

## **LEGAL PROTECTION OF CIVILIANS IN TIME OF ARMED CONFLICTS: THE ISSUE OF ENFORCEMENT**

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*Albeit the international humanitarian law (IHL) set principles and rules for the protection of civilians and civilian objects such as the rules of 'distinction', 'humanity' and 'proportionality' in time of armed conflicts; it is undeniable fact that civilians have always been the major victims of all kinds of wars across the world. Accordingly, this paper investigates why civilians - including men, women and children - persistently constitute the bulk of the victims in such conflicts despite the fact that there are adequate and universal legal norms for the protection of civilians in time of armed conflicts. Besides, it also briefly explores the compatibility of the contemporary rules of IHL with relevant rules of Shari' ah. Finally, authors propose some recommendations to end the culture of impunity and advance the culture of protecting civilians in time of armed conflicts.*

### **INTRODUCTION<sup>3</sup>**

This paper attempts to address one of the most fundamental questions in the field of international humanitarian law (IHL), i.e., in spite of the availability of 'adequate' and 'universal' legal norms for the protection of civilians in time of armed conflicts; why civilians - including men, women and children - persistently constitute the bulk of the victims in such conflicts. It is undeniable fact that civilians were the major victims of the two World Wars. Nowadays, majority of the victims of armed conflicts in Palestine, Syria, Afghanistan and Somalia, to mention few, are the unarmed

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and defenseless civilians. The perpetrators of violence against civilians are both State and non-State actors. In these and other 'armed conflicts',<sup>2</sup> few of which were 'international armed conflicts',<sup>3</sup> and the bulks of them are 'non-international armed conflicts',<sup>4</sup> in which civilians have been attacked, murdered, subjected to starvation, torture, sexual violence,<sup>5</sup> ethnic cleansing,<sup>6</sup> enslavement, forced conscription, displacement and sometimes the entire 'civilian population', as the case in Gaza, are collectively punished.<sup>7</sup> The question raises here is that what are the impediments in protecting civilians in time of armed conflicts. Well, there may be several barriers but the main one, as this paper explains, is the lack of political will to end the culture of impunity, to respect, implement and enforce the principles of IHL and other applicable rules. The primary responsibility of enforcing rules of IHL relating to the protection of civilians rests with any party that bears arms including State and non-State actors. However, the question is what if these actors were unable or unwilling to protect civilians whose responsibility is it to fill in the gap, to implement the applicable laws and to ensure full and effective protection of civilians. The paper briefly refers to the applicable law, its adequacy, its compatibility with relevant rules of *Shari'ah*, highlights the main impediments to protecting civilians and suggests to take of some positive actions to end the culture of impunity and promote the culture of protection of civilians in time of armed conflicts.

#### **PROTECTION OF CIVILIANS IN TIME OF ARMED CONFLICTS UNDER INTERNATIONAL LAW**

Generally, the main applicable law for the protection of civilians in times of armed conflicts is the IHL - a law which is different from, but closely linked to, international human rights law (IHRL). The former is special law applicable only in times of armed conflicts and the later is general law applicable in times of peace and war. Most of the rules of IHL such as the methods and means of warfare including the rules for the protection of civilians are not new to mankind as they were known to many generations of civilisations since time immemorial. In 634 A.D., Caliph Abu Bakr exhorted

the Muslim Army to learn certain rules by heart. The rules were: "Do not commit treachery, nor depart from the right path. You must not mutilate, neither kill a child or aged man or woman. Do not destroy a palm tree, nor burn it with fire and do not cut any fruitful tree. You must not slay any of the flock or the herds or the camels, save for your subsistence. You are likely to pass by people who have devoted their lives to monastic services; leave them to that to which they have devoted their lives".<sup>8</sup>

The Rules of IHL for the protection of civilians and civilian objects including the rules of 'distinction', 'humanity' and 'proportionality' were initially issued by sovereign authorities for the regulation of their own armed forces. The rules, eventually, through State practice, evolved as international customs forming part of the international law. In 1625, Hugo Grotius published his masterwork titled "*The Law of War and Peace*", in which he analysed the practice of States over the centuries in order to outline systematically how that practice had hardened into the law of nations.<sup>9</sup> In due course, the existing customary laws were codified in numerous conventions including the Geneva Conventions of 1949,<sup>10</sup><sup>10</sup> the most relevant of which is the Geneva Convention for the Protection of Civilians in Time of War and the two 1977 Additional Protocols (AP I and AP II) to the Geneva Conventions.<sup>11</sup> The Geneva Conventions and AP I apply in full to international armed conflicts.<sup>12</sup> A more limited set of rules of Geneva Conventions, namely Common Article 3<sup>13</sup> and AP II as well as customary law regulate the conduct of non international armed conflicts. This means the primary sources of IHL are customary and conventional international law. The main difference between the two is that the former binds all States, except the persistence objector State,<sup>14</sup> while the later binds only the contracting States.

