

Similarities of International Humanitarian Law and Islamic Law of Warfare: An Appraisal of The Principle of Distinction During Armed Conflict

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Abstract

Principle of distinction obliges belligerents to always distinguish between combatants and civilians and between civilian objects and military objectives, and shall accordingly direct their military operations only against military objectives. The principle is derived from humanity as such it is one of the basic and fundamental rules guiding the conduct of hostilities under International Humanitarian Law (IHL) and Islamic Law of Warfare. The essence of the principle of distinction is to secure civilian population and their objects from the risks and dangers of attack in conduct of hostilities. Notwithstanding the significance of the principle, belligerents often fail to adhere to this principle thereby resulting in wanton killing of civilians and destruction of civilian objects. This has influenced the perception of some people towards the existence of such humanitarian principle under Islamic law, especially in conflicts that have religious elements. Thus, it is imperative that the article examines the principle within the legal framework of IHL and Islamic Law of Warfare in order to bring to light the platform for its effective application by both states and armed groups during armed conflicts.

I. INTRODUCTION

The need for general protection of civilian population and objects in conduct of hostilities has become a significant concern of the international community.¹ One of the essential principles set out for the purpose of according protection to civilians and their objects during armed conflicts is the principle of distinction.² The principle is now recognised as a basic and fundamental rule of warfare, which every civilized nation must observe and apply in the course of a war. The principle of distinction is a phenomenon conversant

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¹ Kristin Bergtora Sandvik, "Protection of Civilian: From Principle to Practice" www.prio.no/Projects/Project/?x=1006. Site accessed on 23.4.2014.

² IHL has set out certain basic principles that regulate conduct of belligerents with a view to providing adequate protection to civilians. These principles include: precaution; proportionality; prohibition of indiscriminate attack and principle of distinction. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996. Principle of distinction is considered as one of important principles of law of warfare that enhances the development of humanitarian principles. See the Yoram Dinstein, "The Principle of Distinction and Cyber War in International Armed Conflicts" *Journal of Conflict & Security Law*, 2012, Vol 17(2), p.262.

within the legal framework of IHL and Islamic Law of Warfare.³ The two legal regimes provide as a matter of obligation on part of the belligerents to meticulously distinguish between combatant and civilian, and between civilian objects and military objectives and they should accordingly direct their military operations only against military objectives.

However, the effective application of the principle under both regimes seems to be unrealistic and impracticable in view of the increasing civilian casualties in contemporary armed conflicts.⁴ On certain occasions, conflicts that involved Muslim states or armed groups that have Islamic affiliation equally recorded high degree of civilian casualties despite the provisions protecting civilians. The problem can be attributed to either lack of knowledge of the ideals of Islamic warfare or blatant disregard for the norms protecting civilians and their objects. This calls for the need to push for strict observance of the basic humanitarian precepts in the conduct of hostilities by both Muslims and non-Muslims states.

Under Islamic law of Warfare, Almighty Allah says in surah *Al-Bakara* as follows: “Fight in the way of Allah those who fight you but do not transgress. Indeed, Allah does not like transgressors.”⁵ The status of the verse will be discussed later, but it can be deduced from the verse that combatant is a person who carries arms against Muslims and has the physical ability to engage in war and actually waged war directly or indirectly against Muslims.⁶ The legitimacy of a target in the context of an armed conflict is typically determined by the capacity of that target or individual to fight against the Muslims. This by implication includes enemy soldier and leader, as well as adviser.⁷ Sometimes a person can be considered a combatant even if he does not actually carry a weapon provided he

³ The aspect of Islamic law that deals with warfare is known as *al-Siyar* (international law). This branch of law relates to the early Muslim community’s relationship with non-Muslims, which initially pertained to conduct in war of the Prophet (PBUH). The concept of *al-Siyar* was first formalized and institutionalized by Imam Abu Hanafi in his series of lectures entitled “the Muslims laws of war and peace”. Hanfis’ lectures were later compiled and titled as “Introduction to the Laws of Nations” by Muhammad Ibn Hassan Shaybani, a student of Hanafi. Shaybani’s work was later translated by Majid Khadduri serves as the foundation for the contemporary *al-Siyar*. The sources of *al-Siyar*’s authority are the Qur’an, Hadith (tradition of the Prophet), Ijma (consensus opinion of Jurists) and Qiyas (analogical deduction). See Abdullahi Ahmed An-Na’ima, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law*, Syracuse University Press, Syracuse 1996, p.143; Majid Khadduri, “Islam and the Modern Law of Nations” *The American Journal of International Law*, 1956, Vol.50, p. 358. For a detailed discussion on the sources of Sharia, see Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, IIUM, Malaysia, 2001; Ahmed Souaiaia, “On the Sources of Islamic Law and Practices” *Journal of Law and Religion*, 2006, Vol. xx, p.102.

⁴ Noëlle Quéniwet, “The ‘War on Terror’ and the Principle of Distinction in International Humanitarian Law” *ACDI*, 3 Especial, 2010, p.158.

⁵ Qur’an al-Bakara 2:190.

⁶ Muntaqa M. Mahboub, *War and the Protection of the Rights of Individuals: An Examination of Islamic and International Humanitarian Laws*, Triumph Publishing Co. Ltd, Kano (ND), p.19. Military objectives are defined as those objects that by their nature or use are intended for the pursuit of hostilities. Hamed Sultan, “Islamic Concept” in *International Dimensions of Humanitarian Law*, ed. UNESCO, UNESCO, Paris, 1988, p.38. A Civilian object loses its protection where such an object is used to prevent Muslim army from advancing or used to attack them, it has automatically become military objective subject to direct attack. Wahbeh Zuhili, “Islam and International Law” *International Review of the Red Cross*, 2005, vol. 87, No. 858, p.283.

⁷ Quintan Wiktorowicz and John Kaltner, “Killing in the Name of Islam: Al-Qaeda’s Justification for September 11” *Middle East Policy Council Journal*, 2003, vol. X, No.2, p.2.

is an able bodied man from the enemy.⁸ However, this position would be inconsistent with the provisions of the Quran, traditions of the Prophet and practice of the Caliphs of Islam as discussed thereunder.

