractors under the prevailing laws of war, it will be revealed that, there is lack of clarification in the Geneva Conventions and their accompanying protocols, about the function and status of PMC employees, and a number of fundamental questions regarding their status have left unanswered. For instance it is unclear, during an armed conflict force can be used by private military contractors or not, and whether they become legitimate targets and can be criminally prosecuted for their alleged war crimes and hostile actions? All this needs to find the clarification of these answers beyond the provisions of the “Geneva Conventions and their Additional Protocols”, and suggests finding out their historical and legal purpose. After that it can become clear whether PMC contractors can be regarded as combatants or civilians, or the civilians taking direct part in hostilities, or in alternative as unlawful combatants or quasi-combatants? Every suggestion has its own advantages and disadvantages. But declaring the contractors as combatants and imposing obligation on them to abide by the laws of armed conflict can result in exchange for immunity from prosecution and prisoner of war status, would clarify the rights and obligations of the contractors in the battlefield<sup>126</sup>.

As far as the status of POW, under International Humanitarian Law is concerned, the key documents in this regard are the “1949 Third Geneva Convention on the treatment of prisoners of war”, and the “Additional Protocol I to the 1949 Geneva Conventions”. According to some of the International Law experts, employees of PMCs only qualify for protection under the third Geneva Convention and the relevant Additional Protocol, if they abide by the rules set forth therein and can be categorized as

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<sup>126</sup> Ibid.

such, under the relevant terms of these instruments. On the other hand some other experts have argued that “Additional Protocol I, to the Geneva Conventions” excludes contractors, from the category of combatants and confers POW status on only on the combatants. As combatants have been defined as: “all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates.” This definition excludes the private security contractors in Iraq who are protecting U.S. State Department personnel. Because if there is no command responsible for employed contractors then this fact will bar them from being declared lawful combatants, as Blackwater is not subject to the command of USA State Department. Moreover Private Military contractors do not wear uniforms which is a requisite for combatant status, they are rarely subject to command of military personnel and generally do not keep themselves within the military discipline that the regular armed forces are required to follow in obedience with the laws and customs of war. So we can say that the rules of “Geneva Conventions and their Additional Protocols”, are applicable only upon the national governments, authorities and organized insurgency forces lead by those Governments, which are clearly recognized and capable of acting in accordance with international humanitarian law. As a result of this those who participate in hostilities without the status of lawful combatant do not benefit from prisoner of war status and the protections given in consequences. And as the private military contractors are neither civilians, nor combatants, hence in most cases they are not considered lawful combatants<sup>127</sup>.

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<sup>127</sup> David Isenberg, *Are PMCs POWs?* “[http://www.cato.org/pub\\_display.php?pub\\_id=9580](http://www.cato.org/pub_display.php?pub_id=9580)”, last accessed on 25-06-2010.

Another view which looks quite significant is that the members of these private military security companies, or mercenaries are neither combatants, nor civilians, and not unlawful combatants, because there are just two categories, in which a person either be a combatant or non combatant. So the status of these mercenaries has been given as war criminals, who take part in hostilities without any legal status, hence can be presumed as war criminals, liable under the law of armed conflict.

The recent armed conflict, and particularly the US war against Afghanistan and Iraq has resulted in an increasing change of combat strategy and the change of policy by the Muslim population, not only in the Muslim world, but also in the West, because almost every Government of the Muslim countries has supported USA in one way or the other. As a result of all this resistant movements started guerilla warfare against the USA and her allied forces. With the increasing rise of new questions and challenges regarding this complex situation, new verdicts, opinions and *fatawas* of Muslim scholars were put forward regarding the behavior of less than 0.5% of the Muslim population in Europe. As according to Tariq Ramadan, who is an European Muslim, the number of these kind of people is greater in countries such as Pakistan and those of the Middle East, but they are still constituting a small minority of their own population. As in today's world there is no central authority in Islam for making of rules are religious verdicts, so difference of opinion may arise among the Muslim scholars. On reply to answers to the questions from respondents asked from "Sheikh Faisal Mawlawi, the Deputy Chairman of the European Council for Fatwa and Research", in relation to the war in Iraq, on 18 March 2003, The

Sheikh held the following, which has highlighted the root causes and problems in this so called war on terrorism:

- “Removing dictatorship is religiously required, but most scholars agree that military power should not be used for this purpose so as to avoid chaos and sedition among Muslims. (He went on to express doubts about the motives of the Americans and suggested several others US motives not in the interests of the Iraqi people).
- It is the responsibility of all Muslims to help their Iraqi brethren once Iraq is attacked by the US. This help may be rendered through prayer, condemnation of the attack, financial backing, and boycott of US products. They can also join peaceful demonstrations and should ask their governments to reject American troops on their soil and the use of their lands as a launching point of troops against Iraq.
- Muslim soldiers in the US, UK or Australian forces are prohibited from fighting against fellow Muslims in Iraq. They are also totally prohibited from fighting in any aggressive war against any country. They are not permitted to initiate fighting against others.
- Burning oil wells is forbidden because it would cause destruction in the land and this is only permissible if it is the only means through which victory can be achieved.
- Muslims are not allowed to initiate the use of chemical weapons which result in great damage to the environment and horrible loss of innocent souls. But if the American forces initiate the use of chemical weapons, it is permitted to retaliate using them.
- Muslim rulers should refuse to have foreign military bases on their soil. Attack on such existing bases by the governments of those countries should not be encouraged as this may will lead to internal struggle between the rulers and their people, and serve the interests of the invaders. But if attacking these bases will



not lead to internal strife, it is an individual obligation (*fard 'ayn*) on every Muslim who is able to do so.

- It is an individual obligation on every Muslim from other countries travel to Iraq to help defend it if they able to do so but people should not do so unless they have military training and are able to make an effective contribution. Muslims who are citizens of the US or other aggressor country, are nevertheless bound by their treaties with these countries, and are exempted from fighting with the Iraqi people.
- Even if Americans deliberately seek to harm Iraqi civilians and kill them or inflict great suffering on them, Muslims are not permitted to initiate killing civilians or to retaliate using a more destructive or aggressive tool. Acts of retaliation are not proper. The goal should be to guide Americans to the straight path and not to kill them.
- In general Muslims are not permitted to leave the country as refugees because it will result in the country being handed over to the invaders, but a Muslim may leave the country if he or she is not able to do anything to help his brothers and sisters or the country or to resist the enemy”<sup>128</sup>.

According to the Western scholars, Islamic Fundamentalism has replaced the communism which is a great threat to the Western Democracy, and scholars are trying to analyze the historical processes that constructed the cultural and theoretical opposition between the Western thoughts and the religion of Islam. There are obvious differences between the criminal and family law of both the legal systems, as well as International differs from each of the legal system. Western consider Islamic law as regressive and feudal and of Islamic political activists as religious fanatics<sup>129</sup>.

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<sup>128</sup> Jane F. Collier, *Islamic law and western imperialism*, “<http://www.stanford.edu/group/SHR/5-1/text/collier.html>”, last accessed on 25-08-2010.

<sup>129</sup> Ibid.

According to them, if we examine the movement of “Al-Ikhwan al-Muslimeen (the Muslim Brotherhood), founded in Egypt in 1928”, it becomes easy to understand modern Islamic radicalism. Al-Ikhwan was the first movement of its kind in the modern era, to politicize Islam during the period of colonialism, and it was the first movement which put into practice the theories of Salafist thinkers such as “Jamal-al-Din al-Afghani and Muhammad Abduh”. These two Muslim revivalists, who wrote and preached during the beginning of the 20th-century, presented their theories that Islam and modernity are compatible and that Muslims lack control over their destinies because they have fallen into fatalism. According to them, falling away from their true faith has made Muslim lands vulnerable to Western colonialism<sup>130</sup>.

### 3.5: War Against Terrorism and the Combatant Status:

After the attacks of September 11, upon the Bush administration’s response to these attacks a dialogue has been started between different legal experts regarding the status of enemy in this war against terrorism, which is still continue. A lot of criticism has been leveled against the policies of Bush administration, because of the huge violations of established norms and customs of International Humanitarian Law, and violations of worldly recognized Human Rights. Against which various justifications have been given by some legal scholars mostly sympathetic to the government. According to some of the legal experts, although the September 11, attacks amounted to an act of war, but thinking from the legal perspective, the term armed conflict is usually applied to the hostilities between the two or more states, or in the case of a non International armed conflict

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<sup>130</sup> “Youssef H. Aboul-Enein, *Al-Ikhwan Al-Muslimeen: the Muslim Brotherhood, 2003 issue of Military Review*”, “[http://findarticles.com/p/articles/mi\\_m0PBZ/is\\_4\\_83/?tag=content;coll](http://findarticles.com/p/articles/mi_m0PBZ/is_4_83/?tag=content;coll)”, last accessed on 28-08-2010.

between different groups of a state. Non state actors on the other hand can be categorized as war criminals and their act may be held accountable through law enforcement means and can subject to trial if they are captured. But despite of that according to some legal and military experts some of the fundamental principles of the law of armed conflict have proven themselves to be existent and applicable to this war against terrorism, as it has been quoted by Charless Allen during his interview.