The IHL, as a special branch of public international law, aims to limit the negative effects of an armed conflict on people and objects, lays down rules directing warring parties in both international and non international armed conflicts to uphold the well established customary and conventional humanitarian law principles of 'distinction',<sup>15</sup> 'humanity'<sup>16</sup> and 'proportionality'<sup>17</sup> -

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not to targets ‘civilians’<sup>18</sup> for both civilians and ‘civilian objects’ enjoy protection<sup>19</sup> against dangers arising from military operations<sup>20</sup> and are immune from military attacks,<sup>21</sup> not to create terror among civilian population,<sup>22</sup> not to subject them to indiscriminate attacks,<sup>23</sup> not to use weapons that make no distinction between combatants and civilians, not to cause excessive and unnecessary suffering or loss of life,<sup>24</sup> not to subject people to collective punishment,<sup>25</sup> not to commit genocide,<sup>26</sup> not to take civilians as hostage,<sup>27</sup> not to commit sexual violence<sup>28</sup> and not to enslave<sup>29</sup> or torture people.<sup>30</sup> ‘Military objects’<sup>31</sup> are the legitimate targets of an armed attack but not the ‘civilian objects’ and thus cannot be targeted. Armed attacks, which are non-discriminatory, disproportionate and superfluous to actual military necessary, are illegal, unjust, immoral, and wasteful of scarce resources and are counterproductive to the attainment of the political objectives for which military force was used, legally or illegally.

The IHL does not concern itself with the legality or illegality of the armed conflicts as this is the concern of “*jus ad bellum*” which is now regulated by the Charter of the United Nations (UN) and customary international law relating to the regulation of the use of force.<sup>32</sup> Rules of IHL relating to the protection of civilians apply to all types of armed conflicts, irrespective of whether they are waged legally or illegally and whether the armed conflicts are international or non international and that all the warring parties, irrespective of whether they are State actors or non-State actors have to abide by the IHL.

#### **RULES OF INTERNATIONAL HUMANITARIAN LAW: UNIVERSAL AND *SHARI’AH* COMPLIANCE**

Rules of IHL are universal, *Shari’ah* compliance (unless proven otherwise), and they bind all parties involved in armed conflicts, irrespective of whether the warring parties are Muslims or non-Muslims. All Muslim States are parties to the Geneva Conventions of 1949 and as per the principle of “*pacta sunt servanda*” and Article 26 of the Vienna Convention on the Law of Treaty 1969 (VCLT) they are bound to abide by their obligations.<sup>33</sup> The sanctity of treaty obligations is the most fundamental rule of the *Shari’ah*.<sup>34</sup>

Muslim States are required by the *Shari'ah* to fulfil their obligations under treaty to which they are parties and try to interpret its provisions in good faith because the sacredness of treaties, faithfulness to covenants and refraining from deceit<sup>35</sup> are stressed in the Quranic text. To this effect the Holy Quran, which is the primary source of *Shari'ah*,<sup>36</sup> provides the following provisions:

1. "And perform your Covenant [treaty]; verily the Covenant shall be enquired of [you shall be responsible for it]" (*Al-Isra*, 17:34):
2. "O you who believe, fulfill any obligations [you may make]" (*Al-Maeda*, 5:1):
3. "Fulfill the Covenant of Allah when ye have entered into it, and break not your oaths after ye have confirmed them: indeed ye have made Allah your surety; for Allah knoweth all that ye do" (*Al-Nahl*, 16:91):
4. "Excepting those of the idolaters with whom ye [Muslims] have a treaty, and who have since abated nothing of your right nor have supported anyone against you. [As for these], fulfill their treaty to them till their term. Lo! Allah loveth those who keep their duty [unto Him]" (*Al-Taubah*, 9:4):
5. "Fulfill the treaties you have made, such are the people of truth who fear God" (*Al-Baqara*: 2:177): and
6. "Every time they make a Covenant, some party among them throws it aside. Why, most of them are faithless" (*Al-Baqara*: 2:100).

