

Protection of the Right to Life under Modern International Law and Prophetic Law: A Comparative Study

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ABSTRACT:

The right to life is often said to be mother right and most important fundamental right of all rights. The application and criteria of protection of the right to life differs under international humanitarian law (IHL) and human rights law (HRL). As a general conception, IHL is applicable only during armed conflict and HRL is applicable in all other situations excepting armed conflict. This conception though has been proved to be wrong, however, the primary concern regarding the protection of the right to life during armed conflict is that of IHL. However, it does not mean that HRL has nothing to do with an armed conflict or IHL is having no concern about the protection of the right to life beyond armed conflict, rather it means that standard and criteria of protection of the right to life during armed conflict differs in both these branches of international. When the question arises with regard to the protection of the right to life during armed conflict, different answers are found in both these disciplines. The substantive law as well as case law of both the branches differ in this regard to such an extent that a person may lose the protection of his right to life under IHL on the one hand, while still holding such protection under HRL on the other. While Islamic Law does not differentiate between humanitarian law and human rights law, rather in Islam, protection of the right to lie has been ensured on equal footings in and outside an armed conflict. The paper focuses the main causes of differences between IHL and HRL. Consequently, sorting out the best possible manner in which such differences can be removed and resultantly by recommending the standard and criteria as to how the right to life can be best protected.

Introduction

Background:

The concept of Human Rights is an old concept which prevailed in every society, culture and religion, the form of which may differ from each other. Paul Gordon Lauren¹ has discussed these concepts and visions and finally concluded that these concepts and visions cannot be attributed to any single society, form of government, culture or religion². He observed that every great

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religion, culture and civilization respected the human dignity and the values of every individual³. At times, the religions have been blamed on the ground that violations of human rights have been justified on the pretext that these norms of human rights contradict the Divine Judgments, but it is also an admitted fact that the World's religions have called for equality, harmony and have promoted love which is beyond mere concept of protection of human rights⁴.

Various contemporary scholars have attributed the emergence of human rights concept to Christianity and some others have attributed the same to the era of modern enlightenment⁵, but modern scholars are of the view that both Christianity and Enlightenment were declared incapable to deliver according to the need of the time and to the level of protection alleged in their promises⁶. It was further added that the movement of human rights grew in the 1940's after the World War II, and the events following the war have led to real protection which was earlier found only in the books⁷. In this regard, Article I of the Universal Declaration of Human Rights (UDHR) lays down that, "all men are born free and equal in rights and dignity and are endowed with reason and conscience". In this way, the concept prescribed by the Christianity and the Enlightenment was brought into reality after declaring the provisions of UDHR binding on all states to respect and protect the human rights of every single individual⁸.

THE RIGHT TO LIFE IN ISLAMIC LAW:

The life in Islamic law is a gift from *ALLAH* Almighty to man but on the one hand life is termed as right of a man, while on the other, it is a trust on him. *ALLAH* says in the Holy *Quran*: "It is He who gave you life, will cause you to die, and will again give you life"⁹.

From the foregoing text it is apparent that life on the one hand is a gift from God and on the other duty of man to respect and protect the same, because it is only the sole prerogative of *ALLAH* Almighty to give and take the life. Hence, *ALLAH* Almighty, has not only prohibited the taking of the life of another man, rather a man has been prohibited from taking his own life by way of suicide. *ALLAH* says: Do not kill yourselves, for *ALLAH* has been most merciful to you. If any do that in rancour and injustice, soon we shall cast them into fire¹⁰.

In the same manner killing of a human being has been prohibited in Islam except for a just cause. Holy *Quran* in this regard says:

Do not take a life, which *ALLAH* made sacred, except by right. And if anyone is slain wrongfully, we have given his heir authority to demand retribution, but let him not exceed in the matter of taking life¹¹.

Thus, the right to life has been protected under Islamic law by all means and in

all circumstances¹². Besides honoring the sanctity of human life in the above mentioned circumstances, protection of human life during wars and armed conflicts has not only been acknowledged, but also strict laws have been prescribed for protection of the right to life during hostilities. Apart from protection of the right to life of human beings, their mutilation, killing of prisoners of war, torture, inhuman and degrading treatment have also been prohibited in Islamic law¹³.

Whatever is the case, all living creatures are vested with rights beyond any doubt. Animals as well as trees have been granted rights and these rights can be found in divine statutes, for instance in Islamic law, these rights are found in the Holy *Quran* and the traditions of the Holy Prophet ﷺ. Even we can say that being a living creature or having a reasoning is not a condition precedent to have such rights because sometimes these rights have also been extended to buildings etc.¹⁴. Under the Islamic law of war, various directions have been ordained in *Shariah* books regarding the recognition as well as protection of the rights of animals, trees and buildings such as holly places.

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

I instruct you in ten matters: Do not kill women, children, the old, or the infirm; do not cut down fruit-bearing trees; do not destroy any town; do not kill sheep or camels except for the purposes of eating; do not burn date-trees or submerge them; do not steal from the booty and do not be cowardly¹⁵.

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

Mutilation (*muthla*), imposing thirst (*ghulul*), the killing of women, children, and the old (*shuyukh*) the ones who have no judgment for themselves (*lara'ylahum*), and no fighters among them; (the killing of) monks and hermits, the burning of trees, and the killing of animals for other than the welfare (or Eating)¹⁶.

All these rules and principles as envisaged in Islamic Law of war, as contained in the authoritative texts prohibit naked aggression, inflicting any harm on non-combatants, prohibit excessive cruelty even in the case of combatants and in addition to human beings, Islamic law even addresses and protects the rights of animals and the natural environment¹⁷.