According to Allen, the distinction between combatants and these non state actors is difficult, because it is the violation of IHL, on the part of these non state actors, as they do not distinguish themselves by uniforms or distinctive emblem, and they do not comply with the laws of war as envisaged in the “Geneva Conventions and their Additional Protocols”, because under the laws of war, it is the duty of the combatants to distinguish themselves from civilians or civilian population, during the conduct of hostilities by carrying their weapons openly etc. As far as the term enemy combatant is concerned, Allen remarked that, this term applied to "those who are a part of al-Qaeda and other global terrorist organizations and extend threats to the United States." When he was asked to be more specific and precise about these categories, he added, that the term includes a member, agent or associate of al-Qaeda or the Taliban. Moreover the determination of the fact that who is an enemy combatant varies in each individual case<sup>131</sup>. According to Jhon Esposito, quotes the statement of Usama Bin Ladin, regarding the on going war:

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<sup>131</sup> *“The law and campaign against terrorism, the view from Pentagon, interview with a senior administration official – Charles Allen, the Deputy General Counsel for International Affairs at the Department of Defense”*. “<http://www.crimesofwar.org/onnews/news-pentagon.html>”, last accessed on 21-07-2010.

“We, ourselves are the target of killing, destruction and atrocities. We are only defending ourselves. This is defensive Jihad. We want to defend our people and our land. That is why we say, if we don’t get security, the Americans too, would not get security. This is the simple formula that even an American child can understand. Live and let live”<sup>132</sup>.

Such like statements are often been quoted by different spokesmen of *AL Qaeda* and other Islamic military organizations, and the main reason behind all that seems the retaliation by the weak component of the conflict. As they are not able to oppose the aggression of the powerful, so the strategy on their part involves retaliation.

### 3.5.1: Who is a Combatant in the war on terror?

According to “Col. Daniel Reisner”, there are no books and precise rules in international law which describe how to fight terrorism. Generally during the war, people are divided into two different categories, and they are either civilians or combatants. The determination of the status of a combatant has become more complex under international law, and there is only one agreement that a person taking a direct part in hostilities will be considered a combatant, regardless of the fact that where he lives or whether or not he wears a uniform. But there are more complex issues as well, for instance in which category a suicide bomber falls? Should he be declared a criminal and in circumstances can the police capture or shoot him? As for instance a Palestinian shows his jacket containing explosive, so in this case whether Israeli Police is justified to kill him? Because he hasn't yet done anything. In this case If he is an ordinary criminal, he cannot

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<sup>132</sup> “Jhon L. Esposito, Unholy War: Terror in the name of Islam”.

be shot because he hasn't blown himself up yet. On this issue no effective response has been given for encountering the legal problem of a suicide bomber. According to Israel this problem has been faced by Israeli police and some of them has already lost their lives<sup>133</sup>.

### 3.5.2: Legal Status of the Detainees of the War on Terror:-

Another important issue is that whether the detainees of war against terrorism should have any legal right to challenge their detention? This matter has been brought before a number of different courts. “As on December 4, Judge Michael B. Mukasey of the United States District Court for the Southern District of New York ruled that Jose Padilla, a U.S. citizen detained as an enemy combatant within the United States, has the right to consult with the lawyer and is given the right to ask the court to consider whether his detention was lawful or not”? Moreover another “case seeking the right of *habeas corpus* for a group of detainees at Guantanamo Bay is before the Court of Appeals for the District of Columbia Circuit”. When these facts were brought before Allen, he remarked that:

“In such cases U.S. Law limits access to the courts by enemy combatants detained outside of the United States during hostilities to challenge their detention. He added that this did not mean they were without rights rather that the scope of their rights is to be determined by the Executive and the military, and not by the courts. (Which shows that in the cases concerned with this so called war on terrorism the ordinary laws will not be

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<sup>133</sup> Alan Baker, Col. Daniel Reisner, *Jerusalem Issue Brief*. “The evolution of International Law and the war on terrorism”, (Vol. 2. No. 14, 24 December 2002), “<http://www.jcpa.org/brief/brief2-14.htm>”, last accessed on 07-09-2010.

applied rather wishes and whims of the military and the executive of the United States will be the rule of the State”<sup>134</sup>.

### 3.5.3: The Status of Guantánamo Bay Detainees:-

The definition of enemy combatant was changed after the attacks on September 11, 2001. Soon after these attacks, President Bush invoked a number of rights under a newly promulgated War Powers Act. The important one within those rights was the definition and status of a captured member of either Al Qaeda or the Taliban, and declaring him as an enemy combatant. Because it was argued that since members of those organizations do not wear uniforms and do not belong to a recognized state's military, hence they cannot be considered lawful combatants. Therefore, any person captured during this war on terror would not be given enemy combatant status by the military of the United States and would not be eligible for the protection awarded to the prisoners of war as envisaged under the Third Geneva Convention<sup>135</sup>.

As a result of this various Al Qaeda senior leaders and suspects for planning the 9/11 attacks were held in secret prisons throughout the world and interrogated through legally questionable means and with inhuman and degrading manner. Upon this the USA President Bush remarked that the enemy combatant status of these people allowed the military to do whatever they want, but the USA Supreme Court later on ruled against this sacred verdict pronounced by the so called religious and state leader of the USA, and held that the captured Al Qaeda members should have been given prisoner of war protection

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<sup>134</sup> “*The law and campaign against terrorism, the view from Pentagon*”.

<sup>135</sup> *What is an Enemy Combatant?* <http://www.wisegeek.com/what-is-an-enemy-combatant.htm>, accessed on 21-07-2010.

under the “Third Geneva Convention”. As a result of this verdict, and to save herself from its own apex court’s jurisdiction the USA military immediately transferred these prisoners to Guantanamo, in Cuba, the site of an existing prison camp for detained enemy combatants which does not fall within the jurisdiction of the USA Supreme Court<sup>136</sup>.

The process of detention of detainees of Guantánamo Bay was started soon after the USA attack on Afghanistan. The first detention was reported in January 2002, in which up to 600 detainees were held in custody. After their detention the Guantánamo Bay detainees were not allowed to have access to the U.S. judicial system because of their status of being enemy combatants, or an unlawful combatant. According to the authorities the Courts of the United States has jurisdiction but it’s not absolute as far as the detainees of Guantánamo Bay are concerned. And If not over the USA citizens then at least over non-U.S. citizens. In fact, the location was chosen for the detention of this so called war terror just of the unique legal status that USA Supreme Court should be precluded from its exercise of jurisdiction over these detainees<sup>137</sup>.

As a result of this the petitions of Habeas corpus were brought on by Guantánamo detainees, but they were initially rejected by the courts in California and the District of Columbia. Although the opinion of the courts was that these detainees possessed some form of rights under international law. So the matter was brought before the Supreme Court to decide whether federal courts have jurisdiction to review these habeas petitions brought by Guantánamo detainees, or whether the citizenship of the detainees or of their

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<sup>136</sup> Ibid.

<sup>137</sup> “Christiane Wilke, *War v. Justice: Terrorism Cases, Enemy Combatants, and Political Justice in U.S. Courts*”, <http://www.sagepub.com/Martin2Study/pdfs/Chapter%2014/Wilke%20article.pdf>, last accessed on 25-06-2010.

place of detention precludes jurisdiction over them. On this point the majority held the precedent of, *Johnson v. Eisentrager* (1950), does not apply in this case, because, the detainees are not clearly enemy combatants or because they are not nationals of countries with which the United States is at war. Secondly there is dispute regarding their activities, whether they have been engaged in unlawful activities against the USA or not? Finally, they have not been given any opportunity to determine their claims. Moreover the court while holding this also remarked that if the case is left without any clear verdict then there will be an unconstitutional gap regarding the jurisdiction over habeas petitions of the detainees. Although no statutory provision is available that the courts have jurisdiction to hear these petitions, but despite of that the detainees have a constitutional right to have their petitions heard. The Court filled this gap by resorting to constitutional fundamentals, and argued that a legal vacuum which is depriving persons in USA custody to have access to the courts for their legal and constitutional rights, cannot be tolerated, and in circumstances cannot bar the federal courts to hear the petitions of habeas brought by the Guantánamo detainees<sup>138</sup>.