Civilians on the other hand are those who take no active part in hostilities.⁹ By virtue of tradition of the Prophet (PBUH) civilians includes women, children, old men and monks. Others include idiots, imbeciles, sick people, and the blind.¹⁰ These people are recognised as civilians because they are categories of people who live a secluded life similar to that led by women. They are recognised as a separate category of person entitled to various degrees of immunity from attacks. The civilian population enjoys general protection from the dangers of hostilities and military operations provided they do not directly participate in the hostilities.¹¹ Where civilians take part in hostilities their non-combatant status and immunity are forfeited and replaced with combatant.¹²

Under IHL, combatant is defined with all possible precision in the third Geneva Convention of 1949¹³ and the Additional Protocol I of 1977.¹⁴ The third Geneva Convention defined combatant with particular reference to combatant status and prisoner of war status. While Additional Protocol I supplement the third Geneva Convention and goes further to clarify the combatant's right to directly participate in hostilities.¹⁵ Combatant in the provision of Additional Protocol I is the most relevant to principle of distinction because of the generic meaning of combatants, which indicates persons who

⁸ Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law*, Cambridge University Press, Cambridge, 2001, p.8. For instance, a person who came to wash and cook for American soldiers in order to feed them to fight such a person may be considered a combatant. See David Aaron, *In Their Own Words: Voices of Jihad*, RAND Corporation, Santa Monica, 2008, p.106.

⁹ Sultan, *Islamic Concept*, p.37.

¹⁰ Sayyid Sabiq, *Fiqh Us-Sunnah by the Doctrinal Writings of the Holy Prophet*, Trans. Matraji F.A.Z., Dar El Fitr, Beirut, 1996, p.53. See also M. Aduly, ed. *Bulug Al-Maram Min Adillat Al-Ahkam, Attainment of the Objective in Conformity With Evidence of the Legal Judgment*, Trans. Hibah G.A., Dar Al-Kotob Al-Ilmiyah, Lebanon, 2008, Hadith No. 1313.

¹¹ See *Al-Muwatta of Imam Malik Ibn. Anas*, Trans. Aisha Abdurrahman Bewley, Madinah Press Inverness, Scotland, 2001, Jihad, Hadith No. 10.

¹² Sultan, *Islamic Concept*, p.38.

¹³ Convention Relative to the Treatment of Prisoners of War, it came into force Oct. 21, 1950, 75 U.N.T.S. 335 (hereinafter "Geneva Convention III"). Combatants are members of the armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces. It also include members of other militias and members of other volunteer corps including those of organised resistance movements, belonging to party to the conflict and operating in or outside their own territory, even if this territory is occupied provided that such militias or volunteer corps, including such organised resistance movements, who fulfill the following conditions: that of being commanded by a person responsible for his subordinates; that of having a fixed distinctive sign recognizable at a distance; that of carrying arms openly; And that of conducting their operations in accordance with the laws and customs of war. The convention also includes members of regular armed forces who profess allegiance to a government or authority not recognised by the detaining power. Article 4A (1)(2)(3) and (6), Geneva Convention III.

¹⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, it came into force Dec. 7, 1978, 1125 U.N.T.S. 3, reprinted in 16 I.L.M. 1391 (1977) (hereinafter "Additional Protocol I").

¹⁵ Article 43 (1), Additional Protocol I.

do not enjoy the protection of the law accorded to civilian against direct attack but without necessarily conferring combatant status.¹⁶

Meanwhile, civilian is defined negatively in relation to combatants and armed forces. A civilian is any person who does not belong to any category of combatants and who have taken no active part in hostilities.¹⁷ In other words, a civilian is any person who is not a member of the belligerent armed forces, whether or not the authority upon which such a force depends is recognised by the adverse party or of associated militia, incorporated paramilitary police or volunteer corps, including organised resistance units, or of a *levee en masse*¹⁸ acting in immediate resistance to invasion.¹⁹ Thus, in non-international armed conflict, armed forces of a state and dissident armed forces or other organised armed groups are quite distinct from the civilian and civilian population.²⁰ Then from the definition of civilians emerges that of the civilian population, as it comprises of all persons who are civilians.²¹ Since civilians belong to none of the category of combatants, they are immune from direct attack unless and for such time as they directly participate in hostilities.²²

In spite of the numerous literature addressing principle of distinction from both IHL and Islamic Law, this work seeks to add to the field by considering the argument that distinction existed in Islamic law just as it does in IHL by creating obligation on part of armed groups with religious affiliation to respect immunity of civilians during hostilities. In view of this, IHL can substantively incorporate classical Islamic *jus in bello*, which makes Islamic ideals a complement of rules of IHL for the benefit of Muslim countries

¹⁶ Jean-Marie Henkaerts, et al, *Customary International Humanitarian Law*, Vol. 1 Rules, Cambridge University Press, Cambridge, 2005, p. 3. The provision of Additional Protocol I considers combatant from the perspective of a person who has the right to fight and consequently loses protection accorded to civilian for the simple fact that he participates in the hostilities. See also the provisions of Article 43 (20), Additional Protocol I and Article 43 (3), Additional Protocol I.

¹⁷ See Article 51(3), Additional Protocol I; Frits Kalshoven, et al, *Constraint in Waging of War: An Introduction to International Humanitarian Law*, ICRC, Geneva, 2001, p.98.

¹⁸ *Levee en masse* refers to “inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war”. Article 4A(6), Geneva Convention III.

¹⁹ Hilaire McCoubrey, *International Humanitarian Law: The Regulation of Armed Conflict*, Dartmouth Publishing Company Limited, Aldershot, 1990, p.13. Civilian objects are defined in Article 52, Additional Protocol I as objects which are not military objectives. In other words, civilian objects are objects that do not by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization in the circumstances ruling at the time does not offer a definite military advantage. Kalshoven, et al., *Constraint*, p.100.

²⁰ Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, ICRC, Geneva, 2009, p.28. Any civilian who assumed a continuous military function which corresponds to that collectively exercised by an armed group as a whole for the purpose of conduct of hostilities on behalf of the non-state party to the conflict would certainly loses protection accorded to civilian. William H. Boothy, “Direct Participation in Hostilities- A Discussion of the ICRC Interpretive Guidance” *International Humanitarian Legal Studies*, 2010, Vol.1, p.153.

²¹ Article 50 (2), Additional Protocol I.

²² Richard R. Baxter, *Law and Responsibility in Warfare: The Vietnam Experience*, The University of North Carolina Press, United States of America, 1975, p.64.

as well as armed groups with Islamic link. It is against this background that the article attempts to examine principle of distinction under Islamic Law of Warfare and IHL. In doing so, it examines the principle and its imperative nature in conduct of hostilities under the two legal regimes. The article also makes comparative analysis of the essential elements that constitute the principle of distinction. Combatant and civilian, and civilian objects and military objectives will be considered in light of the principle under Islamic Law of Warfare and IHL. The last segment of the article considers the position of direct participation in hostilities under the two legal regimes.

