

When Two Visions of a Just World Clash: International Humanitarian Law and Islamic Humanitarian Law

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Introduction

With the rise of new challenges in the aftermath of 9/11, the emergence of new types of war, the wars in Iraq and in Afghanistan and the changing patterns of conflicts, the uniformity of international humanitarian law is questioned; a debate about the “regionalization” of humanitarian law has spring to life. Humanitarian workers have been confronted with this reality in the field. Academic discussions have become real life issues, such

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as the existence of an Islamic humanitarian law. This law exists and has been shaped by the Quran and the Prophet along the wars.

There is no competition as such between Islamic humanitarian law and international humanitarian law for states such as Iran, Saudi Arabia or any other. The issue lies rather with transnational actors and their interpretations of Islamic law. If States have abided to international humanitarian law by signing conventions, there is an issue with transnational terrorist groups: these actors are supposed to respect international humanitarian law, both the conventions and the customary law; however they have loosened their interpretations of Islamic humanitarian law, the only law they refer to. This paper explores the risks inherent to the regionalization of humanitarian law and the possibilities of reconciliation between the different legal systems, the one being international humanitarian law and the other Islamic humanitarian law as perceived by transnational terrorist groups.

What is Islamic Humanitarian Law?

This part of the paper is a presentation of Islamic humanitarian law and the new dynamic it creates within humanitarian law in general.

A. History of Islamic Humanitarian Law

The laws of war and humanitarian rules in Islam are quite

ancient and were shaped in the 7th century/1st century of Hegira. The Prophet Muhammad had a lot of interactions with other tribes and nations; he soon faced the need to have a set of rules that would regulate an Islamic behavior and pattern in international relations. Islamic international law symbolizes how Islam sees the world, the Islamic discourse on the world and the Islamic actions within the international community.¹ The creation of an international Islamic international law has influenced international humanitarian law, developed in the 19th and 20th centuries.² There is no Islamic public international law branch as such: Islamic law is a system, an "inseparable whole"³ that is not divided into branches such as criminal law or public law. Islamic public law is called as *siyar*.⁴ The *siyars* about war, or jihad (the *qital* approach of jihad as we will see later), are extremely detailed and contain the laws of war, law of treaties and humanitarian rules. The Sunni and Shiite perceptions of international law are more or less the same except for the role of the leader of international relations:⁵ For the Shiites, the Imam is the only leader who can take care of international matters; as the 12th imam is in occultation, no Shiite government can reach a decision on international issues such as war. However Ayatollah Khomeyni established the principle of *velayat-e faqih* according to which educated juristconsults should rule until the 12th imam's return:⁶ matters and decisions of international law are

therefore dealt with by the head of the state, the Guide.⁷

B. The Legal Sources of Humanitarian Principles in Islam

The legal aspect in Islam is very important because Shari'a (Islamic law and its interpretations) and the jurisprudence (fiqh) rule every aspect of life.⁸ It is consequently necessary to know the Islamic legal sources to understand how the humanitarian rules were shaped. There are four sources of law: The first source of law is the Quran, the Holy Book. Then there is the Sunna which is a compilation of the Prophet's words, decisions and actions (compiled in Hadiths). The third source of law is ijma, the consensus of learned Muslim scholars, the Ulemas, deciding on a legal issue; and the fourth one is human reasoning (ray for the Sunnis, aql for the Shiites) of the Ulemas. The process used to interpret this legal corpus called Shari'a is the process of ijihad. The Ulemas who practice ijihad, the exegesis, of the Quran and the Sunna, and who issue a legal decision through ijma or human reasoning, are mojtaheds.⁹ These two main sources of Islamic law are then interpreted either by a group of mojtaheds who reach an ijma, a consensus on a legal matter, or by one learned cleric, a mojtahed, who will give a legal opinion, a fatwa. The role of Quran and hadiths is very important on the matter of shaping humanitarian principles: when the Quran was revealed and the

Prophet was alive, there were many wars and feuds going on:¹⁰ therefore Islamic law reflects this. For example the Quran says: "Fight in the cause of God with those who fight against you, but do not commit transgression; For God dislikes those who transgress (Quran 2:190)."¹¹

A good example of hadith regulating a humanitarian principle is "Do not kill an old person, a child, a woman; do not cheat on the booty, do well: God likes the ones who act right."¹² Another hadith reports that the Prophet said: "Prisoners are your brothers and companions. It is because of God's compassion that they are in your hands. They are at your mercy, so treat them well as if you were treating yourself, with food, clothes and housing."¹³ Or "Do not be eager to meet the enemy but ask God for safety; yet, if you meet them, persevere and have patience; and know that Paradise is under the Shadow of Swords."¹⁴ Some scholars have seen a similarity between these four sources of law and the four sources of international law laid down in Article 38 of the International Court of Justice's statute:¹⁵ International agreements are like the Quran, custom is the Sunna, general principles or law are found in the ijma and scholarly opinions are the fatwas that are the products of ray or aql. These sources of law have shaped what Islamic humanitarian law is today, mainly regarding the concept of war, or jihad.¹⁶

