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IHL before the Establishment of the ICRC: Plurality, Diversity and Continuity

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ABSTRACT

The laws of armed conflict (international humanitarian law/IHL) constitute an important part of international law. The development of international treaties relating to this field is said to have started from 1860s onwards when Henry Dunant formed the Committee of Five which was later on renamed as the International Committee of the Red Cross. Much of the historical accounts on the laws of armed conflict concentrate on the Eurocentric development of the law from this period, and the ancient codes on war formulated across the globe are largely ignored or given a cursory treatment. Continuance of problematic aspects of the old norms in the present times has also received less attention. Therefore, the author first seeks to discuss the primitive fighting practices in feuds. Subsequently, an attempt is made to trace the elements of compassion during war in the ancient times and explore the origin and growth of the laws of armed conflict in different parts of the world in the past. Though, such attempts have been made earlier also, however, the present account covers a wider variety of early codes and contribution of philosophers. Additionally, it tries to underscore how the problematic foundations of early codes continue in the modern law also. The article, thus, aims at contributing to the existing literature on the non-European origins of the laws of armed conflict and highlights the continuity of the past.

Keywords: Development of IHL, Eurocentricism, Early IHL, IHL in Asia

I. INTRODUCTION

A historical survey of the laws regulating violent conduct in war (called as international humanitarian law or laws of armed conflict) should not be limited to a linear and limited study of relevant treaties and other international instruments, but it should also include an account of how the ancient codes and practices developed and influenced the contemporary norms. It helps understand how the modern legal system on war has evolved gradually and what shaped its form and content. A study of the ancient rules of war provides insightful findings not just limited to the gradual development of the law but extending to human nature, ancient civilization and material conditions. On the contemporary significance of any historical

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account of law, it has been marvelously observed that:

To comprehend, understand and appreciate the present legal system adequately, it is necessary to acquire background knowledge of the course of its growth and development ... If we were to confine our attention exclusively to the law as it is, our understanding of it is bound to be deficient as it is not possible to appreciate its present ordering without some familiarity with its past.²

From a Third World perspective, a historical account of international law has its own importance and need because it helps reject the claims of the recent and European origin of the international laws of war. Prominent European authors of international law, such as Verzijl and Roling have opined that international law is a product of the European mind and that it is a law of European lineage.³ This Eurocentric perspective generates a distortion that overemphasizes the centrality of Western contexts of practice and underrates the practice of international law outside the West.⁴ Similarly, Oppenheim⁵ believes that the roots of the present laws of war are to be traced back to practices of belligerents during the latter part of the Middle Ages. On the other hand, Nussbaum⁶ tells us that the history of the law of nations is coterminous with the documentary history of mankind. This does not appear to be a correct legal position⁷ because the history of war, practices relating to conduct in war and its ethical and legal regulation is not specific to any particular geographical boundary and temporal limits. Although, these rules cannot be called international law in *stricto sensu* as it is perceived today, because the emergence of State is only recent. However, the existence and relevance of the old practices and norms among different communities, groups and civilizations cannot be dismissed.

II. POSITION IN PREHISTORY

The era before recorded history is called as prehistoric⁸ and the communities of that time are characterized as primitive. Broadly, this age is divided into Stone Age, Bronze Age and Iron Age. However, anthropologically it is a fallacious simplification of a complex

² MP Jain, *Outlines of Indian Legal and Constitutional History* (7th edn, LexisNexis 2014) 2.

³ RP Anand, *New States and International Law* (2nd edn, Hope India Publications 2008) 6-7.

⁴ Arnulf Becker Lorca, 'Eurocentrism in the History of International Law' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) 1035.

⁵ L Oppenheim, *International Law, vol II: Disputes, War and Neutrality* (H Lauterpacht ed, 7th edn, Longmans, Green & Co 1963) 226.

⁶ Arthur Nussbaum, *A Concise History of The Law of Nations* (The Macmillan Co 1950) 2.

⁷ See Anand (n 2) 10-11; Quincy Wright, 'History of the Concept of War' (1964) XIII, Pt. II The Indian Year Book of International Affairs 122.

⁸ The term was introduced by Daniel Wilson in 1851: Donald R Kelly, 'The Rise of Prehistory' (2003) 14:1 Journal of World History 22.

categorization—Lower Hunters, Higher Hunters, Pastoralists, Advanced Pastoralists, First Agricultural Grade, Second Agricultural Grade, and Third Agricultural Grade.⁹

Hobbes correctly points out that war has always been there¹⁰ but, according to Rousseau, the primitive war was not the same thing as the wars of States.¹¹ War implies a certain development of social organization, and is probably not so common at the lowest stages as it becomes higher up, says Hobhouse.¹² So, he largely prefers to name such fights as feuds.¹³ Therefore, the attempt here is to look for the manner of fighting, tools and methods of attack, behavior with the defeated enemy and elements of restraint, if any, on the violent conduct.