II. PRINCIPLE OF DISTINCTION UNDER ISLAMIC LAW OF WARFARE

Islamic Law of Warfare has subsumed humanitarian considerations into warfare and it regulates in detail the conduct of Muslim armies during hostilities.²³ Among the humanitarian considerations that were subsumed into warfare is the principle of distinction and it serves as one of the basic rules of warfare in Islam. It is a duty under Islamic Law of Warfare to distinguish between two categories of persons in cases of armed conflict of whatever nature. Combatants must be distinguished from non-combatants and accordingly hostilities are directed only against combatants. Hence, the obligation to distinguish between civilian objects and military objectives is clearly imperative and firmly entrenched in Islamic law of warfare.²⁴

The Almighty Allah has made it a duty upon a Muslim army to fight only the combatants. The Qur'an provides- "fight those who fight you but transgress not the limits. Truly Allah likes not transgressors."²⁵ This was the first verse about fighting that was revealed in Madinah, which according to some jurists the verse has been abrogated by subsequent verses on Jihad.²⁶ However, some jurists are of the opinion that the verse has not been abrogated. As such ever since the verse was revealed, the Prophet fought only those who fought him and avoided non-combatants. The phrase "those who fight you" in the verse refers to fighting only the enemies who are engaged in fighting Islam and its followers.²⁷ The verse also enjoins Muslims to fight for the sake of Allah and should not be transgressors. The point of concern now is whether the rubric the verse seeks to establish in this context can still be established in the light of the interpretation given to the verse coupled with the various traditions of the Prophet (PBUH) in similar respect.

²³ An-Na'im, *Islamic Reformation*, p.149.

²⁴ Sultan, *Islamic Concept*, p.36.

²⁵ Qur'an 2 Verse 190, Yusuf A. Ali, *The Holy Qur'an Text, Translation and Commentary* Dar al Arabia Publishing, Printing and Distribution, Lebanon, 1968, p.75.

²⁶ The verses that abrogated the verse Qur'an *Al-Bakara* 2:190 are Qur'an *at-Tauba* 9:5 and 36. See Ibn Kathir, *Tafsir Ibn Kathir*, Abridged by a Group of Scholars Under the Supervision of Al-Mubarakpuri, S.S., (1st ed) Vol.1, Darussalam Publishers and Distributors, Riyadh, 2000, p.527; Muhammad Munir, "The Protection of Civilians in War: The Non-Combatant Immunity in Islamic Law" September 2011, p.7. http://works.bepress.com/muhammad_munir/13 Site accessed on 12.4.2013.

²⁷ Muhammad Munir, Protection of Civilians, p.7

According to a theologian and famous commentator of the Qur'an Hasan al-Basri (d. 728 C.E), he interpreted the word "transgression" in *Al-Bakara* 2:190 to mean prohibition on mutilating the dead, theft (from the captured goods), killing women, children and old people who do not participate in warfare, killing priests and residents of houses of worship, burning down trees and killing animals without real benefit.²⁴ This interpretation of al-Basri provides the basic principle for the protection of civilians during hostilities, which can be further supported by traditions of the Prophet (PBUH). Accordingly, it was reported that during a war, the Prophet (PBUH) saw the corpse of a woman lying on the ground and observed that she was not fighting. How then was she killed? From this statement of the Prophet, jurists have drawn the principle that those who are non-combatants should not be killed during or after the war.²⁹ To further strengthen the assertion, in another narration the Prophet (PBUH) stated that Muslims should fight in the name of Allah and by Allah, and as to the creed of the messenger of Allah. They should not kill an old man, nor a young child, or a woman.³⁰ The Prophet (PBUH) further said: "Do not grudge, and gather your spoils and do good deeds and be benevolent."³¹ Therefore, it is safe to conclude that Qur'an 2 verse 190 as well as the traditions of the Prophet (PBUH) has set the pace for the recognition and establishment of the obligation to distinguish between combatants and civilians during armed hostilities.³²

There is no gain saying the fact that principle of distinction laid down by the Qur'an and the traditions of the Prophet has been followed by the rightly guided Caliphs. The first caliph of Islam Abu Bakar (d. 13/634) reaffirmed the position of Qur'an and traditions of the Prophet (PBUH) in his order to his commander. The Caliph's famous decree states that:

I prescribe ten commandments to you; do not kill a woman, a child or an old man, do not cut down trees, do not destroy inhabited areas, do not slaughter any sheep, cow or camel except for food, do not burn date palm, nor inundate them, do not embezzle, nor be guilty of cowardness.³³

It is clear from these set of instructions just as other similar codes of conduct deduced from the Qur'an and the traditions of the Prophet (PBUH) that distinction as

²⁸ See Ibn Kathir, *Tafsir Ibn Kathir*, pp.527-8.

²⁹ Aduly, *Bulug al Maram*, Hadith No 1313.

³⁰ F.H. Ruxton, *Maliki Law, Being a Summary from French Translations of the Mukhtasar of Sidi Khalid*, El-Nahar Press, Cairo, 2004, p.74. According to Ruxton, children, imbeciles, idiots, old men, impotent and sick people, the blind and monks living in cloisters are to be spared not because of their calling, for they are plunged even deeper than the others in infidelity but because they live a secluded life similar to that led by women. Ruxton, *Maliki law*, p.74.

³¹ Sabiq, *Fiqh us-Sunnah*, p.53. There are some orientalisists who used to cite the tradition of the prophet (PBUH) where the messenger of Allah was asked about the household of the polytheists, whose land may be assaulted during the night and that some of their women and offspring may be killed or wounded. Then the Prophet replied "they are from among them". Relying on this tradition, the orientalisists alleged that Islam does not distinguish between combatants and civilians. However, the commentary of the Prophetic tradition shows that the reply of the Prophet was with respect to unintentional homicide of women and children, not the premeditated one. See Aduly, *Bulug al Maram*, p.418.

³² Sultan, *Islamic Concept*, p.37.

