

Traditional Asian Approaches: An Indian View

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Introduction

While reading the Bible I came across the following in Jeremiah (6:13-14):

“... from the prophet even unto the priest every one dealeth falsely . . . saying Peace, peace: when there is peace”.

These sagacious words written probably some 3,000 years ago echo throughout the ancient Indian history. According to Professor Duncan Derrett:¹

“The veriest tiro knows that peace was a rare feature in India, and in the greater Indian world, except during the great empires, and even at those periods was seldom kept for long throughout the empire itself. He knows, too, that Indian society was used to war, and in many respects approved of war, and that both the sacred and popular writings of India, from the *Vedas* onwards, through the *Epics*, the *Puranas*, the *Arthasastra*, and the *Dharmasastra*, and the literatures patronised by royalty, not merely treat war as a normal feature of life, but even extol it as an instrument of policy and a means of releasing heroic and praiseworthy human qualities.”

No doubt ancient political order was in a state of conflict, yet concentrated efforts were made in the development of the laws of war and humanitarianism in such conflicts. Professor A.L. Basham brings out this point succinctly:²

“At most periods of her history India, though a cultural unit, has been torn by internecine war . . . Yet overall impression is that in no other part of the ancient world were the relations of man and man, and of man and the state, so fair and humane. In no other early civilization were slaves so few in number, and in no other ancient Law book are their rights so well protected as in the *Arthasastra*. No other ancient law giver proclaimed such noble ideals of fair play in battle as did Manu. In all her history of warfare Hindu India has few tales to tell of cities put to the sword or of the massacre of non-combatants. The ghastly sadism of the kings of Assyria, who flayed their captives alive, is completely without parallel in ancient India. There was sporadic cruelty and oppression no doubt, but, in comparison with conditions in other cultures, it was mild. To us the most striking feature of ancient Indian civilization is its humanity.”

1. “The Maintenance of Peace in the Hindu World: Practice and Theory”, (1958) 7 *Ind YbIL* 361. (Footnotes in the quotation omitted.) For a criticism of Derrett's comments, see Singh, N, *India and International Law*, Vol 1 (1973), 61-6.

2. *The Wonder That Was India* (1981), 8-9.

Geopolitics

1. Physiography

The course of warfare in India has been dictated to an exceptional degree by the natural factors of geography, population movement, and climatic conditions. The Himalayas with its extensions to East and West divide India from the rest of Asia and the world. Between the Himalayas and the Vindhya range in central India lies the vast fertile plain without any natural defences. Until the advent of the British Raj no power took the responsibility of guarding the Northwest frontier. The world's largest mountain range has not been unsurmountable and at all times settlers, traders, and tyrants found their way over the high and desolate passes into India. In the course of time the Greeks, Turks, Huns, Mongols and Persians invaded India through the same way. The actual inhabitants of India were defeated everywhere by foreign marauders. The invading movements generally halted at the Vindhyas.

The Vindhyas have been a barrier between the North, formerly called Hindustan, and the littoral peninsula often referred to as Deccan (meaning South), a dry and hilly plateau bordered on either side by long ranges of hills, the Western and Eastern Ghats.

2. Civilization

Civilization, in the sense of an organized system of government over a considerably large area, flourished in India from the early part of the third millennium B.C. The traditional approaches of the Indians to the protection of victims of armed conflict, therefore, cannot be considered in isolation from the geo-political history of the region and the cultural anthropology of the society.

Prior to the Aryan advent, proto-Australoid people inhabited India and had spread their culture through the Indian Ocean and the Pacific. A specific ethnological variety of present Indian populations living in the mountain vastnesses and jungles of India, such as the Kols, Bhils, Nagas, Khasis, and Gonds, is considered to be progeny of the pre-Aryan people.

One of the earliest civilizations of the world and the most ancient in the Indian sub-continent was the Indus Valley Civilization that flourished in the river valley of Indus between 2500 B.C. (c) and 1500 B.C. (c) simultaneously with those of Nile and Euphrates. It was a highly sophisticated culture with chief urban centres at Harappa in Central Punjab near the river Ravi and Mohenjo Daro in northwest Sind on the right bank of the river Indus. The excavations at Harappa in 1946 and subsequent discoveries at Mohenjo Daro suggest that the cities were not oligarchic commercial republics as hypothesized earlier but it was a single centralized State. The Harappa culture like those of Egypt and Mesopotamia was theocratic in character. The Indus Valley Civilization was marked by active intercourse of the Indians with the people at some other important centres of world civilization such as Mesopotamia and Elam.

3. Historical perspectives

(a) The Aryans

The Aryans entered India through the mountain passes around 1500 B.C. (c),

and established their homeland, Aryavarta, in the plains of Punjab and along the upper Ganges. Over the subsequent 2000 years the Aryans developed a Brahmanic civilization with a caste system which had evolved into Hinduism. The Aryans spread eastwards over the Gangetic plain and by 800 B.C. (c) were established in Bihar and Bengal. The first important Aryan kingdom was Magadha with its capital Pataliputra now known as Patna. It was there that during the reign of Bimbisara (540 to 490 B.C.) the founders of Jainism and Buddhism preached. Another important kingdom was Kosala with the capital at Ajodhya.

(b) *The Greek invasion*

In 326 B.C. Alexander of Macedon having successfully completed his expeditions in Persia, Hindu Kush, and Afghanistan, crossed the Indus river. The King of Taxila, Ambhi, had already surrendered to Alexander. Beyond river Jhelum lay the kingdom of the powerful king of Punjab, Paurava (or Porus), because of whose fear Ambhi had allied with Alexander. It was with great difficulty that the Macedonians crossed the river and overpowered Paurava. The chivalry of Paurava has become legendary in India. It is said that when he was brought before Alexander he had nine wounds and he could barely stand, but when Alexander asked him how he should be treated, unhesitatingly he had replied: "like a king". So impressed was Alexander with his captive's reply that he restored him to the kingdom as a vassal and at the time of the retreat of the Greek forces made him in charge of Punjab.

(c) *Asoka and the renunciation of war*

The Greek invaders were eventually driven out by Chandragupta, the founder of the Mauryan empire. According to Indian traditions he was very much aided in his conquests by the very able and knowledgeable Brahman adviser known variously as Kautilya, Chanikya and Vishnugupta, the author of that magnum opus, *Arthashastra*, or "Treatise on Polity", an abundant and valuable source of information on statecraft. Hinduism was the religion of the Mauryan empire. Emperor Asoka (273 B.C. (c) to 232 B.C. (c)), grandson of Chandragupta the greatest ruler of ancient India, unified India except the southern tip. After his bloody conquest of Kalinga (the modern Orissa and the northern coastal strip of Andhra Pradesh), Asoka was remorseful for inflicting the suffering, converted himself from Brahmanism to Buddhism and abandoned wars of conquest. In Asoka's own words:³

"When the King, Priyadarsi (name of the throne), Beloved of Gods (referring to himself), had been consecrated eight years, Kalinga was conquered. 150,000 people were thence taken captive, 100,000 were killed, and many more died. Just after the taking of Kalinga the Beloved of the Gods began to follow Righteousness, to love Righteousness, to give instruction in Righteousness. When an unconquered country is conquered, people are killed, they die, or are made captive. That the Beloved of the Gods finds very pitiful and grievous . . . Today, if a hundredth or a

3. 13 Rock Edict of Asoka, Block, *Les Inscriptions d'Asoka*, 125, Quoted *ibid*, 53-5.

thousandth part of those who suffered in Kalinga were to be killed, to die, or to be taken captive, it would be very grievous to the Beloved of the Gods. If anyone does him wrong it will be forgiven as it can be forgiven. The Beloved of the Gods even reasons with the forest tribes in his empire, and seeks to reform them. But the Beloved of the Gods is not only compassionate, he is also powerful, and he tells them to repent, lest they be slain. For the Beloved of the Gods desires safety, self-control, justice and happiness for all beings. The Beloved of Gods considers that the greatest of all victories is the victory of Righteousness, and that victory of the Beloved of Gods has already won, here and on all his borders, even 600 leagues away in the realm of the Greek kings Turamaya, Antikini, Maga and Alikasudara, and in the South among the Colas and Pandyas and as far as Ceylon.”

Asoka proclaimed his belief in *ahimsa* or non-violence. Buddhism was made the state religion even though other religious faiths were tolerated. Buddhist missionaries were sent throughout India and adjacent lands as far as Syria, Egypt, and Greece. Under the aegis of Asoka, Buddhism has escalated from a simple Indian sect to a major religion of the world. After the death of Asoka in 232 B.C., the Mauryan empire swiftly declined.

During the following 200 years Buddhism also declined in India.

(d) The South

South India enjoyed greater prosperity than the North in spite of incessant warfare. The Pandyas and Chola States, the Tamil speaking kingdoms of the South, maintained trade with the Roman empire. Hindu culture was spread through the Malay archipelago and Indonesia by Tamil speaking colonists from the South Indian kingdoms.

(f) The North

In the meanwhile, the Greeks following Alexander had settled in Bactria (the present day Afghanistan) and established an Indo-Greek kingdom. Following the collapse of the Bactrian power (1st century B.C.) fierce tribes from central Asia, the Scythians, Parthians, Afghans, and Kushans, swept into Northwest India. Small kingdoms arose there and disappeared in quick succession. Notable among them was the kingdom of Kushans, which under its sovereign Kanishka (2nd century A.D.) enjoyed great prosperity.

(f) Gupta rule and foreign invasions

During the 4th and 5th centuries A.D. North India experienced a golden age of splendour under the Gupta dynasty, founded by Chandragupta I (reign 320–330 A.D. (c)). His son Samudragupta (reign 330–380 A.D. (c)) had conquered all of North India and much of the Deccan. The third, Chandragupta II, expanded the kingdom to include Ujjain. Fa-Hsien, a Chinese Buddhist monk vividly described the prosperity of the land. Embassies were sent to many foreign courts, among them Rome. A single code of law was promulgated for India. He was succeeded by Kumaragupta (reign 414–415 A.D. (c)) and Skandagupta (reign 455–467 A.D. (c)). The latter repelled the invasions of the White Huns, but after

his death the Huns overran much of North India. They were from Central Asia known to Byzantine writers as Hephthalites or White Huns, a branch of the group of Turko-Mongol people who were threatening Europe at about the same time.

For some thirty years from 500 A.D. Western India was in the hands of Hun kings, two of whom, Toramana and his son Mihirakula, were mighty monarchs. The 7th century Chinese traveller Hsuan Tsang remembers Mihirakula as a fierce persecutor of Buddhism, and in Kashmir, one of the centres of his power, memories of his sadistic tyranny were still alive in the 12th century, when they were recorded by the historian Kalhana. About 530 A.D. Mihirakula was defeated in Western India, and even though he retained hold on Kashmir, Hun power never again was a serious threat to India.

There was a resurgence of the Gupta glory under Emperor Harsha of Kannauj (606 to 647 A.D. (c)) and North India enjoyed a renaissance of Hindu art, letters and theology.

While the Guptas ruled the North, the South was under the control of the Pallava kings of Kanchi and the Chalukyas controlled the Deccan.

During the medieval period (8th to 13th century) several independent kingdoms, notably the Palas of Bihar and Bengal, the Sen, the Ahoms of Assam, a later Chola empire at Tanjore, and a second Chalukya dynasty in the Deccan, remained powerful. In north-west India the Rajputs had grown strong and were able to resist the rising forces of Islam. Islam was brought to Sind in the 8th century, by seafaring Arab traders. By the 10th century Muslim armies from the North were raiding India.

(g) The Afghans and Mongols

Around that time Turkish chieftains had established a powerful kingdom at Ghazni in Afghanistan. Sabuktigin, one of their amirs, made the first attack on India in 986 A.D. His son and successor, Mahmud of Ghazni, soon after becoming the King in 997 A.D. embarked upon a deliberate policy of raiding the rich and divided kingdoms of India. In 1001 A.D. he defeated and captured the Indian king Jayapala who committed suicide. The league of the Hindu princes organized by his son Anandapala were unable to repel the tyrant's aggression because of the unwieldy and disunited Indian forces, and their dependence on the unpredictable behaviour of the fighting elephants. Between 1001 and 1027 Mahmud made seventeen great raids on India. Palaces and temples were looted and desecrated and enormous caravans of booty and slaves were taken to Ghazni. The great shrine of Somnath in Saurashtra, the kingdom of Candellas in Bundelkhand, the great cities of Kanyakubja and Mathura were captured, pillaged, and plundered. A large number of people were forcefully converted into Islam.

The Ghaznavid power had waned in the 11th and 12th centuries. In 1173 Ghiyas-ud-din of Ghor annexed Ghazni. Shihab-ud-din, his brother, known as Muhammad of Ghor or Muhammad Ghori conquered the Ghaznavid possessions in the Punjab and Sind and embarked on the Hindu states. Prithviraj defeated Ghori in 1191. The following year he had attacked with mounted archers, overpowered the Hindu army, captured and killed Prithviraj, and eventually established the Delhi Sultanate.