At the beginning of this epoch (the age of Lower Hunter and Higher Hunters), the groups of people lived in forests. For them, hunting and foraging were the prime occupations, and survival was the first and foremost concern. Among these people, fighting took place not to conquer a territory, but in order to save life, gather edibles or take vengeance. During such times, restraints on fighting could not be imagined bypassing the more important issues of self-preservation and survival. Barbarism was common in such feuds. However, the habit of living in smaller number limited the scale of violence to some dozens of people. A scientific study done by Hobhouse contains analysis of the practices in respect of treatment with vanquished enemy. The study arrives at the following¹⁴ findings.

There were a few tribes (about 13 out of 298) across the various stages of prehistory that did not have recourse to war. Among the rest of them, the treatment with a defeated foe was cruel and barbaric. War-prisoners and civilians were subjected to slaying, enslavement, cannibalism, infanticide and human sacrifice. In case of a woman and child prisoner, practices like adoption, exchange and release were also in vogue. Woman-captives might have to undergo marriage and prostitution also. Exceptionally, some tribes did not slay woman and child prisoners; however, no records of such gender and age based exemption were found in respect of practices of cannibalism, infanticide and human sacrifice. Data analysis performed in the study tries to establish that in the Third Agricultural Grade the practice of killing war-

⁹ GW Paton, *A Textbook of Jurisprudence* (4th edn, OUP 2004) 45, 47.

¹⁰ This should not be confused with his proposition of “normality of war”. For more, see Thomas Hobbes, *Leviathan* Pt I, Ch XIII.

¹¹ Doyne Dawson, ‘The Origins of War: Biological and Anthropological Theories’ (1996) 35:1 History and Theory 1.

¹² LT Hobhouse, G C Wheeler et al, *The Material Culture and Social Institutions of the Simpler Peoples* (Chapman & Hall Ltd 1915) 228.

¹³ *ibid.* According to Quincy Wright, such fights have characteristics of feud, retaliation or reprisals. Wright (n 6) 121.

¹⁴ Hobhouse and Wheeler (n 11) 229-243.

captives declines and that of enslavement rises.¹⁵ The examination of the data also reveals that when prehistory period came to an end, the practice of cannibalism reduced substantially but that of human sacrifice increased.¹⁶

Similar practices prevalent in the primitive era have been observed by few other writers¹⁷ also. Among the primitive peoples, the rules of fighting consists of group customs or behavior patterns of the members of the group acquired through instructions and discipline to which each generation is subjected.¹⁸ However, for purposes of tracing the origins of restraints in war, speculations on the intrinsically peaceful or aggressive character of *homo habilis* (earliest species of human beings) are largely immaterial.¹⁹

III. CODES IN ANCIENT ERA

The organization of masses of different regions in the subsequent period is categorized as ancient civilizations. The early restrictions in warfare gradually arose in the first millennium BC in several parts of the world.²⁰ The Assyrians, Babylonians, Aryans, Arabs, Chinese, Jews, Greeks and Romans feature the history before and after the birth of Jesus. In this epoch, the creation of metal weapons, use of chariots and organization of professional army had impact over the conduct in the battlefield. However, “The line between primitive and subsequent wars is not sharp.”²¹

Among the early rules of war, the Code of Hammurabi occupies a prominent place. In the seventeenth century BC, Babylonian king Hammurabi ordered that hostages be released on payment of a ransom.²² Around 1400 BC, Egypt had agreements with Sumeria and other States regarding the treatment of prisoners of war.²³ There was a practice in Abyssinia

¹⁵ *ibid* 233.

¹⁶ *ibid* 242.

¹⁷ For example, Practices like enslavement of woman captives, cannibalism and sacrifice of war captives were noted in PC Avebury, *The Origin of Civilisation and the Primitive Condition of Man* (6th edn, Longmans, Green & Co 1902) 155, 381 and 384 respectively. Schwarzenberger cites *Yonoama* written by Helena Valero who was captured by Yonoamami tribe. In a raid by Kerawetari, she witnessed killing children of enemy: Georg Schwarzenberger, ‘The Law of Armed Conflict: A Civilised Interlude’ (1974) XXVIII *The Year Book of World Affairs* 295. See also, Albert Kocourek and John H Wigmore, *Primitive and Ancient Legal Institutions* (Little, Brown and Co 1915) and Keith F Otterbein, ‘A History of Research on Warfare in Anthropology’ (1999) 101:4 *American Anthropologist* 794-805.

¹⁸ Wright (n 6) 122.

¹⁹ Schwarzenberger (n 16) 295.

²⁰ Michael Bryant, *A World History of War Crimes: From Antiquity to the Present* (Bloomsbury Academic 2016) 4.

²¹ Wright (n 6) 123.