The claim for the foundation of the human rights has been raised by the West and the origin and development has been attributed to western scholars¹⁸, but it is also an admitted fact that almost all the western scholars have started the

history of human rights from the eighteenth or the nineteenth century and history supports the concept that the West was totally ignorant of these norms of human rights and first time the concept flourished in the shape of Magna Carta and later on in the shape of promulgation of the USA and the French constitutions¹⁹. While on the other hand, in Islam, the concept was laid down fourteen centuries ago on specified principles and those principles are still applicable without any amendment. The main difference between the two approaches is that the former is a man-made concept which is primarily based on the norms, customs and principles prevalent at that particular time, while the latter is a divinely ordained system not amenable to any change save as provided in that particular system and is applicable for the rest of the time as well. Hence, on the basis of this difference, the former is subject to any change, modification, amendment, suspension, and even the abrogation, but the latter is complete and exhaustive, and has not been subjected to any change, modification, suspension or abrogation till the day of resurrection²⁰.

Legal Instruments:

As discussed earlier, the right to life is a fundamental right of every individual under major human rights instruments and is one of the fundamental rights available to the people under the Constitution of Islamic Republic of Pakistan (Constitution). Article 3 of the UDHR, Article 6 of the International Covenant on Civil and Political Rights (ICCPR), Article 6(1) of the Convention on the Rights of Child (CRC), Article 1 of Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty and Article 9 of the Constitution guarantee the right to life of every human being. Besides the above-mentioned international as well as national law instruments, this right has also been protected by various regional instruments as well.

Apart from the provisions of HRL instruments, IHL instruments also render protection to the right to life in their respective sphere. Before directly going to the provisions of IHL, it seems appropriate to have a brief look at the history and background of IHL.

Although, the term international law (*jus inter genes*), was first time used by Jeremy Bentham in 1780, but prior to that period some work was done in the field of international law in general and in IHL in particular. In this regard, Hugo Grotius (1583-1645), has written a book which was published later on, named as *De Jure Belli Ac Pacis* (Concerning the law of war and peace), and later on emergence of the treaty of Westphalia (1648) further contributed to the development of IHL²¹. Further development in this regard was made in the nineteenth century, firstly when states adopted the practice of outlawing

trafficking of slaves, secondly at the time of adoption of St. Petersburg Declaration which condemned the use of dum dum bullets in times of war and finally in 1898 when Convention on Laws and Customs of Land War (the First Hague Convention) was adopted²².

After World War I, attempts were made with regard to the establishment of peace in the World, and accordingly Geneva Convention 1929 was adopted in this regard²³. In addition to this, Kellog Briand Pact 1930 prohibited the act of aggression and consequently in 1937 a Convention against Terrorism was also adopted by the League of Nations. After World War II, more serious atrocities were witnessed by the World and these atrocities included those which at that time were not covered neither by the international law nor by the domestic law of any state. These included discrimination and mass murder of Jews, Romanis, Homosexuals and Communists. Having faced these problems, it was noticed that there is need to frame additional instruments rendering protection in this regard and consequently Four Geneva Conventions were adopted in 1949, which were followed by their Two Additional Protocols of 1977 and the Third one in 2005²⁴.

The primary protection to the right to life has been given in all the humanitarian law instruments. For instance, various provisions of the first Geneva Convention for the Amelioration of the Condition for Wounded and Sick in Armed Forces in the Field of 12 August 1949 (GC I), dealing with the protection of the wounded and sick in the field render protection to the protected persons. Article 13 of the same Convention defines the protected persons, but said definition is general and the categories of the protected persons have been mentioned in a more elaborative manner. Besides the abovementioned categories, medical centers and mobile units have specifically been included in the category of protected persons. Moreover, medical transports including medical aircrafts have been granted protection under Articles 35 & 36 of GC I.

However, in order to claim protection, medical aircrafts are required to follow the prescribed routes and use distinctive emblem as prescribed under Article 38 of the same Convention and the protection granted to the medical transports and medical aircrafts is subject to adherence to the rules mentioned in the Convention²⁵.

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 (GC II), also renders protection in the same sphere. Article 12 of GCII defines the protection of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea and Article 13 common both to GC I and GC II defines the categories of prote-

cted persons which have been mentioned above. Apart from the individuals, military hospital ships and medical establishments have also been protected under Article 22-23 of the same Convention. Under Article 36 of GC II, personnel of the hospital ships have been given protection and under Article 37 of the same Convention, medical and religious personnel of other ships have also been protected. Medical transport units are also protected. Under Article 38 of GC II, ships used for the conveyance of medical equipment have been given protection and under Article 39 of the said Convention, medical aircrafts have been given immunity from attack. However, these aircrafts have to follow the instructions, specific routes, all the regulations and shall also use the distinctive emblem as prescribed in Article 41 of the same Convention. Moreover, in order to avail the immunity, every such transport should be used for the prescribed purpose²⁶.

Geneva Convention Relative to the Treatment of the Prisoners of War of 12 August 1949 (GC III) contains the detailed rules with regard to the protection and humane treatment of the prisoners of war (POWs). The term POWs has been defined under Article 4 of the said Convention.

The fourth Geneva Convention namely Geneva Convention to the Protection of Civilian Persons in Time of War of 12 August 1949 (GC IV), has been promulgated for the Protection of civilians in the times of war. Protected persons have been defined under Article 4 the said Convention and they are entitled to protection under this Convention, but the term civilian itself has not been defined under the Convention. However, all the assets, property and installations used by the civilians have been given protection under the Convention.