C. War and Peace in Islamic Law

To know the rules of war, one first has to give a definition of the notion jihad: contrary to what some Orientalists, classic Islamic scholars and extremists have said, jihad is not a war waged against the Unbelievers to impose a religion and universalize Islam. Jihad set up war and humanitarian rules and sets limits to the battlefield.¹⁷

There are different sort of jihad, greater and lesser: Jihad is a determined effort¹⁸ to go beyond a problem against Satan, oneself or against an opponent;¹⁹ it can also be an argument, a financial struggle or a war (then it is called a qital).²⁰ Therefore jihad does not always mean a war. Besides, there is no such thing as a Holy War:²¹ the notion of Holy War doesn't even have a translation into Arabic. Majid Khadduri speaks however of a *bellum iustum* in Islam but no such thing exists as jihad is morally justified in itself (as we will see later).²² Islam is a religion of peace (Quran 24:55 and 5:127).²³ However war is a reality in the human realm because violence is inherent to human nature.²⁴ Consequently, God did not rule out war but set up limits to it (Quran 2:216): There is no need to take unnecessary burden on the shoulders by waging unnecessary wars:²⁵ Jihad al qital is to be avoided and is no good in itself; it can only be waged for good reasons.²⁶ Reformist Muslims think of peace as the normal state of live (Quran 61:8). War is led only to maintain the balance of power.²⁷

Shari'a answers to the following questions: when is it legitimated to go to war? Who can call for jihad? Who participates? Where is the war supposed to be taking place? Against who is it led? What means are allowed?²⁸ A fair war is a defensive war relying on the principle of self defense (Quran 2:190, 22:39). Jihad is also necessary to protect Islam (Quran 22:40) and the oppressed (Quran 4:75). So when Islam is threatened, when an Islamic country is under attack or when Muslim people are oppressed, jihad is legitimated. War cannot be led for the booty or for a heroic purpose.²⁹ There is no personal duty as some scholars said to lead a war against the Unbelievers.³⁰ Eventually treaties have to be respected and honored (Quran 8:72): there can be no war if a peace treaty has been signed. What is a lawful war? The concept of just war does not exist in Islam and the Western distinction between just and unjust war is unknown;³¹ any war led for the reasons mentioned before (self defense, defense of Islam, defense of the oppressed) is morally justified. Just wars are limited to one issue while jihad is universal and permanent:³² if one of the reasons to wage war is filled, there is no questioning about the morality of the war. The morality is to bring peace to the entire humanity, so there is an ethical ground to war; a just world is the purpose of jihad.

Eventually, the distinction between *jus ad bellum* and *jus in bello* does not exist in Islam:³³ the grounds for war and the

legitimated means in warfare are intermixed. Instead the earth is divided in two: Dar al-Islam and Dar al-Harb. The Dar al-Islam is the territory of peace, the domain of justice and the Dar al-Harb is the territory of war where a collection of non Muslim nations stay and are free to live as they want as long as they do not threaten Islamic countries. The division does not exist as such in the Quran or the Hadiths. The existence of Dar al-Islam, house of peace, comes from the Quran (Quran 10:25) but the Dar al-Harb was invented by the classicists to justify a permanent state of war.³⁴

At the core of jihad lay the ideas of restrain and abstention from using force (Quran 2:190):³⁵ Jihad is not led to convert people as it is often said but to defend oneself and the community.³⁶ The Holy Quran explains that war should be waged only if there are no other solutions and it should be done respectfully of humanitarian principles. There are however schools of thoughts, the Orientalists and the Classicists, that perceive jihad as war against the Unbelievers and as a green peril.³⁷ There is no doubt that Islamic laws of war and peace have create a dynamic first in international relations and later as a source of inspiration for international humanitarian law. The role of Islamic humanitarian law is however discussed today.

Islamic Humanitarian Law and International Humanitarian Law: A Clash of Civilizations?

The second part of the paper analyses the issues of interculturality in humanitarian law: Are those two sets of law culturally and legally so far apart that a clash of civilizations must ensue? Are there two different visions of a just world?

A. The War Against the West

According to Orientalists and Western liberals, jihad is a war against western values such as democracy.³⁸ Some go as far as saying that humanitarian principles are just an invention of apologetic Islamic scholars. Viewpoints such as the one of Orientalists are fed by scholars' work such as the one of Majid Khadduri who declares that jihad is a Holy War and a propagation of faith by war.³⁹ According to him, the mission of jihad is the universalization of Islam through violence.⁴⁰ In this scheme humanitarian principles would just be tools for conversion. For example, Islamic humanitarian law protects prisoners of war and non combatants: that would be for the purpose of converting them to Islam. This analyze is contrary to the Quran that clearly states that violence should never be used to convert people (Quran 2: 256). Others such as Yadh Ben Achour affirm that the battles led by the Prophet were waged only for territorial purposes and for

the booty, such as slaves:⁴¹ the fact that prisoners of war could be enslaved rather than killed would be perceived as a way to increase the booty and not as a humanitarian principle.

