

# ELEMENTS OF HUMANITARIAN JURISPRUDENCE IN THE ORIENTAL LEGAL PHILOSOPHY: INDO-MUSLIM DIMENSIONS

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## ABSTRACT

International Humanitarian Law (IHL) is rooted in the customs, traditions and norms of ancient civilizations and religious values. Its strong foundation goes back to the oriental legal philosophy as well as universal human values. The laws of war were mainly customary in nature. The code of Manu (200 BC), Moral code of Bhusido (12th Century), Arthasastra of Kautilya (250 CE), Mahabharata (between the 8th and 9th centuries BCE), are only a few to name as oriental legal philosophy. The oriental civilization is one of the core ideological foundation that had great impact on humanitarian jurisprudence. At the beginning of oriental civilizations, many fundamental philosophical thought about war and peace had been gradually developing through millenniums. Many of those fundamental philosophical ideas have been shaping and reshaping our thought about ourselves and our surroundings. In order to ensure proper flourish, due respect, continuation and implementation of humanitarian law in this post-modern legal arena, congruence and feasibility of oriental humanitarian jurisprudence is evident and unquestionable. Humanitarian considerations are also a powerful motivating force behind the codification of modern international humanitarian law. The main objective of which is to limit the sufferings caused by war. This study explores the contribution of the oriental legal philosophy to the development of humanitarian jurisprudence.

**Key Words:** IHL, Humanitarian Jurisprudence, Orientalism, Ancient Civilizations, Legal Philosophy, Indo-Muslim.

## INTRODUCTION

The laws of war are practically as old as war itself, and war is as old as life on the earth.<sup>1</sup> Throughout the various epochs, the development of International Humanitarian Law (IHL) had been influenced by religious concepts, customary behaviors and philosophical ideas. Customary rules of warfare are an integral part of the first rules of international law and relations. It is very natural that, the development of the first rules of customary law took a long and complicated journey to the first written humanitarian principles for the conduct of war. Some rules which tended to impose limitations on the conduct of war, the means of warfare and their application can be traced back to ancient times.<sup>2</sup>

Humanitarian jurisprudence gets its root in ancient Chinese philosophy, Babylonian philosophy, Indian philosophy, Greek philosophy, Roman philosophy,

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Japanese philosophy and various other philosophies of Asian nations. In a lengthy section headed 'Multicultural Background to the Humanitarian Laws of War' Judge Christopher G. Weeramantry argues that;

"it greatly strengthens the concept of humanitarian laws of war to note that this is not a recent invention, nor the product of any one culture ... it is deep-rooted in many cultures — Hindu, Buddhist, Chinese, Christian, Islamic and traditional African."<sup>3</sup>

From ancient time we can observe that some sorts of humanitarian thinking were involved in every stages of its development and Muslim thinkers in the middle ages played their crucial role in influencing the humanitarian development of jurisprudence. And this stage of development has accumulated various civilizations' influence in it. During the Muslim regime we can observe various philosophers played their roles to reshape the existing humanitarian jurisprudential system. We can remember here a great Muslim scholar Shaib Ali, who made his contribution. We can mention the time of Hammurabi Code where various codes regarding laws, and philosophy were subscribed as code and those documents also influenced the humanitarian theories of that time. In the beginning of the code it was said:

"I establish these laws to prevent the strong from oppressing the weak."

Resort to arms is, by and large, a demonstration of barbaric act on the one hand and a necessity to ensure safety and security. Many political philosophers are in view that human life in "the state of nature" was composing "solitary, selfish, nasty, brutish and short", and argue in favor of a Leviathan — an all-powerful sovereign State. The irony of it is, however, that the State, which has over the years come to establish a civilized internal system for the maintenance of law and order and strives for the welfare of the community, behaves on the international plane downright "selfish, nasty, and brutish" in its dealings with other States, often throwing to the winds the high ideals, the moral precepts and the principles of humanity which it swears by and seeks to uphold within its national society.<sup>4</sup>

The seminal problem of all kinds of legal systems, and hence of international humanitarian law, is the yawning gap between precepts and practice. The precepts of international humanitarian law belong to the whole of humanity, both politically and culturally. They are not only products of the nascent European civilization of the post-westphalian era. It is therefore pertinent to search for and identify the roots of the principles of international humanitarian law in all great civilizations of the world. Hence this excursus into the historical foundations of the principles of

that law in the Indian civilization through the ages, relating them to the contemporary era. It must be noted, however, that since the Indian civilization is no exception with regard to the general gap between precepts and practice, the emphasis will be placed on the precepts, not on aberrations in practice.<sup>5</sup> Indeed, bad and ruthless rulers are no monopoly of any particular civilization.

## 2. CONTRIBUTION OF THE INDIAN LEGAL PHILOSOPHY TO HUMANITARIAN JURISPRUDENCE

The ethics of war and the humane principles, related to the treatment of the vanquished, of the Vedic period, is buried under the debris of time. With the constant building up of war-oriented ideologies and power play pervading the minds of many in the current international system, it becomes a necessity to regress a little and understand if war was an unsaid norm or regarded as a ruler's last option during the ancient period. In this context, it is also primal to analyze the extent to which the concepts in Hinduism have helped in the development of international humanitarian laws, the focus being to limit the suffering caused by war.

