

PROTECTION OF THE RIGHTS OF
INDIVIDUALS IN ARMED CONFLICT
SITUATION

A COMPARATIVE ANALYSIS OF ISLAMIC
AND INTERNATIONAL HUMANITARIAN LAWS

BY

MUHAMMAD MUNTAQA MAHBOUB

LL.M/Law/23398/2000/2001

*Being a thesis in the Department of Public Law,
Faculty of Law, Ahmadu Bello University, Zaria*

*Submitted to the Post Graduate School,
Ahmadu Bello University, Zaria*

In partial fulfillment of the requirement for the
award of Masters of Law (LL.M) Degree
of Ahmadu Bello University, Zaria

Ramadan, 1426

September, 2007.

DECLARATION

I declare that, this thesis entitled PROJECTION OF THE RIGHTS OF INDIVIDUALS IN ARMED CONFLICT SITUATION: A COMPARATIVE ANALYSIS OF ISLAMIC AND INTERNATIONAL HUMANITARIAN LAWS, has been performed by me in the Department of Public Law, under the supervision of Dr. Y.;Y. BASHIR. The information derived from the literature has been duly acknowledged in the text and a list of references provided. No part of this thesis was previously presented for another degree or diploma at any university.

MUHAMMAD MUNTAQA MAHBUB

SIGNATURE

Done at September, 2007

CERTIFICATION

This thesis entitled PROJECTION OF THE RIGHTS OF INDIVIDUALS IN ARMED CONFLICT SITUATION: A COMPARATIVE ANALYSIS OF ISLAMIC AND INTERNATIONAL HUMANITARIAN LAW by MUHAMMAD MUNTAQA MAHBOUB meets the regulations governing the award of the L.L.M of Ahmadu Bello University, and is approved for its contribution to knowledge and literary presentation.

DR. Y. Y. BASHIR
CHAIRMAN, SUPERVISORY COMMITTEE

DATE

DR. YAHAYA Y. BAMBALE
MEMBER, SUPERVISORY COMMITTEE

DATE

DR. Y. Y. BASHIR
HEAD OF PUBLIC LAW DEPARTMENT
A.B.U. ZARIA

DATE

PROFESSOR, M. TABI'U
EXTERNAL EXAMINER

DATE

DEAN, POSTGRADUATE SCHOOL
A.B.U., ZARIA

DATE

ACKNOWLEDGEMENT

In the name of Allah, the Beneficial the Merciful; all thanks be to Allah (S.W.T) most Merciful, through whose mercy and blessing I reached where I am today and how I am, without which I would have gone astray, and this research work will not have seen light and come to fruition, may His peace and blessing be upon His Messenger MUHAMMAD (Peace be upon Him).

I must begin to offer my special thanks with the utmost gratitude to my father late Malam Muntaqa Mahboub, my mother Hajiya Hadiza as well as my mother in-law late Hajiya Salamatu, for helping beat the odds against enemies of this life by discharging their legal duty by putting me on the right faith, as well as providing moral and financial support. May Allah (S.W.T) reward them with paradise Amen.

My special appreciation and thanks go to DR Y. A. BASHIR and DR. BAMBALE, my teachers and supervisors, who in spite of all my short comings they tolerated me and accommodated my inactive. Let me express with all sincerity, my special appreciation (for reason known to me) to Dr. Y. A. Bashir my teach and supervisor, for his attitude, sincerity and guidance. I must admit with all sincerity that, he is among the few that Nigeria is desperately looking for currently, I ask Allah (S.W.T) to safeguard his noble principles, and reward him with his favour Amen.

I am greatly indebted-to Professor M.T. Ladan, my teacher, for his guidance encouragement and support, as well as Dr Sani, with the faculty of medicine, Ahmad Bello University Zaria Teaching Hospital for all the moral encouragement and physical support rendered.

I am highly indebted to my beloved wife Fatima Muhtar Ibrahim whose sacrifice, encouragement, love, tolerance and prayers constitute a source of strength to me in the course of this research work.

Last but not the least, my gratitude and appreciation go to Usman Mohammad for rendering the Secretarial services for this work, despite his studies, office work and new marriage, May Allah (S.W.T) bless his new marriage, Amen.

ABSTRACT

The fundamental target of both Islamic law of war and international Humanitarian law is to protect the Rights and Persons of both combatants and non-combatants during and after the hostilities thus, the amount and extent of violence applied in war must be limited to achieving military objective, that is to subdue the enemy, such an action/violence should be proportionate, in other words, there should be a clear distinction between combatants and non-combatants, meaning, the law restricts both the means and method of waging war and object against which such means may be employed. Thus, civilians and civilian objectives must not be made the object of direct attack, they should be accorded necessary protection against the dangers arising from military operation, such as indiscriminate attack that is expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof which would be excessive in relation to the concrete and direct military advantage anticipated.

In the same vein, a combatant who can no longer take part in hostility due to sickness or surrender should not be attacked or

killed, but should be accorded all necessary protection as provided under protocol, and by extension all other prisoners of war, as contain under the third Geneva convention of 1949 as well articles 14 and 75 (2) of protocol 1 of 1977 additional to Geneva convention.

So in essence, both Islamic law of war and International Humanitarian law granted protection to all civilian population, i.e. women, children, religious personnel aged persons and all other categories of persons who did not take part in hostility through any other means as well as their objects. They also extended such protection to combatants who are incapable to continue with hostility as a result of injury or surrender.

Violation of any forbidden act or non-performance of any required act under both Islamic law of war and International Humanitarian law is considered as war crime.

The main objective of this research work is therefore to provide:

A comparison of Islamic law and International Humanitarian Laws by examining the rights of individuals both combatants and non-combatants, during and after armed conflict situations.

To examine the sources of the said two legal systems.

To examine the purpose of war under the said two legal systems.

To determine war crimes under the two legal systems as well as their punishment.

To examine the differences between the two legal systems.

To fill in the vacuum left by learned jurists in the two legal systems, and to offer some suggestions on how to fill the said vacuum as well as to further develop same.

Chapter 1, contains, General introduction to Islamic law of war and international Humanitarian law, statement of the problem, objective of study, scope and limitation of research, justification and literature review.

Chapter 2, traces the origin and development of Islamic law of war as well as examining the rights of both combatants and non-combatants under this legal system

Chapter 3, is exclusively dedicated to deal with international Humanitarian law, wherein, origin and development of the said legal system is examine, as well as the rights of both combatants and non-combatants.

Chapter 4, is on the analysis of the rights of individuals both combatants and non-combatants, under both Islamic law of war

and International Humanitarian laws, as well as areas of disagreement between them.

Chapter 5, Summarized the entire research work and makes some concluding remarks which include conclusion and recommendation.

TABLE OF CASES:

1. Prosecutor Vs. Drazen Erder
Judgment, 5, March, 1998,
(371.L.M. 1193) Para 17.

2. R. vs. Smith,
(1990)17,
S.C.561.

3. The Landovery Castle,
HMS and CMD, 1422,
(1921), Cameron,
The Pelus Trial, App, iX.

4. NUREMBERG JUDGEMENT,
(1946) HMSO CMD 6464,
(1964) 64-5; Am. J. International Law,
(1947), 172, 248-9.

5. COENCA BROSS VS. GERMANY
(1927) 7M.A.T. 683.

6. REYAMASHITA,
(1945 - 6) 4 WAR CRIMES,
Reports, 1 327,
US1.

7. REMEYER(1945),
(The Abbaye Ardenne case)
4, War Crimes Report,
97.

8. RE LEWINSKI (Von Monstein)
(1949) 16 Ann. Dig; 509,
511-13.

9. REHOLZER(1949)
War Crimes Reports,
16 and 21.

TABLE OF CONTENTS:

S/N		PAGES
	Cover page	i
	Declaration:	ii
	Certification:	iii
	Acknowledgement:	iv
	Abstract	v-vi
	Table of Cases	vii
	Table of Contents:	vii-ix
	<u>CHAPTER ONE:</u>	
1.0	General Introduction	
1.1	Introduction:	1- 5
1.2	Statement of problem:	5-7
1.3	Objective of study:	7-8
1.4	Justification:	8-9
1.5	Scope of Limitation of Research:	9-10
1.6	Methodology:	10
1.7	Literature Review:	10 – 17
2.0	<u>CHAPTER TWO:</u>	18-23
	The concept of Islamic Law of war:	
2.1	Origin and development of Concept of Islamic Law of war :	23-27
2.2	Types of war under Islamic Law of war:	27-34
2.3	General Rights and obligations of combatants and its protection (conduct of hostility)	34

(a) Definition of lawful combatants:	34-36
(b) Means and methods for conducting warfare:	36-37
(c) Permitted practice:	37-40
(d) Forbidden practice:	40-42
(e) The Rights of protected persons:	42-52
2.4 Prisoners of war:	
(a) Definition of war crime:	57
(b) Penal responsibility	58 - 59
(c) Remedies for violation	59-60
3.0 <u>CHAPTER THREE:</u>	61
General Rights and obligation of combatants and non-combatants and its protection under International Humanitarian Law.	
3.1 Treatment of prisoners of war	61-66
3.2 Treatment of wounded, sick and shipwrecked	66-72
3.3 Special treatment accorded to, Aliens, women and children, journalist and Refugees.	72 - 78
3.4 War crimes and Grave breaches	85
(a) Definition of war crimes	85
(b) Definition of Grave breaches	87
(c) Command responsibility	90
(d) Defences	91
(e) Superior Orders	92
3.5 Treatment of the accused non-national Military personnel of war crimes.	86
3.6 Establishment of International Criminal Court	97

4.0	<u>CHAPTER FOUR:</u>	100 – 102
	Analysis of the Rights of Individuals under Islamic and International Humanitarian Laws	
5.0	<u>CHAPTER FIVE:</u>	
	Summary, Conclusion and Recommendation	108
5.1	Summary:	108
5.2	Finding and Observation:	110
5.3	Recommendation:	112
5.4	Conclusion:	114

CHAPTER ONE

INTRODUCTION

The history of human kind right from antiquity testified that, conflict or rather armed conflict between individuals, families, tribes and nations has been part of the nature of human persons.

Policy of force was encouraged by disinclination of state of Europe during the dark ages through the Middle Ages, to consider any community other than one which was loosely related to them as Barbarian who did not deserve to be treated on equal footing. An example is the case of Romans who treated none but their Latin cousins as equals, while they treated the rest of the world as Barbarians who deserved to live only under Roman Dominance.¹

During the period referred to above, the rights of combatants as well as non-combatants, e.g. civilians, women, children, aged persons, religious persons and injured combatants were not properly and adequately respected and protected during armed conflict situations. However, even at that period, certain individuals as well as some religious leaders tried with some greater or lesser success to limit the suffering of war among combatants and non-combatants.²

¹ George, Schwarzanberger and Brown, A Manual of International Law, Professional Book Limited, U.K., 6th Edition, 1976, page 5.

² Ladan, M.T., Introduction to International Human Rights and Humanitarian Law, Ahmadu ello University Press, Zaria, Kaduna State, Nigeria, Page 108.

For instance, two thousand years before Christ, King Hammurabi of Babylonia (now in Iraq) codified rules of conduct in war.³

In India, the text of Maharabati and Manu Codes provided that, mercy be shown to the disarmed and wounded enemy.⁴

Over fourteen hundred years ago (7th Century, A. D.), the religion of Islam laid down comprehensive rules of war, in order to alleviate the suffering of war to both combatants and non-combatants.⁵

In the 17th Century, the Dutch legal scholar and diplomat, Grotius, wrote his book entitled *De juri Belli – Acpacis*, which was considered to be the first attempt to draw up rules of international law, protecting the victim of armed conflict.⁶

However, the first modern attempt to draw up a binding code for the conduct of armed forces in the field was that prepared by Professor Francis Libber of the United States of America, promulgated as law, by President Lincon in 1868, during American Civil War. This code though only binding upon United States of American forces was based on what Libber regarded as the generally accepted law of his day.⁷

³ Ibid

⁴ Ibid

⁵ Ibid

⁶ Ibid

⁷ Ibid

Beside the above mentioned attempts by various scholars and statesmen, there had been so many other attempts by the states in more recent times through legally binding treaties aimed at restraining the undesirable effect of armed conflict and protection of non-combatants.

Significant among them are the Hague conventions and the four Geneva conventions of 1949 with their additional protocols of 1977, aimed at protecting non-combatants.⁸

All the four Geneva conventions of 1949 are to apply to any international armed conflicts, while common Article 3, common to all Geneva conventions to apply to non-international armed conflict.⁹

Before and after the birth of Prophet Muhammad (Peace be upon him), the Arabian peninsular was in Jahiliyya (Dark Age or period of ignorance). Barbarism, individualism, communal clashes and wars were the order of the day.¹⁰

The Qur'anic verses allude to the full scale invasion of Hijaz (presently Saudi Arabia) by the Babylonian army prior to the birth of the prophet Muhammad (Peace be upon him), in 57 C.E.¹¹

⁸ Ibid

⁹ C. Green, Leslie, The Contemporary Law of Armed Conflict, Manchester University Press, Oxford Road, Manchester, Miz 9 NV, U.K., 2nd Edition, 2000, Page 29

¹⁰ Hashim, S.H., Interpreting the Islamic Ethic of War and Peace, @www.eccc.org/ ijii/article/ contemporaryissues/ article.

Hashim Sohail hs.itml. Last visited, September 10, 2004.

¹¹ Ibid

During His (Prophet Muhammad) adolescence, the sacrilegious war (Harbal-Fujjar), a four year old war was fought, which was ended by the conclusion of a treaty of peace. This usher in the new solidarity of the various clans of Arabia known as "Hilafu of Fuduli", which in essence united the clan of Hashimites, Zuhrah and that of Ta'am. They took an oath to fight on behalf of the oppressed, be he a traveler, resident or even settler, and to compel the oppressor to pay compensation. Though other tribes did not accede to this agreement, but rather opted to remain in hostility, still the treaty marked a remarkable development heralding a new era in the Arabian peninsular.¹²

These were some of the efforts made at that period by some Arab tribal leaders to curtail the number of wars, but there were no attempts to protect the rights of combatants and non-combatants in the event of war.¹³

Islam was the first religion to provide Arabian peninsular with comprehensive rules and regulations governing the conduct of war, as well as protection of rights of combatants and non-combatants during armed conflict situations.

The first Islamic state was established in Medinah in the 7th Century (Rabee al-Awwal, first year of Hijra) by the Prophet Muhammad (Peace be upon Him). Since then, some basic rules and regulations governing the conduct of war were laid down by

¹² Peace in Islam, (originally in Article, published in Shihab Magazine, in 1948) Trans Prelude Co. U.K.

www.vnofmd.com/books/peace in islam

¹³ Ibid

the prophet (peace be upon him). It was reported that, whenever the prophet was sending troops to battle, he instructed them to comply with the following regulations:

Be just, do not act treacherously, and do not act disloyally or negligently. Do not mutilate, do not kill little children, old men or women. Do not cut off palm tree or burn it. Do not fell any fruits bearing tree. Do not slaughter – sheep, cow or camel, except for food, perchance, you will come across men who retired to monasteries (Priest or clergymen) leave them and their devotion in peace.¹⁴

This is the brief historical account of the position of the two legal systems (International Humanitarian law and Islamic law of war) during their infancy.

STATEMENT OF THE PROBLEM

The 1949 Geneva Conventions are said to apply in any armed conflict whether international or non-international by virtue of Article 3, Common to all Geneva conventions. The conventions are said to bind all parties in armed conflict, whether signatory to it or otherwise. The necessary implication of this statement is that, any other legal system that goes contrary to any provision of the said conventions will not be tolerated or accommodated. In other words, the conventions attained a supremacy status, so that, if

¹⁴ Borhi, A.K., Islam of Human Rights in Garular (ed). The challenge of Islam, (Islamic Council of Europe, London, 1978)

any other law is in clear conflict with their provisions, the latter will be declared null and void to the extent of its inconsistency.

In other words, permission to commit an act which is regarded by the conventions as war crimes will not exonerate a person from liability. An example is the provision of Islamic law of war which permits the killing or enslaving the prisoners of war. How can this be practicable nowadays, if for instance, a new government in any of the Islamic state emerges and decides to apply this Islamic provision?

- (b) There is also provision under Islamic law of war similar to the above (which also violated the provision of the convention – i.e. 3rd Geneva convention Article 14 and Article 34) that permits imposing of poll tax (JIZYA) on the inhabitants of a conquered territory who decide to remain non-Muslims (Christians and Jews). How will this be practiced now-a-days, in the event of the emergence of a new Islamic government that decides to be governed strictly by the provisions of Islamic law of war instead of Geneva conventions provisions, in this and similar respects?
- (c) Another problem worth addressing by this research work is that, Geneva Conventions recognize war correspondents (an issue/problem which was not discussed by writers on Islamic law of war). Can such recognition be extended by Islamic law of armed conflict?

- (d) Similar problem to the above is the issue of using certain kinds of weaponry which were not in existence during the life time of the Prophet Muhammad (Peace be upon Him) as well as his companions and other classical jurists, such as weapons of mass destruction, biological and chemical weapons. What will be the ruling of Islamic law of war on using these weapons?
- (e) Similarly, the issue of rules that will regulate Air warfare was not addressed by the writers on Islamic law of armed conflict despite the significant roles they are playing in the modern warfare, whereas, literature on maritime warfare rules are very minimal and scarce.
These and other problems/issues necessitate the writer to embark on this project with a view to address them.

OBJECTIVE OF STUDY

The objective of this research is to provide:

- (a) A comparison of Islamic and International Humanitarian laws by examining the rights of individuals, both combatants and non-combatants, during armed conflict situations.
- (b) To examine the sources of the said two legal systems.
- (c) The purpose of war under the said two legal systems.
- (d) The definitions and different punishments for war crimes as provided under the two legal systems.
- (e) The possibility of reconciling the two legal systems in case of apparent conflict particularly with respect to the

principle of Islamic law of war which differ radically with the provisions of Geneva conventions, such as permission to kill or enslave prisoners of war in certain situation, enforcement of ransom (JIZYA) on the conquered people who decided to remain non-Muslims.

- (f) To fill in the vacuum left by learned jurists in the Islamic law of war and international Humanitarian law, especially:
 - a. Rules governing the permissibility or otherwise of using certain types of weapons, under Islamic law of war.
 - b. Rules governing the air and maritime warfare under Islamic law of war, as well as the stand point of this legal system in regard to the status of war correspondents.
 - c. The status of the stateless combatants who are captured under international Humanitarian law.

JUSTIFICATION

In the opinion of this writer, there is a serious need to embark on this research at this moment, considering the fact that, there are some new development in the present armed conflict which the Islamic view point has not been discussed by learned writers on this field, such as, Rules and Regulations governing air warfare, maritime warfare, the use of certain kind of weaponry e.g. Weapons of Mass Destruction (Chemical and Biological Weapons), suicide bombing etc. The writer also appreciates the need to address differences between Islamic law of war and International Humanitarian law in respect of some fundamental issues, such as

permission to kill or enslave the prisoners of war in certain situations, enforcing a tax (Jizya) on the conquered people etc, by Islamic law of war, which permission still stand valid according Imam Malik, Imam Shafi'I, Imam Abu Hanifa and Imam Hambali.

Beside the above, there is also need to embark on this project, due to the fact that, it happened to be among the neglected areas in Islamic literature; with a view to develop it.

SCOPE AND LIMITATION OF RESEARCH

This research will examine the provisions dealing with protection of individuals' rights, both combatants and non-combatants during and after armed conflict, under Islamic law of war as well as International Humanitarian law, although the emphasis will be on Islamic law of war.