Muhammad Ghori returned home and sent his general Qutb-ud-din Aibak for

his Indian expeditions. In 1206 following the assassination of Muhammad Ghori, Aibak a manumitted slave proclaimed himself as the Sultan of Delhi and founded a line of rulers called the Slave dynasty. Another general of Muhammad overran Bihar and killed many Buddhist monks.

The Delhi Sultanate firmly established the empire under Iltumish (1210–1235) and Balban (1266–87) and repulsed the Mongols on the Northwest frontier. Faced with constant revolts in the conquered territories and because of family feuds, the Slave dynasty came to an end in 1290.

Under the Khalji dynasty (1290–1320), the conquests of Sultan Ala-ud-din Muhammad Khalji established Muslim dominion in India. Early during the reign of the quixotic Muhammad Tuglaq, founder of the Tuglaq dynasty, the power of Delhi was acknowledged in extreme Southern India. Tuglaq's eccentric rule and ferocious behavior prompted a series of revolts, notably in the Hindu Vijaynagar Kingdom in the south, resulting in a steady loss of territory. When Tuglaq died in 1351, the Hindu south had recovered its independence and the Deccan had become a separate Muslim state, known as the Bahmani Kingdom. Delhi Sultanate became disintegrated under Tuglaq's successors into smaller States. With the sack of Delhi by the Mongol, Tamerlane, the self-styled descendant of Genghiz Khan, the sultanate fell even though local rulers lingered on at Delhi until the invasion of Babur and the Mongul conquest.

(h) Mogul empire

Zahiruddin Muhammad Babur, a descendant of Tamerlane, spent his early life in an unsuccessful struggle to wrest his inheritance of Samarkand (Tamerlane's capital) from the Uzbeks. In 1504 he captured Kabul and established a kingdom in Afghanistan. After the fiasco of his final attempt on Samarkand in 1512, Babur began his attacks southwards towards India. Responding to an invitation from the governor of the Punjab to overthrow the Sultan of Delhi, in 1525, Babur launched a serious invasion. In spite of the smallness of his force he had defeated the Sultan at Panipat in 1526 and captured Agra and Delhi. Eventually he had conquered almost all of north India. Humayun, son and successor of Babur, lost the empire to the Afghan, Sher Khan. Akbar (1542 to 1605), the son of Humayun, re-established the Mogul power and conquered Afghanistan, Baluchistan, and nearly all of the Indian peninsula to the north of river Godavari. Disillusioned with orthodox Islam and hoping to bring about religious solidarity, in 1582, he had promulgated the Din-i-Ilahi (divine faith), an eclectic creed derived from Islam, Hinduism, Zoroastrianism, and Christianity. It was a simple monotheistic cult, tolerant in outlook, centering on Akbar as a prophet. This religious revolution led to serious rebellions by outraged Muslims, and never took hold in India, and disappeared after Akbar's death. At Akbar's death Persian culture was implanted in India and India was free from divisive wars. Mogul expansion continued under Akbar's son Jahangir and his son Shah Jahan. When Shah Jahan fell ill in 1658, his son Aurangzeb (1618–1707) defeated the heir apparent Dara Shikoh and two other brothers, imprisoned his father for life and seized power with the reign title of Alamgir (world shaker). Being a fanatic Muslim he had persecuted the Hindus, destroyed their temples and monuments and executed the ninth guru of the Sikhs when he had refused to embrace Islam. Such measures resulted in the revolts of the Sikhs, Rajputs, and Jats in north and

of the Marathas in the Deccan. From 1682 Aurangzeb concentrated on crushing the Marathas, but his costly campaigns were successful only temporarily and weakened his power in the north. The Mogul empire fell apart soon after his death.

In 1738–1739, Nadir Shah (1688 to 1747 and Shah of Iran 1736 to 1747) invaded Mogul India, pillaged Delhi and Lahore and carried off vast treasure including the Peacock Throne and Koh-i-noor diamond.

(i) *The Europeans*

At the time of Babur's triumph, the Portuguese Vasco da Gama had landed at Calicut in the South (1498) and conquered Goa (1510). The splendour and wealth of the Moguls had attracted the British, the French, and the Dutch to India. The East India Company was chartered by Queen Elizabeth I, for trade with Asia. While the Mogul emperor remained strong the Company carried on trade, but in 18th century when an Afghan invasion, dynastic struggles, and incessant Hindu revolts, were rending the empire, Britain and France seized the opportunity to capture Indian wealth, and each attempted to oust the other. From 1746 to 1763 India was a battle field between the two powers, each allying with the native rulers. India in course of time became a foreign colony of the British, French, and Portuguese.

Sources of Ancient Indian Humanitarian Law

1. International Law in Ancient India

Eminent jurists and publicists apparently obsessed with the Austinian conception of law refuse to believe that the constitutions of ancient societies were favourable for the development of a body of systematic rules regulating interstate activities and relations.⁴ The idea of an international law in ancient India may seem to them to be a surprising phenomenon. Professor Arthur Nussbaum points out:⁵

"In recent times a few studies have been published on the so-called international law of ancient India and China. They describe historical events and practices, but they reveal what could, even in the broader sense of the word, be considered as international law. As has long been known, the Hindu Code of Manu — compiled about 100 B.C. from older materials — displays an astounding degree of humaneness, if not softness, in matters of warfare. An honourable warrior is supposed, for instance, not to strike an enemy who is sleeping, or has lost his coat of arms, or is naked, or is overcome with grief, or has turned to flight. These, and many similar prescriptions, seem to relate to inter-Indian feuds; even so, it is difficult to believe that they had any major significance in actual combat, especially as they were not fortified by legal sanctions. Yet they characterize Indian spirituality, and there is historical evidence of an Indian custom to spare, in warfare, plantations and habitations as well as the cultivators of the soil. This, too, was in accordance with the commands of Manu."

4. See Wheaton, *International Law*, Vol 1 (1929); Oppenheim, *International Law*, Vol 1, 8th ed., 72; Hall, *International Law* (1924), 40.

5. *A Concise History of the Law of Nations*, 3–4.

The observations of Nussbaum are self-contradictory. He refers to the Manu code as enjoinders of spirituality yet he admits that there has been historical evidence of protected targets and persons. According to modern jurists custom based on tacit consent or imitation is a primary source of international law.⁶ While denying these practises the status of international law in ancient India, he admits their existence.

2. Constituent units

The political development of the ancient Indians helped the growth of interstate rules. Ancient India was a congerie of political entities spread throughout the Indian subcontinent. In pre-historic India they were the communes.

The Rigvedic Aryans were divided into a number of tribes which consisted of settlements or groups of villages under a common government, usually a monarchy but sometimes elected. The Pancha Jana (five tribes) were Purus, Turvasas, Yadus, Anus, and Druhyus. There were others too, namely the Bharatas, Gandharis, Usinars, etc.

The Vedic political divisions were Visah, Grama, and Jana.

The Aryans were always harassed by the Dasyus, the survivors of Harappa culture and the non-Aryans.

In the Yajur Veda the Aryan tribes, as territorial sovereigns, ruled over particular tracts in the Indo-Gangetic plain. The famous among them were the Kuru, Panchalas, Kosalas, Videhas and Kasis. The Atharva Veda mentions Gandharas and Bhalikas.

During the Buddhist period there were the sixteen traditional *mahajanapadas*, namely, Anga, Magadha, Kasi, Kosala, Ujjai, Matta, Cheti, Vanisa, Kuru, Panchala, Manchhha, Surasena, Assaka, Avante, Gandhara, and Kamboja.

During Asoka's time there were Dravidian States in the south with whom he had relations.

The political units in ancient India were sovereign States. Maya, one of the authors of *Nitisastras*, described four of the States of Mandala or "Circle of States" as sovereign states. They were: Vijigisu, Ari, Madhyama, and Udasina. Manu, the authors of *Nitisastras* named Kautilya, Sukracharya, and Kamandaka, and the *Agnipurana* describe at some length the Mandala.

It is thus seen that in ancient India there were political units, which are identical to international persons, the subjects of the law of nations.

Irrespective of the number of these political entities, and regardless of their distinctive characteristics and conditions by which they were distinguished, and very often separated from one another, they constituted one family of nations or indeed one civilization, because of their common religion, culture, and heritage. It is this civilization that has meandered through the times of immemorial antiquity to the present time.

3. Sources of ancient Indian humanitarian law

The political development of the ancient Indians helped the growth of interstate rules. Even two thousand years before a Grotius, a Rachel, or an Ayala recalled

6. Oppenheim, op cit., 24 et seq.

Europe to humanitarianism, ancient Indians had propounded a body of rules governing the relations between States into which the continent of India was generally divided.

(a) *Dharma*

The Hindus gave no special name to the science of international law. They preferred to base the rules relating to interstate relationships on *dharma* or religion as the sheet anchor of common humanity.

Dharma pervades throughout the Hindu philosophical thought and social structure. *Dharma* is created for the well being of all creation. All that is free from doing any harm to any created being is *dharma*. *Dharma* is the principle that is capable of preserving the universe. In the *purushartha*, individual's striving to attain the ultimate (*moksha* or salvation), *dharma* is the foremost. *Dharma* is an expression of wide import and refers to the aggregate of duties and obligations: religious, moral, social and legal.

Dharma according to Manu is that "which is followed by the learned (and) good, by those ever free from spite and passions, (and) which is acknowledged by the mind" and consists of "The *Veda*, tradition, good custom, and (what is) pleasing to one's self."⁷ Law is a branch of *dharma*.

In Sanskrit there is no term for *strictissimi juris* for positive law dissociated from the ethical and religious sense. In a system of law founded on the social and sociological concepts of a pastoral people, and necessarily influenced by the theological tenets and philosophical theories of the Vedic Aryans, the admixture of religion and ethics with legal precepts was naturally congruent. Any attempt to isolate completely any secular matter from its religious adjuncts would fail to give a comprehensive idea or proper perspective of the true juridical concepts of Hindu Law.

The sources of international humanitarian law like any other kind of law in ancient India are: *Sruti*, *Smriti*, Digest and Commentaries, and custom.

(b) *Srutis*

For the ancient Hindu, his law was a Revelation, immutable and eternal. He believed that some Hindu sages had attained such great spiritual heights that they could be in direct communication with God, and God had revealed the sacred law. That revelation is contained in *Srutis* or *Vedas*.

Sruti literally means that "which was heard". It was supreme like the decalogue to the later Christians. *Srutis* are the four *Vedas*: *Rig*, *Yajur*, *Sama* and *Atharva*, together with their respective appendices, the *Brahmanas*. The *Brahmanas*, which were later added on, deal with various ceremonies, rituals and sacrifices.

The approximate Vedic period now accepted is 4000 to 1000 B.C., the period when the Aryans streamed into and settled in the rich lands of Punjab and Doab from their ancient home beyond the Hindu Kush. At that time there existed two sets of rules:

- (a) Rules of customary law, that deal with rights and duties, right and wrong,

7. Burnell, AC, and Hopkins, EW, *The Ordinances of Manu*, 17; *Manusmriti*, II:2 and 12.

though the emphasis was on duties and obligations. What was practised was *dharma*.

(b) The law of the divine wisdom. The Vedic Aryans believed that the soul is immortal and the body, its abode, is mortal and perishable. According to them the soul of a being enjoys or suffers in the next birth according to the good and bad *karma* (action) done in this world. *Yajna* (any Hindu ritual in which fire is the eternal deity) was the way of attaining salvation.

(c) *Smritis*

Smriti literally means “what has been remembered”. The *Smritis* are based on the memory of the sages who were the repositories of the sacred Revelation. The *Smritis* are divided into *Dharmasutras* and *Dharmashastras*, they being the earlier and later *smritis*.

(i) *Dharmasutras*. They were mostly written in prose and expound the *Vedas*. The approximate period is usually reckoned to be between 800 and 200 B.C. They bear the names of their authors, the *Dharmasutrakars*. Important among them are: Gautama, Baudhayana, Apastamba, Harita, Vasistha, and Vishnu. The *Dharmasutras* deal with the duties of men in their various relations. They not only propound jurisprudential concepts but help in constructing the ancient legal history. They refer to many previously existing unrecorded customs formulating the rules of law.

(ii) *Dharmashastras*. The era of *Dharmashastras* was the golden age of Hindu law. The Hindu jurisprudence regards the *Smritis*, which are often designated as *Dharmashastras*, as the foundation and an important source of law. Most of the *Dharmashastras* are divided in three parts: *Acharya*, *Vyavahara*, and *Prayashchitta*. The first and last relate to rules of religious observances and expiation. The second deals with civil law. While the early day *Smrithikaras* emphasised the first and last, the later day *Smrithikaras* have exhaustively considered *Vyavahara*, rules of positive law.

