UNIT 1 POSTULATES OF IHL UNDER DIFFERENT ASIAN TRADITIONS

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1.1 INTRODUCTION

By now you must be familiar with the term International humanitarian law (IHL), and what it means. Just to refresh your memory: the term IHL has been defined as a set of rules aimed at limiting violence and protecting the fundamental rights of individuals in an armed conflict. The conflict could be international (between two or more states) or non-international (within the territory of a state). IHL, in fact, is as old as armed conflict. Its origin lies in the customs and usages followed by states to minimize the miseries of war from ancient times. Many of the rules of IHL are considered part of customary international law based on widespread, representative and virtually uniform practice of States accepted as legal obligation and therefore mandatory for all parties to an armed conflict.

In Asia, the ancient scriptures are replete with detailed rules of waging a war—rules relating to the area where a war will take place, methods of warfare, proportionality of the use of force, kinds of armed forces, weapons to be used, and so on. Weapons
causing unnecessary suffering were prohibited; and there were rules relating to the
treatment of prisoners and civilians. Respect for human beings and considerations of
humanity were the basis for these rules.

In Unit 1 of this Module you will learn about the historical traditions and philosophical
thoughts relating to humanitarian law in the Asian countries. Unit 2 will discuss the
religious traditions of IHL in South Asia, and Unit 3 will cover the necessity for the
study of IHL in South Asia.

1.2 OBJECTIVES

After reading this unit, you should be able to:

- discuss the role played by the ancient Asian traditions in the development of IHL;
- describe various humanitarian laws developed under the Asian traditions and
  incorporated in the modern IHL treaties;
- explain what customary IHL means and how it has been codified; and
- appreciate the need for further research in the customs and traditions relating to
  IHL in Asia.

1.3 ASIA AND THE SOUTH ASIAN REGION

The concept of “Asia” as a collective entity is exclusively Western. The peoples of
ancient Asia did not conceive the idea of Asia, because they did not see themselves
collectively. In their perception, they were vastly varied civilizations. Today, Asia is the
world’s largest and most populous continent. It covers 8.6% of the Earth’s total surface
area (or 29.9% of its land area), and with approximately 4 billion people, it has 60% of
the world’s current human population.

The South Asian region is one of the most dynamic regions of the world. It cradled a
civilization that predated those of Egypt and Europe and witnessed the internmenting of
races, cultures and religions down the ages. Conventionally, it has been understood to
include India, Pakistan, Bangladesh, Sri Lanka, Nepal, Bhutan and the Maldives. Though
the South Asian Association for Regional Cooperation (SAARC), the only significant
international institution of the region, binds these States loosely, they are bound intimately
by the ties of a shared past. Nearly 1.47 billion people inhabit India, Pakistan, Bangladesh,
Sri Lanka and Nepal. Every independent nation in this area has internal and external
feuds that often erupt into border conflicts and sometimes even into declared wars.
Portuguese, Spanish, and British imperialist holdings controlled large areas of these
countries from about 1750 until 1945, after which independence rushed into this area.
Many vestiges of Western rule remained, however. All these nations have constitutions
and some form of elected representation.

1.4 WHAT ARE THE POSTULATES OF IHL IN
ASIAN REGION?

The Asian countries are so divergent in their culture, religion and philosophy and social
conditions, that it is not possible to speak of common ideals. The countries in South
Asia, however, have a shared culture. Until the advent of Islam in the beginning of the
eight century, Hinduism was the main religion of this region (not considering Buddhism
and Jainism, which proscribed war in any case). The two great epics of ancient India,
Ramayan and Mahabharat, prescribed precise rules and customs of war and labeled wars as just (dharmayudh) and unjust (adharmayudh). A just war was to be waged by righteous means and within well-defined limits. There were clear rules on the weapons to be used, the area where a war should be fought, the treatment of combatants and non-combatants, etc. The followers of Islam, who came to the region later, also had laws of war, particularly of not inflicting injuries on non-combatants and the civilian population. Thus, respect for IHL is a part of the cultural heritage of South Asia.

