Article

Participation and Protection of Women and Children in Armed Conflict: A Comparative Study of Islam and International Humanitarian Law

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Abstract

The participation, and protection, of women and children in armed conflict is one of the important issues of International Humanitarian Law (IHL) and Islamic Law. Both IHL and Islamic Law provide extensive rules about the protection and participation of women and children in armed conflict. Principally speaking, both of these legal regimes discourage participation of women and children in armed conflict and oblige the belligerent parties to protect women and children in armed conflict. The issue gets complicated when women and children participate in armed conflict which. The participation of them in armed conflict implies a number of legal implications. This paper makes an attempt to discuss the protection of women and children in armed conflict. It also discusses the legal implications of participation of women and children in armed conflict under IHL and Islamic Law.

Keywords: *Women, International, Humanitarian, Children and Law*

Introduction

The history of disputes and conflicts on the planet Earth is as old as humanity itself. These disputes at times, lead to armed conflicts.[1] On the

[1] The very first known conflict in the history of mankind is the conflict that happened between the two sons of Adam namely *Habil*and *Qabil.* They had offered sacrifices to Allah Almighty. When only the sacrifice of the former was accepted the later became furious and he killed his brother. This incident has been narrated by both the *Qur'an* and the Bible. The verses 27-31 of *Surahal-Ma'idah* of the *Qur'an* talk about the incident. The Bible also gives a brief account of the incident in Genesis.

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one hand, the armed conflicts are one of the most common things to happen between two or more human beings, tribes and nations in the course of their relations with each other and history of mankind shows the frequent occurrence of armed conflicts. On the other hand, men have devised a certain set of rules to govern the conflicts and wars. In this regard, every notable civilization, in one way or the other, has contributed in the development of the laws of war. These laws were in very crude form in the past as the wars were not very much complex but with the scientific development and technological advancement the armed conflicts and wars have become very complex and resultantly a detailed and comprehensive scheme of laws governing armed conflict has come to existence. The law of war is generally divided into two broad categories that are *jus ad bellum* and *jus in bello.* The former deals with the justification and cause of war by which the legality of war is what has to be ascertained.[2] The later governs the conduct of warfare in which, *inter alia,* the issues related to the acts that are permissible and impermissible, the lawful and unlawful targets in war and means and methods of warfare discussed. This area of the laws of war is usually referred to as *International Humanitarian Law* (IHL). IHL in general and

[2] Since the area of the law of war is not of our concern for this study, we will not go in details. It is, however, appropriate to note the legal evolution in this regard. Generally speaking, the history –while discussing the *jus ad ballum* –is divided into two eras: the pre, and post, UN charter. In the period before UN charter, there was not a restriction on the use of force. The right and freedom to resort to war was one of the elements of the sovereignty of the *nation states* that were created under the *Treaty of Westphalia,* that had been concluded in 1648. It was after the World War I that the world leaders realized that the power and freedom of use of force should not be limitless. Consequently, the article 12 (1) of the Charter of League of Nations (*The Covenant of the League of Nations*), though did not prohibit use of force, required the state parties to go for *arbitration* for the peaceful settlement of their disputes and they will not resort to war until three months post arbitral award. Finally, the UN Charter imposed ban on the use of force in its article 2 (4) which prohibits the state parties from use of force, or threat of use of force, against territorial integrity and political independence of other states. The charter, however, recognizes two exceptions to the general ban. Firstly, if a state become threat to international peace, the Security Council of the United States may use force against that state if that is indispensable to maintain international peace. The Article 42 of the UN charter mandates Security Council to ensure international peace by use of force. The second exception is what we know as self-defense which is recognized by article 51 of the charter as inherent right of the states. For details see, Peter Malanczul, *Akehurst's Modern Introduction to International Law* 7th ed. (London & New York: Routledge, 1997), 306-317.

participation of women and children in armed conflicts in particular is our prime focus for this study.

In the following we will discussion the evolution in the laws of armed conflict before and after Islam and then will discuss the participation of women and children in armed conflict and their legal implications under *Shari'ah*of Islam and International Humanitarian Law.

2. Evolution of the Laws of War

As we have already noted, international law in general and laws of war in particular after passing certain phases of evolution[3] has reached to the current shape and, being dynamic in nature, they will evolve in future. Every notable civilization has contributed in the development of law. Since our prime focus is on the *Shari'ah* of Islam and modern *International Humanitarian Law*, we will give a brief account of the evolution of laws of war in pre-Islamic civilizations instead going into details. In this context, we will discuss the laws of war that were practiced in three major eras: The Judaism, Greek City States and Roman Empire. The *Shari'ah* and modern *International Humanitarian Law* shall be discussed in considerable detail.

