



War Crimes in International Humanitarian Law and Islamic International Law: A Comparative study

by

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DEDICATION

DEDICATED TO MY PARENTS

ESPECIALLY

To The Sweet Memories of My (Revered) Father Abdul Qayyum (May his soul live in Peace).

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INTRODUCTION

“War crimes” is one of the hot issues now a days. During the last century millions of human beings perished as a result of war crimes, crimes against humanity, genocide etc.

Generally speaking, war crimes are violations of the laws of war committed against those persons who are placed *hors de combat* due to sickness, wounds, detention or any other cause or are civilians. Traditionally, this concept was limited to international armed conflicts; however, with the passage of time it was extended to internal conflicts also.

War crimes incur individual criminal responsibility, together with the special responsibility which lies on shoulders of the commanders who being in position fail to prevent atrocities committed by their subordinates. Commanders have both moral and legal role in preventing atrocities that may be committed by their subordinates. Under customary international law commanders are criminally liable for war crimes committed by subordinates. If certain conditions are met, a commander is charged as a principal to a crime even though he did not directly participate in commission of the actual offense.

One of the most controversial issues of war crimes is the defence of superior order. Under national legal systems, soldier has a general obligation to obey the orders he received from superiors and to presume that the orders are lawful. A problem arises

when a soldier receives an illegal order. In this case, duty of military obedience clashes with the requirements of customary IHL; should he obey the order and commit war crimes or should he deny to perform an illegal act and take the risk of being punished at national level for disobedience? It remained a controversial matter since the trial of *Peter von Hagenbach*, and gave birth to three different approaches. International community tried to harmonize the two doctrines of absolute and conditional liability; but it was not until 1998 that the Statute of ICC ultimately resolved the problem by providing a combination of absolute and conditional approaches.

The concept of war crimes seems to contradict with the concept of Military Necessity, which recognizes the right of a state to win a battle by justifying attacks on legitimate military targets even if such attacks may harm civilians and civilian objects. On the other hand under IHL, intentional attack upon civilians and civilian objects is a war crime. How does IHL harmonize these concepts?

Besides Military Necessity, the right of reprisals is also crucial one. Reprisal allows the states to use illegal means of redress either to induce the enemy to terminate its unlawful conduct or to punish it for the purpose of deterring any further breach. It has proven to be an insufficient mode of redress which penalizes the persons taking no active part in the hostilities. Due to these features IHL has limited the scope of Reprisals and prohibited it against the protected persons and property in international conflicts, while it is silent on internal conflicts. Does this mean that reprisals are allowed in internal conflicts without having any limitations?

Another concept which is closely related to war crimes is the concept of crimes against humanity which developed as a category accessory to war crimes. However, with the passage of time this category appeared as an autonomous category without the need

of any formal link to war crimes. But can we deny their link especially with regard to the crimes committed against civilian population during the wartime?

IHL has introduced universal jurisdiction over war crimes, under which the States are obliged to prosecute persons responsible for war crimes or to hand them over to another state for prosecution. The world's first attempt at a war crimes prosecution in Leipzig in 1921, was a debacle. But during World War II the murder of several million people, mainly Jews by Nazi Germany, and the mistreatment of both civilians and prisoners of war by the Japanese, prompted the Allied powers to prosecute the people they accused to be the perpetrators of these crimes. The Nuremberg Tribunal set important precedents; it provided for individual criminal responsibility for war crimes; it provided that obedience to superior order is not a defence and led to the further development of International Criminal law.

One of the most important developments was the establishment of International Criminal tribunals in 1993 and 1994, by the UN SC for the prosecution of persons alleged to have committed war crimes and other serious crimes in internal conflicts also.

After Nuremberg, it was assumed that a permanent international criminal court be established, but it was not until in 2003 that the court came into force. The Court was given jurisdiction over war crimes committed in international as well as internal armed conflict. ICC has been given complementary jurisdiction over war crime. Complementary jurisdiction dictates that the ICC would be competent to investigate and try a case, unless there is a state that claims jurisdiction. States continue to play the central role; if they fail or find it impossible to assume that role, or show disinterest or bad faith, the ICC will step in to ensure that justice is done. In particular, it is designed to operate in cases where there is no prospect of international criminals being duly tried in domestic courts.

As far as Islamic Law is concerned, the word “*Siyar*” designates the ‘Islamic law of nations’ or ‘Islamic International Law’. It refers to the conduct of the Prophet (pbuh) and the conduct of his successors in their wars with non-Muslims as well as among Muslims *inter se*.

The earlier development of *Siyar* took place under the guidance of Imām Abū Hanīfah (d. 150 AH), who dictated a series of lectures to his disciples entitled “*Kitāb al-Siyar*”. This branch of law was further developed by one of his disciples Muhammad Ibn Hassan Al- Shaybānī, who played such an important role that he came to be considered as one of the founders of this branch of law.¹ He wrote two famous books on the subject: *al-Siyar al-Saghīr* and *al-Siyar al-Kabīr*. The former was translated into English by Prof. Mahmood Ahmed Ghazi, under the title *Kitāb al-Siyar al-Saghīr*, while the second one is available with the commentary of Abū Bakr al-Sarakhsī, under the title *Sharh al-Siyar al-Kabīr*.

The sources of *Siyar* are Qur’ān, *Sunnah*, consensus (*ijmā*), analogical reasoning (*qiyās*), and the practice of the companions of the Holy Prophet (pbuh), especially of the four Rightly-guided Caliphs, and their successors, the early Umayyads.

The laws of war were first developed in detailed instructions given by the Holy Prophet (pbuh), and later by the four Caliphs to Muslim warriors being sent into battles. Special rules granting quarter and safety to enemy *hors de combat* were developed. Elaborate instructions regarding treatment of prisoners of war also developed. Those prisoners who were involved in war crimes were punished. Women, children,

¹ For the earlier development of Islamic International law See Muhammad Ibn Hasan al-Shaybānī, *The Shorter Book on Muslim International Law*, Edited, Translated and annotated by Mahmood Ahmed Ghazi, (Islamabad: Islamic Research Institute, 1998), 1-35.

elderly, religious personnel were treated a separate category that enjoyed immunity from any kind of deliberate harm. Acts denying protection to enemy's property, unless compelled by extreme military necessity amounted to *fasād* on earth.

A closer look at the study of both Islamic International law and IHL reveals that the norms of both legal systems are not only compatible but that Islamic International law covered all humanitarian aspects of modern Humanitarian law fourteen hundred years ago.

Objective of study:

The object of study is two fold:

Firstly; to analyse the concept of war crimes in IHL, to study issue like command responsibility; the defence of superior order; to find out harmonization between the concepts of military necessity and reprisals and to ascertain differences and link between the crimes against humanity and war crimes. It is further intended to study prosecution for war crimes, especially from Nuremberg perspective, with reference to the establishment of ICTY & ICTR, and ICC.

Secondly; to make a comparative study of the provisions of IHL and Islamic law granting protection to 'protected persons', i.e. to enemy *hors de combat*, and civilians and to the 'protected property'.

OUT LINE:

Chapter No 1: War Crimes in International law

The chapter is divided into seven sections:

In the first section meaning and types of wars in International law will be discussed.

In the second section meaning of crime shall be discussed.

In the third section war crimes, the laws the violation of which constitute war crime, extension of the notion of war crimes to internal conflicts, by whom and against whom these crimes are committed shall be discussed.

In section four command responsibility, types of command responsibility and the liability of a commander for crimes committed by his subordinates will be discussed.

In the fifth section, the defence of superior order with reference to three doctrines which developed with the passage of time and the current position at international level of admitting it a defence shall be discussed.

The concept of Military Necessity and limitations imposed by IHL on the exercise of the right of Military Necessity will be discussed in section six.

In the seventh section right of Reprisals and the limitation imposed by IHL on the exercise of the right of reprisal shall be discussed.

While in the last section concept of crimes against humanity, connection between war crimes and crimes against humanity and the difference between both these categories shall be discussed. At the end there would be a conclusion which will summarize my findings.

Chapter No. 2: Prosecution for War Crimes

In this chapter prosecution for war crimes with reference to four distinct phases will be discussed, i.e. after First World War, Second World War, ICTY & ICTR and under the ICC Statute, and at the end there would be a conclusion.

CHAPTER 3: Concept of War Crimes in Islamic International Law

The chapter is divided into six sections:

First section is divided into four parts: First two parts deals with the protection of wounded and sick soldiers during international conflict both in Islamic International law and IHL, while the next two deals with the protection of wounded and sick soldier during internal conflict, both in Islamic International law and IHL.

Second section is divided into four parts: First two parts deals with the protection of prisoners during international conflict both in Islamic International law and IHL, while the next two deals with the protection of prisoners during non-international conflict, both in Islamic International law and IHL.

Third section is divided into four parts: First two parts deals with the protection of non-combatants during international conflict both in Islamic International law and IHL. While the next two deals with the protection of non-combatants, both in Islamic International law and IHL in the context of non-international conflict.

Fourth section is divided into four parts: First two parts deals with the protection of non-military objects both in Islamic International law and IHL. While the next two deals with the protection of places of worship and cultural objects, both in Islamic International law and IHL.

Section five deals with the concept of reciprocity and the limits imposed by Islamic International law on exercise of the right of reciprocity.

Section six deals with the position of Islamic law in signing International conventions like the four GCs and their APs, which is followed by a conclusion.

Chapter 1

War Crimes in International Humanitarian Law (IHL)

Chapter 1

War Crimes in International Humanitarian law

Section I: War

A. Meaning of War:

War means hostile contest through armed forces carried on between nations, states, or rulers, or between citizens in the same nation or state.¹

Professor Oppenheim defined war as:

A contention between two or more States, through their armed forces, for the purposes of overpowering each other and imposing such conditions of peace as the victor pleases.²

Starke has also defined war in a similar way:

A contest between two or more States primarily through their armed forces, the ultimate purpose of each contestant or each contestant group being to vanquish the other or others and impose its own condition of peace.³

¹ *Black's Law Dictionary*, (St. Paul, Minn. West Publishing Co., 1979), s.v "war", 1419.

² Oppenheim, *International Law*, ed. Lauterpacht vol. 2, (London: Longman Group Ltd, 1952), 150.

³ J. G. Starke, *An Introduction to International Law*, (London: Butterworths, 1977), 556.

B. Types of War / Armed Conflict:

International Law recognizes four different types of armed conflict situations:

1. International Armed Conflict;
2. Internal Armed Conflict / Civil War;
3. Situation of Internal Tensions and Disturbances;
4. Wars of National liberation.

1. International Armed Conflict:

The term “International Armed Conflict” refers to a situation in which two or more states are engaged in armed conflict.¹ It has been defined under the common Art. 2 of the Four GCs in the following terms:

...all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting parties, even if the state of war is not recognized by one of them.

... all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.²

In *Delalic case* ICTY found that:

[A]ny difference arising between two States and leading to the intervention of members of the armed forces is an international armed conflict and [i]t makes no difference how long the conflict lasts or how much slaughter takes place.³

¹ Mark Freeman, *International Law and Internal Armed conflicts: Clarifying the interplay between Human Rights and Humanitarian protection*, available at <http://www.jha.ac/articles/2059.htm>.

(Hereinafter, Freeman at www.jha.ac/articles/2059.htm).

² Common Art. 2 of the Four Geneva Conventions, 12 August 1949.

³ ICTY, Judgment, *The Prosecutor v. Zejnil Delalic and Others*, IT-96-21-T, para. 208, as quoted in *Elements of War Crimes under the Rome Statute of the International Criminal Court*, sources and commentary Knut Dormann with contributions by Louise Doswald-Beck & Robert Kolb, (Cambridge University Press, 2003), 23.

(Hereinafter, Dormann, 2003).

2. Internal Armed Conflict / Non-International Armed Conflict / Civil War:

ICTY in *Tadic* case found that a non-international armed conflict takes place:

Whenever there is ... protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.¹

Nowadays, majority of armed conflicts are of non-international character, with foreign intervention, which either support the government or the insurgents.² Such a type of conflict is termed as “internationalized internal conflict.”³

The factual circumstances that renders the conflict international are various and often complex: it includes war between two internal factions both of which are backed by different States; military intervention by two foreign States in an internal armed conflict in support of opposing sides; and war involving a foreign intervention in support of insurgents fighting against an established government. The most transparent ‘internationalized internal armed conflicts’ include NATO’s intervention in the armed conflict between the Federal Republic of Yugoslavia (FRY) and the Kosovo Liberation Army (KLA) in 1999 and the intervention undertaken by Rwanda, Angola, Zimbabwe, Uganda and others, in support of opposing sides in the Democratic Republic of Congo

¹ *The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995, Case No IT-94-1-AR72, para 70, as quoted in Christa Rottensteiner, *Denial of humanitarian assistance as a crime under international law*, ICRC Review No. 835, available at <http://www.icrc.org/Web/Eng/siteengO.nsf/iwpList106/C8929BAA0BB1B828C1256B66005D871A>. (Hereinafter, Rottensteiner at www.icrc.org/835).

² Hans-Peter Gasser, *International humanitarian law and the protection of war victims*, available at <http://www.anilnair.20m.com/humanitarianlaw.html>.

³ Ewen Allison and Robert K. Goldman, Gray Areas in International Humanitarian Law, *Crimes of war: What the Public Should Know*, ed. Roy Gutman & David Rieff (London: W. W. Norton & Company, 1999), 158, (hereinafter, Gutman & Rieff, 1999), also available at <http://www.crimesofwar.org/thebook/gray-area-ihl.html>.

(DRC) since August 1998.¹

3. Situation of Internal Tensions and Disturbances:

The term “Internal Tensions and Disturbances” refers to:

A situation that fall short of armed conflict, but involves the use of force and other repressive measures by a government to maintain or restore public order or public safety.²

The situation of *Lal Masjid*, which prevailed during the month of July, is an example of internal tensions and disturbances.

4. Wars of National liberation:

The term “Wars of National Liberation” refers to:

A conflict in which people are fighting against the colonial domination and alien occupation and racist regime in the exercise of their right to self-determination.³

The people of Kashmir are currently struggling to seek independence from India on the ground of self-determination.

¹ James G. Stewart, *Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict*, ICRC Review No 850, available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5PYAXX/\\$File/irrc_850_Stewart.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5PYAXX/$File/irrc_850_Stewart.pdf).

² Freeman at www.jha.ac/articles/2059.htm.

³ Ibid.

Section II

War Crimes

War crimes means ‘serious violations of international humanitarian law, committed during an international or non-international armed conflict’. ¹

The laws of IHL are either derived from the Hague Conventions of 18 October 1907, Respecting the Laws and Customs of War on Land, (which limits the means and methods of conducting military operations) ² or from the Geneva Conventions of 1949 for the protection of war victims (which obliges the belligerents not to harm the persons who do not or are no longer taking part in hostile actions). ³

In 1949 Geneva Conventions, war crimes have been codified under the term ‘grave breaches of Geneva conventions.’ Each of the four conventions has its own list of grave breaches. Some of these acts include: willful killing; torture or inhumane treatment; destruction of property not justified by military necessity; unlawful deportation or transfer of protected civilian; unlawful confinement of a protected civilian; and taking of hostages etc. The list was further expanded by Additional Protocol I of 1977, which

¹ *How are war criminals prosecuted under humanitarian law?* Extract from ICRC publication "International humanitarian law: answers to your questions" , available at www.icrc.org/web/eng/siteeng0.nsf/iwpList2/Humanitarian_law:IHL_in_brief. (Hereinafter, www.icrc.org-IHL-in-brief).