These Quranic provisions cited above make the *Shari'ah* ruling on the binding effect of treaty law vividly clear. Under the *Shari'ah*, Muslim States Parties to any international treaty, including the Geneva Conventions and the Additional Protocols, are bound to abide by the obligations created under these treaties so long the obligations in question do not contravene the teachings of Islam. The obligations created under IHL as envisaged in the said Conventions and the Protocols are humanitarian in nature and are inline with the spirit of *Shari'ah*. In fact, the letter contains even richer and well developed principles for the Muslims to follow and

protect civilians and civilian objects in times of armed conflicts. If some Muslims failed to follow these principles, which unfortunately is the case in some of the contemporary armed conflicts involving Muslims, then that would be the fault of those individual Muslims but not the fault of Islam. This is the same as in the case of customary and conventional IHL for if its principles are not followed that would not be the fault of the law but the fault of those who violate the law.

The primary aim of IHL principles is to protect innocent and guiltless civilians as well as civilian objects, so is the main purpose of the *Shari'ah*. Both laws value human life and both advocate for its protection in accordance with law. Targeting defenseless civilians and thereby murdering them is surely not in accordance with either IHL or the *Shari'ah*.<sup>37</sup> The Holy Quran considers human life as sacred equating the unjustifiable killing of a human being with killing of the entire humanity and considers the act of saving a human life equal to saving the life of the entire humanity.<sup>38</sup> The *Shari'ah* prohibits targeting and killing of civilians, especially women, children, the elderly, religious clergy and unnecessary or excessive suffering.<sup>39</sup> So long civilians are not participating in the armed conflict, they are immune from military attacks and must be kept out of harm. If the warring parties do not abide by these clear rulings, they commit grave breaches of the Geneva Conventions which amount to war crimes and if the warring parties are Muslims they would also violate the rules of *Shari'ah* relating to civilian protection. In this case, civilians lose the protection afforded to them by both the IHL and the *Shari'ah* and become a legitimate military target once they pick up arms.<sup>40</sup> However, they cannot be granted prisoner of war status once they are captured but they have to be treated humanely. It must be noted that the presence of military personnel among the civilian population does not make the population to lose its status as civilian and as such military attack should be avoided in order to protect civilians.

## IMPEDIMENTS IN ENDING THE CULTURE OF IMPUNITY

It can be observed from the above discussion that the law protecting civilians is clear, adequate and universal, yet, as pointed out in the

introductory part of this paper, today more than 90 percents of the victims of armed conflict are civilians. The impediments to protecting civilians in situations of armed conflicts is therefore not lack of legal rules but rather lack of political will on the part of those whose responsibility is to fully respect, implement and enforce the IHL and other applicable rules. The primary responsibility to enforce IHL rest with States<sup>41</sup> and those who bear arms, be they State actors or non-State actors. Nevertheless, these actors have failed to faithfully carry out their responsibility for if they have done so why there is a large number of civilians have been victimised in times of armed conflicts and civilian objects like schools, market places and places of worships have been targeted and destroyed. These actors have often breached their obligation with impunity, some even committed genocide, war crimes, crimes against humanity and aggression but there are few instances where these criminals were brought to justice even though the international criminal law clearly call for the prosecution of these crimes under the Rome Statute 1998.

Civilians and civilian objects could have been out of harm had aggressive wars in the first place were not waged in clear violation of customary and conventional international law. Prevention is always better than cure. That is why international law calls for the pacific settlement of disputes.<sup>42</sup> If this call were adhered to, the 2003 invasion of Iraq could have not taken place and hundreds of thousands of civilians could have not been killed. Pacific methods of settling disputes, like negotiation and mediation, could also be utilised to avert internal conflicts. If these methods, called for by both conventional international law and *Shari'ah*, were strictly followed, the world would not have observed endless bloodshed for instance in Somalia. The internal conflict in Kenya was successfully resolved by mediation conducted by Kofi Annan, the former Secretary General of the UN. Thus, other internal disputes could also be resolved by peaceful means and avoid to lead to armed conflicts that devastate peace and harm civilians in various ways.