#### 3.5.4: What Kind of International Law Applies to Such a Conflict?

Another controversial issue is that what kind of International Law applies to the prisoners detained in Guantanamo. On this issue the response of White House in the

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<sup>138</sup> Ibid.



beginning was that al-Qaeda detainees do not qualify for the protection of the Geneva Conventions, since they do not belong to a state party to an armed conflict, on the other hand Taliban detainees were admitted to come under the applicability of Geneva Conventions, but they were not admitted to acquire the prisoners of war status. On this issue Allen made it clear that although the status of prisoners of war has been denied but the administration regards all detainees as protected by customary international law, which is a collection of norms that are generally followed by law-abiding states, and have acquired the legal status even when they are not made binding through a specific treaty<sup>139</sup>.

### 3.5.5: Who can be Declared a Legitimate Targeted in the War on Terror?

A lot of criticism has been leveled against the USA policy of targeting the suspects in her war against terrorism. As in an incident “missile strike was launched in Yemen against a car carrying Qaed Sinan al-Harithi, who was alleged to be a senior al-Qaeda operative and his five associates, which according to the administration sources was carried out by the CIA”. The attack broke out the discussion between the legal experts that whether it is lawful to kill alleged terrorists, on this issue some experts suggested that U.S. forces were did wrong to use lethal force, because it was only allowed under the circumstances where it was clearly impossible to detain an individual peaceably. On this Charles Allen replied that the U.S. military followed the traditional rules of war while doing so, because, whenever forces intend to target a specific object, it

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<sup>139</sup> Ibid.

is not a binding rule that warning should be issued before targeting that object, and say, "You may surrender rather than be targeted"<sup>140</sup>.

### 3.6: Suicide bombing and the Combatant Status under Islamic law:-

Suicide Bombing is the major controversial issue of the present world. As a general rule, suicide is prohibited in Islam, as it is mentioned in *hadith*:-

"He who kills himself with anything, Allah will torment him with that in the fire of Hell".  
(*Al Hadith*).

But the people who defend suicide bombing and argue in its favor do so under the principles of martyrdom and necessity. Because a person killed defending his country in the battlefield is a martyr and, in religious terms, the sacrifice of his life in fighting the enemy is for the benefit of his people, hence it is allowed. A martyr is given special burial rites, and according to the teachings of *Quran* and *Sunnah*; it is believed that they can be assured of entry into Paradise in recompense for his sacrifice. According to the principles of Islamic law, some acts which are normally prohibited may be permitted under the principle of necessity, and the people who are suffering oppression that when a defender is faced with overwhelming and unequal force on the part of an invader, and there is no other reasonable means of repelling the unlimited aggression of invader, methods of warfare such as suicide bombing are allowable. This argument has been raised by the oppressed people suffering aggression of Israeli-Palestinian war and the US invasion of Iraq. In both of these cases, the armed forces of occupiers have had an overwhelming military advantage, huge quantities of modern armaments and the ability to deploy them from the air, and in the US case, the additional advantage of naval vessels

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<sup>140</sup> Ibid.

standing offshore, and the support of majority states, including the Muslim states is also available. So in this critical situation the defenders, on the other hand, have had few arms, no aircraft, and virtually no conventional means of defense. Therefore, it is argued by the people who are trying to resist this aggression, which the only way in which they can effectively strike against the occupying army is by guerrilla warfare, including suicide bombing. But it is not allowed as a general rule of combat, because the majority of Muslim thinkers which regards suicide bombing as a legitimate means of combat against military targets reject its use against enemy civilians. They argue that it is legitimate to kill Israeli or US soldiers by suicide bombing but not to target Israeli civilians. On the other hand members of the resistant movement and a minority argue that as the Israeli Defence Force routinely kills Palestinian civilians, Palestinians have a right to retaliate with the same kind of action<sup>141</sup>.

According to my worthy teacher, Prof. Mushtaq Ahmed, in suicide bombing, as the person committing such act will directly be the reason of his suicide, so it is not allowed, and is not the similar, as an act committed at the times of the Prophet (P.B.U.H), and the companions, when some of them were put inside the forts of the enemy, and certain others entered into the lines of the enemy, knowing that they can be killed in consequences. Because in that very situation the reason behind their killing is the enemy who take their lives, and not they themselves<sup>142</sup>.

But it can be argued that the prevailing situation of that time differed from the present phenomena of the present time, and at that time, only those methods were available for the commission of such an act, and in the modern day armed conflict,

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<sup>141</sup> *Islamic Laws on War and Peace*, <http://www.federationpress.com.au/pdf/IslamicLawsonWarPeace.pdf>, last accessed on 25-07-2010.

<sup>142</sup> Muhammad Mushtaq Ahmad, *Jihad Muzahamat Aur Baghawat*, (Gujranwala: Al Shariah Academy).

suicide bombing has become the strongest weapon of the weak, when a poor and persecuted person has no other option to defend his life and particularly his or her honor, then he or she will easily opt to die in a respectable manner. Same views time and again have been expressed by young Palestinian girls, who are demanding ammunition to destroy themselves.

Moreover, the majority of Muslim opinion which regards suicide bombing as a legitimate means against military targets, rejects its use against enemy civilians. They argue that it is legitimate to kill Israeli or US soldiers by suicide bombing but not to target Israeli civilians<sup>143</sup>.

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<sup>143</sup> *Islamic Laws on War and Peace*, <http://www.federationpress.com.au/pdf/IslamicLawsonWarPeace.pdf>, last accessed on 25-07-2010.

## **Chapter No. 4: “Consequences of Direct Participation in Hostilities”**

### **4.1; Loss of Immunity from Attack;**

#### **4.1.1: Loss of Protection in Non-International Armed Conflict:-**

The legal experts are agreed on the fact that grant of immunity for not directly participating in hostilities is not the consequence of their good behavior, and on the other hand direct participation in hostilities does not itself constitute bad behavior or criminal attitude of the parties so participating in hostiles. But whenever a person involves himself in directly participation in hostilities, as a result the immunity of such a person so participating will be waived and he can be attacked as long as he is so participating, and becomes a lawful target of the adversary, but in case of reasonable doubt as to whether an individual was a lawful target, as a result of his or her direct participation in hostilities, it should be assumed that he or she was entitled to civilian protection against direct attack. However there is disagreement of opinion, as to whether members both of the armed forces and of organized armed groups could be directly attacked at any time and place, without taking into account considerations of military necessity<sup>144</sup>.

According to the experts, private contractors or civilian employees working on a military base assumed an increased risk for working in or near a legitimate military objective. Therefore, such personnel was not protected against the effects of hostilities, as it was suggested by Heading III of the Interpretive Guidance, but merely against direct attacks, unless and for such time as they directly participated in hostilities. However some other experts agreed with this fact but they also suggested that the Interpretive

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<sup>144</sup> “*Third Expert Meeting on the Notion of Direct Participation in Hostilities* (Geneva, 23 – 25 October 2005)”.

Guidance could be limited to the clarification that private contractors and civilian employees of a party to an armed conflict, although generally not directly participating in hostilities, but are liable to run over the risks due to their function and their assistance to the regular armed forces<sup>145</sup>.

#### 4.1.2: The requirement of feasible precautions:-

However while launching an attack against a person allegedly participating in hostilities, all feasible and possible measures must be taken in determining whether a person is a civilian or a combatant and, if he is a civilian, whether he is directly participating in hostilities. But in case of doubt in the determination of this fact, the person must be presumed to be a civilian and must be protected against direct attack because the general rule of civilian protection applies and that this conduct does not amount to direct participation in hostilities. Also prior to any attack, all feasible precautions must be taken to verify that targeted persons are legitimate military targets, and if those are not legitimate targets of war, then whenever such an attack is commenced, the responsible command must cancel or suspend the attack if it is apparent that the target is not a legitimate military target. As soon as it becomes apparent that the targeted person is entitled to civilian protection, not being a legitimate target that person should be protected and this determination must be made in good faith, and upon the reasonable information provided. In this matter as stated in IHL, “feasible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations”. If a combatant becomes *hors de combat* then he or she assumes his or her protection and

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<sup>145</sup> “Fourth Expert Meeting on the Notion of Direct Participation in Hostilities (Geneva, 27 / 28 November 2006)”.

any continued attack being launched against him or her should be cancelled or suspended.<sup>146</sup>

#### 4.1.3: The principles of military necessity and humanity:-

The principle of military necessity and humanity is one of the fundamental principles of IHL, and according to that “in the absence of express regulation, the kind and degree of force permissible in attacks against legitimate military targets should be determined, which underlie and inform the entire normative framework of IHL. Today, the principle of military necessity in IHL, is generally recognized to permit only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and resources”<sup>147</sup>.

#### 4.1.4: Aspects and Circumstances which may lead to the loss of protection Against Direct attack:-

a) Temporal scope of the loss of protection: The protection of all the people who actively involve themselves in hostilities will be waived, but only for such time period as long as they are directly participating in hostilities, and on the other hand civilians lose their protection against direct attack for the duration of each specific act on their part which amounts to direct participation in hostilities. As stated earlier “Direct Participation

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<sup>146</sup> Nils Milzer, “*Interpretative Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*”, 74-77.