Paul Tavernier asserts that Iran and Iraq led a total war against each other, without respecting the difference between combatants and civilians; he assumes that the two governments were probably referring to the Islamic legal tradition that accepts such a treatment.⁴² First of all, the Islamic tradition clearly forbids the killings of civilians and non combatants.⁴³ Furthermore, Iran did not lead a total war at the beginning:⁴⁴ Indeed the Islamic Republic of Iran considered the Iraqis to be victims of Saddam Hussein's policies and therefore civilians should be spared.⁴⁵ It changed mid-way when Iran realized the Iraqis were not rebelling against the unjust ruling of Saddam Hussein and it then became a total war. These analyzes are the premises for Samuel Huntington's assertions that Islamic law and its specificity will lead to a clash of civilizations.⁴⁶ According to him, there is no possible conciliation between Islamic law and international law: Islam justifies another type of law and prefers diversity to universality.⁴⁷ His opinion is that Islamic humanitarian law just as Islamic law and Islam is a deviation from the Western world and has set up its own rules that are incompatible with democracy.⁴⁸ According to this stance, Islam is perceived as the religion of the sword and is fed by hatred

against the West.⁴⁹ This position is reinforced by classic readings of jihad.

B. The Classicists

There are different Muslim schools of thought regarding the definition of jihad and the definition of humanitarian principles. The categorization made by Mustansir Mir is really useful in that prospect as it helps to see the divergences and to understand the issues and the consequences of the statements made by these schools.⁵⁰ Classic legal interpretations transform jihad into a war of religion waged against the world to achieve the universality of Islam and establish an Islamic hegemony. Jihad is therefore a personal duty for each Muslim.⁵¹ As a consequence humanitarian standards are lowered: Al Shaybani allows the killing of captives⁵² and Al Mawardi agrees with the killing old men.⁵³ Humanitarian principles are limits that classicists would like to hide or ignore in the name of a purpose.

Neo classicists have a tougher stance: Al Mawdudi is the most radical: Jihad is at the center of all his religious and political beliefs as it is the only way to achieve Islamic hegemony.⁵⁴ Jihad is both defensive and offensive.⁵⁵ He agrees on the existence of human principles such as the ones lay down by the Prophet and is proud of the existence of humanitarian principles within Islam.⁵⁶

He has however a rather narrow interpretation: humanitarian principles are to be respected as long as the “enemy” respects the same rules. If the other side does not respect the rules, total war should be waged.⁵⁷ He refers only to the Quran and the hadiths and seems to refuse human reasoning when it comes to humanitarian principles: He limits the rights of prisoners to the right not to be tied to be killed or not to be tortured with fire; but there is nothing about treating prisoners of war fairly.⁵⁸ Sayyid Qutb also has a defensive concept of jihad. Jihad should universalize Islam:⁵⁹ Muslims are commissioned to enter into the battlefield, seize control of the political power and establish God’s rule.⁶⁰ Abdul Rahman’s leads a jihad to remove unjust rulers and struggle against western domination⁶¹ though he keeps some humanitarian principles.⁶² In general, humanitarian principles are respected as long as the enemy respects them, and they are limited to the strict minimum.⁶³ These intellectuals’ viewpoints are very important as they are today invoked by terrorists.⁶⁴ It is essential to underline the fact that these classicists never denied international humanitarian law; even al Mawdudi who criticized Islamic rulers who forgot Islamic standards and referred only to international humanitarian standards respects international humanitarian law. It allows us to understand how far away the extremist interpretations are from Islam, even from the neo-classicists stance. Can we say according

to these studies that there are two visions of a just world: on the one hand an Islamic one that would either consider peace as the regular state of affairs and would regulate the laws of war, and another that would perceive Islam as a religion to propagate Islam; on the other hand there would be an international and universal humanitarian law.

C. Discussion about the Legitimacy of the Existence of a Regional Law

There are many issues at stake when one speaks about Islamic humanitarian law and its vision of a just world: Is not risky for international humanitarian law to consider Islamic law? How much of Islamic humanitarian law should be incorporated? Is not disrespectful of the principle of universality? How can we negotiate on such values, like the protection of prisoners of war or hostage-taking? Does it affect the security of humanitarian staff in the field? These issues are analyzed throughout this paper; this section will study the principle of universality of humanitarian law. The issue of universality of humanitarian law is a theoretical debate⁶⁵ with practical consequences.