(iii) *Manu Smriti*. The *Manu Smriti* has been all along considered to be the supreme authority in the entire country. The *Dharmashastras* from one Rig-Vedic age copiously refer to the opinions of Manu, Manu Svayambhuva, Prachet as a Manu, and Vriddha Manu; the identity of the real author of the extant *Manusmriti* is not established.

It is divided into 12 chapters and contains 2694 verses. The approximate date of compilation is placed at 200 B.C. The *Manusmriti* is a landmark in the history of Hindu law and a reservoir to which references are necessary for the proper appreciation of any fundamental concept or any question involving first principles. As such the rules of law laid down in it and its most characteristic doctrines have today their practical importance.

Manu stresses the importance of *danda* connoting the concept of sanctions in restraining transgressions of law. For him, *danda* “rules all men; punishment alone protects them; punishment is watchful while they sleep: the wise know punishment (to be) justice.”⁸

8. *Manusmriti*, VII: 18.

A number of commentaries have been written on the Manu Code. The important ones are: Kulluka's *Manvarthamuktavali*, Medhatithi's *Manubhaya*, and Govindaraja's *Manutika*. Mahamahopadhyaya Sir Ganganath Jha has published volumes on *Manusmriti* with Medhatithi's commentary.

(iv) *Yajnavalkya Smriti*. The Code of Yajnavalkya is founded on *Manusmriti* but the treatment is more logical and synthesized. The approximate date is the beginning of the Christian era. Buddha's teaching and particularly his message of universal compassion is reflected in this *Smriti*. Consequently, punishment for various offences is less severe.

Commentaries on *Yajnavalkya Smriti* have been written by Visvarupa, Vijnaneshwara, Apararka, and Shulpani. Because of Vijnaneshwara's commentary, *Mitakshara Yajnavalkya Smriti* became a very important source of Hindu law.

(v) *Narada Smriti*. Written around 200 A.D., it deals with *Vyavahara* and does not deal with *Acharya* and *Prayashchitta*. Narada is emphatic that custom is powerful and overrides any text of the sacred law. Asahaya, himself quoted with esteem in a number of treatises and digests, has written the *Naradabhashya*, a very useful treatise on the *Narada Smriti*.

Among other *Smritis* are: *Parashara*, *Brihaspati*, and *Katyayana*. *Smritis* by Vyasa, Samvarta, and Devala are only referred to in Digests and Commentaries.

(vii) *Puranas*. In considering the *Smritis* a mention needs to be made of the *Puranas*, sometimes included in the term *Smritis*. *Puranas* have been "reckoned" in *Ganga Sahai v Lekhraj Singh*⁹ as "a supplement to the scripture, and as such, constitute a fifth *Veda*." They are a compendium of legends and religious instructions during 300 A.D. to 600 A.D. There are eighteen chief *Puranas*, of which the most important are the *Vayu*, *Vishnu*, *Agni*, *Bhavisya*, *Bhagawata*, *Matsya*, *Kurwa*, and *Markendeya Puranas*. Derrett points out: "The texts of the *purana* are adopted by the twelfth century jurist Apararka, and by the seventeenth century jurist Mitramisra, and thus are unquestionable standard *dharmastra* material."¹⁰

(viii) *Upanishads*. They are the speculative and mystical scriptures of Hinduism, regarded as the well spring of Hindu religious and speculative thought. The word *Upanishad* means literally a "session", sitting at the feet of the master who imparts esoteric doctrines. The *Upanishads*, which form the last section of the *Vedas*, were composed from 900 B.C. (c). Of the 112 *Upanishads* extant, about 13 date from the Vedic period and the rest are later sectarian works. The better known are the *Brhadaranyaka*, *Chandogya*, *Katha* and *Svetasvatra*. The principal early *Upanishads* answer the questions posed in the *Rig Veda* and *Brahmanas*, as to the source and controlling power of the world and the individual and the real significance of the Vedic sacrifice. They are best known for their doctrine of *brahman*, the ultimate and universal reality of pure being and consciousness, and the identity of *brahman* with the inner self, or *atman* (soul) of a man. When a man realizes this fact fully he is wholly freed from transmigration. His soul becomes one with *brahman*, and he transcends joy and sorrow, life and death.

9. 9 ILR (All) 253 (1866).

10. Derrett, JDM, *Religion, Law, and the State in India* (1968), 99.

Since the *Vedas* are the sources of law, and the *Upanishads* reflect the Vedic Concepts, to that extent it is to be relevant in the understanding of the legal principles.

(d) *Digest and commentaries*

The commentaries and digests cover the period from 700 A.D. to 1700 A.D. The digests are referred to as *Nibandhas*. The latest of the commentaries is by Nanda pandit on the *Vishnu-Dharmashastra* called *Vaijayanti*. In addition to those referred to earlier the renowned commentaries were Aparaka's *Aparaditya* (1200 A.D.), Mitra Mishra's *Viramtitrodaya* (1610–1640 (c)), Dyannabhatta's *Smriti Chandrika* (1200 A.D.), Madhavacharya's *Parasaramadhaviya* (1330–38), *Vyavahara Mayukha* by Nilakanthabhatta, Jeemutavahan's *Dayabhaga* and others.

(e) *Custom*

During the early stages of the development of Hindu law, custom was acknowledged and accepted as the embodiment of rules and principles prescribed in tradition. The *Sutrakars* and the *Smritikars* emphasised custom as a source of law, and referred to it as *achara*, *sadachara*, and *shistachara*. The essential attributes of a custom are that it must be ancient, reasonable, must have continued or been observed without interruption, and must be certain in respects of its nature, the venue, and the persons to whom it applies.

(f) *The epics*

There is scarcely any direct knowledge of the period of four or five hundred years between the composition of *Rig Veda* and the age of Buddhism. The only important sources are the sacred texts, the *Vedas*, *Brahmanas*, and *Upanishads*. One event not recorded but strongly remembered was the great battle of Kurukshetra, the basis of the greatest of India's epics, *Mahabharata*. Basham¹¹ fixes the date of this battle around the beginning of the 9th century B.C. There are many legends that refer to this period contained in other sources, notably the epics. But these epics are so overlaid with accretions that no attempt at interpreting them historically has won any general acceptance. These epics, though, are wholly religious.

In addition to the *Mahabharata*, the other epic is the *Ramayana*.

In addition to the *Srutis* and *Smritis* constituting the *Dharmashastras* the epic literatures of the *Mahabharata* and the *Ramayana* give clear evidence of their origin as martial legends. To a student of humanitarian law they are of considerable significance because of the various references to the precepts of war, the treatment of combatants and non-combatants, with startling resemblance to the modern concepts evolved in the Geneva Conventions and their Additional Protocols.

The *Mahabharata*, authored by the ancient sage Vyasa but interpolated by bardic poets and priests with many passages of theology, morals, statecraft, and rules of warfare, is the account of dynastic struggle between two cousins, the Pandavas and Kauravas. Before the battle began, Khrishna preached the exalted

11. Basham, AL, *The Wonder That Was India* (1981), 40.

Bhagvad Gita. Arjuna, the third of the Pandavas, is overcome with anguish when he sees in the opposing army of the Kauravas many of his kinsmen, teachers, and friends. Krishna, who reveals himself as the incarnation of Vishnu, persuades him to fight by instructing him in spiritual wisdom and the means of attaining union with God. For a Hindu, the *Gita* is so sacred, that even today a believer is administered oath on the *Gita*.

The twelfth book of *Mahabharata* known as the *Shanti Parvan* is a collection of many disparate passages on statecraft and human conduct.

Passages on statecraft are also to be found in the second of the great epics, the *Ramayana*, authored by the sage Valmiki in 3rd century B.C. Incorporating the sacred material from the *Veda*, the *Ramayana* relates the adventures of Rama, the seventh incarnation of Vishnu. Rama was deprived by guile of the throne of Ajodhya, and forced into long exile along with his wife Sita and followed by his brother Lakshmana. The demon king of Lanka, Ravana, abducted Sita. Rama allied himself with the king of monkeys Sugriva and their general Hanuman (the monkeys are to be rationalized as the aboriginal tribesmen) and fought a mighty battle in Lanka. Sita was recovered and Rama restored to the throne.

(g) *Arthashastra and other political texts*

No conspectus of the sources of Hindu law, however brief, can omit the *Arthashastra* of Kautilya, known also as *Chanakya* or *Vishnugupta*. The work is not *Dharmashastra* but a masterly treatise on ancient Indian policy and a veritable reservoir of rules relating to the duties of a king and his administration, including the administration of justice, laws, courts, legal procedure, taxation, rights, matrimonial causes, and, of paramount importance for the present purpose, the laws relating to war, and other matters of philosophy, sociology, economics, and hygiene. It gives detailed instructions on the control of the state, the organization of national economy, and the conduct of war, and it is a most precious source book for many aspects of ancient Indian life.

What the *Arthashastra* represents and why it is written is explained by Kautilya at the end of the work:

"The source of livelihood of men is wealth, in other words, the earth inhabited by men. The science which is the means of attainment of that earth is the Science of Politics."¹²

"The object, with respect to which a statement is made, is the topic. For instance: 'This single treatise on the Science of Politics is composed mostly by bringing together the teachings of as many treatises on the Science of Politics as have been composed by the ancient teachers for the acquisition or protection of the earth.'"¹³

"This science brings into being and preserves spiritual good, material well-being and pleasures, and destroys the spiritual evil, material loss and hatred."¹⁴

And the book concludes with the statement:

"Seeing the manifold errors of the writers of commentaries on scientific

12. Kangle, RP, *The Kautilya Arthashastra*, Part II (1972), *Arthashastra*, 15.1.1.

13. *Ibid.*, 15.1.4-5.

14. *Ibid.*, 15.1.72.

treatise, Vishnugupta himself composed the *sutra* as well as the *bhasya*.¹⁵

Other political texts are *Nitisara* ("Essence of Politics") by Kamandaka perhaps written during the Gupta period, *Nitivakyamrita* by Somadesa Suri, a Jaina writer of the 10th century, and *Nitisara* of Sukra, now established to be a work of the early 19th century.

Relevant portions of these ancient political science treatises do constitute a source of international law within Article 38 of the Statute of the International Court of Justice being the "teachings of most highly qualified publicists of the various nations".

Laws relating to treatment of victims of armed conflict in ancient India

1. War: the last resort

The examination of the materials of ancient India for nascent concepts of international humanitarian law though arduous is not a barren pursuit.

War was not a normal condition in ancient India. A ruler would not in general go to war merely for territorial aggrandizement and expeditions would be mounted after deliberation on grave issues.¹⁶ In ancient India, of the six forms of policy, conciliation, gift, and separation were given preference to war even in regular form. In the *Mahabharata* Bhishma advised Yudhishthira:¹⁷

"If thy endeavours after peace fail, then mayest thou engage in battle . . .

'The victory that one acquires by battle is very inferior'. Therefore the collision of battle is not at all desirable as long as it can be avoided. The policy of conciliation, of producing disunion and making gifts should first be tried; battle, it is said, should come after these.'

For Yudhishthir "Peace is better than war".¹⁸

The abhorrence of war was so great that Sanjay declared: "It was better to live on alms in a kingdom than to have sovereignty through war".¹⁹

The *Mahabharata* shows remarkable awareness of how irredentism or movements for liberation occurred in vanquished countries:²⁰

"In hope of terminating the dispute one often seeketh to exterminate the foe. Victory creates animosity, the defeated live in sorrow. He that is peaceful sleepeth in happiness, giving up all thoughts of victory and defeat, whereas he that hath provoked hostility always sleepeth in misery, with indeed an anxious heart, as if sleeping with a snake in the same room. He that exterminates reapeth eternal infamy. Hostility wages ever so long, ceases not: for if there is any one alive in an enemy's family, narrators are never wanted to remind him of the past. Enmity, O Kesava, is never neutralised by enmity, it is fomented by enmity like fire fed by clarified butter . . . Peace that is obtained even through humiliation is best. When those that strive for peace by all means without of course wishing for war,

15. Ibid.

16. Viswanatha, SV, *International Law in Ancient India*, (1925), 127 and 173 et seq.

17. Roy, PC, *Mahabharata*, 11 Vols, 2nd ed (1919-35). Citations hereafter referred to are the *parvas*, Chapter number, and verse. *Shanti Parva*, 102.22.

18. Ibid.

19. Ibid.

20. *Mahabharata: Udyoga Parva*, 71.

find conciliation fails, war becomes inevitable and then is the time for displaying prowess.”

Manu enjoins:²¹ “For since victory or defeat in battle is seen to be not permanent between (two forces) fighting, therefore he (the king) should avoid battle”. A King should first try to overcome his enemy by alliance, gifts, and by causing dissensions if possible: if all these fail then and then only should he wage war.²²

According to Kautilya:²³ “If there is equal advancement in peace or war, he (the king) should resort to peace. For in war there are losses, expenses, marches away from home and hindrances. By that is explained (preference for) staying quiet, as between staying quiet and marching.”