2.1. Laws of War in Pre-Islamic Era

2.1.1. Judaism and Laws of War

Oppenheim, while talking about ancient era of international law, discusses the Jewish period in a considerable detail. According to him,

[3] In the past the relationship between two states would have been looked at in only two folds. Either these states would have peaceful relations or they would have been in the state of war between each other. A third kind of relationship was not recognized. See, Dieter Fleck, et all, eds., *The Handbook of Humanitarian Law in Armed Conflict,* (Clarendon: Oxford University Press, 1995), 39. But, considering the complex situations, the *Geneva Conventions, 1949* adopted the term *armed conflict* instead of *war.* In the common article 2 of the *Geneva Conventions* states that these conventions will apply in the declared wars and other armed conflicts that take place between the state parties to the conventions. This is because, for a conflict to be regarded as war, it is essential that all the parties to the conflict recognize it as war but an *armed conflict* would exist the moment parties to the conflict use weapon against each other. The reason behind adopting the term *armed conflict* instead of war, was that the Geneva Conventions were meant to apply in armed conflicts irrespective of the fact that the conflict was, or was not, a war. See, Rulac.org. (2017). *International armed conflict | Rulac*. [online] Available at: http://www.rulac.org/classification/international-armed-conflict [Accessed 20 Oct. 2020]

the Jews did not consider their contemporary nations equal to them. For, Jews were monist while those nationals were polytheist. The only considerable contribution to international law from the Jews was their recognition of the right to coexistence for *others*. They allowed other nations to live with them with equal status before the law.

As far the Jewish law of armed conflict is concerned, they had divided other nations into two broad categories. The first category was of the people with whom Jews considered to be in the state of explicit war.[4] Jews were not ready to have any kind of relation with them except war. This category included *Amalekites,* and others such as *Hittites, Amorites, Canaanites, Perizzites, Hivites* and *Jebusites*.[5] When Jews came to confrontation with these people, they knew no mercy. Not only they used to kill the combatants, they did not maintain any distinction between combatants and non-combatants. They equally used to target the women and children and kill the animals. The category, however, was of the people with home Jews did not consider the war to be an obligation. With these people, they used to show a more human behavior in warfare. They would kill only the combatants. *Deuteronomy* xx (10-14) commands the Jews that:

1. When you go to any city with the purpose of war, first offer them peace
2. If they accept the offer of peace, establish peace on the condition that all the residents of the city shall be tributaries to, and serve, you.
3. But if the people of that city do not accept the offer of people, besiege the city
4. And will God give the city in your control, kill all the men in the city but take the women, the children, all the cattle in the city and war booties in the city to your ownership, as given to you by God.[6]

This shows that it was allowed in the Jewish law to enslave women and children. These slaves, however, had certain rights under Jewish law. Thus, it was forbidden for a master to kill his salve. Likewise, if a master

[4] Norman Solomon states that Jews considered themselves under divine obligation that they have to fight against these people. See, Norman Solomon, "Judaism and the Ethics of War", *The International Review of the Red Cross,* 87:858 (June 2005), 295-309.

[5] *Old Testament*, *Deuteronomy 20: 17*

[6] *Old Testament, Deuteronomy, 20:10-14*

would beat his slave in a way that caused loss of his eye, the slave would have been free at once.[7]

2.1.2. Greek City States and Laws of War

Greece, before the Macedonian Conquest, was divided into a number of city states which were completely independent in their internal affairs. Nonetheless, the people living in these independent city states shared common caste, origin, language and religion. These states had devised a set of rules and principles that governed their relations *inter se,* to which these states adhere during the times of war and peace. Some glimpses of these rules can be found in modern International Law.[8]

As far the law of war is concerned, the Greeks had set a number of laws regarding war that made the war quite humane and less deadly than that of the Jews. According to these rules, war should have never been resorted to without prior declaration of war. The soldiers died in the battlefield were entitled to proper burial. In case any *City State* was conquered, the people taking shelter in any temple would have been regarded inviolable. They did not kill the prisoners of war. These prisoners would have been exchanged or ransomed. The maximum which could be done to them was to enslave them. There were a number of places –such as the temple of God Apollo at Delphi –that were inviolable. Oppenheim notes that the international law set by the Greeks shows that completely sovereign states can live together in a civilized manner provided they have common interest that makes them love in harmony.[9]

3.1.3. Roman Empire and Laws of War

The contribution made to International law by Roman Empire is also of a great significance. Usually, the Empire had employed 12 notable priests to apply international law in the light of Christian religion. In order to deal with the person and properties of foreigners, they used to look at the fact that whether or not the Roam Empire had any treaty with the state of that foreigner. In the absence of any treaty the persons and their property, likewise the life and property of Romans going to that state,

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[7] Lassa Oppenheim, *International Law: A Treatise,* (London, New York and Bombay: Longmans, Green, and Co., 1905) 1:45-47

[8] For instance, the principle of diplomatic immunity, or protection of envoys for that matter, was a binding principle in Greek City States. Moreover, they had established the principle that religious figures not to be targeted. Ibid, 49.

