ABSTRACT

There is a common tendency to disregard the influence of religions, i.e. Islam, Christianity, Hinduism and Judaism; on the evolution of modern law of armed conflict. Given that all the pioneers in the field of modern law of armed conflict are of European origin, many have shown the propensity to consider this field to be an exclusive product of European civilization. This article strives to show that religions have an intimate relationship with modern law of armed conflict. In fact it goes on to show that religions do not only have a major impact on the development of modern law of armed conflict; there is a great deal of compatibility between them.

Keywords: Laws of armed conflict, Religions, Islam, Christianity, Hinduism and Judaism.
INTRODUCTION

There is a common propensity among the general people as well as the secular or modern law of armed conflict lawyers to claim that religions had no major role in the evolution of the contemporary law of armed conflict. Given that Henry Dunant, Francis Lieber and Jean Pictet, three of the masterminds behind the development of the contemporary law of armed conflict, are all from the western society, many attribute the emergence of the first principle of this branch of law to the western civilization. However, there is no textual evidence to corroborate such attribution. In fact, if one leaves no stone unturned, it will be easily realized that the law of armed conflict as it stands today, is not the product of any one particular culture. It is rather embodied in many cultures or religions-Islam, Christianity, Judaism and Hinduism. By the time Oppenheim’s International law was published, religion had ceased to have its importance that it once had in some of the previous studies of international law. Despite the fact that the law of armed conflict owes a lot to different religions, religions are merely referred to as a historical source of the contemporary law of armed conflict. However, religions may at times have a more prominent impact than laws on the behaviour of the parties involved in an armed conflict. It is particularly true considering that religions are likely to work as an added force beyond the legal system. Theodor Meron has aptly asserted:

“In the long run, humanitarian norms must become a part of public consciousness everywhere. Education, training, persuasion, and emphasis on values that lie outside the law, such as ethics, honour, mercy and shame, must be vigorously pursued. This job cannot be left to the law alone. Public opinion and the social consensus that have proved so effective in the development of the law should be geared to transforming practice as well. For that, the creation of a culture of values is indispensable.”

Also with the ever increasing quantity of the non-state entities in the contemporary world and their growing inclination to consider themselves beyond the scope of existing law, religions

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5 ibid.
appear to be the likeliest to add some persuasive value to the existent framework of the law of armed conflict.\(^8\)

However, the idea of holding debates to determine the interaction and engagement between religions and the secular or contemporary law of armed conflicts has been on the rise in recent years.\(^9\) In all these debates religious scholars at first come up with a listing of the fundamental rules of the law of armed conflict and then strive to establish a link between them and religious texts. This essay will consider the question of compatibility between religions and the law of armed conflict. While considering the question of compatibility, the religions which will be under the spotlight are Islam, Christianity, Judaism and Hinduism.

Buddhist scholar Dr. Walpola Rahula stated:

> “According to Buddhism there is nothing that can be called a ‘just war’-which is only a false term coined and put into circulation to justify and excuse hatred, cruelty, violence and massacre. Who decides what is just and unjust? The mighty and the victorious are ‘just’, and the weak and the defeated are ‘unjust’. Our war is always ‘just’ and your war is always ‘unjust’. Buddhism does not accept this position.”\(^10\)

As Buddhism is totally pacifist, it has deliberately been kept outside the purview of the discussion.

**PRINCIPLES OF THE LAW OF ARMED CONFLICT AND RELIGIOUS CONCEPTS**

Although the Charter of the United Nations not only outlaws war, but also outlaws the threat to use force against the territorial integrity or political independence of any state,\(^11\) states have repeatedly resorted to war. Therefore, it was imperative to frame a branch of law which would start operating once armed conflicts broke out and strive to protect people who were not or were no longer participating in the hostilities and also restrict the methods and means of warfare employed. Gradually, the law of armed conflict was evolved, the fulcrum of which are the four Geneva Conventions of 1949 and the two Additional Protocols of 1977 for the

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8 Carolyn Evans (n 3) 3.
11 Charter of the United Nations, art.2, para.4.

There are seven fundamental rules which form the basis of the Geneva Conventions and their Additional Protocols. In order to examine the compatibility between the religious concepts and the law of armed conflict, the reflection of the religious concepts in these rules will be considered below.