<sup>147</sup> Ibid.

in Hostilities”, this includes preparations and geographical deployments of their armed personnel or their withdrawals, which constitute an integral part of a specific hostile act.

b) Precautions and presumptions in situations of doubt: According to the recognized and accepted principles of IHL, in order to avoid the erroneous or arbitrary targeting of innocent civilians, “parties to a conflict are duty bound to take all feasible precautions in determining whether a person is a civilian and, if so, whether he or she is directly participating in hostilities, and in case of doubt, the person in question must be presumed to be an innocent civilian protected against direct attack”<sup>148</sup>.

c) Restraints on the use of force against legitimate military targets: Although the persons directly participating in hostilities lose their protection against the direct attack of the adversary, but loss of their protection as such does not mean that they stand outside the ambit of law, merely because they have lost their protection against the direct attack. Even attacks against legitimate military targets are subject to legal proceedings, whether based on IHL, or on other branches of international law, such as customary international law, human rights law, and any military operation must comply with the rules of IHL, which lay down the legal framework of means and methods of warfare. Moreover, “the principles of military necessity and humanity require that no more death, injury, or destruction be inflicted than is necessary to achieve a legitimate military purpose in the prevailing circumstances of a battlefield. While on the other hand combatants cannot be required to subject themselves or the civilian population to additional risk in order to capture an armed adversary alive, it would defy basic notions

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<sup>148</sup> “*Overview of the ICRC's Expert Process (2003-2008)*, [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-article-020709/\\$File/overview-of-the-icrcs-expert-process-icrc.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-article-020709/$File/overview-of-the-icrcs-expert-process-icrc.pdf)”, last accessed on 15-07-2010.



of humanity to kill an adversary or to refrain from giving him or her the chance to surrender where there is no need for lethal force to be used”<sup>149</sup>.

d) Consequences of regaining civilian protection against direct attack: When the civilian population no longer takes part in hostilities and when other organized armed groups become peaceful, then they all assume their full protection against any direct attack. IHL neither prohibits nor privileges civilian direct participation in hostilities, and lays down the principle that they are liable to lose their protection as long as they are directly participating in hostilities, and assume their civilian status along with the protection as soon as they leave direct participation in hostilities. Therefore, such participation either by the civilians or organized armed groups does not in itself constitute a war crime. Moreover as long as the civilians are directly participating in hostilities, they are liable to be attack and necessary action including force can be used against them, as the same principle is applicable against the regular armed forces during their combat function<sup>150</sup>.

Another critical situation arises in IHL, when people are used as human shields, even for the protection of legitimate military targets. So if their conduct is held to constitute direct participation in hostilities, voluntary human shields lose their immunity from direct attack, which calls for the attacking commanders to apply the principle of distinction. Harming such civilians, who are acting as voluntary human shields for either of the parties to an armed conflict, even if the result is death, is permitted, on the condition that there is no other less harmful means, and on the condition that innocent

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<sup>149</sup> *Ibid.*

<sup>150</sup> *Ibid.*

civilians nearby who are not acting as voluntary human shields are not harmed. But this harm must be proportionate<sup>151</sup>.

#### 4.2: Loss of Immunity from Attack in Islamic Law:-

The general principle of Islamic Law is that the combatant (who fights), will be killed and not the non combatant (who does not fight), and *Imam Abu Yusuf* states that I asked *Imam Abu Hanifa* about the killing of religious leaders, and he recommended their killing, because they may encourage their forces upon the killing of Muslims. Its commentary has been given by *Imam Al Sarakhsi* that if they restrict themselves at home or Cuhrch etc, then they will be not be killed, because peace has been offered by them. Moreover the blind, and disable from hand, and specially right hand will not be killed, because peace is made by them, but all this will be observed if they do not fight with their property or opinion. Its example is of an old man, if he is able to give his war opinion, then he will be killed, as it has been narrated that, *Darid Bin Al Sama*, an old man was killed, because he was able to give a war opinion. A lunatic during intervals, when he is sense able will be killed. Moreover a tourist or beggar, who provides information to the enemy about the secrets of Muslims, will be killed<sup>152</sup>.

Moreover if a patient is found in a fort then he may be killed, because the disease for certain time keeps him away from participation in hostilities, but is not the guarantee to declare him a non combatant, and if a mad is captured then appeared that he is

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<sup>151</sup> "Lyal, Rewi --- "Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligations of States" [2008] *MelbJIntLaw* 11; (2008) 9(2) *Melbourne Journal of International Law* 313, <http://www.austlii.org/au/journals/MelbJIL/recent.html>", last accessed on 07-09-2010.

<sup>152</sup> Muhammad Bin Hasan Al Shaybani, *Kitab Al Siyar Al Kabir*, (Volume IV), 1429-1434.

conscious then there is no harm in his killing, and if a lunatic is found and a sword is found in his hand, then he may not be killed but will be captured to forbid him from fighting. A child who is not an adult will not be killed, and if he is captured and during his detention he becomes a major then he will not be killed because he was captured when he was not within those who can be killed<sup>153</sup>.

The general rules of ancient Muslim jurists were that, if Muslims enter into their city by force, then it will be lawful for them to kill all their men. Because it is the battlefield and whoever from men is found, then it is obvious that he is a combatant<sup>154</sup>.

Moreover the principles of Islamic Law strictly prohibit the killing of any human being without any justification conferred by Islamic Law. "But the prohibition against killing has the validity of law in regard to Muslims and their allies, but it is merely a general and non-binding rule in regard to others. All this means that the category of those who have full immunity (*Isma*), meaning that they must not be harmed, includes only Muslims and their allies, who are infidels but have a specific legal treaty with Muslims. Such a treaty may be either permanent such as the (*dhimma* contract) or temporary (such as *Aman*), which is given to the infidel merchants in Muslim territory. The sanctity of the lives of Muslims and of those who have a treaty with them is defined is absolute, and harm may be inflicted on them only in self-defense or as punishment for a crime committed by them. Therefore whoever harms any of them has to pay, by enduring punishment or by paying compensation as set down in the law. However some difference may arise, as regarding the war against infidels on the one hand, and war against Muslim

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<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

rebels (*ahl al-baghy*) on the other. Whereas the lives of the former are forfeited, the latter have immunity, and their lives are protected because they are Muslim”<sup>155</sup>.

#### 4.2.1: Four Categories of Enemies in Islamic Law:-

In the books of Islamic law, the rules are not presented in a sequence, rather in some cases they may be complex in nature, and may need interpretation. Moreover the distinctions underlying these rules are not mentioned, and sometimes are left on the opinion (*Ijtihad*), of the jurist. One of the distinctions made in this regard is, “between the two categories of enemies, combatants as opposed to non-combatants, another one is the distinction between the situations in which these people find themselves, namely combat as opposed to captivity. After examining these distinctions, we are able to define four categories of enemies, and to each of them different category of rules is applied. These four categories are:

1. Combatants during combat.
2. Combatants who have been taken prisoner.
3. Non-combatants during combat.
4. Non-combatants who have been taken prisoner, with only one reservation, that there is a disagreement whether it is permissible to take them prisoner or not”<sup>156</sup>?

Another characteristic of Islamic Law is that, there may be disagreement among the Muslim Jurists, leading to more than one legal opinions upon a particular issue, and these disagreements among the jurists increase as we move from one category to another. The category, that is of combatants during warfare, is the most straightforward, and

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<sup>155</sup> Ella Landau-Tasseron, “*Non-Combatants*” in *Muslim Legal Thought*, Hudson Institute, 2006.  
[http://www.currenttrends.org/docLib/20061226\\_NoncombatantsFinal.pdf](http://www.currenttrends.org/docLib/20061226_NoncombatantsFinal.pdf), last accessed on 15-07-2010.

<sup>156</sup> Ibid.

Islamic Law lays down that, “the enemy must be fought by all possible means and with no limitations whatsoever, the aim being either to kill them or to take them prisoner. There are no disagreements among the Muslim jurists on this matter. But in the case of the second category, that of enemy combatants who have been taken prisoner, we find disagreements regarding the fate of the prisoners”. As it is mentioned in the Holy Quran which reads that: “When you meet the unbelievers, smite their necks; then, when you have made wide slaughter among them, tie fast the bonds; then set them free, either by grace or ransom, till the war lays down its loads.” (Quran 47:4). This verse clearly offers two options to the believers fighting their non believer enemies:

1: “Prisoners may be released either for a ransom or without any kind of remuneration. Although the verse is clear, it seems that it was customary to execute prisoners of war, which is opposed by some Muslim jurists, rather some jurists of the time has totally denied the fact that any rule existed in Islamic law, for the execution of the enemy combatants. This is proved by the fact that certain early jurists denounced this practice. There is a report according to which *Abdullah b. Umar*, was ordered by the governor *al-Hajjaj* to kill a prisoner and he refused to do so, citing this verse”. “On the other hand some Muslim jurists, including *Abū ÍanĐfa*, added to the two options given in the verse also that of executing the prisoners, basing their argument on the general Quranic directive, which states that: “Slay the idolaters wherever you find them” (Quran 9:5)”<sup>157</sup>.