In Hindu tradition the spirit of unity and universality extends to the whole world. The Rig Veda (1700-1100 BCE) declares that "there is one race of human beings," so the validity of different traditions, religions, indeed of paths to truth, has always been respected. The guiding principle has been "Sarva Dharma Sambhava (respect for all religions)."<sup>6</sup> In the Vedic period the first and foremost duty of the king was to protect his people. Protection consisted in countering internal threats as well as external aggression to man's liberty.<sup>7</sup> Hindu system of law, like most religious systems, believes that war is undesirable because it involves the killing of fellow human beings and hence should be avoided as a means of settling disputes.<sup>8</sup> However, it does acknowledge that there might be situations when it is better to wage war than to tolerate evil.

Ancient India developed a method in four successive stages for the settlement of disputes between States: the first stage is called peaceful negotiation (sama); the second stage consists of offering gifts (dana) to appease the enemy; the third is a veiled threat (bheda); and the last stage allows the use of force (danda).<sup>9</sup> The clash of arms in battle is therefore clearly undesirable as long as it can be avoided. The policy of conciliation and making gifts should be tried first before engaging in war.

The laws of armed conflicts were founded in ancient India on the principle of humanity. The ancient Hindu texts clearly recognized the distinction between military targets, which could be attacked, and non-military persons and objects, which could not be attacked. Warfare was thus by and large confined to combatants,

and only the armed forces were legitimate targets. It was not allowed to destroy dwellings during war.<sup>10</sup>

The modern humanitarian laws date back to middle nineteenth century but in reality, they root in the tradition of Sindhu valley, particularly the issue of Dharmayuddha and Adharmayuddha, declaration of war, special privileges to Hanuman as doot (messenger) in the Ramayana, and so on.<sup>11</sup> The concept of Dharmayuddha is one of the strong pieces of thread that connects Sanathana Dharma and the ethical aspects of war evident from the epics Mahabharata and Ramayana. The connection can also be found in the Rig Veda, Manusmriti, and Kautilya's Arthashastra, although it was considered initially that "the source of the 'Hindu law of armed forces' was only Upanishads."<sup>12</sup>

It was the policy of the ancient Hindus that once in the field of action; the enemy could be subjected to rigor. But after the cessation of hostilities, the victor should behave in such a way as to secure the advancement of all, including the subjects of the enemy's kingdom.<sup>13</sup> The Arthashastra also has a policy which states that the subjects of the vanquished monarch were allowed to retain their own laws and customs, as any violation of these would result in a mass rebellion. In a way, the laws of war in ancient India with regard to occupied territory were more humane and broader than those of today.

The practice of stopping hostilities at sunset and returning to the respective camps to tent more easily to the day's casualties also dates from very ancient times.<sup>14</sup>

Sanathana Dharma recognizes the concept of humanitarian law in an indirect manner but with clarity. It restricts the means and the methods of warfare without causing harm to civilians or the protected persons. It indicates towards the forever demand of such regulation for the control of the armed race. The best example is the concept of Dharmayuddha which gives a humanitarian touch to warfare. It equally and sufficiently clears that, in terms of the ideals of humanitarianism of ancient India, the laws of war were more progressive.

Rabindranath Tagore (1861-1941), India's messianic poet and Asia's first Nobel Laureate (1913), promulgated a vision of peace through the cultivation of the ideologies of Ahimsa, or non-violence, which he derived from the Bhagavad Gita and Advaita, or one-identity of the universe, which he discovered from the Upanishads. Tagore formulated this vision of peace against a backdrop of and as an antidote to the reckless "jihadism" (both religious and secular) and "war-madness" of the twentieth century, which witnessed the two World Wars as well as an on-going violence in different forms, effectively turning the world into a "tower of skulls."

He attributed this “devil dance of destruction” to three intersecting forces: the unmediated materialism of modern society; belligerent nationalism which often led to nationalist selfishness, chauvinism and self-aggrandizement; and the machinery of organized religion which, he said, “obstructs the free flow of inner life of the people and waylays and exploits it for the augmentation of its own power.” His response to it was the creation of a global human community, or a “grand harmony of all human races,” by shunning exclusivism and dogmatism of all forms, and through the fostering of awareness that human beings were not only material and rational as creatures but also moral and spiritual, sharing a dew-drop of God in every soul.<sup>15</sup>

Explaining his ultimate hope in humanity, Rabindranath commented that although he saw the present civilization in ‘crumbling ruins ... strewn like a vast heap of futility,’ yet he thought that it would be a ‘grievous sin’ to lose faith in mankind.<sup>16</sup> It is because of this abiding optimism, despite what he lived through and what he saw, and his tireless efforts to bring back peace and harmony through inter-civilizational dialogue and through human fraternity, overcoming their differences.