The way civilians were treated in Bosnia and Rwanda in the early 1990s shocked the conscience of humanity, threatened world's peace calling for the so-called guardian of international peace and security, i.e., the UN Security Council, to invoke its authority under Chapter VII of the UN Charter to act collectively to save life and restore peace but did it act as swiftly as it was expected for if it had done so genocide could have been averted and hundreds of thousands of life could have been saved. The reluctance on the part of the Security Council, due to the crippling effect of the veto power of its five permanent members, to take collective humanitarian action in Kosovo, clearly justified NATO, at least on moral ground, to take a unilateral action to save human lives in Kosovo. As Václav Havel, President of the Czech Republic said:<sup>43</sup> “[Kosovo] is probably the first war ever fought that is not being fought in the name of interests but in the name of certain principles and values. If it is possible to say about war that it is ethical, or that it is fought for ethical reasons, it is true of this war. Kosovo has no oil fields whose output might perhaps attract somebody's interest. No member country of the alliance has any territorial claims there and Milošević is not threatening either the territorial integrity or any other integrity of any NATO member. Nevertheless the alliance is fighting. It is fighting in the name of human interest for the fate of other human beings. It is fighting because decent people cannot sit back and watch systematic, state directed massacres of other people. Decent people simply cannot tolerate this and cannot fail to come to the rescue if a rescue action is within their power. This war gives human rights precedence over the rights of states. I see this as an important precedent for the future. It has now been clearly stated that it is not permissible to slaughter people, to evict them from their homes, to maltreat them and to deprive them of their property. It has been demonstrated that human rights are indivisible and that if injustice is done to some, it is done to all”.

The protection of civilians in time of armed conflicts could be effective and actual if the law providing for such protection is implemented, international crimes are prosecuted and the



perpetrators of the crimes are brought to justice and are punished following the due process of law. This is a challenging task but not impossible to do, if there is a political will, to deter the future violators of international humanitarian law. No doubt some of the violators of this law, like Milosevic, few of his colleagues and also some, though not all, Rwandan war criminals, were brought before the International Criminal Tribunal for Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) respectively to answer war crime charges against them.

Another textbook example can be seen is that of Rohingya humanitarian crises in which the successive military regimes and civilian governments of Myanmar (formerly known as Burma) have been committing ongoing genocide, war crimes and crimes against humanity against Rohingya minorities for decades in their own indigenous homeland Arakan State, a previously independence State now included in the modern-day Myanmar by the British colonial power upon its independence in 1948 and renamed it as Rakhine State in 1970s. On 11 November 2019, Gambia filed an application instituting proceedings against Myanmar concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide 1948 to the International Court of Justice (ICJ). As of now, the ICJ, pending its final decision, indicates certain measures in order to protect the victims of genocide.<sup>44</sup> Furthermore, on 14 November 2019, the Pre-Trial Chamber III of the International Criminal Court (ICC) also authorised the Prosecutor to proceed with an investigation for the alleged crimes within its jurisdiction, i.e., genocide, war crimes and crimes against humanity against Rohingyas committed by the successive military regimes as well as civilian governments of Myanmar.<sup>45</sup> In this case, the international community will have to wait to witness how the responsible perpetrators will be brought to justice through available international courts.

However, there are other violators of IHL who are yet to be brought to justice. Had Ariel Sharon, the former Prime Minister of Israel, been brought to justice for the murder of civilians in the

Sabra and Shatila refugee camp,<sup>46</sup> his predecessors could have not waged indiscriminate and disproportionate military attacks against civilians and civilian installations in Lebanon in numerous occasions the latest in 2006 and in Gaza in 2008-2009, 2012, 2014. In addition, many civilians were attacked and murdered in Afghanistan by the warring parties but so far no one is brought to justice.

Individuals are bound to suffer to watch the pain inflicted to fellow human being but we are powerless to do much to provide actual protection except to feel their pains.<sup>47</sup> Humanitarian organisations, like the International Committee of the Red Cross (ICRC), are doing excellent jobs for treating the wounded, the sick and the displaced but they too lack political authority to take actual decisions to prevent the death, torture and displacement to civilians. In the absence of political will to enforce the rules of IHL, the culture of impunity would prevail over the culture of protecting civilians. It is time to end such a culture of impunity which downgrades human civilisations even lower compared to some animal civilisations on this planet world.

## CONCLUSION AND RECOMMENDATIONS

The law would remain mere rhetoric if not enforced. It would have no deterrent effect if the violators of the law are not held responsible. Civilians would continue to suffer if the culture of impunity is not ended and the culture of protection advanced. In order to advance the culture of protecting civilians in time of armed conflicts, the following steps have to be taken by the concern parties.