³³ Imam Malik, *Al-Muwatta Malik*, Book 21, Hadith 21: 3: 10. See also Zuhili, *International Law*, p.282.

a principle of warfare constitutes a mandatory injunction for Muslim army to observe. This simply means that no Muslim army is allowed to overstep or breach this principle unless absolute military necessity requires incidental violation that cannot be averted.³⁴

By and large, under Islamic law of Warfare, a clear distinction between combatants and non-combatants is drawn in an enemy country. As far as non-combatant population is concerned, the instruction of the Prophet (PBUH) has been ‘do not kill them’.³⁵ In other words, civilian and the civilian population enjoy general protection from the effects of hostilities and military operations provided they do not directly participate in the hostilities. However, as an exception, when civilians take part in hostilities, their non-combatant status and immunity are forfeited and replaced with combatant. Therefore, right from the time of the Prophet, Islamic Law of Warfare distinguished between combatants and civilians and strongly condemned the random use of weapons against combatants and civilians alike.

Today, there is consensus of most Muslim jurists in international relations that persons who do not take part in the fighting are excluded from attack. The general protection accorded to civilians naturally implies that they are not subject to attack or to threat of violence.³⁶ Within the context of Islamic Law of Warfare, children, idiots, imbeciles, old men, sick people, the blind, monks and women are recognized as civilians because these categories of people live a secluded life similar to that of women, and women are not considered to be a threat to an Islamic state.³⁷

Furthermore, when Iman Malik was asked whether or not Muslims could kill enemy women and children who stand on the ramparts and throw stones at the Muslims and cause confusion in their ranks, he answered: the Prophet has forbidden the slaying of women and children. Iman Malik went ahead to warn against killing women and children who even take active part in the hostilities.³⁸ However, the position of majority of Islamic scholars is that the elderly and monks, who were normally protected, could be attacked if they were involved in supporting the enemy cause. This stand is buttressed by the incident that happened in 630 AD after the conquest of Makka, during the battle of *Hunayn*, Muslim fighters killed a man who was over one hundred years old, in the presence of the Prophet. The old man was killed because he was alleged to have provided helpful intelligent advice

³⁴ Zuhili, *International Law*, p.283.

³⁵ Abul A'la Maududi, *Human Rights in Islam*, Islamic Foundation, United Kingdom, 1980, p.36.

³⁶ Sultan, *Islamic Concept*, p.638.

³⁷ This position stands in case of apostasy, whoever commits apostasy constitute a threat not only against religion but also against the security of the Islamic state and the apostate should be put to death. In line with this, Hanafi jurists held that a woman apostate is not to be put to death. See Yahya Yunusa Bambale, *Crimes and Punishments under Islamic Law*, Malthouse Press Limited, Lagos, 2003, pp.79-80.

³⁸ The Prophet (PBUH) was reported to have prohibited those who killed the son of Abu Al-Haqaiq from killing women and children. One of the people said, when the woman of the son of Abu Al-Haqaiq Harmed us with screaming I raised sword at her, but when I remembered the prohibition of Allah's messenger (PBUH), I gave up. But for this reason, we would have been relieved of her. Imam Malik Anas, *Al-Muwatta (the Approved)* Trans. Hibah G.A., Vol.I, Dar Al-Kotob AL-Ilmiyah, Lebanon, 2007, p.229.

to the enemy during battle.³⁹ It is believed that women and children could be attacked for taking part in the fighting or supporting the war effort of the enemy but only if it was proven that they had actually participated in the hostilities. Thus the conviction on direct participation of civilian could not be based simply on suspicion or likelihood but rather they must have actually served as combatants or guides.⁴⁰

Under Islamic Law of Warfare, not only does the civilian population enjoy immunity from direct attack, but it also includes civilian objects. It is presumed that all objects are civilian unless proved otherwise. The nature, use and intended purpose of the objects are the criterion for distinguishing between civilian objects and military objectives.⁴¹ Direct attack against civilian objects is prohibited because they enjoy equal immunity with civilian population against direct attack. The Prophet gave instructions to the Muslim troops deployed against the advancing Byzantine army that “in avenging the injuries inflicted upon us molest not the harmless inmates of domestic seclusion; spare the weakness of the female sex; injure not the infant at the breast or those who are ill in bed. Refrain from demolishing the houses of the unresisting inhabitant; destroy not the means of their subsistence, nor their fruit trees and touch not the palm and do not mutilate bodies and do not kill children”.⁴² Thus the position is that during warfare destruction of property is prohibited, except in case of absolute military necessity.⁴³

According to Yamani, any able bodied man is to be treated as a combatant, whether or not he is actually participating in the hostilities. Obviously, this definition seems to be inconsistent with the Qur’anic provisions, tradition of the Prophet and the orders given to Muslim army by the companions of the Prophet that hostilities are permitted only between combatants i.e. acts of war may be committed only by combatants.⁴⁴ Even the combatants have code of conduct during war such as: the prohibition of torture by fire to enemy combatant because the Prophet was reported to have said punishment by fire does not behove anyone except the Master of the fire; combatants should also accord protection to wounded soldiers who are not fit to fight because the Prophet said do not attack a wounded person and that no one should be tied to be killed as the Prophet was reported to have prohibited the killing of anyone who is tied or is in captivity.⁴⁵

³⁹ Nesrine Badawi, “Islamic Jurisprudence and the Regulation of Armed Conflict” 2009, p.10 http://ihl.ihlresearch.org/_data/global/images/Islamic_Jurisprudence_Regulation_AC.pdf Site accessed on 13.11.2010.

⁴⁰ Karima Bennoune, “As-Salamu Alaykum? Humanitarian Law in Islamic Jurisprudence” *Mich. J. Int’l L.* 1994, Vol. 15, pp.630-631.

⁴¹ Sultan, *Islamic Concept*, p.38.

⁴² Cited in Bennoune, *As-Salamu Alaykum*, p.629. Similarly, Shafi’i strongly stressed that attack could not be directed against inhabited houses but only against fortresses, unless the homes were located very close to fortresses. He further asserted that all lifeless things could be killed but living creatures such as animals could be killed only if the Muslim army believed that the creatures’ continued existence could strengthen their enemies. Bennoune, *As-Salamu Alaykum*, p.629.

⁴³ For instance, destruction for army to penetrate barricades, or when that property makes a direct contribution to war, such as castles and fortresses used by the enemy to prevent the Muslim army from advancing. See Zuhili, *International Law*, p.282.

⁴⁴ Zuhili, *International Law*, 282. See also Sultan, *Islamic Concept*, p.37.

⁴⁵ Maududi, *Human Rights in Islam*, p.36.