Another justification for this option was found in the verse stating that “it is not for any Prophet to have prisoners” (Quran 8:67), although the verse continues, “until he make wide slaughter in the land” meaning thereby that: after which it is permissible for them to hold prisoners. There was also another option available for the jurists and that

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<sup>157</sup> Ibid.

was of enslaving prisoners of war, although this is not mentioned in the Quran, while others omitted the other option of releasing prisoners without remuneration, even though this is mentioned in the Quran. Thus the discussions of the Muslim move among these four options, release, ransom, execution, and enslavement. It is agreed among the jurists that the Imam must choose one of these options. Some other jurists consider all four options to be valid, while others allow only some of them. But a number of points of contention can be found concerning the third and fourth categories, namely, “non-combatants in combat and non-combatants who have been taken prisoner. These disagreements fall under three main headings:

1. Lists of the categories of “non-combatants”.
2. Prohibitions concerning “non-combatants” during and after combat.
3. Actions that constitute taking part in combat”<sup>158</sup>.

Dr, *Wahba Al Zuhaili* a renowned Muslim jurist of present time describes that, Whoever participates in war from among the combatants, by fighting, opinion, or planning, will be killed, but the killing of non combatants is not allowed, for instance women, children, insane, old men, lunatic, blind, saint in his sanity, or the people who are not capable of fighting, and also the farmers in their farming, except when they fight by speech, act, opinion, or finance, and the argument in this respect is that, *Rabiya Bin Rafi Al Salami* found *Darid Bin Al Sama* the day of *Hunayan*, and he killed him in spite of the fact that he was an old man over one hundred, and he was unable to assist the polytheists except with his opinion, this news was forwarded to the Prophet (P.B.U.H), and he did not prohibited. In the same way the killing of a woman will be allowed if she is the leader of the enemy, because their power will be broken after killing her, and also if their leader

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<sup>158</sup> Ibid.

is a child and they bring him in the battlefield, then there will be no objection in killing him if their power is broken after his killing<sup>159</sup>.

Another issue which is important to be discussed is that, when Muslims launch an attack upon the enemy, and they take shelter of their women and children, including the Muslim merchants and prisoners, then what will be the way of attack on them. This issue has been discussed by ancient Muslim jurists, for instance, *Imam Muhammad Bin Al Hasan Al Shaybani*, states that:

“Blind, crippled and lunatic prisoners will not be executed. Water may be released to the dwellings of the people at war, their city may be put to fire, and mangonel may be used against them, even though they have among them Muslim children or other persons, prisoners or traders. So also if they take shelter behind them. However, a Muslim should aim his fire at the enemy. But if a Muslim from among them is hit by it, there is neither any *Kaffara* nor any *Diya* is to be paid”<sup>160</sup>.

Same concept has been expressed in *Al Siyar Al Kabir*, and in its commentary *Al Imam al Sarakhsi* states that, because we have been ordered to deal them brutally and to break their power, and by all these means their power will be broken<sup>161</sup>.

Moreover *Imam Al Sarakhsi* states in *Al Mabsoot*;

The opinion of *Al Hasan ibn Ziyad* was that this will be the case if it is certain that there is no Muslim prisoner in the fort, but if it is uncertain then in that case the burning or bombing of fort will not be allowed, because saving the life of a Muslim is obligatory,

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<sup>159</sup> Dr. Wahba Al Zuhaili, *Al Fiqh ul Islami wa Adillato ho*, volume 8, (Queta: Maktba al Rashidya), 5855-5856.

<sup>160</sup> Dr. Mahmood Ahmed Ghazi, “*The shorter book on Muslim international law*, commentary on *Kitab AL-Siyar Al-Saghir*, by Imam Muhammad ibn al Hasan Al Shaybani, (Islamabad: Islamic Research Institute, 1998)”, 55.

<sup>161</sup> Muhammad Bin Hasan Al Shaybani, *Sharkh, Kitab Al Siyar Al Kabir*, (Volume IV), 1467.

and bombing their forts is permissible (*mubah*), and here following the obligation will be the rule. But *Imam Al Sarakhsi* replies that, if we prohibit this, then their fighting against the non believers, and conquering them will become difficult, and rare forts are found where there is no prisoners, and as the killing of prisoner is not allowed, in the same way killing of women and children is not allowed, and there is no prohibition to burn (bomb), their forts because of the fact that there are women and children, but they will intend towards only the non believers<sup>162</sup>.

Dr, *Wahba Al Zuhaili* says in this regard that, whenever there is necessity of war, it will be permissible to burn the forts of the enemy with fire, and to drown them and destroy them, and the cutting of their trees and crops and agriculture, and fixation of cannons (*Manjanik*), and all their techniques of the time. Because Almighty Allah says in the Holy Quran:

“They destroy their houses by their hands and the hands of believers” (*Al Hashar: 2/59*)<sup>163</sup>.

And because the Prophet (P.B.U.H), burnt *Al Buwaira*, which was place near *Madina*, and because by leaving flood on them and the like methods their power can be broken. He further states that there is no harm in bombing them with cannons, guns and other means and methods of today’s warfare, including Army, naval, even if there are Muslims in their cities, prisoners or merchants, because bombing them is necessary, and unbelievers will be intended to be targeted and not the Muslims, because there is no necessity to kill a Muslim without any justification<sup>164</sup>.

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<sup>162</sup> Shams al Iimma al Sarakhsi, *Al mabsoot, Kitab Al Siyar*, (Bairut, Lebanon, Dar ul Maarifa), 32.

<sup>163</sup> Dr. Wahba Al Zuhaili, *Al Fiqh ul Islami wa Adillato ho*, (Queta, volume 8, Maktba al Rashidya), 5855-5856.

<sup>164</sup> Ibid.



In the same way targeting unbelievers is permissible, if they take shelter behind the children and prisoners from among the Muslims, for necessity and retaliation to their tactics, but only unbelievers will be intended to be targeted. But if a Muslim is killed then there will be no compensation *diya* or *kaffara*<sup>165</sup>.

Another important issue, which needs to be discussed here is that, whether all the taxpayers are combatants? As it has been argued by some people that as, the military necessities are fulfilled by the tax paid by these people so they come under the category of combatants, and hence can be attacked. Because it is evident from history that, fund raising was even popular at the time of Prophet (P.B.U.H), as funds were raised for *Ghazwa e Badar, and Ghazwa e Tabook*. But Islamic law differentiates between a direct and indirect link, and usually an act is attributed to the direct link causing that act, and rarely indirect source will be held responsible for that act, as for instance is the case of murder. So on the same basis, only those people are responsible for the acts are war, and can be said combatants, who are directly involved for the preparation of war, as Prophet (P.B.U.H), took action against those poets of *Makkah* who motivated their people on war against Muslims. Moreover, all the people who are paying the tax do not have any intention to contribute for war, rather they are obliged to pay it on every mobile recharge, and buying a match box<sup>166</sup>.

#### 4.3: Loss of immunity from prosecution:

Under IHL, combatants in international armed conflict, who are legally allowed to directly participate in hostilities, cannot be held accountable for their mere act of directly participating in hostilities, and are immune from penal consequences for any such act,

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<sup>165</sup> Ibid.

<sup>166</sup> Muhammad Mushtaq Ahmad, *Jihad Muzahamat Aur Baghawat*, (Gujranwala: Al Shariah Academy), 408-410.

and for all other lawful acts of war they may have committed during such participation, because mere participation in war of a person who is legally allowed to participate in it, is not a crime in itself, and as a result they will benefit from POW status in case of capture. However if a person lacks the status of a combatant, will be held accountable for prosecution, because he was not legally entitled to directly participate in hostilities, and can be prosecuted under the domestic law of the country. No one differed that direct participation in hostilities by a civilian is not a war crime. However some legal experts are of the view that even though civilians directly participating in hostilities could be prosecuted under domestic law regardless of the fact, whether they had respected the laws of armed conflict during combat or not, but the general practice of states in peace treaties implies that grant of amnesty to individuals who had spontaneously taken up arms has emerged as rule of IHL. Legal scholars also emphasized upon the “principle of *de lege ferenda*, which urges the parties not to pronounce death sentences against civilians of each other, who had directly participated in hostilities, provided they had respected the basic norms of international humanitarian law and abstained themselves from the commission of war crimes”<sup>167</sup>.