Tagore’s poetic response to Kipling’s opening line of ‘The Ballad of East and West,’ ‘Oh East is East, and West is West, and never the twain shall meet’,<sup>17</sup> was:

Man is man, machine is machine  
And never the twain shall meet.<sup>18</sup>

Indeed, as Jawaharlal Nehru, the eminent Indian historian, notes, it was a common practice in ancient times for the warring parties to enter into formal agreements with the headmen of self-governing village communities, undertaking not to harm the harvests in any way and to give compensation for any injury unintentionally caused to the land.<sup>19</sup> Wars were usually fought on plains, away from inhabited areas.

## 2.1. Laws of War in the Code Of Manu

The roots of humanitarianism can be traced back to ancient India, where respect for the laws of war was deeply rooted in the armed forces. Those ancient laws, which were preserved in the code of law of Manu and his Dharma Sastra (or Manusmriti), established rules for the conduct of rulers towards their peoples, including, for example, the obligation to treat the vanquished humanely and the prohibition of poisoned weapons.<sup>20</sup>

The code of Manu advises the king: “when he fights with his foes in battle, let him not strike with weapons concealed (in wood), nor with (such as are) barbed, poisoned, or the points of which are blazing with fire. “Whether he himself fights or engages others to fight for him, the king must ensure that the battle will be an honest duel.”<sup>21</sup>

Great importance was attached to distinguish between combatants and non-combatants during war. According to Manu: "persons walking on the road, not participating in the conflict, or mere travelers, or those who are engaged in eating and drinking or pursuing their special avocations or activities or diplomatic errands and of course the Brahmins, unless they are engaged in war, were not to be killed."<sup>22</sup> This can be traced to the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, Part I dealing with the General Provisions and specifically, Article 4 regarding the definition of protected persons.

The rule of international humanitarian law not to attack civilians during warfare is similar to that purported in the Manusmriti. Manu lays down that "one who surrenders or is without arms or is sleeping or is naked, or with hair united (i.e. unprepared) or an onlooker (non-combatant) must never be killed," irrespective of whether the opponent was a believer or an Arya or a yavana (alien non-believer) or whether he was fighting a just war or not.<sup>23</sup> It can be well understood from this rule that the civilians, prisoners of war, and the warriors who are unprepared can be covered under this rule and cannot be killed.

The practice of taking prisoners of war dates back to the Aitareya Brahmana which records, once ten thousand women prisoners belonging to wealthy homes were brought from other countries and bestowed upon Brahmanas in token of the conquest of the quarters. The practice was universal and was known to the Hittites and the Assyrians. A large number of prisoners used to be put to the sword even during the Vedic age. If maidens were among the prisoners of war, they were courteously treated and were induced to marry persons of the conqueror's choice. If they declined the offer, they were sent back to their homes under proper escort. Hospitality, the sacredness of the refugee, the law not to forget a kindness or a hurt, and not to refuse to fight when challenged, are some features of fair fighting according to the epic code.<sup>24</sup> This is much similar to the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, Part II dealing with the General Protection of Prisoners of War and specifically Article 14 regarding respect for the person of prisoners.

With respect to the principle of distinction, the laws of war in ancient India drew a clear distinction between the civilians and the belligerents. This same principle is found in Article 48 of Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977,<sup>25</sup> while Article 51 thereof protects civilians from military operations.<sup>26</sup>

Manu also laid down certain principles that should be followed by both warring parties.<sup>27</sup> For example, combat between mounted and unmounted soldiers

was strictly forbidden. Furthermore, combat between warriors of officer rank and foot soldiers were not allowed, since the former would generally be much better armed and trained than the latter. Collective attacks against a single soldier and the slaying of a warrior who was temporarily at a disadvantage during battle were strictly prohibited.

According to the Manusmriti, only the warriors who actually fight in the battle can take the spoils of war. Yet they are to be shared with the ruler inasmuch as the kings who have engaged them to settle scores with the enemies demand the best part of the booty.<sup>28</sup> In this connection, the conqueror is advised to grant remissions on taxes instead of looting the conquered territory. He must seek to win over the commoners of conquered territory and not do anything that would increase their bitterness. He should not be vengeful but should instead offer an amnesty to all who have surrendered to him.<sup>29</sup>

In this, as in many cases, ancient India was ahead of modern ideas. Chivalry<sup>30</sup>, individual heroism, qualities of mercy and nobility of outlook even in the grimmest of struggles were not unknown to the soldiers of ancient India. Thus among the laws of war, we find that;<sup>31</sup>

1. A warrior (Khsatriya) in armor must not fight with one not so clad;
2. One should fight only enemy and ceases fighting if the opponent is disabled;
3. Aged men, women and children, the retreating, or one who held a straw in his lips as a sign of unconditional surrender should not be killed.<sup>32</sup>

## 2.2 Laws of War in the Kautilya's Arthashastra

Kautilya's Arthashastra was one of the greatest political books of ancient India.<sup>33</sup> Kautilya, also popularly known as Chanakya, was the key adviser to King Chandragupta Maurya (317-293 BC). Chandragupta defeated the Nanda kings and stopped the advance in particular of Alexander the Great's successor Seleucus, preventing him from invading western India.<sup>34</sup> For the first time in Indian history most of the Indian subcontinent was then united in a single empire.<sup>35</sup> In 256 BC, Chandragupta's grandson Ashoka invaded Kalinga. However, after witnessing the suffering that ensued during the conquest of it, he renounced war and turned to Buddhism and non-violence.<sup>36</sup>