In addition to these Conventions, three Protocols have also been added to the above-mentioned Conventions. The First Additional Protocol of 8 June of 1977 is relating to the protection of victims of International Armed Conflict. Whereas, the Second Additional Protocol of 8 June, 1977 is relating to the protection of victims of Non-International Armed Conflict. Third Additional Protocol has also been adopted on 8 December 2005 but the same is relating to the adoption of an Additional Distinctive Emblem.

The first two Additional Protocols (AP I and AP II) contain the provisions regarding the protection of the persons as well as unlawful targets with the difference that AP I deals with the protection during international armed conflict. Whereas, AP II deals with non-international armed conflict and these provisions along with the relevant provisions of the Four Geneva Conventions of 1949 are the primary provisions of IHL.

The above-mentioned provisions of international law have also been incorpora-

ted in the domestic laws as well and in this regard the right to life has also been contained in Article 9 of the Constitution, which states that "no person shall be deprived of life or liberty save in accordance with the law". Although, the provision contains this single sentence but the same has been interpreted in a broader perspective by the courts.

From the above said analysis, it can be inferred that the international law instruments containing the provisions of the right to life are primarily relating to two main disciplines of international law, namely IHL and HRL. Both of the aforementioned branches of international law protect the right to life in their respective spheres. However, both have their own rules and parameters and at times they differ from each other with regard to the protection of the right to life, as in some cases one of the above said branches may be protecting the right to life, whereas, the other may not. In order to understand this deference with regard to protection of the right to life, it is also necessary to understand the difference between the two disciplines.

The basic difference between the two disciplines is with regard to the grant of rights and procedural capacity of individuals. In this respect, the aim of HRL is to grant the positive rights to the individuals, whereas, the aim of IHL is to protect the interests of the individuals through means other than the grant of rights²⁷. On the basis of this difference, another distinction has also been drawn that IHL is principally applicable only during armed conflict, whereas HRL is applicable in all other situations besides armed conflict and in certain other cases during armed conflict as well. On these bases, in various cases even deaths and casualties of innocent civilians and other non-combatants is not a violation of IHL. For instance, civilians killed in collateral damage would not constitute a violation of IHL, because it is concerned with the right of states and has nothing to do with the rights of individuals. On the other hand, no such exception is available under HRL, as it is available under IHL, which is based upon the fact that HRL not only deals with the rights of states, rather primary aim of HRL is to give protection to the rights of every single individual²⁸.

For a certain period, the view that only IHL is applicable during armed conflict remained under discussion before various forums. In this regard, previously it was argued that the applicable law during the armed conflict is IHL and not HRL. The verdict of the International Court of Justice (ICJ) is repeatedly cited in favor of this view. ICJ in the 1996 *Nuclear Weapons Advisory Opinion*, while interpreting the meaning of arbitrarily as mentioned in Article 6 of ICCPR held that the rules of IHL on the conduct of hostilities constitute *lex specialis*, meaning thereby that IHL alone will be applicable during the conduct of

hostilities and the verdict apparently shows that application of HRL has been excluded during the conduct of hostilities or during an armed conflict. This kind of interpretation is reaffirmed few years back in the *Palestinian Wall Advisory Opinion*, though the legal experts believe that the conception of *lex specialis* is not clear. The ICJ has referred to IHL as constituting the *lex specialis* in the situations of armed conflict, but the Court did not hold that IHL entirely displaces HRL with respect to all rights under HRL. Citing the *Nuclear Weapons Advisory Opinion*, a few experts felt that it was clear that HRL was subordinate to IHL with respect to the right to life. According to this view, HRL is entirely displaced by IHL on this question and therefore, the issue that when fighters can be targeted must be resolved by IHL alone²⁹, but this view has been negated after development of international bodies as some legal experts believe that HRL relating to the right to life is suitable to supplement the rules of IHL relating to the use of force for non-international armed conflicts and occupation, as well as the law relating to civilians taking a “direct part in hostilities”. Most of the occupying powers deny that HRL applies to the situations of occupations as the U. S. and Israel have repeatedly stated, but the ICJ, human rights treaty bodies and General Assembly and Security Council resolutions are insisting upon respect and compliance of both in the situations of occupation. Now it is generally agreed that in situations that are relatively calm, the use of potentially lethal force during occupation is governed by the “law enforcement model” that is HRL, which requires that a state should effect an arrest where possible before opting for use of force³⁰. The United Nations Human Rights Committee (UNHRC), in its report on Israel, stated that “before resorting to the use of deadly force, all measures to arrest and detain persons suspected of being in the process of committing acts of terror must be exhausted”³¹. This principle was recognized by the ICJ in the *Palestinian Wall* case which confirmed the concurrent application of HRL and IHL during armed conflicts in the following manner:

"As regards the relationship between international humanitarian law and human rights law, there are thus three possible solutions: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law"³².

The above-mentioned findings of the ICJ overrule its earlier findings in *Nuclear Weapons* Advisory opinion of 1996 that during armed conflict rules of IHL

constitute as *Lex specialis*. Here the court ruled that while adjudicating upon the issue, the court has to take both of the branches of international law into consideration.

Various jurists of the present legal fraternity argue that there is almost a consensus among the legal experts that HRL is applicable during the armed conflict. International judicial and political bodies have repeatedly supported this version and the opponents find a very limited scope. Besides many judgments of international and regional courts, there are many resolutions brought and passed at different forums including the Security Council (SC), General Assembly (GA), Human Rights Council (HRC) and the Commission on Human Rights (CHR), which ensure the application of HRL during armed conflict³³.