The scope of research will be limited to the followings:

- (a) Historical development of the two legal systems.
- (b) Rights of individuals both combatants and non-combatants during and after the armed conflict under the two legal systems.
- (c) Extent of protection of such rights under the two legal systems.
- (d) Punishment for violation of such rights as remedies under the two legal systems.
- (e) Areas of agreement and disagreement between the two legal systems, reasons for disagreements and the

possibility of reconciling the existing disparities between them.

METHODOLOGY

This research will be doctrinal in nature, thus, it will be carried out through the use of library materials, such as textbooks, journals, article and other available literature, including relevant materials in the internet.

LITERATURE REVIEW:

The bulk of this research is literature based, thus, text books, statutes as well as decided cases will also be examined. A lot of books were written on the Islamic law of war as well as International Humanitarian law. The books consulted on Islamic law of war by the writer are among others:

- (1) NAZARIYAT AL-HARB FIL-AL-ISLAM WA ASARAH FI AL-QANUN AL-DAULI AL-AMM. (Written in Arabic). By: DR RAU MIFTAH QAMAQ.

This is one of the most contemporary literatures on the subject. In this book, .so many aspect of Islamic law of war has been examined by the writer, as, he wrote extensively on the principles regulating the conduct of war, ranging from the initiation of war, who has the authority to initiate armed conflict, when can it be initiated, lawful wars, permitted practices, forbidden practices during and after armed conflict situation, rights of individuals both combatants and non-combatants during and after the armed conflict situation etc.

All these issues were thoroughly examined by the learned author. However, the book has its shortcoming; for instance, the book did not discuss rules and regulations governing the air and maritime warfare, mercenary, thus, permission for all the Muslims to render both physical and material assistant to follow Muslims fighting with non-Muslims anywhere in the world notwithstanding not being de-facto or de Jure citizen of the fighting state; and the permission to kill or enslave the prisoners of war vis-à-vis Geneva Convention of 1949 which is said to be binding on all the states, and individuals, whether signatories to it or otherwise.

Also, the learned author did not make any attempt to state categorically the stand of Islamic law of war in respect of those issues and others similar to them which are in clear violation of some of the Geneva Convention provisions, in spite being a contemporary writer with a substantial amount of knowledge of International Humanitarian law (Western). Notwithstanding the above said shortcomings of the book, this research has immensely benefited from the book, especially on the aspect of rights of individual, combatant and non-combatant during and after the hostility.

- (2) The next book worth mentioning in this research is AHKAM AL- HARB WA AL-SALM. DIRASA AL-MUQARANAT, By Dr MUHAMMAD al-LAFY (Arabic version). This book is a book

that tried to give a comparative analysis between Islamic law of war and International Humanitarian law.

This book examined all the basic principles regulating armed conflict as well as the rights of individuals both combatants and non-combatants during and after the hostility. It also discussed the war crimes. However, even though the learned author embarked on comparative analysis he did not examine punishment for war criminals under Islamic law. The book also failed to discuss the position of Islamic law in respect of maritime and air warfare. Just like the previous book of Dr RAU MIFTAH GAMAQ. It examined the permission given by Islamic law for killing and enslaving the prisoners of war, but did not offer a solution on how to reconcile the two legal systems nowadays.

Another book extensively consulted in the cause of this research is a book titled: MUSLIM CONDUCT OF STATE, written by MUHAMMAD HAMIDULLAH; This book is not limited to the Islamic law of war, but rather discussed Islamic International law in general, it dealt with the subject matter (armed conflict) in Chapter three (3). In this chapter, the learned author, like the two books mentioned earlier on, discussed general principles regulating armed conflict. However, this book discussed some issues that were not dealt with by the said two books, for instance, it dealt with the issue of neutrality in chapter two (2), wherein he cited a great number of cases and treaties of neutrality during the life

time of the Prophet Muhammad (Peace and blessing be upon Him) as well as the time of the Prophet's four rightly Khalifs (Successors) in page 299.

He even went further to mention the Ijtihad of Ulama (Jurists) on laws of neutrality in page 306. He also treated the issues of spies, in page 240. In page 242 he examined the issue of Uniform, wherein he cited an authority which says, Prophet Muhammad (Peace and blessing be upon Him) is reported to have worn special cloaks during Military Marches, and He (Prophet) was also reported to have said: "The distinguishing factor between us and the unbelievers is the turbans tied around caps". While in page 244 the author mentioned the issue of flags though very briefly. Another distinctive feature of this book is that, it discussed women who took part in battles in different capacities, ranging from nursing to actual fighting, wherein he mentioned Safiyya as an example of women who participated in actual hostility. These issues and many more were dealt with in this book. The author really tried a lot in discussing a lot of issues relating to armed conflict, issues that were not touched by great majority of writers.

However, the book still carries with it some shortcomings, like the previous books mentioned above, for example, it failed to examine the rules and regulations governing the conduct of hostility in the air as well as maritime warfare,

the issue of mercenaries, and the position of Islamic law nowadays in regards to the killing and enslaving of war captives. The last but not the list on Islamic law of war is a book titled, WAR AND PEACE IN THE LAW OF ISLAM; BY: MAJID KHADURI. This book like the earlier books examined by the writer, is dedicated substantially to the Islamic law of war, even though, the author discussed theory of state in page 15 – 18 (Chapter 1), chapter II, dealt with the nature and sources of law, while chapter III, discussed Islamic International law in general.

These are the only chapters, which did not touch on Jihad (Islamic law of war), the remaining chapters were exclusively dedicated to the law of armed conflict.

Like the previous books examined above, this book discussed extensively rules and regulations governing the conduct of hostility as well as the protection of individuals' rights, both combatants and non- combatants during and after the armed conflict.

However, this book is the only book came across by the writer that examined rules and regulations governing maritime warfare. This book touches so many issues in respect of Islamic law of war which were not examined by many writers. However, the book is not without shortcomings. For instance, even-though the writer is among the prominent contemporary writers, the book did not

discuss, rules governing the conduct of hostility in the air, even by way of analogy or opinion. The book also failed to discuss the position of mercenaries' vis-à-vis the Geneva Conventions. It also failed to state the Islamic law position in respect of killing and enslaving prisoners of war nowadays and its comparison with the Geneva Conventions of 1949. The issue of war correspondents was not also touched. Notwithstanding the said shortcomings, this research had immensely benefited from the book especially on the aspect of maritime warfare. These are some of the literature consulted by the writer on Islamic law of war.

On the other hand, the books examined by the writer on international Humanitarian law are as follows:

THE CONTEMPORARY LAW OF ARMED CONFLICT: BY:

LESLIE C. GREEN. The book is among the books that are exclusively dedicated to the law of war. This book covered almost everything as far as the law of armed conflict is concern. However, the book is not without shortcomings, among the shortcomings of the author was his failure to highlight the shortcomings of some Geneva Conventions' provisions, such as Geneva Accord on prisoners of war, which requires "Humane treatment" to be extended to all prisoners of war. The term "Humane treatment" if taken together with the word "Civilization" in Article three of the Accord of prisoners of war which states, "Prisoners of war

will be protected from the passing of sentences and the carrying out of execution without previous judgment pronounced by a regularly constituted Court affording all the judicial guarantees which are recognized as indispensable by "Civilized" People". Implicitly, the accord concedes that, there are "Uncivilized people", it remains unclear who they are and whether in the eyes of the "Civilized" they are entitled to rights otherwise conceived as having universal applicability? This very question has not been addressed or determined by the learned author.

The book also failed to highlight the lapses of the Geneva Convention accord to prisoners of war which only provide a protection to those prisoners of war who engage in military action on behalf of an established state, but failed to accord same protection to those who engage in Military action on behalf of stateless organization. The writer also overlooked the importance of making a suggestion to the effect that, more effective and efficient enforcement mechanism need to be evolved to back Hague Convention and Geneva Conventions, which have been facing serious threat by some powerful countries.

Another book consulted by the writer is a book written by DAVID H. O. Titled, "PUBLIC INTERNATIONAL LAW IN THE MODERN WORLD". This book deals with the principles of International law generally, though discussed law of war in

page 306 but in brief, as a result of which so many issues were left out by the book.

The last but not the list is the book titled, "INTERNATIONAL LAW AND THE USE OF FORCE". By: IAN BROWLIE. The book examined historical experience of the war since 1815 to the formation of the United Nations, wherein he discussed all the treaties and convention dealing with the rules and regulation governing the armed conflict. The book is also among the literature that treated the issue of use of force extensively. It also examined Right of self-defense by a state from 1920 to the period after the Second World War, more than many books. The book did not stop at that, it went further to examine self-help in the modern law of war, an area which is neglected by great number of writers. The shortcoming of the book is its failure to discuss those historical experiences in the African Continent and Arab World as part of global experiences, since it is more of general history and experiences of the human race globally. Notwithstanding the shortcoming, the writer benefited immensely from the book, more especially on the historical aspect of the conventions, which regulate the conduct of the War. The research will also examine the judicial decisions of some International Tribunals in order to find out, whether they cover the vacuum highlight earlier on.

CHAPTER TWO:

2.0 THE ISLAMIC LAW OF WAR:

THE CONCEPT OF ISLAMIC LAW OF WAR.

In the pre-Islamic era, there was no just cause for waging war. In most cases the nature of wars or armed conflict prosecuted was aggressive and not defensive in nature. It is the Islamic law of war that disallowed the Muslims to provoke war of aggression, and yet permit them to take up arms for defence whenever war is forced on them. When conflict becomes inevitable, the Muslims are mandated to engage in armed conflict for self defence and the Allah (SWT) says:

“To those against whom war is made, permission is given to fight, because they are wronged and verily Allah is most powerful for their aid; they are those who have been expelled from their homes in defiance of right for no cause except that they say “Allah is our lord”¹⁵

War in Islamic law is what is popularly referred to as Jihad. The term Jihad is derived from the verb Jahada (abstract noun, Juhd) which means "exerted" Literally.¹⁶ Its theological meaning is exertion of one's power in Allah's path, that is, the spread of the belief in Allah and in making His word supreme over this world.

¹⁵ Qur'an, Suratu Hajj (22) : 39 - 40.

¹⁶ FairuzAl-Badi, QAMUS AL MUHID, (Cairo 1933) Vol., 1, page 286.

The individual's recompense would be the achievement of salvation, since the Jihad is Allah's direct way to paradise¹⁷.

This definition is based on a Qur'anic injunction which says:-
*"O ye who believed shall I guide you to a gainful trade which save you from painful punishment? Believe in Allah and His Apostle and carry on warfare in the path of Allah with your possession and your persons. That is better for you, if ye have knowledge. He will forgive your sins and will place you in the Gardens beneath which the streams flow, and in fine houses in the Gardens of Eden: that is the great gain"*¹⁸.

According to AJIJOLA A.D.¹⁹ The Jihad is a sacred duty of religion incumbent on the Muslim nation at large to launch defensive war against unbelievers to repel their persecution upon the believers or aggression upon the Muslim country.

The Jihad in the broad sense of exertion could be conceived, as an effort in whatever form, be it material, physical or otherwise, directed towards achieving a particular goal, materially or spiritually provided such efforts are intended to seek the pleasure of Allah (SWT). In the early Makhan revelations, the emphasis was in the main on persuasion.

¹⁷ Khaduri, Majid, WAR AND PEACE IN THE LAW OF ISLAM, the Johns Hopkins Press, 1995, page 55.

¹⁸ Qur'ani LXI, 10-13

¹⁹ AJIJOLA A.D.; INTRODUCTION TO ISLAMIC LAW Int'l Islamic Publishers Karachi (Pakistan) July, 1981, page 141.

The prophet Muhammad (Peace be upon Him), in the discharge of his prophetic functions, seemed to have been satisfied by warning His people against idolatry and inviting them to worship Allah. This is evidence by such a verse as:-

"He who exerts himself (Jahada) exerts only for his own soul²⁰, "rather than struggle for proselytization". In the Medinan revelations, the Jihad is often expressed in terms of strife, and there is no doubt that in certain verses the conception of jihad is synonymous with the words war and fighting²¹.

The jurists however, based on their understanding with the Qur'anic verses on Jihad, have distinguished four different ways in which the believer may fulfill his Jihad obligation, thus:

- (a) By his heart;
- (b) His tongue;
- (c) His hands; and
- (d) By the sword²².

The first is concerned with combating the devil in the attempt to escape his persuasion to evil. This type of Jihad was so significant, in the eyes of the Prophet Muhammad

⁶ Qur'an: XXIX: 5.

²¹ Khaduri, Majid, Opp.Cit, page 56.

²² Ibn Rushd, KITAB AL-MUQADDIMAT AL-MUMAHIDAT, (Cairo, A.H.1325). Vol.1, page 259. IBN HAZAM, KITAB AL- FASH FI AL-MILAL WAL-AHWA WAL-NIHAL, (Cairo A.H. 1321), Vol; IV. page 135.

(Peace be upon Him), hence it was regarded as the greater Jihad. Ibn Qayyimul al-Jauziyyah in explaining this aspect of Jihad observed thus:

"The Jihad against the evil tendencies which dominate a person's mind is more important than fighting against the enemies at the battle field. It is in fact the basis on which the struggle in the path of Allah could be successfully launched"²³.

The second, and third, are mainly fulfilled in supporting the rights and correcting the wrong²⁴. The fourth is precisely equivalent to the meaning of war²⁵. The following are the Qur'anic verses relied upon by jurists to come up with the above categorizations Allah (SWT) says:

1. *"And those who make efforts (or strive) in our cause, we will certainly guide them to our path....."²⁶*
2. *And whoever strives (makes efforts) does so for his own soul....."²⁷*
3. *"Then Lo! Thy Lord for those who became fugitives after they had been persecuted and then fought and*

²³ Ibn Qayyum, J.A ZADUL AL-MA'AD FI HADYI KHARUL AL-IBAD, Darum Manor, Damascus - Syria, 1419/1988, page 95.

²⁴ Khaduri, Majid, Opp. Cit; page 57

²⁵ Ibid.

²⁶ Qur'an 29, (Al Ankabut): 69.

²⁷ Qur'an 29 (Al-Ankabut): 6.

*were steadfast. Lo! The Lord afterward is (for them) in deed for giving, merciful"*²⁸

4. "And verily we shall try you till we know those of you who strive hard (for the cause of Allah) and the steadfast and till we test your record"²⁹.
- 5 "And could not those who are slain in the way of Allah "dead" Nay, they are living, only ye Pereira not."³⁰
- 6 "To those against whom war is made, permission is given to fight because they are wronged and verily Allah is most powerful for their aid, they are those who have been expelled from their homes in defiance of right for no cause .except that they say Allah is our Lord."³¹

This very last quoted verse was the first verse that directed the Muslims to fight, it was revealed in Madinah. The verse, clearly and expressly stated the reasons why Muslims were given permission to fight, thus:

- (1) Because they were expelled from their houses (i.e. expelled from Makkah).
- (2) Without any justification except that they declared that, there is no God but Allah, and Allah is our Lord.

²⁸ Qur'an.xvi (Al-Nahal): 110

²⁹ Qur'an xlvii (Muhammad): 31

³⁰ Qur'an: II (Al-Baqara): 154

³¹ Qur'an 22 (Hajj) 39 - 40.

The last leg of the verse stated other reasons, e.g.

(3) For the protection of faith and places of worship of Muslims and non-Muslims as well.

Allah (SWT) says:

".....for had it not been for Allah's repelling some men by means of others, cloisters and churches and oratories and Mosques, wherein the name of Allah is oft mentioned, would assuredly have been pulled down, verily Allah helpeth one who helpedth Him. Lo! Allah is strong, Almighty".³²

Which explicitly shows that, physical Jihad (war) is only for, defending self and faith, (place of worship inclusive). The verse also guaranteed freedom of religion. In other words, everybody is given a liberty to practice the religion of his own choice, and Muslims are not allowed to fight a war for the sake of compelling non-Muslims to accept Islam.

Allah (SWT) says:

"There is no compulsion in the religion" ³³

2.1 ORIGIN AND DEVELOPMENT OF ISLAMIC LAW OF WAR:

Prior to the advent of Islam, there were no formal rules and regulations among the Arab city states governing armed conflict. Any rule formulated or practiced during that era was

³² Qur'an: (22) (Hajj) 39-40.

³³ Qur'an

so formulated and applied to serves some specific purpose. Once the purpose is fulfilled, the rules became obsolete.³⁴

After the advent of Islam, the Muslim nation introduced a dignified legal formula for the practice of international relation. Hence it is under the Islamic law that international law relating to war in particular was first accorded a dignified place. By this position, the international legal system coined under Islamic law is known as Siyar, which encompasses not only relationship among nations but relationship among nationals of different countries of the globe regardless of their religious inclinations.³⁵

The Islamic International law therefore originated from the rules governing the conduct of war as well as behaviours of the warriors and how to treat captures in the custody of the captors.³⁶

Ilmul al-Siyar was defined by famous jurist al-Sharkasi as follows:-

The conduct of the believers (Muslims) in their relation with the unbelievers of enemy territory, as well as with the people with whom the believers have made treaties, who may have been temporarily residents (Musta'ameen, i.e. subject of war, but were granted safe conduct to enter Muslim

³⁴ Redha, Muhammad. The Messenger of Allah Mohammad, (Dar al-Kutab al-Ilmiyah Beirut- Lebanon, 1999), Translated by Mahmoud Salami page 100.

³⁵ Ibid.

³⁶ Al-Lafi, Muhammadu, Nazariyya Fi Ahkam Al-Harb Wa Al-Sulm Dirasat Al-Huqarana, Makatabat al-Jamahiriyya, Tarabulus-Libya, 1989, page 55 (Arabic version).

territory) or permanently Dhimis (i.e the non-Muslim-is subject of Islamic state) in Muslim land, as well as the relationship with the apostate and with rebels.....³⁷

While Abu Sulaiman added that, "Siyar" includes the rules of civilized intercourse with people living in friendship with Muslims, which are contrasted in the Qur'an with those in hostility with them³⁸. Siyar, owes its origin to the tradition of the Prophet Muhammad (Peace be upon Him) particularly in Medinan period. It is therefore, not surprising that, right from the first century of Hijra (Migration from Mekkah to Medinah) there exist some codes or compendia of law dealing with this branch of Islamic law. It is however, generally accepted by the vast majority of Islamic jurists that, Imam Abu Hanifah (d.150 A.H) was the first Islamic Jurist to designate special lectures he delivered on the Muslim laws of war and peace³⁹.

These special lectures of Imam Abu Hanifah were compiled and edited by his prominent disciple Imam Muhammad bin Hassan al-Shaibani. This work of Imam Shaibani (under the titles)⁴⁰ gave impetus to the systematic study of Islamic

³⁷ Abu Sulaiman, A. : Towards an Islamic Theory of International Relations; New Direction for methodology and Thought, HIT, Hemdon, Virginia, U.S.A., 1414/1993, page 7.

³⁸ Ibid,

³⁹ Ibid. Khaduri, Majid, THE ISLAMIC LAW OF NATIONS, SHAYBANI'S SIYAR, the Johns Hopkins Press, 1965, pages 4 - 5.

⁴⁰ Kitab al-Siyar al-Sagir and Kitab al-Siyar al-Kabir

International law in general and Islamic law of war in particular.⁴¹

Imam Malik bn Anas, also designated a chapter in his famous book Muwatta Malik on this subject.⁴² This attested to the fact that, the field of Islamic law of war has been given a considerable attention by the Islamic jurists as far back as the second century of Hijrah (migration of the Prophet Muhammad Peace be upon Him, from Mekkah to Medinah).

It was in Madinah, that, Allah's first permission to fight was granted in the following verse:

"To those against whom war is made, permission is given to fight, because they are wronged; and verily Allah is most powerful for their aid; they are those who have been expelled from their homes in defiance of right for no cause except that they say ""Allah is our Lord""⁴³

That was how the law of war under Islamic law started and eventually underwent a process of development process through practices of the Prophet Muhammad (Peace be Upon

⁴¹ Khaduri, Majid, The Islamic Law of nations, Shaybani's siyar, The John Hopkins Press, 1965, pages 4-5.