On the other hand voluntary human shields are not combatants, and as a result if they are captured they will not be considered prisoners of war and therefore cannot avail the immunity from legal proceedings under domestic law for all their acts committed during their direct participation in hostilities. “As US citizens who acted as voluntary

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<sup>167</sup> “*Third Expert Meeting on the Notion of Direct Participation in Hostilities* (Geneva, 23 – 25 October 2005)”.

human shields in Iraq in 2003, were held liable to civil proceedings, but there was a disagreement upon the question of whether they might be charged with treason”<sup>168</sup>.

“However, even if voluntary human shielding is direct participation in hostilities, should they be captured, voluntary human shields would be covered at a minimum by common Article 3 of the Geneva Conventions and possibly Article 75 of Additional Protocol”<sup>169</sup>.

In short we can say that, in international armed conflicts, the term “combatants” confers the right to participate directly in hostilities. As according to the Inter-American Commission; “the combatant’s privilege is in essence a licence to kill or wound enemy combatants and destroy other enemy military objectives.” Therefore lawful combatants cannot be prosecuted for all their lawful acts of war done in the course of military operations even if such acts constitute a serious crime in peacetime. They can be prosecuted only for grave violations of international humanitarian law, and particular for war crimes, and if captured, all these combatants are entitled to prisoners of war status and they can benefit from the protection of the Third Geneva Convention”. Therefore all combatants are lawful military targets, and in broader sense, all the members of the armed forces other than medical personnel and chaplains are combatants, and therefore they are lawful military targets and targeting them would not be held a violation or crime in an armed conflict. As stated earlier the concept and conditions for combatant and

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<sup>168</sup> “Lyall, Rewi, *Voluntary Human Shields, Direct Participation in Hostilities and the International Humanitarian Law Obligations of States*”.

<sup>169</sup> Ibid.

prisoners of war status can be derived from “Article 4 of GC III and from Articles 43 and 44 of API”, as has already been mentioned<sup>170</sup>.

These definitions will also include for instance, “civilians taking a direct part in hostilities, as well as members of militias and of other volunteer corps, including those of organized resistance movements which have not being integrated in the regular armed forces but they belong to either of the party to an armed conflict, provided that they do not comply with the conditions of Article 4A (2) of GC III”<sup>171</sup>.

However, there is a reservation that civilians having directly participated in hostilities can be prosecuted for any offence that they may have committed under domestic law of their own country even if, in doing so, they did not violate IHL. Moreover, as is the case for combatants, civilians having directly participated in hostilities can be prosecuted for any violation of IHL<sup>172</sup>.

#### 4.4: Prosecution of Enemy Combatants under Islamic Law:-

In Islamic law when enemy combatants are captured then punishment may be imposed on them according to their acts committed in the war, for instance as has already mentioned above, when members of enemy forces are captured, then whoever is exempted from killing in the battlefield will be exempted after the war, and whoever is liable to be killed in the battlefield will be killed after the war, except the child and the lunatic, whose killing will be permissible in war if they fight, but they will not be killed

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<sup>170</sup> “Knut Dormann, *The legal situation of “unlawful/unprivileged combatants”*, 45-46, [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5lphbv/\\$file/irrc\\_849\\_dorman.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5lphbv/$file/irrc_849_dorman.pdf)”, last accessed on 08-08-2010.

<sup>171</sup> Ibid.

<sup>172</sup> “*Overview of the ICRC's Expert Process (2003-2008)*, [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-article-020709/\\$File/overview-of-the-icrcs-expert-process-icrc.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-article-020709/$File/overview-of-the-icrcs-expert-process-icrc.pdf)”, last accessed on 20-08-2010.

after war of they are captured, if they have killed a huge number of Muslims, because killing is a punishment and both of them are not liable to punishment.

#### 4.5: Legal regime applicable upon capture:

A combatant when captured on his direct participation in hostilities, will has some responsibility, as well as some rights as well. But for this reason the determination of the status of combatant is very important.

If a person who has participated directly in hostilities is captured on the battlefield, it may not be obvious to which category that person belongs, i.e. combatants or non combatants, and for such types of situations Article 5 of GC III, and Article 45 of AP I, provides for a special procedure through a competent tribunal to determine the status of a captive<sup>173</sup>.

##### 4.5.1: Who is an "enemy combatant"?

In its general sense, an "enemy combatant" is a person who, either lawfully or unlawfully, engages in hostilities in an international armed conflict. This term is used by those who view the "global war against terror" as an armed conflict in the legal sense, and by this term they mean, "the persons belonging to, or believed to be associated with terrorist groups, regardless of the circumstances of their capture. As already mentioned, a member of the armed forces of a State engaged in an international armed conflict or of an associated militia that fulfils the requisite criteria is a combatant, and, as such, entitled to POW status upon capture by the enemy. But in non-international armed conflict,

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<sup>173</sup> Knut Dormann, *The legal situation of "unlawful/unprivileged combatants"*, 45-46, [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5lphbv/\\$file/irrc\\_849\\_dorman.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5lphbv/$file/irrc_849_dorman.pdf), last accessed on 08-08-2010.

combatant and prisoner of war status are not provided, because States are not willing to grant members of armed opposition groups, and resistant movements, other than the regular armed forces immunity from prosecution under domestic law for taking up arms. Therefore the two issues should be discussed separately”<sup>174</sup>.

#### 4.5.2: The legal protection of unlawful combatants under GC IV:-

As the unlawful combatants do not meet the conditions to qualify as prisoners of war and are not protected by GC III, it should be clarified that whether unlawful combatants fall within scope of application of GC IV, and after that it will become clear what kind of protections they are entitled to avail, when they are in enemy hands.

“Article 4 (1) of GC IV” states that:

“Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”

This definition clear shows that, “any person would be protected once he/she finds himself/herself in the hands of a Party to an armed conflict or occupying Power. But if read in isolation, definition would not only include civilians but even members of the armed forces”. However the scope of application is reduced by specific exceptions:

The following persons are excluded by the subsequent paragraphs of this Article:

According to its paragraph 2:

“Nationals of a State which is not bound by the Convention are not protected, but this exception is now a theoretical concept because since the 1949 Conventions have been universally ratified.

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<sup>174</sup> “<http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-ihl-210705>”, last accessed on 15-09-2010.

Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, are not protected, while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are”<sup>175</sup>. But the fact that “a person has unlawfully participated in hostilities is not a criterion for excluding the applicability of GC IV. On the other hand, Article 5 of GC IV, uses the term “protected persons” with regard to persons detained as spies or saboteurs as well as persons definitely suspected of or engaged in activities hostile to the security of the State or Occupying Power. Because both the activity hostile to the security of the State or Occupying Power, and of “sabotage” constitute direct participation in hostilities. Therefore, this article would apply to persons who do not fulfill the criteria of GC I-III and take a direct part in hostilities, i.e. persons labeled as “unlawful combatants” as is the custom in present day war on terror”<sup>176</sup>.

#### 4.5.3: Who is entitled to "prisoner of war" status? What is the consequence of failure to qualify for prisoner of war status?

##### a. In international armed conflict:-

“In this kind of armed conflict, there are lawful combatants on two or more sides, within the armed forces of one State fighting the armed forces of another State. All the four Geneva Conventions apply to situations of international armed conflict, and it is the Third Geneva Convention which regulates the protection of lawful combatants upon capture by the enemy”. It also stipulates the procedure for determination of entitlement to prisoner of war status by a competent tribunal in case of doubt. On the other hand, unlawful

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<sup>176</sup> “Knut Dormann, *The legal situation of “unlawful/unprivileged combatants”*, 45-46, [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5lphbv/\\$file/irrc\\_849\\_dorman.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5lphbv/$file/irrc_849_dorman.pdf)”, last accessed on 08-08-2010.

combatants do not qualify for prisoner of war status, and their status and situation upon capture by the enemy is covered by the Fourth Geneva Convention, regarding the status of civilians, on the condition that they fulfill the nationality criteria according to the relevant provisions of the Additional Protocol I, provided that it has been ratified by the detaining power. But this protection is different that conferred upon the lawful combatants. On the other hand, “persons protected by the Fourth Convention and the relevant provisions of Protocol I may be prosecuted under domestic law for directly participating in hostilities, for their all unlawful acts during an armed conflict. They may be held under custody as long as they pose a serious security threat, and, while in detention, may under specific conditions be denied certain privileges under the Fourth Geneva Convention. They may also be prosecuted for war crimes and other crimes and sentenced to terms exceeding the length of the conflict, including the range of other penalties provided for under domestic law. Moreover the persons who are not covered by either the Third or the Fourth Geneva Convention in international armed conflict are entitled to the fundamental guarantees which have been provided by customary international law, as stated in Article 75 of Additional Protocol I, as well as by applicable domestic and human rights law. Therefore, the ICRC has never stated that all persons who have taken part in hostilities in an international armed conflict are entitled to prisoner of war status”<sup>177</sup>.

b. In non-international armed conflict:-

On the other hand, “in non-international armed conflict combatant status does not exist, and the Prisoner of war or civilian protected status under the Third and Fourth Geneva

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<sup>177</sup> Ibid.