As far as the situations under occupations are concerned, the ICJ in accordance with the above-mentioned findings in the *Palestinian Wall Advisory Opinion* has held that HRL applies in occupied territory, meaning thereby that IHL shall not be considered as *lex specialis* in such like situations. Moreover, there are a number of General Assembly Resolutions as well as the 1968 Tehran Conference, in which States have asserted that HRL applies in situations of occupation. One such resolution, which both the US and UK supported, made clear that HRL applied in Iraqi-occupied Kuwait in 1990, but there are various observations, as many experts believe that every occupying power denies the application of HRL with respect to its occupation, as US and UK both deny its application on their occupation of Iraq³⁴.

The latest approach adopted by ICJ is quite compatible with the approach adopted by UNHRC. In *DRC v. Uganda*³⁵, the ICJ considered the concrete application of these Principles and held that Uganda was an occupying Power in *Ituri* during the relevant period and it was held that Article 43 of the Hague Regulations of 1907 imposed upon it an obligation to secure respect for the applicable rules of HRL and IHL to protect the inhabitants of the occupied territory against acts of violence and not to tolerate such violence by any third party³⁶.

The above-said fact is quite relevant with the right to life, because this is a right which is called "the irreducible of human rights" and is a right which is inalienable and non-derogable even in times of public emergency, which threatens the right to life of the entire nation, meaning thereby that every individual has a right to possess the right to life in all circumstances including the situations of emergency, irrespective of its enforcement.

With regard to the right to life, its protection and enforcement, different views were expressed at the times of drafting of different international law instruments containing the right to life. The first view expressed in this regard was that the right to life is non-derogable in all situations and no exception can be made in

this regard, meaning thereby that taking of life cannot be justified even in unavoidable circumstances³⁷. However, the second view was that there should be limitations with regard to the exercise of the right to life and circumstances should specifically be mentioned to avoid the uncertainty of the states and in those specified circumstances, taking the life would not amount to the violation of the right to life³⁸. This view was criticized on the ground that such view was pressing upon the exception than on the protection of the right to life and that would ultimately amount to authorize the taking of life instead of its protection. Apart from these two opinions, a third view was maintained that a general formulation is better instead of listing exceptions. However, this view was adopted in a few international law instruments containing the right to life, but not in certain others³⁹. Major HRL instruments including UDHR, ICCPR, ADRD, and ACHR have adopted the last approach.

From the foregoing discussion, it is evident that the scope provided in both of the above said disciplines with regard to the protection of the right to life is wider. However, this study is focusing on the protection of the right to life during armed conflict. In this regard, it is appropriate to define the term armed conflict before explaining the situations in the same.

Armed Conflict:

Armed Conflict has been divided into two sub categories. The first one is international armed conflict and the second one is non-international or internal armed conflict. The four Geneva Conventions define international armed conflict in the words that "International armed conflict that occurs between two or more state parties to the conventions"⁴⁰. From the foregoing definition, it can be inferred that international armed conflicts always occur between the state parties and not between different groups or individuals.

Moreover, Article 1(4) of AP I extend this definition to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination"⁴¹.

On the other hand, definition of non-international armed conflict is not clear. Internal armed conflict has been defined at two places. Article 1 of AP II states that an internal conflict is a conflict between the "armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol". Secondly, Common Article 3 of the four Geneva Conventions applies to "armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties". From the above-mentioned definitions, it is clear

that the definition provided in AP II is more specific and narrower than that provided in Common Article 3 of the Four Geneva Conventions⁴².

Application of Human Rights Law during Non-International Armed Conflict and Situations of Occupation:

A few cotemporary legal experts believe that HRL relating to the right to life is suitable to supplement the rules of IHL relating to the use of force for non-international armed conflicts and occupation, as well as the law relating to civilians taking a “direct part in hostilities”⁴³. According to international law experts, HRL does not categorize the people for the purpose of protection as IHL do. However, the principles have also been prescribed under HRL for the protection of the right to life during NIAC. The main principle in this regard is “law enforcement model”, which regulates the conduct of hostilities during NIAC. It further emphasizes the observance of the principles of necessity and proportionality during the conduct of hostilities in NIAC. All the major human rights bodies including HRC, ECHR, Inter American Court and Commission have applied the scheme of protection provided under HRL. According to the experts, this scheme was applied in the case of *Guerrero V. Columbia* where the main principle of “law enforcement model” was laid down according to which the state authorities are under obligation to effect an arrest before resorting to use of force. However, this principle is subject to the condition that the state authorities under situation must exercise effective control and the principle would not apply where such control is not exercised by the state because the law enforcement model does not stipulate any obligation, the compliance of which is impossible for the states⁴⁴.

Protection of Life during Non-International Armed Conflict:

Unlike International armed conflict, there are many issues and complications in non-international armed conflict. One of these problems is the issue of determination of combatants and non-combatants. Settlement of this issue is the foremost necessity in order to determine the people entitled to protection of their right to life. Status of combatants is clear in international armed conflict, but as far as non-international armed conflict is concerned, there is disagreement among the legal experts as to whether the combatant status is clear in non-international armed conflict?

Common Article 3 of the four Geneva Conventions, termed as "an expression of fundamental considerations of humanity by the International Court of Justice", is the fundamental norm which gives protection to certain persons during armed conflict. Common Article 3 is applicable in both international and non-international armed conflicts because it has been declared a norm of

customary international law, but Common Article 3 provides only basic guarantees regarding the protection of innocent people. Detailed provisions regarding their protection are provided in AP II to the four Geneva Conventions, but the basic problem with AP II is that most of the states have not yet signed or ratified it⁴⁵.