The first rule lays down, ‘persons hors de combat and those who do not take a direct part in hostilities are entitled to respect for their lives and physical and moral integrity. They shall in all circumstances be protected and treated humanely without any adverse distinction.’

Two of the prominent provisions of the law of armed conflict which conceive this rule are common Article 3 to the Geneva Conventions of 1949 and Article 4 of the Additional Protocol-II. Common Article 3 connotes that persons who do not have direct involvement in the hostilities as well as the member of the armed forces who have become hors de combat must be treated humanely irrespective of any criteria whatsoever. Article 4 of the Additional Protocol-II also mirrors similar provisions and entitle people having no direct involvement in the hostilities and persons hors de combat to identical rights. Several rules of Chapter V of the customary law of armed conflict has also adopted this rule.

Inviolability of persons not having direct part in hostilities is a part of Islamic tradition and has played a substantial contribution in establishing it as a principle of international law. The treatment of the two envoys of Musailamah Al-Kazzab by the Prophet (PBUH) is an ideal illustration of the Islamic practice of respecting the people not having direct part in hostilities. In response to the violent address by the two envoys, he responded: ‘If not that the envoys should not be killed, I’d have ordered for you to be beheaded.’ It clearly shows the Islamic tradition of extending respect for the lives and integrity of those who do not take direct part in hostilities.

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12 Hans-Peter Gasser (n 1) 15-16.
13 ibid 15.
14 Carolyn Evans (n 3) 18.
16 ibid.
Practice of this rule is evident in Hinduism as the Ramayana narrates a conversation between Ravana and his brother Vibhishana. When Hanuman appeared at the court of Ravana as an envoy of Rama, Ravana intended to kill him. Being aware of such intention, Ravana’s brother Vibhishana was quick to remind him that such act would amount to a breach of the duty of kings.

The second rule states, ‘it is forbidden to kill or injure an enemy who surrenders or who is hors de combat.’

The most prominent provisions which elucidate this rule are found in Articles 40, 41 and 42 of the Additional Protocol-I. Article 40 brands it unlawful to conduct hostilities with the goal that all the members of the enemy party will be killed. Article 41 declares a person who is in the possession of the enemy party or who explicitly shows his intent to surrender or who is unable to defend himself as hors de combat and safeguards them from an enemy attack. Article 42 also extends such protection to a distressed person parachuting from an aircraft. This rule also appears to have been enumerated in numerous provisions of Chapter V of the customary law of armed conflict.

The privilege of aman has been incorporated in Islam which is very much in consonance with the abovementioned provisions. The literal meaning of aman is protection or safety and it refers to the granting of protection to the person or property of enemy combatants during the conduct of hostilities. The basis of this privilege seems to be a Quranic verse which says:- ‘If anyone of the polytheists seeks your protection, then protect him until he hears the word of God. Then, afterwards, escort him to his place of safety.’ The Prophet (PBUH) implemented this principle in his life and granted aman to the defeated pagan Arabs.

Hinduism seems to have adopted these principles as well as the Code of Manu proclaims: - “Let him not strike one who (in flight) has climbed on an eminence, nor a eunuch, nor one who joins the palms of his hands (in supplication) nor one who (flees) with flying hair nor one who sits down nor one who says, ‘I am thine’. Nor one who is sleeping, nor one who has

18 ibid.
19 ibid.
20 Hans-Peter Gasser (n 1) 15.
22 ibid 131.
23 ibid.
lost his coat of mail, nor one who is naked nor one who is disarmed nor one who looks on without taking part in the battle nor one who is fighting with another foe.”

Judaism has also preached not to kill people who have surrendered and to take care of them. The third rule stipulates, ‘the wounded and sick shall be collected and cared for by the party to the conflict which has them in its power. Protection also covers medical personnel, establishments, transports and equipment. The emblem of the red cross or the red crescent is the sign of such protection and must be respected.’

With the exception of the Third Geneva Convention of 1949, all three other Geneva Conventions of 1949 contain provisions relating to the protection of the wounded and sick as well as the medical personnel, establishments, transports, equipment and distinctive emblems. Also the Additional Protocols of 1977 provide for similar protection.


Rules 25, 26, 28, 29, 30, 31, 32 and 35 of customary law of armed conflict also mirror this rule. They talk about the protection of medical personnel, medical activities, medical units, medical transports, persons and objects displaying the distinctive emblem, humanitarian relief personnel, humanitarian relief objects and hospitals respectively.