Universality of international humanitarian law is a prerequisite for its proper application:⁶⁶ International humanitarian law has to be universal to be enforced everywhere. States are bound by

the Geneva and the The Hague conventions because they signed them. The States are also bound by customary international humanitarian law. A study made by the International Committee of the Red Cross of customary international humanitarian law illustrates the universality of this law. The authors took into account the practices of all States; the study demonstrates that all parts of the world, all cultures and civilizations have contributed to the development of modern international humanitarian law.⁶⁷

The International Committee of the Red Cross (ICRC) promotes the universality of humanitarian law as it is one of its core principles. Its mission is to put across "a universal message adapted to the local context."⁶⁸ The ICRC has a lot of programs to link international humanitarian law and local laws as to ensure the universality of the first while respecting the specificity of the latter. The tactic of the ICRC is to develop a network within the political, economic, military and academic circles to encourage people to respect the principle of universality. The ICRC also contributes to local debates on humanitarian universal values through promotion program with the help of national societies of the Red Cross. The aim is to relay the humanitarian message: "This type of cooperation allows the ICRC to work closely with people from a wide range of cultural backgrounds. In so doing, it can explore many new ways of promoting the universality of

humanitarian law, select humanitarian messages that are suited to the cultural context, and identify the most effective means of conveying them.”⁶⁹ Eventually, the ICRC declares: “Lastly, the ICRC is pleased that this study has served to emphasize the universality of humanitarian law. All traditions and civilizations have contributed to the development of this law, which is today part of the common heritage of mankind.”⁷⁰ The regionalization of humanitarian law should therefore not be perceived as a threat but as an enrichment.⁷¹ Through collaboration, each culture can bring a bit of its specificity to international humanitarian law as long as this particularism does not threaten international law. How can international humanitarian law accommodate Islamic interpretations?

Grounds for a Dialogue between the Two Sets of Law: Similarities

Modern interpretations of Islam allow a ground for dialogue. Modernists have another interpretation of jihad and humanitarian principles: Islam advocates only defensive war. According to Mahmud Shaltut, Islam is not the religion of the sword.⁷² Blood should not be shed for other reasons than self defense and defense of Islam; humanitarian principles have to be respected during wartimes. These principles have to be widely understood to cover



both Islamic values and international values: "the requirements of war should give way to humanitarian imperatives."⁷³ This attitude is the one of the ICRC: collaboration between local values and universal values as to enrich international humanitarian law. Besides, this cooperation is straightforward with Islam as international humanitarian law and Islamic humanitarian law have many common values. Consequently the choice made by some Muslim modernists and the ICRC is to focus on the shared values as to transcend the differences between the Islamic perception and the international documents. To go beyond the usual opposition between international law and Islamic law is a step that would guarantee a better enforcement of international humanitarian law and that would allow more protection to all the humanitarian actors. What are these common values? If there is a war, it has to be waged according to the *fi sabil illah*, in the way of Allah, which means that divine principles and duties must be respected:⁷⁴ war should be limited and humanitarian principles enforced. Islamic humanitarian principles are to be found in the Quran and the Sunna: Proportionality (Quran 16:126-128); Humanity (Quran 5:32); Compassion; Non discrimination; Dignity; Equality and fraternity (Quran 4:1); and Justice (Quran 16:90). Any war should be made according to these key principles. From these principles, modern Islamic intellectuals have identified Islamic humanitarian

rules:⁷⁵ Prohibition of torture, killings and unnecessary sufferings; No excess and wickedness; Non combatants cannot be killed (women, children that are not warriors, slaves, servants, blind, incapacitated, old people, crippled people...); Respect of prisoners of war; No mutilation of men; No killings of mutilation of animals; No destruction of religious symbols; No destruction of herds; No destruction of trees; No devastation of harvests; No destruction of houses and cities and belongings; No killing of hostages; No expulsion from homelands ; No rape; No blockade; No massive destructive arms; Limitation of the Battlefield in time and space; Help to the wounded and sick; No massacre and right to surrender; No acts of revenge; No poisoning

The acts permitted are: Killing warriors in the battlefield; Killing of imprisoning children or women that are warriors; Killing of imprisoning anyone who plays a role in war (logistical, food provisions, weapons supplies or helping in mapping the war;⁷⁶ Propaganda; Ruses; All kind of weapons but there a condition with the use and the aim: killings must be done with dignity, no pain and no torture;⁷⁷ Night attacks; Booty; Food may be ordered from the enemy country; fines. War crimes are also forbidden: genocide is a non respect of the humanitarian principle of equality;⁷⁸ the crime of torture and other ill-treatments are also forbidden as it is contrary to the principle of dignity.⁷⁹ These

are divine orders and cannot be disrespected: the foundation of Islamic humanitarian law is therefore “do not transgress.”⁸⁰ Mohaghegh Damad goes as far as finding similar categorization of wars: ⁸¹ non international armed conflicts cover war against armed thieves and bandits, war against rebels and the Muslims seceding from the main branch of Islam; and there are also international armed conflicts. Islamic law is even more protective in the case of non international arm conflicts than the Geneva Conventions.⁸² Anyone who reads the Geneva Conventions will be struck by the similarities between these Islamic humanitarian principles and international humanitarian law. This is why the ICRC has chosen to work on these common grounds.