For Kamandaka, a solvent treasury and safe advice were much better than mere display of power. He therefore recommends lavish gifts.

In *Dhammapada*, an early collection of Buddhist verse, we read:²⁵

“Victory breeds hatred,
for the conquered sleep in sorrow
above victory or defeat
the calm man dwells in peace.”

The ancient Indian, thus, regarded war as a necessary evil to be resorted to only as a last expedient. War as such existed as an institution of legal theory as well as State practice. Certain well defined rules guided all wars — rules that were sanctioned by *Dharmashastras*, religion, and common humanity and were carried out by men ennobled by a sense of chivalry, according to customs and usages. The rule of might and the doctrine of “State necessity” had no more elaborate application than in the modern armed conflicts that cynically disregard the rights of the others.

The laws, customs, usages, and other sources contain many precepts pertaining to armed conflict with startling similarities to the modern international humanitarian law. As the purpose of this paper is to elaborate only those concepts that concern the treatment of victims of armed conflict, the author is obliged to contain the paper within such confines and refer to only the concepts that have a direct bearing to the subject of the paper.

2. *Basis of protection*

The humanitarian law enunciated in the Geneva Conventions and their Additional Protocols is binding upon the States parties only upon ratification. Consent thus is the basis of the legal obligation to implement the humanitarian law.

Professor Nussbaum cursorily concludes that the prescriptions of *jus in bello* in ancient India were not of any significance in actual combat as they were not fortified by legal sanctions.²⁶

An agreement between the warring parties for applying the rules of war was

21. Burnell and Hopkins, op cit, *Manu Smriti*, 7.199.

22. Ibid, 7.198 and 200.

23. Kangle, op cit, *Kautilya*, 7.2.1. to 3.

24. *Nitisara of Kamandaka* hereinafter referred to as *Kamandaka*, 17.2 to 3.

25. *Dhammapada*, 201.

26. Nussbaum, op cit, 4.

not unknown. According to Mahamahopadhyaya P.V. Kane,²⁷ “in the *Bhismaparva* (1.27–32) certain rules of war agreed upon between the Kauravas and Pandavas are set out . . .” Agreements between the belligerents for the application of rules of warfare were, thus, in existence in ancient India, a practice that is quite modern, as in the case of the agreements between the parties to apply Article 3 of the Geneva Conventions in the Yemen and Algerian conflicts.

3. *Jus ad bellum*

The epics and the *Dharmashastras* would not recognize any kind of war which violated the strict rules of *Dharmayuddha*. The war was righteous or was a *Dharmayuddha* when (a) other means having failed it was resorted to as the last remedy, (b) the object was just and righteous, and (c) the fighting was conducted in accordance with recognised rules of warfare abstaining from the use of prohibited force, weapons, and practices.

The causes of war according to the *Agni Purana* are:²⁸

- (a) Enticement or abduction of one's wife;
- (b) Encroachment on the capital, territory, the kingdom, or sovereignty rights of a king by his adversary;
- (c) pride, and oversensitiveness as to honour;
- (d) loss of fortune;
- (e) humiliation suffered by an ally or friendly king;
- (f) death of an ally;
- (g) accretions to the domain of a foreign king and a disturbance of the balance of power among the “circle of kings”.

The *Kamandaka*²⁹ in addition to the above considers intervention on moral grounds to be just.

Buddha the apostle of non-violence is said to have taught: “He who wages war in a righteous cause after exhausting all means of preserving peace is not blameworthy.”³⁰

As a corollary to *Dharmayuddha* there is *Kutayuddha*. The main theme of *Kutayuddha* is to win at any cost. It was a war fought in contravention of accepted rules.

Kautilya classified conquests into three categories: *Dharma*, *Lobha*, and *Asura Vijaya*.³¹ Dikshitar has interpreted *Dharma Vijaya* as an equivalent to *Dharmayuddha*, and asserts it as a righteous method of warfare.³² In *Lobha Vijaya* the main motive for invasion was greed for wealth. In *Asura Vijaya* the invader was sure of victory but he would not be satisfied without anything short of unconditional surrender and annihilation of the enemy. The motive for such a conquest was glory and self-aggrandizement. Professor Dikshitar considers both *Asura* and *Lobha Vijaya* to be *Kutayuddha*.³³ The *Ramayana* condemns

27. Kane, PV, *History of Dharmasastra*, Vol III (1946), 209.

28. *Agni Purana*, 240.15. Shastri, MND, *Agni Purana: A Prose English Translation* (1967). See Also *Ancient Indian Tradition, Mythology Series* (1970) several volumes for the texts of *Puranas*.

29. 17.2–3.

30. Narasu, PL, *The Essence of Buddhism*, (1948), 43.

31. Kautilya, 12.1.10 to 16.

32. Dikshitar, R, *War in Ancient India*, (1948), 81–3.

33. *Ibid*, 85.

Kutayuddha and it was not commendable for honourable men.³⁴ In the *Mahabharata* it is laid down³⁵ that "It is better to die in righteous war than achieve victory in unrighteous war." It also reiterates:³⁶ "A king should never hanker for victory achieved in unjust war since a king can never win fame by winning a battle by foul means."

According to the *Dharmashastras* and the epics only *Dharmayuddha* is permitted. Only the *Arthashastras* prescribe *Kutayuddha* under certain circumstances. They look upon war (a) from the point of utility and (b) from the point of "State necessity". Sukracharya states that a king should never destroy his army by recklessly undertaking wars; but once in a war he should behave in such a way that the opponents should be aware of him. Victory had to be obtained at any cost whether one followed the accepted rules of international usage or not, because it is a folly to lose one's object. A clever king should, therefore, even suffer insult and humiliation at the outset to secure ultimate victory.³⁷ Sukracharya, however, neither denies the existence of *Dharmayuddha* nor recommends *Kutayuddha* in every eventuality. The exigencies of "State necessity" according to him preempt the inherent superiority of every ethical principle. *Kutayuddha* is recommended only for the weak. There is no warfare, says Sukracharya, which extirpates the powerful enemy as much as *Kutayuddha*, and one should follow the moral rules so long as one is powerful because people remain friends till then, just as the wind befriends the fire.³⁸

Kautilya also enunciates identical principles.³⁹ Overwhelming considerations of self-preservation compelled a State to resort to *Kutayuddha*, but Kautilya advised small states undertaking such wars to enter into subordinate alliances with a powerful state.⁴⁰ It was only when outside help was not available that *Kutayuddha* was to be adopted.

4. *Jus in bello*

Humanitarianism raised the laws of warfare in ancient India to such a high level that the distance of centuries vanishes in the mist of time. If humanitarianism had contributed to the high order of the interstate relations and international usages, chivalry ennobled the ideal of warfare and the character of the soldier engaged in the armed conflicts. The ancient Indians entertained a very high ideal of warfare and their practice in general conformed to that lofty ideal.

Humanitarianism of the laws regulating wars in ancient India has been succinctly stated by Basham:⁴¹

"For (the more orthodox texts) the major motive of war is glory, not gain. War is not merely a means to an end, but part of the warriors' *dharma* and good for its own sake . . . Rules of fair fighting are laid down . . . For the later sources, such as Manu, a battle was ideally a gigantic tournament with

34. Shastri, HP, *The Ramayana of Valmiki*, 3 vols. (1952-59) (tr), hereafter cited with the chapters (ie *kanda*) *Yuddakanda*, 50.15.

35. *Mahabharata*, *Shanti Parva*, 9.5.17.

36. *Ibid.*, 16.15.

37. Jivananda (ed), *Sukranitisara*, 4.7.350 and 363.

38. *Ibid.*, 4.7.189.

39. 10.3.

40. Book 12.

41. Basham, *op cit*, 127.

many rules . . . Homage and not annexation was the right fruit of victory . . .

. . . the chivalrous rules of war, probably based on very old tradition, and codified in their present form among the martial people of Western India in post-Mauryan times, must have had some effect in mitigating the harshness of war for combatants and non-combatants alike. It is doubtful if any other civilization set such humane ideals of warfare.”

The *Mahabharata* declares:⁴²

“A king should not attempt
to gain the earth unrighteously,
for who reveres the king
who wins unrighteous victory?
Unrighteous conquest is impermanent
and does not lead to heaven.”

The theory of international humanitarian law by which the hardships of war have been mitigated to a large extent is also reflected in the *Mahabharata*. Bhishma counsels abstention from fruitless acts of hostility, from insolence, and from haughty speech and recommends humane treatment of the conquered people.⁴³ Elsewhere Bhishma observes that a *Kshatriya* (the warrior class) who destroys righteousness and transgresses all wholesome barriers does not deserve to be reckoned as a *Kshatriya* and should be driven from the society.

According to Manu:⁴⁴ “This real and eternal law for soldiers has been declared; from this law a *Kshatriya* (the warrior class) should not fall away.”

The idea of men being the creation of one Creator and that they were all His children was propounded in the *Upanishads* and gradually led to better treatment of the conquered by the conqueror.

In the *Ramayana* we see that the laws of war had become humanised. War was a game to be fought fairly. People were chivalrous enough and tried to settle the issues relying on arms and not stratagems. Hanuman sought Sita’s sanction for slaying the female slaves who had tormented her. Sita advised Hanuman to pardon those guilty of iniquitous acts. It was proper to show compassion even to them who deserved chastisement and extirpation.⁴⁵

In the age of *Puranas* there is a reception of the laws laid down in the *Dharmasutras* and epics. The laws are humanised and the people were advised to show kindness to their enemies. In a typical style of Rousseau, the aim of an armed conflict was not the slaughter of enemies but to win success with as little oppression and slaughter as possible. The *Siva Purana*, *Brihaddharma Purana* and *Padma Purana* enumerated the protected persons who cannot be killed.

The persons protected and the safeguards guaranteed under humanitarian considerations in ancient India are considered in the following pages.

5. Military objects

The ancient Indians had made a distinction between military objects that could be the targets of attack and non-military objects which could not be attacked.

42. *Shanti Parva*, 97.1 to 2.

43. *Ibid.*, 102. 34 to 38.

44. *Manu Smriti*, 7.9.

45. *Yuddhakanda*, 15.

Megasthenes, the Greek ambassador of Seleucus Nicator at the court of Chandragupta Maurya at Pataliputra recorded:⁴⁶

“Whereas among other nations it is usual, in the contests of war, to ravage the soil, and thus to reduce it to an uncultivated waste, among Indians on the contrary, by whom husbandmen are regarded as a class that is sacred and inviolable, the tillers of the soil, even when the battle is raging in their neighbourhood, are undisturbed by any sense of danger, for the combatants of either side in waging the conflict make carnage of each other but allow those engaged in husbandry to remain quite unmolested. Besides, they neither ravage an enemy’s land with fire, nor cut down its trees”

Nearly a millennium later, Hiuen Tsang said:⁴⁷ “Petty rivalries and wars were not infrequent, but . . . they did little harm to the country at large.”

The veracity of these statements is seen from a simile employed in a celebrated Buddhist work: the author says that philosophers, while they are free to destroy the opinions of their adversaries, must carefully respect the principles of logic which are useful to all, just as kings while destroying the soldiers of the enemies, respect the field labourer who is the common help of both armies.⁴⁸

All places of religious worship, houses belonging to persons who were not participating in warfare, or property that was not in the possession of armed forces could not be attacked, or destroyed, according to recognized customs and scriptural texts. Warfare, as a rule, was confined to combatants. Consequently, the targets of attack were the combatant forces wherever they existed, and neither towns nor cities were allowed to be ravaged during the war or while the armies were marching.⁴⁹

Dharmayuddha according to the *Agni Purana*⁵⁰ was to leave the “fruit and flower gardens, temples and other places of public worship unmolested.”

The clear line of demarcation between civilians and belligerents enunciated in ancient Hindu warfare has a surprising similarity to some of the provisions of Part IV of Protocol I. Article 48 requires the belligerents to distinguish between civilian and military objects. Article 51.1 requires that the civilians shall enjoy general protection from military operations. If the civilians could carry on their normal activities or vocations, it bears testimony to the fact that in ancient India the military operations were carried on without prejudice to the civilians. This would also be true in respect of the prohibition against indiscriminate attacks. A harmonious construction of Article 52.1 and 3 requires that places of worship, houses not utilized for military purposes, are exempted from attack. This principle was in existence in ancient India.

Megasthenes’ account of husbandmen being free from any danger suggests that acts or threats of violence for terrorising the civilians, prohibited by Article 51.2, were also prohibited in ancient India. The same rendering regarding the land being not “ravaged” and made “an uncultivable waste” goes to show the application of the principle of Article 55 relating to the protection of the natural environment.