[9] *Ibid,* 48.

did not have any legal protection. Such a foreigner would fall prisoner, and later slave, of the person taking possession of him and his property. It was obvious, however, that that foreigner should have become free if he somehow managed to flee to his state. And if the Roman Empire had any treaty of peace, alliance and hospitality with any state, the persons coming from that state would enjoy protection to their persona and property.

As far as war is concerned, the Roman Empire had set some very clear rules about war. Roman Empire considered war to be permissible and legal institution. It is the Roman Empire which presented the notion of *just war.*[10] Usually, Roman Empire considered war to be lawful in one of the four situations. First, an aggression against any part of Roman Empire, second, a violation against an envoy, third, any violation of a treaty and four, providing assistant to the enemy of Roman Empire in any war by a third state. In all of these situation's war would have been lawful if the other state failed to convince the Roman Empire. In order to declare war, an arrow was thrown from the border of Roman Empire. Once the war would begin, the Roman did not know any norms of war and have no mercy.

The Romans had, however, set rules for the end of war. According to Roman law, the war would come to an end in any of the three manners.

[10] St. Augustine was the first person who presented the idea of *just war.* When the Roman Empire embraced Christianity, it had to face the dilemma of religion. For, the teaching of Jesus Christ disliked use of force. The concept of *charity* obliges Christians to turn the other cheek if someone slaps one's cheek. Obviously, it was not possible to defend a waste empire like Roman Empire without war and use of force. Thus, St. Augustine presented the idea of *just war* in his book *City of God.* According to the idea of Augustine, one should not use force on individual level but in order to defend the *city of God* and people from an external threat, war can be waged and that war would become a *just war.* Augustine set the following four standards for any war to qualify to be called *just war.* First of all, a lawful political authority should decide to wage war. Secondly, a wrong is done to the state to which only war is appropriate response. Thirdly, the war should be proportionate to the wrong committed against state. And lastly, war is the last resort and no other option is available to respond to the wrong. See for details, Oregonstate.edu. (2003). *Great Philosophers: Augustine on War*. [online] Available at: https://oregonstate.edu/instruct/phl201/modules/Philosophers/Augustine/augustine_justwar.html [Accessed 21 Oct. 2020]. The idea of *just war* has evolved in the later centuries and Thomas Aquinas has considerably contributed to it. See, John Langan, "The Elements of St. Augustine's Just War Theory", *The Journal of Religious Ethics,* 12:1 (Spring 1984), 19-38

The first way to end war was to conclude a peace treaty which would bring the two states into the state of friendship. Surrender by the enemy was the second way to bring the war to end. The surrender would guarantee the protection of life and property of the enemies. The thirds way was to defeat the enemy and conquer them. In this situation the fate of the life and property of the enemy would have been subject to the will of the Romans.[11]

2.2. Islam and Law of War

Generally Islamic *Fiqh* manuals discuss the issues related to International law in the chapter or book titled *Kitāb al-Siyar.* Literally, *Siyar* is plural of *Sirah* which means method. In the technical sense, *Siyar* is the term which is used to refer to the area of Islamic law that deals with the relationship of Muslims with non-Muslims. Islamic law has provided an extensive set of rules and principles regarding *Siyar.* A detailed discussion of these rules is out of scope of this paper; therefore, we shall only focus on the development of *Siyar* and then will discuss the rules related to the participation of women and children, and protection of them, in war shall be discussed later on.

The rules related to *Siyar* are derived from the *Qur'ān,* the *Sunnah* of the Holy Prophet (peace and blessings of Allah Almighty be upon him), consensus of Muslim jurists, the practice of the companions of the Prophet and analogy. The first notable jurists to work on this area of Islamic law are *Imām* Abu *Ḥanifah* and *Imām Abdu'l Rahmān al-Awzā'i.* The former had dictated a short book on *Siyar* to his disciples and when that book reached to the later, it was received with criticism. Imām Abu Yusuf, the renowned, student of Abu *Ḥanifah*, responded to the said critique in his *Al-Radd 'Alā Siyar al-Awzā'i.* After Abu *Ḥanifah* and al-Awzā'i, *Imām* Muhammad b. al-Hassan al-Shaybani is the jurist who turn *Siyar* into a sophisticated branch of Islamic Law. Initially, al-Shaybani, authored a short book on *Siyar* titled *al-Siyar al-Ṣaghir.* When this book reached to *al-Awzā'i*, he wondered why an Iraqi would write on *Siyar.*[12] When al-

[11] Oppenheim, *International Law,* 49-52.