²² Mary Ellen O’Connell, ‘Historical Development and Legal Basis’ in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, OUP 2013) 16.

²³ Jean Pictet, cited in Gary D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (CUP 2010) 4.

(Ethiopia) to cut off the right hand and the left foot of soldiers to show who had lost a battle.²⁴ The conduct of Assyrians during war was brutal. They took delight in burning, massacre and torture.²⁵ The narrations of their devastating triumphs recorded on the walls of their palaces tell the awful truth:

Assurnazir-hapal in 882 BC says, “I had some of them flayed in my presence and had the wall hung with their skins. I arranged their heads like crowns and their transfixed bodies in the form of garlands.”

In 745 BC, Tiglath-Pilezer II writes, “I shut up the king in his royal city. I raised mountains of bodies before his gates. All his villages I destroyed, desolated, burnt.”²⁶

The description of Assyrians coming down “like a wolf on the fold” applies equally to Babylonians, Medes and Persians, Phoenicians and Carthaginians; and even the Jews,²⁷ although, they recognized a higher moral law and the ideals of peace proclaimed by their prophets. However, the position in Persia was satisfactory. Under their domination, there was no continuous burning of cities, devastation of fields, massacre or wholesale enslavement of inhabitants. It was a period of peace.²⁸

Besides the above practices, descriptive humanitarian rules and principles suggested in different parts of the world in ancient times are discussed below.

India

The rules of war promulgated in the ancient India are part of several scriptures reflecting idealism, ethics and pragmatism. Their scope is comprehensive and addresses many aspect of war. They tried to suggest an ideal system in battlefield. These texts were mainly written by Brahmins who were Aryans and belonged to the highest *Varna* (class) under the hierarchical *Varna* system as per the Rig Veda.²⁹ The epic poems Mahabharata and Ramayana suggest proposal of peace before the declaration of war. In Mahabharata, Krishna approaches the *Kouravas* with a message of peace on behalf of the *Pandawas* and also conveyed a warning of attack in case of rejection of the offer. Similarly, in Ramayana Rama sent Angada to Ravana with an offer for amicable solution.

The scriptures advocate distinction between combatants and civilians. They prohibited

²⁴ Ingrid Detter, *The Law of War* (2nd edn, CUP 2000) 151.

²⁵ Charles Seignobos, *History of Ancient Civilisation* (Arthur Herbert Wilde tr, Charles Scribner 1906) 41.

²⁶ Ibid 40.

²⁷ Charles G Fenwick, *International Law* (Vakils, Feffer and Simons Pvt. Ltd 1971) 5.

²⁸ Seignobos (n 24) 74.

²⁹ Rig Veda, 10/90/12.

deliberately targeting of viewers of the battle, children, women and old persons.³⁰ Soldiers could be attacked generally, however, the ancient books do not permit attack on a soldier who apologizes and surrenders;³¹ who is tired and unable to fight;³² who has no weapons,³³ or who is injured.³⁴ The texts also prohibited destruction of temples, slaying of animals employed in battle and cutting of sacred trees.³⁵ In the present context, such prohibitions are widely available in the Geneva Conventions (1949) and Additional Protocols (1977).

The ancient Indian literature also provides for norms regulating the means and methods of hostilities. They do not permit use of concealed, poisoned or lethal weapons during war.³⁶ Humane treatment with prisoners of war is also one of the prescriptions applicable in war-time. However, some of the rules contain the imprints of *Varna* system and provide for discriminatory conduct during war. For instance, Kautilya's condemnation of enslavement applies in favor of Aryans only.³⁷ On the other hand, he is in favor of violence and devastation in war with wild tribes.³⁸ It shows that the scriptures were not free from prejudice against non-Aryans.³⁹ The difference and bias in rules on the basis of cultural distinction continued in the modern era also on the basis of the binary of civilized and uncivilized. In the colonial era, the "civilized" Western countries did not extend the operation of the treaties relating to conduct in war to wars with "uncivilized" colonies. In their opinion, the savages (colonies) deserved no humane treatment and mercy.

Besides the scriptures, records have been found of agreements between the warring rulers and the heads of villages' self-governing communities, promising not to injure harvest in any way during war and to give compensation for any injury unintentionally caused to the land.⁴⁰ The idealism reflected above was certainly unique and wide in scope; however, it could not ensure their observance during wars. It is mainly because the codes were not in the form of binding agreements between rulers, but individual writings and literature.

³⁰ *The Laws of Manu* from F Max Muller (ed), *Sacred Books of the East*, vol XXV (Georg Buhler tr, Atlantic Publishers 1990) 7/92; Agnipuran, 236/57-60; Mahabharata, Shantiparva, 98/48.

³¹ Pramathanath Bandyopadhyay, *International Law and Custom in Ancient India* (Calcutta University Press 1920) 116-117.

³² Shukraneeti, Ch. 4, Sainya Prakaran/355-57.