It is important to point out at this juncture that despite the fact that Islamic law of warfare has subsumed humanitarian considerations as well as it regulates in detail the conduct of belligerents in warfare, this can only represent the classical period of Islamic civilization. Certainly, this does not portray the case of the contemporary Muslim states that are all parties to the Geneva Conventions and the Additional Protocols.⁴⁶ This simply means that contemporary Muslim States are bound to observe their obligations under the Geneva Conventions and as a matter of fact, there is no single Muslim state today that applies Islamic law of warfare as its *jus in bello*.⁴⁷

III. THE PRINCIPLE OF DISTINCTION UNDER IHL

Principle of distinction entails that parties to an armed conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their military operations only against military objectives.⁴⁸ This principle is one of the most fundamental protections afforded to the civilian population in armed conflict. At the heart of IHL lies the principle of distinction between the armed forces who conduct the hostilities on behalf of the parties to an armed conflict and civilians who are presumed not to directly participate in hostilities and must be protected against the dangers arising from military operation.⁴⁹

Prior to the codification of the Geneva Conventions and their Additional Protocols,⁵⁰ the principle of distinction was mentioned in the St. Petersburg Declaration in 1868 which states “the only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy”.⁵¹ State practice also establishes that principle of distinction is a norm of Customary International Law applicable to both classes of conflicts (international and non-international armed conflicts)⁵² and the continuous

⁴⁶ For the names of States Parties to the Geneva Conventions and their Additional Protocols, see ICRC, ‘The Geneva Conventions of 1949 and their Additional Protocols’ <<http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/>> Site accessed on 10.3.2014.

⁴⁷ *Jus in bello* refers to the law regulating conduct of belligerent during armed conflict, which is independent of the legality or otherwise of resorting to use of force.

⁴⁸ Article 48 (1), Additional Protocol I.

⁴⁹ Melzer, *Interpretive Guidance*, p.11; McCoubrey, *Regulation*, p.114.

⁵⁰ It is significant to mention that before the codification of principle of distinction, the principle has existed in several other laws and customs of war. For instance, Islam has considered distinction in warfare as a fundamental rule of war, which can be seen in the provision of Qur’an *Al-Bakara* 2:190 cited above and other traditions of the Prophet (PBUH) as well as the teachings of the rightly guided Caliphs have all established the obligation on Muslims to distinguish combatants from civilians during hostilities long before the contemporary IHL. See Jean Pictet, *Humanitarian Law and the Protection of War Victims*, Henry Dunant Institute, Geneva, 1975, pp.16-17; A.V.P. Rogers, *Law on the Battlefield*, Manchester University Press, Manchester, 2004, p.1.

⁵¹ Kalshoven, et al., *Constraint*, p.102.

⁵² In *Prosecutor Vs Martić*, ICTY, IT-95-11-I, 1996, the applicability of these rules to all armed conflicts has been corroborated by General Assembly resolution 2444 (XXXIII) and 2675 (XXV), both adopted unanimously in 1968 and 1970 respectively. These resolutions are considered as declaratory of customary international law in this field. The customary prohibition on attacks against civilians in armed conflicts is supported by its having been incorporated into both Additional Protocols. Article 51 of Additional Protocol I and Article 13 of Additional protocol II. Both Protocols mentioned above prohibit attacks against the civilian population as such as well as individual civilians. Both provisions explicitly state that these rules shall be observed in all circumstances. The Appeal Chamber reaffirmed that both articles constitute customary international law. See also Henckaerts, et al, *Customary*, p.3.

respect for the principle is what makes it possible for humanitarian law to fulfill its aim of protecting the civilian population from the consequences of armed conflict.⁵³

To distinguish between combatants and civilians is an important aspect of warfare and has long been recognised as the indispensable means by which humanitarian principles are injected into the rules governing conduct in war.⁵⁴ The reason underlying the principle of distinction is that combatants have the right to participate in hostilities and consequently may be the object of attacks on the part of the enemy to disable them while civilians lack the right of direct participation. Distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the later be spared as much as possible.⁵⁵ The International Court of Justice (ICJ) in its advisory opinion in the Nuclear Weapons case stated that the distinction between combatants and non-combatants is one of the cardinal principles constituting the fabric of humanitarian law.⁵⁶ Similarly, in the same case of *Prosecutor v Martić*, the International Criminal Tribunal for the former Yugoslavia (ICTY) stressed the rule that civilian population as well as individual civilians shall not be the object of attack as a fundamental rule of IHL applicable to all armed conflict.

The fact that the principle of distinction is derived from the principles of humanity, no self-respecting state would challenge the applicability of such principles in both international and non-international armed conflict.⁵⁷ Therefore, the limitations set by the principle on the use of violence in war seek to achieve a reasonable balance between the necessary destruction of the military resources of the enemy in time of war and the equally compelling need not to cause unnecessary suffering, destruction and loss of life which confer no clear military advantage.⁵⁸

Under international armed conflict, Article 48 of Additional Protocol I provides for the need to distinguish between civilian population and combatants and between civilian objects and military objectives.⁵⁹ A civilian loses the protection accorded to him under

⁵³ Avril McDonald, "The Challenges to International Humanitarian Law and the Principles of Distinction and Protection from the Increased Participation of Civilians in Hostilities", A Paper Presented at the University of Teheran at a Round Table on the Interplay Between International Humanitarian Law and International Human Rights Law, April, 2004, (NP).

⁵⁴ Kenneth Watkin, "Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy" *Program on Humanitarian Policy and Conflict Research, Harvard University, Occasional Paper Series*, Winter 2005, NO. 2, p.9.

⁵⁵ See Kalshoven, et al., *Constraint*, p.99.

⁵⁶ International Court of Justice, Advisory opinion on the legality of the threat or use of Nuclear Weapons, Report 1996, Para 76.

⁵⁷ Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*, Clarendon Press, Oxford, 1989, p.74.

⁵⁸ Richard R. Baxter, "The Duties of Combatants and the Conduct of Hostilities (Law of the Hague)" in *International Dimensions of Humanitarian Law*, UNESCO, Paris, 1988, p.103.