Islam forbids fighting the wounded and sick. The Prophet (PBUH) said: ‘Do not attack a wounded person.’ In fact when Richard Lion Heart fell seriously ill during the crusade, the Muslim leader Saladin sent his medical personnel to take care of the ill King Richard.

Kautilya, the Chief Advisor and Prime Minister to the Emperor Chandragupta, developed a principle of warfare that the conquering king should take care of the distressed, hopeless and sick. Thus Hinduism has also practised this rule from an ancient time.

24 Manoj Kumar Sinha (n 16) 291.
25 Carolyn Evans (n 3) 14.
26 Hans-Peter Gasser (n 1) 15.
28 ibid.
30 Manoj Kumar Sinha (n 16) 293.
There are biblical texts which teach Jewish people to treat the enemies with mercy even during the conduct of hostilities.\textsuperscript{31} It can be inferred from this that there is an obligation in Judaism to collect and care the wounded and sick during the armed conflict.

The fourth rule connotes, ‘captured combatants and civilians under the authority of an adverse party are entitled to respect for their lives, dignity, personal rights and convictions. They shall be protected against all acts of violence and reprisals. They shall have the right to correspond with their families and to receive relief.’\textsuperscript{32}

The whole of the Third Geneva Convention of 1949 is concerned about the treatment of the captured combatants. On the other hand, the Fourth Geneva Convention of 1949 which focuses on the protection of the civilians contain a significant number of provisions in Part III dealing with the treatment of captured civilians. Besides this rule has also been augmented in Chapter V of the customary law of armed conflict.

Islam has preached to treat the captured combatants or the prisoners of war mercifully. Reference can be drawn to Quranic verses as well as Sunnah to corroborate this. God the Almighty says: ‘And they feed, for the love of God, the indigent, the orphan and the captive.’\textsuperscript{33} The Prophet (PBUH) also commanded to treat the captives well.\textsuperscript{34} He himself practised this in his life and even released prisoners at the end of the war, either with some prospect of survival or ransom.\textsuperscript{35} The following narrative by a muslim soldier is a testament to that.

The Prophet (PBUH) sent Khalid bin Al-Walid to the tribe of Jadhima and Khalid invited them to Islam but they could not express themselves saying Aslamna (i.e. we have embraced Islam), but they started saying Saba’na! Saba’na! (i.e. we have come out of one religion to another). Khalid kept on killing some of them and taking some of them as captives and gave every one of us his captives. When there came the day then Khalid ordered that each man should (i.e. muslim soldier) kill his captive, I said, ‘By Allah, I will not kill my captive, and none of my companions will kill his captive.’ When we

\textsuperscript{31}Carolyn Evans (n 3) 15.
\textsuperscript{32}Hans-Peter Gasser (n 1) 15.
\textsuperscript{34}ibid.
\textsuperscript{35}ibid.
reached the Propher, we mentioned to him the whole story. On that, the Prophet raised both his hands and said twice, ‘O Allah! I am free (or innocent or not responsible for) from what Khalid has done.’

One of the captives from the battle of Badr recalled in this regard: ‘Whenever I sat with my captors for lunch or dinner, they would offer me the bread and themselves the dates, in view of the Prophet’s recommendation in our favour (in that desert situation bread was the more luxurious item of food than dates). As soon as any of them held a piece of bread, he would offer it to me. Feeling shy, I would give it back to one of them but he would immediately return it to me.’

Hinduism also advocates humanitarian treatment of captives and the Agni Purana requires them to be released at the end of hostilities. A victorious king is obliged to assure the captive combatants or civilians that they are entitled to respect despite the change of rulers.

The fifth rule enumerates, ‘everyone shall be entitled to benefit from fundamental judicial guarantees. No one shall be held responsible for an act he has not committed. No one shall be subjected to physical or mental torture, corporal punishment or cruel or degrading treatment.’

A large number of provisions from Part III of the Third Geneva Convention of 1949 and also a few provisions from Part III of the Fourth Geneva Convention and Article 75 of Additional Protocol-I have perceived this rule.