The Proportionality Principle:

With regard to the principle of proportionality, it is held that proportionality in IHL is different from the proportionality in HRL. In IHL, this principle is applied in respect of military target, whereas in HRL, it is applied in relation to the right to life⁴⁶. Therefore, in HRL, principle of proportionality is a matter of necessity. These two principles, namely principles of proportionality and necessity are the standards for the use of force but in the opinions of the legal experts it is difficult to measure these two principles, as it is illustrated in the following examples. The *El Frontón* case involved a prison riot in Peru. In order to cope with the riot, the Peruvian authorities demolished the prison with prisoners inside it, and in the *Brothers to the Rescue* case, a Cuban MiG 29 fighter plane shot down a small civilian aircraft which had allegedly violated Cuban airspace. It was held that disproportionate force was used in these cases⁴⁷.

Moreover, proportionality is directly linked with the principle of arbitrariness, especially during the use of force. The Human Rights Committee in a case concerning the principle of disproportionality and arbitrariness held that:

“The action of the police resulting in the death of Mrs. Maria Fanny Suarez de Guerrero was disproportionate to the requirements of law enforcement in the circumstances of the case and that she was arbitrarily deprived from her life contrary to article 6 (1)”⁴⁸.

These precedents reflect that even in cases of emergency, the force used is subject to the principles of proportionality and arbitrariness. The force used by the armed forces even during an armed conflict is not unlimited rather IHL imposes various limitations on the use of force by the armed forces of the parties to a conflict. Members of the armed forces are trained in this body of law and they know, for instance, that it is forbidden to kill unarmed civilians, to take part in any attack on them, to attack vehicles or buildings displaying the protective emblem and to kill prisoners of war. Most importantly, the officers commanding the forces will have to bear additional responsibility of the acts of subordinate forces as well. Some states are concentrating upon to train their forces according to the principles of IHL and on the other hand, various international organizations particularly International Committee of the Red Cross is contributing for the awareness of the Geneva Conventions 1949 along

with their Additional Protocols of 1977⁴⁹.

Issue of Combatants and Non Combatants:

The experts believe that there are clear categories of combatants and non-combatants in International Armed Conflict, but they doubt whether this type of categories exist in Non-International Armed Conflict. On the other hand, experts believe that there are no such categories under HRL and the rules of HRL do not permit to target a person on the basis of his status alone, irrespective of his position at the time of target and irrespective of his possibility of arrest. It is also important to settle that in the situation of occupation, can the occupying power target a person on his combatant status alone, or means of arrest should be exhausted before targeting? On this question, some experts differentiate between current and foreign fighters and they suggest that foreign fighters should not be targeted on their status alone⁵⁰.

Targeted Killings:

As far as the issue of targeted killings is concerned, the legal experts believe that the rules would not consider a targeted killing to be illegal in the following exceptional situations, if:

1. "It is carried out in an area where the state does not exercise effective control so that it cannot reasonably effect an arrest; and
2. The state authorities have sought to transfer the individual from whatever authority is in control of the area, assuming that there is such an authority; and
3. The individual has engaged in serious, life-threatening, hostile acts and the state has reliable intelligence that the individual will continue to commit such acts against the lives of persons the state is under an obligation to protect; and
4. Other measures would be insufficient to address this threat"⁵¹.

According to the contemporary legal experts, every case of targeted killings, falling outside of these exceptions would be absolutely unlawful.

Collateral Damage and Loss of Civilian Life:

GC IV was the first attempt towards the assurance of Civilian immunity and protection. Although, it initially contained some gaps but later on when AP I and AP II were introduced, they fulfilled the gap left by GC IV for the purpose of civilian immunity and protection during an armed conflict. Later on, AP I was further amended for strict assurance of civilian immunity and protection⁵².

As far as the expression "collateral damage" and the loss of civilian life or damage to property that results from otherwise lawful acts of war is concerned, there are different standards in both IHL and HRL. IHL does not strictly prohibit the killing of civilians in the former case while HRL does. On this issue, the European Court of Human Rights (ECtHR) recently considered the problem of

incidental loss of civilian life with respect to the civil war in the Russian territory of Chechnya. In one case, a bomb dropped by a Russian plane had exploded near the minivan of the applicant and her relatives, as they were fleeing the village of *Katyr-Yurt* through what they had perceived as a safe exit from heavy fighting. In another case, bombs were dropped on a civilian convoy at the border between Chechnya and Ingushetia. Russian authorities issued a press statement denying civilian damage, claiming that a column of trucks with fighters and ammunition had provoked the encounter by firing upon a government aircraft, but according to the ECtHR, Article 2 of the European Convention on Human Rights (ECHR) covers not only intentional killing, but also the situations in which it is permitted to use force which may result in the deprivation of life. The test to be applied by the ECtHR was one of “absolute necessity” and that the force used must be strictly proportionate to the achievement of the permitted aims. In the *Katyr-Yurt* case, the ECtHR said that the State’s responsibility is not confined to circumstances where there is significant evidence that misdirected fire from agents of the state has killed a civilian. It may also be engaged where they fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and minimizing incidental loss of civilian life⁵³.

From the foregoing analysis, it can easily be inferred that protection of the right to life during armed conflict differs under IHL as compared to HRL. Since, the application of HRL during armed conflict has been admitted, hence, the difference between the two branches is required to be removed for the better protection of the right to life.