³³ Mahabharata, Bhishmaparva, 1/31; Manu (n 29) 7/92. Although, Krishna asked Arjuna to attack Karna when he was trying to fix the wheel of his chariot.

³⁴ Manu (n 29) 7/93.

³⁵ WS Armour, 'Customs of Warfare in Ancient India' in *Transactions of the Grotius Society*, vol 8 (CUP 1922) 74-78.

³⁶ Mahabharata Shantiparva, 95/11; Manu (n 29) 7/90.

³⁷ Arthashastra, 3/13/4.

³⁸ Arthashastra, 9/2.

³⁹ For more, see Kailash Jeenger, *A Humanitarian Critique of International Humanitarian Law* (Springer, forthcoming), Ch 6.

⁴⁰ Jawahar Lal Nehru, *The Discovery of India* (Penguin Books 2012) 143.

China

It is among the member states of the ancient Chinese and Indian empires that regional law began first to take more definite shape.⁴¹ Zhou dynasty (1046-256 BC) adhered to “a highly ritualized conception of military campaigns that imposed in-built constraints on their conduct”⁴² unlike the previous rulers of Shang dynasty. Such limitations include: “in the event a river crossing threw an army into turmoil, the opposing army had to refrain from attacking until order was restored. An invader was enjoined to retreat if the ruler of the state being invaded died”.⁴³ The ancient Chinese culture was not in favor of glorification of war. In the same vein, military heroism was also not a celebrated notion.⁴⁴ It has been well observed in respect of the Chinese practices of war:

“In antiquity they did not pursue a fleeing enemy more than one hundred paces or follow a retreating enemy more than three days, thereby making clear their observance of the forms of proper conduct. They did not exhaust the incapable and had sympathy for the wounded and sick, thereby making evident their benevolence.”⁴⁵

However, in few wars the conduct derogated and resulted into massacre of soldiers as well as civilians. It was the Epoch of the Warring States from 475 BC to 221 BC. A group of scholars in this Epoch propounded detailed humane rules and principles of war and peace. Their views came to be known as the School of War (*bingjia*). One of the most influential of them was Sun Tzu who wrote a classical treatise on war in the fifth century BC. In this work, he primarily looks at war with utter disgust, however, if war becomes unavoidable, victory must not be stained with immoral means, he suggests. Few of his precepts concerning war are quotable. He advocated capturing enemy soldiers, instead of killing them,⁴⁶ and according kind treatment to them.⁴⁷ In respect of civilians and civilian objects, he believed that “the best thing of all is to take the enemy’s country whole and intact; to shatter and destroy it is not so good.”⁴⁸ He was not in favor of sieging walled towns as far as possible.⁴⁹ Another treatise with the same title was penned during the same period by Sun Bin who stresses that; “A

⁴¹ Fenwick (n 26) 5.

⁴² Bryant (n 19) 18.

⁴³ *ibid.*

⁴⁴ Gregor Paul, ‘War and Peace in Classical Chinese Thought’ in Perry Schmidt-Leue (ed), *War and Peace in World Religions* (SCM Press 2004) 60.

⁴⁵ Vaibhav Goel, ‘An Introduction to Origin, Evolution Development of International Humanitarian Law’ in Louise Doswald-Beck and Azizur Rahman Chowdhury et al (eds), *International Humanitarian Law—An Anthology* (LexisNexis 2009) 6.

⁴⁶ Art of War, Ch III/1.

⁴⁷ *ibid* Ch II/17.

⁴⁸ *ibid* Ch III/1.

⁴⁹ *ibid* Ch III/4.

distaste for war is the most basic principle of the True King.”⁵⁰

Islam

In Islamic tradition also, adequate rules regulating the conduct of armed operations are available.⁵¹ An overarching direction in Islam is not to violate the instructions given by Allah.⁵² The instruction not to transgress is reflected in Muhammad’s decision not to slay prisoners of war of Badr and Hunayn. The Quran instructs to “fight those who fight you”⁵³ and, thus, suggests that civilians should not be targeted during an armed conflict. The ban also extends to civilian objects, such as houses and fields.⁵⁴ The Islamic tradition of humanitarianism in war also seeks to outlaw torturous conduct against opponent’s soldiers.⁵⁵

Greek city-states

Separated by mountains and arms of sea, Greece was divided into small city-states having general kinship for each other but not at all for non-Greeks or barbarians. About the Greeks, Fenwick⁵⁶ quotes Phillipson and underscores that an elaborate code based upon the universal law and supported by treaties, governed the conduct of hostilities. It prescribed many rules to mitigate the ferocity of interstate conflicts. But he disagrees with him saying that in actual practice, the laws of war were as little able to restrain the Greeks as to restrain belligerents in more modern times.⁵⁷ The deliberate massacre by the Lacedemonians of the Platean garrison that had capitulated is a notable instance.⁵⁸ War with Troy (Trojan War) fought in the 12th century BC is yet another example of the Greek ruthlessness. The Greeks actually treated non-Greeks or barbarians as born enemies to whom they were conditioned not to show any pity. The few practices were generally religious and not much influential:

“the asylum of temples was extended to fugitives from battle; priests were usually held inviolable; and each belligerent party was to be permitted by the enemy to bury the dead.”⁵⁹

Having quoted this, Nussbaum admits that there was nothing like the Code of Manu⁶⁰ or

⁵⁰ Paul (n 43) 60.