46. McCrindle, JW, *Ancient India as described by Megasthenes and Arrian* (translation of fragments) (1926), 33.

47. Quoted by Viswanatha, op cit, 18.

48. Citation from *Abdhidharmakosvayakhya* quoted by Breloer in *Kautilya-Studien*, i, 118 fn.

49. Singh, N, op cit, (fn 1), 72–3.

50. 236.22.

6. Combatants and non-Combatants

The distinction between combatants and non-combatants envisaged in modern international humanitarian law was recognized by the ancient Hindus.

Killing a foe in war was lawful. Gautama in *Dharmasutra* says:⁵¹ “It is no sin to kill men in war.” Dying a hero’s death was the highest honour for a Kshatriya. Manslaughter in war was made holy and righteous. Manu states:⁵² “Kings who, desirous to slay one another, fight with their greatest strength in battles and without turning away, go to heaven”. The same eulogy of war is also enunciated by Yajnavalkya:⁵³ he who kills his opponents in war with open arms, not with covered or disguised weapons, goes to heaven like the ascetics.

While killing an enemy in war was lawful, some people were protected from slaughter on grounds of humanity and justice. The idea of a fair fight existed, so brave men wanted to defeat their rivals in an open conflict and those incapable of protecting themselves or incapacitated from doing so were not to be killed. The *Manusmriti* prohibits killing in the following cases:⁵⁴

“Nor should one mounted slay an enemy down on the ground, a eunuch (meaning one wanting in manliness or a coward according to Medhahiti), a suppliant, one with loosened hair, one seated, one who says ‘I am thy prisoner’;

Nor one asleep, one without armour, one naked, one without weapons, one not fighting, a looker-on, one engaged with another;

Nor one who has his arms broken, a distressed man, one badly hit, one afraid, one who has fled; remembering virtue one should not slay them”.

According to Gautama:⁵⁵

“No sin is committed by injuring or slaying men in battle except him who has lost his horse, charioteer or weapons, him who joins his hands (in supplication for life), whose hair are dishevelled (in flying), who turns away from the field, who sits down, who climbs in eminence or a tree (in flight), except envoys or messengers, except him who declares himself to be a cow or a brahmana”.

Vridha-Harita exempts spectators from killing.⁵⁶

Sankha, Yajnavalkya’s commentator, states that a soldier should not kill another while the latter is drinking water or taking his meals or is taking off his shoes, nor should one kill a woman, a female elephant, nor a charioteer, nor a bard nor a brahman nor should one who is not a king kill one who is a king.⁵⁷

Yajnavalkya enjoined⁵⁸ “not to kill one who says ‘I am yours’, a eunuch, one without arms, one fighting with another, one who had desisted or ceased from fighting, one who is an observer.”

The *Baudhayana* adds some more categories:⁵⁹ “Let him not fight with those

51. 10.15 and 16.

52. 7.89.

53. *Yajnavalkya Rajadhrma Prakaranam*, 322–3.

54. 7.91 to 93.

55. 10.17–18.

56. 7.216 quoted by Kane, op cit, 209.

57. Quoted by Kane, op cit, 210.

58. Op cit, 325.

59. Vol i, 10.18.11.

who are in fear, intoxicated, insane, out of mind, nor with those who have lost their armour, nor with women, infants, aged men and Brahmans."

For Apastamba,⁶⁰ "in War (Kshatriyas) shall act in such a manner as those order, who are banned in that art of war. The Aryans forbid the slaughter of those who have laid down their arms, of those who beg for mercy with flying hair or joined hands and of fugitives."

The *Mahabharata* recognized the distinction between combatants and non-combatants, and it was a sin to kill one not actively engaged in fight. The episode of Srutayudha makes it clear that one who killed a non-combatant will incur the eternal curse. Srutayudha had a mace which if used against a non-combatant would kill the person using it. He had hurled it against Janardana who was not engaged in fight, and so it boomeranged and killed Srutayudha.

According to the *Mahabharata* war was a manly sport where people were eager to display their prowess. The *dharma* of the *Kshatriya* was to fight and maintain law and order. *Dharmayuddha* has been conceptualized. War was to be according to laws formulated, fair and not deceitful. Bhishma lays down the principle of fair fight:⁶¹

"A Kshatriya must not put on armour for fighting a Kshatriya unclad in mail. One should fight one — and abandon the opponent when the latter becomes disabled and to fight an army clad in armour by putting on armour . . . one should not on horseback proceed against a car warrior. A car warrior is to proceed against a car warrior. Neither poisoned nor barbed arrows should be used. These are instruments of the wicked. One should fight righteously without yielding to wrath or being fond of unnecessary slaughter. The righteous should always act righteously towards those who are righteous. Even he that is wicked should be subdued with fair means. It is better to lay down life itself in the observance of righteousness than win victory by sinful means."

Fair fight was *Sanmukha Yuddha*, that is to fight openly face to face and not strike one from behind.

War being an act of heroism, in the *Mahabharata* it was a sin to fight a fugitive or the unarmed, the supplicants for quarter, or those afflicted with fear or agony. Karna exclaimed:⁶² "Brave warriors that are observant of the practice of the righteous never shoot their weapons at persons with dishevelled hair, or at those that have turned their faces from battle or at a Brahmana or at him who joins his palms, or at him who yields himself or beggeth for quarter or one who has put up his weapons or whose arrows are exhausted or at one whose armour is displaced or at one whose weapon has fallen off or broken."

Bhishma's attitude towards the rules of war was that⁶³

"no one should slay those that are asleep, or thirsty, or fatigued or those whose accoutrements have fallen away or one that has set his heart on final emancipation or one that is flying away or one that is walking (unguarded) along a road or one engaged in drinking or eating or one that is mad, or one that is insane or one that has been wounded mortally or one that has been

60. Vol ii, 5.10.11.

61. *Shanti Parva*, 95.6 to 16.

62. *Karna Parva*, 90.109 to 110.

63. *Shanti Parva*, 100.27 to 29.

exceedingly weakened by his wounds or one that is staying trustfully or one that has begun any task without having been able to finish it, one skilled in special art or one that is in grief or one that goes out of the camp for gathering forage or fodder or men who set up camp or camp followers or those that wait at the gates of the king or his ministers, menials of army chief or chief of the servants.”

In the *Puranas* there is repetition of the laws laid down in the *Dharmashastras*.

The *Siva Purana* postulates that one was not to kill a man afflicted with grief, sickness, weakness, a boy, a man protected by women, a pauper, one whose bow was broken or whose bow-string had split, one with dishevelled hair, one who had surrendered with blades of grass in his mouth as a sign of surrender, one who surrenders saying “I am yours”, an old man, one who was not aware of the fight, a eunuch, etc.⁶⁴ The *Brihaddharma Purana* gives a similar list of men who were immune from killing.⁶⁵ “One who was afraid, one afflicted with sorrow, one who surrendered, or begged for quarter, woman, boy, blind or crippled man, a hermit, one who is distressed or lamenting, insane, one who had entrusted, a Brahmin, one who was fallen, one weeping, one engaged in sexual intercourse, one without arms, a naked, a poor, an old man with nails and hair, one asleep, a mad man.” The *Padma Purana* repeats the same injunction.⁶⁶

The treatises on Political Science also have identical mandates. The *Sukraniti* in the context states:⁶⁷

“Nor should be slain one who is over-fatigued, or is bereft of his armour, or is naked or has given up arms, or is a mere spectator or is engaged in fighting with some one else.

A person who is either eating or drinking or is engaged in some other work as also a person who is frightened and is incapable of giving a fight, should not be slain.

The old and the youngsters should not be slain and so also is not proper to kill the woman or only the king. However, there is no infringement of Dharma in killing someone while fighting with approved weapons and in complete observance of the laws of warfare.”

In the *Ramayana*, Rama counsels his brother Lakshmana when he was infuriated with Indrajit's fight incognito and was about to massacre the Rakshas:⁶⁸ “It does not behove thee to clear all the Rakshas of the earth for the folly of one individual. Thou should not slay, who hath retired from battle, hath hidden himself, hath sought thy shelter, hath stood before thee with joined palms, hath fled away or is bewildered”.

Even for the down to earth pragmatist Kautilya open warfare in which the place and time are indicated was most righteous.⁶⁹ “When attacking the enemy's camp”, says Kautilya, “they should show safety to those fallen down, those turning back, those surrendering, those with loose hair, those without weapons, those disfigured by terror and to those not fighting.”⁷⁰

64. *Dharma Samhita*, 12.35 to 39.

65. 62.56 to 59.

66. 4.235 to 240.

67. 4.1177 to 1179.

68. *Sundarakanda*, 31.30.

69. 13.4.52.

70. 13.4.52.

From the above discussion it is thus clear that the parties to the armed conflict were not entirely free to choose the method of warfare. The right to kill was conditioned by many restraints, and many categories of persons have been protected from being killed. This is identical to the requirement of Article 35.1 in the First Protocol, and Article 12 of the First and Second Geneva Conventions and Articles 32 and 68 of the Fourth Convention, and Article 22 of the 1899 and 1907 Hague Conventions.

Article 41 of Protocol I requires the sparing of persons who are placed *hors de combat*, a principle that is found in ancient India.

The practice of face to face warfare, *Sanmukha Yuddha*, illustrates the prohibition of perfidy enunciated in Article 37 of Protocol I.

Persons who could not be killed included an onlooker, insane, infants, aged men, skilled artisans, ushers, a pauper, blind or crippled men, one who is engaged in sexual intercourse, etc. These could not be part of the armed forces by their very nature. There were strict rules in ancient India for the recruitment of armed forces, and they certainly do not include an infant, aged men, or other above referred categories. Further, the battlefield is hardly a place or time for a person to be involved in sexual intercourse. These categories of persons have nothing to do with the war as they are civilians and their activities have nothing to do with combatancy. In exempting them from being killed, the laws of war in ancient India have drawn a distinction between civilian persons and belligerents. What is incorporated in Article 51.2 of Protocol I, and in Article 23 of the 1899 and 1907 Hague Conventions, was thus in vogue in ancient India.

Among the persons who were immune from killing were the Brahmins. The term *brahmana* originally meant one possessed of *brahman*, a mysterious magical force of the type widely known to modern anthropologists by the Melanesian word *mana* meaning a generalized supernatural force or power which may be concentrated in persons. It was first applied to the specially trained priest who superintended the whole sacrifice and with his magic spells would counteract any evil influence caused by minor errors of ritual. By the end of the Rig-Vedic Period the term was used for all members of the priestly class. According to Manu the duty of the brahman is to study and teach, to sacrifice, and to give and receive gifts.⁷¹ The prominence of the brahman in the class hierarchy, *varna*, of India is eulogized by Manu: "The birth of a Brahman is a perpetual incarnation of *dharma*, for he exists for the sake of *dharma*, and for the existence of the *Vedas*."

When a Brahmin is born, he is born above the world, the chief of all creatures, to guard the treasury of *dharma*.⁷²

The religious brahman might have a high post at a court, and the *purohita* (priest) wielded high influence with orthodox kings. Yajnavalkya suggests that the king should deliberate privately with him before coming to a final decision.⁷³ He was a court chaplain. They were competent as teachers of *Veda* and other branches of learning. They had taught and trained the kings in warfare.

The brahmins accompanied the armed forces as the spiritual leaders. The immunity granted to them from slaying is similar to the provisions of Protocol I

71. 1.88.

72. 1.98 and 99.

73. 1.312.

granting protection to the “religious personnel” (Article 15.5 read with Articles 12 and 16), Article 24 of the First Geneva Convention, and Articles 36 and 42 of the Second Geneva Convention.

7. Prohibited instruments of warfare

The military literature of ancient India is filled with detailed descriptions of the weapons that were used in ancient Indian warfare.⁷⁴ Since international humanitarian law is concerned more with the prohibitions of the use of certain instruments in warfare rather than with their utility, it is not the present purpose to go into the details of the ancient Indian arsenal.

Weapons consisted of *Astra* and *Sastra*. The former is thrown or cast down by means of charms, and machines or fire. They were charmed or tubular. *Sastras* are weapons by which cuts could be inflicted.

The *Rig Veda* speaks of “the celestial arrow, the growth *Prajanya*, whose point is annointed with venom, whose blade is iron.”⁷⁵

The weapons referred to in *Mahabharata* are: clubs, iron balls, rocks and *sataghnis* and darts, maces, spiked bludgeons, scimitars, lances, mallets, axes, *kampanas*, swords, nails, short clubs, battle-axes, razors, arrows having bony heads, discs, snake-headed shafts, and spears. Reference is also made to the *Bhargava*, weapons from which followed millions of keen arrows, blazing, resembling snakes, and probably venom tipped. There is a mention of *Agnibana* (arrows whose head was wrapped in combustible substance and set on flame), *Asani* and *Vajra* meaning “lightning” (apparently some electric energy generated from them), and *sammohanban* which rendered those they struck unconscious.

The *Manusmriti* promulgates:⁷⁶ “One should not, fighting in battle, slay enemies by concealed weapons, nor with barbed or poisoned weapons, nor with fire-kindled arrows”.