The treatment of enemy prisoners as a good example of a common working ground: prisoners of war have rights and they have to be treated well according to the Quran: “As long as they go straight with you, go straight with them.”⁸³ Hadiths are also useful: the status of prisoners should be respected as the Prophet said “Pay respect to the dignitary of a nation who is brought low.”⁸⁴ Caliph Abu Bakr said to his officials that no prisoners should be tied in chains, handcuffed and they shall be provided with food (Quran 8:76).⁸⁵ They should be provided with clothes and adequate housing.⁸⁶ A prisoner cannot be killed, mutilated or tortured. His dignity should be preserved as he is a creature of God. Prisoners

may be tried if they have offended committed a major offence against Islam but not for belligerent acts.⁸⁷ Children and mother should not be separated. Prisoners have to respect the rules and if they try to run away, they will be brought back but not punished except for the breach of parole. The future of the prisoners is to be decided by the commander: they might be beheaded, enslaved, released by paying a ransom or released and exchanged.⁸⁸ These duties are divine and there is a divine punishment for anyone who would not respect these humanitarian rules.

The Iran-Iraq war is a good illustration of the enforcement of Islamic humanitarian law in concomitance with international humanitarian law. We cannot say Iran's interpretations are extremist and we cannot say Iran's viewpoints were not respectful of international humanitarian law. The Islamic Republic of Iran decided from the beginning that it would respect international humanitarian law; besides it was in the country's best interests to respect humanitarian principles. However Iran invoked some Islamic principles not as to be contrary to international humanitarian law but as to affirm its Islamic ideology alongside international humanitarian law. Soon the Islamic Republic of Iran began to invoke some rules of Islamic humanitarian law. For example, Mehdi Bazargan kept reminding Khomeyni that he had to respect the Islamic distinction between civilians and



combatants: "According to Islam, it is justifiable to retribution only if we, with out own missiles, hit the commanders or senders of the Iraqi missiles rather than hitting civilians areas and killing innocent people and turning their homes and communities into ghost towns and hills of rubble, all in the name of striking military targets."⁸⁹ So the set of law Iranians were referring at first was Islamic law before international humanitarian law. This was explained by the influence of the Islamic republic and the revival of the Islamic ideology. Therefore the few differences that exist between Islamic humanitarian law as interpreted by the Islamic Republic of Iran and international law emerged and there were limits to the exploitation of a common ground. The monitoring of the situation by the ICRC became increasingly complex as the conflict went on. Indeed the two parties referred more and more often to Islamic law and to the differences that exist between the two sets of laws. Therefore at one point the International Committee for the Red Cross could not have access to prisoners under the conditions set up by its mandate⁹⁰ and Iran was criticized by the ICRC for not respecting the fourth Geneva Conventions.⁹¹ The ICRC delegation in Iran had its activities interrupted so often that eventually the organization made a public call in 1983 to the State Members of the Geneva Convention: it was asked of them to do whatever possible to encourage the respect of the

Geneva conventions by Iran.⁹² The worrisome fact was the non access to prisoners. It was said that the Islamic republic of Iran had a loose analyze of the concept of dignity as it was forcing the Iraqi prisoners to convert so Shiism or to demonstrate against Saddam Hussein's power.⁹³ This example demonstrates the limits of working on similarities and common grounds. To go further in the analyze, it is essential to grasp the idea that one notion can have different meanings: The notion of dignity in Islam is to respect one's life as a creature of God but it does not entail the respect of one's political or religious beliefs, at least in the Islamic Republic of Iran's interpretations. The issue is the same for human rights: the Islamic Republic of Iran uses universal human rights terms such as freedom of expression but the content of the notion is radically different: freedom of expression in Islam is limited by the respect of Shari'a, or the Islamic Republic of Iran interpretations of what Shari'a is; therefore, when one affirms the respect of the principle of dignity of prisoners of war, we should keep in mind that the vocabulary is the same, but not the content and the extent of the right: the principle of dignity of prisoners of war will be respected as long as it does not go against the interpretations made of the Shari'a. What worsens the issue is that there are Sunni and Shiite interpretations of the Shari'a, as well as classic, conservatives or reformists interpretations. It is essential to grasp the idea that Iran

never contested the existence and his attachment to international humanitarian law. It merely decided to turn to some post Islamic interpretations of Islamic law to be in agreement with its new Islamic ideology and for what was perceived as internal matters.

There is indeed an influence and even congruence with time.⁹⁴ For example issues such as war crimes were developed in Islamic humanitarian law thanks to the influence of international humanitarian law.⁹⁵ However differences do exist especially because of extremist interpretations such as the one of Al Qaeda. There is a minority claiming that there ethic of saving life is less important than the aim of jihad which is the universalisation and hegemony of Islam; Not killing during jihad demonstrates a weakness and as a lack of faith (kufr). These intellectuals are the ones of "thesword" and they perceive jihad as a way to universalize Islam and fight perversion. They justify their actions by referring to the verse of the sword:⁹⁶ "And when the sacred months are over, Fight the idolaters unto the finish Where ever you find them, or arrest them. Besiege them or lie in ambush, for them through every stratagem; Yet if they do repent and take to prayer, And pay zakat, then let them go their way; God is indeed Forgiving, Full of Mercy". In some interpretations and translations of the Quran, the order "slay them" appear instead of "arrest them". That is why the intellectuals in favor of jihad as an aggressive