⁵¹ See also, Jeenger (n 38).

⁵² *The Quran* from F Max Muller (ed), *Sacred Books of the East*, vol VI 27 (EH Palmer tr, Atlantic Publishers 1990).

⁵³ Aftab Alam, ‘The Islamic Concept of Humanitarian Law’ in VS Mani (ed), *Handbook of International Humanitarian Law in South Asia* (OUP 2007) 43.

⁵⁴ O’Connell (n 21) 17.

⁵⁵ Alam (n 52) 41.

⁵⁶ Phillipson, cited in Fenwick (n 26) 7.

⁵⁷ *ibid.*

⁵⁸ Thucydides, cited in *ibid* 7-8.

⁵⁹ Nussbaum (n 5) 15.

⁶⁰ However, it is important to note that the Code of Manu also contained several casteist and gendered norms

Indian meekness in the Greek cities.⁶¹ With the passage of time, the war between Greek city-states also started. These conflicts witnessed brutal plunder and pillage.

“These wars between the Greek cities were ferocious ... Ordinarily when an army invaded a hostile state, it leveled the houses, felled the trees, burned the crops and killed the laborers. After battle, it made short shrift of the wounded and killed prisoners in cold blood. In a captured city everything belonged to the captor: men, women, children were sold as slaves. Such was at this time the right of war.”⁶²

Thus, the Greek traditions on the rules in war were initially based on the insider-outsider differential. Wars with non-Greeks knew no mercy. Barring a few humanitarian considerations, enemies in war were treated brutally, irrespective of soldiers and civilians.

Rome

The foundation of Roman law was stronger and its spectrum was wider. The etymological origin of the term *jus in bello* (law regulating conduct of armed operations in war) can be traced in the Roman law. Contrast to the Greek tradition, a foreigner was not an enemy for the Romans. In order to maintain humanity in war, a distinct group of priests, the *fetiales* was identified in 509 BC. The group was assigned the responsibility to certify a just cause of war whereupon if the Senate declared war, it had to be “just” and “pious”—*bellum justum et pium*.⁶³ Though, the practice could not last longer. Excepting this temporary practice, “the conduct of [Roman] war was essentially unrestrained. Prisoners could be enslaved or massacred; plunder was general; and no distinction was recognized between combatants and noncombatants.”⁶⁴ After conquest, treatment with captives was barbaric. Following the ceremony (a religious procession in respect of a conquest), the captives were imprisoned, or, as in the case of Vercingetorix, beheaded, or, like Jugurtha, cast into a dungeon to die of hunger.⁶⁵

About the hundred years of the Punic Wars between Romans and Carthage, Nehru writes: “they fought like wild animals, bringing misery to vast populations.”⁶⁶ The third Punic war (149-146 BC) was a war of extermination. The Romans took Carthage by assault, razed it, and

which were discriminatory and oppressive to Shudras (the lowest class of people) and women. For more, see GS Ghurye, *Caste and Race in India* (Popular Prakashan 2008) 91, 97; BR Ambedkar, *Annihilation of Caste: The Annotated Critical Edition* (Navayana 2013) 269-270; AS Altekar, *The Position of Women in Hindu Civilization: From Prehistoric Times to the Present Day* (Motilal Banarasi Dass Publishers 2016) 107, 109.

⁶¹ Nussbaum (n 5) 15.

⁶² Seignobos (n 24) 158-159.

⁶³ Nussbaum (n 5) 16-17.

⁶⁴ Robert C Stacey, cited in Solis (n 22) 4.

⁶⁵ Seignobos (n 24) 245.

⁶⁶ Jawahar Lal Nehru, *Glimpses of World History* (Penguin Books 2004) 85.

conquered Africa.⁶⁷ Thus, in Rome, the conduct in war was largely unrestrained, and barbaric treatment with non-Roman enemies also became common. The idea of “no quarter” is traced to the “Roman style of war known as *guerre mortelle* — in which no privilege of ransom or mercy would be granted.”⁶⁸