⁵⁹ Françoise Krill, "The Protection of Women in International Humanitarian Law" *Extract From the International Review of the Red Cross*, 1985, pp.13-14.

the principle of distinction when he takes a direct part in the hostilities.⁶⁰ This provision of the law is as a result of the desire to restrict warfare to acts of violence against the enemy, which is strictly necessary from a military standpoint. The provision is a cardinal rule and principle not only of the Additional Protocol, but also of the whole of IHL. In international armed conflict civilians are persons who are neither members of the armed forces of a party to the conflict nor participants in *levee en masse*.⁶¹ Thus civilians as long as they are not incorporated into the armed forces, private contractors and civilian employees do not cease to be civilians simply because they accompany the armed forces and assume functions other than the conduct of hostilities that would traditionally have been performed by military personnel.⁶²

Unlike Additional Protocol I, Additional Protocol II does not contain specific rules and definitions in respect of principle of distinction, however the short fall have been largely filled through state practice which forms the basic rules that are applicable as customary law to non-international armed conflict.⁶³ Additional Protocol II states that civilian population as well as individual civilians shall not be the object of attack and they shall enjoy protection against direct attack unless and for such time as they take a direct part in hostilities.⁶⁴ In the same vein, Common Article 3 also provides that High Contracting Parties shall accord protection to persons taking no active part in the hostilities including members of armed forces who have laid down their arms and those placed *hors de combat*. It is observed that the traditional dual privileged status approach of dividing a population into combatants and civilians is only as effective as the accuracy with which the definition of combatant is established and to the extent there is a clear understanding of when civilians lose the protection of their status by participating in hostilities.⁶⁵

IV. APPLICATION OF PRINCIPLE OF DISTINCTION IN CLASSES OF CONFLICTS

Additional Protocol I being the applicable regime in international armed conflict states that in order to ensure respect for and protection of civilian population and civilian objects, the parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly

⁶⁰ Article 51 (3), Additional Protocol I.

⁶¹ Toni Pfanner, "Military Uniforms and the Law of War" International Committee of the Red Cross, 2004, Vol. 86, No. 853, p.104; Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge University Press, Cambridge, 2010, p.202.

⁶² Melzer, *Interpretive Guidance*, p.39

⁶³ Jean-Marie Henckaerts, "Study on Customary International Humanitarian Law: Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict" International Review of the Red Cross, 2005, Vol. 87, No. 857, p.189.

⁶⁴ Article 13, Additional Protocol II. See also Article 3 (7), Additional Protocol II to the Convention on Certain Conventional Weapons which is also applicable in non-international armed conflicts.

⁶⁵ Watkin, *Warrior*, p.9.

shall direct their operations only against military objectives.⁶⁶ Thus civilian population immunity last for as long as they do not take a direct part in the hostilities.⁶⁷

In non-international armed conflict, Additional Protocol II and Common Article 3 do not contain detailed rules and definitions with respect to principle of distinction.⁶⁸ However, Article 13 of the Additional Protocol II provides that the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operation. The civilian population as well as individual civilians shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. Civilians shall enjoy the protection afforded to them unless and for such time as they take a direct part in hostilities. Similarly, Common Article 3 to Geneva Conventions states that persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wound, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.⁶⁹

Obviously, the legal regime applicable to international armed conflict is quite distinct from the one covering non international armed conflict. But since the principle of distinction is derived from the principle of humanity, no self-respecting state should challenge the applicability of such principle in both international and non-international armed conflict.⁷⁰ Thus state practice establishes principle of distinction as a norm of customary international law applicable in both international and non-international armed conflict.⁷¹

Under Islamic Law of Warfare, a similar position is obtainable as one of the humanitarian considerations that were subsumed into Islamic law of warfare. Islam recognised principle of distinction as a basic rule of warfare and has made it a duty to distinguish between combatants and non-combatants and accordingly hostilities are directed only against combatants.⁷² Almighty Allah in the Qur'an obliged Muslim army to distinguish between combatants and civilians and fighting is allowed between

⁶⁶ Article 48, Additional Protocol I.

⁶⁷ Article 51 (3), Additional Protocol I.

⁶⁸ Henkaerts, Rule of Law, p.189.

⁶⁹ In addition, the prohibition on direct attacks against civilians is also contained in Amended Protocol II to the Convention on Certain Conventional Weapons and set forth in Protocol III to the Convention on Certain Conventional Weapons which has been made applicable in non-international armed conflict. The application of the Protocol to the Convention on Certain Conventional Weapons in non-international armed conflicts was made pursuant to an amendment of Article 1 of the Convention and was adopted by consensus in 2001. See Henkaerts, et al, Customary, p.5.

⁷⁰ Meron, Customary Law, p.74.

⁷¹ Henkaerts, et al, Customary, p.3.

⁷² Sultan, Islamic Concept, p.37. It is also noted that in Islamic Law of Warfare, responsible leadership, strict discipline and absolute respect for Islamic law together constitute the criteria for drawing the essential distinction between combatants and civilians and between civilian objects and military objectives.

combatants.⁷³ The same principle was also decreed by the Prophet (PBUH) and the commands given by the righteous caliphs of the Islam after the demise of the Prophet.

The divine nature of sources of Islamic law has made it applicable to all classes of conflicts. In other words, Islamic Law of Warfare draws no distinction between the various types of war or armed conflict with respect to application of principle of distinction. Whether a war is waged to propagate the Islamic faith or inform people about it, or whether it be a defensive war or one directed against apostates, schismatics or rebels, the rules governing it are the same because they were laid down by the same divine authority to be observed by all and applied without distinction or discretion.⁷⁴ Therefore, as far as application of humanitarian rules is concerned especially principle of distinction under Islamic law, there can be no distinction between international and non-international armed conflicts.

By and large, the differences in the application of the principle of distinction under IHL to international and non-international armed conflicts have been abridged by recognizing the principle as a customary norm applicable to all classes of conflicts. The jurisprudence of International Tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) has further blurred the distinction in the application of the principle in international and non-international armed conflicts. This position is similar to that of Islamic law of Warfare as Islam did not differentiate the application of principle of distinction to different types of conflicts. In Islam, the applicable law in all classes of conflicts is drawn from divine sources (Qur'an, Sunnah, Ijma, Qiyas, etc) and it therefore covers all classes of armed conflicts regardless of their character or nature.

V. THE STATUS OF COMBATANTS AND CIVILIANS

As we earlier discussed, combatant in the provision of Additional Protocol I is adopted by given generic meaning to combatants, indicating persons who do not enjoy the protection of the law accorded to civilian against direct attack but without conferring combatant status.⁷⁵ While civilian is any person who does not belong to any category of combatants and who have not taken active part in the hostilities. The protection accorded to civilians is premised upon their restraint from participation in belligerent activities and upon their identifiability as non-combatant.⁷⁶

Likewise, under Islamic Law of Warfare, the legitimacy of a target in the context of an armed conflict is typically determined by the capacity of that target or individual to fight against the Muslims. Civilians are those who take no active part in hostilities.⁷⁷ They

⁷³ Ali, Qur'an Translation, p.74.