Kautilya advocated the humanitarian treatment of conquered soldiers and citizens. In particular, he maintained that a humanitarian policy toward a defeated people was practical; pointing out that if a king massacres those whom he has defeated, he frightens all the kingdoms that surround him and terrifies even his own ministers,<sup>37</sup> whereas more land and loyal subjects can be gained if the defeated are treated magnanimously. He counseled that it is best to wage war against an



unjust king who has no public support, yet it is wise to avoid war with a righteous king whose subjects will fight vigorously on his behalf.<sup>38</sup> He pointed out that when facing the choice as to whom to attack, it is always best to attack an unjust king-dom. Therefore, a king should march only against an enemy with disaffected subjects. If a king has the option of attacking a strong king who is unjust or a weak king who is just, he should actually attack the stronger king because that king's subjects, weary of injustice, will not help their ruler and might even join in the war against him.

Kautilya recommended that the conquering king should order the release of all prisoners and give help to the distressed, the helpless and the sick. He thus called for the establishment of a righteous course of conduct for sound military policy. In taking this stance, Kautilya was following the traditional advice given in the Dharma Sastras that Aryans<sup>39</sup> condemn the killing of those who have thrown down their weapons, who have disheveled hair, who fold their hands in supplication, or who are fleeing. He states that the just conqueror is satisfied with the obeisance of the defeated ruler. He also held that the fundamental rule about immoveable property was that it did not belong to the victor by right; only such things as chariots, animals, and war material belonged to the conquering forces. The king should personally examine all such captured wealth and should then keep a part for himself and distribute the rest among his armed forces according to rank.<sup>40</sup>

Being a shrewd pragmatist, Kautilya emphatically stressed the need for kind treatment of the vanquished people and their princes. He promised them security of their cattle and reinstatement of those who were "possessed of good treasury and army." An efficient proponent of policies for the king, Sukra went a step ahead and laid down salaries and allowances for the defeated princes and their dependents.<sup>41</sup> He recommended leaving them free by fixing the quantum of tribute.<sup>42</sup>

These notions or ideals followed by the ancient political scholars can be traced to the Geneva Conventions of August 12, 1949. As for the kind treatment of the vanquished people and their princes, Part II of the Geneva Convention Relative to the Treatment of Prisoners of War can be associated. Part II of the same deals with the General Protection of Prisoners of War and specifically, Article 13 regarding the humane treatment of prisoners.

Also, taking the war casualties into account, the evidence available in the ancient Indian literature proves that it was the duty of the sovereign to look after the welfare of families of those who had laid down their lives at the altar of the state.

### **2.3 Laws of War in the Vedic Rules**

The two major epic Ramayana and Mahabharata stress considerable signifi



cance on the law of war which is called as the yuddanithy.<sup>43</sup> Both the text says that the war should have necessary object, purpose and standard. It should mitigate the requirement of the Neethysastra and Dharmasastra. Any war which deviates from these standards leaves behind disastrous consequences. Three principles of just war, distinction, proportionality and military necessity were greatly observed while waging war.<sup>44</sup> Hindus believe that it is right to use force in self- defense even then the rules of ethics were not violated. This is clear from the verses of Rig-Veda 1- 39: 2.

“May your Weapons be strong to drive away the attackers, may your arms be powerful enough to check the foes, let your army be glorious, not the evil- doer”.

The Rig-Veda sets down the rules of war at 6-75: 15, and says that a warrior will go to hell if he breaks any of them.

“Do not poison the tip of your arrow; Do not attack the Sick or Old  
Do not attack a child or a woman; Do not attack from behind”

The Rig Veda also laid down the right conduct of war. The rules laid down in the Rig Veda maintain that it is unjust to strike someone from behind, cowardly to poison the tip of the arrow, and heinous to attack the sick or old, children, and women. This can be related with the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, Part II dealing with the General Protection of Populations against Certain Consequences of War and specifically, Article 24 regarding measures relating to child welfare.

In the Ramayana, a classic example of the observance of humanitarian principles can be found when Lakshmana, in the war against Ravana, was forbidden by Rama to use a weapon of war which had the potential to destroy the entire race of enemy including those who did not bear arms.<sup>45</sup> Rama advised Lakshmana that the weapon could not be used because such mass destruction was forbidden by the ancient laws of war, even though the enemy, Ravana, was fighting an unjust war with an unrighteous objective.<sup>46</sup>

The Ramayana describes an interesting discussion between Ravana and his brother Vibhishana about the inviolability of an ambassador. Ravana planned to kill Ambassador Hanuman, who appeared at his court on behalf of Rama. His brother Vibhishana reminded him that if he did kill the ambassador, he would be acting against Raj Dharma (the duty of kings).<sup>47</sup>

This is very much akin to the Geneva Convention Relative to the Treatment

of Prisoners of War of August 12, 1949, Part III, Section II, Chapter VI dealing with Discipline and specifically, Article 42 regarding the use of weapons.

