

Concept and Implications of Collateral Damage in the Light of Islamic Law and International Humanitarian Law

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Abstract

Wars and armed conflicts are irresistible reality of every time. Neither Islam nor international humanitarian law absolutely prohibit wars. The limitations prescribed only discuss the legality and illegality of wars and means and methods of that time. In this regard, Islamic law as well as international humanitarian law prescribe certain limitations regarding the damage to the life and property of people including combatants and non-combatants. Generally, it is well settled that damage to the life and property of non-combatants is not permissible both under Islamic law and international humanitarian law. However, there are certain conditions when any such damage to the life and property of non-combatants including civilians could be legalized. One such scenario is the case of collateral damage. While aiming at a lawful military target, if any damage is caused to the life and liberty of non-combatants, it becomes permissible subject to certain limitations. However, the principle is often misused by the aggressive parties in a way that whenever damage occurs to the non-combatants, it is labeled as collateral damage and is justified on this ground. Whereas there are certain principles that have evolved with the passage of time and need to be observed while ascertaining the legality of collateral damage. Furthermore, the scale of collateral damage also needs to be observed. For instance, it is yet to be ascertained what proportion or percentage of collateral damage could be legalized as compared to damage to a lawful military target. Various powers justify killings of ten people in collateral damage as compared to one lawful target which is declared excessive and unjust by many others. Therefore, it is imperative that some definite concrete rules should be developed for ascertaining the exact ratio and proportion of collateral damage. No provision under international humanitarian law prescribes any such criterion. Islamic law also does not specify the exact quantum of collateral damage. However, case law developed under international humanitarian law prescribes some rules regarding certainty of the principle. On the other hand, Islamic law also contains instances that could lead us to ascertain the exact criterion for ascertaining the legality or illegality of collateral damage. This paper aims to conduct a comparative study of Islamic law and international humanitarian law on the issue and attempts to produce some concrete rules regarding ascertaining the exact quantum of collateral damage for the purpose of its legality and illegality particularly in today's scenario.

Key words: War; Non-combatants; Civilians; Collateral damage; Legality.

Introduction:

The principle of distinction and proportionality are the basic principles of international humanitarian law (IHL). According to the principle of proportionality, while targeting a lawful military object,

civilians and civilian objects must be spared to the extent possible. It has been further laid down that any damage caused to civilians and civilian objects must not be excessive as compared to the military advantage a party anticipates and any kind of excessive use of force resulting in excessive damage would be in violation of the law of armed conflict.¹ Those attacks would also be unlawful that cause disproportionate collateral damage.²

Generally, under IHL, any damage to civilian life and property is not permissible. However, there are circumstances when any such damage becomes permissible under the law of armed conflict termed as ‘collateral damage’. The term means that if actions are conducted in accordance with the law of war then any incidental loss to the life and property of non-combatants or civilians would not be unlawful. However, there are certain conditions for these actions to become lawful i.e. these actions (i) are based on military necessity and (ii) should be proportional to that military necessity. If these conditions are fulfilled, then in accordance with the principles of IHL, they cannot be declared unlawful and accordingly question of compensation with regard to any damage caused by these actions would not arise.³

The concept of collateral damage has also been given the name of ‘double effect’ theory, which means that an attack launched against the enemy may have a positive effect and a negative effect. In such like situation, a negative effect can be justified as a lesser of two evils if resorting to it repels a greater harm. According to Welzer, this theory is the basis for acceptance of the doctrine of collateral damage. However, it can only be permitted under certain conditions. He, in this regard, says that:

[I]t is permissible to perform an act likely to have evil consequences (like the killing of noncombatants) provided the following four conditions hold: 1) The act is good in itself or at least indifferent, which means, for our purposes that it is a legitimate act of war. 2) The direct effect is morally acceptable—the destruction of military supplies, for example, or the killing of enemy soldiers. 3) The intention of the actor is good, that is, he aims only at the acceptable effect; the evil effect is not one of his ends, nor is it a means to his ends. 4) The good effect is sufficiently good to compensate for allowing the evil effect; it must be justifiable under Sidgwick’s proportionality rule.⁴

So according to this theory, the primary object for the justification of collateral damage is that it is legal if it is caused in order to repel a greater harm subject to the fulfillment of four conditions enumerated above.