² Hague Conventions of 18 October 1907, Respecting the Laws and Customs of War on Land and the Regulations annexed thereto.

³ These are the four Geneva Conventions of 12 August 1949, namely: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949; Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949.

included in grave breaches certain medical experimentation; making civilians and non-defended localities the object or inevitable victims of attack; the perfidious use of the Red Cross or Red Crescent emblem etc.¹

However, it is not necessary that all grave breaches, which are specifically mentioned in GC's and AP I may constitute war crimes.² For instance, if the commander of a POW camp fails to keep the record of all disciplinary punishments (a violation of Article 96 of the Geneva Convention), he is not committing a war crime (although he is breaching GC).³

Some other acts which are not prohibited under the Geneva Conventions or Additional Protocol I may nonetheless be considered as war crimes under the term "violations of the laws and customs of war" (the same phrase as in the Nuremberg Charter), i.e. under customary International law.⁴ It includes violations of other treaties such as violation of the 1907 Hague Convention or violation of other rules of customary International law regulating warfare.⁵

The Statute of the International Criminal Court (ICC) has provided a list of war crimes in which it has included not only grave breaches of the Geneva Conventions, but also some twenty-six violations of the laws and customs of war, most of which have been considered by States as crimes since at least World War II.⁶

¹ Steven R. Ratner, War Crimes, Categories of, Gutman & Rieff, 1999, 374, also available at <http://www.crimesofwar.org/thebook/war-crimes-categories.htm>. (Hereinafter, www.crimesofwarbook.org).

² Dommann, 2003, 128.

³ Steven R. Ratner, War Crimes, Categories of, Gutman & Rieff, 1999, 374, also available at www.crimesofwarbook.org.

⁴ Ibid.

⁵ Toni Pfanner, *The establishment of a permanent international criminal court: ICRC expectations of the Rome Diplomatic Conference*, ICRC Review No. 322, available at <http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList320/33B672B257BF71BFC1256B66005B8AB6>. (Hereinafter, Pfanner at www.icrc.org/322).

⁶ Steven R. Ratner, War Crimes, Categories of, Gutman & Rieff, 1999, 374, also available at www.crimesofwarbook.org.

Accordingly, war crimes cover both ‘grave breaches’ and ‘other serious violations of the laws and customs of war’ both in the context of international and non-international armed conflicts.¹

As far as civil wars are concerned, states consider these conflicts as a matter of their domestic jurisdiction, international law has few rules governing the internal conflict and consequently there is a very short list of war crime. Additional Protocol II of 1977, which governs the conduct of internal conflicts, but unfortunately it contains no criminal liability provisions and as compared to international conflicts the reach of customary law over war crimes committed in internal conflicts is less clear.²

However, recent developments (in the field of IHL governing internal conflicts) have shown that war criminals of internal armed conflict may also be prosecuted, through special statutes and under customary International law, without having to establish any linkage to an international armed conflict. For instance, the statute of ICTR explicitly provides the court jurisdiction over serious violations of Common Article 3 and Additional Protocol II; the Yugoslav tribunal has also interpreted its Statute to allow for jurisdiction over serious violations of Common Article 3 as well as over other serious violations of the laws and customs of war in internal conflicts.³ ICTY in the *Tadic* case stated:

What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.⁴

Since then, it is widely accepted that violation of treaty law as well as of

¹ Dormann, 2003, 128.

² Steven R. Ratner, War Crimes, Categories of, Gutman & Rieff, 1999, 374, also available at www.crimesofwarbook.org.

³ Steven R. Ratner, International vs. Internal Armed Conflict, Gutman & Rieff, 1999, 206-207, also available at <http://www.crimesofwar.org/thebook/intl-vs-internal.html>.

⁴ *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-AR-72, Decision on the defence motion for interlocutory appeal on jurisdiction (2 October 1995), p. 64, para. 119, as quoted in Pfanner at www.icrc.org/322.

customary laws regulating war in internal armed conflicts should also be considered as war crimes. The evidence of such a new trend can also be found in art. 8 of the Rome Statute, which defined war crimes as serious violations of rules regulating internal armed conflict (i.e. violation of Common Art. 3) as well as violation of other rules (i.e. violation of laws and customs of war), which regulate internal conflicts.¹

Under the ICC Statute, war crimes are committed against protected persons and property.² Protected persons are those persons who are placed *hors de combat* due to sickness, wounds, detention or any other cause or are civilians and are incapable of defending themselves. According to Art. 41, a person is a *hors de combat* either if he is in the power of an adverse Party; or if he wishes to surrender; or if he is incapacitated by wounds or sickness and is therefore incapable of defending himself.³ Under the GC IV protected civilians are divided into three categories: aliens in the territory of a party to the conflict, persons in occupied territory, and internees.⁴

As far as 'protected property' is concerned, it has not been defined in the GC; it only refers to the property which cannot be destroyed or misappropriated. It includes medical units, medical transports, hospital ships, worship places etc.⁵

War crimes may be committed by civilians as well as by military personnel. Regarding the perpetrator of the crime ICTY in the *Delalic* case stated:

It is not necessary that the perpetrator be part of the armed forces, or be entitled to combatant status in terms of the Geneva Conventions, to be capable of committing war

¹ Antonio Cassese, *International Law*, (Oxford University Press, 2001), 246. (Hereinafter, Cassese, 2001).

² Art. 8 (2) (a) of the Statute of ICC.

³ Art. 41 AP I of 1977.

⁴ Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

⁵ Arts. 19, 33-35 of GC I, Arts. 22, 24, 25, and 27 of GC II, Arts. 19, 21, 22, 33, 53 & 57 of GC IV.

crimes during international armed conflict.¹

During post World War II trials, in addition to military personnel, other category of persons including members of Government, party officials and administrators, industrialists, businessmen, judges, prosecutors, doctors and nurses, executioners etc were found guilty of war crimes.²

In order for an act to become a war crime, it is necessary that it must be committed during an armed conflict.³ However, it is not necessary that every crime committed during an armed conflict must constitute a war crime; there must be a sufficient link between a crime and a conflict.⁴

Another important criterion is that these crimes must not necessarily be based on a state policy, or committed in furtherance of a policy associated with the conduct of war. ICTY in *Delalic case* provided that:

It is not necessary that a crime be part of a policy or of a practice officially endorsed or tolerated by one of the parties to the conflict, or that the act be in actual furtherance of a policy associated with the conduct of war in actual interest of a party to the conflict.⁵

¹ ICTY, Prosecution's Response to Defendant's Motion, *The Prosecutor v. Zejnil Delalic and Others*, IT-96-21, para. 3.25, as quoted in Dorman, 2003, 34-35.

² Dorman, 2003, 35-37.

³ Rottensteiner at www.icrc.org/835.

⁴ Kriangsak Kittichaisaree, *International Criminal Law*, (Oxford University Press, 2001), 131. (Hereinafter, Kittichaisaree, 2001).

⁵ ICTY, Judgement, *The Prosecutor v. Zejnic Delalic and others*, IT-96-21-T, para. 195, as quoted in Dorman, 20003, 388.

Section III

Doctrine of Command/Superior Responsibility

A. Doctrine of Command/Superior Responsibility

The doctrine of superior responsibility lays down the criminal liability of those persons who, being in positions of command, whether civilian or military have failed either to prevent or punish the crimes of their subordinates.¹

Under customary International law, commanders are criminally liable for war crimes committed by their subordinate even though they took no active part in the commission of the offense. During a war, a commander is not only responsible to prevent and repress war crimes but he is also under an obligation to take appropriate measures including, *inter alia*, punishing those responsible for those crimes.²

This duty is well recognized both in customary law as well as in treaty law and goes back to the Leipzig trial during World War I.³ At the end of World War I, the Allies established a “Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties,” to investigate and make recommendations for war

¹ Ilias Bantekas, *The interests of States versus the doctrine of superior responsibility*, ICRC Review No. 838, available at <http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList320/2ED170C736 637 D92C1 256B6 6 005E8E83>.

(Hereinafter, Bantekas, at www.icrc.org/838).

² Michael L. Smidt, *Medina, and Beyond: Command Responsibility In Contemporary Military Operations*, Military Law Review, vol. 164, available at http://www.au.af.mil/au_awc_awcgate/mil_law_rev/volume164_smidt.pdf.

(Hereinafter, Smidt at www.au.af.mil).

³ Bantekas, at www.icrc.org/838.

crimes.¹ The Commission concluded:

All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of Staff, who have been guilty of offenses against the laws and customs of war or the laws of humanity, are liable to criminal prosecution.²

Under the influence of the report of the commission, *The Treaty of Versailles* provided for the trial of Kaiser Wilhelm II for “offenses against international morality and the sacredness of treaties,” including other German officials who were accused of having committed “violations of the laws and customs of war.”³ However, no one was tried under the doctrine of ‘command responsibility.’⁴

On 8 August 1945, the Allies signed an agreement to establish an International Military Tribunal (IMT) at Nuremberg to try war criminals. The agreement, known as the ‘London Charter’, expressly provided for the prosecution of senior military and civilian officers who were:

Leaders, organizers, instigators, and accomplices participating in the formation or execution of a common plan or conspiring to commit any of the foregoing crimes are responsible for all acts performed by any persons in the execution of such plans.”⁵

In 1949 the third Geneva Convention reiterated the principle of holding civilian as well as military leaders responsible for war crimes committed by their subordinates, which was also adopted by AP I of 1977 in Articles 86 and 87.⁶ The same view was

¹ Donald Wells, *War Crimes and the Laws of War*, (University Press of America, 1984), 69. (Hereinafter, Wells, 1984).

² Ibid.,

³ *Treaty of Versailles*, June 28, 1919, Arts. 227 & 228.

⁴ Smidti at www.au.af.mil.

⁵ Article 6 the Charter of International Military Tribunal.

⁶ April Yates, *Imputing the Intent of a Superior to a subordinate*, available at <http://www.nesl.edu/center/wcmemos/2000/yates.pdf>. (Hereinafter, Yates at www.nesl.edu).

adopted by the statutes of ICTY,¹ ICTR,² and by the Statute of ICC.³

B. Types of Command Responsibility:

There are two types of Command Responsibility; direct and imputed:⁴

1. Direct Responsibility:

Direct responsibility occurs when ‘a superior acts positively by ordering, instigating, or planning criminal acts carried out by his subordinates’.⁵

2. Imputed Responsibility:

Imputed responsibility occurs when a superior fails to prevent the crimes of his subordinates; he failed to take necessary measures to control their crimes and to carry out necessary investigation and prosecution of the perpetrator of those crimes.⁶

Thus, in order to establish superior responsibility, three elements must be proved: Firstly, there must be a superior-subordinate relationship. Secondly, the superior knew or had reason to know that the subordinate had committed or was about to commit a crime. Finally, he failed to take necessary measures to prevent the commission of the crime or punish the perpetrator thereof.⁷

¹ Art. 7 (3).

² Art. 6 (3).

³ Art. 28.

⁴ Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, (London: Martinus Nijhoff Publications, 1992), 368.

(Herinafter, Bassiouni, 1992).

⁵ Kittichaisaree, 2001, 251.

⁶ Bassiouni, 1992, 368.

⁷ Kittichaisaree, 2001, 252.

As discussed earlier, the principle of command responsibility is not only limited to military commanders, but it also covers political leaders and other civilian superiors who exercise the requisite authority.¹

At the end of World War II the criminal proceedings instituted in Tokyo made criminally liable both the Japanese Prime Minister Tojo and Foreign Minister Hirota for their failure to prevent and punish crimes committed by Japanese troops against prisoners of war, even though they had no direct contact with the perpetrators of such crimes. However, under the position of authority they were able to stop those crimes and punish the persons liable of committing those crimes. Moreover, those crimes were committed on such a large scale that they received the attention of the whole world, and it was undisputable that they received enough information regarding the commission of those crimes. Consequently, the position of authority they were holding and their indisputable knowledge of the crimes made them criminally liable. These findings were upheld in the in the case of former ex-Prime Minister Kambanda of Rwanda.²

As far as the question of extension of chain responsibility is concerned, Article 86 of Additional Protocol provides:

The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal disciplinary responsibility as the case may be if they knew, or had information which would have enabled them to conclude in the circumstances at the time that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.³

This rule applies and extends to any high officer in the chain of command ‘who knows or has reason to know that his subordinates are committing war crimes’ and

¹ Kittichaisaree, 2001, 251.

² Bantekas at www.icrc.org/838.

³ Art. 86, AP I of 1977.

he failed to take preventive measures to stop them from committing such crimes.¹

However, chain of responsibility can not be extended practically as far as possible, that is, to commanders in chief, but is generally confined to those officers who exercise supervisory capacity over their subordinates.²

¹ Nomi Bar-Yaacov, Command Responsibility, Gutman & Rieff, 1999, 99, also available at <http://www.crimesofwar.org/thebook/command-respon.html>.

² Ibid.,

Section IV

DEFENCE OF SUPERIOR ORDER

DEFENCE OF SUPERIOR ORDER

The legal debate on superior orders (whether it provides any form of defence under international law or not) has been controversial since the trial of *Peter von Hagenbach* in the fifteenth century,¹ and has produced three main 'schools of thought':

1. The *Respondeat Superior* Doctrine;
2. The Conditional Liability or Limited Responsibility Doctrine that, which, as will be shown later, exists in different versions and;
3. The Absolute Liability or Full Responsibility Doctrine:²

1. The *Respondeat Superior* Doctrine:

According to the *respondeat superior* theory, propounded most strongly by Oppenheim, the subordinate was exempted from criminal responsibility if he committed a war crime. As the subordinate was regarded an instrument in the hands of the superior, it was

¹ Charles Garraway, *Superior orders and the International Criminal Court: Justice delayed or justice denied*, available at <http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList320/4F89CC080CE0E792C1256B66005DD767>. (Hereinafter, Garraway at www.icrc.org).

² Elies van Sliedregt, *Defences in International Criminal Law*, Paper to be presented at the conference Convergence of Criminal Justice Systems: Building Bridges Bridging the Gap, The International Society for the Reform of Criminal Law. 17th International Conference, 25 August 2003, available at <http://www.isrcl.org/Papers/Sliedregt.pdf>. (Hereinafter, Sliedregt at www.isrcl.org).

the superior who could be held accountable for the commission of the crime. The subordinate could thus successfully invoke a defence of superior orders.¹ In 1914 both the British as well as American military law considered it as a complete defence.²

2. The Conditional Liability or Limited Responsibility Doctrine:

According to this doctrine, the subordinate may be held responsible for war crimes, together with his superior, under certain circumstances; namely 'when he knew or should have known that the order was illegal, or when the illegality of the order was manifest.' At national level, this approach was for the first time adopted in the decision of the *Austro-Hungarian Military Court* in 1915 and was subsequently reaffirmed at Leipzig Court in the two well-known cases of *Dover Castle* and *Llandovery Castle*.³ Since that time, many states adopted this approach.⁴

3. The Absolute Liability or Full Responsibility Doctrine:

The Statute of the Nuremberg Tribunal established the absolute liability doctrine, according to which obedience to superior order was not a defence and could only be considered in mitigation of penalty. It provided that:

The fact that the defendant acted pursuant to order of his Government or a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.⁵

During the Second World War the US and UK also changed their war crimes

¹ Sliedregt at www.isrcl.org.

² Yates at www.nesl.edu.

³ Paola Gaeta, *The Defence of Superior Orders: The Statute of The ICC versus Customary International Law*, European Journal of International Law, vol. 10, 1999, available at www.ejil.org/journal/Vol10/No1/100172.pdf.