It is true that the Rig Veda refers to Dasas (slaves) and the epics Ramayana and Mahabharata refer to enslavement of war prisoners but it is also equally true that Smriti (remembered texts that are a codified component of Hindu customary law, different from Shruti which encapsulate Dharma through listening or hearing), condemn slavery and the Agni Purana clearly forbids the enslavement of prisoners which again is similar to the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, Part II dealing with the General Protection of Prisoners of War and specifically, Article 14 regarding respect for the person of prisoners.

Also, some of the humanitarian aspects of the warfare rules put forth in the Shanti Parva of the Mahabharata have a striking similarity with the laws in the present international system notably, Chapter II dealing with the Quarters, Food and Clothing of Prisoners of War and specifically, Article 26 regarding food; Chapter III dealing with the Hygiene and Medical Attention and specifically, Article 30 regarding medical attention; and Article 31 regarding medical inspections. The prisoners of war were generally to be accorded generous treatment. In the epoch of the Brahmanas, the fettered prisoner was sent out of the kingdom and was permitted to remain on the outskirts. Sometimes the captive agreed to become a slave of the captor for a period of one year after which he became a free man. According to the Mudraaraakshasa, Kautilya set free the prisoners who were captured in war by the king Chandragupta.

A similar story is related in the epic poem Mahabharata: Arjuna, observing the laws of war, refrained from using an ultra-destructive weapon in a conventional war, for when fighting was restricted to ordinary conventional weapons, the use of extraordinary or unconventional types was immoral, besides contravening religious tenets or the recognized laws of warfare.<sup>48</sup> The Agni Purana clearly mentions that prisoners of war should not be enslaved. If soldiers were taken prisoner, they were to be released at the cessation of hostilities. Mahabharata has enlisted the rules of the war at Kurukshetra. It enlists as follows:

Each day the battle was over at sunset, and the hostilities mixed freely like friends. Single combats might only be between equals and one could not use methods not in accordance with Dharma. Thus, those who left the field or retired would not be attacked. A wise, charioteer, elephant troops and infantry men could engage themselves in battle only with their opposite numbers in the enemy ranks, those who sought quarter or surrender was safe from slaughter. Nor might one, for the moment the disengaged, direct

his weapons against another who was engaged in combat. It was wrong to slave one who had been disarmed or whose intention was directed elsewhere or who was retreating or who had lost his arm and no shafts were to be directed against non-combatant attendants or those engaged in blowing conches or beating drums.<sup>49</sup>

At the same time where war was detested in all manners, the Mahabharata, dwells at length, and with great care, on what should be done for internal security in times of war, should war become inevitable, and at the battlefield to win the battle. However, through it all, the foundations, the dharma, are repeatedly highlighted. Because war achieves no permanent good, only causes a long chain of pain and suffering, war should be avoided by all means. If it cannot be avoided, then there is a dharma, too, of how a war is to be conducted in human terms.<sup>50</sup>

The laws of war in ancient India with regard to occupied territory were more humane and broader than those of international humanitarian law today. The ancient Indian texts like Mahabharata, being the greatest epic ever written in the history of mankind, and Manusmriti, a code of law by Manu, lay down the laws governing war in ancient India, are congruous to the provisions of Geneva Conventions, as in the Basic Rules of the Geneva Conventions and their Additional Protocols. Geneva Conventions and their Additional Protocols in today's world governing the matters of warfare can be said, little bit effectively. Thus it is obvious that ancient oriental humanitarian norms are viable and its viability is transparently existed in post-modern legal global order. Persons hors de combat and those who do not take a direct part in hostilities are entitled to respect for their lives and their moral and physical integrity. They shall in all circumstances be protected and treated humanely without any adverse distinction.<sup>51</sup> In the Shanti Parva of the Mahabharata, it is mentioned: "This means to kill someone not in combat; to rape a woman, or misbehave with her; ingratitude; to rob one devoted to learning and knowledge; to deprive another of all he has – these are considered very low acts even among robbers."<sup>52</sup>

### 3. CONTRIBUTION OF THE ISLAMIC LEGAL PHILOSOPHY TO HUMANITARIAN JURISPRUDENCE

The advent of Islam set peace which applies both to believers and to all peoples and nations. However, since war is recognized as an in-built condition of humankind, peace is regarded as the normal state and war as an exceptional, although unavoidable, state.<sup>53</sup> Thus the Qur'ān does not order war,<sup>54</sup> but it does allow it when certain conditions are met. Surah Al-Nisa (4:74) provides a general guideline:

“Let those (Believers) who sell the life of this world for the Hereafter fight in the cause of Allah, and whoso fights in the cause of Allah, and is killed or gains victory, we shall bestow on him a great reward”.<sup>55</sup>

This means that the believers must have mercy and not fight when it is not necessary for self-defense and they must keep to the principle of proportionality.<sup>56</sup> Roger Algaase outlines that the Islamic law of war strikes a balance between military necessity and respect for human life in a manner which gives higher priority to saving lives of non-combatants than do modern international laws.<sup>57</sup> On this ground, the Cairo Declaration on Human Rights in Islam (1990) provides:

“It is the duty of individuals, societies and states to protect the right to life from any violation, and it is prohibited to take away life except for a Shari’ah prescribed reason”.<sup>58</sup>

With the majority of today’s conflicts taking place in Muslim countries or involving Muslim combatants, aid agencies are operating - arguably more than ever before - in situations where Islamic norms govern the terrain in which they work. Islamic law contains a rich but complex set of rules on the protection of civilians. But can that centuries-old canon be reconciled with modern international humanitarian norms?.<sup>59</sup>

In this study the author explores the Islamic jurisprudence on international humanitarian law by interpreting Islamic edicts, and how these principles are relevant to the post-modern global legal arena.