Concept and definition of Collateral Damage:

These instances reflect that at times civilians and civilian objects can lawfully be killed during an attack that was not aimed at them rather at some lawful object and target. This concept is called ‘collateral damage’ under IHL.⁵ It is also argued that in the war, collateral damage cannot be avoided and there cannot be presumed any circumstances where damage to life and property of civilians does not occur as civilians are supposed to be present in the areas of a lawful military target. Situation of a war without any loss to civilian life and property can only be imagined in an area where no civilian life exists e.g. in the sea or a desert or forest without human life. Therefore, we can say that collateral damage is a hard reality which has been accepted under the law of war. In other words, collateral damage is part and parcel of war and it cannot be presumed that any attack would target only the lawful objects with such an accuracy that no damage to the life and property of civilians could be

¹ International Committee of the Red Cross, *the Law of Armed Conflict: Basic Knowledge* (Geneva: ICRC, 2022), 12.

² International Committee of the Red Cross, *the Law of Armed Conflict: Non-International Armed Conflict* (Geneva: ICRC, 2022), 18.

³ W. Michael Reisman, “Compensating Collateral Damage in Elective International Conflict”, *International Human Rights Law Review*, (2013) Vol. 8, 9.

⁴ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 2006), 153.

⁵ Arne Willy Dahl, “ICC Statute Article 8(2)(b)(i)” (2017) PURL of film: <www.cilrap.org/cilrap-film/8-2-b-i-dahl>, accessed 23-10-2024.

caused. Disallowing any attack that is likely to cause collateral damage would mean disallowing all kinds of attacks.⁶ Given the fact that loss of civilian life is unavoidable, collateral damage has been given legal cover under IHL and the only express condition provided under Additional Protocol I is that it should not be ‘excessive’ as compared to the anticipated military advantage.⁷

Legality and Illegality of Collateral Damage:

No provision of law of Geneva Conventions or their Additional Protocols covers this situation. However, it is covered by Article 8, paragraph 2, sub-paragraph (b) (iv) of the Rome Statute of International Criminal Court which criminalizes any attack causing excessive damage to the civilians or civilian population in relation to direct military advantage anticipated from that attack. Article 8(2)(b)(iv) of the Rome Statute prescribes circumstances where intentional attack and damage to civilian life and objects leads to the commission of serious violations of the law of war. For the sake of clarity, Article 8(2)(b)(i) to (iv) is reproduced hereunder:

Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
- (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.⁸

The provision is clear that any such attack cannot be intentionally launched when it is known that any such attack would cause incidental loss to civilians or natural environment excessive in relation to concrete and direct military advantage. However, the exact criteria has not been provided in this provision either which could ascertain as to what extent and as to what ratio any incidental loss to civilian life and property could be justified.

However, certain principles could be deduced from Article 8(2)(b)(iv) supra. According to these principles, an attack can be declared indiscriminate if the attacker does not know that it will hit the civilians or a military object. Even if a military objective is located in the area surrounded by civilian population, this kind of attack is not permissible. Aerial bombardment or carpet bombing are the examples of such indiscriminate attacks. Even if the attack is intended to be launched against a military target in any such area and the same was not launched with the precision against the military target or was indiscriminately launched against the military target hoping that someone will be hit, the loss of civilian life and property in such an attack would become unlawful. Therefore, we can say that indiscriminate attacks are prohibited under IHL and any such attacks are meant to be conducted directly against the civilians. This scenario aligns with the case of excessive collateral damage. However, it is difficult to draw a clear line between indiscriminate attacks and excessive collateral damage, but basic principles should be followed in ascertaining any such case.⁹ Indiscriminate attacks

⁶ Yoram Dinstein, “Concluding Remarks: LOAC and Attempts to Abuse or Subvert It”, *International Law Studies*, Volume 87, 487.