[12] According to Mahmud Ahmad Ghazi, perhaps it was surprising for *al-Awza'i* to see a book on Siyar from an Iraqi scholar because Iraqi people did not have to face issues related to international affairs because, unlike Syria where al-Awza'i lived, Iraq was not situation on the borders of *Dar al-Islam*. See, Mahmood Ahmad Ghazi, *The Shorter Book on Muslims International Law (Translation of* Muhammad b. al-Hassan al-Shaybani, *Al-Siyar al-Saghir)*, (Islamabad, Islamic Research Institute, 1998), 9.

Shaybāni, knew about the reaction of *al-Awzā'i*, he wrote another book on the subject titled, *al-Siyar al-Kabir.* Both of these books are part of *Ẓāhir al-Riwāyah.*[13] Among these two, the former had been out of print for a long time and was discovered in the 20th century and Dr. Mahmood Ahmad Ghazi had translated it and published it with a valuable note on it.[14] The later book, however, is not available separately. It is available with the commentary on it by *Imām al-Sarakhsi. Al-Ḥākim al-Shahid* had summarized the six books of *Zāhir al-Riwāyah* titled, *al-Kāfi fi Furu' al-Ḥanafiyyah.* While summarizing these books, al-Ḥakim put *al-Siyar al-Ṣaghir* unaltered as the book was already well summarized by al-Shaybāni. Imam al-Sarakhsi has written a detailed commentary on *al-Kāfi* titled *al-Mabsuṭ* which has been published in 30 long volumes. Other Muslim jurists followed the footsteps of Imām al-Shaybāni.[15]

The issues that are discussed in *Kitāb al-Siyar* include, *inter alia,* the relationship between Muslim and non-Muslims, protection of envoys, dealing with apostates and rebels, norms of war, legality of war, the prisoners of war, war booty, peace treaties with non-Muslim nations and trade with between Muslims and non-Muslims.[16]

2.3. International Humanitarian Law

The area of International Law that discusses the manners to wage war is called International Humanitarian Law. The main purpose of this law is that when it is inevitable to wage war, it should cause minimum possible losses and a balance should be maintained between the principle of humanity and the need to wage war. International Humanitarian Law is based on three basic sources. The first source of this law is international custom. This custom enumerates certain principles related to war which were implemented for centuries. It was in the consciousness of the man

[13] *Zahir al-Riwayah* is the combination of six books of Hanfi School of law written by al-Shaybani. These books are *al-Siyar al-Saghir, al-Siyar al-Kabir, al-Jami' al-Saghir, al-Jami' al-Kabir, al-Mabsuṭ, al-Ziyadat.* See, Muhammad Amin b. 'Abidin al-Shami, *Sharh 'Uqud Rasm al-Mufti,* (Karachi: Maktaba al-Bushra, 2009), 18.

[14] Mahmood Ahmad Ghazi, *The Shorter Book on Muslims International Law (Translation of* Muhammad b. al-Hassan al-Shaybani, *Al-Siyar al-Saghir*), (Islamabad, Islamic Research Institute, 1998)

[15] For instance, Imam al-Shaybani, puts an hypothetical situation and then explores Islamic law over the situation in both *al-Siyar al-Saghir* and *al-Siyar al-Kabir.* Imam Shafi'i, in his *al-Umm,* adopted the same method without adding any new situation. What he did is to either agree or disagree with al-Shaybani. Ibid. pp 6-33.

[16] Muhammad Munir, "International Islamic Law: Siyar", *Research Papers,* VII:1-2 (2007), pp. 923-940

for centuries that some acts are prohibited and some are permitted during the war. For example, this principle was historically accepted that treachery and breaking the covenant was not permitted during the war. International Humanitarian Law based on International custom has now become part of the law of treaties. The historical importance of this custom is evident in itself. So to give legal recognition to custom, if it is not recognized as a custom it does not make a difference because now this customary international law has become part of international treaties and is now known as treaty law.