Almost there is a consensus that Islamic law follows the principle:  
“Islam has always handcuffed its fighters’ hands.”

More than a millennium prior to the codification of the Geneva Conventions, most of the fundamental principles of modern IHL could be found in the teachings of Islam. Islamic norms emphasize restraint and stress the importance of not doing more harm than is necessary to accomplish the goal at hand. “While according sanction to fighting in self-defense the Koran enjoins concurrently, humanitarian rules of warfare to mitigate the human suffering it inflicts,”<sup>60</sup>

“Fight in the way of Allah with those who fight with you, and do not exceed the limits, surely Allah (God) does not love those who exceed the limits.”<sup>61</sup>

The actions and statements of the Prophet Muhammad and of the early

Caliphs of Islam point to strong humanitarian considerations. In a famous decree, Abu Bakar al-Siddiq, the first Caliph, before departing for the conquest of the Levant,<sup>62</sup> told his warriors:

“When you meet your enemies in the fight, behave yourself as befits good Muslims. If Allah gives you victory, do not abuse your advantages and beware not to stain your swords with the blood of one who yields, neither have you touched the children, the women, nor the infirm, also men, whom you may find among your enemies.”

Torture and mutilation are strictly forbidden under Islamic law, regardless of the enemy. The Prophet is reported to have said:

“God will torture those who torture people on earth.”

According to Bennoune,<sup>63</sup> except in cases of necessity, the Prophet strictly prohibited killing enemies by burning or drowning, as these methods inflicted unnecessary suffering. But some scholars say that while he opposed “treacherous killing and mutilation”, he allowed Muslims to retaliate proportionately to protect their people, dignity and homeland. Particularly in the context of internal armed conflict (rebellion by Muslims against a Muslim ruler), “Muslim jurists advocate a type of balancing test according to which the possible evils are weighted against the potential good.”<sup>64</sup> Humanitarian work in general is validated within Islamic law: the Koran affirms that the needy have a right to aid and that believers must give to the poor, the orphans and the captives “for the countenance of Allah” (76:8-9).

There are strong reasons to believe that the mainstream oriental Islamic philosophy of war has great influence on the modern humanitarian jurisprudence through the emergence of renaissance in Europe. Islam itself has a detailed war manual which has contributed greatly in the overall development of modern philosophy of law of the armed conflicts. Over the centuries, classical Muslim jurists have been providing progressive legal interpretation of war. Islamic Philosophy of War and Peace explains the spirit of Islamic law that mandates a kind of perpetual peace. There cannot be any perpetual war between the Muslim and non-Muslim communities. To foster peaceful relations between Muslims and the rest of the world conflicting parties need to work sincerely with its ethical system of instruction for a balanced life based on universal faith and reasonable and predictable behavior between warring parties.

The primary sources<sup>65</sup> as well as secondary sources were used by Muslim jurists to develop the Islamic law of war and peace. The laws of war developed in

Mohamadan law thorough different holy war between Muslim and non-Muslim. The rules of conduct of Muslims during war time are strictly regulated by the principles and norms of Holy Qur'ān, the words of the Prophet (pbuh) and the commands of Abu Bakr As-Siddiq (632-634), the first Caliph of Islam, and some rulings from other Muslim commanders.<sup>66</sup> The modern humanitarian jurisprudence like the rules of warfare laid down by the international law, including those addressing the treatment of enemy persons and property, are governed by the fundamental principles of necessity, humanity and chivalry. Specific rules derived from these principles are mainly as follows:

1. Principles of humanity and virtue should be respected during and after war.<sup>67</sup>
2. A non-combatant, who is not taking part in warfare, whether by action, opinion, planning or supplies, must not be attacked.<sup>68</sup>
3. The destruction of property or animals is prohibited, except when it is a military necessity to do so, for example for the army to penetrate barricades, or when that property makes a direct contribution to war, such as castles and fortresses.<sup>69</sup>
4. It is prohibited to kill for no reason, to continue killing when the enemy is defeated, to break peace treaties, or to force prisoners to fight against their own forces.
5. It is prohibited to kill women, children, those incapable of fighting or neutrals, including peasants, physicians and journalists.
6. It is prohibited to use poisonous weapons, to burn prisoners or property, to amputate body parts or to sexually abuse in any way, including rape.<sup>70</sup>
7. It is prohibited to mistreat prisoners of war, the sick or the wounded.
8. Torture, excess and wickedness, humiliation of men, treachery and perfidy are prohibited.<sup>71</sup>