⁷ Article 51(5)(b) of Additional Protocol I.

⁸ Article 8(2)(b)(iv) of the Rome Statute of the International Criminal Court.

⁹ Arne Willy Dahl, “ICC Statute Article 8(2)(b)(i)” (2017) PURL of film: <www.cilrap.org/cilrap-film/8-2-b-i-dahl>, accessed 23-10-2024.

are otherwise prohibited under Article 51 of Additional Protocol I which states that:

Indiscriminate attacks are prohibited. 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.¹⁰

In view of Article 51 *supra*, three main conditions have been set out to consider an attack indiscriminate which include, attack has not been directed against a specific military target, has employed means and methods that cannot be directed against a specific military target and effects of attack cannot be kept limited. All these three conditions have been prescribed to fulfill one of the fundamental principles of IHL i.e. principle of distinction.¹¹ In the light of these principles and conditions, parties also have a duty to abort an operation or attack where it appears that collateral damage would be excessive in nature as compared to the anticipated military advantage.¹² Moreover, parties are also under an obligation to use weapons of a nature which are likely to cause less collateral damage and not excessive even if any such weapons are more costly than the ordinary ones.¹³

The relevant principles governing the scheme of collateral damage also envisage that while deciding as to whether an attack is indiscriminate, reference should be made to the foreseeable effects of any such attack. For instance, if an attack is launched against an ammunition depot which is otherwise a military target, but with the foreseeable circumstances that its fuel and fossils would cause damage to civilians and civilian population, then any such attack would be indiscriminate and unlawful.¹⁴ Therefore, mere existence of a lawful target or a lawful object is not sufficient under IHL, rather surrounding circumstances should also be considered before launching any such attack. If any attack otherwise launched against a lawful military target or object causes disproportionate collateral damage as a result of ignoring the surrounding circumstances such as given in the above instance, such attack would be unlawful and amounts to “Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated” as enumerated under Article 8(2)(b)(iv) of the Rome Statute.

Similar case would arise where a person launches an attack against somebody assuming that he or she is a lawful target but without any care that the attack is being launched against a civilian or a combatant. It means that in case of doubt, no such attack can be launched merely on the basis of anticipation of a lawful military target. According to the verdict of International Criminal Tribunal for Yugoslavia (ICTY) in Galic case, this kind of act constitutes a crime. Another similar situation is that when an attacker believes that the object of attack is lawful, but even then he does not undertake necessary care and caution that a civilian might be object of any such attack. This principle also necessitates that due care and precaution should be taken while launching any such attack in order to distinguish civilians from the attack. Although lack of this kind of precaution does not render it a war crime but may constitute recklessness and may constitute violation of IHL. In determining any such crime or recklessness, one must analyze what kind of information was available to the person

¹⁰ Article 51(4) of Additional Protocol I.

¹¹ Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (Oxford: Hart Publishing, 2008), 136.

¹² *Ibid*, 137.

¹³ *Ibid*, 182.

¹⁴ The Joint Doctrine and Concepts Centre, *The Joint Service Manual of the Law of Armed Conflict: Joint Service Publication 383* (Wiltshire: the Joint Doctrine and Concepts Centre, 2004) 26.

launching any such attack at the time of its launching. The assessment should not be based merely on observation rather all aspects should be taken into consideration. Moreover, attacks against civilians cannot be launched even by way of reprisals. Additional Protocol I of 1977 (AP I) prohibits any such attack. In this regard, Article 20 of AP I states that “Reprisals against the persons and objects protected by this Part are prohibited.”¹⁵ Article 51(6) states that “Attacks against the civilian population or civilians by way of reprisals are prohibited.”¹⁶ Article 52(1) states that “civilian objects shall not be the object of attack or of reprisals.”¹⁷ With regard to the protection of objects indispensable to the survival of the civilian population, Article 54(4) states that “These objects shall not be made the object of reprisals.”¹⁸ Moreover, not only the life and property of civilians rather cultural property has also been protected from reprisals. In this regard Article 53 of AP I states that:

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:

- a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
- b) to use such objects in support of the military effort;
- c) to make such objects the object of reprisals.¹⁹

Furthermore, attacks against natural environment are also prohibited by way of reprisals. In this regard Article 55(2) says that “attacks against the natural environment by way of reprisals are prohibited.”²⁰ Finally, with regard to protection of works and installations containing dangerous forces, Article 56(4) states that “It is prohibited to make any of the works, installations or military objectives mentioned in paragraph 1 the object of reprisals.”²¹

However, these prohibitions have not attained the status of customary international law and accordingly these are not binding on the states not a party to AP I or those who have made any reservation in this regard. For instance, the United Kingdom has entered into reservation with regard to this rule.²²

The principle of proportionality is another fundamental principle of international humanitarian law that requires that an attacker should not accept increased risk. It rather requires to refrain from any such attack in order to avoid excessive collateral damage.²³ In order to ascertain whether principles of distinction and proportionality have been violated or not, collateral damage estimation is another tool. For estimation, number of aspects have to be kept in mind including the exposure of civilian population in case of an armed attack, effects of blast and fragmentation in case of attack, nature of the target, its location and environment.²⁴ Exposure of civilian population would differ in case where they are used as human shields and when they are inside their residents. Therefore, according to IHL, the accurate estimation of collateral damage in order to bring it in legal or illegal sphere cannot be made and the threshold of civilian damage would differ depending upon different situations. However, certain principles have been set by international instruments including the Geneva Conventions and their Additional Protocols discussed above. From these principles, we can deduce that any attack should be launched with precision; any attack without precision causing damage to

¹⁵ Article 20 of Additional Protocol I.

¹⁶ Article 51(6) of Additional Protocol I.

¹⁷ Article 52(1) of Additional Protocol I.

¹⁸ Article 54(4) of Additional Protocol I.

¹⁹ Article 53 of Additional Protocol I.

²⁰ Article 55(2) of Additional Protocol I.

²¹ Article 56(4) of Additional Protocol I.

²² Arne Willy Dahl, “ICC Statute Article 8(2)(b)(i)” (2017) PURL of film: <www.cilrap.org/cilrap-film/8-2-b-i-dahl>, accessed 23-10-2024.

²³ The Joint Doctrine and Concepts Centre, *The Joint Service Manual of the Law of Armed Conflict*, 26.

²⁴ The French Joint Centre for Concepts, “Doctrine and Experimentation, Collateral Damage Estimation” 157/DEF/CICDE/NP, (2014), 21.

civilian life and property would be unlawful; in case of doubt between a civilian object and a lawful military target, attack should be avoided; an attack can be launched merely on the basis of anticipation of a lawful military target; indiscriminate attacks are unlawful; and these kinds of attacks are also prohibited by way of reprisals.

Islamic Concept of Collateral Damage:

Principles of distinction and proportionality are also the fundamental principles of Islamic law of war. Although principle of distinction has been expressly mentioned in various traditions of the holy Prophet (ﷺ), but primarily scholars have derived this rule from the verse of the holy Quran which says ‘fight in the way of Allah against those who fight you, and do not transgress’.²⁵ On the basis of the same, fighting is allowed only against those who are fighting Muslims and one who fights becomes a combatant. So according to this verse, fighting is allowed against combatants only.²⁶