war refer to this verse. Another issue is that Islamic humanitarian law relies on divine law while international humanitarian law is secular. It means that Muslims have divine obligations and if they perceive it as one of their divine duties to kill civilians, such as Al Zawahiri advocates, this order seen as divine will overcome universal humanitarian values.⁹⁷ Speaking of a basic compatibility is not enough: two systems cannot live side by side on basic mutual agreement. The differences, what the ICRC calls grey areas, need to be bridged.⁹⁸ The real challenge is to harmonize the two sets of law.⁹⁹ Islamic law has potentialities for such reconciliation.¹⁰⁰

A Manual for Action: Beyond The Clash and the Compatibility: Conciliation

One way to solve this confrontation between the two sets of laws would be to find a middle path that would respect Islamic humanitarian law while ensuring the respect of international law. The aim would be to avoid a clash of civilizations that could be fatal as it has consequences in practice for humanitarian workers, civilians and combatants. Most Muslims actors accept to abide by international humanitarian rules;¹⁰¹ however the enforcement in practice is a bit different.¹⁰² Consequently, there are real interactions between the two systems with effects in the field. These effects were discreet at first because of the decolonization and also

because the secularist trend was stronger in Muslim countries for a while; there are examples of leaders such Yasser Arafat¹⁰³ or the Shah of Iran advocating for the respect of secular international humanitarian law. The issue of conciliation became real after the 1979 Iranian revolution and the revival of the Islamic ideology.¹⁰⁴ Since then the two legal systems are clearly in competition¹⁰⁵ and it has effects in the field as Islamists now refer to the Islamic system rather than the universal system. There is definitively an Islamic vision of a just world.

A. Terrorism: How to Deal with Reality?

The issue of conciliation between Islamic humanitarian law as interpreted by transnational actors and international humanitarian law has considerable impact in the field, such as terrorism: extremists read Sayyid Qutb, Abul Rahman and al Mawdudi who all have radical views: jihad should universalize Islam in a struggle against the West. Their followers justify terrorist actions based on these aggressive interpretations of jihad; they have adapted humanitarian principles freely to their wars in the name of the propagation of Islam. The terms used by Al Zawahiri or Al Zarqawi justify radical actions.¹⁰⁶ For example, Al Zawahiri finds it legal to target Muslims non combatants.¹⁰⁷ Algerian Islamists did cut throat so as not to make their victims suffer but their targets

were civilians.¹⁰⁸ Hostage taking is another issue: It is forbidden in Islam to take civilians hostages because they are non combatants. Al Zarqawi has reinterpreted jihad and the legal sources of war:¹⁰⁹ he considers it acceptable to suppress humanitarian principles in order to reach the goal, the universalization of Islam. Consequently, in Iraq, the fighters seize civilians and non combatants as hostages, which is unacceptable according to more reformist interpretations of jihad.¹¹⁰ Another issue is that all Muslim intellectuals agree upon the idea of a defensive jihad to defend the oppressed Muslims. Therefore, Muslims were facing a dilemma during the war in Bosnia and today in Palestine:¹¹¹ these are situations of war where the State oppresses its own Muslims and it would be legitimated from an Islamic humanitarian point of view to interfere.¹¹² The Quran says Muslims should always be reasonable, prescribes them to always search for a middle way between what is right and wrong, and orders them to dislike extremism.¹¹³ However extremism does exist: how could international humanitarian law address this issue?

B. International Humanitarian Law as a Tool to Transcend all Differences

Some scholars say that international humanitarian law is universal, that it reflects all cultures and religions and therefore

the latest should evolve within the international set of law:¹¹⁴ there should be a conversation between the civilizations based on this idea. Therefore Islam would accept the general principles of law recognized by civilized nations (ICJ statute 38 (1)). Some speak of a deliberate movement of adjustment through a dialogue. This approach relies only on the good will of the parties, and we have just seen some non state actors are not willing to follow humanitarian rules. Besides, Islam is a bit more complicated to integrate in the international legal bulk because of the diverse interpretations that are made up of Shari'a: some might agree with the idea of a conversation to integrate Islamic humanitarian law through necessary compromises, but they will have no legitimacy; others will be free to have a extremist reading of Islam and refuse any compromise. It is a major issue within Islam: there are many IslamS and there is no unique authority to gather everyone around one definition of humanitarian standards. Therefore any conversation would be from international humanitarian law to IslamS, which makes the task impossible to realize.