(Hereinafter, Gaeta at www.ejil.org).

⁴ *Ibid.*

⁵ Art. 8 of the Charter of IMT.

codes and reduced the scope of defense of superior orders.¹ This doctrine was followed in the charter of Tokyo Tribunal² and was upheld by the Statutes of the ICTY and ICTR.³

The rationale behind this principle is that a soldier is a ‘reasoning agent’, and is therefore capable of deciding between wrong and right. He is under no obligation to do an illegal act. But if he elects to do so he takes the risk of being punished along with his superior.⁴

Since 1945, the international community tried to harmonize both doctrines in order to make it in accordance with the ‘realities of military life.’⁵ Attempts were made at the international level to codify ‘conditional liability approach’ in AP I.⁶

At the drafting stage of the Statute of ICC, there was disagreement among the delegates: one was advocating the absolute liability approach (in particular Germany and the United Kingdom) and another group supporting the conditional/limited liability approach (the United States), and ultimately after a prolonged discussion, they reached at a compromise on one rule.⁷

The absolute liability approach was adopted for genocide and crimes against humanity, while the other approach was chosen with regard to war crimes and possibly the crime of aggression.⁸ Thus the twin approaches appeared simultaneously ‘by

¹ Yates at www.nesl.edu

² Art. 6 of the charter of IMT for Far East (IMTFE).

³ Art. 7 (4) of ICTY, Art. 6 (4) of ICTR.

⁴ Gaeta at www.ejil.org/journal.

⁵ Garraway at www.icrc.org.

⁶ *Ibid.*,

⁷ Sliedregt at www.isrcl.org.

⁸ Art. 33 of the statute reads as follows:

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of the Government or the superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful. 2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

attributing a different scope or field of application of each of them.'

The purpose of reaching at a compromise was to safeguard the interest of the servicemen on the battlefield to obey orders the illegality of which they are not in a position to appraise, as was asserted by US delegation. The same concern did not arise with regard to genocide and crimes against humanity because such crimes are committed systematically and on a large scale and always involve higher political and military authorities.¹

Moreover, laws and customs of war are not always clear and it cannot be expected that he will always know each and every case, and he has to rely on his superiors. Although, ICC has provided a list of war crimes but still it has left the door open for interpretation of these crime.²

¹ Gaeta at www.ejil.org.

² Sliedregt at www.isrcl.org.

Section V

Military Necessity

Military necessity is a legal concept used in international humanitarian law (IHL) which justifies attacks on legitimate military targets which may cause 'adverse, even terrible, consequences for civilians and civilian objects'.¹

According to the doctrine of military necessity, winning battle is a legitimate target and belligerents are allowed (in order to achieve that goal) even to set aside the other requirements of IHL.² This principle was for the first time stated in General Orders No. 100, a codification of the law of war drafted by Francis Lieber and issued by President Lincoln in 1863,³ who wrote that:

Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.⁴

The Hague Regulations 1907, for the first time codified the restriction of 'imperative military necessity' and limited the destruction or seizure of the enemy's property to that which was demanded by the necessities of war which was also adopted by the 1954 Convention.⁵

¹ Françoise Hampson, Military Necessity, Gutman & Rieff, 1999, 251, also available at <http://www.crimesofwar.org/thebook/military-necessity.html>.

(Hereinafter, Hampson at www.crimesofwar.org).

² Ibid.

³ Jennifer Van Bergen & Charles B., *Gittings Truth out Editorial, Bush War: Military Necessity or War Crimes?* available at http://www.truthout.org/docs_03/072603D.shtml.

⁴ Ibid.

⁵ Jean-Marie Henckaerts, *New rules for the protection of cultural property in armed conflict*, ICRC Review No. 835, available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JQ37>. (Hereinafter, Henckaerts at www.icrc.org/835).

Further progress is made by the Additional Protocols which provides a balance between military necessity and humanitarian need;¹ it prohibits any attack which cause ‘incidental loss of civilian life, injury to civilians, or damage to civilian objects that is excessive in relation to the ‘anticipated concrete and direct military advantage of the attack.’ Thus, it creates an obligation on military commanders to consider consequences of an attack as compared to estimated advantage.² According to some writers; there are three constraints on the free exercise of military necessity:

- First; any attack must be intended and tend towards the military defeat of the enemy; attacks not so intended cannot be justified by military necessity because they would have no military purpose.
- Second; even an attack aimed at the military weakening of the enemy must not cause harm to civilians or civilian objects that is excessive in relation to the concrete and direct military advantage anticipated.
- Third; military necessity cannot justify violation of the other rules of IHL.³

¹ Henckaerts at www.icrc.org/835.

² Horst Fischer Proportionality, Principle of, Gutman & Rieff, 1999. also available at <http://www.crimesofwar.org/thebook/military-necessity.html>.

³ Françoise Hampson, Military Necessity, Gutman & Rieff, 1999, 251, also available at www.crimesofwar.org.

Section VI

Reprisal

Reprisal means to seize by force the property or subjects belonging to the enemy, in retaliation for loss or injury suffered from that state or its citizens.¹

Reprisal is a legal term in international humanitarian law (IHL), which describes a particular kind of illegal act.² It is a form of retaliation which is normally illegal, but which becomes lawful by a prior illegal act committed by the state against which it is directed,³ in order to induce it to terminate its unlawful conduct or to 'punish' it for the purpose of deterring any further breach.⁴

Over the course of time, customary law came to recognize, certain requirements for a lawful reprisal, which can be found in the *Naulila* case. In that case the Arbitral Tribunal provided the following three conditions to be met for a lawful reprisal:

Firstly;	there must be a previous violation of International Law;
Secondly;	the reprisal must be preceded by an unsuccessful demand for redress;
Thirdly;	it must be proportionate to the injury suffered. ⁵

¹ *The Oxford English Dictionary*, vol. 2, (Oxford: Clarendon Press, 1970), s.v "reprinted", 485.

² Kenneth Anderson, *Reprisal Killings*, Gutman & Rieff, 310, also available at <http://www.crimesofwar.org/the-book/reprisal.html>.

³ *Akehurst's Modern Introduction to International Law*, ed. Peter Malanczuk (London & New York: Routledge, 1997), 351. (Hereinafter, Malanczuk, 1997).

⁴ Antonio Cassese, *On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, European Journal Of International Law, vol. 9, No 1, available at <http://www.ejil.org/journal/Vol9/No1/art1.pdf>.

⁵ Anthony Clark Arend & Robert J. Beck, *International Law and the use of force: Beyond the U.N Charter paradigm*, (London: Routledge, 1993), 17.

This method of enforcement has been criticized on the ground that¹ it leads to abuse; each belligerent by using the alleged breaches of its adversary as an excuse tries to escape from its obligations under IHL restricting its freedom. Furthermore, all reprisals lead to Counter-reprisals, both sides become involved in a process of measures and counter-measures and it opens the way to unrestrained violence.

Lastly; reprisals against the protected persons are against the aims of International Humanitarian Law (IHL), as their effect is to penalize people who themselves are the victims of war, whom the IHL protects.²

Due to these features there is a growing tendency of banning the reprisal and as a result under the four GCs and AP I reprisals against the protected persons and property are prohibited.³

As far as AP II is concerned, it is silent on the matter. Some writers are of the opinion that it cannot in any case be construed as allowing retaliatory actions in internal conflicts; the principles of humanity must be applied in internal conflicts as well.⁴

¹ Antonio at www.ejil.org.

² Francois Bugnion, *International Committee of Red Cross and the Protection of war victims*, (Macmillan, 2003), 316.

³ Art. 46 of GC I, Art. 47 of GC II, Art. 13 of GC III, Art. 33 of GC IV, Arts. 20, 52 (1), 54 (4) of AP I.

⁴ Frits Kalshoven, *Reprisal, Gutman & Rieff*, 309, also available at <http://www.crimesofwar.org/thebook/reprisal.html>.

Section VII

Crimes against Humanity

A. Brief Historical Overview:

The term crime against humanity for the first time originated in the preamble of Hague Convention of 1907. After World War I, the Allies found that in addition to the war crimes committed by Germans, Turkish officials by murdering Armenians committed “crimes against the laws of humanity”.¹

The most important development regarding the concept of crimes against humanity, took place since World War II.² The charter of International Military Tribunal extended the idea of war crimes to include acts not only prohibited by the International Laws of war, but also the acts, in violation of the universal human rights.³ The term was codified in 1945, the London Conference, as a basis of prosecution of Nazi war criminals, which defined it as covering the following acts:

Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the court where perpetrated.⁴

¹ *The Human Rights Encyclopedia*, ed. James R. Lewis and Carl Skutsch vol. 2, (New York: Sharpe Reference, 2000), s.v. crimes against humanity, 665.

² Marie-Claude Roberge, *Jurisdiction of the ad hoc Tribunals for the former Yugoslavia and Rwanda over crimes against humanity and genocide*, ICRC Review No. 321, available at <http://www.icrc.org/web/eng/siteeengO.nsf/htmll/section-review-1997-321>. (Hereinafter, Roberge at www.icrc.org/321).

³ James T. Johnson, *Morality and Contemporary Warfare*, available at <http://religion.rutgers.edu/courses/347/readings/war-crimes.html>.

⁴ Art. 6 (c) of the Charter of IMT.

The term was meant to cover atrocities committed by the Germans within Germany against its own citizens, in distinction with war crimes, which were committed against non-German combatants or civilians in the occupied territories.¹

This concept was criticized on the ground that the trial of accused violators of such a new concept represented *ex post facto*,² or retroactive punishment.³ At the Nuremberg, the UK did not consider crimes against humanity proper basis for prosecution (as it did not consider crimes against peace to be the proper basis), it only considered war crimes to be the proper charges.⁴ This concept also attracted criticism for being politically defined. For example, Nazi atrocities were recognized as crimes against humanity, while American and Soviet persecutions were not.⁵ Wells puts it thus:

Why was it genocide to kill the 135,000 at the camp at Maidanek, but not to slay the 250,000 at Hiroshima and Nagasaki?⁶

Unlike grave breaches of the 1949 Geneva Conventions or genocide, crimes against humanity have not been defined in a treaty, and its definition has developed inconsistently.⁷

There are eleven texts defining crimes against humanity, but they all differ concerning the definition of the crime and its legal elements. The list of specific crimes contained within the meaning of crimes against humanity has been expanded by ICTY and ICTR, which includes the crimes of rape and torture, while ICC statute expanded the

¹ William A. Schabas, *The 'Odious Scourge': Evolving Interpretations of the Crime of Genocide*, available at http://www.nuigalway.ie/human_rights/Docs/genocide.ankara.1.06.doc.

(Hereinafter, Schabas at www.nuigalway.ie).

² A Law passed after the occurrence of a fact.

³ Gerhard von Glahn, *Law Among Nations: An Introduction to Public International Law*, (New York: Macmillan, 1981), 771-772.

⁴ Wells, 1984, 76.

⁵ *Crimes against humanity*, available at http://en.wikipedia.org/wiki/Crime-against_humanity.

⁶ Wells, 1984, 85.

⁷ Roberge at www.icrc.org/321.

crimes of Apartheid and forced disappearance of persons.¹ However, the common thing between these definitions is that:

- 1- they refer to specific acts of violence against persons irrespective of the fact whether the person is a national or non-national and irrespective of whether these acts are committed in times of war or in times of peace, and
- 2- these acts must be the product of persecution against an identifiable group of persons irrespective of the make-up of that group or the purpose of persecution. Such a policy can also be manifested by the “widespread or systematic” conduct of the perpetrators, which results in the commission of the specific crimes contained in the definition.²

B. Connection between War Crimes and Crimes against Humanity:

Although, convictions were pronounced by the Nuremberg Tribunal on charges of crimes against humanity, this concept remained vague often overlapping with the war crimes.³ The judgment of International Military Tribunal restricted the scope of crimes against humanity to war crimes or crimes against peace.⁴ Thus it became a category, accessory to war crimes or crimes against peace.⁵

Although International Law Commission (ILC), by following IMT adopted an artificial link between them, but no such link appeared in the subsequent enactments. Crimes against humanity, are now recognized as self-contained category, without the need of any formal link with war crimes.⁶

¹ Cherif Bassiouni, Crimes against humanity, Gutman & Rieff, 1999,108, also available at [http://www.crimesofwar.org/the book/crime.against.humanity.htm](http://www.crimesofwar.org/the%20book/crime.against.humanity.htm).

(hereinafter, Bassiouni, [www.crimesofwar book.org](http://www.crimesofwar.org/the%20book/crime.against.humanity.htm)).

² Ibid.

³ Roberge at www.icrc.org/321.

⁴ S.K Agrawala, T.S Rama Rao and J.N Saxena, *New Horizons of International law and developing countries*, (India: N. M. Tripathi Private Ltd, 1985), 93.

⁵ Ibid., 94

⁶ *Oppenheim's International Law*, ed. Robert Jennings & Arthur Watts (India: Pearson Education Ltd, 2003), 996.

(Hereinafter, Oppenheim, 2003).

Now it is widely accepted that these acts have to be committed systematically and on large scale against any civilian population, and must be based on a policy by a State, an organization or a group.¹

Crimes against humanity are considered as a part of *jus-cogens*, which can't be derogated from. They give rise to universal jurisdiction; all states can prosecute the perpetrator irrespective of the fact wherever the crime has been committed.²

Like war crimes, crimes against humanity make individual criminal responsibility without admitting the defence of superior order. No statute of limitation applies to crimes against humanity. Since the last ten decades there is a growing tendency that those responsible for crimes against humanity and other serious violations of human rights should not be granted amnesty.³ Moreover, no state can make legislation in violation of the elementary human rights.⁴

According to Roberge, although war crimes and crimes against humanity are now considered as two autonomous categories, their link can't be denied in modern conflicts. In his own words:

If war crimes and crimes against humanity are now two autonomous, self-sustained categories, it cannot be denied that they are often closely linked in modern conflicts, especially in connection with crimes against civilian population. Murder, deportation and other acts in the long lists that appear in recent instruments are clear examples of connection and overlapping. The four Geneva Conventions and Protocol I codify a significant range of acts and situations which demonstrate that violations can be classified both as war crimes and crimes against humanity.⁵

¹ Henckaerts at www.icrc.org/835.

² Bassiouni, Crimes against humanity, Gutman & Rieff, 1999, 108, also available at www.crimesofwarbook.com.

³ *Legal Standards*, available at <http://www.hrw.org/reports/2002/isrl-pa/ISRAELPA1002-04.htm>.

⁴ Oppenheim, 2003, 998.

⁵ Roberge at www.icrc.org/321.

C. Difference between War Crimes and Crimes against Humanity:

The difference between war crimes and crimes against humanity is as follows:

- 1- War crimes are committed only in times of war while crimes against humanity are committed in times of peace and war alike.
- 2- War crimes are committed against nationals of another state while crimes against humanity are committed against the persons having the same nationality as that of the perpetrator.¹
- 3- It is necessary that crimes against humanity must be committed systematically and on a large scale. No such requirement is necessary for war crimes, a single isolated act may be considered as a war crime.² For example, a single murder of a POW or a civilian may be considered as war crime but it cannot be termed as crimes against humanity.³

¹ Bassiouni, 1992, 179.

² Sarvesh Singh & Saurabh Mishra, *From Rome to the Hague-An Appraisal of The International Criminal Law*, available at <http://www.ebc-india.com/lawyer/articles/812.htm>.

³ Macnaab Associates, P.C., International Criminal Defence Group, *When Interpol comes calling*, available at <http://www.internationalcrimes.com/generalprinciples.htm>.