Acknowledging the fact that principles of distinction and proportionality have been recognized under Islamic law of war, it also appears that issue of collateral damage has been discussed under Islamic law as well. Although the issue has not been discussed under the title of collateral damage, but Muslim jurists have discussed different situations which directly relate with collateral damage. For instance, issue of (Al-Bayaat) i.e. attacks during nights has been discussed by almost all the Muslim jurists. This issue is linked with collateral damage in the sense that during night attacks, stones and fire were thrown at the opponent army and due to nighttime it was difficult for each of the parties to recognize each other as was the case in face-to-face fighting. The main issue involved in this situation was that lives of innocent civilians were involved in attacks of this kind and while launching these kinds of attacks it was difficult to make a clear distinction between combatants and civilians as normally these attacks were launched against the forts and cities having combatants as well as civilians inside. Al-Sarakhsi permits these kinds of attacks at night. Majority of other jurists also permit these attacks but a few of them opined that these attacks are disfavored. Al-Sarakhsi also permits use of weapons that may increase the chances of collateral damage including throwing stones, burning and flooding enemy forts.²⁷

Issue of human shields has also been discussed under the chapters of ‘al-tatarrus’ that means enemy uses its women and children and sometimes Muslims or Dhimmis as human shields. In this situation, majority of Muslim jurists permit attacking human shields with the condition that Muslims shall aim their target at the enemy and not these human shields. Al-Sarakhsi and many other Muslim jurists have also allowed certain kind of attacks similar to Al-Bayaat and Al-Tatarrus that may lead to indiscriminate killings of non-combatants, but one of the arguments advanced in this regard is that these rulings were issued keeping in view a particular sociopolitical situation of that time.²⁸ Be that as it may, even the jurists who have allowed attacking human shields do not permit it unconditionally and absolutely, rather restrict with the condition that during any such attack on human shields, the lawful military target shall be aimed. To this extent concept of collateral damage under Islamic law²⁹ aligns with its concept IHL as both legal systems, (i) permit collateral damage, (ii) permit attacking human shields on the basis of military necessity, and (iii) prescribe that during such like attack the primary lawful target shall be aimed.

However, night attacks are permissible but as an action, because the holy Prophet (ﷺ) discouraged night attacks which is evident from the incident of Khaiber when the holy Prophet (ﷺ) was marching towards Khaiber and it has been reported that:

“The Prophet (ﷺ) set out for Khaibar and reached it at night. He used not to attack if he reached

²⁵ The Qur’an (2:190).

²⁶ Niaz A. Shah, “the Use of Force under Islamic Law”, *The European Journal of International Law*, Vol. 24: No. 1, (2013), 360.

²⁷ Dr. Ahmed Al-Dawoody, “Al-Sarakhsi’s Contribution to the Islamic Law of War” *UCLA Journal of Islamic and Near Eastern Law*, 14(1), (2015), 33.

²⁸ Ibid.

²⁹ According to majority point of view.

the people at night, till the day broke. So, when the day dawned, the Jews came out with their bags and spades. When they saw the Prophet; they said, "Muhammad and his army!" The Prophet (ﷺ) said, Allahu--Akbar! (Allah is Greater) and Khaibar is ruined, for whenever we approach a nation (i.e. enemy to fight) then it will be a miserable morning for those who have been warned."³⁰

Similar narration has also been reported from Anas (R.A.).³¹ Number of other narrations are also available which clearly say that attacking the enemy during night was not the practice. These and the similar narrations reported from the holy Prophet (ﷺ) clearly reflect that he discouraged night attacks and the only reason was to protect civilian life and property, otherwise the narrations clearly reflect that the Jews of Khaibar were unaware of arrival of Muslim armies and in such like situation, surprise attack during night would have been more easy for Muslims. However, Al-Sarakhsi says he does not object over attacking the enemy at night and with weapons likely to increase collateral damage like throwing stones, burning and flooding enemy forts. Most of other Muslim jurists also allow night attacks while certain others consider it disfavored.³² However, despite permissibility of night attacks certain conditions have been prescribed by Muslim jurists. All these instances clearly establish that indiscriminate attacks are not allowed under Islamic law.

As far as the quantum of collateral damage under Islamic law is concerned, that can also be ascertained in Islamic law like IHL on the basis of conditions prescribed by Muslim jurists in this regard. The issue of 'Al-Tatarrus' and related acts are allowed under exceptional circumstances in accordance with the conditions prescribed by Muslim jurists.