Conventions, also becomes irrelevant. Members of organized armed groups are entitled to no special status under the laws of non-international armed conflict and may be prosecuted under domestic criminal law if they have taken a direct part in hostilities". However, the international humanitarian law of non-international armed conflict, and customary International Law, for instance "Common Article 3 of the Geneva Conventions, and Additional Protocol II to the Geneva Conventions are applicable, as well as applicable domestic and international human rights law all provide for rights of detainees in relation to treatment, conditions and due process of law"<sup>178</sup>.

By the universally accepted principles of International Law, "the law of war draws a distinction between the regular armed forces and the peaceful populations of belligerent nations, and also between lawful and unlawful combatants". Lawful combatants are subject to capture and detention, and will be given the prisoners of war status under the relevant provision of IHL, and "unlawful combatants are likewise subject to capture and detention, but in addition they are also subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. Moreover the spy who secretly and without uniform, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, also qualify the status of a belligerent who are deemed not to be entitled to the status of

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<sup>178</sup> Ibid.

prisoners of war, but as an offender of the law of war, and the domestic law of enemy state, is subject to trial and punishment by military tribunals”<sup>179</sup>.

The Bush Administration announced and determined in February 2002 that “Taliban detainees fall under the categories covered by the Geneva Conventions, while Al Qaeda detainees are not, but that none of the detainees qualifies for the status of prisoner of war (POW). The Administration declared all of them to be “unlawful enemy combatants,” without any protection of law, and claimed the right to detain them without trial and continue to hold them in preventive detention even if they are acquitted of criminal charges by a military tribunal. Within these, fifteen of the detainees had been determined by the President to be subject to his special military order (“MO”) of November 13, 2001, making them eligible for trial by military commission for war crimes offenses. The USA Supreme Court, on the other hand, found that the procedural rules established by the Department of Defense to govern the military commissions were not established in accordance with the Code of Military Justice (UCMJ), and the Supreme Court clarified in *Rasul* and later *Boumediene*, case that detainees presently held at Guantanamo have recourse to federal courts to challenge their detention, and they may enforce any rights they may have under the Geneva Conventions and other laws of armed conflict”<sup>180</sup>.

#### 4.6: Status of Prisoners of War under Islamic Law:-

*Imam Muhammad*, says that the Imam of Muslims has the discretion either to execute the unbeliever prisoners or to distribute them among those who capture them, and *Al Hasan* (R.A), disliked the killing of enemy prisoners, and *Hamad Bin Abi Sufyan*

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<sup>179</sup> April 2, 2010 by *Avenging Sword Unlawful Combatants Before 9/11*, <http://aleksandreia.wordpress.com/2010/04/02/unlawful-combatants-before-911/>, last accessed on 20-08-2010.

<sup>180</sup> Jennifer K. Elsea, Legislative Attorney, Michael John Garcia, “*Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court*, (February 3, 2010), <http://www.fas.org/sgp/crs/natsec/RL33180.pdf>”, last accessed on 20-08-2010.

disliked their killing after the end of war. They have based their opinion on the fact that: *Abdullah Bin Amir* sent to *Ibn e Umar* (R.A), with a prisoner in order to kill him, and he remarked that, he will not kill him after he has been captured. But *Imam Muhammad* states that our argument for killing them is the story of *Banu Quraiza*, as Prophet (P.B.U.H), killed them after their capture, and when the war ended, and because Prophet (P.B.U.H), killed *Uqba Bin Abi Mueet* and *Nazar bin Al Haris*, and they were from among the prisoners of *Badar*. And *Umar Bin Al Khattab* (R.A), killed *Maabad Bin Wahb*, captured by *Abu Burda*, and he listened him speaking, *O Umar*, you think that you npeople won, I swear of *Laat and Uzzaa*, then he took him from *Abu Burda* and killed him. *Imam Al Sarakhsi* rights in its commentary that, the priotection from killing will be proved by peace or belief, and with capture it will not be proved. So he remains immune from protection as was before capture, and after his capture he does not become a non combatant, rather he becomes unable to combat<sup>181</sup>.

Dr, *Wahba Al Zuhaili*, says that after the end of war, when members of enemy forces are captured, then whoever is exempted from killing in the battlefield will be exempted after the war, and whoever is liable to be killed in the battlefield will be killed after the war, except the child and the lunatic, whose killing will be permissible in war if they fight, but they will not be killed after war if they are captured, and even if they have killed a huge number of Muslims, because killing is a punishment and both of them are not liable to punishment. And their killing during war will be to resist the danger from the enemy, and whenever danger is found from their side, and then their killing will be allowed to fight against their danger as has been stated by *Kasani*. But he states that this is the majority school of thought, (*Hanafiya, Mlikiya, Hanabila, Al Shiya Al Zaydiya, and*

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<sup>181</sup> Muhammad Bin Hasan Al Shaybani, *Sharkh, Kitab Al Siyar Al Kabir*, (Volume IV), 1024-25.

*Al Shafie*, in one of his opinions), and *Al Shiya Imamaiya*, *Al Zahiriya*, *Ibn Al Munzir*, and *Al Shafie*, in his dormant opinion says that the killing of every one is allowed except the women and children<sup>182</sup>.

*Allama Maudodi* has expressed another opinion in this matter, under the title: Prohibition of Killing of Prisoner, in the following words, that when Prophet (P.B.U.H), entered into *Makkah* after victory, he said:

“Do not attack a wounded, deserted should not be chased, prisoner should not be killed, and the one who remains at his home after closing his door will be protected”.

Then he further elaborates that, it is the general law of Islam, but it is the right of the Islamic state, that if the worse enemies of Islam, or the people who have committed huge crimes against Muslims, or the leaders of *Kuffr* or mischief who are responsible for a big crime, then the leader of Islamic state has the discretion to order their execution. As the Prophet (P.B.U.H), killed *Uqba Bin Mueet*, among the prisoners of *Badar*<sup>183</sup>.

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<sup>182</sup> Dr. Wahba Al Zuhaili, *Al Fiqh ul Islami wa Adillato ho*, (volume 8), 5855-5856.

<sup>183</sup> Sayyed Abu Al Aa\_ la Maudodi, *Al Jihad Fil Islam*, 231.

## Conclusion:-

As has already been discussed in detail, the principle of distinction is one of the fundamental principles of International humanitarian law, and therefore the distinction between the combatants and civilians is the primary concern of international humanitarian law (IHL). Because the function of combatants is to fully participate in hostilities, and on the other hand civilians are presumed not to be directly participating in hostilities, and hence are fully protected from attack. Due to this fact, civilians lose their protection if and only if they “directly participate in hostilities”<sup>184</sup>. This principle is elaborated in “Article 51(3) of Additional Protocol 1 to the Geneva Conventions”.

Therefore the clarification of the notion of Direct Participation in Hostilities is very important in IHL, because the primary aim and object of IHL, is to protect the civilians and civilian population. But it is uncertain, that what are the limits of direct participation in hostilities. Because it is certain that concept of direct participation in hostilities is not confined merely to those who use arms but it extends beyond that as well. For instance logistic support to one of the parties or intelligence service may be considered direct participation in hostilities, as means and methods of warfare have been changed with the passage of time. Moreover in recent armed conflicts particularly when non state actors are engaged, the status of private military companies, computer network attacks, and communication networks, including the civilian participation in hostilities is also controversial, so it is difficult to determine, whether it should be considered direct

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<sup>184</sup> <http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-ihl-feature-020609>, last accessed, 03-09-2009.

participation in hostilities or not? All these questions form basis of IHL, so they must be clarified<sup>185</sup>.

For the clarification of all these concepts, ICRC conducted five expert meetings on the notion of direct participation in hostilities from 2003-2008, in which many legal and military experts from around the world were invited to participate and give their opinions for the purpose, and finally after six years of expert discussions and research, the ICRC has published the "Interpretive Guidance on the notion of direct participation in hostilities under IHL, on June 2, 2009, which aims to clarify the meaning and consequences of direct participation in hostilities under international humanitarian law (IHL)"<sup>186</sup>.

Under "Article 4(A)(2)", Combatants are defined, and four conditions are mentioned to declare a person a combatant, but IHL does not provide an explicit definition of civilians, rather treaty and customary law defines "combatants" and then requires that a person who is not a combatant may be considered a civilian.

When there is immediate resistance of people, against the aggressor forces, it is called *levee in masse*. And according to "Article 43, of the First Additional Protocol", to the Geneva Conventions, it has been admitted that during an armed conflict it is not always possible to comply with the all abovementioned four conditions, and they all will gain the status of combatants if they fulfill the last two conditions mentioned in Article 4 A, although they may not be under a command responsible for his subordinates and they

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<sup>185</sup> *ibid*

<sup>186</sup> "<http://www.reliefweb.int/rw/lib.nsf/db900SID/SODA-7TJP5H?OpenDocument>", last accessed 19-09-2009.

may not be carrying arms openly. Another problem arises when civilians are placed in front of military objective so that the civilian status of those people should abstain the enemy from the attack on the military objective as well, and act as voluntary human shields. All these issues are still unclear in IHL, and need to be clarified. ICRC, published its interpretative guidance but was not agreed upon between the international legal experts.