CONCLUSION

1- War crimes are the violations of the laws of war, whether committed by civilians or military personnel both in International as well as Internal armed conflicts.

2- Under Customary International law it is the duty of all superiors, whether civilian or a military to ensure the prevention and punishment of breaches of international humanitarian law by their subordinates. Where they fail to do so, they bear individual responsibility for the acts of their subordinates, even though they took no active part in the commission of crime.

3- Under customary International law the defence of obedience to superior order does not constitute a valid defense, unless he did not know that the order was illegal, and could not reasonably expected to know that the act ordered was unlawful.

4- The doctrine of Military Necessity does not justify indiscriminate attacks directed against civilian population.

5- Reprisals are insufficient mean of redress, and there is a growing tendency of banning the reprisals; IHL has prohibited reprisals against protected persons and property in international armed conflicts. As far as Internal conflicts are concerned IHL is silent on the matter.

6- Crimes against humanity refers to systematic acts of violence committed against any civilian population. After World War II, it appeared as a distinct category from war crimes, however in modern conflicts their link can't be denied and crimes committed against civilian population during an armed conflict can be termed both as war crimes and crimes against humanity.

Chapter 2

Prosecution for War Crimes

Chapter 2

Prosecution for War Crimes

Historically speaking, the trial of Peter von Hagenbach, in the year 1474 seems to have been the earliest trial for war crimes. Charles, Duke of Burgundy appointed Peter von Hagenbach as a governor of Breisach. He committed atrocious acts like murder, rape, illegal taxation and confiscation of private property against the people of Breisach in order to submit them to the rule of Duke, Charles of Burgundy. He also committed criminal acts against the people of neighbouring territories, including Swiss merchants on their way to the Frankfurt fair.¹

After the deliberation of the town by a large coalition (Austria, France, Berne and the towns and knights of the Upper Rhine) he was prosecuted before a tribunal of twenty-eight judges belonging from allied coalition and states and was convicted with murder, rape perjury, and pother crimes against the ‘laws of God and man’ and was given death sentence.²

A. Prosecution for war crimes after World War I (1919):

¹ Edoardo Greppi, *The evolution of individual criminal responsibility under international law*, International Review of the Red Cross No. 835 available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JQ2X>. (Hereinafter, Greppi at www.icrc.org/835).

² Kittichaisaree, 2001, 14.

1-Brief Historical overview:

At the end of World War I, the Allies established a “Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties,” to investigate and make recommendations for war crimes. The Commission submitted its report to the Preliminary Peace Conference in Paris in which it made recommendation that a high tribunal be established and every person regardless of rank or authority should be prosecuted. It further provided that the following acts should be considered as crimes:

- (a) Acts which provoked the world war and accompanied its inception;
- (b) Violations of the laws and customs of war and the laws of humanity.¹

2-Unsuccessful attempts to prosecute war criminals after World War I:

Under the influence of the report of the commission the *Treaty of Versailles* provided for the prosecution of Kaiser and other high-ranking German officials including Kaiser before the court, but unfortunately no prosecution took place. On February 3, 1920 the allied submitted a list of 896 alleged war criminals to Germany but Germany refused to hand over them to the allied powers. Ultimately, a compromise was reached among the allied powers and the German government and it was agreed upon that they would be tried before German Supreme Court. The Allied powers resubmitted a shorter list of 45 names and the German Supreme Court agreed to prosecute 12 out of whom only 3 were prosecuted.²

Kaiser was given asylum in Netherlands which refused to extradite him on the ground that his act of committing ‘supreme offence against international morality and the sanctity of treaties’ were political in nature and not punishable according to Dutch law.³

¹ Wells, 1984, 69.

² Ibid., 70.

³ Kittichaisaree, 2001, 15.

B. Prosecution for war crimes after World War II (1945):

1- Brief Historical Overview:

In January 1943 some of the occupied nations issued St. James Declaration in which it was proposed that those guilty of committing war crimes should be punished.¹ On October 30, 1943 Moscow Declaration was issued by the Allies in which it was agreed upon that the Germans would be tried in those nations where their crimes were committed, while those whose crimes had not been committed in a specific location, they would be tried by a decision to be published later.²

2- Establishment of International Military Tribunal (IMT):

On August 8, 1945 an agreement was reached between the US, Great Britain and Northern Ireland, France and USSR for the establishment of an International Military Tribunal (IMT) to prosecute those major Nazi war criminals whose crimes had not been committed in a specific location. While those whose crimes had been committed in a specific country were to be tried under Control Council Law No 10.³

3- Analysis of the Tribunal:

(a) Jurisdiction of the Tribunal:

The tribunal was given jurisdiction over three categories of crimes, namely crimes against peace, war crimes and crimes against humanity:

¹ Wells, 1984, 71.

² Ibid., 71-72.

³ Ibid., 72.

(i) Crimes against Peace:

The crimes against peace enumerated in the charter were defined as planning, preparation initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances or participation in a common plan or conspiracy for the accomplishment of any of the afore-mentioned acts.¹

Both the Nuremberg and the Tokyo tribunals provided that “initiation of a war of aggression constitutes supreme international crime”.² It was the most debatable aspect of the Nuremberg and Tokyo Tribunals.³ At the Nuremberg, UK did not consider crime against peace proper basis for the prosecution. It only considered war crimes to be the proper charges.⁴ The lawyers for the German defendants pointed this out as:

No sovereign power had made aggressive war a crime at the time that the alleged criminal acts were committed, that as statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.

On the other hand, the prosecution insisted that the crime did exist and that the *Pact of Paris of 1928* had outlawed war altogether, which was binding on sixty-three nations which had signed the Pact.⁵ The findings of the majority on aggressive as a war crime was strongly criticised in the dissenting opinions of Judges Pal and Rölling.⁶

All the Japanese defendants were found guilty of waging aggressive war, while eight Germans were found so guilty.⁷ However, the fact is that the tribunals of

¹ Art. 6 (a) of the Charter of IMT.

² George Schwarzenberger, *International Law as applied by International Courts and Tribunals: The Law of Armed Conflict*, vol. 1, (London: Steven & Sons Ltd, 1968), 485. (Hereinafter, Schwarzenberger, 1968).

³ Glahn, 1981, 772.

⁴ Wells, 1984, 76.

⁵ Ibid., 82.

⁶ Schwarzenberger, 1968, 486.

⁷ Wells, 1984, 82.

Nuremberg and Tokyo laid down *ex post facto law*¹ which was “not known before Nuremberg either in continental legal systems or to international law”.²

(ii) War Crimes:

War crimes were defined as violations of the traditional laws and customs of war and the emphasis was put on acts of murder, ill-treatment of civilian population and murder or ill-treatment of prisoners of war, unnecessary and wanton destruction of cities, towns or villages etc.³

As for war crimes, the Tribunals applied, *inter alia*, the norms of the 1929 Geneva Conventions relating to the protection of victims of armed conflict and the 1907 Hague Convention Respecting the Laws and Customs of War on Land although these instruments did not provide for criminal sanction of such crimes.⁴

(iii) Crimes against Humanity:

As far as crimes against humanity are concerned, again the emphasis was put on inhumane acts committed against civilian population like murder, extermination, enslavement, deportation or persecution on political, racial or religious grounds.⁵ The defence counsel once again asserted that IMT by introducing this category of crime has applied *ex post facto law*; in other words it applied international law retroactively.⁶

However, the Nuremberg Tribunal did not treat it as a new concept; it did not

¹ Schwarzenberger, 1968, 494.

² Wells, 1984, 82.

³ Art. 6 (b) of the Charter of IMT.

⁴ Kittichaisaree, 2001, 18-19.

⁵ Art. 6 (c) of the Charter of IMT.

⁶ Cassese, 2001, 249.

question the legality of the inclusion of crimes against humanity in the Charter of IMT by providing that since the beginning of 1939, war crimes were committed on a large scale which were also crimes against humanity. It further ruled that it was:

The expression of international law existing at the time of its creation; and to the extent [was] itself a contribution to international law.¹

The charter of IMT provided for individual criminal liability for crimes against peace, war crimes and crimes against humanity.² It further stated that obedience to superior orders was not a defence and could only be considered in mitigation of penalty.³

(b) Judgment of the Tribunal:

Twenty-four major Nazi war criminals were placed on trial, leaving prosecution of minor Nazi war criminals to the States where they committed their crimes. One defendant committed suicide before trial, and another was pronounced medically unfit to stand trial. The tribunal delivered its judgment on October 1, 1946 according to which three were acquitted; twelve were given death sentence, three sentenced to life imprisonment, and four sentenced to prison terms.⁴

On January 19, 1946 the Supreme Commander for the Allied powers in the Far East issued special proclamation for the establishment of IMT for Far East, for the trial of major Japanese war criminals who as individuals or as members of organizations were charged with offences against peace. The jurisdiction of the tribunal was similar to that of the Nuremberg, it delivered its judgment on 12 November 1948, which was also based upon the principles expressed at Nuremberg.⁵

¹ Kittichaisaree, 2001, 86-87.

² Art. 6 of the Charter of IMT.

³ Art. 8 of the Charter of IMT.

⁴ Kittichaisaree, 2001, 18.

⁵ *Manual of Public International Law*, ed. Max Sørensen (Macmillan & co. ltd: 1968), 516

4- Impact of Nuremberg on International Law:

There is disagreement among the jurists, whether Nuremberg has formed a precedent or not or whether Nuremberg principles have become part of International law or not?

Majority of jurists, in their authoritative works have accepted the charter and principles of Nuremberg as law.¹ Among these writers are Lauterpacht who says that: “the principles of Nuremberg will be considered as principles of International Law.”²

According to Cheriff Bassiouni:

The Post World War II prosecutions have been the principle examples and basic precedents for the international individual criminal accountability before internationally constituted tribunals.³

According to Michael Akehurst “... the judgment of the Nuremberg Tribunal constitutes a precedent”⁴ But all the jurists have not supported that view; many of them have showed doubt about the legality and validity of such trials. According to Later Senator Taft:

The Nuremberg Trials while clothed with forms of justice were in fact an instrument of government policy, determined months before at Tehran and Yalta.⁵

Kelsen criticized it as “captor show that was the creator of law.”⁶ The International Military Tribunal (IMT), as well as Tokyo Tribunals were also criticized as

¹ Brownlie, *International law and the use of force by states*, (Oxford: 1983), 194.
(Hereinafter, Brownlie, 1983).

² Oppenheim, 1952, 257.

³ Bassiouni, 1992, 193.

⁴ Malanczuk, 1997, 355.

⁵ R.C Hingorani, *Modern International Law*, (New Delhi: Oxford & 9BH, 1993), 340.
(Hereinafter, Hingorani, 1993).

⁶ Ibid.

being merely “victor’s tribunals”, instead of broader international participation, these were established by a few victorious states and were criticized as constituting little more than “victor’s justice”, as these were only concerned with the prosecution of losing side. None of the members belonging to the allied powers was prosecuted. This was particularly the case with the Tokyo Tribunal. Japanese leaders were prosecuted while America, which was guilty of dropping nuclear bombs at Hiroshima and Nagasaki was not.¹

Another criticism was the violation of *nullem crime sine lege*, a fundamental principle of international law, which means that there can be no punishment without a law. At the time of the establishment of these tribunals, there was no law providing for the criminalization of war crimes or the crime of waging war of aggression, while the whole concept of “crimes against humanity was largely unknown.²

Despite these criticisms, the Nuremberg as well as Tokyo tribunal have a fundamental importance in the development of international criminal law.³ Since Nuremberg it has been accepted that individuals committing war crimes, crimes against peace, or crimes against humanity should be held criminally responsible,⁴ and that obedience to superior orders, national laws or regulations does not constitute a defence.⁵

Nineteen other nations adhered to the Nuremberg Charter, and considered the principles to be a part of international law,⁶ and now these states are estopped⁷ from

¹ Hingorani, 1993, 340.

² Jacquie Cassette, *Towards justice in the wake of armed conflicts? The evolution of war crimes tribunals*, African Security Review, vol. 9, No. 5/6, 2000, available at www.iss.co.za/Pubs/ASR/9No5And6/Cassette.html.

(Hereinafter, Cassette at www.iss.co.za).

³ Ibid.

⁴ Benjamin B. Ferencz, *Compensating Victims of the Crimes of War*, The Virginia Journal of International Law, vol.12, No 3, 1972, available at www.benferencz.org/virginia.htm.

⁵ Starke, 1977, 590.

⁶ Brownlie, 1983, 192.

⁷ The Principle of Estoppel precludes a person from asserting something contrary to what is implied by a previous action or statement of that person or by a previous judicial determination.

denying it.¹ On 11 December 1946, the General Assembly adopted a resolution in which it affirmed the principles of the charter and the judgment of the Nuremberg International Tribunal.²

After Nuremberg and Tokyo tribunals, several treaties providing jurisdiction over war crimes and other international crimes were adopted. In 1948 Genocide convention was adopted.³ While in 1949, four Geneva Conventions were adopted, which categorized war crimes as 'grave breaches' and obliged the member states to prosecute persons alleged to have committed war crimes or to hand it over to another state for prosecution.⁴

In 1950, International Law Commission (ILC), prepared a Draft Code of Offences against the Peace and Security of Mankind, in which it embodied the principles of Nuremberg.⁵

In 1967 and 1968 further resolutions were adopted, which provided that statutory limitations could not be considered as a bar to prosecution of persons responsible of committing war crimes, and crimes against humanity;⁶ and that major war criminals should be denied political asylum.⁷

¹ Brownlie, 1983, 193.

² Cassese, 2001, 293.

³ For the text of the Convention See *Blackstone's International Law Documents*, ed. Malcolm D. Evans (Oxford University Press, 2003), 36-39. (Hereinafter, Evans, 2003).

⁴ "Each High Contracting Party shall be under an obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned..." (See Articles 49 I, 50 II, 129 III, 146 IV).

⁵ Starke, 1977, 589.

⁶ Art. I & IV of the Convention on the Non-Applicability of Statutory Limitations to war crimes and crimes against humanity 1968.

⁷ G.A. Resolution 3 "1" of 13 Feb, 1948 (Extradition and punishment of war criminals), Also See G.A Resolution 170 "ii" of 31 Oct. 1947 (Extradition of war criminals and Traitors).

In 1977, two Additional Protocols were adopted which provided protection to victims of non-international armed conflicts and provided for universal jurisdiction over grave breaches committed in non-international armed conflicts.¹

However, in spite of many atrocities and wars of aggression, the Nuremberg and Tokyo Tribunals remained isolated precedent for the next five decades; such as genocide was committed in Cambodia,² atrocious acts were committed during the Vietnam war, Iraqi Air Forces, alleged to have used both mustard and nerve gases while bombing a village in Kurdistan, which could also fit the principles of Nuremberg.³

C. Adhoc International Tribunals: International Criminal Tribunal for the former Yugoslavia (ICTY) & Rwanda (ICTR) (1993-94):

In May 1993, the UN SC pursuant to Chapter VII of the UN Charter established the International Tribunal for the prosecution of persons responsible for serious violations of International Humanitarian Law (IHL) committed in the territory of the former Yugoslavia since 1991, in The Hague, Netherlands.⁴

One year later, a similar tribunal was established in Rwanda for the prosecution of persons alleged to have committed Genocide and other serious violations of International Humanitarian Law (IHL), in the territory of Rwanda (Rwanda Tribunal).⁵

The ICTY was given jurisdiction over "serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991", breaches of the 1949 Geneva Conventions, violations of the laws or customs of war,

¹ Cassette at www.iss.co.za.