⁴² Pizada, Syed, S., Opp. Cit. page 198. This coincide with the 8th century Christian Era, which further lend credence to the fact that Siyar predates the codification of the modern International law which is only started in the 16th or 17th century.

⁴³ Gamaq, Rau Miftah. NAZARIYAT AL-HARB FIL ISLAM WA ASARAHA FIL QANUN AL-DAULI, World Islamic Call, 1426 A.H, Benghazi - Libya, page 46-7.

Him). The development process can be divided into three periods. The first was the time of the holy prophet, the second was the period of noble and righteous successors as well as the period of Umawiyya and Abbasiyya, and the third stage was during Islamic dynasties in Andulusia Spain⁴⁴, India⁴⁵ and Turkey, which came to an end under Mustapha Kamal Atatuk.

2.2 TYPES OF WAR UNDER ISLAMIC LAW OF WAR:

According to Islamic teachings, only the head of government in any Muslim country is given the legal authority to order or command the commencement of war. No other person has this authority, unless and of-course it is delegated to him by .the head of Islamic government.

During the lifetime of the Prophet Muhammad (Peace be upon Him), He was the only person with that authority, as can be seen during the wars of Badar, Uhud, Banu Quraiza, Khaibar, Da'if, Tabuk and Mekkah among others. This is clear testimony that no other person has the legal mandate to authorize the declaration of war beside the head of government.

This same position was observed during the period of four rightly guided Caliphates (successors- of the Prophet Muhammad (Peace

⁴⁴From 94 A.H to 897 A.H thus, 800 years.

⁴⁵ The first Caravan of Islam entered the Indo-pak subcontinent in 980 A.H. Muslim ruled over India *for*. nearly 800 years.

be upon Him). None of them ever deviated from this precedent. In Islam wars are waged for the following purposes. Thus, it could be fought base on action of an enemy e. g. actual attack or manifest intention to attack. It could also be on the bases of certain conduct of Muslims, such as apostasy and rebellion.

1. **DEFENSIVE WAR:**

This is a situation whereby the enemy has invaded a Muslim territory practically, or has declared their intention to invade. If it is a mere declaration of intention to attack, the decision to avert that imminent intention through any means is purely discretionary power of the head of government, but in the event of actual invasion, the head of government has no any other choice or option than to order the Muslim army to retaliate or dispel the attack. In this kind of state of affairs (actual invasion), the Caliphate (head of government) can direct any of the capable citizen to go 'out for defence, and not only the armies, if the circumstance demand such, in order to defend the state as well as the faith (Islam)⁴⁶ . Instance of defensive wars during the life time of the Prophet Muhammad (Peace be upon Him) are followings among others:-

- (a) War of Badar, when Quraish (People of Mekkah) intended to attack the Prophet and His followers in Medina. Though the war was not prosecuted in their

⁴⁶ Gamaq, Rau Miftah, Nazariyat Al-Harb Fil Islam Wa Asaraha Fil Qanun Al-Dauli, World Islamic call, 1426 A.H Benghazi - Libya, page 46-7.

first attempt, the war of Badr took place later which was popularly referred to as the Great Badr.

- (b) War of Uhud, when the people of Meccah attacked Medinah.
- (c) War of khandaq, when the Arab tribes and the Jews who neighboured Medinah declared war against the Muslims in Medinah.
- (d) When Byzantine Empire lunched an offensive war against Muslims in Medinah⁴⁷.
- (e) When the Sultan Muhammad Fateh of the Ottoman Turks captured the Fort of Constantinople in 857 A.H corresponding to 1453 A.D⁴⁸

2. WAR AGAINST APOSTACY (RIDDA):

Apostasy may take place in one of two forms, (a) either the believer reverted from (irtadda, literally turned his back against) Islam with no intention of joining the Dar al-Harb (non-Islamic territory), (b) or a group of believers, having renounced Islam, joined the Dar al-Harb or separated themselves in a territory constituting their own abode (dar).

⁴⁷ Ibn Hisham, Abu Muhammad Abdul Malik, Al-Sira Al-Nabawiyya as quoted in Gamaq Rau Miftar, Ibid, page 154-5.

⁴⁸ Saeed, Akbarabadi, Islamic History, The Rise and fall of Muslims, From the pious Caliphs to Abbasid, Spain and Moghal Dynasties, New Delhi, India, 2005 page 124.

The latter situation is relevant to our discussion on the Jihad (war). If the apostates are numerous and powerful enough to defy authority, the Caliphate (head of government) is under obligation to declare war (Jihad) against them. The jurists⁴⁹, however, advise negotiation before fighting begins, since this may succeed in persuading the apostates to return to Islam. Neither peace nor tribute, nor poll tax is acceptable, since the law tolerate no secession from Islam. The apostates must either return to Islam or accept the challenge of Jihad.⁵⁰

Should the apostates refuse and fighting begin, the rules governing the conduct of war would be the same as those governing a war with the people of Dar al-Harb (abode of un-believers). However, neither their property nor they become subject to the general rule of submission of unbelievers, namely, they and their wives are not liable to be condemned into slavery, nor their property confiscated or divided as spoil. The property of those killed in battle is taken over by the state as booty.

Some jurists, such as the Hanafis maintained that the apostate's wife is liable to be condemned to slavery and

⁴⁹ Khaduri, Majid. WAR AND PEACE IN THE LAW OF ISLAM, Opp. Cit. page 75.

⁵⁰ Ibid, page 77.

taken as part of the booty, as well as the children born after apostasy, but the majority of jurists do not think so.⁵¹.

The outstanding case of apostasy was the secession of some Arabian tribes after the death of the Prophet Muhammad (Peace be upon Him). Abu Bakr, the first Caliph (Successor), warned them first to return to Islam, and those who did not return were severely fought.

In our contemporary time, the application of this rule depends largely on both the Political and legal system of a given country, in the absence of central Caliphate of Islam in the present world. This situation may be compared to treasonable felony in the law of Nigeria and other countries.

3. **WAR AGAINST REBELLION (BAGHI):**

Baghis are group of people within Islamic state that oppose the authority of the state based on their contrary opinion on fundamental issues of Sharia. If the dissenters did not renounce the authority of the Imam (head of government), they were not fought and were allowed to reside peacefully in the Dar al-Islam (abode of Islam). The Khalifa (head of government), however, should persuade them to abandon their dissenting ideas and to conform to orthodoxy, if they refused and failed to conform to the law, then they were fought against. But if they refuse to abandon their dissenting

⁵¹ Ibid. pages 78.

opinion and do not breach the law they will not be fought. In the same vein if their dissension resulted from certain grievances which did not touch the creed, such as against their own governor, an attempt should be made to reconcile them. If they are very few so that, they could be controlled without difficulty, there will be no need for a Jihad against them. The Khawarij were a case in point, when they disagreed with the Caliph Ali, they were offered three propositions: (a) they were permitted to say their prayers in the Mosque, (b) they were not attacked by the Caliph, and (c) they were allowed to live in Dar al-Islam⁵². But once they opposed, [armed opposition], the Caliph, marched against them and crushed their power in the battle of al-Nahruwan (A.D. 658)⁵³.

In our present time, any given country is at liberty to either go with the position of the law as it was during Khalifa Ali's period, or to change it to suit their time, place and circumstances, since the disagreement is basically based on personal Ijtihad (understanding) and Maslaha (Public interest), not on an express/explicit verse of the Qur'an or prophetic tradition.

⁵² Ibid, page 76-7.

⁵³ SAHNUN, AL-MUDAWANA AL-KUBRA, (Cairo, A.H. 1323) Vol; III, page 47-50. Mawardi, AHKAM AL-SULDANIYYA, page 97.

4. **WAR AGAINST OPPRESSION OR HUMANITARIAN INTERVENTION:**

The basis for humanitarian intervention is based on the Qur'anic verse which states⁵⁴:-

“And why should you not fight in the cause of Allah and of those who, being weak, are ill-treated and oppressed men, women and children, whose cry is: our Lord! Rescue us from this town whose people are oppressors, and raise us from you one who will protect, and raise for us from you who will help”⁵⁵.

According to Sayyid Qutb,⁵⁶ Muslim should not only fight to rescue the oppressed, but should hasten to do so. He went further to say, being persecuted on account of religious belief is the worst type of suffering for more dreadful than any other abuse, since it touches the innermost core of human existence.⁵⁷

The practicability of this principle in the present world, will not be possible, because almost all the Muslim nations nowadays are members of the United Nation, as well as

⁵⁴ Al-Ghazali, Abu Hamid, AL-MUSTAPHA MIN ILM AL-USUH, Dhar Ihya al-Turath al-Arabi, Beirut-Lebanon, 1418/1997, Vol.11, pages 36-38.

⁵⁵ Qur'an: 4:75.

⁵⁶ Qutb, Sayyid, FI ZILAL AL-QUR'AN, Dhar al-Sharug, Cairo - Egypt, 1985, Vil.2, page 708.

⁵⁷ Ibid.

signatories to its Charter, and under United Nations Charter, this type of war is not allowed without the permission/Resolution of the Security Council. The only war an individual state is allowed to wage without first having recourse to the United Nations is in self defence, moreover Muslim are bound by all the agreement/conventions, they submitted themselves to, such as the United Nation Charter, provided it does not go against any express provision of the Qur'an or authentic Hadith.

2.3 **GENERAL RIGHTS AND OBLIGATIONS OF COMBATANTS.**

DEFINITION OF LAWFUL COMBATANT:-

Combatant is defined as: - "The person who carries arms against Muslims, and has the psychological and mental ability to engage in war, and actually waged war directly or indirectly against Muslims⁵⁸"

The necessary implication of this definition can be said to have excluded certain categories of persons, such as, civilians, children, sick, wounded, old men and women. However, if any of those categories takes a direct part in hostilities, he/she stands to lose his/her status as protected person, and then becomes a legitimate object of attack. Also, if any person within the above categories makes forcible resistance, gives military information to the enemy,

⁵⁸ Gamaq, Rau Miftah, Opp. Cit, page 173.

or obstructs the Muslim forces in any way, he is liable to be treated as a combatant.

The purpose of armed conflict under Islamic law, is to defeat the enemy with the least possible expenditure of men, resources and money bearing the principles of humanity in mind, through any of the following means⁵⁹:-

(1) **KILLING THE ENEMY:**

Killing the enemy is permissible during armed conflict if there is no any other means of defeating him. Allah (SWT) says in following the verses:-

(a) *"Now when ye meet in battle those who disbelieve, then it is smiting of the neck until when ye have routed them....."*⁶⁰

(b) *"And slay them whenever you find them, and drive them out of the places whence they drove you out...."*⁶¹

(c) *"O ye who believe! Fight those of the disbelievers who are near to you, and let them find harshness*

⁵⁹ ibid. page 173-4.

⁶⁰ Qur'an: XLV II: 4.

⁶¹ Qur'an: II. 191.

in you, and know that Allah is with those who keep their duty (Unto Him)⁶²

(2) CAPTURING THE ENEMY:-

If there is any other means of capturing the enemy rather than killing him/them, Islam gives permission to the Muslim soldiers to capture. Allah [SWT] says:-

"Then, when the sacred months have passed, sly the idolaters whenever ye find them, and take them captive....." 63

MEANS AND METHODS FOR CONDUCTING WARFARE:-

As has been stated earlier on, that, the main object of armed conflict, is to achieve victory over the adverse party either by killing him or to subdue him (capture), Islamic law has laid down basic rules for conducting warfare, and its an obligatory upon each and every Muslim soldier to comply strictly with those rules.

Islamic law permits such action (killing), as are imperative for the purpose of defeating the adverse party, and forbids acts which go beyond this, that will eventually cause unnecessary injury to persons (combatants and non-combatants), or damage to property not essential in achieving the said victory. This is the reason why Islamic law restricts both the means of waging war and the

⁶² Ibid.

⁶³ Qur'an IX, 5.

objects against which such means may be employed. There are therefore permitted and forbidden practices.

PERMITTED PRACTICES:

Under Islamic Law of war, certain means, methods, weaponry and practices are permitted for the purpose of defeating the enemy, during armed conflict, such as:-

- (1) Muslim armies are allowed to use weapons, such as swords, arrows etc, as was used during His (Prophet Muhammad (Peace be Upon Him) life time. Those types of weapons, were the kinds of weapons among others, during that era, but this does not mean Muslim now-a-days are prohibited from using modern sophisticated weapons such as naval warships, i.e. Nuclear powered Aircrafts, carrier,, Dock Landing ship, Nuclear powered Guided Missile Cruiser, conventional powered Guided Missile Cruiser, Guided Missile Destroyer etc, Fighter Aircrafts, such as Prop Powered Fighters, Jet Powered fighters etc, and all other types of weapons that can be lawfully used in land, Sea or air warfare. This is because, similar examples abound during the life time of the Prophet Muhammad (Peace be upon Him). For instance, when His companion (IKRAMA bn ABI JAHAL) advised him to build a defensive wall around Medina that will give them protection from foreign invasion, Prophet Muhammad (Peace be upon Him) accepted the advice, and instructed His companions to build the defensive wall throughout Medinah (even though this type, of strategy was

not known to Arabs, when the advice was given)⁶⁴. So by analogy, Muslim can also use the modern weapons.

It should be noted that, however, Muslims soldiers are enjoined to be guided by the principles of necessity and humanity, in the sense that, they should not kill any of the protected persons⁶⁵.

(2) **BLOCKADE:-**

That is to prevent ingress and egress of anything that will strengthen the enemy Military capability to continue fighting Muslims, during armed conflict situations between Muslims, and non-Muslims. This blockade can be carried out through any of the following ways:-

- (a) Blocking the entry of all basic necessities and arms to the enemy soldiers. This type of blockade was ordered by Khalifa Umar bn al-Khatab during war with the tribe of Ba'alabak, when he ordered his commander to block their Caravan which was carrying Sugar and other foodstuff from reaching the enemy soldiers⁶⁶.
- (b) The water supply of the enemy may be cut off, or in some other way may be made unusable for them. The Prophet Muhammad (Peace be upon Him), applied this

⁶⁴ GAMAQ, RAU MIFTAH, Opp. Cit. page 178 and 189.

⁶⁵ Ibid.

⁶⁶ Ibid.

method during the battle of Badr and Khaibar, with great effect⁶⁷.

- (c) Economic trees can also be cut off, if such an act will weaken the enemy soldier. Prophet Muhammad (Peace be upon Him), did same, during the battle of Banu Nadhir and Banu Thaqifa. However, Islamic law of war does not allow the cutting of economic trees for any other purpose besides weakening the enemy soldiers⁶⁸.
- (d) Slaughtering the enemy's animal, such as sheeps, camels, horses, donkeys etc. Most of the Islamic jurists permit such an act during armed conflict, provided such an act will weaken the power of enemy soldiers⁶⁹. However, Imam Malik and Imam Shafi'i are of the opinion that, animals of all kinds belonging to the enemy can only be slaughtered for the purpose of eating only, when the need arises during war⁷⁰.

These are some of the permitted practices. It is very difficult to give a comprehensive list of all the permitted acts. The general principle of Islamic jurisprudence (Usul al-Fiqh) may however help to a

⁶⁷ AI-ASBAHI AL-IMAM, MALIK BN ANAS, AL-MUDAWANATA AL-KUBRA. (Arabic version), SA'ADAT Publication, Cairo, Egypt, 1975, Vol.2, page 6.

⁶⁸ Ibid.

⁶⁹ Ibid. page 40.

⁷⁰ Ibid.

great extent thus, everything not prohibited by Islamic law expressly, is permissible.

FORBIDDEN PRACTICES:-

Certain practices are forbidden by Islamic law of war, during and after armed conflict, such as: -

1. Burning the enemy person, or animal with fire: One day the Prophet Muhammad (peace be upon him) dispatched a detachment with the instruction to arrest a culprit and bum him alive, but He immediately recalled them and ordered them not to bum the criminal, but simply to kill him, He said:-

"Only the lord of fire can punish with fire"⁷¹.

Prophet Muhammad (peace be upon him) also forbids the burning of earth.

2. Muslim army is not allowed to employ, or use poisoned weapons, against the enemy armies or civilians, unless when it becomes absolutely necessary, for instance, in a situation where the enemy army are using similar weapons against Muslim army. Allah (SWT) says:-

"If ye punish, then punish with the like of what where with ye were afflicted"⁷². Also during the war of Badar, prophet promised to mutilate the Quraish whenever Allah give Him

⁷¹ Al-AsQalani, Ahmad Bn Hajar, Al-Fatahu al-Bhari, Commentary on Sahih Al-Bakhari, . (Alabic version) Dar al-fikr, Cairo - Egypt, Vol.7, page 333.

⁷² Qur'an: XVI, 126.

victory over them for mutilating Hamza but Allah (S.W.T.) Has forbidden Him to do it.

In another instance, Allah (SWT) says:

"..... And one who attacketh you, attack him in the manner as he attacked you, observe your duty to Allah, and know that Allah is with those who ward off (evil)"⁷³.

3. Devastation and destruction of harvest, property, farmland and quarters belonging to civilians, are all forbidden⁷⁴.
4. Principles of humanity should always be taken into consideration when attacking the enemy. In other words, the means of delivering a lawful attack are not unlimited, thus, it is prohibited to use any weapon that is capable of causing superfluous injury, or unnecessary suffering, unless when it is extremely necessary, based on the analogy of the prohibition of using poisoned weapons. For instance (nowadays) weapons of mass destruction, Gas, Chemical or bacteriological weapons,⁷⁵ based on the principle that forbids using fire against enemy⁷⁶. However, that is not to suggest that, Muslims should not possess them in their stock, just in case of any eventuality, unless if Muslims are hundred percent sure that, other nations (more

⁷³ Qur'an: 1:194.

⁷⁴ HAMIDDULLAH, MUHAMMAD, MUSLIM CONDUCT OF STATE, Ashraf Press, Kashimin Bazar Lahore, Pakistan, 1973, Page 214.

⁷⁵ Such as, Mustard gas, Anthrax, Tularema, Phosgene Gas, Hydrogen Eyanide, etc.

⁷⁶ Hamidullah, Muhammad, Opp. Cit. page 214.

especially super powers as well as developed countries) dispose off their own. Allah (SWT) says:

"Make ready for them all thou canst of (armed) force and Of horses tethered, that they by ye may defer, the enemy of Allah and your enemy, and others beside them ye know not, Allah knoweth them".⁷⁷.

5. Killing non-combatants, mutilation and decapitation of prisoners of war are not allowed⁷⁸

THE RIGHTS OF PROTECTED PARSONS:-

Islamic law of war from day one [7th century, when the 1st Islamic state was established in Medina by Prophet Muhammad (SAW), set down rules and regulation governing the conduct of its combatants as well as giving the maximum protection to all non-combatants generally, during and after the armed conflict.

Prophet Muhammad (SAW) is reported to have been commanding the Muslim army thus;

"Advance in the name of Allah (SWT) and with the assistance of Allah (SWT) and under the Religion of Islam, but you should not kill aged person, children, infant, women.....⁷⁹" ..

⁷⁷ Qur'an: VIII, 60.

⁷⁸ Hamidullah, Muhammad, Opp. Cit. Page 212.

⁷⁹ Ibn Waqidi, Muhammad Bn Umar, KATAB AL-MAGAZEE, (Arabic Version) Alim al-Kutab,

It is explicitly clear that, if the above mentioned command is taken into cognizance, certain categories of persons are obviously declared or considered protected persons under Islamic law of war, and are also protected from being attacked. The details of such persons and protection given to them are as follows:-

1. **WOMEN AND CHILDREN:** - Under Islamic law of war. Women and children, are considered as protected persons, because they don't usually partake in hostility, and Islamic law only allows killing those that carry arms against Muslims and have the physical and mental ability to engage in a war, and actually waged a direct or indirect war against Muslims.