Apart from that this rule is now recognized as a customary law under Rule 90, Rule 91 and Rule 100 of the customary law of armed conflict. Rule 90 forbids torture, cruel or inhuman treatment and outrages upon personal dignity, Rule 91 forbids corporal punishment and Rule 100 ensures fair trial guarantees which means that everyone shall be convicted only in pursuant to fair trial which would meet all the required judicial standards.

36 (n 14) accessed 04 January 2016.
37 (n 28) accessed 05 January 2016.
38 Manoj Kumar Sinha (n 16) 293.
39 ibid.
40 Hans-Peter Gasser (n 1) 16.
Islam has strongly prohibited the ‘mutilation of bodies in war, or disfigurement by amputating the nose, cutting off the ear or lips, or slicing the belly open, even if the enemy practises such acts.’

Hinduism also directs not to subject anyone, combatants as well as civilians, to cruel or degrading treatment.

The sixth rule enshrines, ‘parties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare. It is prohibited to employ weapons or methods of warfare of a nature to cause unnecessary losses or excessive suffering.’

The law of armed conflict also restricts the means and methods of warfare that can be adopted by combatants. The conspicuous provisions in this regard have been enunciated in Articles 35, 37, 38, 39 and 57 of the Additional Protocol-I. Article 35 lays down the basic rules relating to means and methods of warfare and expressly forbids employing means and methods which would result in excessive distress. Article 37 defines what acts would constitute perfidy and prohibit the commission of them. Article 38 prohibits misuse of certain recognized distinctive emblems while Article 39 prohibits the wrongful use of the flags or military emblems, insignia or uniforms. Article 57 requires the parties involved in an armed conflict to choose means and methods of warfare in such a way so that the collateral damage is minimal.

Rule 46-Rule 69 of the customary law of armed conflict deal with the aspect of the methods of warfare whereas Rule 70-Rule 86 are concerned about the means of warfare.

Islam has also imposed some restrictions on the means and methods of waging war. It has forbidden the use of poisoned arrows or the application of poison on sharp spears. There is Islamic prohibition of perfidy as well.

Two of the most prominent mythologies of Hinduism, Ramayana and Mahabharata, as well as the Code of Manu have also limited the scope of means and methods of waging war. For

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41 Sheikh Wahbeh al-Zuhili (n 32) 275.
42 Manoj Kumar Sinha (n 16) 292-293.
43 Hans-Peter Gasser (n 1) 16.
45 Daniel Thurer (n 5) 236.
example, the Code of Manu has banned the use of weapons with hooked spikes or poison or heat.\textsuperscript{46}

Mahabharata has also enshrined this identical principle. Despite possessing a hyper-destructive weapon, Arjuna refrained from employing it as the fight was confined to the use of conventional weapons and employing such weapon would have been not only immoral but also in contradiction with recognized laws of warfare.\textsuperscript{47}

Apart from these, Ramayana also narrates another story where Rama, prince of Ayodhya in India, advised his half-brother Lakshmana not to use an ultra-destructive weapon in the war against Ravana, the ruler of Sri Lanka because that would have caused excessive suffering.\textsuperscript{48}

As regards the Christianity, the Second Council of 1139 proscribed the use crossbow and the siege machine, considering them to be too cruel to be used in warfare.\textsuperscript{49}

The \textit{seventh rule} provides, ‘parties to a conflict shall at all times distinguish between the civilian population and combatants in order to spare the civilian population and property. Neither the civilian population nor civilian persons shall be the object of attack. Attacks shall be directed solely against military objectives.’\textsuperscript{50}

The general protection extended by the Geneva Conventions to the civilian populations against the effects of hostilities was so narrow in scope that it proved to be deficient with the radical development in military technique. Therefore, Additional Protocols were adopted which contain a series of provisions providing extensive protection to the civilian population as well as the civilian objects. Some of the striking provisions are enumerated in Articles 48, 51, 52, 53, 54, 55 and 56 of the Additional Protocol-I and Articles 13, 14, 15 and 16 of the Additional Protocol-II.