² Malanczuk, 1997, 355.

³ Charlotte & Dichl, 1998, 286.

⁴ For the text of the Statute of ICTY See Evans, 2003, 378-386.

⁵ For the text of the Statute of ICTR visit <http://www.derechos.org/nizkor/ictr/ictrststute.html>.

genocide, and crimes against humanity.¹

The jurisdiction of ICTR is limited to acts committed in Rwanda, or by Rwandan nationals in neighboring States during 1994 over genocide; crimes against humanity; and violations of common Article 3 of the 1949 Conventions and Additional Protocol II.²

Traditionally, as compared to the civilian victims of International wars, the victims of internal conflicts were given less protection.³ With the establishment of these tribunals it became possible to try persons accused of having committed war crimes in internal armed conflict without the need of any formal link with International conflict⁴ and these tribunals significantly contributed towards the development of individual criminal responsibility for war crimes, crimes against humanity, and genocide.⁵

D. War Crimes under the ICC Statute (1998-2003):

The Statute of the ICC was adopted during the Diplomatic conference at Rome in 1998, which came into force on July 1st, 2002, after it obtained the ratification of sixty states.⁶

1. Jurisdiction of International Criminal Court (ICC):

International Criminal Court (ICC) has jurisdiction over genocide, war crimes,

¹ Arts. 2-5 of the Statute of ICTY.

² Arts. 2-4 of the Statute of ICTR.

³ Justice Richard Goldstone, *Preventing and Prosecuting Crimes against Humanity in the 21st Century*, available at http://www.iccnow.org/documents/GoldstoneAbuja_14Feb05.pdf?PHPSESSID=c0ec3555d06ba66a0a1ea948d576aecd.

⁴ Gutman & Rieff, 1998, 206.

⁵ Malcolm D. Evans, *International Law*, (Oxford University Press, 2003), 730.

⁶ For the text of the Statute of ICC see Evans, 2003, 463-543.

and crimes against humanity, and the crime of aggression.¹ However, the jurisdiction of the court over aggression is conditional upon the adoption of the definition of aggression.² The ICC has jurisdiction to try a case only where the state in which the crime has occurred is a party to the Rome Statute, the state of which the person accused of the crime is a national of a State party to the statute, or the Security Council refers the situation to the court.³ The jurisdiction of the court is only limited to the crimes which are committed after the creation of the court.⁴

Basically ICC has introduced four categories of war crimes; first category deals with the ‘grave breaches’ committed in international armed conflict and refers to the crimes committed against protected persons and property; second category deals with the ‘other serious violations of the laws and customs of war’ committed in international armed conflict in which twenty-six crimes have been added. Third category deals with the serious violations of Article 3 common to the Geneva Conventions, committed in internal conflicts and covers acts committed against ‘persons taking no active part in the hostilities including members of armed forces who have laid down their arms and those placed *hors de combat*⁵ by sickness, wounds, detention or any other cause.’

The fourth category is related to “other serious violations of the laws and customs applicable in armed conflicts not of an international character”. The last two categories are followed by clauses excluding from the ICC’s jurisdiction acts committed in situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence “or other acts of similar nature”.⁶

¹ Art. 5 (1) of the Statute of ICC.

² Art. 5 (2) of the Statute of ICC.

³ Arts. 12 & 13 of the Statute of ICC.

⁴ Art. 11 of the Statute of ICC.

⁵ According to Art. 41 (2) of AP I, a person is *hors de combat* if:

(a) he is in the power of adverse party; (b) he clearly expresses an intention to surrender; or (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself;

Provided that in any of these cases he abstains from any hostile act and does not attempt to escape.

⁶ Art. 8 (2) (d) & (f).

Accordingly, the Statute of ICC Statute covers both the grave breaches and ‘other serious violations of the laws and customs of war’, whether committed in international armed conflict or internal armed conflict. As far as the context of the statute is concerned this distinction is not important as it has not attached different consequences for both the categories, this distinction is only relevant at the national level; under International law each state has right to exercise ‘permissive universal jurisdiction’ over war crimes, however the four GCs and AP I, by obliging the member states to prosecute persons accused of having committed “grave breaches,” has introduced compulsory jurisdiction over serious war crimes.¹

2. Complementarity Principle:

Both the preamble to the Statute and article I expressly provides that the Court is to be “complementary” to national criminal jurisdictions.² The statute of the court requires national courts to take themselves initiative to investigate most serious crimes including war crimes, by applying their domestic laws, unless where the national courts do not have the willingness or capacity to carry out the investigation or prosecution.³

3. Rationale behind Complementarity Principle:

The complementary principle rationalizes the following things:

¹ Dormann, 2003, 128-129.

² Art. 1 of the Statute provides: “An International Criminal Court … shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions...”

³ Art.17 (2) of the Statute of ICC provides three situations in which domestic courts shall be considered as unwilling to carry out investigation, these are:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility … (b) There has been an unjustified delay in the proceedings … (c) The proceedings were not or are not being conducted independently or impartially...

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

- 1- It supports the principle of *double jeopardy*, i.e., no person can be prosecuted twice for the same offense. (It means that if a national court has already punished a person he cannot be punished again by ICC for the same offense);
- 2- National courts (by prosecuting the war criminals) have already fulfilled the intention of ICC that no criminal should go unpunished;
- 3- It gives national courts a chance to themselves solve their problems, without any external interference;
- 4- It recognizes the sovereignty and the jurisdiction of the states over their own citizens.¹

¹ Sharif 'Utlam, *Al-Mahkamat Al-Jināiyah Al-Dawoliyyah: Al-Mo'āmalāt Al-Dastūriyyah wa al-Tashri'iyah*, (ICRC, 2004), 34.

CONCLUSION

- 1- The charter of IMT introduced three categories of crimes namely crimes against peace, war crimes and crimes against humanity which were not known before.
- 2- The world's first successful attempt to prosecute war criminals took place after World War II. There is disagreement among the jurists whether it has formed a precedent or not? According to the majority of jurists it became a precedent.
- 3- In 1997-1998, the UN SC established two International criminal tribunals for the Former Yugoslavia and Rwanda and for the first it became possible to try persons alleged to have committed war crimes in internal conflicts.
- 4- The Statute ICC provides the court jurisdiction over war crimes committed both in the context of international and internal conflicts. The jurisdiction of the court complements the jurisdiction of the states, which means that it will only exercise its jurisdiction when the national courts failed to do so.

Chapter 3

Concept of War Crimes in Islamic International Law

Chapter 3

Concept of War Crimes in Islamic International Law

Section I

Protection of wounded, sick, and shipwrecked under Islamic International law and International Humanitarian Law (IHL)

It consists of four parts:

- A- Protection of wounded, sick and shipwrecked under Islamic International Law during international armed conflicts**
- B- Protection of wounded, sick and shipwrecked under International Humanitarian Law (IHL) during international armed conflicts**
Comparison between Islamic International Law and International Humanitarian Law (IHL)
- C- Protection of wounded, sick and shipwrecked under Islamic International Law during non-international armed conflicts**
- D- Protection of wounded, sick and shipwrecked under International Humanitarian Law (IHL) during non-international armed conflicts**
Comparison between Islamic International Law and International Humanitarian Law (IHL)

A-Protection of wounded, sick and shipwrecked under Islamic International Law during international armed conflicts:

Regarding all those persons who are placed *hors de combat* due to sickness, wounds or any other cause, the Holy Prophet (pbuh) is reported to have said:

Wounded shall never be killed, *mudabbar* shall never be chased ... and whosoever shuts his door then he shall be immune.¹

Similarly, women, children, elderly, ill, religious personnel have been given immunity from the effect of hostilities as long as they do not directly or indirectly participate in the war. The underlying reason (*illā*) for granting them protection is their incapability to fight. Rubāh b. Rabī‘ narrates that once the Holy Prophet (pbuh) saw some people gathered round dead body of a woman, who was killed during fighting. Upon this he said “This is not one with whom fighting should have taken place”.² These words provide the basis that whoever is not capable of fighting must not be killed; therefore inflicting injury or attacking wounded, sick and shipwrecked and all those who are not capable of fighting is also prohibited.³ No military aim can be achieved by killing or persecuting them, therefore any act of killing them would be considered as an act of *fasād* on earth, whereas Allah Almighty has prohibited from *fasād*.⁴ As stated in the Qur’ān: “And do not act corruptly making mischief in the land.”⁵

According to Abū Zahrah, it is illegal to kill those wounded and sick soldiers who are incapable of defending themselves; they must be given proper medical treatment and whereafter they become prisoners to be treated accordingly.⁶

This immunity is not only available to wounded and sick combatants but to all those *hors de combat* who have laid down their weapons, with an intention to surrender

¹ Abū ‘Ubayd, *Kitāb Al-Amwāl*, (Al-Qahira: Maktabat al-Kullīyāt al-Azhariyyah, 1975), 82. (Hereinafter, Abū ‘Ubayd, 1975).

² Abu Dawūd, *Sunan Abu Dawūd*, Tr. Ahmed Hassan, vol. 2, (Sh. Muhammad Ashraf: 1984), 739. (Hereinafter, Abū Dawūd, 1984).

³ *Hūkm* and attribute go side-by-side, whenever attribute is found *Hūkm* is found too, Imran Ahsan Khan Nyazee, *Islamic Jurisprudence*, ed. Zafar Ishaq Ansari (Islamabad: Islamic Research Institute, 2000), 307.

⁴ Abd al-Ghani Abd al-Hamid Mahmood, *Islami Shariat aur Bayn al-Aqwami Insani Qanun mei'n Musallah Jango'n Kay doran Mutasir honey Waley Afrad ka Tahaffuz*, Tr. Mohammad Munir, (Islamabad: Hafiz Traders, n.d), 9.

⁵ 2: 60.

⁶ Muhammad Abū Zahrah, *Al-‘Ilqāt al-Dawolīyya fī al-Islam*, (Dār al-Fikr al-Arabi, n.d), 106.

and have embraced Islam. Once the Prophet sent a detachment towards *al-Huruqāt*, one soldier attacked a man who uttered, “There is no God but Allah”. Usāmah b. Zaid narrates that when he mentioned it to the Prophet, he said: “Who will save you from “There is no God but Allah” on the Day of Judgment? Usāmah replied that he uttered it for fear of the weapon. The Prophet said: “Did you tear his heart so that you learnt whether he uttered it for this or not...”¹

Al-Miqdād b. Aswad reports that he asked the Prophet that if he meets a man who is a disbeliever, and he fights with him, and cuts off one of his hands with the sword, and then takes refuge by a tree and says: “I embraced Islam for Allah’s sake”, can he be killed after he uttered it? The Prophet said: “Do not kill him...”²

As far as those *hors de combat* are concerned who have not accepted Islam but they have laid down their weapons with an intention to surrender and they seek protection, they also cannot be killed. As stated in the Qur’ān: “And if any one of the Associators (non-Muslims) seeketh thy protection, then protect him”.³ Protection must not necessarily be given on demand; it may be given without any demand through a general proclamation, like the one granted by the Prophet at the conquest of Mekkah.⁴

The right to grant protection is not only available to *Imām*, but also to an ordinary Muslim which would be binding on the Muslim state.⁵ The Prophet enforced the protection granted by Umm Hānī to a polytheist by saying: “We have given security to those to whom you have given it”.⁶

¹ Abū Dawūd, 1984, 730.

² Ibid.

³ 9: 6.

⁴ Abū ‘Ubayd, 1975, 82.

⁵ Abū Yūsuf, *Kitāb al-Kharāj*, (Beirut: Dār al Ma‘ārifat, 1979), 204-206, (hereinafter, Abū Yūsuf, 1979), Muhammad al-Shirbīnī al-Khatīb, *Mughnī al-Muhtāj Ma‘ārifat Ma‘ānī Alfās al-Minhāj*, vol. 4, (Misr: Mustafā al-Bābī al-Hilbī, 1985), 237, (hereinafter, Shirbīnī, 1985), Al-Shafī ‘ī, al-Umm, vol. 4, (Beirut: Dār al Ma‘ārifat, n.d), 284, Ibn Qudāmah, *al-Mughnī*, vol. 13, (Qahira: Hajar, 1992), 75, (hereinafter, Ibn Qudāmah, 1992).

⁶ Abū Dawūd, 1984, 772.

Once the enemy belligerents have been granted protection they become ‘protected persons’ and it becomes unlawful to kill them. Abu Bakrāh narrates that the Prophet is reported to have said, “If any one kills a man whom he grants protection, Allah will forbid him to enter paradise”.¹ According to Sarakhsī, if a group of Muslims even by mistake kills those (protected) persons they will have to pay the relevant compensation (*diyat*) for it.²

B- Protection of wounded, sick,³ and shipwrecked⁴ under International Humanitarian Law (IHL) during international armed conflicts:

The principle of immunity of wounded and sick members of armed forces is laid down in GC I, which provides that the “wounded or sick shall be respected and protected in all circumstances”.⁵ Under the same convention, it is the duty of belligerents to search the wounded and sick and to protect them against ill-treatment, and to ensure their adequate care.⁶ They must be provided proper medical assistance to whichever party they may belong.⁷ Under the GC I, the wounded and sick combatants who fall into enemy hands are prisoners of war and must be treated accordingly.⁸

Comparison between Islamic International Law and International Humanitarian Law (IHL):

Both legal systems have provided that those enemy *hors de combat* who are either

¹ Abū Dawūd, 1984, 771.

² Al-Sarakhsī, *Sharh Kitāb al-Siyar al-Kabīr*, Commentary by al-Shaybānī, vol. 1, (Matba‘at Sharikat al-‘Ilānāt al-Sharkīyyah, n.d), 258.
(Hereinafter, Al-Sarakhsī, n.d).

³ Wounded and sick means all those persons “... whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility.” Art. 8 (a), Protocol Additional to the Geneva Conventions of 12 August 1949, relative to the Protection of Victims of International Armed Conflict (Protocol I), 8 June, 1977.

⁴ Shipwrecked means all those persons “... whether military or civilian, who are in peril at sea or in other waters as a result of misfortune affecting them or the vessel or aircraft carrying them and who refrain from any act of hostility...” Art. 8 (b), AP I of 1977.

⁵ Art. 12, Geneva Convention I of 12 August 1949 Relative to the treatment of wounded and sick on land.

⁶ Art. 15, GC I of 1949.

⁷ Art. 10 (2), AP I of 1977.

⁸ Art. 14, GC I of 1949.

wounded or sick or have laid down their weapons with an intention to surrender, must be respected and treated humanely and must not be killed. Under the two bodies of law wounded and sick must be provided proper medical assistance whereafter they become prisoners to be treated accordingly.

C-Protection of wounded, sick and shipwrecked under Islamic International Law during non-international armed conflicts:

In Islamic law, the term '*Qitāl ahl al-Bāghī wa-al-Khawārij*' (i.e. war with the rebels and dissenters) is used for internal conflicts. As far as the term '*Ahl al-Bāghī*' is concerned it refers to those conflicts in which one group of the community rebels against the Muslim government and establishes its own illegitimate authority.¹ While the term '*al-Khawārij*' is used for those dissenters who opposed 'Alī b. Abū Tālib when he submitted his dispute (with Mu'āwīya b. Abū Sufyān) to an arbitration, for they claimed that the real arbitrator is Allah Almighty alone.²

In Internal conflicts, all those persons who are placed *hors de combat* due to sickness, wounds or any other cause have been given complete protection. Regarding them, the Prophet is reported to have said:

Wounded shall never be killed, *mudabbar* shall never be chased, ... and whosoever shuts his door then he shall be immune.³

The Prophet is also reported to have said:

O Ibn Masood! Do you know God's punishment for those who rebel from this Ummah?