This principle is reiterated in the *Shanti Parva*.⁷⁷

The *Puranas* refer to certain hyper-destructive weapons: the *Brahmastra*⁷⁸ and *Pasupatastra*,⁷⁹ the highly resonant incendiary weapons that set fire to everything. Lakshmana in *Ramayana*⁸⁰ and Arjuna in *Mahabharata*⁸¹ were prevented from using them because they could cause indiscriminate loss of life.

There is also reference to bacteriological warfare in the *Puranas*.⁸² Arrows were shot to cause fever and other serious diseases of the eyes and ears of the enemy.

People believed in *mantras*, words or formulae to be recited or sung, that have magical and spiritual efficiency. The *Atharva Veda* refers to resorts to enchantments as a means to win battles. *Mantra Yuddha* had a place in ancient

74. See Date, GT, *Art and War in Ancient India* (1929); Oppert, *Weapons, Army Organisation and Political Maxims of the Ancient Hindus* (1850); Dikshitar, op cit; and Kane, op cit, 212–5.

75. 6.4 to 6.

76. 7.90.

77. 11.13.

78. *Devi Purana*, 43.49 and 50.

79. *Ibid*, 54 and 55.

80. *Yuddhakanda*, 7.39.

81. *Udyoga Parva*, 194 to 212.

82. *Brahma Purana*, 96.18.

warfare, viz., imprecations directed against a hostile enemy, a charm to ensure victory in war, a charm to check the advance of a hostile army, a hymn of war drums for victory, a charm to make poisoned arrows innocuous, an incantation for the destruction of hostile enemy.⁸³

It is thus seen that weapons that tend to cause excessive bodily pain (barbed and poisoned) and that are likely to cause indiscriminate suffering by setting things on fire (fire-kindled arrows) or hyper-destructive weapons were proscribed. They are similar to the Declaration of St Petersburg, 1868, prohibiting the use of the Dum Dum bullets, and the 1899 Hague Declaration (IV,3), and Article 23(a), (c), (e) of the 1899 and 1907 Hague Conventions.

Manu prohibits the use of concealed weapons. That would imply that the arms should be carried openly by the militia, a requirement similar to the provisions of Article 13(2) (c) of the First and Second Geneva Conventions, and Article 4A(2) of the Third Geneva Convention.

8. *Treatment of protected persons and sick and wounded*

What was to happen to those who were not to be killed? They were either to be taken prisoner or set at liberty. According to the *Shanti Parva* they can be seized but never slain.

In the *Ramayana* Vibhishana approaches Rama for shelter. Sugriva, Rama's ally, advised against the shelter, for Vibhishana could have been a fifth columnist, and, having left Ravana, could leave Rama also. Rama gave him shelter and said:⁸⁴ "O slayer of foes, even a wicked-minded enemy, if he, with folded palms, and a poor heart, craveth for thy shelter, should not be slain. If an enemy, proud or terrified, seeketh shelter in fight, he should be saved by a great man even at the risk of his own life. One who from fear, ignorance, or wilfully doth not protect him who seeketh his shelter perpetrates a mighty iniquity, blamed by all. When a person is slain before him whose shelter he hath taken he taketh away all the virtues of his protector. So great is the sin in not affording shelter unto those who seek for it, it standeth in the way of heaven, bringeth in calumny and destroyeth the strength and prowess. I shall, therefore, follow the excellent words of Kundu — leading to piety, fame and heaven. I always declare 'no fear' unto all creatures, whenever any approaching me says, 'I am thine' and seeketh my shelter. O Sugriva, do thou soon bring him here — whether he be Ravana or Vibhishana".

When a defeated king was brought as a prisoner he was to be incarcerated in the place and persuaded for a year to acknowledge the suzerainty of the conqueror.

Irrespective of the result, the prisoner was to be set free after that one year.⁸⁵

A weak and defeated foe imploring protection was to be treated like a son.⁸⁶

In the *Puranas*, though the war was fierce, instances of humane treatment of enemies is found. Kalki entreated the widows of Mlechhas to desist from fighting. At last when they agreed, they were set free and proper arrangements were made for the funeral obsequies of their husbands.⁸⁷ Many men who

83. *Atharva Veda*, Chaps 5 to 8 and *Agni Purana*, 123 to 125, 323.

84. *Yuddhakanda*, 18.27 to 34.

85. *Shanti Parva*, 96.3 to 7.

86. *Sabha Parva*, 5.

87. *Kalki Purana*, pt 3, ch.1.

surrendered their arms were reprieved and their lives spared.⁸⁸

For the treatment of the sick and wounded on the battle field there is evidence of the medical corps being there. In the *Mahabharata* it is stated⁸⁹ that markets, prostitutes, conveyances, oxen, machines, arms and physicians, accompanied an army. The *Bhishma Parva* states that doctors well versed in extracting splinters of arrow-heads from the body approached with their instruments to extract darts from Bhishma's body.

In formulating the marching lines of army, Kautilya advised:⁹⁰ "Physicians with surgical instruments, blunt instruments (like tweezers), medicines, curative oils and bandages in their hands and women (nurses) looking after the food and drink of the army should stand behind the soldiers uttering encouraging words."

Prompt medical attention was, thus, available for the sick and wounded. The medical corps included the nurses as well. Kangle's translation of Kautilya ends the above referred passage with "should be stationed in the rear". This would demonstrate that the medical corps was not to be exposed to the dangers of the onslaughts of war and as such were to be placed in a place of safety. The protection afforded to the nurses, medicines, food and drink, is also demonstrable by their place at the rear. "Women . . . uttering encouraging words" will import that the women-nurses alleviated the suffering of the wounded and the dying. The Red Cross spirit had hovered in ancient times.

The injunction of the *Mahabharata* in regard to a wounded enemy was the show of compassion. This was actuated by humane motives. A wounded foe was either to be sent home or, if taken prisoner, his wounds were to be carefully attended by skilful surgeons. Bhishma's command in this context is:⁹¹ "When in consequence of a quarrel between righteous kings, a righteous warrior falls into distress, his wounds should be attended to and when cured he should be set at liberty. This is the eternal duty."

This mandate is, however, conditional. Humane treatment was to be given to the righteous warrior and not to those who had fought *Kutayuddha*. The main emphasis throughout has been on righteousness.

From a passage in the *Agni Purana*⁹² it is seen that one of the duties of the infantry soldiers was to carry the dead and the wounded from the battle field to a place of safety; warriors in chariots on the other hand helped to carry wounded from a distance.

The humane treatment afforded to persons who could not be killed in ancient India is identical to the provisions of the First Geneva Convention, Article 13, and other applicable provisions.

On the treatment of sick and wounded the ancient practices were similar to those of the provisions of Articles 12, 6, 9, 15, 18, 19, 33 and 36 of the First Geneva Convention, and Articles 12, 6, 10, 12, 18, 21, 30, 28 and 47 of the Second Convention.

The protection, according to Bhishma, was to be afforded to a "righteous warrior", that is a person who is fighting the war according to the laws and not a

88. *Matsya Purana*, 59.113.

89. *Udyoga Parva*, 151.58.

90. *Kautilya*, 10.3.47, Kane, op cit, 208.

91. *Shanti Parva*, 95.13 to 14.

92. 236.44 to 48.

soldier who had engaged in *Kutayuddha*. It may be seen that Article 13 of the First and Second Convention in defining the "Protected Persons" postulate certain conditions. Under Article 13.2, for being treated as a protected person the combatant should inter alia carry arms openly and conduct the operations in accordance with the customs and laws of war. A combatant transgressing these principles is not entitled to protection under the Geneva Conventions. Such a distinction was envisaged in ancient India.

Repatriation of the sick and wounded practised in ancient India may be discernable in modern international law by reading the relevant provisions of the First and Second Conventions with Article 118 of the Third Convention.

The practice of carrying the wounded from the battlefield to a safety zone for treatment is found in article 15 of the First Convention.

9. *Prisoners of War*

In ancient India the practice of taking prisoners of war was in existence but the treatment that was accorded was humane and generous. The *Mahabharata* records the practice:⁹³ "Enemies captured in war are not to be killed but are to be treated as one's own children".

During the Vedic times the *Dasyus* or the aborigines if taken prisoners were reduced to slavery. In classical Sanskrit the words *dasa* means "bondsmen", while the feminine form *dasi* is used in the sense of the "slave girl". In the *Rig Veda* these words have been used in such a sense. Though many of the vanquished aborigines were enslaved, some seem to have come to terms with the conqueror and one *dasa* chief is mentioned as following Aryan ways and patronising the brahmanas.⁹⁴ The *Mahabharata* declares that it is the law of war that the vanquished should be the victors' slave, and the captive will serve his master until ransomed.⁹⁵

The *Puranas* also mention the prisoners of war being taken as slaves. Even women were captured and enslaved.⁹⁶

It is not the present purpose to deal with the institution of slavery in ancient India. *Dharma* did not recognize slavery. The treatment afforded to the slaves, however, was distinct from what was given in ancient Rome or Greece. Slavery as depicted in the *Arthashastra*⁹⁷ differed from them: the slaves in India were not Aryans, and they had the protection of the religion and law.

The later day practice was that if prisoners of war were taken as slaves they were to be liberated on the conclusion of peace. The *Agni Purana* enjoined upon the monarchs the duty of abstaining from making captives of war and declared: "A king should treat a prisoner of war ransomed and liberated as his own begotten son. A defeated army should not be fought again . . . The wives of the defeated king do not pass to the victor . . . Of five means of appeasing the wrath of a stronger adversary by gifts, the fifth one is setting at liberty prisoners captured in war".⁹⁸

93. *Shanti Parva*, 102.32.

94. Puggot, S, *Prehistoric India*, (1950), 155.

95. *Vana Parva*, 256.11 (Ch.111).

96. *Brahma Purana*, 202.

97. 3.13, see Kane, op cit, Vol ii, 180-9.

98. 236.61 to 65.

Megasthenes declared that there were no slaves in India. The *Arthashastra* is liberal in many ways on slavery. The sale of children is forbidden. Slaves are entitled to own and inherit property, and earn money in their spare time. Slaves of upper class could not be compelled to perform defiling duties. The chastity of slave girls was protected. The master who rapes her must set her free and pay compensation. If he sires a child even with her consent both the mother and child become free.⁹⁹ Probably it was the humane treatment, the survival of the Mauryan laws, that might have prompted Megasthenes to declare that slavery did not exist.

In the case of female prisoners of war they were induced to marry persons of the conqueror's choice. If they declined they were sent back to their homes under escort.¹ Kautilya advised the release of all prisoners of war.²

It is thus seen that enslavement was more in the sense of captivity. The release of the prisoners of war after the conclusion of the peace relates to the provisions of Article 118 of the Third Geneva Convention.

10. *Enemy occupation*

The position of *Dharmashastras* on enemy occupation has been clearly enunciated by Yajñavalkya:³ "Whatever is the king's duty towards his own subjects in his ancestral realm, the same obligation in its entirety devolves on him when he makes himself master of another kingdom. After the conquest is completed, he must maintain intact the practices, contracts, and family traditions prevailing in that country."

The *Mahabharata* enjoined:⁴ "The victor should protect the land newly conquered from acts of aggression. He should not cause his troops to pursue too much the routed foe. The onset is irresistible of persons that rally after rout and that, despairing of safety, assail their pursuers. For this reason O King, thou shouldst not cause thy troops to pursue too much the routed foe. Warriors of courage do not wish to strike them that run away with speed."

When a kingdom tormented by anarchy was invaded by a powerful conqueror the people were advised by the *Mahabharata* to surrender:⁵ "The people should go forward and receive the invader with respect. Such conduct will be consistent with wise counsel. There is no greater evil than anarchy. If the powerful invader be inclined to equity everything will be right. If on the other hand he be enraged, he may exterminate all."

If the people did not submit and resisted the invader no consideration was to be shown. *Levée en masse*, however, was allowed only in exceptional circumstances.

The advice was to win the vanquished through psychological approaches. To prevent irredentist movements for liberation the conqueror was enjoined not to do anything that would rankle the hearts of his enemy. He was to treat the enemies with kindness and compassion. He was not to be actuated with malice,

99. 3.13.1 to 24.

1. *Shanti Parva*, 96.5.

2. 13.5.11.

3. 1.342-343.

4. *Shanti Parva*, 100.273.

5. *Ibid*, 67.1 to 8.

vengeance, or superior complex. The agitated class of the occupied territory were to be conciliated with "soothing words and alluring presents."⁶

By his behaviour the conqueror was to win the confidence and loyalty of the conquered people. He was to convince them that he was not a villain, that he did not mean to dishonour them, and that he was not actuated with a spirit of vengeance. For this reason Manu advised:⁷

"Having conquered, let him worship the gods and righteous Brahmins also: let him grant immunities, and proclaim indemnities."