In this regard, the first ever approach adopted with regard to the reconciliation between the two is that of ICJ adopted in its 1996 Advisory Opinion on the use of Nuclear Weapons. The Court in this respect concluded that a particular loss of life or violation of the right to life as described in ICCPR and all other human rights law instruments, can only be ascertained on the basis of the law applicable in armed conflict and that in the opinion of ICJ would be IHL exclusively while considering the same as *lex specialis*⁵⁴.

The concept was overturned by the jurisprudence adopted by ECtHR in the cases pertaining to disputes of Ireland and Turkey. In this regard, it was generally understood that not applying the principles of IHL in these situations might be the result of not considering the prevailing situations in these cases as that of armed conflict. The situation was further changed when the ECtHR ruled in Chechen cases, where it not only exclusively applied the principles of HRL by excluding the principles of IHL, rather sometimes applied HRL in a manner which was explicitly in contradiction of IHL⁵⁵.

Another solution suggested for the problem is that instead of having recourse to HRL and instead of declaring IHL *lex specialis*, principles of customary international law should be applied to fill the existing gap. However, it has also been noted that as long as principles of customary international law are applied, application of HRL is excluded and as long as HRL remains applicable, principles of customary international law are excluded. This led Abresch to conclude that in this scenario, customary international law and HRL are two competing factors with regard to the protection of right to life as well as any other kind of protection provided during an armed conflict⁵⁶.

In my humble opinion, the two systems are complementary, however, as discussed above, in a number of situations, either one of them does not provide any explicit remedy or both of them provide a contradictory remedy. Thus, in such a situation, the discipline providing better protection shall be applied so that human rights in general and right to life in particular, could be best protected.

Principles of Distinction and Proportionality under Islamic Law:

Under the injunctions of Islamic Law, it has been held that after beginning of hostilities, Muslims are not at liberty to use indiscriminate and excessive use of force rather they are liable to observe the basic principles laid down in this regard.

Another important characteristic of Islamic law is that it not only imposes restrictions upon the cause of war rather has also laid down complete guiding principles with regard to the conduct of war as well. Once war has commenced, Muslim forces are not at liberty to use indiscriminate force and unlawful methods, rather they have to observe the complete code of conduct of war prescribed in the Holy *Quran* and the Traditions of the Holy Prophet (ﷺ). Basic principles of IHL have been more elaborately defined under Islamic law and the Holy *Quran* in this regard states that: Fight them until there is no Fitnah anymore, and obedience remains for Allah. But, if they desist, then aggression is not allowed except against the transgressors. (2:193).

Kill them wherever you find them, and drive them out from where they drove you out, as Fitnah...is more severe than killing. However, do not fight them near Al-Masjid-ul-Haram (the Sacred Mosque in Makkah) unless they fight you there. However, if they fight you (there) you may kill them. (2:191). But if they desist, then indeed, Allah is Most-Forgiving, Very-Merciful. (2:192).

The holy month for the holy month, and the sanctities are subject to retribution. So when anyone commits aggression against you, be aggressive against him in the like manner as he did against you. (2:194)”.
 From the above mentioned verses of the Holy *Quran*, it is crystal clear that military

expedition launched for a specific objective has to be ceased when said objective has been accomplished.

Moreover, distinction is not only fundamental principle of IHL, rather holds some more value under Islamic law. According to the Holy Quran: Fight in the way of Allah against those who fight you, and do not transgress. (2:190).

This principle of proportionality has also been based upon the verses of the Holy *Quran* which are as under:

And if you were to harm (them) in retaliation, harm them to the measure you were harmed. And if you opt for patience, it is definitely much better for those who are patient. (16:126)

The one who does something evil will not be punished but in its equal proportion. (40:40)

The recompense of evil is evil like it. Then the one who forgives and opts for compromise has his reward undertaken by Allah. Surely, He does not like the unjust. (42:40).

Therefore, it is clear that Islam also recognizes the sanctity of human life and gives protection in this regard, as has been reported from the Holy Prophet ﷺ:

Do not cheat or commit treachery, nor should you mutilate or kill children, women, or old men⁵⁷.

Apart from the above-mentioned verses, many instances from the Traditions of the Holy Prophet ﷺ can be quoted which further necessitate this principle⁵⁸. The

Holy *Quran* also prohibits genocide, indiscriminate and excessive use of force, not only against the human beings rather against the animals and trees etc. which is clear from the practice and Traditions of the Holy Prophet ﷺ and his Companions.

Hence, it is established that Islamic law renders protection of the human life to all the vulnerable groups and Islamic Jurists have based their teachings upon these principles with the passage of time when interpretation and elaboration of these principles was required due to expanding territories of Islamic state. Some scholars have based the difference between Islamic Law and modern international law on the ground that the criteria of protection of the right to life under modern international law is based upon the difference between combatants and non-combatants and under Islamic law upon the believers and disbelievers. According to them, Muslims are entitled for complete protection in this regard, Jews and Christians (people of Book) for a limited protection, and other non-believers (not from the people of Book) to no protection at all⁵⁹. The presumption appears to be based upon the notion of “cause of war” under Islamic law. However, it has also been admitted that at times non-believers have also been

granted protection in this regard as was the case at the time when *Macca* was conquered, when even non-believers were spared without any return. Conclusion of various agreements with non-believers is also an example that they can be held entitled to protection.