Other than this international custom, the structure of International Humanitarian Law is standing on two different types of treaties. The details of these two treaties are discussed below:

2.3.1. Geneva Conventions

The First type of treaties is called the Geneva Conventions. This treaty started in the decade of 1860.The First Geneva Convention was signed in the year 1864.This convention was related to the wounded and the sick soldiers in the battleground.[17] The Second Geneva Convention in 1906 was related to the wounded and the sick soldiers in the sea.[18] After World War I, the Geneva Conventions were again reviewed and the Third Geneva Convention was promulgated in 1929 which was related to the prisoners of war.[19] At last, the Geneva Conventions were again reviewed in 1949 and the Fourth Geneva Convention was signed on 12th August 1949.[20]

In addition to these four Geneva Conventions, three additional protocols were also adopted. Two of these additional protocols were adopted in 1977, one of which is related to the protection of the affected persons during an International armed conflict. The other additional protocol deals with the protection of affected individuals in case of a non-international armed conflict. The Third Additional Protocol was adopted

[17] The full name of this Convention is "*Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*."This Convention was signed on 22nd of August, 1864

[18] The full name of this Convention was "*Geneva Convention for the Amelioration of the Condition of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea* "

[19] The full name of this Convention is "*Geneva Convention Related to the Treatment of Prisoners of War".* It was signed on 27th of July, 1929.

[20] The Fourth Geneva Convention was related to the protection of civilians during the war. The title of the Convention was "*Convention Related to the Protection of the Civilian Prisoners in Time of War*"

in 2005 which deals with the adoption and immunity of a distinctive emblem.[21]

2.3.2. Hague Conventions

The second type of treaties related to the International Humanitarian Law is the Hague Conventions. These treaties were formed in 1907 after the International Conferences were held in 1899 and 1906. Hague Conventions had many things related to an armed conflict which later also became part of the Third Geneva Convention. Following were accepted in the Hague Conventions:

1. Definition of the combatant
2. Means and methods of warfare
3. Procedure for setting military targets

In short, the modern international humanitarian law has been extracted from these three sources and among these three sources, Geneva Conventions enjoy prime importance because the main feature of the rest of the two treaties can be found now in the Geneva Conventions.[22]

3. Legitimate Targets in War

These discussions come under Islamic law and International Humanitarian Law such as; in wars which of the targets are legitimate or illegitimate, the difference between a combatant and a non-combatant, the safeguards available to the non-combatants, etc.

3.1. The distinction between a Combatant and a Non- combatant

As far as International Humanitarian Law is concerned the definition of a combatant can be found in both The Hague Regulations and the Third Geneva Convention. Article 1 of the Hague Regulations and Article 4(a) (1), (2) and (3) of the Third Geneva Convention defines the term 'combatant'. Moreover, Article 43(2) of the Additional Protocol II to the Geneva Conventions also defines a combatant. Under these legal provisions, a combatant is a person who fulfills the following conditions and being a combatant, he gets the status and the rights of a prisoner of war.

[21] For the history and details of Geneva Conventions please see: Emily Crawford and Alison Pert, *International Humanitarian Law*, (Cambridge: Cambridge University Press, 2015), p4-19

[22] For details of the Hague Conventions please see, Ibid. p10-13

1. He should be under the command of a person who is responsible for his subordinates
2. He should have a distinctive emblem (like a uniform) which should help differentiate him from non-belligerents.
3. He should carry arms openly.
4. He carries out armed activities following international humanitarian law.[23]

As far as the definition of a non-combatant is concerned, it is not necessary to define it because whoever does not fall on the criteria of a combatant is a non-combatant. This is a discussion related to International Humanitarian Law

As far as Islamic law is concerned, it does not give a clear definition of a combatant t and a non-combatant but the Islamic humanitarian law categorizes non-combatant as the people who do not directly participate in war, and the ones who participate in war are known as combatants. The main reason for this division is that when the Islamic law was being formulated, it was a custom at that time that all adult men participated in the war and were called combatants whereas children, women, and old people did not participate in war and were known as non-combatant.[24] Today the armed forces have become more organized and Islamic states also have organized armed forces so Islamic law will also accept the definition of a combatant given by Geneva Conventions because the definition of combatant is not proven by text of the *Qur'ān* or the *Sunnah:* rather the definition of combatant is based on the understanding of a factual situation.

3.2. Protection to non-combatant

The distinction between a combatant and a non-combatant and the protection afforded to a non-combatant is discussed under the principle of distinction in international humanitarian law. This principle of distinction is one of the fundamental principles of international

[23] Article 4A (2), Geneva Convention III, 1949

[24] In this regard the Hadith of the Prophet *Muhammad* (Peace be upon him) and the famous commandments of *Abu Bakr* (May Allah be pleased with him) can be used as evidence which will be explained in the next section. The Prophet *Muhammad* (Peace be upon him) ordered not to attack those who did not normally participate in war at that time.

humanitarian law. This principle requires that during the war, a distinction be made between a combatant and a non-combatant and that targeting the only combatant and military targets are made directly while avoiding targeting civilians and civilian property. Violation of the principle of distinction is tantamount to a serious violation of laws of war.[25]

Article 48 and 51 of the Additional Protocol I to the Geneva Conventions provides basic guidelines for the protection of non-combatants during the war. Article 48 states that to ensure respect for the principle of protection of civilians, those participating in war shall only target the opponent troops and military targets and shall refrain from targeting civilians and their property. The Article in the Additional Protocol provides the following details;

Non-combatant citizens will be protected from the dangers posed by war. In addition to the other principles of international humanitarian law, the following matters will be taken care of to ensure this protection.