"Gods" refer to Gods in the conquered territory and "immunities" are "gifts, such as clothes and ornaments".⁸

The purpose of war which was righteous was not territorial aggrandizement by annexing conquered lands. It was for mutual assistance, goodwill and gaining an ally.

For Manu,⁹ "a conquering sovereign prospers not so much by gain of gold and territory as by gaining a firm ally, though now insignificant, yet capable in future."

The primary duty of the conqueror was to hold a plebiscite for ascertaining the wishes of the people on the choice of the government. Manu says:¹⁰ "But having completely known the intention of all of them, let him station there as a ruler one of that race, and give precise directions." The conqueror was to recognize and respect the local laws, religions, and custom. Says Manu:¹¹ "And let him make authoritative their laws as declared, and let him honour him (the new king) with jewels, together with the chief persons in the country." The emphasis has been on a faithful ally. The conquering King according to Manu may "act with the conquered, having carefully made an alliance with him, and considering an ally, gold, territory (as) the triple fruit of victory."¹²

Having set up a government according to wishes of the people and recognized its sovereignty, the conqueror was to evacuate the country to be governed by the new king. Manu declared:¹³ "A king should, to save himself, unhesitating, abandon even a prosperous land, furnishing grain, and plentiful in cattle."

In essence it was the establishment of a colonial administration in modern theory and practice. This is elaborated by Yajnavalkya. The king was not to discriminate between the colonial people and his own. Yajnavalkya said:¹⁴ "A king to follow his own duties in a land brought under him as he observes them in his own country. To allow the usages and customs of conquered country to be in vogue — unless it is contrary to *Sastras*."

On the treatment of the vanquished kingdom the *Mahabharata* states:¹⁵

"If a hostile king be vanquished by the troops of the invader, the latter should not himself fight the vanquished foe. On the other hand, he should bring him to his palace, and persuade him to stay for a whole year — 'I am

6. Ibid, 96.12.

7. 7.201.

8. See Brunnel and Hopkins, op cit, 174, fn. 6.

9. 7.208.

10. 7.202.

11. 7.203.

12. 7.206.

13. 7.212.

14. 341 to 342.

15. *Shanti Parva*, 96.3 to 6.

thy slave' — whether he says or does not say this, the vanquished foe by living for a year in the house of his victor gains a new lease of life. If a king succeeds in bringing by force a maiden from the house of his vanquished foe, he should keep her for a year and ask her to marry him or anyone else. If she does not agree, she should then be sent back. He should behave similarly in respect of all other kinds of wealth that are acquired by force. The king should never appropriate the wealth confiscated from thieves and others awaiting execution . . . The kind taken from the enemy by force should be given away to Brahmans. The bulls taken away from the enemy should be set to agricultural work or be sent to the enemy''.

Kautilya's *Arthashastra* is redolent of the international consciousness of his age when he imposes strictest injunctions upon a conquering king not to "cover the land, property, sons or wives of the slain one". On the contrary he should reinstate in their own estates the relatives of the kings slain. The throne should be preserved in the dynasty. Kautilya cautions that if a king does not follow these precepts he runs the risk of prompting the "circle of kings" to destroy him.¹⁶

In the administration of the conquered territory, Kautilya pleads for consolidation through conciliation:¹⁷

"After gaining new territory, he (the conquering king) should cover the enemy's faults with his own virtues, his virtues with double virtues. He should carry out what is agreeable and beneficial to the subjects by doing his own duty as laid down, granting favours, giving exemptions, making and showing honour. And he should cause the enemy's seducible party to be favoured as promised, and more if they had exerted themselves. For he who does not keep his promise becomes unworthy of trust for his own and other people, also he whose behaviour is contrary to that of the subject. Hence he should adopt a similar character, dress, language, and behaviour as the subjects. And he should show the same devotion in festivals in honour of deities of the country, festive gatherings and sportive amusements . . . And he should cause the honouring of all deities and hermitages, and make grants of land, money and exemptions to men distinguished in learning, speech, and piety, order the release of all prisoners and render help to the distressed, the helpless and the diseased . . . He should prohibit the killing of females and young ones and the destruction of a male's virility. And discontinuing whatever custom he might regard as harmful to the treasury and the army, or as unrighteous, he should establish a righteous course of conduct . . .

In the case of territory formerly possessed and reconquered, he should cover up that defect of the constituents because of which he had to leave and should strengthen that quality on the strength of which he has returned. In the case of inherited territory, he should cover up the father's defects and display his virtues.

He should institute a righteous custom, not initiated before and continue one initiated by others; and he should not institute unrighteous custom, and should stop any initiated by others''.

16. 7.16.26 to 30.

17. *Sukranitisara*, 5.84 to 85.

The *Sukraniti* states¹⁸ that the victorious should protect the people of the conquered territory as his own children, collect revenues and grant a portion of it to the maintenance of the vanquished king and his family. The soldiery was to remain outside the occupied village and should not be permitted to enter without royal permission, and they should on no account oppress the villagers. There is a prohibition on military rule, as Sukracharya definitely lays down that the soldiers should not be appointed to any other post.

The spies were to be used for building up the image of the king and informing of the customs of the conquered territory.¹⁹

The Fourth Geneva Convention and Articles 48 to 78 of Protocol I deal with the humane treatment of civilians, prescribing principles ensuring their safety. The laws of war relating to occupied territory in ancient India go much beyond the present international humanitarian law because they also impose an obligation of establishing a government according to the wishes of the people and not imposed upon them. Annihilation of the enemy population is proscribed. The ancient Hindus were pragmatists. Their resort to war was motivated by the desire of building up the image of the king for righteousness, as the upholder of *dharma*. The king was aware that there is no country without people and no kingdom without a country.

11. *Enforcement*

The laws of war were thus very elaborate. Their observance was always emphasised. But what were the sanctions behind the laws of war?

The sanctions were mainly religious. The life beyond always reminded a person of his duties and their observance. To obey the laws of war was like obeying the ordainments of God.

In the *Mahabharata*, Yudhisthira, the eldest of the Pandavas, was reputed for his truthfulness. But he was a party in the ruse for killing Drona. Drona had a son, Ashwatthaman, renowned for his valour. An elephant by the name of Ashwatthaman was killed, and Yudhisthira was persuaded to tell Drona that "Ashwatthaman is dead". Yudhisthira shouted this news, adding in a whisper "— the elephant". The *Mahabharata* says that till that time Yudhisthira's chariot which had always stayed at the breadth of four fingers above the surface of the earth, now drooped, till chariot and horses touched the ground. That, the orthodox Hindus believe till this day, was the beginning of *Kaliyuga*.²⁰

Transgression of the laws of war was considered sinful. *Apastamba* prescribed penances.²¹

18. 13.5.3 to 8, 11, 13 to 14, and 22 to 24.

19. 13.5.9 and 10.

20. In the Hindu cosmology the cosmos passes through cycles within cycles for all eternity. The basic cycle is the *kalpa*, a day of *Brahma* or 4,320 million earth years. Within the *kalpa* are fourteen *manvantaras*, or secondary cycles each lasting 306,720,000 years. In each of the *manvantara* there are 71 *mahayugas*, or aeons. Each *mahayuga* is divided into 4 yugas called *Kria*, *Treta*, *Dvapara* and *Kali* consisting of 4,800–2,400–1,200 god years each of which equal to 360 human years. Each yuga represents a progressive decline in piety, morality, strength, stature, longevity and happiness. We are now in the seventh *mavantara* and in the *Kaliyuga* which according to the tradition began in 3102 B.C., believed to be the year of the *Mahabharata* war. Soon after the *Kaliyuga* the world is destroyed, something like the armageddon.

21. 2.10' to 12.

The ancient Hindus were not merely satisfied with laying down injunction of religion for the guidance of the army, nor was their consciousness for the sanctity of long standing usages relied upon. Elaborate rules were framed for keeping the soldiery under strict control, The soldiery was to be inspected by the king and properly officered.²² The troops were to keep their arms, weapons and uniforms ready for use. They were responsible for food and water. Daily parades were held in the mornings and evenings. Soldiers were liable to martial law with punishments for violating military codes. They were required to forsake violence, rivalry, procrastination over state duties, indifferences to injuries of the king, conversation as well as friendship with enemies. An oath for the observance of the rules was administered.

12. Dissemination

Articles 47 of the First Convention, 48 of the Second Convention, 127 of the Third Convention, and 144 of the Fourth Convention, and Article 83 of Protocol I and Protocol II, refer to the widest dissemination of the Conventions. Knowledge of humanitarian law is necessary for its implementation. Resolution X of the 1981 Manila Conference reminded the Governments of their obligations to disseminate international humanitarian law.²³

There has been an accute awareness of the dissemination of humanitarian law in ancient India. No one realized its importance more than the Buddha. Buddha told his father that he would be a *Chakravarti* — master of the world, but that his path was different. The conditions at his time were quite chaotic. People quarrelled over everything. People, particularly the mercantile community, were sick of wars. The *Upanishads* had failed to solve the problems of the day. Buddha had seen that people had no love for their fellow beings, and great injustices were committed in the name of God. Wars killed thousands of people. Buddha had, therefore, realized that the only way to put an end to the carnage was to train every individual. Each one was responsible for his own self, for his own action. He preached the basic principles of the *Upanishads*, universal love and non-injury to others. He condemned all injury: war was a big injury.

Buddha classified some services and arts as false means of livelihood, and its pursuer never attained salvation: “Just as, again, some *Sramanas* and *Brahmanas* feeding on pious offerings obtained a living by practising low art (brute attainments) and false ways of life such as . . . *Khatta Vijja* (Soldier’s art . . . such as swords, arrows, bows, and arms.”²⁴

Buddha’s preaching had great effect on the mass of soldiers. They were deserting their army and joining the Sangha. When there was revolt at the frontier and King Bimbisara sent his Commander-in-Chief to quell the rebellion, the soldiers were meditating: “By choosing war, I shall commit many sins and unholy acts. By what means I can save myself from sin, and do not commit inequities”.²⁵ They then realized that if they went to the *Sakyamuni* and became mendicants they could save themselves from the sin and unholiness.

22. *Kamandaka*, 15.48.

23. Moreillon, J, *The ICRC and the Manila Conference: Evaluation and Prospects*, (1982), 10. For the text of the resolution see, *International Review of the Red Cross*, Nov-Dec, 1981, 327.

24. *Digha Nikaya*, 1.21–23, p 9.

25. *Ibid*, para 57, p 67.

The Buddha's purpose was thus wonderfully served. If soldiers deserted and refused to fight then a permanent stop could be put to war. Ambitious and avaricious autocrats cannot wreck the world by wars if they do not get men to fight for them. Buddhism was thus admirably successful in assuaging aggressions.

On the temporal side all the rules inculcated in the military codes were communicated to the soldiers and they were taught to respect law and order and to be particularly dutiful towards innocent villagers; while a liberal scale of pay diminished their rapacity for pillage or plunder. According to Sukracharya these rules did not simply remain in the codes but were communicated to the soldiers on every eighth day.²⁶

Humanitarian Law in Modern India

India is a High Contracting Party to the four Geneva Conventions and incorporated them into Municipal Law. India had participated in the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974–1977, and signed the Final Act, adopting the two Additional Protocols. These Protocols have not been signed or ratified by India. The Constitution of India, however, contains provisions identical to the safeguards enjoined in Protocol II.

1. Relationship between international law and municipal law

Article 51 of the Indian Constitution enjoins that the Union "shall endeavour to foster respect for international law and treaty obligations in the dealings of the organised peoples with one another."

Whether customary International Law or Conventional International Law ratified by India ipso facto becomes a part of Indian Law was not decided by the Supreme Court until 1980. In that year, the Supreme Court, following the Dualistic Theory, held that International Law does not become a part of Indian Law except by incorporation.²⁷ In that case, the appellant, sentenced to civil prison for failure to redeem a money debt under the provisions of the Civil Procedure Code, challenged his incarceration as violative of Article II of the International Covenant on Civil and Political Rights, 1966, ratified by India, and prohibiting imprisonment for the enforcement of contractual obligations. The Court declared:²⁸ "... the basic human rights enshrined in the International Conventions . . . may at best inform judicial institutions and inspire legislative action with member States, but apart from such deep reverence, remedial action at the instance of an aggrieved individual is beyond the area of judicial authority."

2. Geneva Conventions and the Protocols

Prior to the Constitution, there were the Geneva Conventions Act of 1911 and the Geneva Conventions Implementing Act of 1936.

26. 4.11.387.

27. *Jolly George Varghese v The Bank of Cochin*, AIR 1980 SC 470.

28. At 474.

(a) Ratification and incorporation of the Conventions

India had ratified the four Geneva Conventions on November 9, 1950 without reservations and was the sixth country to ratify them.