1. Give peace a chance, work towards peaceful coexistence, resolve conflicts through pacific means, including negotiation and mediation, as advocated by contemporary international law as well as the *Shari'ah* and avoid armed conflicts. Remember prevention is better than cure.
2. Avoid aggressive use of armed force as aggression is one of the major causes of civilian casualties. Aggression violates international law. It is a crime against peace and is in fact

the supreme crime. It has to be suppressed and its perpetrators have to be brought to justice.

3. Educate the law enforcement machineries, particularly the army, and instill in them rules of IHL. Basic rules of IHL have to be taught in schools as today's children are tomorrow's leaders and law enforcers.
4. End suicide bombing because it involves self-emulation, indiscriminate killings and is therefore un-Islamic. Effort must be made to educate the public about this irrefutable fact.
5. The primary responsibility to protect civilians and civilian objects rests with the warring parties. If these parties failed and the situation was so grave that threatened international peace and security like that in Bosnia and Rwanda in the early 1990s, then the responsibility to protect civilians would shift to the UN Security Council and, as the guardian of peace and security, it has to act responsibly and in accordance with the purposes and principles of the UN Charter.
6. Establish credible, independent and impartial national or international enquiry commissions to investigate and find out the truth whether or not genocide, war crimes and crimes against humanity have taken place in an armed conflict. The primary responsibility to prosecute these crimes rest with the State in which the crime took place but if the State in question is unable or unwilling then these crimes have to be tried before an international, *ad hoc* or permanent, criminal tribunal and the offenders, if found guilty, have to be punished.
7. End the culture of impunity and this would only be possible if the perpetrators of the crimes of genocide, war crimes, crimes against humanity and aggression are brought to justice.

Authors humbly hope that the above recommendations would contribute to end the culture of impunity and maintain

international peace and security at both international and national level.

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### Notes

- 1 An earlier version of this paper was presented at the International Humanitarian Conference 2011: Protecting Civilians in Time of Armed Conflict: The Shari'ah and International Law Perspectives, 10 February 2011, Senate Hall, International Islamic University Malaysia, Kuala Lumpur, Malaysia.
- 2 “[A]rmed conflict exists whenever there is a resort to armed force between States or protracted armed violence between such groups within a State. International humanitarian law applies from the initiation of such conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal armed conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there”. *Prosecutor v. Tadic*, Appeal on Jurisdiction, Case IT-94-1-AR72 (Oct. 2, 1995), 35 I.L.M. 32, 54, para. 70 (1996); See also *Prosecutor v Kunarac et al.*, IT-96-23/1-A, Judgement, 12 June 2002, para. 56. Armed conflict can be categorised into two broad categories, namely ‘international armed conflict’ and ‘non-international (internal) armed conflict’.
- 3 ‘International armed conflict’ is defined as “a declared war or any other armed confrontation between two or more States, even if the state of war is not recognised by one of them. It also include within it wars of national liberation”. Thus, ‘international armed conflicts’ can be classified into two categories, namely (1) Inter-State wars (i.e., armed conflict between two or more States) and (2) Wars of national liberation. See International Committee of the Red Cross, “How is the Term “Armed Conflict” Defined in International Humanitarian Law”, *Opinion Paper*, March 2008, p. 1.
- 4 ‘Non-international armed conflict’ refers to “protracted armed

confrontation between governmental armed forces of one or more armed groups, or between such groups arising on the territory of a State". It may include civil wars – wars in which rebels within a State fight against the State or a group of rebels within a State fight against another group of rebels. See International Committee of the Red Cross, n. 3, at p. 3. According to Gasser, "non-international armed conflicts are armed confrontations that take place within the territory of a State between the government, on the one hand, and armed insurgents group on the other hand". See H.P Gasser, *International Humanitarian Law: An Introduction* (Henry Dunant Institute, Geneva/Paul Haupt Publishers, Bern: 1993), p. 555. A detail definition of non-international armed conflict is proposed by Schindler who says: "[T]he hostilities have to be conducted by force of arms and exhibit such intensity that, as a rule, the government is compelled to employ its armed forces against the insurgents instead of mere police forces. Secondly, as to the insurgents, the hostilities are meant to be of a collective character, i.e., they have to be carried out not only by single groups. In addition, the insurgents have to exhibit a minimum amount of organisation. Their armed forces should be under a responsible command and capable of meeting minimal humanitarian requirements". See D. Schindler, "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols", *RCADI*, 1979, Vol. 163, No. 2, p. 147.