According to Muslim jurists, collateral damage in the shape of 'Al-Tatarrus' is allowed in a case when the enemy confines itself in the fort with women and children or Muslim captives and there is apprehension of harm for Muslims by the enemy or Muslims are unable to conquer the city or fort without resorting to it.³³ It means that attacks under 'Al-Tatarrus' are allowed under exceptional circumstances.³⁴ Further, attacks under 'Al-Tatarrus' are allowed in order to repel a greater harm i.e. in case harm is apprehended from the enemy and Muslims are unable to conquer the city or a fort without resorting to any such attack.³⁵ This situation also extends where non-Muslims use Muslims as human shields. Muslim jurists are primarily divided into two opinions on this. Majority of Muslim jurists including Hanafis, Malikis, Shafiis and Hanabla are of the opinion that attacking the enemy is allowed even if they are using Muslims as human shields if there is military necessity even if it leads to killing of Muslims as human shields.³⁶

On the other hand, Sheikh-ul-Islam says that Muslim jurists have agreed that if non-Muslim army uses Muslim captives as human shields they can be killed with certain conditions. According to him, if harm is apprehended for Muslims in the sense that if they do not fight the enemy and attack them despite of keeping Muslims as human shields, they will be fought and killed then attacking the enemy is allowed in that situation even if Muslims, being human shields, are killed. If such like situation arises, attack is permissible but two conditions are prescribed for Muslim army:

- i. Human shields should be attacked according to the need and proportionately.³⁷
- ii. Muslims shall aim at non-Muslim combatants meaning thereby that they shall not aim at killing of Muslim human shields even if they are killed on the basis of necessity.³⁸

The above-mentioned conditions clearly stipulate that under Islamic law, non-combatants cannot be

³⁰ *Sahih Al-Bukhari*, Vol. 4, Hadith: 2945.

³¹ *Suna Al-Tirmizi*, Kitab Al-Siyar, Hadith: 1550.

³² Al-Dawoody, "Al-Sarakhsi's Contribution to the Islamic Law of War".

³³ Muhammad Bin Sahl Al-Sarakhsi, *Sharkh Al-Siyar Al-Kabir* (Al-Sharikah Al-SHarqiyyah Lil Ilanaat) 1555/4.

³⁴ Muhammad Bin Ali Bin Muhammad Al-Shawkani, *Fathul-al-Qadeer* (Dar-al-Fikr), 448/5.

³⁵ Ala ul Din Abu Bakr Bin Masood Al-Kasani, *Bidai-al-Sanai fi Tarteeb Al-Sharai* (Dar-al-Kutab Al-Ilmiyyah) 101/7.

³⁶ *Ibid*.

³⁷ Muhammad Bin Idrees Al-Shafi'i, *Al-Umm* (Dar-al-Marifah 1410 A.H.) 379/8.

³⁸ Muhammad Bin Sahl Al-Sarakhsi, *Al-Mabsoot* (Dar-al-Marifah) 109.

killed in ordinary circumstances, and they can only be killed in case of military necessity. Even in case of military necessity, attacks cannot be launched against non-combatants directly, rather primary target should be enemy combatants and not non-combatants. Indiscriminate attacks are not allowed under Islamic law. Moreover, Islamic law of war also prescribes the conditions where Muslims can also be killed where they are being used as human shields. In the case human shields, there is no difference between Muslims and non-Muslims, meaning thereby that killing human shields or causing collateral damage is justified on the basis of military necessity just to repel a greater harm as compared to a lesser harm and in normal circumstances, killing of non-combatants is prohibited under Islamic law. Furthermore, limitations and conditions have been prescribed under Islamic law in a case of any attack apprehending loss to civilian life and property and these attacks are not allowed absolutely and unconditionally. The common features between Islamic law and IHL are that any attack apprehending loss to civilian life and property shall only be aimed at the lawful military target and that too on the basis of military necessity. Further, any such attack should be launched with great precision to target a lawful military target, and civilians and civilian objects cannot be targeted directly even if they are used as a human shield.