The Geneva Conventions Act of 1966 was enacted under Article 253 read with entries 13 and 14 of the Union List in the Seventh Schedule to implement the ratified Conventions. Section 20 of the Act repealed the earlier enactments. The Act is divided into five chapters. Chapter I deals with the title and extent and commencement of the Act and gives certain definitions. Of these, the important definition is that of "protected internee" as a person protected by the Fourth Convention and interned in India. Chapter II deals with punishment of offenders against the Convention and the jurisdiction of courts to deal with breaches by punishing them. Chapter III lays down the procedure for the trial of protected persons, for offences, enabling a sentence of death or imprisonment for a term of two or more years to be imposed and for appeals. Chapter IV prohibits the use of Red Cross and other emblems without the approval of the Central Government and provides for a penalty. Chapter V gives power to the Central Government to make rules. The Act then sets out the four Conventions in four Schedules.

(b) The Protocols

India has actively participated in the formulation of Protocol I, and supported all the articles of the Draft Protocol I.

India has opposed Protocol II. The Indian delegate had succinctly emphasised India's reluctance to any agreement like Protocol II. Since it is reflective of the attitude of the countries opposed to such an agreement, it is necessary to quote India's attitude towards Protocol II. The Indian delegate explained to the Conference: "His delegation had always opposed the idea of a second Protocol, although its provisions were already a part of his country's national law. The application of an international instrument in an internal situation militated against the sovereignty of the country concerned and constituted an interference in that country's domestic affairs."

The newly independent developing countries were very zealous of their sovereignty and would guard against any action which might constitute any form of interference in their domestic affairs. Article 3 common to the Geneva Conventions of 1949 had been drafted in an entirely different context, when colonial and imperial powers had ruled half the world. The adoption of the United Nations Charter had given an impetus to the former colonies to throw off the yoke of foreign rule and wage wars of independence, but the imperialist powers had cunningly claimed that they were overseas parts of their metropolitan territory and that the national liberation conflicts were therefore internal conflicts.²⁹

India, probably for the above considerations, has not signed either of the Protocols. The question of their ratification at this juncture does not therefore arise.

3. Enforcement of the Conventions

The Supreme Court of India had occasion to consider the scope and enforceability of the Conventions and the Geneva Conventions Act of 1966 in

29. Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 1978, Vol VII, 76.

*Rev Mons Sebastiao Francisco Xavier Dos Monteiro v The State of Goa*³⁰ in 1970.

Father Monteiro at the time of making the appeal was a resident of Goa. After the Indian annexation of Goa he had the choice of opting for Indian citizenship or retaining his Portuguese nationality. He opted for the continuance of his Portuguese nationality and as such was registered as a foreigner. He had also obtained temporary permission to stay in India until November 13, 1964. After the expiry of that period he did not ask for the extension of his stay. The Lieutenant Governor of Goa, acting under the authority vested in him by a notification issued by the President of India under Article 239, ordered Father Monteiro to leave India. On his failure to leave India he was prosecuted under Section 14 coupled with Section 3(2)(c) of the Foreigners Act, and sentenced to 30 days simple imprisonment and a fine of 50 rupees.

It was contended that the order of the Lieutenant Governor was tantamount to deportation, and that the Geneva Conventions Act gives protection against such deportation during occupation which has not validly ceased, and, therefore, no offence was committed by him. Once there is military action and occupation, occupation cannot cease by a unilateral act of annexation as was done by incorporating the territories of Goa with India. The Twelfth amendment only legalises annexation so far as India is concerned, but in International Law, the territory remains occupied. Occupation does not come to an end by annexation and, therefore, the occupation continues till there is either cession of territory or withdrawal of the occupying power from the territory, both of which events have not taken place.

Reliance was placed on the provisions of the Fourth Convention Relating to the Protection of Civilians in War, particularly on Articles 1, 2, 4, 6, 8, 47, 49, and 77. Both India and Portugal are parties to the Convention. Under Articles 1 and 2 the High Contracting undertake to respect and ensure respect for the Convention in all circumstances of declared war or of any other armed conflict if the state of war is not recognised by one of the parties and to all cases of partial or total occupation of the territory of a High Contracting Party even if the occupation meets no armed resistance. Article 4 defines protected persons as those "who at a given moment and in any manner whatsoever, find themselves, in case of conflict or occupation, in the hands of a Party to the conflict of the Occupying Power of which they are not nationals". Article 6 envisages the *terminus a quo* and the *terminus ad quem* for the Convention. The application of the Convention commences from the outset of any conflict or occupation, and, in the territories of the Parties to the conflict, the application of the Convention ceases on the general close of military operations. In the occupied territory it ceases one year after the general close of military operations, but the occupying power is bound for the duration of occupation, to the extent such power exercises the functions of Government in such territory by the provisions of Articles 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, and 143. Article 47 envisages that protected persons shall not be deprived of the benefits of the Conventions, inter alia by changes introduced into, or by the annexation of the whole or part of, the occupied territory. Barring the military exigencies, deportation of protected persons is prohibited, under Article 49.

30. AIR (57) 1970 SC 329.

As the Convention does not define "occupation", the Supreme Court relied on the definition contained in Article 42 of the Hague Convention (IV) Respecting the Laws and Customs of War on Land 1907 to which the Convention is supplementary by virtue of Article 154. Article 42 of the Hague Convention provides: "Territory is considered occupied when it is actually placed under the authority of the hostile army." The Court considered that "occupation is by military authorities."³¹ Reliance was placed on the *Justice Trial (In re Altstotter and others)*,³² where it was stated that the laws of belligerent occupation apply only to an occupation during the course of actual warfare and that once the enemy has been totally defeated those laws do not apply to the ensuing occupation.

Whether occupation in Article 47 means belligerent occupation or occupation which continues after the total defeat of the enemy the Court held that "when the conflict is over and there is no hostile army in the field, annexation has the effect of creating a title to the territory", and, consequently, occupation means "belligerent occupation" which "comes to an end when hostilities cease and the territory becomes a part of the Occupying Power".³³ It was held that in the case of Goa "true annexation followed . . . so close upon military occupation as to leave no real hiatus."³⁴ The court concluded: "We can only take the critical date of true and final annexation as December 20, 1961, when the entire government and administration were taken over and there was no army in occupation and no army in opposition. The occupation on December 20, 1961 was neither belligerent occupation nor anticipated occupation, but true annexation by conquest and subjugation . . . since occupation in the sense used in Article 47 had ceased, the protection must also cease."³⁵ It was, thus, held that there was no breach of the Convention.

On the scope of the remedies envisioned in the Act the Court held that "the Act by itself does not give any special remedy. It does give indirect protection by providing for breaches of Conventions. The Conventions are not made enforceable by Government against itself nor does the Act give a cause of action to any party for the enforcement of Conventions. Thus there is only an obligation undertaken by the Government of India to respect the Conventions regarding the treatment of civilian population but there is no right created in favour of protected persons which the Court has been asked to enforce."³⁶

In this case the Supreme Court laid down the following propositions:

(a) The protection given by Article 47, Schedule IV of the Act, i.e., the Fourth Convention incorporated into Indian Municipal Law, to persons in the appellant's position, enured only during military conflict, and not after the conflict had ceased and the territory had been annexed by the occupying power.

(b) The Act itself gave no remedy to the appellant as the Conventions were not made enforceable against the Government.

(c) Reception and residence of an alien is a matter of discretion, and every State, by reason of its own territorial supremacy, has the right and competence to

31. At 335.

32. (1947) 6 LRTWC 1.

33. AIR (57), at 336.

34. At 337.

35. Ibid.

36. At 334.

exclude aliens from the whole or a part of its territory.

(d) An excluded alien has no right to maintain an action in the State's courts to enforce a right to stay in the said territory.

Without entering into any controversy regarding the legality of the Indian annexation which was conceded in the present case (such a controversy not being relevant here), it should, however, be noted that the Supreme Court has failed to appreciate that from its nature, belligerent occupation is a transient condition. Either the territory will revert to the ousted Government; or by a further legal act of annexation it will become a part of the territory of the Occupying State. Obviously, if an occupant were free as such to annex the territory, no purpose would be served by rules hedging about his powers. Further, an occupant is not legally entitled to annex until the state of war resulting in the occupation has ceased.

The Supreme Court has also failed to recognise the full import of Article 42 of the Hague Regulations. Though "occupied . . . as a matter of fact" leaves ample room for varied appreciations, it is at least clear that a mere proclamation that occupation has taken place is not sufficient. Occupation of an area begins where there is a sufficient force to retain command of the situation, following cessation of substantial local resistance. Often, but not necessarily, cessation of resistance will have been preceded by formal surrender of local military forces and possibly even by the surrender of the entire national forces in existence, though the State concerned usually retains some power of resistance elsewhere. Such was the case in the 1939 War with the German occupation of Poland, Belgium, and France. Even if a State's entire national forces have surrendered to the invader, and its Government lacks means of its own to resist elsewhere, the status of the invader remains that of belligerent occupation, not of conquest, as long as the invaded State has allies with whom its Government continues the struggle. Indeed the very next day, Portugal, a member of NATO referred the matter to the Security Council.

The Supreme Court also failed to note that the Constitutional amendment annexing the territory was enacted on March 27, 1962, but contained a provision to the effect that it was deemed to have come into force from December 20, 1961. Factually, there was a difference of 3 months between the occupation and the actual annexation. What was the position of Goa between December 20, 1961 and March 27, 1962? The status, obviously, was that of belligerent occupation, yet the Supreme Court considered that occupation ceased from December 20, 1961.

The Provisions of the Convention are incorporated in the Municipal Law. This legislation by incorporating the Geneva Conventions in the Schedules has made them a part of the law of the land, creating rights and obligations. The Constitution of India authorises the Supreme Court to redress grievances by the issuance of writs, directions, or orders. If a legislation creates legal rights, but does not provide for specific remedy, it is anomalous to state that it cannot be enforced. All the legislations do not contain remedial provisions. The remedial justice is to be found in the provisions of the Constitution.

Article 51, though non-justiciable, enjoins the State to foster respect for international conventions and agreements. Because of her obligations under Article 2 common in the Four Convention to "respect" and "ensure respect" for

the Conventions, India has enacted the Geneva Conventions Act. To say that the only obligation is to “respect” the Conventions and no obligation is created for enforcing it against the Government would undermine the commitment of India to the international community, and may adversely affect the credibility of India in international conferences.

If the Conventions were not intended to be enforced against the Government, against whom are they enforceable? With the kind of conclusions that the Supreme Court had arrived at, it would not have made any difference whether the Conventions were incorporated into municipal law or not. The very purpose of the enactment is to enable the courts to administer, implement, and enforce the municipal law. Unfortunately, the Supreme Court failed to appreciate these phenomena.

Conclusion and appraisal

“The past can never be effaced since the recollection of it is an element in shaping the future”, declared James Bryce. Without access to the grass roots of a civilization one remains only at the mercy of hopes. An enquiry into the past gives an insight to the ethos of the society and above all the psychology of the people with which any legal propositions must accord if they are to mean anything at all. To see what India has done, what India is doing, and what India will do, one must see all India in a glance.

For a student of international humanitarian law, why is a study of India relevant? Is it because India is the world’s largest democracy? Is it because the defence power of India is increasing day by day? Or is it because India is to be feared? The answer is an absolute “no”. It is because from India something is to be expected, something is to be learnt which cannot be obtained from elsewhere, something elusive and hard to describe. Was it not the progressive, ever growing tradition, referred to as Hinduism, that has recognized the complete freedom for individuals to grow as best as they can in a healthy atmosphere of moral life and ethical perfection? The entire history of India is a story of repeated revolutions, wherein according to the demands of the society, it has been always growing into fresh traditions from time to time and place to place. In all these differences, which are in fact only superficial, there has ever been a chord of unity. The Indian culture is distinctly separate from all others. The readiness to accept new tradition according to demands of the age is the healthiest sign that guaranteed to the Indians such a long historical existence.

Further India has been the cradle of nonviolence. It has been the birth place of such religions like Buddhism and Jainism that abjure and abdicate violence. If national liberation movements have called for battallions of troops elsewhere in the world, the Indians have won their independence, with the ideology and commitment to *ahimsa*, nonviolence, under the leadership of its modern apostle, Mahatma Gandhi. With its rich heritage of nonviolence, and traditional beliefs of righteousness, India is a fertile soil for nurturing international humanitarian law into a state of consummate perfection.

We read in history that during Alexander’s victorious march along the plains of India, he met a great Master who was not prepared to pay his homage to the temporal victor and was incarcerated for this lack of respect. Next day, Alexander went to the cage and introducing himself as the victorious emperor,

commanded the saint to seek of him any boon. The saint, looking upon the monarch with withering contempt and with the serenity born out of true Wisdom, replied: "you obstruct the sun's light, please move away a little. This is all the boon I ask thee."

This is the spirit of India where the Vedic rhythms throughout the Indian history have been reverberating with: "Om Shanthihi! Shanthihi! Shanthihi!!!": Oh Peace! Peace! Peace!!!