1. Civilians will not be attacked.
2. Civilians will have this protection as long as they do not participate in the war directly.
3. Indiscriminate attacks are prohibited.
4. Attacks on civilians and civilian property in retaliation are also prohibited.

As far as Islamic law is concerned, Islamic law on more than one occasion makes it clear that those who do not take part in the war will not be targeted. There are several verses in the Quran which show that it is not permissible to attack non-combatants. In verse 190 of *Surah-al Baqarah,* Allah says: "Fight in the way of Allah against those who fight you and do not transgress. Verily, Allah does not like the transgressors."[26]Arguing from the same verse Imām al-Sarakhsi argues that it is not permissible to kill women, children, and non-combatants. He says:

[25]Basic Principles of IHL - Diakonia". 2019. *Diakonia.Se*. Accessed October 21. https://www.diakonia.se/en/ihl/the-law/international-humanitarian-law-1/introduction-to-ihl/principles-of-international-law/

[26]Al-Quran, Al-Baqarah, Verse 190. The translations of the verses of the Qur'an in this article are taken from the translation of *the Qur'an* by Mufti Muhammad Taqi Usmani. See, Muhammad Taqi Usmani, *The Meanings of the Noble Qur'an with Explanatory Notes*, (Karachi: Maktaba Ma'arif al-Quran, 2010)

"قال: لا ينبغي أن يقتل النساء من أهل الحرب ولا الصبيان ولا المجانين ولا الشيخ الفاني لقوله تعالى {وقاتلوا في سبيل الله الذين يقاتلونكم}وهؤلاء لا يقاتلون"

That means:

> "It is not appropriate to kill women of *Ahl al-Ḥarb,* nor the children, the lunatics, and elderly people because Allah Almighty has said: "Fight in the way of Allah against those who fight you" and these people are not fighting.[27]

As far as the *Sunnah* of the Prophet (peace be upon him) is concerned, many *ahādith* have been narrated which forbid the killing of the non-combatants. It is narrated on the authority of 'Abdullah b. 'Umar that the Messenger of Allah (peace be upon him) found a woman dead in a battle, so he forbade the killing of women and children.[28]

Moreover, the commandments issued by Abu Bakr, the first caliph of Islam, may Allah be pleased with him, to his army in this regard are of special importance regarding the laws of war in general and the exception of the non-combatants in particular. When Hazrat Abu Bakr sent an army to Syria under the leadership of Yazid b. Abi Sufyān, he commanded the army in these words;

"ولا تغرقن نخلا ولا تحرقنها، ولا تعقروا بهيمة، ولا شجرة تثمر، ولا تهدموا بيعة، ولا تقتلوا الولدان ولا الشيوخ ولا النساء، وستجدون أقواما حبسوا أنفسهم في الصوامع فدعوهم وما حبسوا أنفسهم له"

This means:

> "Do not inundate and burn a date tree, do not kill cattle and cut a fruit tree, do not demolish temple, do not kill children, elderly and women. You might come across people who have secluded themselves in temples, leave them without interfering in what they do."[29]

The commandments that were given by Abu Bakr specifically instructed not to target the non-combatants and not to damage their property and religious sites.

From the above discussion, it can be concluded that both Islamic law and International Humanitarian law talk about the distinction between

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[27] Muhammad b. Ahmad b. Abi Sahl al-Sarakhsi, *Sharh al-Siyar al-Kabir*, (Beirut: Eastern Company for Advertisements, 1971), 1: 1415

[28] Abu 'Abdullah Ahmad b. Muhammad b. Hanbal al-Shaybani, *Musnad al-Imam Ahmad b. Hanbal*, (Beirut: Al-Risalah Foundation, 2001) 8: 360, Hadith No. 4739

[29] Ahmad b. Husayn b 'Ali b. Musa al-Bayhaqi, *Sunan al-Kubra*, (Beirut: Dar al-Kitab al-'Ilmiyyah, 2003), 9: 145, Hadith No. 18125

the combatants and the non-combatants and directs that only combatants can be targeted in war while the non-combatants and their property is protected.