When Prophet Muhammad (peace be upon him), saw a murdered woman during the war of Hunain, he asked what happened to her, He was told that, she was killed by Khalid bn Waleed. He (Prophet) ordered some of His companions who were with Him, to go and tell Khaleed that:

"Prophet Muhammad forbids killing children and women"⁸⁰.

In another instance, (during the war of Hawazin), Prophet Muhammad (peace be upon him), was reported to have

Beirut- Lebanon, 1966, Vol.3, page 905.

⁸⁰ *ibid.*

issued a serious warning against killing children and women, and repeated that warning three (3) times⁸¹-

It was also the practice of the Prophet Muhammad (peace be upon him) not allow a child below fifteen years to participate in any of His expeditions⁸².

Based on the above mentioned authorities, jurists unanimously opined that, children and women should not be killed, provided they did not take part in hostility directly or indirectly⁸³. However, in a situation whereby muslims' lives cannot be saved without risking the lives of women and children who happened to be in their midst, and there is no any other means to avoid such, some jurist (such as Imam Ghazali and Imam Shafi'i) are of the opinion that, those women and children should also be killed in order to avert the greater evil, based on the following authorities:

(1) *Prophet Muhammad (peace be upon him) attacked Banu Musdhalag in retaliation, when asked about the women and children in their midst, he replied:*

*"They are part of them"*⁸⁴

(2) *"Necessity permits prohibited acts".*

(3) *"Principle of Resorting to lesser evil when there are two evils".*

⁸¹ ibid.

⁸² ibn Hisham, Muhammad Abdul Malik. Opp. Cit, Vol.3, page 244.

⁸³ Ibid

⁸⁴ Ibid.

It should be noted however that, this did not negate the prohibition of killing women and children as a general principle⁸⁵.

Same principle (which permits killing women and children when a dire necessity demands such) applies in a situation where enemy army took them (women and children) hostage, according to Imam al-Shafi'i⁸⁶, while Imam Malik and Imam al-Auza'i, were of the contrary opinion, thus, the enemy in such a situation should not be attacked.⁸⁷

(2) **AGED PERSONS:**

That is any person who lacks the physical ability, due to his old age, to engage in a physical hostility or to kill⁸⁸.

Islamic law of war prohibits killing those kinds of people based on the authority of Prophet Muhammad (peace be upon him), where He said:-

"Advance in the name of Allah and under the religion of Prophet Muhammad, but you should not kill aged persons, women and you should not be excessive.....⁸⁹".

⁸⁵ GAMAQ, RAU MIFTAH, Opp. Cit, page 196.

⁸⁶ Ibid.

⁸⁷ AHMAD, AL-DARDIRI, ABU AL- BARAKAT, Al-Sharh Al-Saqir Ala Aqarab Al-Masalik, Ila Mazhab ImaJ-n Malik, (Arabic Version), Dhar al-Ma'arif, Cairo - Egypt, Vol.2, page 275.

⁸⁸ AL-SHAIBANI, MUHAMMAD BN HASSAN, KITAB al-SIYAR al-KABEER. fArabic version), Vol.4, page 1442.

⁸⁹ IBN WAQIDI, MUHAMMAD BN UMAR, Opp. Cit. Vol.3, page 905.

It was also the command of Sayyidina Abu Bakr and Sayyidina Umar bn Khatab to their armies, thus, "They should not kill aged persons."⁹⁰

It should be noted however, those, category of persons are prohibited to be killed subject to their non-participation in a war, either directly or indirectly. In other words, if an aged person takes either direct or indirect part in hostility through whatever means, they risk that immunity, and become a legitimate target of attack.⁹¹

(3) **CLERICS:**

Among the protected persons are religious personals. It is not permissible to attack religious personals or their place of worship, no matter whatever religious persuasion.

The first successor to the Prophet Muhammad (peace be upon him), Khalifa Abubakr, was reported to have told one of his Military commanders in the person of Zaid bn Abi Sufyan, that, "..... during this expedition you are likely to come across certain people who engage themselves in religious activity, isolated in their places of worship. Whenever you come across those types of people, you should leave them alone, (you should neither attack them or their places of worship)⁹².

⁹⁰ Ibid

⁹¹ AL-SHAIBANI, MUHAMMAD BN I-IASSAN, Opp. Cit. Vol.4, page 1417.

⁹² IBN HAMAM, KAMAL DEED BN MUHAMMAD, SHARK FATAHUL al-OADEER. (Arabic version), Bulaq Printing Press, Cairo - Egypt, 1316 H.J. Vol.4, page 29

It should be noted however that, the clergy, become lawful target of attack if any of the followings occurred:-

- (a) If they engage in physical combat;
- (b) If they incite people against the Muslim army through whatever means or method⁹³.

According to some Hanafi jurists, (such as Abu Yusuf), the clergy should be killed, whether they participated in hostility or not, because according to them, they are not worshipping what they are commanded to worship or rather they are unbelievers and to them (those jurists), un-belief is a ground for killing a person. Abu Yusuf is reported to have said, when he was asked as to whether religious people can be killed even if they did not participate in hostility. He answered:

"I once asked Abu Hanifa a similar question and he answered in the affirmative, and also gave his reason by saying, because they are un-believers, and killing a un-believer is lawful"⁹⁴.

While jurists who gave contrary opinion with that of Hanafi jurists, such as Imam Malik and Imam Shafi'I, and even some jurists within the Hanafi school of thought itself, relied on the Qur'anic verse which reads:-

⁹³ GAMAQ RAO, MIPTAH, Opp. Cit. page 201.

⁹⁴ MUHAMMAD ARAFAT AL-DASUQU, SHAMSDEEN, HASHIYAT AL-DASUO ALA AL-SHAPHI AL-KABIR, (Arabic version), Madba'at al-Irshad, Baghdad, Iraq, 1984, Vol.2, page 156.

"Fight in the way of Allah against those who fight against you, but begin not hostiles! Allah loveth not aggression"⁹⁵

The favoured opinion among most of the jurists is the one that prohibits the killing of religious people.

- (4) **CIVILIANS**: - It has already been stated under the definition of combatant, earlier on, that, any person who carries arms against Muslims and has the physical and mental ability to engage in a war, and does wage war directly or indirectly, qualifies to be subject of attack. So any person outside the scope of this definition is considered by Islamic law of war as civilian. Islamic Law of war not only forbids their (civilian) attack, but also went further to prohibit any indiscriminate attack that will involve civilians. This obligation extends to the pre-cautionary measures that have to be taken when launching an attack, whether in offence or defence. In other words, the Muslims army should be proportionate in their attack, and to avoid an aggressive act that may be expected to cause loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. So employing any weapon, such as bacteriological; biological or chemical, whose effect is uncontrollable so as to expose civilians' lives or objects to

⁹⁵ Qur'an:1:190.

danger is illegal, based on the authority of the above quoted Qur'anic verse.⁹⁶

In the writer's opinion, the term civilian, comprises of alien civilians, journalist, medical personals, diplomats and all other humanitarian workers, as well as other variety of personnel's who accompany the armed forces, who may be in uniform and those who rendered religious or medical services to the army.

It should be noted however that, those categories of persons can only enjoy such protection subject to their non-participation in hostility directly or indirectly, through whatever means or method. The moment they partake in hostility they automatically become lawful subject of attack like any other lawful combatant. A number of prominent modern scholars, such as Yusuf al-Qarrawi hold this opinion, for instance in an interview with al-Jazeera Television, Yusuf Qarrawi opined that, most of the abducted and kidnapped people by Iraqi Resistance army are not in reality journalist or humanitarian workers, but rather, are either spying for United states of America or facilitating the occupation/war to the occupying army in one way or the other in the name of journalism or humanitarian services.⁹⁷

⁹⁶ Ibid.

⁹⁷ In the programme titled AL-SHAR'IA WAL-HAYAT, dated, Monday 20th September, 2004, 12:30pm. Nigerian time.

(5) **WOUNDED AND SICK COMBATANTS:-** Wounded and sick combatants are of two types, thus:

- (a) Those who can manage to escape, in spite of their wounds and sickness;
- (b) Those whose sickness and wounds is to the extent that, they can cannot escape even if they are left alone.

Islamic law of war provides the following rules in respect of the above mentioned two categories of wounded and sick combatants as follows;

- (1) Capturing them as prisoners of war;
- (2) They may be abandoned on land, but must be provided with all the necessary assistance that may be required.
- (3) Some of the jurists are of the view that, they may be killed if the adverse party is also doing the same in retaliation. They buttressed this position with what Abdullahi bn Mas'ud (Prophet Companion) did during the battle of Badar, when he killed (beheaded) Abu Jahal after being wounded and took his head to the Prophet Muhammad (peace be upon Him)⁹⁸.

⁹⁸ AL-SHAUKANI, MUHAMMAD EN ALI, Nailu Al-Audar Min Hadith Sayyid Al-Khair, (Arabic version) Dhar al- Jiel, Beirut - Lebanon, 1973, Vol.8, page 155.

It should be noted however that, it is the commander alone that will decide the fate of the wounded and sick combatant, by applying any of the above mentioned options.

- (6) DEAD ENEMY: - The general principle of Islamic law of war is that, mutilation of enemy dead is strongly forbidden. The Prophet Muhammad (peace be upon Him) says,

"No any part of a dead body should be removed without legal/lawful justification, either in war or otherwise"⁹⁹.

Dead bodies of the fallen enemy, as those of Muslims, are to be buried and if the enemy requests the handing over of the body of some of their people, such a request should not be refused provided the enemy army is willing to reciprocate. The Prophet did hand over dead persons in some occasions. He (Prophet), refused to accept money offered by the enemy for the handing over of the body of Naufail Bn Abdullah Bn Mugira during the battle of Khandaq, and rather handed him to them free of charge¹⁰⁰.

Abu Hanifa is however, of the opinion that, if money is offered in this connection by the enemy, it may be accepted. He argues, that, since the property of the enemy may be captured by the Muslims, and if they offer it willingly, its

⁹⁹ Ibid

¹⁰⁰ Ibid.

acceptance cannot be forbidden. According him, the practice of the Prophet to hand over the dead body freely, seemed to represent piety, rather than strict law, (taqwa and not fatwa), or was based on deeper psychological objectives and propaganda purposes.¹⁰¹.

- (7) **PRISONERS OF WAR:-** Long before the Geneva Convention on treatment of prisoners of war, Islamic law established some rules for fair and humane treatment of the prisoners of war. The Qur'an makes allusion to the issue of taking prisoners of war, where Allah (SWT) says:-

*"So when you meet those who disbelieve (in battle) strike (their) neck until when you have inflicted slaughter upon them, then secure their bonds, and either (confer) favour afterwards or ransom (them) until the war lays down its burden....."*¹⁰².

In another verse the Qur'an also says;

*"It is not for the Prophet to have captives (of war) until he inflicts a massacre (upon Allah's enemies) in the land....."*¹⁰³.

Islamic law of war places a great premium on kind treatment of the prisoners of war. Muhammad Hamidullah remarked that, when

¹⁰¹ AL-SHAIBANI, MUHAMMAD BN HASSAN, KHITAB AL-SIYAR AL-KABEER, Vol. 3, page 2040.

¹⁰² Qur'an: 47:4.

¹⁰³ Qur'an: 8:67.

the Prophet Muhammad (peace be upon Him), enjoined Muslims to treat the prisoners of war captured at the battle of Badar with kindness and fairness, many Muslim soldiers contended with dates and water, while they fed their prisoners with Bread¹⁰⁴.

Abu Yusuf, a Hambali's student maintained that, prisoners of war must be fed and treated well, until a decision is taken regarding their fate. The expenses of taking care of them will be borne by the capturing Muslim state, for which Allah (SWT) promised a great deal of reward, where He says:-

*"And they give food in spite of love of it, to the needy, the orphan and the captive (saying) we feed you only for countenance (i.e. approval) of Allah. We wish not from you reward or gratitude. Indeed, we fear from our lord a Day altered and distressful. So, Allah will protect them from the evil of that Day and give them radiance and happiness....,"*¹⁰⁵.

Prisoners of war are to be well taken care of, and given protection from heat and cold. A mother should not be separated from her baby or other near relatives from each other. Based on the above, Islamic law of war provides the following Rights to the prisoners of war, thus:

¹⁰⁴ Hamidullah. Muhammad Opp. Cit, page 262.

¹⁰⁵ Qur'an:71:9-12.

- (a) **THEY SHOULD BE PROVIDED WITH FOOD:-** Prophet Muhammad (peace be upon Him) is reported to have said:-

"They (prisoners of war) are your brothers, so feed them from the food you are eating and cloth them from the cloth you are wearing"¹⁰⁶.

For this commandment, His companion fed their prisoners of war with the best food that they had.¹⁰⁷

- (b) **CLOTHING THEM:-** Prisoners of war should be provided with a cloth that will suit the particular season they are in. Thus, they should be given winter dress, summer cloth etc. It has been said that, during the battle of Badar, Abbas was captured and brought before Prophet Muhammad (peace be upon Him) without a proper dressing on him. Immediately, the (Prophet) provided him with suitable cloth for that season¹⁰⁸.

- (c) **SHELTER:** - Prisoners of war are entitled as of right to be provided with a shelter, and with all the required facilities that will cater for the need of the place and season. Males should be separated from female. In other words, each

¹⁰⁶ Al-Shaukani, Muhammad Bn Ali, Opp. Cit. page 166.

¹⁰⁷ AL-LAFI, MOHAMMAD, AHKAM AL-HARB WA AL-SALMI. Maktabat Al-Jamahiriyya, Dharabalus, Libya, 1989, page 371.

¹⁰⁸ Hamidullah, Muhammad, Opp. Cit. page 262, Werberg, H. "Pacta Sunt Servanda" American Journal of International Law, Quarterly, Vol.18, No.2 of April, 1942.

gender should be given separate accommodation. They should not be mixed in the same house/prison¹⁰⁹.

(d) **PRISONERS OF WAR SHOULD NOT BE OVER-BURDENED WITH WORK:-** They should not be required to carry out any work beyond their ability.

(e) **PRISONERS OF WAR SHOULD NOT BE MUTILATED:** It has been reported that when Suhail, a notorious poet, who had been consistently attacking the Prophet v/with his poems, as well as inciting non-Muslims against him and his companions, was captured during the battle of Badar, Umar bn Khattab requested the prophet to allow him to mutilate his tongue. The Prophet (SAW) said:-

"..... I will not grant you permission to mutilate him; otherwise, Allah will mutilate me, notwithstanding being His Prophet"¹¹⁰.

The above Rights are accorded to prisoners of war by Islamic law of war right from their capture up to the cessation of hostility. When the hostility comes to an end, The Muslim leader is given options by Islamic law of war in regards to prisoners of war. The followings are the options open to him:-

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

(1) **TO BE RELIESED FREE OF CHARGE:-** In accordance with the instruction of Allah (SWT):

Instances abound, where Prophet Muhammad (peace be upon Him) resorted to this option. For instance, When the city of Mecca was captured, the Prophet released all the prisoners of war.

(2) **TO BE REQUIRED TO PAY RANSOM EITHER IN CASH OR IN KIND FOR THEIR RELEASE.**

For instance, the prisoners of war captured during the *battle of Badr* paid ransom for their release. Prisoners of war can also be required to render services in consideration of their release such as teaching young kids certain knowledge, or skill. They may be exchanged with the Muslims captives who happen to be in the hand of the enemy.

(3) **ENSLAVEMENT:**

Prisoners of war may be enslaved, or killed, based on the practice of the of the Prophet Muhammad (Peace be upon Him) as well as the understanding of the following verses:-

"It is not for any prophet to have captives until he hath made slaughter in the land"¹¹¹

It should further be noted that, there are controversies in respect of the actual state of the Qur'anic verse that permits killing the

¹¹¹ Qur'an: VII:67.

prisoners of war. Some of the jurists (such as Ghazali) are of the opinion that, the said verse has been abrogated with the verse in, Surat Muhammad (2nd verse quoted above) so the permission to kill is no longer applicable. While some other jurists [such as Imam Malik) held contrary opinion, and say there was no contradiction between the two verses, so this permission is still valid¹¹².

2.4 **WAR CRIMES AND PENAL RESPONSIBILITY:**

DEFINITION OF WAR CRIME:-

Certain practices are forbidden by Islamic law of war, during and after armed conflict as pointed out above under forbidden practices, as well as those listed under "The Rights of protected persons." This can be used as a convenient guide to what are generally known as war crimes. Thus, war crimes can be defined as:-

"Violation of the laws of war, such violation shall include, but not be limited to, burning an enemy person or animal with fire, employing poisoned weapons against the enemy, mutilation and decapitation of prisoners of war, murder or ill-treatment of prisoners of war, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by Military necessity"¹¹³.

¹¹² Ibid.

¹¹³ Ibid.

This list is only exemplary and not exhaustive, so other breaches of Islamic law of war can still amount to war crimes.

PENAL RESPONSIBILITY:-

Command responsibility: Every individual, regardless of rank or governmental status, is personally liable for any war crime that he might commit¹¹⁴.

A commander, that is to say, any one in a position of command whatever his rank might be, including Head of State or the lowest non-commissioned officer, who issues an order to commit a war crime is equally guilty of the offence with the subordinate, actually committing it. He is also liable if, knowing or having information from which he should have concluded that a subordinate was going to commit such a crime he failed to prevent it¹¹⁵.

It has been reported that, Prophet Muhammad (peace be upon Him) sent some of His Companion under the leadership of Khalid bn Waleed to Banu Juaima bn Kinana tribe to invite them to Islam, not to fight them. Despite that, the commander (Khalid) ordered his army to kill some of them. When the report reached the prophet, He condemned the

¹¹⁴ Ibid, page 360.

¹¹⁵ Ibid.

action of Khalid and subsequently sent Aliyu bn Abu Abdullahi to pay them compensation¹¹⁶.

And individual army is not under obligation to carry out the order of a superior officer to commit any of war crimes. An offender will be personally liable. This is based on the Prophetic tradition which says:-

*"There is no obedience to a person in disobedience to Allah (SWT)."*¹¹⁷

Based on the above, the defendant cannot plead superior orders as a defence to his action.

REMEDIES FOR VIOLATION:-

No physical penal punishment was reported to have been meted out against any of the accused guilty of war crimes during the period of Prophet Muhammad (peace be upon Him) or His successors beside verbal condemnation, admonition and payment of compensation (Diyya) to the victim of crime or his relatives.

In the opinion of the writer, absence of physical penal punishment during the period of the Prophet will not prevent modern Muslim States to provide specific penal punishment to war crimes in addition to the one provided by the Prophet

¹¹⁶ Pages 364 - 368.

¹¹⁷ As Quoted in Qamaq, Rau Miftah, Ibid.

Muhammad (peace be upon Him), based on the principle, established by Khalifa Umar bn Abdul-Azeez which states:-

"A state should create a punishment commensurate to a crime innovated by the people (which has not be known previously)".¹¹⁸.

¹¹⁸ QAIRAWAN, ABU ZAID, AL-RISALA (Arabic version).

CHAPTER THREE

GENERAL RIGHTS AND OBLIGATION OF COMBATANTS AND NON-COMBATANTS UNDER INTERNATIONAL HUMANITARIAN LAW.

GENERAL RIGHT AND OBLIGATION OF COMBATANTS AND NON-COMBATANTS AND ITS PROTECTION

International Humanitarian Law (I.H.L.) means, international rules, established by treaties or custom, which limit the rights of parties or means of warfare of their choice, or which protect states not party to the conflict or persons and objects that are or may be effected by the conflict¹¹⁹.