Breaches of any of the above mentioned principles and rules have been characterized as war crimes or crime against humanity in the contemporary IHL jurisprudence.<sup>72</sup>

Islamic law makes it abundantly clear that soldiers in the battlefield must be directed solely against enemy combatants. Civilians and non-combatants must not be deliberately harmed during the course of hostilities. The holy Qur'an cites:

“And fight in the way of God those who fight against you and do not transgress, indeed God does not like transgressors.”<sup>73</sup>

Today's IHL jurisprudence is not against any fundamental principles of the Qur'an and Hadiths, which prohibited soldiers and combatants not to show any overt hostilities toward women and children, the aged, the blind, the sick, the incapacitated, the insane, the clergy and al-asif (farmers, craftsmen and traders).<sup>74</sup>

During the lifetime of the Prophet, there were not such kinds of weapons that could cause wide-spread destructions to the people as well as environment, later on important prohibition has evolved. For example, poisonous weapons were considered against the moral aspects of human dignity and consequently against divine law. The first implied prohibition is found in the holy Qur'an where it is said "For that We have decreed upon the children of Israel that whosoever kills a human soul except in retribution of committing fasad (destruction, damage) in the land, it shall be as if he killed all of humanity, and whosoever saves it a human soul it shall be as if he saved all of humanity".<sup>75</sup> Another prohibition is reflected in the Hadith "do not punish the creatures of God with the punishment of God".<sup>76</sup> Furthermore, flooding as a weapon is also prohibited because those who are immune could be caught in it, and similarly to poisoning the enemy's source of water in order to kill them.<sup>77</sup> Therefore, we can deduce the idea that the use of Weapons of Mass Destruction is not permitted because it may cause indiscriminate attacks and may loss a number of lives. Now the prohibition of employing these poisonous weapons, asphyxiating gases, or weapons which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international of the ICC Statute.<sup>78</sup>

The creature of the world is belonged to Allah and nobody is empowered, whether in war or out of war, to destroy any being as well any property of the world. Hence, even during the course of hostilities, unjustifiable destruction of enemy property is strictly prohibited. The Prophet is quoted to have said: "Do not destroy the villages and towns, do not spoil the cultivated fields and gardens, and do not slaughter the cattle".<sup>79</sup>

There are many limits on the methods of waging war set out in the sharia. An oft-quoted example of the congruence of Islam and humanitarian law can be found in the address to the first Syrian expedition of the first caliph Abu Bakr al-Siddiq (632-634 AD), in which he instructed his army commander thus:

I prescribe Ten Commandments to you: "Stop, O people, that I may give you ten rules for guidance on the battlefield. Do not commit treachery or deviate from the right path. You must not mutilate dead bodies; do not kill a woman, a child, or an aged man; do not cut down fruitful trees; do not destroy inhabited areas; do not slaughter any of the enemies' sheep, cow or camel except for food; do not burn date palms, nor inundate them; do not embezzle (e.g. no misappropriation of booty or spoils of war) nor be guilty of cowardliness...You are likely to pass by people who have devoted their lives to monastic services; leave them alone."<sup>80</sup>



The concern to protect the noncombatant, the rejection of treachery and respect for religious institutions has a strong resonance with modern developments in international law.<sup>81</sup> In its insistence on the importance of protecting the natural environment — both plant and animal — the speech in many ways moves ahead of the current state of international humanitarian law,<sup>82</sup> where only relatively recently has some requirement of care for the environment been included in Additional Protocol- I.

Modern jurisprudence of IHL similarly reflected in action of them. Like, the extensive destruction and appropriation of property, not justified by military necessity are considered by Article 8(2) (a)(iv) of the ICC Statute as grave breaches of the 1949 Geneva Conventions.

Islamic laws of war order its follower to respect and treat the prisoner of war humanely. They must be fed and given water to drink, clothed if necessary, and protected from the heat and the cold and from cruel treatment. Torturing POWs to obtain military information is prohibited.<sup>83</sup> The Qur'ān provides that: "And they feed the needy, the orphans and the captives out of their food, despite their love for it (or because of their love for God). Indeed we feed you for the sake of pleasing God: we do not wish reward or gratitude from you".<sup>84</sup> The same are inserted and they are in action in modern IHL where this rule complies with Article 82 of the Geneva Convention (IV) for the Protection of Civilian Persons in Time of War. Article 3(a) of the Cairo Declaration on Human Rights in Islam (1990) also provides that "in the event of the use of force and in case of armed conflict ... it is a duty to arrange visits or reunions of the families separated by the circumstances of war".

The Holy Quran contains provisions concerning the treatment of prisoner of war. The verse 67 of Surah Anfal, which was revealed with the reference to seventy prisoners of the battle of badr, when the prophet (SM) decided to take ransom for them in accordance with the advice of the majority of his companion, the Quran disapproved receiving ransom for the release of prisoners.