Judaism

The approach of Judaism towards war has been unstable. In the initial Jewish history, prophet Isaiah (eighth century BC) is found to have said that “they shall beat their swords into plowshares and their spears into pruning hooks: nation shall not lift up swords against nation, neither shall they learn war any more”.⁶⁹ In the second century BC, Deuteronomy appeared as a written canon on warfare. It was actually a collection of sermons delivered by Moses. The Book of Deuteronomy prescribes that if the enemy does not surrender or agree to make peace with you, siege the city, slay the men and capture women, children livestock and everything else.⁷⁰ However, during siege of a city, Deuteronomy prohibits putting an axe to the trees bearing fruits.⁷¹ In respect of seven nations namely, Hitties, Girgashites, Amorites, Cannanites, Perizzites, Hivites and Jebusites; Moses denies quarter or treaty and asks to put them to death and destroy their sacred pillars, poles and idols.⁷² That is why it has been observed that “Judaism contains a moral license which permits war despite the recognition that peace is the ethical ideal”.⁷³ According to Nussbaum,⁷⁴ Deuteronomy is the oldest written document on warfare. Observance to the commands of Moses is reflected in Israelite practices in war against Midian where they slew men and captured the women and children.

Thus, the above account of historical traditions of humanitarianism in war informs us about the diversity of rules and principles promulgated across the globe in the ancient times. Majid Khadduri points out that within each civilization a body of principles and rules developed for regulating the conduct of states with one another in peace and war.⁷⁵ These norms were a reflection of the existing moral and ethical principles. They were shaped by the conditions prevailing at that time. However, adherence to these norms is certainly very ambitious to imagine. Some rulers respected the precepts, while many others violated them because of

⁶⁷ Seignobos (n 24) 239.

⁶⁸ Samuel White, ‘Roman Laws of War’ in Samuel White (ed), *The Laws of Yesterday’s Wars 2: From Ancient India to East Africa* (Brill 2022) 111; Schwarzenberger (n 16) 297.

⁶⁹ Isa. 2:4, cited in Nussbaum (n 5) 9.

⁷⁰ Deuteronomy, 20:12-14.

⁷¹ *ibid* 20:19; Dan Cohn-Sherbok, ‘War and Peace in Judaism’ in Perry Schmidt-Leue (ed), *War and Peace in World Religions* (SCM Press 2004) 86.

⁷² *Ibid.*, 20:17; Bryant (n 5) 28.

⁷³ Cohn-Sherbok (n 70) 83.

⁷⁴ Nussbaum (n 5) 9.

⁷⁵ Majid Khadduri, cited in Anand (n 2) 12.

political instability, expansive plans and religious distinctions. The derogation was common irrespective of geographical regions and time-frames. Similar trend can be seen in modern wars also, sometimes with even more ferocity. Additionally, many of the rules were prejudiced and applicable to similar group only. Likewise, in the modern era, the pre-World War I treaties regulating the means and methods of war were applicable among the colonizers only.⁷⁶ Wars with colonies were not subjected to any legal regulations. The colonizers enjoyed the freedom to brutally suppress any violent anti-colonial or freedom struggle.

Besides the above narrated humanitarian practices, it is significant to note that there were two traditions — Buddhism and Jainism — which supported non-violence and forbade use of arms. Thus, no rules on the conduct of military operations are found in Buddhism and Jainism.

In the historical accounts of ancient humanitarian rules, yet another contribution that receives less attention is the works of European philosophers.

IV. CONTRIBUTION OF EARLY MODERNITY PHILOSOPHERS

The European philosophers of the early Modern and subsequent era wrote extensively on the relations between nations and their conduct during war. Their works were influenced by theological principles of St. Augustine and Thomas Aquinas.⁷⁷ The international law or *jus gentium* as developed by them appears to be an offspring of the natural law philosophy.

Bartolus (1314-1357) and Baldus (1327-1410)

Bartolus who is called as the “first theorist of international law”,⁷⁸ was a famous Italian jurist and professor, and Baldus was his disciple. Their ideas touched few aspects of the laws of war also. Bartolus condemned enslavement of Christian prisoners of war and he stressed upon distribution of booty instead of being retained by the captor.⁷⁹ His disciple Bardus, on the other hand, maintained that the authority to wage war vests in emperor and pope only.⁸⁰

Giovanni da Legnano (1320-1383)

According to Holland, the first substantive treatise upon the subject of war and reprisals was written by Giovanni da Legnano who was a professor of Civil and Cannon Law, and Vicar of

⁷⁶ See, Declaration Renouncing the use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, 1868; Art. 2, Hague Convention (II) with Respect to the Laws and Customs of War on Land of 29 July 1899, and Art. 2, Hague Convention (IV) with Respect to the Laws and Customs of War on Land of 18 October 1907.

⁷⁷ “Earlier writers had written ... especially on the usages of war and on the treatment of ambassadors, but they did not separate the legal from the theological and ethical ...”: JL Brierly, *Law of Nations* (Andrew Clapham ed, OUP 2012) 23.

⁷⁸ Stephen C Neff, ‘A Short History of International Law’ in Malcolm D Evans (ed), *International Law* (3rd edn, OUP 2010) 7.