As a branch of public international law applicable in armed conflict situations. International Humanitarian Law is designed to ensure respect for human beings in so far as compatible with Military requirement and public order, and to attenuate the hardship caused by hostilities¹²⁰.

The purpose of armed conflict is to defeat adverse party. The law of armed conflict only permits such action as imperative for this purpose and forbids acts which go beyond this and cause injury to persons or damage to property not essential to achieving this end. The law restricts both the means of waging war and objects

¹¹⁹ LADAN, M.T., Introduction to international Human Rights and Humanitarian Laws, Ahmadu Bello University Zaria. Kaduna - Nigeria, chapter five, page 132.

¹²⁰ Ibid, page 118.

against which such means may be employed, and the basic rules of armed conflict apply equally to all theatres, whether on land, sea or in the air, for the main part, the rules which have evolved in relation to warfare on land have been adopted, adapted or developed to the particular situations that arise in connection with maritime or air warfare¹²¹.

The most basic rule of the law of armed conflict is that, civilian and civilian objects must not be made the object of direct attack¹²², which means, in other words, the civilian population as well as individual civilians should be accorded necessary protection against the dangers arising from military operation, such as indiscriminate attack that is expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof which would be excessive in relation to the concrete and direct military advantage anticipated.¹²³

The "attack" here referred to, relates to the advantage anticipated from the specific military operation of which the attack is a part taken as a whole and not from isolated or particular parts of the operation¹²⁴. Combatants are the legitimate object of attack, but only so long as they are capable of fighting, willing to fight or

¹²¹ C. Green, Leslie, the contemporary law of Armed conflict, Manchester University Press, Oxford Road, Manchester Miz 9 Mr., U.K. 2nd edition, 2000, page 122.

¹²² Protocol 1, Article 51 (2) and Article 52 (1) of protocol 1

¹²³ Protocol 1, Article 51 (1) and 4 (a-c)

¹²⁴ C. Green Leslie, opp. Cit. page 124.

resist capture, once incapable in this, and so hors de combat, they are immune from attack, but may be taken prisoner¹²⁵.

Military objects are lawful object of attack and are defined as "Those object which by their nature, locations¹²⁶, 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 (which will" depend upon the discretion of the commander of the forces involved.) Offer a definite military advantage to the whole operation and not merely the particular attack contemplated¹²⁷.

The commander must take all necessary precaution to see to it that, the attack is not targeted against civilians or civilian objects and even in targeting military objects a feasible precaution in the choice of means and method of attack should be observed with a view to avoiding and in any event to minimizing incidental loss of civilian life injury to civilians as well as damage to civilian objects. If however, there is a great possibility of incidental loss of civilian life, injury to civilians, damage to civilian object, or a combination thereof, which will be excessive in relation to the concrete and direct military advantage anticipate, those who plan or decide

¹²⁵ Protocol 1, Article 41 (1) and 2 (a - c), protocol 1, Article 44 and protocol 1, Article 45 (1) as well as 2nd Geneva convention of 1949 Article 3 (1).

¹²⁶ This will include an area of land, provided that particular area would be of direct use to the defending forces or those attacking, as well as any track of land through which the adverse party is likely to move its force or in a area the occupation of which would provide the occupant with the possibility of mounting a further attack. Sec C. Green Leslie, opp. Cit. foot note, 24, page 125.

¹²⁷ Protocol 1 Article 52 (2).

upon such attack should refrain from so doing¹²⁸. It is also a mandatory legal provision that, "effective" advance warning shall be given of attacks which may effect the civilian population, unless the circumstances do not permit such¹²⁹.

Certain objects are always immune from attack, being those normally dedicated to civilian purpose, such as a place of worship, a house or other dwelling or a school, and if there is any doubt whether such an establishment is being used for its proper purpose, it is to be given the benefit of the doubt and remain immune from attack¹³⁰. It is also unlawful to kill or wound an enemy after he has laid down his arm or is otherwise unable to defend himself and has surrendered unconditionally¹³¹. If having apparently offered to lay down his arms, he attempts to attack the person accepting his surrender he would be liable to trial as a war criminal¹³².

¹²⁸ PROTOCOL 1, Articles, 57 (1) and (2) (a)-(i - hi) and protocol 1, Article 52 (1) and (2) problem arose after operation desert storm (The Gulf War, 1991) concerning the United States bombing of the American shelter in Baghdad, where there were some 1,500 civilian casualties, According to intelligence reports of the United State America it was a command communication center. But it has been a civilian air raid shelter. Quoted by C. Green Leslie in foot note, 27, page 125 from U.S operation Law Handbook JA 422 1996, P. 18. Israel was also alleged to have killed over 400 Lebanese civilians among whom 35% were estimated to be children during its recent war (2006) with HUSBULLA in violation of these legal provisions, sec. THE MIDDLE EAST magazine August/September 2006, issue 370 page 15. the international community has strongly condemned this disproportionate use of force by Israel with separate statement from French, Russia and other governments criticizing Israel's excessive response. Sec Ibid. page 8.

¹²⁹ Protocol 1, Article 57 (2) (c).

¹³⁰ PROTOCOL 1, Article 52 (3) American occupation forces in IRAQ as well as insurgents within Iraq both Sunni and Shi'a are guilty of violating it's provision.

¹³¹ 3rd Geneva Convention, 1949 Article 3 (1).

¹³² C. Green Leslie, opp. Cit. page 148.

All the normal rules with regard to the protection and survival of the civilian population, the ban on terror bombing of towns and other civilian habitations, restriction on the use of weapons, protection of the environment and dangerous installations, respect for cultural objects and other protected places, and for the wounded, sick and shipwrecked, apply in aerial warfare as they do in warfare on land and sea¹³³,.

TREATMENT OF PRISONER OF WAR:

The Third Geneva Convention of 1949 has been dedicated to the treatment of prisoners of war. For that, a comprehensive list of categories of persons who are considered as prisoners of war is given in article 4, thus, any person belonging to one of the following categories, who have fallen into the power of the enemy, is regarded as prisoner of war. Thus;

- (1) Members of the armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of the volunteer corps, including those of organized resistance movements, belonging to a party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or

¹³³ COENCA BROSS VS GERMANY (1927) 7. M.A.T. 683, when the Greco – German mixed Arbitr Tribunal held the convention iv rules regarding bombardment applicable to air warfare.

volunteer corps, including such organized resistance movements, fulfill the following conditions:-

- (a) That of being commanded by a person responsible for his subordinates;
 - (b) That of wearing a fixed distinctive sign recognizable at a distance:
 - (c) That of carrying arms openly.
 - (d) That of conducting their operations in accordance with the laws and custom of war.
- (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power.
- (4) Person who accompany the armed force without actually being members there of, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour unit or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identify card similar to the annexed model.
- (5) Member of crew, including masters, pilots and apprentices of the merchant marine and the crews of

civil aircraft of the parties to the conflict, who do not benefit by more favourable treatment under any other provision of international law.

- (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

It should be noted however that, not all those falling into the hands of power of the enemy become prisoners of war or are entitled to prisoner of war status.

Enemy civilians, for example, when taken into custody or interned do not fall into this category, and if captured are entitled to treatment in accordance with Geneva Convention IV (4), 1949¹³⁴;

Unless they take part in hostile activities when they may be regarded as unlawful combatants and treated accordingly. For instance, where an individual protected person is engaged in spying activity, sabotage or suspected of activity hostile to the security of the occupying power, in all those cases where absolute military security so require, be regarded as having forfeited his rights under the present convention. In each case, however such

¹³⁴ C. Green, Leslie, *opp. Cit.* p. 198.

persons shall be treated with humanity and in case of trial shall not be deprived of the right of fair and regular trial prescribed by the General Convention¹³⁵.

Neutral nationals captured by a belligerent must be released as soon as operations permits, unless they have been guilty of un-neutral activities, or are volunteer members of the adverse party's forces¹³⁶.

Diplomatic representatives of the adverse party must not be made prisoners of war, but allowed to return to their own country and this is true whether the diplomat is accredited to the country by whose force he has been captured, or if he is found in occupied territory, and this is normally done a reciprocal basis¹³⁷.

Another category of persons who are denied prisoner of war status are mercenaries.

Mercenary are defined as any person who:-

- (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) Does in fact, take a direct part in hostilities;
- (c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material

¹³⁵ Fourth Geneva convention Relative to the protection of civilian person, 1949, Article 5

¹³⁶ C. Green, Leslie, opp. Cit. p. 198.

¹³⁷ Ibid.

compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed force of that party;

- (d) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
- (e) Is not a member of the armed forces of a party to the conflict; and
- (f) Has not been sent by a state which is not a party to the conflict on official duty as a member of its armed forces¹³⁸.

Prisoner of war must be treated humanely and protected at all times, particularly against any violence or intimation, as well as against insult and public curiosity¹³⁹. The responsibility for the treatment of prisoners of war rest upon the detaining power¹⁴⁰

Article 14 together with article 75 (2) of protocol 1 provide protection against physical violence or torture in the person of prisoner of war. They must no be exposed to condition likely to effect their health, due attention being paid to the climate and must not be exposed to the dangers of the zone of operations and should be provided with air raid shelters¹⁴¹. The location of their camps, which are to be clearly marked "PW" or "PG" (prisoners de gurre) is to be given to the adverse party through the medium of the protecting power and should not be cited near military

¹³⁸ PROTOCOL 1, Article 47 1 and 2 (a - f).

¹³⁹ 3rd Geneva convention, Article 13.

¹⁴⁰ Ibid, Article 12

¹⁴¹ 3rd Geneva Convention, Articles 13 and 19.

objective. They are to be provided with proper shelter and food as well as proper medical treatment and should on no account be subjected to any medical or scientific treatment or experimentation which is not required by their own state of health¹⁴². This latter prohibition (unfit medical or scientific treatment or experimentation) is so comprehensive that it cannot even be waived by a prisoner giving consent other than for a blood transfusion or skin graft, "provided that (consent) is giving voluntarily and without any coercion or inducement, and then only for therapeutic purpose, under conditions consist with general accepted medical standards and controls designed for the benefit of both the donor and the recipient. It is possible that, in exceptional circumstances, such as kidney transplant from one sibling to another, this may be permitted if the surgery is performed by medical officer of the same force as that of the two patients or under the supervision of the Red Cross¹⁴³.

Any prisoner who dies must be buried honourably and, if possible according to his own religious rites and in an individual grave, cremation is permitted at the request of the deceased, in accordance with his religious belief or for reason of hygiene. The grave should be properly marked and information recorded with the Grave Registration Service maintained by the Detaining power. Whenever possible, dead prisoners should be buried with their own nationals.¹⁴⁴

¹⁴² Ibid, Articles 13, 15 and 26.

¹⁴³ C. Green, Leslie, opp. Cit. page 202.

¹⁴⁴ Ibid.

Prisoners, other than officers, may be compelled to work, but no prisoner is to be employed on work of humiliating kind whereby he might be made a laughing stock to those around him, either fellow prisoners or civilians among whom he might work, nor should he be employed to undertake a dangerous work¹⁴⁵, or to work in support of the detaining power's war effort. The removal of mines or similar devices is considered to be dangerous¹⁴⁶.

Female prisoners must be treated with due regard to their sex and must in no case be treated less favourably than male prisoners. Their sex must be taken into consideration in the allocation of labour and the provision of sanitary and sleeping facilities. If undergoing disciplinary punishment it should be no more severe than would be imposed upon a member of the detaining power's forces, male or female, for the same offence, and if held for disciplinary punishment they must be kept in separate quarters from men and under a guard of women¹⁴⁷. They (Women) should also be protected from violence rape and other sexual results¹⁴⁸.

Captors must not kill prisoners of war for any reason, even if they are unable to provide the necessary facilities to guard them or to restrict their movement, or because they will have to be fed, thus, reducing the supplies available to the captors because the

¹⁴⁵ 3rd Geneva convention. Articles, 51 and 52.

¹⁴⁶ Ibid, Article 52.

¹⁴⁷ Ibid, Article 25.

¹⁴⁸ Protocol I, Article 76.

convention¹⁴⁹, directed that, prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.

THE WOUNDED. SICK AND SHIPWRECKED

Protocol 1 of 1977 additional to Geneva Convention of 1949 deals with the wounded, sick and shipwrecked collectively, the term shipwrecked applies to any shipwrecked whether of sea or in any other waters, and whether by act of nature or enemy action, and whether from a vessels or aircraft, provided the individual in question refrain from any hostile act.¹⁵⁰ Whereas, "Wounded" and "sick" apply to persons, whether military or civilian, who because of trauma, disease or other physical or mental disorder or disability and who needs medical assistance or care provided he refrain from any act of hostilities. The terms (wounded and sick) also cover maternity cases, new born babies and other persons who may be in need of immediate medical assistance or care¹⁵¹ parties to the conflict must to search and collect those wounded, sick or shipwrecked.

In land warfare, these obligations exist at all times, but at sea after an engagement¹⁵². Should wounded, sick and shipwrecked persons fall into the hands of a neutral power, the latter must apply the provision of the convention by analogy¹⁵³. Wounded sick and shipwrecked are entitled to be treated as combatants and to

¹⁴⁹ 3rd Geneva Convention Article 118 and Article 109.

¹⁵⁰ Protocol 1, Article 8 (b)

¹⁵¹ Ibid, Article 8 (a).

¹⁵² C. Green Leslie, opp. Cit. p. 128.

¹⁵³ 1st Geneva convention. Article 4.

be protected and respected. They should be treated humanly and cared for by the detaining power without any adverse distinction on sex, race, nationality, religion, political opinion, or any other similar criteria, attempts upon their lives and violence against their person shall be prohibited, they shall not be murdered nor subjected to any biological or medical experiment, nor exposed to conditions which result in infection, and only urgent medical requirements justify priority in treatment among them, although women must be treated with all consideration due to their sex. They shall also not willfully be left without medical assistance and care nor shall they be exposed to any condition or situation that will expose them to contagious or infectious diseases¹⁵⁴.

The wounded, sick and shipwrecked of a belligerent who fall into enemy hands shall be prisoners of war and the provisions of international law concerning prisoners of war shall apply to them. The captor may decide according to circumstances, whether it is expedient to hold them, or to convey them to a part in the captor's own country, to a neutral part or even to a port in enemy territory. In the last case prisoners of war thus returned to their home country may not serve for the duration of the war¹⁵⁵.

Military hospital ship equipped with a view to assist and treat the wounded sick and shipwrecked, and hospital ships utilized by National Red Cross Society or by officially recognized relief societies or by private persons with the sole purpose of treating

¹⁵⁴ 2nd Geneva convention. Article 12.

¹⁵⁵ Ibid. Article 16.

the wounded, sick and shipwrecked should in no circumstances be attacked or captured, but shall at all times be respected and protected¹⁵⁶.

All that was discussed above, deals exclusively with the obligations on belligerent states (parties to the convention) on prisoners of war who are captured or become incapacitated and helpless as result of sickness or through other means.

Beside the said obligations, there are other obligations placed upon the belligerent states (parties to the conventions) with regard to civilian. For instance, part IV of protocol additional to Geneva Convention of 1977 is concerned with civilian population as such lying down as a basic rule¹⁵⁷. Article 50 of protocol 1 defines civilians and civilian population as:-

1. Civilian is any person who does not belong to one of the categories of persons referred to in Article 4A(I), (2), (3) and (6) of the Third Convention and in Article 43¹⁵⁸ of this protocol. In case of doubt whether a person is a civilian, that person shall be considered to be civilian.
2. The civilian population comprises all persons who are civilians.

¹⁵⁶ Ibid, Articles 22, 24, 25.

¹⁵⁷ Article 51 -60.

¹⁵⁸ The categories of persons excluded by the those Articles are:- (a) Nationals of a state which is not bound by the conventions, (b) Nationals of a neutral state who find themselves. In a territory of a belligerent state, and (c) Nationals of a co- belligerent state; (3rd Geneva Convention).

3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

That in order to ensure respect for and protection of the 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 objects and accordingly shall direct their operations only against military objectives¹⁵⁹.

The protocol also contains a number of article providing for the general protection of civilians, civilian objects and places of warship¹⁶⁰ with further provisions for relief of the civilian population, for the treatment of persons in the power of a party to the conflict, including refugee and stateless persons, those detained in connection with the conflict who might include their own nationals, as well as women and children.

Essentially what the protocol is aiming at is, to provide maximum protection to civilian lives and objects, and to also prohibit all other form or acts of threats of violence the primary purpose of which is to spread terror among the civilian population. For that, civilians are expected to enjoy the protection afforded by this Protocol¹⁶¹ and other relevant Article in the convention¹⁶², provided

¹⁵⁹ Protocol 1, Article 48.

¹⁶⁰ Ibid, Article 51-54.

¹⁶¹ Protocol 1.

they did not take a direct part in hostilities¹⁶³. Among the prohibited acts are indiscriminate attacks, such as:-

- (a) Those which are not directed at a specific military objective¹⁶⁴,
- (b) Those which employ a method or means of combat which cannot be directed at a specific military objectives, or
- (c) Those which employ a method or means of combat the effects of which cannot be limited as required by this protocol.

Beside the indiscriminate attacks, it is also prohibited to use starvation of civilian as a method of warfare¹⁶⁵. These and many other protection has been provided by this protocol (protocol 1).

¹⁶² E.g. 4th Geneva Convention

¹⁶³ Protocol 1, Article 51 (3)

¹⁶⁴ For instance, Israel recent attack on the town of Bait Hanun in the month of November 2006 where 60 people were killed most of whom were women, aged and children and days later, a further 18 civilian were also killed in the same town. (The Middle East Magazine December, 2006, issued No. 373, Page 4)., Pakistan's military attack on Madarassa (religious seminary) near Khar on 28th October, 2006 where 80 people 'were killed who were believed to be civilians, whom Pakistani president Pervez Musharraf said are among the hide-out of Taliban Gorillas, as well as terrorist training facility- (The Middle East Magazine, December 2006, issue No. 373) Page 28., Recent Israel attack during its recent war (2nd war) with Lebanon Hisbullah, where they blew up a prominent United Nations post in southern Lebanon, killing 4 U.N. personnel, after being warned through 10 telephone calls, as well as indiscriminate attack on the civilian quarters (during the same war) that led to killing over 400 Lebanese overwhelmingly civilians, and an estimated 35% of whom were children. (The Middle East Magazine, August/September, 2006, issue No. 370, Pages, 5 and 15) and Indiscriminate attacks against civilian and civilian objects by both American forces and Insurgents in the on-going Iraq war. where civilians and Mosques were indiscriminately attacked and killed, for instance Ansar Al-Sunnah group in Iraq carried abut 285 February, 2005, Issue No. 353. Pages 24-5).attacks in October, 2003 in which 1,155 people (civilians) were killed, American forces killed so many civilians. As well as so many civilians' killing'by Muqtada Al-Sadr's Jaisifi's Mahdi. (The Middle East February, 2005, issued-NO.353 pages 24 - 5).

¹⁶⁵ 2,000, between 150,000 and 300,000 Sudan southerners were threatened by starvation the Sudan government declared the — no-go-zone (Africa Today Vol. 8 No. 7, July, 2000, Page 11).

Beside the civilians, there are other species of persons who are also regarded to be among the protected persons, even though they fall within the category of civilian population, they are given a special consideration due to their status, these are among others:-

- 1- ALIENS
- 2- WOMEN AND CHILDREN
- 3- JOURNALIST AND
- 4-REFUGES

THE POSITION OF ALIENS:

Any alien civilian, in the territory of a party, or in occupied territory at the beginning of, or during a conflict are entitled to leave and return to their home state, unless the national interest of the adverse party prevent this. Those persons permitted to leave may provide themselves with the necessary funds for their journey and take with them a reasonable amount of their effect and articles of personal value.¹⁶⁶ If departure is forbidden, those effected shall be entitled to have such refusal reconsidered as soon as possible by an appropriate court or administrative board designated by the detaining power for that purpose¹⁶⁷.-

In principle, non- repatriated aliens remaining at liberty should be treated according to the regulations concerning the treatment of aliens in peace time. They are also entitled to receive any individual or collective relief extended to them; the same medical

¹⁶⁶ Protocol of Article 54 (1) for instance it was reported that in June 4th Geneva Convention, Article 35.