⁷⁴ Sultan, Islamic Concept, p.32.

⁷⁵ Henkaerts, et al, Customary, p.3. See also the provisions of Article 43 (20), Additional Protocol I and Article 43 (3), Additional Protocol I.

⁷⁶ Kalshoven, *Constraint*, p.98; Baxter, *The Vietnam Experience*, p.64.

⁷⁷ Sultan, Islamic Concept, p.37.

are recognised as a separate category of person entitled to various degrees of immunity provided they do not take active part in the hostilities.

Therefore, it can be inferred from our earlier discussion that the Prophet and his companions instructed the Muslim troops at various occasions in a language that foreshadows modern International humanitarian rules and concerns. For instance, the Prophet said “in avenging the injuries inflicted upon us molest not the harmless inmates of domestic seclusion; spare the weakness of the female sex; injure not the infants at the breast or those who are ill in bed”.⁷⁸ Similarly, the prohibition of attack on persons rendered hors de combat in Article 41, Additional Protocol I is either explicitly or implicitly covered by the Islamic Law of Warfare or form part thereof by means of reasoned deduction.⁷⁹

It is obvious that the definition of combatants in Islamic Law of Warfare appears to be more generous than the modern humanitarian law definition as it covers any person who carries arms against Muslims and has either directly or indirectly waged war against Muslims. By this definition, a person who qualifies as a combatant under Islamic law may not be regarded as such under IHL. Under IHL, any person outside the definition of combatant contained in third Geneva Convention and Additional Protocol I, the individual is to be regarded as non-combatant. In other words, where a person is not covered within the provisions of the third Geneva Convention and Additional Protocol I and the person takes up arms against the enemy in the conduct of hostilities, he would be regarded as civilian who directly participate in hostilities. Yet, the slight discrepancy in the definition of combatant in IHL and Islamic Law of Warfare does not affect the position of combatant as a legitimate target under the two legal regimes.

Furthermore, the definition of civilian and civilian population given in Article 50, Additional Protocol I merely endorses and implements a basic rule of the Islamic concept. In addition, the basic rule in Article 48 of the same Protocol on distinction between combatants and civilians simply reflects the instructions given by the righteous caliphs Abu Bakar and Umar to their Muslim army.⁸⁰ Finally, Islamic humanitarian precept shows that the major categories of protected persons and restricted acts were present in Islamic law as it is obtained under IHL.⁸¹

VI. THE POSITION OF CIVILIAN OBJECTS AND MILITARY OBJECTIVES

As we earlier pointed out, the reason underlying principle of distinction is not only to distinguish between civilian and combatants, but to also distinguish between civilian objects and military objectives and consequently attacks shall only be targeted at military objectives. Under IHL, it is a basic requirement that during conduct of hostilities not only

⁷⁸ Bennoune, *As-Salamu Alaykum*, p.635.

⁷⁹ Sultan, *Islamic Concept*, p.35.

⁸⁰ Sultan, *Islamic Concept*, p.37.

⁸¹ Bennoune, *As-Salamu Alaykum*, p.638.

lives and well-being of individual civilians and civilian population that is protected but also the protection of those objects that are civilian in character.⁸² The Protocol defined civilian objects as objects which are not military objectives.⁸³

Article 52(3) of the Additional Protocol I has made it clear that in case of doubt whether an object which is normally dedicated to civilian purposes such as a place of worship, a house or other dwelling or a school is being used to make an effective contribution to military action, it shall be presumed not to be so used. This position was further emphasized in the case of *Prosecutor Vs Stanislav Galic*.⁸⁴ The Trial Chamber of ICTY states that in case of doubt as to whether an object which is normally dedicated to civilian purposes is being used to make an effective contribution to military action, it shall be presumed not to be so used. The Trial Chamber understands that such an object shall not be attacked when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action.

Military objectives on the other hand, are covered by Article 52 (2), Additional Protocol I and it states that attacks shall be restricted to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization in the circumstances ruling at the time, offers a definite military advantage. In IHL, the presence of civilians within or near military objectives does not render the objects immune from attack⁸⁵, meaning a military objective remains a military objective even if civilian persons are in it.⁸⁶

On the other hand, Islamic Law of Warfare equally applies similar standard to that of IHL. All objects are presumed to be civilian objects unless it is proved otherwise. The nature, use and intended purpose of the objects are the criteria for distinguishing between civilian objects and military objectives. Attacks should therefore be strictly confined to military targets i.e. to objects which by their nature or use are intended for the pursuit of hostilities.⁸⁷ The instruction of the Prophet (PBUH) to Muslim troops reads “refrain from demolishing the houses of the unresisting inhabitants; destroy not the means of their subsistence, nor their fruit trees and touch not the palm and do not mutilate bodies and do not kill children”.⁸⁸

⁸² Baxter, *Duties of Combatant*, p.119.

⁸³ Article 52, Additional Protocol I. It is only those objects that qualify as military objectives may be made subject of attack, all other objects are protected against attack. See also Kalshoven, F., et al, p.100

⁸⁴ IT-98-29, ICTY, Trial Chamber Judgment of 5th December 2003, Para 5.

⁸⁵ Henkaerts, et al, *Customary*, p.31.

⁸⁶ Muhammed Tawfiq Ladan, *Introduction to International Human Rights and Humanitarian Laws*, Ahmadu Bello University Press, Zaria, 1999, p.138.

⁸⁷ Sultan, *Islamic Concept*, p.38.

⁸⁸ Cited in Bennoune, As-Salamu Alaykum, p.624. Similarly, Caliph Abu Bakar gave orders never to destroy palm trees, burn dwellings or cornfields, cut down fruit trees, kill livestock. But Muslims are allowed to eat from the enemy's fruit and livestock if they are constrained by hunger and never to lay hands on monasteries. Sultan, *Islamic Concept*, p.38.