3.3. Participation of Non-combatants in War and its Effects

The reason that the non-combatants enjoy protection is that they do not participate in the war directly. Based on this protection, if the non-combatants start participating in the war directly, they will lose the protection they have and in that case attack on them will be legal. Article 51(3) of the Additional Protocol-I to the Geneva Conventions states that the non-combatants shall enjoy this protection unless they participate directly in the war. It can also be observed that under international humanitarian law, non-combatants are protected by modern law and if he tries to take advantage of this protected status and attacks, then this is called 'perfidy' which is illegal in both Islamic law and international humanitarian law.[30]

4. Protection available to Women and Children

As already discussed above in the paper, both international humanitarian law and Islamic law protect ordinary non-combatants in general and women and children in general. Now we will see how Islamic law and International humanitarian law sees the participation of women and children in war.

4.1. Definition of a 'Child' in Terms of Participation in the War

Before looking at how Islamic law and international humanitarian law view children's participation in an armed conflict, it is important to ascertain the definition of a 'child' in terms of an armed conflict.

[30] There are a number of *Ahadith* narrated from the Prophet about prohibition of perfidy (*ghadr)* in Islamic law. According to one narration, the Holy Prophet appointed a companion a captain over a group of soldiers and while dispatching the battalion, he commanded the captain, "*[F]ight in the name, and in the way, of Allah. Fight against people who disbelieve in Allah. Fight but, don't embezzle and don't commit perfidy. Don't mutilate and do not kill a child". See,* Muhammad b. 'Ali b. Muhammad b. 'Abdullah al-Shawkani, *Nayl al-Awṭar,* (Cairo: Dar al-Hadith, 1993), 7:272, Hadith No. 3281. Likewise, the article 37 (1) of the *Additional Protocol I to Geneva Conventions* also prohibits perfidy. The said article defines perfidy as an act committed by a person to avail the trust of the enemy and put the adversary in misconception that he is under obligation to protect the person under IHL, and then attack on him. Article 37 (1) (c) specifically declares it to be perfidy that a person participates in armed conflict while showing himself a non-combatant.

Under Islamic law, anyone who has not reached puberty is a child. To determine whether or not a person has reached puberty, Islamic law primarily looks at the biological changes within a person rather than the age. If the biological changes do not help, then the age is the criteria to determine *childhood* of a person.[31]

Islamic law prohibits a minor from participating in an armed conflict. The Prophet (peace and blessings of Allah be upon him) did not allow minors to be part of the army, despite the great need and desire for children during the early wars of Islam. *Hazrat Abdullah bin Umar* (may Allah be pleased with him) narrates that on the occasion of the battle of *Uhud*, when he was fourteen years old, he was presented to the Messenger of Allah (may peace be upon him) for *jihad*, he returned him. He was fifteen years old at the time of the battle of *Khandaq*, so he was allowed to take part in *jihad*.[32]

As far as international humanitarian law is concerned, Article 77 (2) of the Additional Protocol I to the Geneva Convention states that all parties must take all possible measures to prevent a child under the age of fifteen from participating directly in an armed conflict and they shall not recruit children younger than this age in the army. This provision further states that if children aging 15 and 18-year-olds are going to be recruited in an army, then older children will be given preference for recruitment.

4.2. Participation of Women in War and its Effects

Islamic law does not allow women to participate in the war directly. Imām al-Sarakhsi says, "We do not like women to participate in wars with men because the structure of women is not fit for war, as the Prophet (peace and blessings of Allah be upon him) pointed out with the words, 'Alas!

[31] According to Islamic law, the symbol for a boy that he has reached puberty is that he experiences wet-dream or he becomes able to have sexual intercourse. If any of these indicators do not appear in a boy, then Abu Hanifah says the boy will reach age of puberty when he becomes 18 years old. Likewise, the symbol of puberty in a girl is that she experiences menstruation. If she does not menstruate, then according to Abu Hanifah 17 years is the age of puberty for her. Imam Shafi'i considers 15 years for both male and female. Some jurists consider 25 years to be the age of puberty for such a boy and/or girl. See, Muhammad b. Mahmud al-Babarti, *al-'Inayah Sharh al-Hidayah,* (Beirut: Dar al-Fikr, n.d), 9:270.

[32] This narration has been narrated in many books of hadith, including Bukhari and Muslim. See Muhammad b. Isma'il al-Bukhari, *Sahih Bukhari*, (Cairo: Dar Tuq al-Najat, 1422 AH) 3: 177, Hadith No. 2664; Muslim b. al-Hajjaj al-Qushayri, Sahih *Muslim*, (Beirut: Darahiya Al-Tarath Al-Arabi), 3: 1490, Hadith No. 1868

She was not a fighter".[33]Even in the life of the Prophet (peace and blessings of Allah be upon him), women did not take part in wars directly.[34]This shows that Islamic law does not allow women to participate in wars, but in times of great need, women can take part in direct armed conflict.