¹⁶⁷ Ibid.

attention as provided for the detaining power's population; to practice their religion; if living in a dangerous area they must be allowed to leave in the same way as local nationals; and children under fifteen, pregnant women, and the mothers of children under seven must receive the same benefit as nationals of the detaining power¹⁶⁸.

Subject to security considerations, aliens are entitled to seek paid employment on the same term as local nationals, and if unable to support themselves must receive support from the detaining power for themselves and their dependants¹⁶⁹.

THE POSITION OF WOMEN AND CHILDREN

The parties to the conflict shall take the necessary measures to ensure that, children under fifteen are specially cared for, particularly when orphaned or separated from their families as a result of a conflict, proper provision must be made for their education and religious care, and to the extent possible this should be entrusted to persons of similar cultural background. Every effort should be made to bring dispersed families together or keep them in contact, but correspondence among them may be restricted to personal matter only¹⁷⁰. Children shall be the object of special respect and shall be protected against any form of indecent assault. The parties to the conflict shall provide them with the care

¹⁶⁸ Ibid, Article 38.

¹⁶⁹ Ibid, Article 39

¹⁷⁰ Ibid, Article 24 and 25

and aid they require, whether because of their age for any other reason¹⁷¹.

If children are arrested or otherwise detained for reasons connected with the conflict, they must be kept separate from adult detainees, unless they are held in family unit¹⁷².

Children under fifteen should not be recruited into the armed forces and every effort should be made to prevent their taking part in the conflict¹⁷³.

If any child who have taken part in -hostilities are captured he continue, even if treated as prisoner of war to enjoy the special protection granted to children. If he (child) commits an offence connected to the conflict, even a war crime he must not be executed unless he has attained the age of eighteen years or over at the time of the act in question¹⁷⁴.

An occupying power is responsible for maintaining the functioning of local organizations concerned with child welfare and must

¹⁷¹ Protocol 2, Article 77 (1).

¹⁷² Ibid, Article 77 (4).

¹⁷³ Ibid, Article 77 (2): It is reported that, in violation of this Article so many children under fifteen both boys and girls were used as child-soldiers during so many conflicts in Africa, for instance Tens of thousand of boys and girls were kidnapped and force-marched into UNITA territory (Revels sergeants under late Jonas Savimbe who fought Angolan Government) to become child-soldiers, as an example of Savimbi's soldiering, when he was no longer able to conduct conventional warfare because of international sanctions against his movement. (Africa Today March 2002, Vol. 8, No. 3, Page 19). Ugandan rebels leader Joseph Kong also used children as child-soldiers in his movement (lord's resistance Army (LRA) in his fight/war with Ugandan government. The young girl who could have been no older than 14 years of age was seen and arrested with an AK-47 slung over her shoulder and carrying two jerry cans of water at the rebel camp at Ri-Kwangba town. (New African Magazine, May 2007, No. 462, Page 34).

¹⁷⁴ Protocol 2, Article 77 (3) and (5).

facilitate identification and registration of children. If the local organizations are inadequate the occupant must take all possible steps to guarantee their care, welfare education, language and religion. He must do nothing to alter their personal status or to enroll them in organization established by him, and any intentional action directed at the destruction of their cultural characteristic may amount to genocide¹⁷⁵.

No party to the conflict shall arrange for the evacuation of children, other than its own nationals to a foreign country other than temporary for medical reasons, or for a temporary evacuating where compelling reasons require such, thus, for their own safety, if it is not safe to leave them in certain area because of the risk involve. However, where the parents or legal guardians of those children sought to be evacuated can be found, their written consent to such evolution is required. If they cannot be found, the written consent of the persons what by law or, custom are primarily responsible for the care of the children in question is required. Any such evacuation shall also be supervised by the protecting power in agreement with the parties concerned namely, the party arranging for the evacuation, the party receiving the children and any parties whose nationals are being evacuated. In each case, all parties to the conflict shall take all feasible precautions to avoid endangering the evacuation¹⁷⁶.

¹⁷⁵ C. Green, Leslie, Opp. Cit; Page 240

¹⁷⁶ Protocol 2, Article 78 (1).

After being evacuated, each child's education, including his religious and moral education as his parents' desire, shall be provided with the greatest possible continuity¹⁷⁷

Beside the children, women also shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault¹⁷⁸.

Pregnant women and mothers having dependant infants who are arrested, detained or interned for reason related to the armed conflict, shall have their cases considered with the utmost priority, and pronouncement of death penalty shall be avoided on those women. The death penalty shall not be executed on such women¹⁷⁹.

Women whose liberty has been restricted must be kept separate from Men and under the supervision of Women, although, families should whenever possible be kept together as family units¹⁸⁰. The High contracting parties and the parties to the conflict shall facilitate in every possible way the reunion of families dispersed as a result of armed conflicts and shall encourage in particular the work of the humanitarian organizations engaged in this task¹⁸¹.

¹⁷⁷ Ibid, Article 78 (2).

¹⁷⁸ Ibid, Article 76 (1).

¹⁷⁹ Ibid, Article 76 (2 and 3).

¹⁸⁰ Ibid, Article 75 (5).

¹⁸¹ Ibid, Article 74.

THE POSITION OF JOURNALISTS: Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians¹⁸², for that, they are entitled to be protected, provided they take no action adversely affecting their status as civilian¹⁸³. They are also entitled to obtain an identity card. This card, which shall be issued by the government of the state of which the journalist is a national, or in whose territory he resides, or in which the news medium employing him is located, shall attest to his status as a journalist¹⁸⁴.

In view of protocol 1, Article 79(1) making the journalists an object of attack, that will cause loss of life, injury or damage to his facilities will amount to grave breach of this protocol, thus, a war crime, provided he did not take part in the hostilities through any means howsoever¹⁸⁵.

THE POSITION OF REFUGES:

The convention relating to the status of Refugees (CRSR) of 1951 defines the term "Refugee" as apply to any person who:

"..... as a result of events accruing before 1st January 1951 and owing to well-founded fear of being persecuted, for reason of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his (or her) nationality and is unable or owing to such fear is unwilling to avail himself (or herself) of the

¹⁸² Ibid, Article 79(1).

¹⁸³ Ibid, Article 79(2).

¹⁸⁴ Ibid, Article 79 (3).

¹⁸⁵ Protocol 2, Article 85 (3)(a),(b),(c) and (f)

protection of that country; or who, not having a nationality and being made outside the country of his (or her) former habitual residence as a result of such events is unable or owing to such fear is unwilling to return to it....."

Critical examination of this definition will reveal that, stateless person is also considered as refugees. Protocol 1 Article 73, state "person who before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the parties concerned or under the national legislation of the state of refugee or state of residence shall be protected person within the meaning of parts I and III of the Fourth Geneva Convention in all circumstances and without any adverse distinction." This means, these two categories of persons are accorded the status of protected persons, and should enjoy all the protections guaranteed under the said Convention, (4th Geneva Convention part 1 and III). In other words, they are entitled in all circumstances among others to respect for their persons, their honour; their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against acts of violence or threats thereof and against insult and public curiosity.

Women shall be especially protected against any attack on their honour in particular against rape enforced prostitution, or any form of indecent attack. They shall be treated with the same

consideration by the party to the conflict in whose power they are, without any adverse distinction based, in particular, on race religion or political opinion¹⁸⁶. It is prohibited to apply physical or moral coercion against them with a view to obtain information from them¹⁸⁷.

No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. Pillage as well as reprisal against them or their property is also forbidden¹⁸⁸.

Those among them who have lost their gainful employment as a result of the war shall be granted the opportunity to find paid employment¹⁸⁹. The party to the conflict in whose hands protected persons may be is responsible for the treatment accorded to them by its agents respective of any individual responsibility which may be incurred¹⁹⁰.

However, the following are denied to enjoy this protection, thus:-

¹⁸⁶ Fourth Geneva Convention of 1949, part III, Article 27.

¹⁸⁷ Ibid, Article 31.

¹⁸⁸ Ibid article 33.

¹⁸⁹ Ibid, article 39.

¹⁹⁰ Ibid, Article 29: in a study; released in November 2006, by Middle East Magazine if highlights the plight of Palestinian gees; it stared among others, in Lebanon, one of the reviews contributors, sheriff El-sayed, Alt, 1 reports that in addition to the almost 211,000 inhabitants living in 12 Palestinian refugee campus run by the United Nations Relief and Works agency (UNRWA) hundred and thousands of others live in unofficial caps which lack basic services such as health and education, infrastructures and properly rights. An estimated 3,000 to 5,000 others do not have identification papers recognized either by JNRPWA or the Lebanese government making their status akin to that of irregular magazines. Their freedom of movement is restricted (The Middle East Magazine, November 2006.

- (a) He (or she) who committed a crime against peace, a war crime, or a crime against humanity¹⁹¹;
- (b) He (or she) who committed a serious non-political crime outside the country of refuge prior to his (or her) admission to that country as a refugee;
- (c) He (or she) who has been guilty of acts contrary to the purpose and principle of the United Nation¹⁹².

WAR CRIME AND GRAVE BREACHES DEFINITION

DEFINITION OF WAR CRIME :

It is now common to use the definition section of the London Charter¹⁹³ establishing the Nuremberg Tribunal as a convenience guide to what are generally known as war crime, it reads.

"Violation of the laws of custom of war, such violation shall include, but not limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill treatment of prisoners of war or person on the seas, killing of hostages, plunder of public or private

¹⁹¹ Can this be the defence of the Nigerian government for betraying former Liberian Leader by handing him over to United Nation special court in Sierra Leone to face 11 charges all woven around helping or supporting the Revolutionary United Front (RUF) commit, a crime against peace war crimes and crimes against humanity between 1996 and 2002 after receiving all the necessary assurances from former Nigerian head of government Obasanjo as well as other African leaders, against prosecution (flea bargain), or he was betrayed as a result of mounting pressure from United States of America on Nigerian Leader Olusegun Obasanjo? Even tough, refused to accept the blame, insisting that, Tailor was captured by the Interpol in his attempt to escape.

¹⁹² Ladan, M.T. Opp.1 cit page 258.

¹⁹³ Ibid.

property, want destruction of cities towns or village, or devastation not justified by military necessity."

This list is only exemplary and not exhaustive that other breaches of customary law of war, such as disregarding an offer of surrender or executing a spy without trial still amount to war crime¹⁹⁴.

Because of the offences committed against civilians, particularly in occupied territory, the charter introduced a new nomenclature, describing some of these crimes as crime against Humanity,¹⁹⁵ such as:-

"Murder, extermination, deportation, and other inhumane acts committed against any civilian population, before or during the- war, or persecution on political, racial or religious ground in execution of or in connection with any crime within the jurisdiction of the Tribunal whether or not violation of the domestic law of the country were perpetrated."

These offences, which in most cases would have amounted to war crimes any way, were made amenable to trial by the same tribunal as enjoyed jurisdiction, over war, crimes previously defined. It is

¹⁹⁴ Schwarzenberger, G., International Law, Vol. 2, the Law of Armed Conflict, Stevens London 1968 ch. 39 and the London Charter, Article 6 (B). the definition in Article 8 of the statute of the international criminal court is somewhat wider, spelling out in addition all the possible offences listed in the Geneva Convention and protocol 1. see also, C. Green, Leslie, opp. Cit page 295 footnote 63.

¹⁹⁵ Ibid

important to emphasize that local legality was irrelevant, since many of the offences committed by German Forces in occupied Europe or Germany proper were often in compliance with German legislation or that enacted by puppet administration. This provision made the defence of "prior legality," impossible in such circumstances, and is fully consistent with the general rule that municipal law cannot be pleaded as an excuse for disregarding international law, at least before an International Tribunal or one called upon to apply international law¹⁹⁶

DEFINITION OF GRAVE BREACHES:

According to the 2nd Geneva Convention relating to the treatment of wounded sick and shipwrecked on land or at sea¹⁹⁷, grave breaches as:-

"Willful killing, torture or inhuman treatment, including biological experiment, willfully causing great suffering or serious injury to body or health (such as may arise from inadequate living conditions) and extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly."

To compel a prisoner of war to serve in the forces of an adverse party or to deny him his rights to a fair trial also constitute grave breaches¹⁹⁸. The civilian convention confirms that similar acts

¹⁹⁶ Ibid.

¹⁹⁷ Green, Leslie, Opp. Cit Page 295 Foot Note 63.

¹⁹⁸ Protocol I, Article 85(4)(e).

against civilians are grave breaches and adds to the list, unlawful deportation or transfer or confinement of a protected person and the taking of hostage¹⁹⁹.

Protocol 1, extends the definition of grave breaches in regard to anyone protected by the protocol that is to say, to combatants and prisoner of war, any person who have taken part in hostilities and to refugees and stateless person, as well as the wounded, sick and shipwrecked, medical and religions personnel, medical unit and transport under the control of the adverse party²⁰⁰.

This protocol²⁰¹ provides a list of acts which constitute grave breaches (among others beside the ones mentioned above) if committed willfully in breach of the protocol causing death or serious injury to body or health, thus:-

1. Making the civilian population or individual civilian the object of attack,
2. Launching an indiscriminate attack effecting the civilian population or civilian object in the knowledge that such attack will cause excessive loss of life, injury to civilian or damage to civilian object;
3. Launching an attack against works or installation containing dangerous forces in the knowledge that such attack will

¹⁹⁹ Prisoner of Convention, Article 130 and Protocol 1, Article 85(3) (a-f) & (4) (a-d).

²⁰⁰ Protocol 1, Article 85(1), (2), (3)(a-f) and (4)(a-c).

²⁰¹ Ibid,Article (3) (a-f)

- cause excessive loss of life, injury to civilian or damages objects;
4. Making non-defended localities and demilitarized zones the object of attack;
 5. Making a person the object of attack knowing he is hors de combat;
 6. Perfidious use of distinctive emblem of the Red Cross, Red crescent or lion and sun²⁰² or other protected signs by the convention or protocol."

In addition to this list, protocol 1 in Article 85(1) provide that, certain other acts are grave breaches if committed willfully and in violation of the conventions or protocol such as :-

"..... transfer by the occupying power of parts of its own civilian population into occupied territory or deportation or transfer of all or parts of the population of that territory within or out of the territory (although this is permitted on a temporary basis to permit the entry of administration of the territory or if it is necessary for the security or imperative military reasons); unjustifiable delay in repatriating prisoners of war or a civilians²⁰³; practice of apartheid, and other inhumane and degrading practices involving".

²⁰² The lion and sun was finally used by Iran, but has disappeared since the inception of Islamic Revolution. Any perhdious use of the Red Shield of David would be considered a grave breach by Israel and those powers which recognize this emblem defector. See Green Leslie, opp. Cit, page 299, Footnote 80.

²⁰³ The policy of "Ethnic cleansing" carried out in 1999 and 1993 by the Serbs against Muslims population of Bosnia is clearly in breach of this provision, and has resulted in Yugoslavia's expulsion from the United Nations. However, the evacuation of some Muslims by the ICRC to prevent their being massacred cannot be considered a breach. See Ibid, footnote, 83. The Rwandan

Outrages upon personal dignity based on racial discrimination²⁰⁴; making the clearly recognized historic monuments; works of art or places of worship which constitute the cultural or spiritual heritage of people and to which special protection has been accorded by agreement²⁰⁵, the object of attack causing as a result extensive destruction there of; where there is no evidence of prior use of such objects in support of the adverse party's military effort; and when such places are not located in the immediate proximity of military Objectives, depriving any person protected by the conventions or the protocol of a fair and regular trial."

The fact that a particular act has not been listed as a war crime or grave breach does not preclude its being treated as a war crime if it is in breach of any of the customary or treaty law of armed conflict²⁰⁶.

COMMAND RESPONSIBILITY:

Every individual, regardless of rank or governmental status, is personally liable for any war crime or grave breach that he might commit. A commander, that is to say, anyone in a position of command whatever his rank might be including a head of state or the lowest non-commissioned officer, who issues an order to

Genocide of 1994 where over 500,000 Tutsis and Hutus were killed is also a clear case of the violation of this provision. See New African Magazine, May, 2004, No. 429, Page 24 and West Africa Magazine, 25th February, 2002 - 3rd March, 2002, Issue 4314, page 21.

²⁰⁴ The convention on the elimination of all forms of Racial discrimination (1965) 60, U.N.T.S 195

²⁰⁵ Hague convention for the protection of cultural property in the event of Armed conflict, 1954.

²⁰⁶ C. Green Leslie, *opp. Cit.* page 303.

commit a war crime or a grave breach is equally guilty of the offence with the subordinate actually committing it. He is also liable if, knowing or having information from which he should have concluded that a subordinate was going to commit such a crime, he failed to prevent it²⁰⁷, and if, being aware of such commission, fails to initiate disciplinary or penal action²⁰⁸,

Any commander failing to exercise proper control over his force with the result that they commit war crimes, even if he remains unaware of this when he should have known is also liable for war crimes²⁰⁹. This is because he is under obligation to know the behavior of his troops and ensuring that they behave in accordance with the law of armed conflict²¹⁰.

He is also liable if the offences occur within sight or hearing of his office, in the presence of his officers or non-commissioned officers, or if members of his unit have committed war crimes previously²¹¹.

DEFENCES

(a) NECESSITY:

A Person charged with war crimes or grave breaches cannot plea military necessity by way of defence²¹², unless the act in

²⁰⁷ 4th Geneva Convention, 1949, Article 148 and protocol 1, Article 87 (1-3). The case of former Liberian leader who is presently facing 11 charges before the United Nation International criminal tribunal at Hague readily came 10 mind. See NEW AFRICAN Magazine May, 2006, No. 451, Pages 10-15.

²⁰⁸ Protocol 1, Article 85 (3).

²⁰⁹ Re Yamashita (1945-6) 4 War Crimes reports, 1327 US1.

²¹⁰ Hague regulations, Article 1, See also, protocol 1, Article 43 and 87.

²¹¹ Re Meyer-(1945- the Abboye Ardenne case) 4 war crimes report, 97.

question relates to a breach of a treaty provision stipulating that military advantage may be taken into consideration²¹³.

The fact that military necessity does not constitute a defence does not mean that an accused is unable to plea that he acted under duress as, for example that, he was in immediate and real fear for his life²¹⁴. This does not, however, permit him to plead that he was threatened with subsequent disciplinary or penal action if he failed to obey an order to commit the act in question, although in such circumstances, the threat may be taken into consideration in mitigation of punishment. Similarly he cannot plead that he committed a war crime on account of personal necessity relating to his life or comfort, such as that he deprived a protected person of food to preserve his own life. This too, however may be considered a mitigating circumstance²¹⁵.

(b) **SUPERIOR ORDERS:**

It is almost inevitable in any war crimes that the accused will plead that he was only carrying out the order of a superior,

²¹² Re Lewinski (called Von Monstein) (1949) 16 Ann. D.G 509, 511 - 13.

²¹³ 4th Geneva Convention, Article 148 provides: No High contracting party shall be allowed to absolve itself or any other high contracting party of any liability incurred by itself or by another high contracting party in respect of breaches referred to in the preceding article.