To crown it all, Islamic Law of Warfare contains law of the requisite protection of civilian objects. Civilian object is protected as well as the environment which is now emerging as an important protected category in the contemporary IHL.⁸⁹ It suffices that, the scope of application of the protection of civilian objects is wider under the Islamic Law of Warfare than in the provision of Additional Protocol I, for it is more precise, more generous and more humanitarian. However, the stipulations, criteria and details enunciated in the provisions of the Protocol are indeed, in perfect harmony with the very essence of the Islamic Law of Warfare and can therefore be regarded as forming an integral part of it. Thus the general principle of the Islamic Law of Warfare with regards to the protection of the civilians and civilian objects are enshrined in the primary sources of Islamic law and in reasoned deduction. These principles are binding and constantly applicable through time and space, whatever the nature of the armed conflict in question.⁹⁰

VII. THE POSITION OF DIRECT PARTICIPATION IN HOSTILITIES

One of the areas of uncertainty affecting the regulation of both international and non-international armed conflict under IHL is the absence of precise definition of the term direct participation in hostilities.⁹¹ The uncertainty is the aftermath of lack of IHL treaty that define the concept and the lack of clear and resolved interpretation of the concept established from state practice or international law jurisprudence.⁹² However, it is clear and uncontested that when a civilian uses weapons or other means to commit acts of violence against human or other material enemy forces, such a civilian is considered to have taken a direct part in the hostilities.⁹³

Direct participation in hostilities is interpreted to mean that the persons in question perform hostile acts which by their nature or purpose are designed to strike enemy combatants or material.⁹⁴ In other words, the notion of direct participation in hostilities refers to specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict. To take a direct participation in hostilities is usually taken to mean to engage in a specific attack or attacks on an enemy combatant or object during a situation of armed conflict. In essence, there must be a direct causal relation between the activity engaged in and harm done to the enemy at the time and place where the activity occurs.⁹⁵

Under IHL, for an act to qualify as direct participation in hostilities, the act must be likely to adversely affect the military operations or military capacity of a party to

⁸⁹ Bennoune, *As-Salamu Alaykum*, p.637.

⁹⁰ Sultan, *Islamic Concept*, p.37.

⁹¹ Henkaerts, *Rule of Law*, p.190.

⁹² Melzer, *Interpretive Guidance*, p.41

⁹³ Henkaerts, *Rule of Law*, p.190.

⁹⁴ Kalshoven, *Constraint*, p.99.

⁹⁵ McDonald, *Principle of Distinction*, p.21.

an armed conflict or alternatively, to inflict death, injury, or destruction on persons or objects protected against attack; there must be a direct causal link between the act and the harm likely to result either from the act or from a coordinated military operation of which that act constitutes an integral part; and the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.⁹⁶ Thus for an act to amount to direct participation in hostilities, it must meet the three basic requirements of threshold of harm, direct causation, and belligerent nexus cumulatively. Therefore, the immunity of civilians was granted on the implicit understanding that the civilian population is harmless and consequently should not be attacked; and civilians who actively engaged in hostilities or committed any hostile act ceased to be harmless thereby become subject of attack.⁹⁷

Similarly, under Islamic Law of Warfare, the civilian population enjoy general protection from dangers of hostilities and military operations provided they do not directly participate in the hostilities. Civilians who take a direct part in hostilities loses their immunity and their non-combatant status is forfeited and replaced by combatant status i.e. they become legitimate military target. The general protection accorded to civilians naturally implies that they are not subject to attack or to threats of violence.⁹⁸ In Islam, it is believed that women and children could be killed for taking part in the fighting or supporting the war effort against Muslims, but only if it was proven that they had actually participated in the hostilities.⁹⁹ Therefore, direct participation of civilian in hostilities serves as an exception to civilian immunity against direct attack both under IHL and Islamic Law of Warfare.

⁹⁶ Melzer, Interpretive Guidance, p.46.

⁹⁷ Emily Camins, "The Past as Prologue: The Development of the Direct Participation Exception to Civilian Immunity" International Committee of the Red Cross, 2008, vol. 90, No. 872, p.867. In addition, Article 51 (1) (2) and (3), Additional Protocol I, states that the civilian population and individual civilians shall enjoy general protection against dangers arising from military operation. The civilian population as such as well as individual civilians shall not be the object of attack. Acts and threat of violence the primary purpose of which is to spread terror among the civilian population are prohibited. Civilians shall enjoy the protection afforded to them unless and for such time as they take a direct part in hostilities. See also Article 13, Additional Protocol II.

⁹⁸ Sultan, Islamic Concept, p.38.

⁹⁹ Bennoune, As-Salamu Alaykum, p.631. In addition, Imam Maliki took a more restricted position in favor of women and children. He is said to have gone far as to warn against killing women and children who take a direct part in hostilities. See Bennoune, As-Salamu Alaykum, p.630. However, there are some Islamic scholars who have contrary opinion with respect to killing of civilians during an armed conflict. They opined that once the unbelievers in the *dar al harb* (abode of war) had been invited to adopt Islam and refused to accept one of the alternatives, the Muslim army are allowed, in principle, to kill any one of them, combatants and non-combatants, provided they were not killed treacherously and with mutilation. They buttress their argument with the fact that prohibition of attack against women and children is interpreted to mean prohibition on targeting rather than on killing. Thus, they agree that women and children may die in the course of fighting as collateral. Shafi'i relied on the incident in which the Prophet (PBUH) was asked about the consequences of night raids and whether the raiders would be held accountable for their death and the Prophet responded that – they are from them and accordingly can be killed in the process. Badawi, Islamic Jurisprudence, 9. See also the commentary of Hadith No. 1311 in Aduly, Bulug al-Maram, p.416.

VIII. CONCLUSION

Principle of distinction under IHL and Islamic Law of Warfare are similar in the sense that both legal regimes articulate the obligation on belligerents to distinguish between civilians and combatants and between civilian objects and military objectives and shall direct their military operations only against military objectives. With the establishment of principle of distinction as a norm of customary IHL, the applicable law under the two legal regimes did not differentiate the types of conflicts when it comes to discharge of obligation imposed by the principle. The position of combatants and military objectives as legitimate military targets and that of civilians and civilian objects as protected against dangers of military operations are synonymous under the two legal regimes. In case a civilian directly participates in hostilities he loses immunity against attack and becomes legitimate military target both under IHL and Islamic Law of Warfare.

It is suggested that there is need for Islamic Humanitarian ideals, particularly the principle of distinction to be integrated and form part of the contemporary IHL in order to make the contemporary humanitarian norms a whole for its effective application by both state and non-state actors during conduct of hostilities. It is further suggested that Islamic scholars, International Committee of the Red Cross (ICRC) and other humanitarian organization should orient and educate fellow Muslims and non-Muslims through television programs, internet, social networks, newspapers and all other mediums of communication on the humanitarian norms contained in Islamic law of warfare in order to clarify the misconception on lack of humanitarian ideals, particularly on part of armed groups that have religious affiliation.