⁷⁹ Nussbaum (n 5) 46-47.

⁸⁰ *ibid* 46.

the Pope.⁸¹ His book *De bello de represaliis et de duello*, deals with variety of issues relating to war, such as authority to declare war, lawfulness of war, duties of soldiers and commander, commands of superior, booty, *postliminy*, prisoners of war, attack on saints and rights of civilians.⁸²

Francisco de Vitoria (1486-1546)

Vitoria was a Spanish theologian and a philosopher. Being a professor of theology by profession and inspired by the teachings of Thomas Aquinas, Vitoria carried out systematic study and inquiry of the contemporary issues which are contained in his thirteen theological “*Relectiones*”. In the sixth “*Relectio*”, he considers important questions, such as, whether Christians can wage war at all; with whom lies the authority to declare war; which factors justify war and in what manner a just war may be lawfully conducted.⁸³ However, this investigation was carried out by him in the context of the Spanish plan of colonizing the American Indians, whom he named as barbarians. In his work, Vitoria sought to legitimize war on the barbarians, indiscriminate violence, plunder of property, seizure of valuable items, hostage-taking and enslavement of children and women.⁸⁴

In his general approach towards war, he prioritized military necessity. Accordingly, if military necessity requires, property of civilians could be seized, enemy soldiers could be killed after conclusion of war and war captives posing threat to security could be put to death.⁸⁵ Property of the vanquished could be seized to make good the losses and expenses incurred by the conqueror. However, he prohibited killing of women and children indiscriminately and enslaving defeated Christians; and he suggested quarter be given to enemy soldiers fighting in good faith.⁸⁶ However, Nassbaum’s observation that Vitoria’s work exhibits a clearly humane tendency⁸⁷ is exaggerated.

Pierino Belli (1502-1575)

After having served as an Italian military judge, Belli wrote *De re Militari et de Bello Tractatus* (On Military Matters and War) in 1563. It is believed that almost seventy years before Grotius’ famous work, he offered a systematic treatment to the rules of war.⁸⁸ Reference to abundant earlier authorities and his own practical experience as a judge renders

⁸¹ TE Holland, *Studies in International Law* (Clarendon Press 1898) 44.

⁸² *ibid* 46.

⁸³ *ibid* 52.

⁸⁴ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2004) 27.

⁸⁵ Bryant (n 19) 85.

⁸⁶ *ibid* 86.

⁸⁷ Nussbaum (n 5) 63.

⁸⁸ Solis (n 22) 17.

his work more relevant. Besides concentrating on just war doctrine, “he shows a marked advance over his predecessors by unreservedly condemning any cruelty against prisoners and by insisting upon fair treatment with the inhabitants of occupied enemy countries”.⁸⁹

Balthasar Ayala (1548-1584)

The opinion of Ayala, a Spanish military judge, with respect to laws of war display the prevailing approach and his experience as judge. His views on restraints of war suffer from few serious defects as to non-secular nature of limits in many ways, for example, prohibition on enslavement of Christian prisoners of war only, obligatory nature of treaties of truce and ransom between Christian sovereigns only, and, on the other hand, recommendations of “wars of fire and blood” against heretics and rebels justifying blind violence in Spanish war.⁹⁰ Ayala’s tractate has been found to be the most detailed inquiry into the consequences of unjust warfare.⁹¹

Francisco Suárez (1548-1617) Spanish Priest, philosopher, theologian

Like Vitoria, he was also a professor of theology in Spain and he presented new dimensions of the just war doctrine like a successor. Recognized as the “most scholastic of the scholastics”,⁹² Suárez’s contribution to international law is unfathomable, particularly to the laws of war. His ideas on limits on war differ in case of just war and unjust war but at the end it appears to be justifying violence in disguise.⁹³ According to him, if war is fought for a just cause, then killing even of clerics is not a breach of the laws of war. To the contrary, in an unjust war, prisoners of war do not qualify for protection. He held permissible slaying of enemy soldiers after war except mercenaries. However, he recommends exemption to three classes of the “innocent”; first, women, children and those unable to fight; second, ambassadors and third, clergymen and members of religious orders.⁹⁴

Alberico Gentili (1552-1608)

Gentili was a British-Italian and a religious professor of Civil Law at the Oxford university. About him, Holland calls for our attention and reminds “that the first step towards making International Law what it is, was taken, not by Grotius, but by the Perugian refugee, the adopted son of Oxford, Albericus Gentilis”.⁹⁵ In his celebrated work, *De Jure Belli* (The Law

⁸⁹ Nussbaum (n 5) 63.

⁹⁰ Bryant (n 19) 88.

⁹¹ Nussbaum (n 5) 75.

⁹² *ibid* 67.

⁹³ See Bryant (n 19) 90-91; Nussbaum (n 5) 69-70.

⁹⁴ Bryant (n 19) 90-91.