The same is the case with international humanitarian law. International humanitarian law does not prohibit women from participating in the war. Even the law acknowledges the fact that in recent history women have played an active role in wars.[35] Though women participate in armed conflict, women are entitled to certain concessions. International humanitarian law requires that prisoners of war should not be discriminated against, so women shall not be discriminated against if they participate in an armed conflict based on their sex. Similarly, Article 76 of the Additional Protocol I to the Geneva Convention emphasizes the following:

1. Special efforts should be made to protect women from rape, forced prostitution, and other inappropriate acts.
2. If a woman is a prisoner of war and is accompanied by young children with her, then the cases of such women should be looked at on a priority basis.
3. No matter how serious a war crime is committed, no pregnant woman will be sentenced to death and no such punishment shall be imposed.

4.3. Children's Participation in war and its Effects

As discussed earlier in the paper, children are not allowed to participate in an armed conflict but if at any instance children participate in an armed conflict, in that case, international humanitarian law[36] will take care of the following issues;

1. Under Article 77 (2) of the Additional Protocol I of the Geneva Conventions such children still enjoy the privileges, so that if such a child is captured by the enemy, whether he or she receives the

[33] Al-Sarakhsi, *Sharh al-Siyar al-Kabir*, 1: 184

[34] *Ibid.*

[35] For details see, Charlotte Lindsey, *Women Facing War,* (Geneva: ICRC, 2001), 23-25

[36] Articles 77 (3), (4) (5) Additional Protocol I to the Geneva Conventions

status of a prisoner of war or not, the said provision will still provide protection.

2. If such children get arrested, they will be kept in separate rooms from adults, unless the child is accompanied by family members.
3. No child can be sentenced to death for war crimes if he was under 18 years of age at the time when he committed the crime.

If a child takes part in an armed conflict, Islamic law does not impose criminal liability on the minors. The child will have the same protection as if he or she did not participate in the armed conflict.[37] Though the child risks his life to participate in the armed conflict and risks his life, still he cannot be targeted specifically.

Conclusion

In the light of the discussion made above it can be concluded that both Islamic law and international humanitarian law protect non-combatants

[37] The idea of *capacity* in Islamic law is relevant here which plays decisive role in imposing a criminal –and civil liabilities –on the individuals. According to Islamic law a person must have *capacity* (*Al-ahalliyyah*) in order to be able to be assigned to the criminal and civil liabilities. The capacity, initially, if of two types i.e. *Ahalliyah al-Wujub* and *Ahalliyah al-Ada'.* The *Ahalliyyah al-Wujub* is the capacity which constitutes the ability of an individual to face the liability and get entitled for rights. This capacity is further divided into two types i.e. *Ahalliyyah al-Wujub al-Naqisah* and *Ahalliyyah al-Wujub al-Kamilah.* In the former, the individual is entitled to certain rights but he is not able to be imposed with liabilities. This is when a life begins in the womb of mother until the baby is born alive. When the baby is born alive, his *Ahalliyyah al-Wujub* becomes perfect. Thus, he is able to be imposed with civil and financial liabilities. But the person is immune from criminal liabilities with this *capacity.* Consequently, if he causes damage to others property, he will be liable to compensate the damage but if he inflicts commits a criminal offence, he cannot be punished for the said offence. The *Ahalliyyah al-Ada'* is the capacity to *execute* which enables the individual to execute what is imposed on him due to any of his actions. This capacity is further divided into two types i.e. *Ahalliyya al-Ada' al-Naqisah* and *Ahalliyyah al-Ada'al-Kamilah.* The former is any condition that makes the *capacity* defected. These conditions include, *inter alia,* madness, intoxication, sleep, unconsciousness and minority. In the *defected capacity to execute* an individual can face the civil liabilities. He is immune from criminal liabilities. When the *capacity to execute* becomes *perfect* only then an individual can be liable for all kind of liabilities. This *capacity* exists when an individual reaches the age of majority with sound mind. See for details, 'Abdul 'Aziz b. Ahmad b. Muhammad 'Ala'uddin al-Bukhari, *Kashf al-Asrar Sharh Usul al-Bazdawi,* (Beirut: Dar al-Kitab al-Islami, n.d), 4:237. Since the *child* is not able to be liable for criminal liability, he is regarded as if he did not participate in armed conflict in Islamic Law.

along with women and children during an armed conflict. They cannot be targeted if they do not participate directly in an armed conflict. In this situation, if they participate directly in the armed conflict, then they can be targeted but if they get captured, the law provides special concessions for them. This fact is also clear from the above discussion that there is no significant difference between Islamic law and international humanitarian law on the issue of participation of women and children in an armed conflict.

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