According to other scholars' ideas, the sovereignties would talk to each others and "each participant remains free to perceive as they wish the source of the normative force of the obligations the process reproduces":¹¹⁵ This is a major threat to universality. We are dealing here with core rights such as the one to live or

not to be tortured. It seems a dangerous game to pretend that a radical interpretation of Islam doesn't threaten these core values. There should be only one source of normative force: international law. Besides, the normative force of international humanitarian law should not be left to the states to navigate. One cannot accommodate the normative source and force of obligation so as to respect sovereignty. The idea that this law abidingness is recognized but that each state can accommodate it threatens the principle of universality. Eventually this is a simplistic approach of the Islamic radical challenges: Indeed this flexible approach is denounced as being paternalistic and euro-centric by extremists¹¹⁶ and even by Muslim reformists¹¹⁷ who claim that Islam should be taken into account "as it is". The Islamic specificity is adverted with pride: Al Mawdudi reminds us that Muslims had establish these humanitarian rules before the western system came in to force; he condemns the Muslim rulers who have signed and ratified the Geneva conventions because they disobeyed God, the Prophet and Shari'a: These rulers have given up on their particularism to abide by foreign standards: "It hurts one's feelings that Muslims are in possession of such a splendid and comprehensive system of law and yet they look forward for guidance to those leaders of the West who could not have dreamed of attaining those heights of truth and justice which was achieved a long time ago".¹¹⁸ The existence

of an Islamic particularism cannot be denied: the ethic is an Islamic political and religious ethic of war and peace.¹¹⁹ This specificity is linked to the inherent nature of Islam that makes humanitarian rules divine.¹²⁰ Islamic principles have to be respected because God ordered it. It is a matter of faith¹²¹ and when Muslims have to choose, they will go for Islamic rules first. Therefore it is essential to find a solution that would respect Muslim faith while enforcing international humanitarian law. The values of Islamic humanitarian law are multiple and there are multiple sources of authority, which is contrary to the principle of universality. How do we accommodate the principle of universality and this specificity? This question has a theoretical impact but also for humanitarian workers in the field who have to negotiate with Islamic groups and an Islamic state.

C. Conciliation between Islamic Humanitarian Values and International Humanitarian Values

According to Professor Abdullahi An Naim, there can be only one humanitarian law, and it has to be international humanitarian law;¹²² however this law should reflect all different legal traditions¹²³ and not only the euro ethnic approach.¹²⁴ There is a need of a mutual and respectful interaction between Islamic law and international law. This interaction between the two legal systems should be

aimed at maintaining the primacy of international law “as to sole legal framework for international peace and security”.¹²⁵ His argument is that there is an Islamic law way that is “supportive of the possibility of international law”.¹²⁶ There is a problem of legitimacy on both sides and an issue about the acceptance of each other systems which can be done only with an engagement of all the systems at stake. As Abdullahi An Naim explains, there is no doubt Islamic humanitarian law forbids violence and extremism, and sets humanitarian rules during wartime. Reformist Islamic religious ethics insists on presenting Islam as a religion of peace and when at war, respects humanitarian principles.¹²⁷ However there are ambiguities exploited by extremists. As Professor An Naim underlines this is not proper to Islam but to all political ethics to have ambiguities. But it is true that regarding Islam in the post 9-11 context questions arise.¹²⁸

It would be wrong to assume that all interpretations of Islam and the entire Islamic political thought praise violence; there are many peaceful analyses. Therefore, according to Abdullahi An Naim we should use this peaceful trend among Islamic scholars.¹²⁹ Islamic humanitarian law should be perceived as a positive contribution to the history and development of humanitarian law.¹³⁰

According to Abdullahi An Naim; the enforcement of

Islamic law is fine as long as it remains between the international boundaries.¹³¹ It means that enforcing Islamic rules of war and humanitarian rules in an archaic framework and traditionalist interpretations is not acceptable. Abdullahi An Naim explains that it is necessary for Islam to have a new look at the world, and there is a need for a renewed and more modern process of interpretation (ijtihad) of the Shari'a. Shari'a should be freed from traditional and conservative interpretations.¹³² There is a need for a new and modern interpretation of Islamic law as to ensure the compatibility between Islamic norms and international humanitarian law.¹³³ This means that the dar al harb concept and the jihad interpretation as aggressive war must be reassessed because they are warmongering.¹³⁴ The principle of ijtihad encourages to think and to use human reason to solve issues. There is therefore the need for open minded mojtaheds with modern views whose legal decisions and reasoning take root into reality and take into account the context.¹³⁵ They can adapt Islam to universal human rights and international humanitarian law.¹³⁶ For issues related to terrorism and political violence, the mojtaheds should refer to morality and ethics to condemn such actions. It is a complicated but important process as it is respectful of Islamic legal methods and international law at the same time. A new ijtihad with a humanitarian view is a way to reconcile the two legal systems.¹³⁷

According to Marcel Boisard, there are already principles guiding the interpretation of Shari'a when it comes to humanitarian rules:

¹³⁸ these are the principal characteristics of Islamic international law and are very similar to international law. If all the mojtaheds keep these rules in mind and their meaning in the universal language, they could interpret Shari'a with a dynamic pacifism. It is therefore important for Islam to be reformed, to be a religion open to the world.¹³⁹ The only way one can keep its faith and respects international law is through a reform of Islam. Besides, one cannot refer to archaic interpretations of Shari'a to justify actions and every human is responsible for his/her actions.