Article 48 of Additional Protocol-I sets the tone by stipulating that the parties to the conflict shall at all times distinguish between the civilian population and combatants, as well as between civilian objects and military objectives. The other relevant articles have elaborated the protection of civilian protection and civilian objects. Article 51 illustrates the protection of civilian population, Article 52 amplifies the general protection of civilian objects, while Articles 53, 54, 55 and 56 explain the protection enjoyed by cultural objects and places of

\textsuperscript{46} Manoj Kumar Sinha\textsuperscript{n 16} 291.
\textsuperscript{47} \textit{ibid}.
\textsuperscript{48} \textit{ibid}.
\textsuperscript{49} Arthur Nussbaum, \textit{A concise history of the law of nations} (Macmillan 1947) 25.
\textsuperscript{50} Hans-Peter Gasser (n 1) 16.
worship, objects indispensable to the survival of the civilian population, natural environment and protection of installations containing dangerous forces respectively.

On the other hand Additional Protocol-II is applicable to armed conflicts of non-international character only and extends similar protections extended by the Additional Protocol-I. Articles 13, 14, 15 and 16 ensure protection of the civilian population, objects indispensable to the survival of the civilian population, installations containing dangerous forces and cultural objects and places of worship respectively.

Rules 1, 2, 6, 7, 10, 11, 13, 16, 23, 24, 38, 39, 40, 42, 43, 44 and 45 of customary law of armed conflict have reflection of this rule. They talk about the basic principle of distinction between civilians and combatants, prohibition of violence aimed at spreading terror among the civilian population, principle of distinction between civilian objects and military objectives, civilian objects’ loss of protection from attack, prohibition of indiscriminate attacks, prohibition of treating as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar of civilians or civilian objects are prohibited, obligation to verify that targets are military objectives, civilian population and objects under one’s own control from the vicinity of military objectives, protection and respect for cultural property, protection of works containing dangerous forces and protection of natural environment respectively.

In Islamic tradition, the laws of war have referred to the principle of distinction between legitimate military objectives and civilian objects. The Prophet (peace be upon him) expressly prohibited the killing of non-combatants, women, children and monks and the destruction of places of worship. Even crops and livestock are extended protection.

Caliph Abu Bakr was also heard addressing:

Stop, O people that I may give you ten rules to keep by heart! ……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 flock or the herds or the camels, save your subsistence. You are likely

51 Sheikh Wahbeh al-Zuhili(n 32) 280-281.
52 ibid.
53 ibid, 282.
to pass by people who have devoted their lives to monastic services; leave them to that which they have devoted their lives.\textsuperscript{54}

The laws of war in Hinduism also attached great importance in distinguishing between civilians and belligerents. The laws of Manu prohibited attacking the non-combatants.\textsuperscript{55} Besides in spite of the war raging close to the cultivating lands, the warring armies left them untouched.\textsuperscript{56}

The Judaic tradition has also called for sparing trees which is a part of the natural environment while trying to capture a city in the following words: ‘When you are trying to capture a city, do not cut down its fruit trees, even though the siege lasts a long time. Eat the fruit but do not destroy the trees. The trees are not your enemies.’\textsuperscript{57}

As far as Christianity is concerned, Rule 2313 of the Catechism of the Catholic Church has forbidden wanton destruction of whole cities or areas and their inhabitants.\textsuperscript{58}

CONCLUSION

In light of the above, it is evident that there is a great deal of compatibility between the law of armed conflict and various religious principles of warfare. The framers of the law of armed conflict realized that in order to make it globally appealing, it was essential to incorporate principles from various cultures of the world and it is religion which forms the basis of a culture. Hence, one can see a lot of compatibility between the law of armed conflict and religious principles of warfare. However, it does not mean that there is no incompatibility between them. There is a popular saying: ‘The more heavenly the ends, the more devilish the means.’\textsuperscript{59} The same can be attributed to the religious principles of warfare. Having said that it should also be borne in mind that these religious principles of warfare are subject to interpretation and any kind of incompatibility is probably liable to be accredited to the way in which it is interpreted. Still if any kind of incompatibility arises, it is religion which must make way for the law of armed conflict in this secular world. Nevertheless, religions can

\textsuperscript{55} Manoj Kumar Sinha (n 16) 291.
\textsuperscript{57} Deuteronomy (20:19).
\textsuperscript{58} Carolyn Evans (n 3) 16.
\textsuperscript{59} Daniel Thurer (n 5) 200.
have a persuasive role in enhancing compliance with the law of armed conflict. Let it be concluded with a quote of Judge Christopher G Weeramantry: ‘….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…….’

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