¹ For the definition of *al-Bāghī* see al-Kasānī, *Badā' i' al-Sanā' i' fī Tartīb al-Sharā'i*, vol. 7, (Beirut: 1986), 140, (hereinafter, al-Kasānī, 1987), Shirbīni, 1985, 123, Ibn 'Arafah Al-Dusūqī, *Hashiat 'Ala Sharh al-Kabīr li al-Durdīr*, vol. 4, (Dār Ahyā' Al-Kūtub al-Arabiyyah, n.d), 300, (hereinafter, al-Durdīr, n.d), Mohammad Zakī 'Abd Al-Barr, *Tuhfat Al-Fuqahā*, vol. 3, (Qahira: Maktabat Dār al-Turāth, 1998), 251.

² For details see Tabarī, *Tarīkh Tabarī: Sīrat al-Nabī*, Tr. Muhammad Ibrahim, vol. 2, (Karachi: Nafees Academy, n.d), 306-368.

(Hereinafter, Tabarī, n.d)

³ Abū 'Ubayd, 1975, 82.

Ibn Masood said, God and His apostle knew: The Prophet said, God's decision about them is that their *mudabbar* should never be chased ... nor should their wounded be killed.¹

Internal conflicts arose during the successive reigns of the Companions of the Prophet. They provided complete protection to those rebels who were not able to defend themselves. Regarding rebel warriors who due to wounds are not capable of defending themselves 'Alī (RA), during the battle of *Jamal*² is reported to have said: "Do not kill their wounded..."³

At the end of the battle of *Nahrwān*,⁴ 'Alī provided protection to 400 wounded combatants who were seriously injured and he allowed their tribesmen to take them back in order to provide them medical treatment, and he even allowed them to take their belongings with them.⁵

As discussed earlier on wounded, sick and shipwrecked in international conflicts are protected from the effects of hostilities because they are incapable of fighting; the same rule applies to those Muslim warriors who are placed *hors de combat* due to sickness, wounds or any other cause and are not capable of defending themselves.

D-Protection of wounded, sick and shipwrecked under International Humanitarian Law (IHL) during non-international armed conflicts:

In the context of an internal armed conflict, Common Article 3 and Additional

¹ Al-Bayhaqī, *Al-Sunan Al-Kubrā Ma' ā Jawāhir al-Niqā*, vol. 9, (Beirut: Dār Al-Ma'ārifat, 1992), 181. (Hereinafter, Al-Bayhaqī, 1992).

² A war fought between 'Alī and the supporters of retaliation for the murder of 'Uthmān (the third caliph), led by 'Ā'isha, the wife of the Holy Prophet (pbuh).

³ Al-Bayhaqī, 1992, 181.

⁴ A war fought between 'Alī and a group of *Khawārij* at a place in Irāq known as *Nahrwān*.

⁵ Tabarī, n.d, 363.

Protocol II are applicable.¹ Common Article 3 establishes an affirmative obligation to treat the wounded and sick combatants humanely. It expressly provides that:

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* due to sickness, wounds, detention, or any other reason, shall in all circumstances be treated humanely.²

AP II stipulates that they must be provided proper medical treatment without adverse discrimination.³ They must be collected and protected against ill-treatment; their dead must also be searched and disposed off properly.⁴

Comparison between Islamic International Law and International Humanitarian Law (IHL):

Both legal systems have provided that all those persons who are placed *hors de combat* due to sickness wounds or any other cause in the context of non-international armed conflicts must be respected and treated humanely; they must be provided proper medical assistance and due care.

¹ "Article 3, the text of which is repeated in all four Geneva Conventions, is the only part of the conventions that applies explicitly to internal armed conflicts. It has been called a "*treaty in miniature*" and sets forth the minimum protections and standards of conduct to which the State and its armed opponents must adhere... Additional Protocol II of 1977 also covers internal armed conflicts, but it is less widely accepted among States than the 1949 Conventions". Steven R. Ratner, *International vs. Internal Armed Conflict*, Gutman & Rieff, 1999, 206-207, also available at www.crimesofwarbook.org/thebook/intl-vs-internal.html.

² Common Art. 3 of the Four GCs of 1949.

³ Art. 7, AP. II of 1977.

⁴ Art. 8, AP. II of 1977.

SECTION II

Protection of Prisoners under Islamic International law and International Humanitarian Law (IHL):

It is divided into four parts:

- A- Protection of prisoners under Islamic International law during international armed conflicts**
- B- Protection of prisoners under International Humanitarian Law (IHL) during international armed conflicts**
Comparison between Islamic International Law and International Humanitarian Law (IHL)
- C- Protection of prisoners under Islamic International law during non-international armed conflicts**
- D- Protection of prisoners under International Humanitarian Law (IHL) during non-international armed conflicts**
Comparison between Islamic international Law and International Humanitarian Law (IHL)

A- Protection of Prisoners under Islamic International law during international armed conflicts:

Muslims are generally encouraged to offer good treatment to prisoners. The Prophet ordered his companions to treat the prisoners of *Badr* well,¹ and the result was that his companions provided them better food than what they had for themselves.² Their behaviour was praised by Allah Almighty:

And they feed, for the love of Allah the indigent, the orphan and the prisoner.³

It is reported that a captive from the tribe of *Thaqīf* requested the Prophet for food

¹ Tabarī, n.d, vol. 1, 191.

² Ibid.

³ 76:8.

and water. The Prophet said: "These are your basic needs."¹ The basic needs not only include food and water, but also clothes.²

The honour and dignity of each prisoner must be respected; unlawful sexual intercourse with a captive woman before distribution of booty is not allowed.³ According to Al-Māwardī whoever commits such a crime, will have to pay compensation for it.⁴

If prisoners are not involved in heinous crimes they must be released immediately, as was the conduct of the Prophet. After the battle of *Hunain*, he released 6 000 prisoners of the *Hawāzin* tribe (with out ransom).⁵ Similarly, he released the prisoners during the battle of *Badr* with ransom and is reported to have said: "If Mut'īm b. 'Adī had been alive and spoken to me about these filthy ones, I would have left them for him."⁶

The Prophet also released some prisoners under certain conditions; for instance, some were released on the condition that they teach reading and writing to Muslim children.⁷ Similarly, it is reported that he had exchanged two prisoners with two Muslims taken captives by the idolators.⁸

Execution of prisoners is generally forbidden as evidenced from the Qur'ān,

¹ Muhammad 'Alī Al-Shawkānī, *Nayl al-Awtār Sharh Muntaqā al-Akhbār min Ahādīth Sayyed al-Akhbār*, vol. 7, (Misr: Mustafa al-Bābī al-Hilbī, n.d), 247.
(Hereinafter, Shawkānī, n.d).

² *Sahīh al-Bukhārī*, Tr. Muhammad Muhsin Khan, vol. 4, (Medina: Al-Maktabat Al-Salfiat, n.d), 156.
(Hereinafter, Bukhārī, n.d).

³ Abū Yūsuf, 1979, 206.

⁴ Al-Māwardī, *al-Ahkām al-Sultāniyah wa al-Wilāyat al-Dīniyah*, (Beirut: Dār al-Kutub al-'Ilmiyyah, 1983), 88.
(Hereinafter, Māwardī, 1983).

⁵ Abu 'Ubayd, 1975, 156.

⁶ Ibn Qayyim, *Zād al-Mi'ād fī Hudā kheir al-'Ibād*, vol. 3, (Maktabat al-Manār al-Islāmīyah, 1994), 109-110.

⁷ Abū 'Ubayd, 1975, 153.

⁸ Ibn Hajar al-'Asqalānī, *Sūbul al-Salām Sharh Bulāgh al-Mūrām min adillat al-Ahkām*, vol. 4, (Lahore: Dār Nashr al-Kutub al-'Ilmiyyah, n.d), 55.

“Thereafter (is the time) either for generosity or ransom...”¹ As far as the conduct of the Prophet is concerned, throughout all wars he killed very few prisoners. However, they were among the worst criminals who were previously engaged in atrocities against Muslims. Among them were Nadār b. Hārith and ‘Uqbā b. Mū‘it, two prisoners from the battle of *Badr*. Both were inveterate foes of Islam who used to persecute the Prophet, while Nadār used to ridicule the Qur’ān and the Prophet.²

During the battle of *’Uhad*, Abū ‘Izzā, (a poet) was executed who was set free during the battle of *Badr*. He used to motivate (through his poetry) the enemy to fight with the Muslims. During the battle of *’Uhad*, he was once again caught and killed.³

After the conquest of Mekkah, the prophet is reported to have declared a general amnesty except half a dozen persons who were declared outlaws, to be killed wherever found, out of whom only two were killed. One of them was ‘Abd Allah b. Khattāl, who was sent to collect *zakāt* after he had accepted Islam, along with a servant. But on his way he killed the servant and reverted to *jahiliyya*, (and was actually killed in retaliation).⁴

Ibn ‘Umar, Hasan and ‘Ata have disliked the killing of enemy prisoners. It is narrated that Hajjāj b. Yūsuf handed over a prisoner to Ibn ‘Umar and ordered him to kill that prisoner. Ibn ‘Umar refused to do so by saying: “We have not been commanded to do so” and read this verse: “Thereafter (is the time) either for generosity or ransom...”⁵

Majority of Muslim Jurists agree that execution of prisoners is a discretion of

¹ 47:4

² Ibn Hishām, *Al-Sīrah al-Nabawiyah*, vol. 1, (Beirut: Dār al-Kutub al-‘Ilmīyah, n.d), 300, 415-416, 644. (Hereinafter, Ibn Hishām, n.d).

³ Tabarī, vol. 1, n.d, 223.

⁴ Ibn Hishām, vol. 2, n.d, 409-410.

⁵ Abū Yūsuf, 1979, 195-196.

Imām, who will exercise it only in the best interest of Islam and Muslim community.¹ The right to put to death some particular prisoners is only available to *Imām* (Muslim ruler) and no one else can do that.²

Muslim jurists clearly recognize that prisoners cannot be held responsible for mere acts of belligerency, even if they embrace Islam or become *dhimmīs* i.e. subjects. This is because they did that conscientiously and in accordance with their own religion, as a resisting power. They can only be prosecuted for acts committed beyond the right of belligerency,³ e.g. if they mutilated the bodies, or killed protected persons, or committed *zinā*, or committed (other) war crimes.⁴

B- Protection of prisoners under International Humanitarian Law (IHL) during international armed conflicts:

Prisoners of war (POWs) have been given protection under Geneva Convention III Relative to the Treatment of prisoners of war.⁵ Under the Convention, prisoners of war must be treated humanely; causing them injury or putting them to death is strictly prohibited.⁶ Such protection is available to all prisoners without making any distinction on the basis of religion, nationality or race.⁷ The honour and dignity of each prisoner must be respected.⁸ They must be supplied proper food, water,⁹ clothes etc.¹⁰

¹ Al-Sarakhsī, *Al-Mabsūt*, vol. 10, (Beirut: Dār al-Ma‘ārifat, 1986), 63, Ibn Qudāmah, *Al-Muqna‘ fī Fiqh Imām Ahmed ibn Hanbal*, vol. 1, (Qatr: Al-Muhibim al-Syria wa Sha‘ūn al-Dinīya, n.d), 488-489, Abd al-Barr, *al-Kāfi fī Fiqh Ahl al-Medīna*, (Riyadh: Maktabat al-Riyadh al-Hadītha, 1978), 467.

² Ibn Nūjāym, *Al-Bahr al-Rā‘iq Sharh Kinz al-Daqā‘iq*, vol. 5, (Quetta: Al-Maktabat al-Mājidiyah, n.d), 82, (hereinafter, Ibn Nūjāym, n.d), al-Sarakhsī, vol. 4, 1978, 63.

³ Mohammad Hamidullah, *The Muslim Conduct of State*, (Lahore: Hafiz Press, 1977), 214. (Hereinafter, Hamidullah, 1977).

⁴ Nizam al-Din Abd al-Hamid, *Asrā al-Harb fī al-Islam wa al-Qanūn al-Dawlī*, (Wizarat al-Awqāf wa Sha‘ūn al-Dinīyah, 1986), 77.

⁵ Geneva Convention III Relative to the Treatment of Prisoners of war, 1949.

⁶ Art. 13, GC. III of 1949.

⁷ Art. 16, GC. III of 1949.

⁸ Art. 14, GC. III of 1949.

⁹ Art. 26, GC. III of 1949.

¹⁰ Art. 27, GC. III of 1949.

GC III further provides that at the end of hostilities, prisoners should be released and repatriated without delay, except those prisoners against whom criminal proceedings are pending; they may be detained until the end of such proceedings, or until the completion of punishment.¹ However, criminal proceedings cannot be instituted for their hostile acts (i.e. attacking enemy combatants or military objects) committed during the conflict, unless they violate the laws of war,² or violate the laws of the detaining power.³

Comparison between Islamic International Law and International Humanitarian Law (IHL):

Both laws provide similar kind of treatment. Under both legal systems the dignity and honour of prisoners of war must in all circumstances be respected. They must not be subjected to degrading treatment; they must be supplied proper food, clothing etc. They should be released and repatriated without delay after cessation of conflict. Both legal systems have provided that prisoners cannot be killed except for war crimes.

C- Protection of Prisoners under Islamic International Law during non-international armed conflicts:

In non-international armed conflicts, prisoners have been given complete protection from the effect of hostilities. The Prophet is reported to have said:

O Ibn Masood! Do you know God's punishment for those who rebel from this Ummah? Ibn Masood said, God and His apostle knew: The Holy Prophet (pbuh) said, God's decision about them is that their *mudabbar* should never be chased, their prisoner should not be killed....⁴

¹ Arts. 118 & 119, GC. III of 1949.

² A. P. V. Rogers, *Combatant Status*, Gutman & Rieff, 1999, 97, Also See Knut Dormann, Al-Wada' Al-Qanūni lil Muqātiliñ Ghayr Al-Shari'īn/ Ghair al-Murakkhisin, *Al-Mujalla't Al-Dawoliyya Lil-Salib Al-Ahmar: Mukhtarāt min 'A'idād 'Aām 2003*, (ICRC: 2004), 135.

³ Arts. 82-85, GC. III of 1949.

⁴ Al-Bayhaqī, vol. 9, 1992, 181.

During the battle of *Jamal*, 'Alī is reported to have said:“ Do not behead their prisoners...”¹

According to majority of Muslim Jurists, rebel prisoners are not to be beheaded,² and according to Al-Māwardī, if they agreed to behave like law-abiding citizens, they ought to be immediately released.³ While according to Hanafī jurists, they can be killed on certain occasions, as for example when the rebellion is not yet completely subdued.⁴

As far as prosecution of rebel prisoners is concerned, majority of Muslim jurists (Abū Hanīfah, Mālik, Ahmed and some Shāfi‘ī jurists) are of the opinion that rebel prisoners cannot be held liable for mutual loss to lives and properties caused during a conflict.⁵ However, they can be held liable for crimes liable to *hadd* punishment like drinking, theft, adultery etc in the view of Shāfi‘ī, Mālik and Ahmed⁶ except Abū Hanīfah.⁷

D- Protection of Prisoners under International Humanitarian Law (IHL) during non-international armed conflicts:

AP II provides protection to all those who are interned or detained in non-international armed conflicts, under the term "Persons whose liberty has been restricted". It provides that the honour and dignity of all those persons who do not or are no longer taking part in hostilities must be respected; they must be treated humanely without any adverse distinction, extensive killings, cruel and degrading treatment etc is strictly prohibited.⁸ They must be provided proper food, drinking water and must be protected

¹ Al-Bayhaqī, vol. 9, 1992, 181

² Ibn Qudāmah, 1992, vol. 12, 252, AL- Dusūqī, n.d, 299, Al-Māwardī, 1978, 60

³ Al-Māwardī, 1978, 60.