The above-mentioned account reflects that both Islamic law and IHL prescribe certain standards for ascertaining collateral damage and the circumstances where it can be justified. However, one of the distinguishing feature of Islamic law is that these rules were developed in Islamic law at the time when all male members of the enemy use to fight; there was no immunity for women and children; slavery for women and children was common; and elimination of the enemy was the primary intent of each party in an armed conflict. Further, these rules were developed when the parties use to stay in the cities surrounded by forts and conquering the fort was not possible without launching indiscriminate attacks and there was no authority at international level to monitor the conduct of the parties. On the other hand, these rules were incorporated in IHL in late 19th and mid-20th centuries and are still in evolution phase. Prescribing the rules for protection of civilians and ascertaining the legality of any damage to the civilian life and property during that time period is the main feature which makes Islamic law a divine law, containing the best moral and legal values for all times.

Conclusion:

It is well established by now that concept of collateral damage during armed conflict has been recognized by Islamic law as well as IHL. However, the exact quantum regarding legality of collateral damage has not been prescribed both under IHL and Islamic law, rather certain conditions have been prescribed in order to declare any loss of civilian life and property as collateral damage. One of the conditions is the observance of the principles of distinction and proportionality that have been recognized by IHL as well as Islamic law. The principle of distinction is the fundamental principle of Islamic law and IHL which envisages that while launching an attack a clear distinction should be made between combatants and non-combatants. According to the principle of proportionality, in case of collateral damage, the loss to civilian life and property should be proportionate and should not be excessive. The second condition under IHL is that while launching any attack likely to cause collateral damage, legitimate target should be aimed and not the civilian life and property. However, with regard to the quantum of civilian loss during collateral damage, exact criterion has not been provided, and the limitation is primarily based on the above mentioned two conditions though certain other parameters have also been provided including the location of primary target, exposure of civilian population and the effects of attack in case of blast and fragmentation. IHL does not allow any attack not launched with precision causing damage to civilian life and property. In case of doubt between a civilian object and a lawful military target, attack should be avoided. An attack cannot be launched merely on the basis of anticipation of a lawful military target. Indiscriminate attacks are unlawful and these kinds of attacks are also prohibited by way of reprisals.

Islamic law also prescribes certain conditions with regard to collateral damage. The first and the foremost feature of Islamic law in this regard is that Muslim jurists have differed with regard to the

conditions for legitimate collateral damage. Collateral damage not only to the extent of enemy's civilian life and property rather against the life and property of Muslims is allowed but conditionally and not absolutely. In this regard, a few jurists have relaxed the conditions but all of them agree that collateral damage is allowed, but in cases where there is no other option. A few Muslim jurists have also prescribed that the conditions that it is allowed only when a greater harm is apprehended from the enemy e.g. if Muslim forces do not launch an attack, they will be attacked by the enemy or there is no other room to enter a city or fort. Otherwise in normal situations, all the precautions should be used to prevent loss of civilian life and property. It is also evident from the fact that night attacks have been discouraged by the holy Prophet (ﷺ) and the saying of the holy Prophet (ﷺ) with regard to women and children that they are from the enemies cannot be construed a general command to ignore the killings of women and children during war as at many other occasions the holy Prophet (ﷺ) denounced the killing of women and children and his discouragement on the basis of above mentioned Traditions is also evidence that he intended to protect women, children and all other non-combatants.

It is also evident that the concept of collateral damage, though impliedly, has been discussed under Islamic law of war much earlier than IHL which emerged at the end of 19th century. Islamic law of war also contains detailed rulings regarding legality and illegality of collateral damage keeping in view specific situations and circumstances of the war. It also appears that Islamic law of war imposes more rigid conditions for the legitimacy of collateral damage as compared to IHL and guidance can be sought from the rules of Islamic law for regulating the concept of collateral damage and devising a more clear criterion for its legitimacy.