- 5 Examples of sexual violence include rape, sexual slavery, enforced prostitution, sterilisation, indecent assault, and degrading treatment of similar nature.
- 6 Ethnic cleansing has come to the fore as a major problem in recent conflicts, such as those in the Balkans during the 1990s. It must be repudiated in all circumstances as a violation of the principle of distinction.
- 7 The United Nations Fact-Finding Mission on Gaza, headed by distinguished international jurist Richard Goldstone, lays out in detail the nature and scope of violations of international human rights and humanitarian law perpetrated on civilians in Gaza.
- 8 Majid Khadduri, *War and Peace in the Law of Islam* (The Lawbook Exchange, Ltd: 1955), p. 102.
- 9 H. Grotius, *De Jure Belli Pacis, Cds Libri Tres* (F. Kelsey trans. 1925 of 1625 ed.); S. D. Bailey, *Prohibitions and Restraints in War (R.I.I.A.)* (Oxford University Press for the Royal Institute of International Affairs: 1972), p. 25.

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10 The Geneva Conventions of 1949 include:

- (1) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31;
- (2) Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, 75 UNTS 85;
- (3) Geneva Convention Relative to the Treatment of Prisoners of War, 75 UNTS 135;
- (4) Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287.

All the four Geneva Conventions opened for signature on 12 August 1949 and entered into force on 21 October 1950.

11 Additional Protocols to the Geneva Conventions of 1949 (Protocols I & II), opened for signature on 12 December 1977, 1125 UNTS 3.

12 The four Geneva Conventions apply in full to “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the State of war is not recognised by one of them,” or in “any cases of partial or total occupation of the territory of a High Contracting Party”. See Article 2 Common to the four Geneva Conventions. The ICRC’s Commentary to Common Article 2 further clarifies that: “Any difference arising between two States and leading to the intervention of armed forces . . . is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a State of war. It makes no difference how long the conflict lasts, or how much slaughter takes place”. See J.S. Pictet, *Commentary of the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (International Committee of the Red Cross: 1952). The AP I, in its Article 1, indicates that: “This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions”. Article 1(4) of AP I further provides that: “[A]rmed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination” automatically qualify as international armed conflicts for the purposes of the Protocol.

13 Common Article 3 provides: “In the case of armed conflict not of an

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international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all cases be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth of wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above- mentioned persons:
    - (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
    - (b) taking of hostages;
    - (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
    - (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.
  - (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the Conflict. The parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of other provisions of the present Convention”.
- 14 A persistent objecting state is not bound by the eventual customary law if the state fulfills two conditions, i.e., (1) the objection must have been maintained from the early stages of the rule onwards, up to its formation, and beyond; and (2) the objections must be maintained consistently. See Villiger, *Customary International Law and Treaties* (Martin Nijhoff Publishers, Dordrecht: 1985), p. 14; See also *Anglo-Norwegian Fisheries Case* [1957] ICJ Rep 9.
- 15 The principle of ‘distinction’ is the ‘basic rule’ of IHL that seeks to shield those who are not directly participating in armed conflict from its effects

by prohibiting direct attacks upon civilians or objects that do not constitute legitimate military objectives. Article 48 of AP I provides 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 objectives and accordingly shall direct their operations only against military objectives”. In the *Nuclear Weapons* Advisory Opinion, the ICJ recognised distinction as one of two ‘cardinal’ principles of the law of armed conflict, the other being unnecessary suffering. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ Rep. 226 (July 8), at para. 77. See also, *Legal Consequences of a Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, General List. No. 131, (July 9, 2005), at para. 86. It is indisputable that the principle of distinction is customary international law for both international and non-international armed conflict. Article 13 of AP II sets forth the general principle that “the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations”. The application of the principle of distinction as a customary rule in non-international armed conflicts is emphasised in the ICRC Commentary to the Article. In *Prosecutor v. Tadic*, Case IT-94-1, (Oct. 2, 1995), at paras. 122 and 127, the ICTY Appeals Chamber also found the principle of distinction to be customary law in non-international armed conflict.

- 16 The principle of humanity complements the principle of necessity by forbidding those measures of violence that are not necessary, i.e., not relevant or proportionate to the achievement of a definite military advantage. This principle of humanity aims “to prevent and alleviate human suffering wherever it may be found to protect life and health, and to ensure respect for the human being”. See M. McDougal and F. Feliciano, *Law and Minimum World Public Order: the Legal Regulation of International Coercion* (Yale: 1961), p. 525.
- 17 Proportionality is a customary and conventional rule of IHL that prohibits attacks that may be expected to cause incidental civilian casualties or property damage which would be excessive in relation to the concrete and direct military advantage anticipated. See Article 33(3) of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.
- 18 ‘Civilian’ and ‘civilian population’ are defined in Article 50 of the AP I as “[A]ny person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Geneva Convention Relative to the Treatment of Prisoners of War and in Article 43 of this



Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian. Conversely, persons referred to in Article 4 (A), (4) and (5) and Article 43 (2) of the AP I are to be treated as civilians. These persons include medical personnel and chaplains and other persons accompanying the armed forces or members of technical crews. The civilian population comprises all persons who are civilians. 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.