But the most important issues which need to be clarified are the status civilians, *levee in masse*, voluntary human shields, computer network attacks, private military security companies, and the war on terrorism.

As far as civilians are concerned, in IHL, civilians are generally considered non combatants. The four Geneva Conventions and their Additional Protocols use the term civilian, but no precise definition is provided in this context, rather a negative definition has been given in Article 50 (1), of AP I, which states that, civilian is a person who does not belong to any of the categories of persons mentioned in “Article 4(A), (1), (2), (3), and (6) of GC III, or Article 43, AP I”, in non international armed conflict. As far as international armed conflict is concerned, “Common Article 3, of the four Geneva Conventions”, does not provide any clarification of the term civilian, however the “ICRC study on Customary IHL” states that a combatant is any person who is a member of the armed forces, whereas on the other hand a civilian is any person who is not a member of the armed forces. Therefore privilege has been given to the civilians in Article 51-3 of AP I that the civilians are immune from attack as long as they do not directly participate in

hostilities, whereas this immunity will be waived when they actively start participating in hostilities until they leave such participation<sup>187</sup>.

Moreover *levee in masse*, and other resistant movements are now given the status of combatants, if they fulfill the last two requirements mentioned in Article 4-A, of GC IV, as mentioned in Article 43. there is a ban on voluntary human shields as has been mentioned and such act is prohibited in a number of provisions of Geneva Conventions 1949, as envisaged in “Article 51(7), of Additional Protocol 1, of 1977”. After five expert meetings on the notion of Direct Participation in Hostilities, ICRC, published its report, and concluded that voluntary human shields does not amount to direct participation in hostilities, upon which the legal experts tasked with to draw this report, were aggrieved and all the 50, military and legal experts agreed that the civilians who become voluntary human shields will fall within the ambit of Direct Participation in Hostilities, and could be declared as legitimate targets during an armed conflict<sup>188</sup>.

In CNAs as objectives are defined in “Article 52 of Additional Protocol I”, are lawful targets, and therefore according to this definition all the military equipments and facilities, except medical and religious items, are clearly military objectives, and thereby subject to direct computer network attack. The people who are involved in cyber crimes are also aware of the fact that they may be held liable for their activities, and may lawfully be prosecuted and punished, and if these cyber crimes are committed on the command of states to conduct hostile military actions then the persons launching such

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<sup>187</sup> “Michael N. Schmitt, *Direct Participation in Hostilities, and 21st Century Armed Conflict*”, 506.

<sup>188</sup> Richard Landes, *Hamas and Human Shields: Is it a Human Shield, if they're willing?*



attacks will also be legitimate targets, but it is difficult to determine when such attacks are conducted on the command of states to conduct hostile military actions. As far as PMCs, and mercenaries are concerned "Article 47, of the first Additional Protocol", lays down that, a mercenary shall not have the right to be a combatant or a prisoner of war. So due to this fact, the legal environment of IHL, in which private military and security companies (PMCs) currently operate is called a "legal vacuum". And the reason for this is that the laws of war do not directly provide for the use of force by non-state actors, and PMCs. Lastly, soon after 9-11, a so called war on terrorism was started, and upon this the USA President Bush remarked that the people fighting the USA and her allies hold the status of enemy combatant, and this status of these people allowed the military to do whatever they want, but the USA Supreme Court later on ruled against this sacred verdict pronounced by the so called religious and state leader of the USA, and held that the captured Al Qaeda members should have been given prisoner of war protection under the Third Geneva Convention. As a result of this verdict, and to save herself from its own apex court's jurisdiction the USA military immediately transferred these prisoners to Guantanamo, in Cuba, the site of an existing prison camp for detained enemy combatants which does not fall within the jurisdiction of the USA Supreme Court<sup>189</sup>.

As far as Islamic law is concerned, unlike Western International Law, Islamic Law, or Shariah is a complete code of life, and in matters regarding International Law, and conduct of hostilities it has prescribed the rules with every detail, as is the case with other branches of Shariah Law. First time in the history of mankind Islamic law, laid down the principles of war and prohibited inhuman and degrading treatment, as

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<sup>189</sup> Ibid.

according to *Sayyed Abu Al Aa\_la Maudodi*, during the pre Islamic period of Arab there was no distinction between combatants and non combatants. Every person of enemy nation was considered as enemy. Women, children, old people, sick, and wounded, no one was immune from this high handedness. Rather the main object was to degrade the enemy, and their women were specifically targeted during the war, and a nation used to feel proud to take the honour of enemy women<sup>190</sup>. But when Islam came in the World, it prohibited all these evils prevalent in the society, and introduced new rules of war. So it is obvious that the distinction between combatants and non combatants in Western International Law is the product of last three centuries, and even today it is not fully secured, as admitted 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”, whereas on the other hand Islamic Law laid down its basic principles of the rights of combatants and non combatants before fifteen centuries when it was revealed and even modern jurists are following those principles in their works.

Islam has laid down a complete code of conduct of war, and fighting (*Jihad*) was revealed with the passage of time, and fighting was permitted against those who were aggressive against the Muslims. The Holy *Quran*, says:

“Fight in the way of God against those who fight against you, but begin not hostilities. Lo! God loveth not aggressors”. (*Al-Baqarah* 2:190).

Moreover every detail has been provided in the Holy Quran, and the traditions of the Holy Prophet (P.B.U.H), regarding the status of combatants in the war, and there is no

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<sup>190</sup> Sayyed Abu Al Aa\_la Maudodi, *Al Jihad Fil Islam*, 198,199.

ambiguity, rather even more than one opinions are available upon a particular issue, which is also a mercy upon the human beings. Islamic law not only describes the categories of human beings, which can be declared combatants, rather Islamic law, also provides the situations and circumstances in which even non combatants, or civilians can come under the category of combatants and hence can be targeted. The general principle of Islamic Law is that the combatant (who fights), will be killed and not the non combatant (who does not fight). But some times other people can also come under the category of combatants. For instance according to *Imam Abu Hanifa*, religious leaders can be killed, because they may encourage their forces upon the killing of Muslims. Moreover an old man can be killed if he is able to give his war opinion, as it has been narrated that, *Rabiya Bin Rafi Al Salami* found *Darid Bin Al Sama* the day of *Hunayan*, and he killed him in spite of the fact that he was an old man over one hundred, and he was unable to assist the polytheists except with his opinion, this news was forwarded to the Prophet (P.B.U.H), and he did not prohibited it. In the same way, as a general principle women and children are not to be killed, as it has been narrated that:

Once, after a battle, the Prophet (PBUH), passed by a woman who had been slain, whereupon he remarked:

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

But they can be killed if they fight, and a woman can be killed, if she is the leader of the enemy, because their power will be broken after killing her, also if their leader is a child

and they bring him with them in the battlefield, then there will be no objection in killing him if their power is broken after his killing<sup>191</sup>.

The status of combatants will be same during and after the war, except with regard to a few categories of people, for instance whoever is exempted from killing in the battlefield will be exempted after the war, and whoever is liable to be killed in the battlefield will be killed after the war, except the child and the lunatic, whose killing will be permissible in war if they fight, but they will not be killed after war if they are captured, even if they have killed a huge number of Muslims, because killing is a punishment and both of them are not liable to punishment. This is the majority school of thought, (*Hanafiya, Mlikiya, Hanabila, Al Shiya Al Zaydiya, and Al Shafie*, in one of his opinions), and *Al Shiya Imamaiya, Al Zahiriya, Ibn Al Munzir, and Al Shafie*, in his dormant opinion says that the killing of every one is allowed except the women and children<sup>192</sup>. Some other opinions are also available regarding the execution of non Muslim belligerents; however majority from among the modern jurists do not support the execution of enemy combatants, and hold that even the executions held at the time of the Holy Prophet (P.B.U.H), were based upon exceptional principles, and was not a rule of *Shariah*.

To conclude, it is evident that the concepts regarding the status of combatants and belligerents, directly participating in war are not clear, and Islamic Law provides detailed rules regarding this principle, including the case study, hence principles of Islamic Law can be incorporated to fulfill the vacuum of International Law in general, and of

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<sup>191</sup> Dr. Wahba Al Zuhaili, *Al Fiqh ul Islami wa Adillato ho*, (volume 8), 5855-5856.

<sup>192</sup> Ibid.

International Humanitarian Law in particular, as Article 38, of the Statute of International Court of Justice includes;

“The general principles of law recognized by civilized nations, as a source of International Law”.

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