⁹⁵ Holland (n 80) 23. Brierly also maintains that Gentili was perhaps the first writer to make a definite separation

of War) consisting of three volumes, humanitarian considerations prevail in his philosophy of war. The premise of his treatise is the ancient Roman law.⁹⁶ He was first among his cotemporary thinkers to stipulate an interval of thirty-three days between declaration of war and commencement of war as cooling-off period.⁹⁷ Other restrictions put forward by him are in common with the other medieval jurists; like fair conduct during and after war, kind treatment with prisoners and ransom. In line with Vitoria and Ayala, he was also not in favor of enslavement of Christian prisoners — a practice endorsed in reciprocity to Turks. However, what makes his work more impressive is that he regarded as crimes the practices of denial of quarter, giving poison to enemy and committing rape even as a necessity of war. In his opinion, there exists an implied contract between captive and captor, not mentioned by any other previous jurist, which should be respected. Therefore, it has been said about him that “he was like a skilled mariner wintering in safe and familiar harbors, who suddenly hoists sail and scuds into the vast watery unknown”.⁹⁸

Hugo Grotius (1583-1645)

The Dutch jurist Hugo Grotius wrote a comprehensive treatise on international law, *De jure belii as pacis* founded on the secular notions of natural law. Like Cicero and Augustine, he recognized self-defense, recovery of property and punishment as three just causes of war.⁹⁹ In this respect, Grotius opened a new path by his doctrine of *temperamenta* of warfare.¹⁰⁰ Rejecting the views of worshippers of expediency in warfare, he held killing of women, children and captives illegal in the light of natural law. However, he faces criticism when he does not oppose killing of hostages taken as a guarantee to ensure compliance of a treaty; because this contravenes the law of nature.¹⁰¹ He was in favor of respecting the limitations on warfare irrespective of the just or unjust character of resort to war. This is considered as a major contribution in legal ideas and part of the Grotian tradition.¹⁰²

of international law from theology and ethics and to treat it as a branch of jurisprudence: Brierly (n 76) 25. Neff accredits Gentili's treatise as the first truly systematic study of the law of war: Neff (n 77) 7.

⁹⁶ Merio Scattola, 'Alberico Gentili' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) 1095.

⁹⁷ Bryant (n 19) 95.

⁹⁸ *ibid* 94.

⁹⁹ *ibid* 101.

¹⁰⁰ Brierly (n 76) 31.

¹⁰¹ “Yet this piously nurtured foundational myth, which smacks of 19th century hero worship and anticlericalism, is hardly borne out by the text of Grotius' masterpiece. Neither does it propound a new 'secular' conception of natural law, nor is it really a system of international law.”: Peter Haggemacher, 'Hugo Grotius' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) 1099.

¹⁰² Solis (n 22) 18.

Jean-Jacques Rousseau (1712-1778)

In the eighteenth century, Rousseau suggested a very fundamental precept of restraints in war which influenced the development of the laws of armed conflict subsequently. In his work on social contract (1762), he famously wrote:

“The object of war being the destruction of the hostile State, the other side has a right to kill its defenders while they are bearing arms; but as soon as they lay them down and surrender they become once more merely men, whose life no one has any right to take.”

This precept suggests that wounded, sick or unarmed soldiers should not be attacked as they pose no threat to the adversary. Similarly, civilians must be spared. This principle provides a rationale as to why excesses of war must be controlled. It has been aptly observed in respect of Rousseau’s opinion:

“it was the first recognition of the principle that the purpose of using force is to overcome an enemy state, and that to do this it is sufficient to disable enemy combatants. The distinction between combatants and civilians, the requirement that wounded and captured enemy combatants must be treated humanely, and that quarter must be given, some of the pillars of modern humanitarian law, all flow from this principle.”¹⁰³

Thus, this principle has been understood as very fundamental to the modern rules and principles of the laws of armed conflict.

V. CONCLUSION

To sum up, the rules regulating hostile conduct originated and developed in ancient times in many parts of the world. They depict some progress from the primitive barbaric practices in feuds. These rules were shaped by the prevalent material circumstances, ethics, weapons and military equipments. The rules and codes were predominantly an individual creation. Historically, they have been considered as indicating an ethical conduct during war and beginning of humanitarianism during the conduct of military operations. However, it must be realized that the ancient precepts were often guided by military necessity, and they permitted brutal conduct with an enemy of different group identity. Similar approach can be seen in the modern laws of war. During colonialism, the law was not applicable to armed conflicts with colonies that were considered as uncivilized. Military necessity is still the overarching

¹⁰³ O’Connell (n 21) 20.

principle of the modern international “humanitarian” law. Given the limitations, the ancient codes on war and the works of jurists are helpful to understand the origin and growth of the law before the Battle of Solferino from a broader perspective and to realize the continuity of the problematic aspects of the old rules and principles.