²¹⁴ In Re Holzer (1949) cited at 5 war crimes report, 16 and 21. the case of person setting up a defence that he was compelled. There is no doubt on the authorities that compulsion is a defence when the crime is not of a heinous character. But the killing of an innocent person can never be justified. See also ERDEMOVIC case in which it was held that, even a threat to his life will not provide a defence when the charges relate to mass murder. PROSECUTOR VS DRAZEN ERDER -judgement, 5 March 1998 (37 I.L.M. 118,2, 1193) para 17 "Duress does not afford a complete defence to a soldier charging. It ed with a crime against humanity and / or a war crime involving beings. It may be taken only by way of mitigation".

²¹⁵ C. Green Leslie, Opp. cit page 305.

often one known to be dead or in captivity. Formerly, particularly when armies made up of professional volunteers, it was considered that a soldier must implicitly and without question carry out every order given to him, so that he could never be personally liable for a war crime he had been ordered to commit²¹⁶.

Today, however, especially since conscription has resulted in the enlistment of person from every walk of life and every level of intelligence, he is no longer regarded as an unthinking automation and is only required to obey lawful orders; as a result he cannot lawfully be punished for refusing to obey an unlawful order. Moreover since the protocol²¹⁷ requires commanders to ensure that those under their command are made aware of their responsibilities under the conventions and protocol, together with the presence of legal adviser on the instruction to be given, as provided by protocol 1, Articles 82 and 87 (2) it is now possible to presume that a soldier is aware of his obligation and he may legitimately question the order that he has been given. Already in the South African (Boer) war, the defence was narrowly defended. In *R.V. Smith*²¹⁸ Solomon J. declared: -

²¹⁶ Oppenheim, L., *International Law*, Edited by Lauterpacht, H., Longmans, London, 1st ed. 1952, through 5th ed., vol. II, page 253.

²¹⁷ Protocol 1, Article 87 (2).

²¹⁸ (1990) 17,S.C561.

"It is monstrous to suppose that a soldier would be protected when the order is grossly illegal (But that he is) responsible if he obeys an order not -strictly legal..... is an extreme proposition which the Court cannot accept (e), specially, in war immediate obedienceis required..... I think it is a safe rule to lay down that if a soldier honestly believes he is doing his duty in obeying..... And the orders are not manifestly illegal; that the.... ought to have known they were unlawful, (he) will be protected by the orders."

The judgment normally regarded as the leading authority on the issue of superior orders as a defence, prior to the Nuremberg Trial was THE LANDOVERY CASTLE decided by the German Reichsgericht at Leipzig in 1921²¹⁹. This arose out of the sinking of a hospital ship and subsequent firing on its boats. The Court pointed out that^^ ,

The firing on the boats was on offence against the law of nation... Any violation of the law of nation in warfare is..... a punishable offence, so as in general; a penalty is attached to the deed. The killing of enemies in war is in accordance with the law of the state that makes waronly in so far so as such killing is in

²¹⁹ HMS, and CMD, 1422 (1921) Cameron, the pelus trial, APP, IX.

accordance with the condition and limitations imposed by the law of nations.

The fact that this deed is a violation of international law must be well known to the doer; apart from acts of careless ignorance is a sufficient excuse. In examining the essence of this knowledge, the ambiguity of many of the rules of international law, as well as the actual circumstances of the case, must be born in mind, because in wartime, decision of great importance have frequently to be made on very insufficient material. This consideration however, cannot be appealed to the case of present before the court. The rule of international law which is here involved is simple and universally known. No possible doubt can exist with regard to question of its applicability.

Despite this judgment, the Pre-World War II, military law manuals of both, the United Kingdom and United States, persisted in stating that superior orders constitute a valid defence. However, after the outbreak of the war and the increasing knowledge of German breaches of the law, the statement were amended to bring them in line with the LANDOVERY CASTLE decision, recognizing that only lawful orders were to be obeyed, although an unlawful order might be considered by way of mitigation so long as the act was not one which violate(d) both unchallenged rules of warfare and outrage(d) the general sentiment of humanity²²⁰.

²²⁰ OPENHEIN, 1. OPP. CIT., PAGE 253.

TREATMENT OF THE ACCUSED NON-NATIONAL MILITARY PERSONNEL OF WAR CRIMES:

Non- national military personnel accused of war crimes, other than in absentee, are up-course prisoners of war, as such they are entitled until their conviction to be treated in the some way as other prisoners of war. Their trial must take place before the same Tribunal and in accordance with the same rules and procedure as apply in trials of members of the holding powers armed forces charged with similar offences as provided under Third Geneva Convention [Relative to the treatment of prisoners of war) Article 102.

Any civilian charged with war crime while in the power of the state of which he is national is entitled to all the safeguards of a proper trial and defence²²¹, and these must not be less than those

²²¹ As provided under 3rd Geneva convention (relative to the Treatment of Prisoners of war) Articles, 99-104. a provisions that are seriously violated by United States of America in regard 10 prisoners of war at Guntanamo Bee even though it persistly says, they are not prisoners of war as envisage by the convention and protocol but rather enemy combating), as justification for not according item rights as prisoners, of war as outlined by the 3rd Geneva convention. The term enemy combatant" or any of its derivatives illegal, unlawful or unprivileged combatant does not appear anywhere in me Geneva Convention., However, it does outline what is to be a legal combatant". So the U.S argues that any combatant who does not fall into this category should be designated as an "enemy combatant". According to the third Geneva Convention, a combatant must be afforded the legal status of prisoner of war if he or she is a member of an force or other militia. Moreover, Article 5 states should any doubt arise as to whether persons, having committed a7 belligerent act and having fallen into the hands of the enemy, belong to any of the categories (shown above) such persons shall enjoy the protection of the present convention until such time as their status has been determined by a competent tribunal. This means that, those detained at camp delta (Guantamo bee) have the legal right to be treated as prisoners of war, enjoying the protection that affords, until such time as a "competent tribunal decides otherwise. No such tribunal, competent or otherwise was initially set up to decide on legal status of the detainees at camp delta. This rendered illegal the detention of prisoners there at the time as enemy combatant. The United Stare of American Government was later forced to convene the combatant status review tribunal (CSRT) to, review each individual case at the conclusion of the review 38 prisoners were released, some also much debate as to whether the procedure followed by CSRT are enough to constitute a "competent tribunal" as the proceedings offered defendants few of basic protection such as the right to counsel and right to offer witnesses of their own. French detainees, returned to their countries of origin, nave made allegations of fortune against their American captors (allegation which have been denied previously). However, a report by the international Red Cross, which was leaked to the New York times, Claims that their inspectors found evident of tactics designed to "break the will" of prisoners such as, humiliation, sensory deprivation, solitary confinement and exposure to extreme temperatures and loud music. This was denied by Washington which maintained that its treatment of detainees therein complied with international standard. This

provided for prisoners of war by the prisoners of war convention. Further, they must always be presented for prosecution and trial in accordance with the applicable rules of international law and, if they do not enjoy as protected persons more favourable treatment under the conventions and protocol, they are to be granted the fundamental guarantees embodied in the protocol²²².

ESTABLISHMENT OF INTERNATIONAL CRIMINAL COURT:

In 1998 a treaty was adapted establishing an International Criminal Court. Although the Court has been established independently of the United Nation, it is to be a permanent Tribunal. Its jurisdiction depends on a case being referred to it by a state party or "by the security council acting under Chapter VII of the Charter", and the council, acting under chapter VII is given the power to defer any hearing for a period of twelve months and this decision may be repeated, as provided by Article 13 and 16.

Unlike the adhoc tribunal which has primacy over national tribunals, this Court is to be "complementary thereto, so that it will

continued denial of mistreatment have been wreaked considerably by documents leaked to the Washington post that revealed official approval for many of the tactics condemned in the Red Cross report. Defenders of Guantanamo Bee and the lack of legal protection for its detainees are often heard to claim that, these people are terrorists. It is somewhat difficult to understand how a conclusion could be arrived at without there ever having been a single trial to determine the innocence or guilt of those detainees. Not only that none of the prisoners has had access to lawyers or to the cases being made against them. They are defamed indefinitely, with the only dubious glimmer of hope being the prospect of a military tribunal, which would be held behind closed doors, with their defence conducted by the U.S military, which also serves as prosecutor, judge and executioner and none of the usual guarantees to a fair trial taken for granted in ordinary free and democratic societies. But is not only the maltreatment at Guantanamo Bee that are causing concern with human rights abuses being exposed at the Abu Ghraib prison in Iraq and the revelation that secret flights, operated by the CIA, have been using European airport to move terrorists suspect around the world to undisclosed location for interrogation and detention, it appear that the disregarding of established international standard 01 human rights and the abuse of prisoners has become systematic, and cannot be readily dismissed as isolated incident carried out by individuals acting without authority. See the Middle East Magazine April, 2006, Issue No. 366, Pages, 26-28.

²²² Protocol 1, Article 75 (1-8)

have to deny jurisdiction if the case is being investigated by a state which has jurisdiction over it, unless the state is unwilling to carry out the investigation or prosecution." However, recognizing a situation which may well result from a revolution Coup d' tat or devastating war, "in determining in a particular case, the court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings²²³. At one time it was thought that, an international Criminal Court would possess jurisdiction over offences detailed in the various drafts of the International Law Commission.

However, the new Court is clearly intended to deal only with "the most serious crimes of concern to the International Community as a whole," namely, genocide, crimes against humanity war crimes and aggression²²⁴. Interesting enough, although the Nuremberg Tribunal giving effect to its Charter, considered aggression to be the "Supreme International Crime..... In that it contains within itself the accumulated avid of the whole," and regarded less of the statement of principle drawn up by the International Law Commission, or the General Assembly's Resolution 3314 (xxix) of 1974 defining aggression, the draftsmen of the treaty were unable to agree as to what would constitute this offence.

²²³ Article 17 (1) (a) and 17 (3)

²²⁴ Article 5.

In accordance with normal practice the Court is bound to observe the principle known as in idem, the non-retroactivity of its jurisdiction which does not apply to offences committed before it comes into existence. While aggression is within its jurisdiction and much emphasis is given to war crimes, the Court will have jurisdiction over genocide and crimes against humanity even when committed in time of peace²²⁵.

The United State of America has made clear its opposition to the statute largely because of the fear that attempts may be made to try American personnel and there exist a basic conviction that, taking into consideration the number of peace-keeping and other operations in which American Forces may be involved,, there is too much risk that, political consideration will became significant in seeking to ground jurisdiction²²⁶.

However, as pointed out, if the United States were to initiate or indicate an intention to initiate proceeding against Americans in American Courts (e.g. the recent one it did in respect of some of its Forces who committed War Crimes in Abu Ghurraib prison in Iraq) the Court would lack jurisdiction. In other words, the jurisdiction of the International Criminal Court can be circumvented if a state put up its own Kangaro Court.

²²⁵ C. Green, Lesie, Opp. Cit page 313-5.

²²⁶ Ibid.

CHAPTER FOUR

ANALYSIS OF THE RIGHTS OF INDIVIDUALS UNDER ISLAMIC AND INTERNATIONAL HUMANITARIAN LAWS

INTERNATIONAL HUMANITARIAN LAW

The main objective of International Humanitarian law is to prevent unnecessary suffering during warfare. In this sense, it recognizes that human beings, being human, will fight each other. International Humanitarian law does not seek to prescribe rules for determining whether or not a fight was justly entered into. Rather it prescribes rules to confine the violence which is inevitable when it occurs to only the persons who are involved in the war, and only for the purpose for which the war is fought. It does so by prescribing sets of rules in order to ensure that belligerent actions are only confined to military necessity and targets, i.e. only to what is required in order to achieve the military objectives of the war.

International Humanitarian Law today can be discerned into two streams, viz, Hague law and Geneva conventions and its two additional protocols. The term Hague law – refers to the Regulations respecting the laws and custom of war on land, often referred to as The Hague Regulations 1907, and its numerous successor International instruments. The Hague Regulations purport to codify the International rules applicable to the means and methods of warfare. Its main purpose was to prevent unnecessary suffering during warfare. Thus the rights of

belligerents to adopt means of injuring the enemy, is not unlimited.

While the Geneva convention on the other hand, as it stands today is – mostly statutory and reflects developments in the rules of International Humanitarian law formulated by states in International treaties. It prescribes rules for the protections of non-combatants which include prisoners of war. However a strong argument has been made out that, many of the fundamental rules of International Humanitarian law are now so universally accepted by the community of nations that they have attained the status of customary International law and are binding on states even if they have not acceded to the treaties that enacted these rules (i.e. four Geneva Conventions and their two additional protocols of 1977).

So in essence, both the Hague law and the Geneva conventions of 1949 – and their two additional protocols of 1977 can be said to be based on three common principles:

- (1) The doctrine of military necessity which prescribes that all belligerent actions must only be to achieve a military objective so if an action cannot be justified with a military objective, it should not be undertaken.
- (2) The principle of distinction. This prescribes that a clear distinction must be drawn between combatants and non-combatants. This means for example, that weapons that harm both combatants and non-combatants at the same time are illegal.

- (3) The principle of proportionality, which prescribes that the amount and extent of violence applied achieve a military objective, should be proportionate to the military worth of that objective.

It is significant to point out that to some extent there seems to be areas of convergence between international Humanitarian law and International Human Rights Law. In essence International Humanitarian law tends to protect and preserve the humanity in man which is also the objective and basis of International Humanitarian rights law. It is submitted, for instance that, all prisoners of war are not only protected under the Geneva conventions but also protected by the Universal Declaration of Human Rights, convention against Torture among others.

ISLAMIC LAW OF WAR

Reviewing the early Muslim era and reflecting on the experience of the early Muslim generations, one can clearly see that peace was always the original position of Muslims, and that war was either a punitive measure to prevent tyranny and oppression, or a defensive measure to stop aggression.

From the very beginning, Prophet Muhammad (Peace be upon Him) was instructed to use a friendly and polite approach to call people to Islam. Despite the violent opposition of the Quraysh [tribe of Meccah], the prophet proceeded to summon people peacefully to Islam, after the immigration to Medinah, the prophet was permitted to fight those who declared war against Him and Muslims.

Islam permits war but keeps it within the strict rules and limits. Islamic law of law, has set down certain rules, which is merciful and considerate to people, and required Muslims to observe them. Islamic law of war has first drawn a clear line of distinction between the combatants and non-combatants. As far as the non-combatants population are concerned, such as, women, children, the aged and clergies the instruction of the prophet are as follows:

Do not kill any old person, any child, or any woman; do not kill the monks in monasteries.

Prophet Muhammad (Peace be upon Him) comes across a slain woman while riding in battle, he frowned with anger, and instructed:

Do not kill women and innocents, monks or other religious leaders who are deemed non-combatants. No wanton killing of livestock and animals, No burning or destruction of trees and orchards and no destruction of wells. ⁽¹⁾

Abu Bakr the first Caliph (Successor to the prophet) formulated a detailed set of rules for Islamic conduct during war. He gave the following instructions to a Muslim army setting out for Syria, which was then governed by the Byzantine Empire, thus:

Stop, o people, that I may give you ten rules for your guidance in the battlefield. Do not comment treachery or deviate from the right path. You must not mutilate dead bodies neither kill a child, nor a woman, nor an aged man. Bring no harm to the trees, nor burn them with fire, especially those which are fruitful. Slay not any of the enemy's flock, save for your food. You are likely to pass by people who have devoted their lives to monastic services, leave them along.⁽²⁾

So in essence, Islamic law of war granted protection to all civilian population, women, children, religious personnel, aged person and all other categories of person who did not take part in hostility through any other means as well as their objective, it also extended such protection to combatants who are incapable to continue with hostility as a result of injury or surrender. In essence, it can be safely concluded that, the main objective of armed conflict under Islamic law is to defend faith and self by way of defeating the adverse party with the least possible expenditure of men, resources and money, bearing principle of humanity in mind.

4.2 DIFFERENCES BETWEEN ISLAMIC AND INTERNATIONAL HUMANITARIAN LAWS:

Basically and substantially there is an agreement between Islamic law of war and International Humanitarian law in respect of the protection of the individual rights both combatants and non-combatants, and in many other respects, as highlighted in this research work. However, there are certain areas of divergence, such as:

- (1) Islamic law of war permits enslaving of prisoners of war in certain circumstances. Whereas, enslavement of prisoners of war is made a war crime under International Humanitarian Law. For this reason the 3rd Geneva Convention Article 118 provides:
"Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities". This clearly renders enslaving prisoner of war unlawful, hence a war crime, as provided under Articles 7 and 8 (2)(b) of Rome statute of 1998.
- (2) Under Islamic law of war killing of prisoners of war is permitted in certain circumstances, for instance, it's the view of Imam Malik, Imam Shafi'i and Imam Abu Hanifa that, prisoners of war who are believed to be extremely dangerous may be killed by the order of the Imam (head of Islamic government). They based their ruling on the practice of the prophet Muhammad (peace be upon Him) when He ordered the killing of UKUBAT BNA BI MU'ED

NADHARAD BN HARITH and HILAL BN AL-ADAL after the battle of Badr.⁽³⁾

Whereas, killing a prisoner of war is prohibited under 3rd Geneva Convention. Article 13, reads:

Prisoners of war must at all times be humanely – treated. Any unlawful act or omission by the detaining power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a seriously breach of the present convention.

The same prohibition is contained in protocol 1, Article 75⁽²⁾

- (3) Islamic law permits the payment of Jizya (Tax poll) from conquered persons if they would not want to embrace Islam. Earlier on it was pointed out that one of the objectives of war in Islamic law is for the protection and preservation of Islam therefore persons who are non-Muslims residents in Islamic territory would be required to pay Jizya since the Muslims are required to pay Zakka. However, the 3rd Geneva Convention has a different legal standing on the issue under consideration for it provides.

“Prisoners of war shall retain the full civil capacity which they enjoyed at the time of their capture....”

- (4) Another distinguishing character of Islamic law of war is that, it binds individuals not territory, the believer accordingly must ordinarily observe the law even if he happens to be in a non Muslim territory. Thus, the state jurisdiction is essentially dependant on its individual's religion which entitle him to membership as well as the citizenship of the Muslim state.⁽⁴⁾

Whereas, International Humanitarian Law, binds territories.

- (5) Defending faith (Religious right or right to practice one religion) is one of the purpose of waging war under Islamic law of war, as captured by S. Mahamassani's contribution to the subject of international law in the light of Islamic doctrine, where he said:-

Islamic law is essentially a law of peace, built on human equality, religious tolerance and universal brotherhood. War in theory, is just permissible only as a defensive measure on ground of extreme necessity, namely to protect the freedom of religion, to repel aggression, to

prevent injustice and to protect the freedom of religion....⁽⁵⁾

Whereas, under United Nations Charter, (Article 4), war is only permitted for the purpose of self defence, or under collective security provisions.

These are some of the fundamental differences between Islamic law of war and International Humanitarian law.

CHAPTER FIVE

SUMMARY, CONCLUSION AND RECOMMENDATION

5.1 SUMMARY

To recapitulate the main points discussed in this research work, a brief overview of the work, "PROTECTION OF THE RIGHTS OF INDIVIDUALS IN ARMED CONFLICT SITUATION: A COMPARATIVE ANALYSIS OF ISLAMIC AND INTERNATIONAL HUMANITARIAN LAW"²²⁷ hereby given.

The present work is opened with the general introduction to this research work, thus, chapter one, which comprises brief introduction to the Islamic law of war and International Humanitarian law, statement of the problem, objective of study, scope and limitation of research, justification for embarking on a research of this nature, and lastly, literature review.

Chapter Two, traces the origin and development of Islamic law of war, wherein the concept of Jihad was defined. The chapter also discussed types of Jihad under Islamic law of war i.e.

- (1) Defensive war
- (2) War against apostasy (RIDDA)
- (3) War against oppression or humanitarian intervention

²²⁷ Ahmad, Al-Dardiri, Abu al-Badakat, Al-Sharh al-Aqrab Ala Aqrab Al-Masaliki, Dhar Ma'aruf, Cairo – Egypt, Vol. 2, Page 275.