This solution proposed by professor Abdullahi An Naim respects Islam and gives it a chance to reform itself from inside by "insiders" instead of enforcing rules upon Muslims. With these new interpretations, there is therefore no need for Muslims to repudiate their religion and beliefs.¹⁴⁰ Thanks to a new hermeneutics of the Shari'a, the ambivalence between Islamic humanitarian values and international values would then be resolved in favor of international law.¹⁴¹ Reforming Islam will be a long process because there is no Islam but Islams.¹⁴² Islamic law is not a local custom because there is no such thing as one interpretation of Islamic law.¹⁴³ There is no unique leading figure of authority that has emerged to put order.

Conclusion

Humanitarian law can be enriched through experiences and other “versions” of humanitarian law as long as these versions go through a process of reform “from inside”. Therefore universality and specificity can both be respected and reconciled. The main problem lies with extremist interpretations of Islamic law. Despite this analyze and offer of solutions for a reconciliation there still are many issues. For example, suicide bombings: according to the extremist trend, human life has no value per and one can show faith by himself/herself blowing up. Jihad is then seen as a self mortification process (in Sunni thought), a struggle against the self mixed up with struggle against external threats.¹⁴⁴ The main issue here is that there are several interpretations of Islamic law and the notion of jihad. It is essential to solve these internal tensions as to ensure the enforcement of international humanitarian law that would have been legitimized by Islamic humanitarian law first. How is that possible? There is a trend within Islamic intellectuals working on a reformation of the interpretations (ijtihad) of Islamic law. It will take a long time and a deep re-interpretation to change such ideas and approaches. Non-state actors, like bin Laden, are not subject of international humanitarian law as such, but only to international and national criminal law. They are individual criminal suspects, not international legal personality who can be

subjects of international law. Therefore international humanitarian law applies to them and it is essential now for Islamic intellectuals to establish order in these interpretations and take over thanks to a modern interpretation of ijihad. It is urgent to give a prompt reply to these extremists interpretation of Islam as to de-legitimize them and this could be done only by the adherence to international humanitarian law. To adhere to this international system, Islamic law needs to be reformed. In the meantime, humanitarian workers and agencies have to deal with extremists actions.

Eventually, Islamic humanitarian law has to face other challenges that are similar to the ones international humanitarian law has to deal with: rape, terrorism, weapons of mass destruction, torture, assassination and guerilla insurgency;¹⁴⁵ it is consequently essential for Islam to solve these issues and to give them a proper Islamic response so that international humanitarian law would know thanks how to address these issues to this Islamic expertise. An example of Islamic intellectuals tackling such issues is the one of weapons of mass destruction (WMA), which is a major topic of debate now, especially since the Islamic Republic of Iran has renewed its wish to use nuclear energy. There is an important discussion in Iran amongst mojtaheds and academics to know whether weapons of mass destructions are Islamic or haram (forbidden). The main trend it that all kind of weapons

of mass destruction are anti-Islamic because they kills civilians and extend the battlefield ad infinitum;¹⁴⁶ Ayatollah Mohaghegh Damad reports that bombings or missiles are forbidden because they strike blindly at civilians.¹⁴⁷ Hadiths require the killing to be just¹⁴⁸ and WMA are perceived as disproportionate use of force¹⁴⁹ causing unnecessary sufferings.

The problem comes again from classicists as Al Mawdudi says it is legitimate for Muslims to keep acquiring all kind of weapons (despite the fact that Muslims are forbidden to enter arm trades¹⁵⁰) when Western powers have such weapons and the aim is the propagation of Islam.¹⁵¹ He quotes the Quran: "And so prepare against them whatever force and war mounts you are able to muster, so that you might deter thereby the enemies of God" (Quran 8:60). So here is an illustration of the difficulty of reforming traditionalist interpretations regarding WMA as to enforce international humanitarian law. Islam is often framed as an obstacle in the field. It is important to work on this conciliation in theory and in the texts but also in practice. The aim is that humanitarians would not meet this Islamic barrier anymore¹⁵² and would be able to set up a dialogue with Islamic fighters and Islamic non governmental organizations.¹⁵³ In the end, this would ensure a dialogue in the field and the security of humanitarian workers as their work will be understood and respected. This is why a manual

for conciliation is needed today: to work on conciliation between two visions of a just world.

This approach should also help us to reflect upon our role and responsibility as international law workers: going beyond those differences to make the two sets of law work together will give guidelines to humanitarian workers in the field to work more efficiently in advocating humanitarian rules. Everyone has a role in shaping the world of international law and it is almost the duty of the international community to listen to the Islamic version of humanitarian law as to ensure a better world for all. The methods generated by the international community to contribute to a just world such as listening to other's viewpoints should be enforced. That does not mean that a cultural version of humanitarian law or a regionalization should be accepted. □

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