- 19 Attacking civilians and civilian objects is prohibited. See Article 13 of the AP II, Article 8 (2) (e) (i) of the Rome Statute, and Common Article 3(1)(a) of the Geneva Conventions. In *Tadic case*, the Appeals Chamber of the ICTY stated that this was “declaratory of the principles of customary international law regarding the protection of civilian populations ... in armed conflicts of any kind”.
- 20 Article 51 (1) of the AP I provides that: “[T]he civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances”.
- 21 Article 51 (2) of the AP I provides that: “[T]he civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited”.
- 22 *Ibid.*
- 23 Article 51 (4) of the AP I prohibits indiscriminate attacks. According to this provision, indiscriminate attacks are “(a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction”.
- 24 Article 51 (5)(b) provides that: “[A]n attack which may be 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”.

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- 25 Collective punishment is a penalty imposed upon persons or groups for acts that they have not committed. Collective punishment is expressly prohibited in the context of both international and non-international armed conflict.
- 26 Participating in genocide in any way is forbidden. Genocide is any of the following “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; or (e) Forcibly transferring children of the group to another group”. See Article 3 of the Genocide Convention; Articles 2.2 and 4.2 of the ICTY; Article 6 of the Rome Statute.
- 27 Common Article 3 of the Geneva Conventions and Article 4(2)(c) of the AP II forbid taking hostages for any purpose.
- 28 “Sexual violence, which can be committed against persons of either sex and irrespective of age”, is expressly prohibited in Article 4(2)(e) of the AP II.
- 29 Article 4(2)(f) of the AP II specifically forbids “enslavement in any form during non-international armed conflict. Examples of enslavement include trafficking in persons, particularly women and children, for sexual or any other unlawful purposes”.
- 30 Common Article 3(1) of the Geneva Conventions prohibits “torture, mutilation, and cruel or degrading treatment”. Article 4(2)(e) of AP II adds a prohibition of corporal punishment. “Torture is the intentional infliction of severe pain or suffering, whether physical or mental, for such purposes as punishment, obtaining information or a confession, intimidation or coercion, or a reason based on any kind of discrimination. A major form of torture is mutilation, which includes permanent disfigurement, permanent disablement, and the removal of any part of the body, unless justifiable on medical grounds or carried out in the victim’s interest”. Corporal punishment, defined as “the application of physical force that results in pain, is also excluded. Degrading treatment would include, for instance, publicly parading captured personnel in a manner subjecting them to ridicule and insult”.
- 31 Article 52 of the AP I defines military objectives as “those objects which by their nature, location and use make an effective contribution to the enemy’s

military action; and whose destruction, capture or neutralisation, in the circumstances ruling at the time, offer a definite military advantage”.