⁴ Abū Yūsuf, 1979, 214, Al-Sarakhsī, 1986, vol. 9, 126, Ibn Nūjaym, n.d, 141.

⁵ Abū Yūsuf, 1978, 215. Ibn Qudāmah, vol. 12, 1992, 250, Al-Māwardī, 1978, 61.

⁶ Ibn Qudāmah, vol. 12, 1992, 146,

⁷ Ibn Nūjaym, n.d, 142.

⁸ Art. 4, AP II of 1977.

from the dangers of armed conflict.¹

Under IHL, insurgents may be tried for sedition, treason, rebellion, murder or other crimes under the domestic law of their state.² However, under Art. 6 (5) states are empowered to grant amnesties to those people who participate in non-international armed conflicts. It reads as follows:

At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.³

According to ICRC, this provision means that as long as the combatants respect the laws of war they cannot be punished for merely taking part in the hostilities.⁴

Comparison between Islamic International Law and International Humanitarian Law (IHL):

Under both legal systems, rebel prisoners are entitled to the same protection as provided to the prisoners in international armed conflicts; their dignity and honor must in all circumstances be respected; they cannot be killed during captivity. Under both legal systems, rebel prisoners must be released except where they have committed war crimes.

¹ Art. 5 (1) (b), AP II of 1977.

² Peter Rowe, *Soldiers, Rights of*, Gutman & Rieff, 1998, 343, also available at www.crimesofwar.org/thebook/soldiers-rights-of.html.

³ Art. 6 (5), AP II.

⁴ Yasmin Naqvi, *Amnesty for War Crimes: Defining the limits of International Recognition*, ICRC Review No. 851, available at [www.icrc.org/Web/eng/siteengO.nsf/htmlall/5SSDUX/\\$File/irrc-851-Naqvi.pdf](http://www.icrc.org/Web/eng/siteengO.nsf/htmlall/5SSDUX/$File/irrc-851-Naqvi.pdf).

SECTION III

Protection of non-combatants/civilians under Islamic International law and International Humanitarian Law (IHL):

It consists of four sections:

- A- Protection of non-combatants under Islamic International law during international armed conflicts**
- B- Protection of non-combatants under International Humanitarian Law (IHL) during international armed conflicts**
Comparison between Islamic International Law and International Humanitarian Law (IHL)
- B- Protection of non-combatants under Islamic International law during non-international armed conflicts**
- C- Protection of non-combatants under International Humanitarian Law (IHL) during non-international armed conflicts**
Comparison between Islamic International law and International Humanitarian Law (IHL)

A-Protection of non-combatants under Islamic International law during international armed conflicts:¹

In Islamic law women, children, elderly and religious personnel have been given protection from any kind of deliberate attacks. As stated in the Qur'ān: "Fight in the cause of Allah those who fight you, but do not transgress limits...."²

¹ Kāsanī, vol. 7, 1986, 98, Māwardī, 1983, 38, al-Shirbīnī, vol. 4, n.d, 224, Ibn Qudāmah, 1992, vol. 13, 141, 100, Wahbah Zuhaylī, *Āsār al-Harb fī al-Fiqh al-Islāmī: Dirāsa Muqārana*. (Dār al-Fikr, 1992), (hereinafter, Zuhaylī, 1992) Abd Al-Latif Amir, *Ahkām al-Asrā wa al-Sabāya fī al-Harūb*, (Al-Qahira: Dār al-Kūtub al Islāmīa, 1986), 299-311, Muhammad Munir, The Protection of Women and Children in Islamic Law and International Humanitarian Law: A Critique of John Kelsey, *Hamdard Islamicus*, vol. 25, No. 3, July-September 2002, 69-79.

² 11: 190.

According to Hassan al-Basrī, Ibn ‘Abbās, ‘Umar b. ‘Abd Al-‘Azīz and Muqātil b. Hayyān ‘transgression’ refers to the prohibition of mutilation, *ghulūl*,¹ killing of women, children, elderly, religious personnel and old people who are not capable of fighting; killing priests and residents of houses of worship, unnecessary burning of trees and killing of animals.²

Sulaymān b. Buraydāh narrates that the Prophet is reported to have said:

Fight for the sake of Allah and fight those who disbelieve in Allah. Fight, but do not steal (from the captured goods), commit treachery, mutilate, or kill a child, or those who reside in houses of worship.³

Ibn ‘Umar narrates that once in a battle the Prophet saw a woman killed; thereon forbade the killing of women and children.⁴ In an expedition, he saw some people gathered round a woman. He is reported to have said: “Tell Khālid (who was in charge of the van) not to kill a woman or a hired servant.”⁵ There is yet another report in which he said: “Do not kill children and religious personnel.”⁶

Aswad b. Sārī reports that the Prophet said, “Don’t kill children in war”, the Companions asked, “O the Apostle of Allah (pbuh), but they are the children of pagans”, he replied, “Aren’t the pious of you the children of pagans”.⁷

Abu Bakr⁸ advised his army going to Syria not to kill women, children and elderly.⁹ Similar instructions were given by Caliphs ‘Umar,¹⁰ ‘Uthmān¹¹ and ‘Ali.¹²

¹ *Ghulūl* means misappropriation of booty or spoils of war.

² Ibn Kasīr, *Al-Misbāh Al-Munīr fī Tahzīb Tafsīr Ibn Kasīr*, vol. 1, (Lahore: Darussalam, 2000), 528.

³ Al-Shawkānī, n.d, 261, Ibn Hajar, 1995, 222.

⁴ Bukhārī, 1978, 160.

⁵ Abū Dawūd, 1984, 739.

⁶ Al-Bayhaqī, *Al-Sunan al-Saghīr*, vol. 2, (Mekkah: al-Maktabat al-Tijārīyah, n.d), 312.

⁷ Al-Shawkānī, n.d, 247.

⁸ The first rightly guided successor of the Holy Prophet (pbuh).

⁹ Mālik, *Al-Muwatta*, Tr. Mohammad Rahim al-Deen, (New Delhi: Kitab Bhavan, 2000), 200.

¹⁰ The second rightly guided successor of the Holy Prophet (pbuh).

¹¹ The third rightly guided successor of the Holy Prophet (pbuh).

¹² The fourth rightly guided successor of the Holy Prophet (pbuh).

According to Ibn Rūshd there is unanimity among Muslim Jurists that women and children should not be killed during a war as long as they do not fight.¹ Women can be killed if they directly participate in the war, as the Prophet did not condemn killing of a certain woman from *Banū Quraizah* who was participating in the war.²

Women and children can also be killed in cases of extreme necessity, i.e. when it becomes extremely difficult to differentiate between combatants and non-combatants and in such a case they are killed unintentionally as a result of the attack on the combatants. Sa ‘b b. Jasththāma narrates that the Prophet was asked about women and children of Polytheists being killed during night raids, he said: “They are from them”.³

According to Ibn Hajar “They are from them” does not refer to the intentional killing; it simply means that when it becomes extremely difficult to harm the fathers without harming their children, it is allowed to harm or kill them in order to reach their parents. Thus children can be killed (unintentionally) when they are mixed up with combatants.⁴

To sum up, killing of civilians is allowed under the doctrine of necessity; “the entire necessity renders the forbidden permissible”. However, in such a case it is the duty of military commanders to avoid excessive damage as much as they can, because “necessities are assessed according to their intensity”, otherwise it would be considered as an act of transgression from which Allah Almighty has forbidden.

B- Protection of non-combatants under International Humanitarian Law (IHL) during international armed conflicts:

¹ Ibn Rūshd, vol. 1, n.d, 280.

According to *Shāfi‘ī* school of thought whoever voluntarily kills the non-combatants and civilians, he will have to pay the relevant compensation (*dīyat*) for it, Al-Shirbīni, vol. 4, n.d, 224. While, according to Hanafī law there is no blood-money for it. Al-Sarakhsī, vol. IV, n.d, 1430.

² Tabarī, vol. 1, n.d, 300.

³ *Sahīh Muslim*, Tr. Abdul Hamid Siddiqi, vol. 3, (Lahore: SH. Muhammad Ashraf, 1978), 946-47.

⁴ Ibn Hajar al-Asqalāni, *Fath al-Bāri bil Sharh Sahīh Bukhāri*, vol. 12, (Beirut: Dār al-Ma‘ārifat, 1978), 333. (Hereinafter, Ibn Hajar, 1978).

Civilians have been given protection under Protocol 1, which requires that parties to the conflict must endeavour to distinguish between civilian population and civilian objects.¹ Civilian population comprises all persons who does not participate in hostile acts.² It further provides that they shall enjoy such protection unless they take a direct part in hostilities.³

However, civilians are not totally sheltered from military operations. Article 57 recognizes this fact explicitly in admitting to the possible incidental loss of civilian life, and only prohibits that which would be excessive in relation to the concrete and direct military advantage anticipated.⁴

Comparison between Islamic International Law and International Humanitarian Law (IHL):

Deliberate killing of non-combatants who are not taking part in hostilities is forbidden under Islamic law and IHL. Under both the systems, they can be killed if they directly participate in the war or when it becomes extremely difficult to differentiate between combatants and non-combatants.

C- Protection of non-combatants under Islamic International Law during non-international armed conflicts:

In Islamic law, women, children, elderly, servants and all those who are not capable of fighting have been given same immunity as provided to non-combatants in the context of international armed conflicts. The immunity is only available to them as long as they do not fight; otherwise they lose immunity.⁵

¹ Art. 48, AP I of 1977.

² Art. 50, AP I of 1977.

³ Art. 51 (3), A P I of 1977.

⁴ Art. 57, A.P I of 1977.

⁵ Al-Sarakhsī, vol. 10, 1986, 130.

D- Protection of non-combatants under International Humanitarian Law (IHL) during non-international armed conflicts:

The immunity of civilian population from attacks equally applies in the context of non-international armed conflict as it applies in the context of international armed conflict. Common Art. 3 stipulates that 'persons taking no active part in hostilities ... shall in all circumstances be treated humanely'.² Under AP II, civilian population must not be the object of attack; those attacks the primary purpose of which is to spread terror among the civilians are prohibited.³ It further provides that the civilian population shall enjoy such protection for such a time unless they directly participate in the war.⁴

Comparison between Islamic International Law and International Humanitarian Law (IHL):

Both legal systems provide immunity to non-combatants in non-international armed conflicts as long as they do not fight, however if they started fighting they lose immunity.

¹Art. 3 Common to the Four GCs of 1949.

² Art. 13 (2), AP II of 1977.

³ Art. 13 (3), AP II of 1977.

SECTION III

Protection of non-military objects under Islamic International law and International Humanitarian Law (IHL):

It consists of four sections:

- A- Protection of non-military objects under Islamic International law**
- B- Protection of non-military objects under International Humanitarian Law (IHL)**
- Comparison between Islamic International Law and International Humanitarian Law (IHL)**

- C- Protection of places of worship and cultural objects under Islamic International law**
- D- Protection of places of worship and cultural objects under International Humanitarian Law (IHL)**
- Comparison between Islamic International Law and International Humanitarian Law (IHL)**

A-Protection of non-military objects under Islamic International Law:

In Islam, only military object can be targeted; looting or touching civilian property, slaughtering their animals, felling off trees, burning or destruction of crops are all considered as *fasād* in Islam, as stated in the Qur'ān:

And when he turns away, his effort in the land is to make mischief therein and to destroy the crops and the cattle, and Allah likes not the *fasad*.¹

Anas b. Mālik is reported to have said: "Allah's Messenger (pbuh) forbade to fetter beasts and make them target".² Saubān narrates that the Prophet is reported to have

¹ 2: 205.

² Ibn -i- Māja, *Sunan Ibn-e-Māja*, Tr. Muhammad Tufail Ansari, vol. 4, (Kitabkhavan: New Delhi, 2000), 383, (Hereinafter, Ibn -e- Māja, 2000).

said:

Whoever killed a minor or an elderly or burned down a palm-tree or cut off a fruit tree or slaughtered a sheep, in order to obtain skin, he did not return successful.¹

Yahyā b. Sa‘īd reports that Caliph Abū Bakr, while seeing off an army going to Syria walked with Yazīd Ibn Abū Sufyān who was heading one-fourth of that army clearly prohibited *fasād* and said that:

I am giving you ten instructions ... Do not cut down a fruit tree, and never shall you devastate a building. Do not injure sheep or camel except for meal. Do not burn a palm-tree nor shall you inundate it. Do not cheat and do not show cowardice.²

Awzā‘ī, Lais and Abū Sawr have disliked any kind of destruction in the enemy's territory.³ However, majority of jurists are of the opinion that destruction of those objects which directly or indirectly contribute to military actions or when these objects are situated near military objects whereby it becomes inevitable for defence and military purposes to destroy such objects, it is allowed.⁴

Under Islamic law, destruction of non-military objects is allowed under the doctrine of necessity only, “the entire necessity renders the forbidden permissible”. However, such destruction must be not be excessive, otherwise it would be considered as an act of *fasād*, which Allah Almighty has clearly prohibited.

B- Protection of non-military objects under International Humanitarian Law (IHL):

Under IHL, non-military objects have been given protection under

¹ Ahmed b. Hanbal, *Masnad al-Imām Ahmed b. Hanbal wa bi Hāmishat Muntakhab Kinz al-‘Ummāl wa Sunan al-Aqwāl wa al-Afāl*, vol. 5, (Dār al Fikr: Beirut, n.d), 276.

² Muwattā, 2000, 200.

³ Al-Shawkānī, n.d, 251.

⁴ Ibn Qūdāmah, vol. 13, 1992, Al-Kasānī, vol. 7, 1986, 100, Ibn Rūshd, 1988, 282, 146, Al-Māwardī, 1983, 48.

AP I of 1977, which prohibits destruction of non-military objects.¹ Such protection is available to all those objects which are indispensable for the survival of the civilian population such as food-stuffs, agricultural areas, crops, livestock etc.² Under the same Protocol, deliberate destruction of non-military objects is allowed under certain circumstances when these objects by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, offers a definite military advantage.³

Comparison between Islamic International Law and International Humanitarian Law (IHL):

Under both legal systems, non-civilian objects have given protection from attacks, but such protection is not available to those non-military objects which directly or indirectly contribute to military actions.

C-Protection of places of worship and cultural property under Islamic International Law:

Islam provides full respect to worship places of other religions, as Almighty Allah says:

For had it not been for Allah's repelling some men by means of others, cloisters and churches and oratories and mosques, wherein the name of Allah is oft mentioned, would assuredly have been pulled down.⁴

The conduct of the Prophet provides a practical example of respecting enemy's places of worship. When he entered into peace agreement with the people of

¹ Art. 52 (1), AP I of 1977.

² Art. 54 (2), AP I of 1977.

³ Art. 52 (2), AP I of 1977.

⁴ 22: 40.