The fact is that the primary rules of the law of war under Islamic Law were set at the time of the Holy Prophet ﷺ and were interpreted in the 9th century by the Islamic jurists i.e. many years before the foundation of modern international law. It is also an admitted fact that the rules of IHL as promulgated from time to time were not followed. This fact has been admitted by the Western scholars, as stated by *Sayyed Maudodi* in his book “*Al Jihad Fil Islam*” who narrates some text from “International Law” by “Berkin Head” who states that unfortunately, the way in which World War is fought, reveals the fact without any doubt that the principle of distinction between the civilians and armed forces is in danger of being abolished. This vacuum was present because of the fact that the Laws upon which the principle of distinction was established were themselves baseless. The fact has also been admitted in “International Law and the World War” by “Garner” that when we compare the Articles of the Hague Convention 1907, with the circumstances of 1914-18, World War, then it should be kept in mind that all the people who participated in World War, did not ratify the Convention, so the determination of the fact, that whether the rules prescribed by the Convention are binding or not, was doubtful⁶⁰. Unlike, modern international law, Islamic law not only prescribes the rules of warfare rather makes them binding from the day first without any need of any ratification. Moreover, any violation committed in this regard would entail its consequences in this world and hereinafter, hence, worldly consequences even if escaped by a perpetrator cannot save him from hereinafter. This very foundation and philosophy of Islamic law of war has compelled the rulers and commanders of all the times to follow the teachings of Islamic law irrespective of any international monitoring body.

Thus, it is not only IHL which has given the concept of protection of civilians or non-combatants rather Islamic law had laid down the foundation of this protection much earlier. According to many Traditions or *Ahadiths* of the Prophet ﷺ, five categories of people have been granted protection from attack during war being non-combatants. These include, women, children, the aged, the clergy and any hired man. The entire mechanism of protection under Islamic Law is based upon the difference between *Al-Muqatileen / Al-Muharibeen* and *ghair Al-Muqatileen / Ghair Al-Muharibeen*. Both the words i.e. *Muqatileen* and *Muharibeen* are derived from *Muqatil* and *Muharib* and both mean ‘who fights’.

Hence, having based the distinction between the people who fight and who do not and consequently granting protection to those who do not fight unlike those who fight, the concept of protection granted to non-combatants was much earlier laid down by the Holy Prophet ﷺ than Hugo Grotius and many other international law experts who introduced these concepts in 17th and 18th centuries⁶¹.

However, both the words i.e. *Muqatileen* and *Muharibeen* have been further defined and it has been debated among the Muslim jurists as to who falls within the definition of a combatant. This definition has been made dependant upon the cause of war (*casus belli*) under Islamic Law. According to the great Muslim jurist *Imam Al-Shafi* and *Imam Ibne-Hazm*, the cause of war under Islamic law is unbelief of people in Islam and every person excepting women and children lose their protection unless they become Muslims or pay *Jizyah* (Islamic tax imposed upon non-Muslims). According to them, Traditions of the Holy Prophet ﷺ concerning five categories of people mentioned *supra* are not authentic and only women and children are immune in general situation. On the other hand, according to majority schools of thought including *Imam Abu-Hanifa*, *Imam Malik* and *Imam Ahmad Bin Hanbal*, the cause of war under Islamic law is war itself and not disbelief of non-believers. Hence, only those people lose their protection during war or an armed conflict who participate in fighting and not beyond that⁶².

CONCLUSION:

IHL though developed after the development of HRL but contains concrete rules with respect to the protection of protected persons. The responsibility though primarily has been fixed on the states but with the passage of time and with the emergence of new issues, non-state actors, organizations and even individuals have been brought under the responsibility fixed by IHL. The scope of IHL is to provide protection during armed conflicts. In this regard, IHL differentiates between IAC and NIAC and criteria for protection as well as applicable law differs in both these types of conflicts. The major portion of IHL including four Geneva Conventions and AP I, is applicable during IAC. Whereas, customary international law, CA 3 and AP II are applicable during NIAC. Protection provided during IAC is clear as compared to NIAC because categories of combatants are clear under IAC as compared to NIAC where no such clear categories have been provided. Therefore, categories of combatants and protected persons need to be defined properly under NIAC for their protection.

Moreover, principles of distinction and proportionality are the fundamental Principles of IHL and apart from international legislations, many states have adopted measures at domestic level to enact laws in accordance with these

principles. Violation of these principles directly becomes the violation of the right to life, hence, compliance of these principles is essential for the protection of the right to life. All the acts posing a threat to the right to life are required to be regulated. Such as use of excessive force and the use of fire arms⁶³.

For the purpose of curtailing the breaches of the right to life, the first step required is to abridge the difference between IHL and HRL with regard to protection of the right to life. The ongoing difference, which has already been discussed, not only portray an ambiguous picture regarding the required standard of protection of the right to life, rather sometimes aids the perpetrators to escape the liability in respect of protection of the right to life.

On the other hand, if we look at Islamic law, it does not differentiate between IHL and HRL as far as their enforcement is concerned. Moreover, equal protection of the right to life has been provided without prioritizing any one of these disciplines and laying down complete rules on every problem faced by Muslim jurists. With regard to problems, which have not been specifically discussed, chapter if *Ijtihad* is open for Muslim jurists. Hence, adoption of rules of Islamic law for protection of the right to life during armed conflicts can solve the problem.

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¹Dr. Paul Gordon Lauren is Professor of History at the University of Montana, he is the author of several award-winning books, including *The Evolution of International Human Rights: Visions Seen*, The United Nations described him as the leading authority on the history of the rights of man. For more information see <<https://www.umt.edu/mansfield/events/files/paul-lauren-bio.pdf>> (last accessed on October 3, 2017).

²Stephen James, *Universal Human Rights Origins and Development* (New York: 2007, LFB Scholarly Publishing LLC), 7.

³Ibid.

⁴Joseph Runzo, ed. et all, *Human Rights And Responsibilities in the world religions* (Oxford: 2003, One world Publications), 1.