- 32 See Mohammad Naqib Ishan Jan, *Use of Force in International Law* (CLJ Publication: 2011).
- 33 According to Article 26 of the Vienna Convention on the Law of Treaties 1969, “Every treaty enforce is binding upon the parties to it and must be performed by them in good faith”. This Article reflects the principle of ‘*pacta sunt servanda*’, that means a State that becomes a party to a treaty is bound to carry out the duties established by that treaty. See Mourice Mendelon, “Are Treaties Merely a Source of Obligation”, in W. E. Butler (ed.) *Perestroika And International Law* (1990), p. 81; Louis Henkin, “*International Law: Politics, Values and Functions*”, *Recucit Des Cours*, 1989, Vol. 9, p. 51; J. L. Brierly, *The Law of Nations* (Humphrey Warlock, London: 1963), pp. 45-49; Josef L. Kunz, “*The Meaning and Range of the Norm Pacta Sunt Servenda*”, *Am. J. Int’l L.*, 1959, Vol. 39, p. 775; Common Article 1 of the Geneva Conventions which requires States parties to undertake “to ensure respect for the present Convention in all circumstances”.
- 34 See Mohamed Hosny Mohamed Gaber, *Earthly Islamic State with Special Reference to the Evolution of the Principle of the Islamic International Law*, (U Microfilms International: 1983), pp. 96-100.
- 35 “To the Greeks, the rule of good faith formed part of universal law. To the Romans, it was part of *jus gentium*, which is common to every tribe and people: *pacta sunt servenda*. To the Muslims, it (is) part of the *Shari`ah* or divine law, *at-taharruz `anal-ghadr* (refraining from deceit), which is set forth in unmistakable terms in both the Quran and Traditions (of the Prophet Muhammad (*s.a.w.*))”. *Ibid.*, at p. 97.
- 36 There are four main sources of *Shari`ah*, namely: the Quran, the *Sunnah*, *Ijma`* and *Qiyas*. The Quran is the words of Allah (*s.w.t.*) as revealed to Prophet Muhammad (*s.a.w.*). The *Sunnah* (*ahadith*) are the traditions of the Prophet Muhammad (*s.a.w.*) and are made up of his actions and sayings. The *Sunnah* helps to interpret the Quran. *Ijma`* is a consensus among Islamic jurists. When consensus is reached among Islamic jurists, *Ijma`* occurs, and the rule or opinion is considered law.
- 37 “[T]ake not life which Allah has made sacred, except by way of justice and law: thus He commands you that you may learn wisdom” (Quran, Al-Anaam, 6:151).

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- 38 “[I]f anyone killed a person not in retaliation for murder or for his spreading evil in the land, it would be as if he killed the whole of mankind. And if anyone saved a life, it would be as if he saved the whole of mankind” (Quran, Al-Maeda, 5:32).
- 39 Prophet Muhammad (*s.a.w.*) instructed Muslims who are forced to fight a war: “Do not kill women or children or non-combatants and do not kill old people or religious people”, and he mentioned priests, nuns and rabbis. And he said, “Do not cut down fruit-bearing trees and do not poison the wells of your enemies”. At the end of one battle Prophet Muhammad (*s.a.w.*) saw a corpse of a woman among the dead and he asked those present about her presence. They told him she was killed by Khalid ibn Walid’s army. The Prophet told one of them to run to Khalid and tell him that he forbade the killing of children, women, and servants.
- 40 See Articles 48 and 51(3) of the AP I; Article 13(3) of the AP II.
- 41 Common Article 1 to the Geneva Conventions clearly provides that States parties undertake “to ensure respect for the present Convention in all circumstances”.
- 42 See Articles 2(3) and 33 of the Charter of the United Nations.
- 43 Vaclav Havel, Speech to a joint session of the Senate and House of Commons, Ottawa, 30 April 1999.
- 44 International Court of Justice, “Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia v. Myanmar) - Provisional measures” (23 January 2020) <<https://www.icj-cij.org/en/case/178/provisional-measures>> (accessed on 12 April 2020).
- 45 International Criminal Court, “ICC judges authorise opening of an investigation into the situation in Bangladesh/Myanmar”, ICC-CPI-20191114-PR1495, (14 November 2019) <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1495>> (accessed on 12 April 2020).
- 46 “The Sabra and Shatila massacre took place in two Palestinian refugee camps (Sabra and Shatila) in Beirut, Lebanon during 16-18 September 1982, during the Lebanese civil war. In this period Israeli-allied Phalangists entered the camps which were entirely surrounded by Israeli tanks and soldiers. The Phalangist militia raped, killed, and injured thousands of unarmed civilians, mostly children, women and elderly people inside the encircled and sealed camps. More grotesquely, the Israeli Occupation Forces ensured there was no lull in the brutal killings and illuminated the area

with flares at night and tightened their cordon around the camps to make sure that no one could escape the terror that had been unleashed. The Israeli Defense Minister, Ariel Sharon, who is known as the 'Butcher of Sabra and Shatila', and his Chief of Staff, Rafael Eitan, watched from the seven story Kuwaiti embassy as their Phalangist allies massacred the hapless Palestinians imprisoned in the camps". For further detail see Abdus Sattar Ghazali, "Remembering the Sabra and Shatila Massacre", (18 September, 2010) <<https://www.countercurrents.org/ghazali180910.htm>> (accessed on 12 April 2020).

- 47 "Human beings are members of a whole, In creation of one essence and soul. If one member is afflicted with pain, Other members uneasy will remain. If you have no sympathy for human pain, The name of human you cannot retain". A Persian (Farsi) poem composed by Sa'adi Shirazi (1213-1293).



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