The chapter also examine the general rights and obligation of both combatants and non-combatants which include the rights of wounded, sick and dead combatants, as well as the different treatment of prisoners of war as provided by the Holy Qur'an and practices of the prophet Muhammad (peace be upon Him), and lastly the chapter end discussion with what amount to war crimes and their punishment under Islamic law of war.

Chapter three, deals with the International Humanitarina Law, wherein the followings are examined:

- a) Origin and development of this law.
- b) Permitted and forbidden practices during and after the aimed conflict.
- c) Treatment of prisoners of war, sick, wounded and shipwrecked as well as civilians generally.
- d) And lastly, the chapter examines war crime, defences as well as punishment for the crimes. It also gives a brief account on the establishment of International criminal court.

Chapter Four, is on the analysis of the rights of individuals under Islamic and International Humanitarian laws by way of comparism.

Chapter five summarized the entire research work and makes some concluding remarks which include conclusion and recommendation. From the foregoing, certain findings in terms of lessons learnt can be said to be as follows:

1. Islamic law of war like other branches of Islamic law generally based primarily on the two fundamental sources, thus, the Qur'an and the sunnah. It also recognized other traditional sources such as consensus (Ijma'a), analogical deduction/reasoning (Qiyas) the practice of the companions as well as other sources, such as treaties.
2. Another distinguishing character of Islamic law of war is that, it binds individuals rather than territories.
3. Another important finding of this research work is the different treatment of prisoners of war obtained under Islamic law of war, which differs radically with what is provided under International Humanitarian law (i.e. Geneva Conventions of 1949 and its two additional protocols of 1977).
4. It is also the finding of the research that, there is inter-relation between International Humanitarian law and International Human Rights law, in the sense that, if a right of a captured person during hostility is not protected under International Humanitarian, International Human Rights law fill the vacuum.

In view of these findings, this research work observe that, even though Islamic law of war is part of the Islamic law generally, based on the same sources and maintained by the same sanctions, it is expected to develop in order to meet the challenges of the changing circumstances, time and place. But unfortunately this branch of Islamic law is one of the branches of Islamic law that suffered serious set back and stagnation. Thus, it did not receive the attention it deserved from the scholars of Islamic law of the periods that followed the periods of four prominent scholars (i.e. Imam Abu Hanifa, Imam Malik, Imam Shafi'I and Imam Ahmad bn Hanbal), partly due to colonialism which policies halted the progress of any other branch of Islamic law beside those dealing with spirituality, by replacing them with secular legal systems, which as a result discouraged those scholars to pay due attention to this aspect of Islamic law, due to lower demands. For instance, if one cares to investigate he would find out that, there are some areas in the activity of war which either received minimal attention or no attention at all, such as:-

- a) Rules regulating the conduct of war in the Air and maritime.
- b) Prescribed and articulated penal punishment for war crimes.
- c) The position of Islamic law of war on the present phenomenon of suicide bombing.

These and other areas suffered neglect, hence, insufficient and un-articulated literature/rulings on them.

5.2 **RECOMMENDATION**

Based on the foregoing findings and observations, the following recommendations in the humble opinion of the writer will enhance further development of both Islamic law of war and International Humanitarian law:

- 1) Islamic International law in general and Islamic law of war in particular should be included in the syllabus of the Nigerian universities as an independent course unit for those who are offering, sharia, civil law, international relation, diplomacy and political science.
- 2) Islamic law lectures, law lecturers, and other lecturers in other discipline, such as political science, history and international relation with sufficient Arabic language background in the Nigerian Universities and other research centers, should embark on mass translation of the Arabic literature on Islamic law of war into English language with a view to develop and provide easy access to this important branch of Islamic law.
- 3) Ahmadu Bello University Zaria, center for Islamic Legal Studies should encourage the development of this aspect of Islamic law, through mass translation, conferences, seminars etc, both locally and

internationally; and it should involve all the stakeholders in the project, such as International Committee of Red Cross, Red Crescent, etc.

These are some of the recommendations a writer is able to offer in respect of Islamic law of war. While on the part of International Humanitarian law, it is respectfully recommends as follows:

- 1) More effective and efficient enforcement mechanism need to be evolved to back up Geneva conventions of 1949 and its two additional protocols of 1977, which are now seriously threatened by some powerful nations, such as United States of America, Israel, Great Britain etc.

Unless such is done, breaches will continue, a situation that is likely to drag the world further into unfortunate situations like the one we are witnessing currently in Iraq, Afghanistan, Palestine, Lebanon, etc, where war of aggression, suicide bombings, abductions, hostage taking and indiscriminate attack on civilians as well as the abuse of the rights of prisoners of war.

- 2) Some moral and ethical values should be inculcated in the minds of all the armed forces globally with a view to minimize rampant breach and violation of the rights

of both combatants and non-combatants during and after the war.

- 3) United Nations should strive to maintain its integrity by all means, or else to become completely worthless like its predecessor, League of Nations.
- 4) The Geneva Convention accord on the Treatment of prisoners of war be amended to ensure that those engaged in military action on behalf of stateless organization, recognized as prisoner of war and to receive the same protection as those who fight for established states or militia.

5.3 CONCLUSION

From what has been discussed so far by this research work, it is now apparent that, the two legal systems (Islamic law of war and International Humanitarian law) are substantially in agreement in regard to the protection accorded to both combatants and non-combatants, even though they differ radically in respect of the treatment of prisoners of war. Likewise, under Islamic law of war, there is no well defined and articulated punishment for war criminals, as has been highlighted herein.

Now the fundamental question is can these two different positions of these two legal systems be reconciled?

It is humbly and respectably submitted that, these two contradictory positions can be reconciled for the following reasons:-

- 1) Allah (SWT) did not make legislation in respect of killing prisoners of war, enslaving them, or enforcing Jizya on the conquered territory that refuse to accept Islam fixed, but rather discretionary, in the sense that, the Imam (head of Islamic government) is given a discretionary power by Allah (SWT) to either apply any of them, or not to apply any at all for instance, Imam, can release any of the prisoner of war or all of them, free of any charge and unconditionally, he can also impose Jizya, etc. Imam can exercise these discretionary powers unilaterally or on the bases of treaty with enemy, base on the instruction of Allah (SWT) as well as the practices of the prophet Muhammad (Peace be upon Him). Allah (SWT) says:-

So, when you meet (in the fight-Jihad in Allah's cause) those who disbelieve, smite (their) neck till when you have killed and wounded many of them, then bind a bond firmly (on them, i.e. take them as captive(s), thereafter either for generosity (i.e. free them without ransom) or ransom until war lays down its burden....²²⁸

²²⁸ Al-Shaukani, Muhammad bn Ali, Naulu Al-Audhar min Hadith Sayyid Al-Khair (Arabic Version) Dhar al-Jiel, Beirut-Lebanon, 1973, Vol. 8, Page 155.

It was also among the practice of the prophet Muhammad (Peace be upon Him) towards the prisoners of war. For instance, when He captured the city of Meccah, He released all the prisoners of war free of any charge.

- 2) It is permissible for Islamic state or individual to enter into treaty with non Islamic state/s or individuals.

Allah (SWT) says:-

- (a) "Except those of the unbelievers with whom you have a treaty and who have not subsequently failed you in aught, nor have supported anyone against you. So fulfill their treaty to them to the end of their term. Surely Allah loves the pious."²²⁹
- (b) "And if any one of the unbelievers (polytheist, idolaters, pagan) seek your protection then grant him protection, so that he may hear the word of Allah and then escort him to where he can be secure..."²³⁰
- (c) "How can there be a covenant with Allah and with His messenger for the mushrikun (polytheist, idolaters, pagan) except those with whom you made a covenant (treaty) near the

²²⁹ Al-Asqacani, Ahmad Bn Hajar – Al-Fatahu Al-Bhari, commenting on Sahih al-Bukhari, Dhar al-Fikr, Cairo – Egypt, Vol. 6, page 152.

²³⁰ Khaduri, Majid, War and peace in the Law of Islam. The John Hopkins Press, 1965, Page 55.

sacred mosque? So long as they are true to you, stand true to them verily Allah loves the pious,"²³¹

- (d) "...And fulfill every covenant (treaty/agreement), verily, the covenant will be questioned about".⁽¹⁰⁾

These Qur'anic injunctions were put into practice by the prophet Muhammad (Peace be upon Him) in a number of His treaties, such- among others – His treaty with AWS and KHAZRAJ (major Arab tribes in Medinah) a treaty (or constitution of Medinah as its popularly known) which was acceded to by the Medinan Jews (Banu Nadhir and Banu Qainuqa'a), His treaty with the Meccans (Hudaibiyya treaty), as well as other treaties He concluded with other tribes surrendering Medinah and outside. His treaties were regarded as model which was followed by His successors to the latter. Examples of their treaties are:

- a) A treaty concluded between patriarchs of Jerusalem with the Khalifa Umar bn Al-Khattab 17, A. H. (A.D. 635).
- b) Treaty concluded between Byzantines Empire and Mu'awiyya among others.

In view of the above, its clear that, Muslim government is given liberty by Allah (SWT) to enter into an agreement/treaty with non-Muslim government, provided the agreement will not lead to fundamental compromise to the

²³¹ Sobhi, Mahammasani, International Law in the light of Islamic Doctrine, Academic de Driol International Recoil de Course, 177, (1966) Page 307-8

basic tenants of Islamic law. The moment an Islamic government ratify or accede to a treaty, it become bound by it.

The classical example of this, is, when the treaty of Hudaibiyya was concluded and signed between the contracting parties, prophet Muhammad (Peace be upon Him) taught the entire Muslim nation how binding a treaty is according to Islamic teaching, in the sense that, among the provision of the said treaty, ----- "if any person among the Muslim converted into paganism and join the Meccan pagans, meccans are not oblige to return him/her back to Medinah, and if anyone among the pagans converted to Islam and join Muslims in Medinah prophet should return him/her back."

Prophet Muhammad (Peace be upon Him) accepted the condition in spite of the objection by some of His companions.

Immediately after signing the said treaty and before living the place of signing, one of the Meccans (Abu Jandal) converted to Islam and joined the Muslims therein, the representative of Meccans (who happens to be the father of Abu Jandal), there and then requested the prophet to hand him back to them base on the said provision, the prophet complied (despite the serious objection raised by Abu Jandal

and some of his companions), but the prophet told them, that, he had no any other option than to respect His commitment under the said treaty, (which action showed the extent of the binding nature of treaty according to Islamic teaching). Allah (SWT) says:-

- a) "Obey Allah and obey His Messenger....."
- b) "Whoever obey messenger, certainly he obeys Allah."
- c) "You have a good example in the prophet (His teachings) for whomever desire to prosper in the day of judgment".

(3) Islamic law is not meant to be burden, creating difficulties for human kind. It is design to facilitate mankind's individual and societal needs, as such, among the pillars on which Islamic law is based is removal of unnecessary difficulties wherever possible Allah (SWT) says:-

(1) "Allah does not burden a soul with more than it can bear".

(2) "Allah wishes for you ease and He does not wish difficulty for you"²³².

(3) "Allah did not make difficulty for you in your religion"²³³.

²³² QUR'AN: 2:185,

(4) "Allah wishes to lighten the burden for you, for man was created weak"²³⁴ .

In the light of the above quoted verses, some prominent scholars of usual al-Fiqh (Jurisprudence), such as SHATIBI, QARAFI and GHAZALI opined that, great part of Islamic law is not necessarily fixed, but are affected by time, place and circumstances. (Thus, it changes with the change of time, place and circumstances). This is because, Islamic law is meant for human benefit, and when circumstances require or necessitate change, Islamic law is ready to change.

It is reported that Caliph Umar bn Khatab, suspended the punishment of amputation of the hand of a thief due to the circumstances that warranted such, Le farming, which he considered as SHUBHA (doubt). It is also reported that, he cancelled the potion of Zakkah assigned for the encouragement of non Muslims to accept Islam, on the ground that, the need for such encouragement is no more there, because the objective of such legislation, was to have more people that will defend Islam then, due to serious threat Islam was facing from all quarters (i.e. whole Arabian peninsular), but now (during his time) Islamic State is firmly established, (for that reason, the money should now be used for much more relevant purpose).

²³³ QUR'AN: 22:78.

²³⁴ QUR'AN: 4:28.

What all the above decisions is teaching is that, Umar went beyond the mere literal meaning of those legislation, to find out the actual objective of the said legislations. Prophet Muhammad (Peace be upon Him) is reported to have said:-

"I instruct you to follow my Sunnah (teachings) and the Sunnah of my rightly successors....."

And it is unanimously agreed among the jurists that, Prophet (Peace be upon Him) was referring in the above quoted Hadith) to His four (4) rightly successors, i.e ABU BAKR, UMAR, USMAN and ALI .

While Allah (SWT) says, in regard to the obligatory nature of the obedience to the Prophet's instructions:-

- (1) "It is not for a believer man and woman whenever Allah and His Messenger Decree (gave an instruction) to have any other choose" (alternative/option, thus, if really he is a true believer, he Just have to obey that instruction).
- (2) ".....whoever disobeys Allah and His Messenger has gone manifest astray".

Most of the legislations dealing with social activities (which are not purely ritualistic/spirituals, i.e. prayer, fasting, Tauhid, Pilgrimage)

are meant to achieve a specific immediate objective, (thus mundane, even though complying with any precept of Shari'a instruction, whether social or spiritual will also earn him reward in hereafter), so if the benefit/objective for which the law is enacted is continuous, the law will continue, but if it changed due to a change in circumstances, time or place, the law must also change. The Islamic jurisprudential maxim says:-

"The purpose of any piece of law, depends on the cause (objective which it desires to achieve) the moment such an objective changes, the law will also change".

Some of the Acts of the prophet are considered as what is termed SIYASA AL-SHARIYYA, an act which is usually built based on the maslah of a particular moment, [i.e. to serve particular objective\ public interest], the moment the objective ceases to exist, the ruling made for that purpose will also become irrelevant.

In view of the above expositions, it can safely be concluded that, a great measure of Islamic law is not fixed or static, but rather flexible (more specifically, Islamic law of war, because most of its principles are founded on Ijtihad, based on either MASLAHA, SAD'AL-ZARFA or, Siyas al-Shariyya) it changes with change of time, place and circumstance. For this reason, it is humbly and respectfully submitted that there is nothing wrong in adopting any of the principles enshrined in Geneva Conventions of 1949, its two (2) additional protocols of 1977, or any other treaty, to be

recognized as part of Islamic law, provided they are not in clear conflict with the clear and express provision of either the holy Qur'an or authentic tradition of the Prophet Muhammad (peace be upon Him). More so, some of the Jahili Arab customary laws, governing marriage, contractual dealing, etc, which were not repugnant to Islamic teachings, were either adopted, or modified by Islamic law.

In view of all these submissions and authorities, it is humbly and respectably submitted that, since almost all Muslim states (if not all) are signatories/party to Geneva Conventions of 1949 as well as its two additional protocols of 1977, they are legally bound to observe and apply all its provisions to the extent of their ratification. In other words, it is now the conventions that will regulate their conduct of war, more especially in regard to the treatment of prisoner of war.

BIBLIOGRAPHY

<u>S/N</u>	<u>AUTHORS</u>	<u>BOOKS</u>
1.	AJILOLA, A. D.	INTRODUCTION TO ISLAMIC LAW.
2.	AL-LAIFI, MUHAMMAD	NAZARIYAT KI-AHKAM AL-HARB WOAL-AL-SULIM, DIRASAT AL- ' MUQARANA..
3.	ABU SULAIMAN, A. A.	TOWARDS AN ISLAMIC THEORY OF INTERNATIONAL RELATION.
4.	AL-GHAZALI, ABU HAMID	AL-MUSTASPHA. FI ILMI AL-USUL
5.	AL-ASQALANI, AHMAD BN HAJAR	AL-FATAHU AL-BHARI.
6.	GAMAQ, RAU MIFTAH	NAZARIYAT AL-HARB FIL ISLAM WA ASRUHA FIL QANUN DAULI.
7.	GENEVA CONVENTIONS OF 1949 AND ITS TWO ADDITIONAL	FOUR CONVENTIONS AND ITS TWO ADDITIONAL PROTOCOL.

PROTOCOLS OF 1977.

8. GIDE AND REST A HISTORY OF ECONOMIC DOCTRINE.
9. HASHIM, S.H. INTERPRETING THE ISLAMIC ETHICS OF WAR AND PEACE. '
[@WWW.ECCA.ORG/IJIIE/ARTICLES/CONTEMPORARYISSUES/ARTICLE](http://WWW.ECCA.ORG/IJIIE/ARTICLES/CONTEMPORARYISSUES/ARTICLE). HASHIM SOHAIL HS. LTML.
10. HAMIDULLAH, MUHAMMAD BN UMAR MUSLIM CONDUCT OF STATE.
11. IBNRUSHID KITAB AL-MUQADDIMA AL-MUHAHIDAT.
12. IBN QAYYUM, J.A. ZADAL AL--MA'AD FI HADYI KHARUL IBAD.
13. IBN HISHAM ABU MUHAMMAD, ABDUL-MALIK AL-SIRA AL-NABAWIYYA
14. IBN WAQIDI, MUHAMMAD BN UMAR. K1TAB AL-MAGAZEE

15. IBN HAMAM,
KAMALDEEN BN
MUHAMMAD SHARH FATAHU AL-QADEER.
16. KHADURL MAJID WAR AND PEACE IN THE LAW OF
ISLAM
17. LESLIE C; THE CONTEMPORARY LAW OF
ARMED CONFLICT.
18. GREEN LADAN.M.T. INTRODUCTION TO
INTERNATIONAL HUMAN RIGHT
AND HUMANITARIAN LAW.
19. MUHAMMAD ARAFAT,
AL-DASUQI,
HAMSDEED HASHIYAT AL-DASUDI ALA SHARH
AL-KABEER.
20. MAWARDI, ABU AL- KITAB AL-AHKAM AL-
HASSAN,ALI BN SULDHANIYYA.
MUHAMMAD IBN HABIB
21. QUTUB, SAYYID. FI ZALAL - AL-QUR'AN.
22. QAIRAWAN. ABU ZAID AL-RISALA.
23. REDHA. MUHAMMAD THE MESSENGER OF ALLAH,

MUHAMMAD.

24. SCHWAZENBERGER, G. AND BROWN. MUHAMMAD BN IDRIS A MANUAL OF INTERNATIONAL LAW.
25. SHAFI'I, ABU KITAB AL-UMM
26. SAED,AKBARABADI, ISLAMIC HISTORY, THE RISE AND FALL OF MUSLIM.
27. SAHANUN AL-MUDAWANA AL-KHUBRA
28. SHAIBANI. SIYAR AL-KABEER
MUHAMMAD HASSAN.
29. SOBBI, MAHAMMA SANI INTERNATIONAL LAW IN THE LIGHT OF ISLAMIC DOCTRINE.

MAGANIZES:

1. MIDDLE EAST MAGAZINE AUGUST/SEPTEMBER 2006, ISSUE NO.370.
2. MIDDLE EAST DECEMBER, 2006 ISSUE NO.373.
3. MIDDLE EAST FEBRUARY. 2005, ISSUE NO.353
4. MIDDLE EAST NOVEMBER, 2006

5. MIDDLE EAST APRIL. 2006, ISSUE NO.366
6. NEW AFRICAN MAY 2007, NO.462.
MAGAZINE.
7. NEW AFRICAN MAY, 2004, NO.429
MAGAZINE
8. NEW AFRICAN MAY, 2006, NO.451
MAGAZINE
- WEST AFRICAN 25TM FEBRUARY, 2002, 3[^]
MAGAZINE MARCH, 2002, ISSUE NO.4314
9. AFRICA TODAY. MARCH, 2002, VOL.8; NO.3.