⁵Frederick M. Shepherd, ed. *Christianity and Human Rights Christians and the Struggle for Global Justice* (Lanham • Boulder • New York • Toronto • Plymouth, Rowman and Littlefield Publishers, Inc. 2009), 21. Charles Dickens describes the world revolution brought in the twentieth century in the words that It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair. Upon the proponent of this theory his era has been named as Dickenasian era, and he has further elaborated that the best protection of the human rights has been found in the books, but on the ground worst of the human rights violations have been inflicted. He further added that in the twentieth century, although, more than thirty new democracies emerged but the world has also witnessed more than thirty civil wars.

⁶Shepherd, *Christianity and Human Rights Christians and the Struggle for Global Justice*, 25.

⁷Ibid.

⁸Ibid.

⁹Al-Quran, Surat al-Hajj (chapter 22), Verse: 66.

¹⁰Al-Quran, Surat al-Nisa (chapter 4), Verse: 29-30.

¹¹Al-Quran, Surat al-Isra (chapter 17), Verse: 33.

¹²Jabri, *Democracy, Human Rights and Law in Islamic Thought*, 217-19.

¹³Islam has not only protected the human life as a general principle, but has also abolished all the principles and customs on the basis of which killing of human being was considered to be just reason at that time. For instance, killing of children for fear of hunger, to infanticide females as well as abortion was considered right, but Islam strictly prohibited these evil practices. The following verses from the Holy *Quran* prescribe these principles. “Do not kill your children for fear of hunger. We shall provide sustenance for them as well as for you. Truly, killing them is a great sin’ (17, al-Isra, 31). “When the female [infant], buried alive, is questioned, for what crime was she killed?” (81, al-Tawkeer, 89). Above all, killing one human has been resembled to be killing of entire mankind and saving one human being to save entire mankind. “If anyone slays a person, unless it be for murder or for spreading corruption in the land, it is as though he has slain all whole people. And if anyone saves a life, it is as though he has saved the lives of all people (5, al- Maidah, 32).

¹⁴Number of traditions have been narrated in which the rights of animals as well as trees have not only been recognized, rather strict commandments have been issues regarding their protection under Islamic law.

¹⁵“Islamic Laws of War and Peace”, <http://www.federationpress.com.au/pdf/IslamicLawsonWarPeace.pdf>, (last accessed on, June 9, 2010).

¹⁶Ibid.

¹⁷Ibid.

¹⁸Abul A'la Maududi, *Human Rights in Islam*, Lahore: 1995, Islamic Publications Ltd, 11-13.

¹⁹Ibid.

²⁰Ibid.

²¹Francisco Forrest Martin, et al. *International Human Rights and Humanitarian Law, Treaties, Cases and Analysis* (Cambridge University Press, 2006), 1-4.

²²Ibid.

²³Ibid.

²⁴Martin, et al. *International Human Rights and Humanitarian Law, Treaties, Cases and Analysis*, 2-4.

²⁵Article 35-36, 38 of the first Geneva Convention for the Amelioration of the Condition for Wounded and Sick in Armed Forces in the Field of 12 August 1949.

²⁶Article 36-39 of Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949.

²⁷Rene Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press, 2004). The concept of possession of the human rights on the one hand their enforcement on the other, has been illustrated in *Peter Pazmany University Vs Uzechsolovakia case*, where it was held that capacity to possess human rights does not *ipso facto* create the right to enforce them. Whereas, where an individual lacks the capacity to enforce his respective human rights, it does not necessarily means the non-existence of that human right. Because of this very fact

that an individual lacks the capacity to enforce his human rights, states started acting on behalf of individuals and this respect various claims have been brought forward either by the individuals or by the independent bodies and corporations.

²⁸Reuben E. Brigety II, *Conflict and Human Security: A Search for New Approaches of Peace-building* (2004), IPSHU English Research Report Series No.19.

²⁹Expert Meeting on the right to life in armed conflicts and situations of occupation, Organised by The University Centre for International Humanitarian Law, Geneva, available at:http://www.geneva-academy.ch/docs/expert-meetings/2005/3rapport_droit_vie.pdf, accessed on 10-09-2012.

³⁰Ibid.

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³⁵Case Concerning *Armed Activities on the Territory of the Congo*, (DRC v. Uganda), ICJ, Judgement of 19 December 2005, para. 216.

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³⁷Nihal Jayawickrama, *the Judicial Application of Human Rights Law, National, regional and International Jurisprudence* (New York: Cambridge University Press, 2002), 243-244.

³⁸Ibid.

³⁹Ibid.

⁴⁰See(GC-I, Art. 2; GC-II, Art. 2; GC-III, Art. 2; GC-IV, Art. 2)

⁴¹See Article 1(4), AP 1.

⁴²Niaz A. Shah, *War Crimes in the Armed Conflict in Pakistan, Studies in Conflict & Terrorism* (2010): 33:4, 283-306.

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⁴⁵Dorien van Veelen, *The right to life in internal armed conflict: a study of the Chechen cases before the European Court*, Master's Programme in International Human Rights,(Spring 2008).

⁴⁶Ibid.

⁴⁷Ibid.

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country, but the Committee decided that their killing was arbitrarily. It clearly reflects that it is not a condition for arbitrary use of force that the act done must be unlawful, rather it is quite possible that a person may be deprived of his life arbitrarily as mentioned in Article 6 of ICCPR, in the circumstances, where the act done is lawful but disproportionate force has been used under international law.

⁴⁹Peter Rowe, *the Impact of Human Rights on Armed Forces* (Cambridge University Press, 2006), 114.

⁵⁰Ibid.

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