Najrān, he granted protection to the lives, properties and places of worship of Christians:

Full protection is accorded from Allah and His Prophet (pbuh) to the Christian inhabitants of *Najrān* regarding their life, land, nationhood, property and wealth, even to those who are residing as their dependants in the vicinity villages of *Najrān* and to those living in *Najrān* and outside the country, their priests, monks, churches, and everything whether great and small.¹

The companions of the Prophet also fully respected these divine commands, and whenever they conquered a country they did not damage the worship places of non-Muslims. When Abū ‘Ubaidah (RA) conquered Syria, he made a peace treaty with the people of Syria on the condition that their synagogues and churches would be left in their original conditions and would not be destroyed, nor they would be interfered with regard to them.²

When ‘Amr b. al-‘Ās (RA) conquered Egypt, he granted protection to the lives, properties and churches of the people of Egypt.³ Similarly, a covenant between ‘Umar and the Christians of Jerusalem was concluded on the occasion of the conquest of that city. ‘Umar undertook to guarantee them freedom of lives, properties, and religion. He agreed that their churches would not be destroyed, nor they would be used as places of residence.⁴

As far as destruction of cultural objects is concerned, countries like Egypt and Syria are also the proofs of not destroying cultural objects. When Muslims conquered these countries no one harmed the cultural heritage of these places and the historical monuments of Pharaoh and *Qubtīs* are still present. Apart from this, any country that became part of Muslim world, during the early years of Islam, retained its culture and tradition. When the palace of Caesar was conquered, the antiques discovered

¹ Abū Yūsuf, 1979, 145.

² Ibid., 149.

³ Ibn Kasīr, *Tarīkh Ibn Kasīr: al-Bidāyat wa al-Nihāyat*, vol. 7, (Karachi: Nafees Academy, n.d), 207.

⁴ Tabarī, vol. 2, n.d, 472.

were neither destroyed nor distributed by the Muslims among themselves. Instead, these were sent to 'Umar; these included idols cast in gold and silver apart from jewels.¹

D- Protection of cultural property and places of worship under International Humanitarian Law (IHL):

Cultural property has been given protection under The Hague Convention, 1954.² Under the Convention cultural property, includes significant architectural monuments, art works, books or manuscripts of artistic or historical significance, museums, large libraries, archives, archaeological sites, and historic buildings.³ The convention was strengthened by the Additional Protocols I of 1977, which prohibits attacks against the "historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples."⁴

Comparison between Islamic International Law and International Humanitarian Law (IHL):

Under both legal systems, places of worship and cultural objects have been given immunity from attack, as has been provided to those objects which are indispensable for the survival of human life.

¹ Tabarī, vol. 2, n.d, 503-505.

² Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954.

³ Art. 1, Hague Convention of 1954.

⁴ Article 53, AP I of 1977.

Section V

Principle of Reciprocity and the laws of war in Islamic International Law

The laws of war in Islam are regulated by the principle of reciprocity or ‘*mu’āmalah bi’l -misl*’.¹ In this connection the Holy Qur’ān lays down:

The sacred months are for the sacred months and the forbidden things are reciprocal. So one who transgresseth against you, transgress against him in like manner as he has transgressed against you and fear God ...²

This means that as long as polytheists are observing the sanctity of *Harām*¹ months Muslims should also do the same; however, if the enemy disregards it and starts fighting then Muslims are allowed to do the same.⁴ The second part of the verse shows that the principle of reciprocity is limited by proportionality, which requires that Muslims should retaliate in a measured way, within the limits and extent of initial aggression.⁵

Although, Islam has recognized the principle of reciprocity but at the same time compassion and mercy are preferable acts in Islam, as stated in the Qur’ān:

¹ The terms like *Mu’āmalah bi’l -Misl* (Reciprocity), *Muqabile be Misl* (reprisal), *Qisās* (punishment), *Enteqām* (vengeance) and *talāfee* (retribution) are all equivalent for the concept of reprisal in the law of armed conflict. For comparison between Islamic law and IHL on the subject see Seyed Mostafa Mir Mohammadi, *Belligerent Reprisals in Islamic Law and International Humanitarian Law*, Research paper presented in Qum Conference on IHL / Islamic law held in Nov. 2006. (The research paper basically dealt with the issue from Shi’ā perspective), (hereinafter, Mohammadi, Qum Conference / 2006), Hamidullah, 1977, § 64, (a), 222, 254, 255, 282, 305.

² 2: 194.

³ Months of *Harām* are *Muharram*, *Rajab*, *Dhūl-Qa’dah* and *Dhūl’-Hijjah*. Since the time of Ibrahim war was prohibited during these months.

⁴ Abu al-A’lā Mawdūdī, *Taqhīm al-Qur’ān*, vol. 1, (Lahore: Idara Tarjumān al-Qur’ān, 1988), 152.

⁵ Sayyed Qūtb, *In the shade of the Qur’ān fi Zilāl al-Qur’ān*, Tr. & Ed. by M. A. Salahi & A. A. Shamis, vol. 1, (UK: The Islamic Foundation, 1999), 214.

If ye punish, then punish with the like of that wherewith ye were afflicted. But if ye endure patiently, verily it is better for the patient.¹

Majority of Commentators are of the view that this verse was reveled during the battle of ‘Uhad, when the body of Hamzāh (RA) was badly mutilated.² Hind, took out his liver and chewed a part of it but soon vomited it.³ When the Prophet saw Hamzāh in this situation he became very angry and said that he would mutilate seventy of them in retaliation for him.⁴ However, God quickly revealed to him saying, “If ye punish, then punish with the like of that wherewith ye were afflicted”

According to Ibn ‘Abbās, after revelation of this verse the Prophet remained patient and prohibited from mutilation.⁵ After the conquest of Mekkah when Wahshī came before the Prophet, he forgave him and only said: “Woe to you, hide yourself from me and never let me see you again”.⁶

Samrāh b. Jūndab narrates that the Prophet used to exhort us to give alms and forbid us to mutilate”.⁷ While Abu Sa‘īd al-Khūdrī narrates that the Prophet even forbade from mutilating the beasts.⁸

Beside proportionality, the concept of reciprocity is limited by two other principles, which are the ‘last solution’ and the observance of ‘ethical and humanitarian considerations’. The former solution requires that this course of action must be taken as a last resort when other means like arbitration, compensation etc fail.⁹ The later requires

¹ 16: 126

² Qūrubi, *Al-Jāmi‘ li Ahkām al-Qur’ān*, vol. 10, (Dār al-Kātib al-‘Arabī, 1967), 201. (Hereinafter, Qūrtubi, 1967).

³ Tabarī, vol. 1, n.d, 242.

⁴ Qūrubi, 1967, 201.

⁵ Ibn Hishām, vol. 2, n.d, 102.

⁶ Ibn Ishāq, *The Life of Muhammad*, Tr. A. Guillaume, (Oxford University Press, 1982), 376.

⁷ Abū Dawūd, 1984, 738.

⁸ Ibn-i- Māja, 2000, 383.

⁹ Mohammadi, Qum Conference / 2006.

requires that prohibited acts remain prohibited, even though enemy is committing such acts. According to Zuhaylī:

Although the principle of reciprocity is an ancient one, Islam embraced it in dealing with others in time of peace and war alike to make justice reign, establish standards of fairness and impartiality, and ensure that the enemy would not overstep limits in its deeds and conduct. However, if the fundamental ethical and moral principles are breached, Muslims should not do the same. For instance, Islam proscribes the mutilation of bodies in war, or disfigurement by amputating the nose, cutting off the ear or lips, or slicing the belly open, even if the enemy practices such acts.¹

Similarly, if the enemy deliberately attacks our civilians or commits acts of violence against prisoners, Muslims are not allowed to do the same because every one is responsible for his own deeds. No one can take the burden of another's actions, as Allah Almighty says:

The detriment of a person's actions will be borne by him and no one shoulders the sin of another.²

¹ Wahbah Zuhaylī, *Islam and International law*, ICRC Review No. 858, available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-858-p269/\\$File/irrc_858_Zuhili.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-858-p269/$File/irrc_858_Zuhili.pdf).

² 6: 164.

Section VI

Can Muslim States sign International Conventions?

Muslim are enjoined to have peaceful relations with the non-Muslim states, as stated in the Qur'an:

And if they incline to peace, incline thou also to it, and trust in Allah, Lo! He is Hearer, the Knower.¹

When the Holy Prophet (pbuh) migrated to Medina, he signed a charter, called 'Charter of Medina' with the Jewish tribes settled therein,² under which both the parties were allowed to enjoy the right to religious freedom and they undertook to assist each other against any external attack.³

At the end of sixth year after *hijrah*, the Prophet signed a treaty of *Hudaybia* with the *Mekkans*,⁴ most of the terms and conditions of which were biased against the Muslims. One such condition was that if any Muslim would join the *Mekkans*, he would not be returned, but if any *Mekkan* joined Muslims they would have to return him. While the negotiations were going on between the Prophet and Suhayl b. 'Amr, Abu Jūndūl came there to the Prophet, having his feet tied with chains. He requested the Prophet for help (to take him back), but he refused to do so (as it was against the terms of the treaty).⁵

Majority of Muslim jurists are of the opinion that treaty of peace with the non-

¹ 8: 61.

² Those tribes were *Banu Qaiyunaqa*, *Banu Nadir* and *Banu Quraizah*.

³ Ibn Ishāq, 1982, 231.

⁴ For details see Ibn Hishām, vol. 2, n.d, 390-406.

⁵ For details see Tabarī, n.d, 335-337.

Muslims is permissible and the condition is that it should be in the interest of Muslims.¹

The Prophet fully observed all the humanitarian aspects of the laws of war and it can safely be concluded that there is no restraint in signing international conventions like the four Geneva Conventions and their Additional Protocols, the Genocide Convention and the Statute of ICC. Once Muslims have signed a treaty with non-Muslims, they have to respect their treaties, as stated in the Qur'an:

Except those of the idolaters with whom you have had a treaty, and who have abated nothing of your right nor have supported anyone against you. (As for these), fulfill their treaty to them until the end of their term. Surely, Allah loves those who keep their duty (unto to Him).² So long as they are true to you, be true to them. Verily Allah loves those who keep their duty.³

Although, under Islamic law Muslims have to respect their treaties as long as the other side is respecting it, prohibited acts like mutilation, deliberate and unnecessary killing of civilians and unnecessary destruction of civilian objects etc remain prohibited under Islamic law even if the other side does not respect them.

¹ Kasānī, vol. 6, 1986, 108, Ibn Qudāmah, vol. 13, 1992, 154, Al-Durdīr, vol. 2, n.d, 283-86, Al-Umm, vol. 4, n.d, 189.

² 9: 4.

³ 9: 7.

CONCLUSION

- 1- The rules of Islamic International law providing safeguard and quarter to those enemy *horse de combat* who are either sick or wounded or have laid down their weapons and are no longer taking part in the hostilities are similar to the rules enshrined in IHL. In fact, Islamic law for the first time provided that whoever kills enemy *horse de combat*, he would have to pay compensation for it.
- 2- The rules regarding Prisoners of war (POWs) are no less equally beneficial than the rules of Geneva Convention. Indeed Islamic International law is the first International law which provided that the honour and dignity of prisoners must be respected, they must be released as soon as possible, unless they commit war crimes in which case they will have to face punishment.
- 3- Islamic International law has provided comprehensive rules for the protection of non-combatants which are similar to the provisions of IHL. The principle that civilian loose immunity where they directly or indirectly participate in the war is also fully in line with the rules of IHL.
- 4- The rules of Islamic International law, prohibiting the destruction of non-military objects except in the cases of extreme military necessity are also similar to the provisions enshrined in IHL.
- 5- The laws of war are regulated by the principle of reciprocity but this principle is limited by the rules of proportionality and moral and ethical considerations.
- 6- Under Islamic International law Muslim states are allowed to sign International conventions governing the laws of war like the Four Geneva conventions and their additional Protocols; as these laws are fully in line with the laws of Islamic International law practiced by the Holy Prophet (pbuh) and his companions fourteen hundred years ago.

CONCLUSION & PROPOSALS

CONCLUSION & PROPOSALS

- 1- War crimes are the violations of the laws of war, whether committed by civilians or military personnel both in International as well as Internal armed conflicts.
- 2- Under Customary International law it is the duty of all superiors, whether civilian or a military to ensure the prevention and punishment of breaches of international humanitarian law by their subordinates. Where they fail to do so, they bear individual responsibility for the acts of their subordinates, even though they took no active part in the commission of crime.
- 3- Under customary International law the defence of obedience to superior order does not constitute a valid defense, unless he did not know that the order was illegal, and could not reasonably expected to know that the act ordered was unlawful.
- 4- The doctrine of Military Necessity does not justify indiscriminate attacks directed against civilian population.
- 5- Reprisals are insufficient mean of redress, and there is a growing tendency of banning the reprisals; IHL has prohibited reprisals against protected persons and property in international armed conflicts. As far as Internal conflicts are concerned IHL is silent on the matter.

- 6- Crimes against humanity refers to systematic acts of violence committed against any civilian population. After World War II, it appeared as a distinct category from war crimes, however in modern conflicts their link can't be denied and crimes committed against civilian population during an armed conflict can be termed both as war crimes and crimes against humanity.
- 7- The charter of IMT introduced three categories of crimes namely crimes against peace, war crimes and crimes against humanity which were not known before.
- 8- The world's first successful attempt to prosecute war criminals took place after World War II. There is disagreement among the jurists whether it has formed a precedent or not? According to the majority of jurists it became a precedent.
- 9- In 1997-1998, the UN SC established two International criminal tribunals for the Former Yugoslavia and Rwanda and for the first it became possible to try persons alleged to have committed war crimes in internal conflicts.
- 10- The Statute of the ICC provides the court jurisdiction over war crimes committed both in the context of international and internal conflicts. The jurisdiction of the court complements the jurisdiction of the states, which means that it will only exercise its jurisdiction when the national courts failed to do so.
- 11- The rules of Islamic International law providing safeguard and quarter to those enemy *hors de combat* who are either sick or wounded or have laid

down their weapons and are no longer taking part in the hostilities are similar to the rules enshrined in IHL. In fact, Islamic law for the first time provided that whoever kills an enemy *horse de combat*, he would have to pay compensation for it.

- 12- The rules of Islamic International law providing safeguard and quarter to those enemy *horse de combat* who are either sick or wounded or have laid down their weapons and are no longer taking part in the hostilities are similar to the rules enshrined in IHL. In fact, Islamic law for the first time provided that whoever kills enemy *horse de combat*, he would have to pay compensation for it.
- 13- The rules regarding Prisoners of war (POWs) are no less equally beneficial than the rules of Geneva Convention. Indeed Islamic International law is the first International law which provided that the honour and dignity of prisoners must be respected, they must be released as soon as possible, unless they commit war crimes in which case they will have to face punishment.
- 14- Islamic International law has provided comprehensive rules for the protection of non-combatants which are similar to the provisions of IHL. The principle that civilian loose immunity where they directly or indirectly participate in the war is also fully in line with the rules of IHL.
- 15- The rules of Islamic International law, prohibiting the destruction of non-military objects except in the cases of extreme military necessity are also similar to the provisions enshrined in IHL.
- 16- The laws of war are regulated by the principle of reciprocity but this principle is limited by the rules of proportionality and moral and ethical considerations.

17- Under Islamic International law Muslim states are allowed to sign International conventions governing the laws of war like the Four Geneva conventions and their additional Protocols; as these laws are fully in line with the laws of Islamic International law practiced by the Holy Prophet (pbuh) and his companions fourteen hundred years ago.

PROPOSALS:

Criminalizing certain violation of the laws of war is not enough unless the states, the UN and international organizations like ICC take practical measures for the suppression and prosecution of persons accused of having committed war crimes. At the national level, govts should enact effective implementing legislation to ensure that they can cooperate fully with the ICC.

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