Later on, this matter has been dealt with in Surah-Muhammad ---Once the fight is entered upon, it shall have to be carried out with utmost vigor.....when an enemy is taken as prisoner of war, generosity (release of prisoner without ransom) or ransom is recommended to free him.<sup>85</sup>

Islam does not approve mutilation, torture, and drowning of combatants whether they are dead or alive. Hazrat Abu Bakar (R), also issued almost similar directives to three of his generals before the conquest of Syria. On an occasion, he

gave commandments to one of his generals-“Don’t kill any woman, children, and elders or wounded; don’t burn them; don’t destroy inhabited place; don’t have cows or sheep drowned; don’t be guilty of cowardice; don’t be inspired by hatred”<sup>86</sup>

The gist of above wordings regarding prisoner of war of Islamic Humanitarian Jurisprudence is echoed in article 118 & 119 of Third Geneva Convention of 1949. And it is needless to say that Third Geneva Convention is one of the major sources of contemporary Humanitarian law. So, it can be assumed that oriental Humanitarian principles are still stable and feasible in this post-modern global legal order.<sup>87</sup>

Furthermore, Islamic law of war strictly prohibits mutilation. Prophet of Islam says” “do not steal from the booty, do not betray and do not mutilate.”<sup>88</sup> The Prophet also instructed Muslims to avoid deliberately attacking an enemy’s face. Following this, the Qur’anic verse on mutilation was revealed and the Prophet in return prohibited betrayal and mutilation.<sup>89</sup> This instruction was then followed by Abu Bakar (R) instructing to “beware of mutilation, because it is a sin and a disgusting act.”

It is clearly evidence that the modern philosophy and jurisprudence of Humanitarian laws are greatly influenced to formulate today’s law of war. It can be understanding that modern European law of war, its progeny and international humanitarian law are in action and shaping them in different code. All over the world, even today, the great majority of treatises and manuals of international law short-circuit the history of international law by mentioning the contribution of Greco-Roman antiquity and then calmly passing over the contribution which Islam made from the seventh to the fifteenth century.<sup>90</sup>

It can be said that provisions as to responsibility for war in Islam paves the way to the formation of International Criminal Court having jurisdictions for genocide (defined in article 6 of Rome Statute of the International Criminal Court, 1998), crimes against humanity (defined in article 7 of Rome Statute of the International Criminal Court, 1998), war crimes (defined in article 8 of Rome Statute of the International Criminal Court, 1998), and crimes of aggression. Islamic tradition outlines clear standards of responsibility and accountability and thereby has kept huge contribution to the establishment of International Criminal Court. The following hadith encourages fighters to refuse to commit war crimes on the battlefield: “It is obligatory for one to listen to and obey a Muslim ruler’s orders, unless these orders involve disobedience to God; but if an act of disobedience to God is commanded, it is not listened to or obeyed.”

In one example, the Prophet’s companion, Abdullah bin Umar, refused to

comply with an alleged order from his commander Khalid bin Walid, one of Islam's greatest generals, to kill all prisoners since bin Umar saw it as unjust. His decision was later vindicated by the Prophet. In addition, Bennouna says, fighters who committed "war crimes" during the Prophet's time were subject to punishment. After the conquest of Egypt, the son of governor General Amr ibn al- 'As beat an Egyptian Copt without legal justification. Caliph Omar, the Muslim ruler at the time, whipped ibn al- 'As's son as punishment.

#### 4. CONCLUSION

For enriched oriental humanitarian jurisprudence, peace and tranquility in south and East Asia by making it war free or by limiting the effects of war and armed conflict and protecting civilians, have been maintained more effectively by International humanitarian law. So, in fine, it can be concluded that, oriental humanitarian philosophy is still viable to a lots of extent to this post-modern global legal order. The ancient sources of the religions like Hinduism have proven time and again that the Hindu minds had always foreseen the need of International Law and International Humanitarian Law. Therefore, we find that the modern laws of warfare were conceived by the ancient Indian laws much before the advent of modern Humanitarian Law.<sup>91</sup> It is sobering to remember that the Mahabharata had been expressing these concerns more than two thousand years ago. Therefore, we expect that if nothing more, then the Mahabharata era will definitely repeat and sanity will prevail over the world leadership and the same will serve the purpose of the Geneva Conventions.<sup>92</sup> This study evidences that there is room for the contribution of the Islamic civilization within international humanitarian law and a conversation between different civilizations is needed in developing and applying international humanitarian law norms. The West has either remained ignorant of the contribution of the Arabs and Islam to international law or has disregarded it. With the exception of a few highly specialized historians, Western scholars who have sought to trace back the history of international law have done so after their fashion without hardly ever thinking of the Islamic contribution. All over the world, even today, the great majority of treatises and manuals of international law short-circuit the history of international law by mentioning the contribution of Greco-Roman antiquity and then calmly passing over the contribution which Islam made from the seventh to the fifteenth century.' One cannot but speculate about the intentions behind such an omission. Is it due to a hidden rivalry between the main religions of the West, namely Christianity, and Islam; is it a fear of giving any legitimacy to a religious law by a world striving to be secular; or is it merely ignorance on the subject? The omission of a genuine mention of the Arab or Islamic influence in the narratives of other parts of Western and international history suggests something other than a mere coincidence.

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