The importance and necessity of a standing military force was understood in ancient India. This recognition led to the maintenance of a permanent militia to fight off any kind of opposition and aggression. However, it was widely acknowledged that peaceful remedies should be exhausted before taking recourse to the use of force. Ancient India developed a method for the settlement of disputes between States in four successive stages: the first stage was called peaceful negotiation (sama); the second stage consisted of offering gifts (dana) to appease the enemy; the third was a veiled threat (bheda); and the last stage was the use of force (danda). Armed conflict was clearly considered undesirable and was to be resorted to if the policy of conciliation and making gifts failed. The Code of Manu, the basis for the laws, morals and customs of India developed between B.C. 200 and 200 A.D., also referred to the protection of war victims.

Manusmriti

Manusmriti, is the most important and earliest metrical work of the Dharmasastra textual tradition of Hinduism. Generally known in English as the Laws of Manu, it was first translated into English in 1794 by Sir William Jones, an English Orientalist and judge of the British Supreme Court of Judicature in Calcutta. The text presents itself as a discourse given by Manu, the progenitor of mankind, to a group of seers, or rishis, who beseech him to tell them the “law of all the social classes”. Manu became the standard point of reference for all future Dharmasastras that followed it. According to Hindu tradition, the Manusmriti records the words of Brahma. By attributing the words to supernatural forces, the text takes on an authoritative tone as a statement on Dharma, in opposition to previous texts in the field, which were more scholarly.

Sun Tzu, in “The Art of War” – the foremost classic of Chinese literature on military strategy, written around B.C. 500 – spoke of some important requirements implied by humanity during combat. These in parts may be understood as follows: a commander must show intelligence, sincerity, humanity, courage and dignity; he may utilize captured enemy equipment but must respect prisoners of war; a commander should endeavour to win the victory without harming enemy military and civilian personnel and should avoid using needless violence; a commander should not seek the total annihilation of an enemy.

Sun Tzu and The Art of War

Sun Tzu was an ancient Chinese military general and strategist and philosopher who is traditionally believed to have authored The Art of War, an influential ancient Chinese book on military strategy, considered to be a prime example of Taoist thinking. Sun Tzu has had a significant impact on Chinese and Asian history and culture, both as an author of The Art of War and through legend. During the 19th and 20th centuries, Sun Tzu’s The Art of War grew in popularity and saw practical use in Western society, and his work has continued to influence both Asian and Western culture and politics.
Self Assessment Question

1) Describe briefly the about Sun Tzu and his work relating to IHL.

The culture and traditions of Asia accepted principles similar to the principles of modern IHL. In this Unit, the historical attitudes and practices related to IHL in the Asian countries will be discussed briefly.

1.4.1 The Just War Doctrine

The just war doctrine seems well entrenched in the traditions of Asia. The roots of humanitarian law can be found in the teachings of the Chinese thinkers, rulers and military strategists who have had a profound influence throughout Chinese history. Sun Tzu’s famous book *The Art of War* first appeared around B.C. 500, but still commands a huge readership throughout the world. Not interested in devising strategies for a short-lived victory, Sun Tzu advocated “trying to defeat the enemy by morality,” and asserted that a skilful strategist should be able to subdue an enemy army without engaging it, to take an enemy city without laying siege to it, and to overthrow an enemy State without bloodying swords. In other words, unnecessary suffering should be avoided.

There is sufficient evidence to surmise that an idea akin to what international lawyers call the doctrine of *bellum justum* (just war), played a significant role in the evolution of what is termed the *just ad bellum* in ancient India. In India, a distinction was drawn between *dharmayuddha* (just war) and *adharmayuddha* (unjust war). Though the history of India is full of violent wars, these resulted in repugnance towards wars in philosophy and law. In theory and law, warfare was never sanctioned unless it was a *dharmayuddha* meant to uphold the sovereignty of law. However, the use of war for demonstration of prowess through *ashwamedha yagnya* was also permissible in ancient India.

1.4.2 Declaration of War

As among the ancient Greeks and Romans, there was a practice in ancient India of announcing the commencement of hostilities by a formal declaration of war. If you read ‘The Hague Convention (III) Relative to the Opening of Hostilities, 18 October 1907’, in Article I you will notice that it provides that the hostilities between the contracting powers ‘must not commence without previous and explicit warning, in the form either of a party’s reasoned declaration of war or of an ultimatum with conditional declaration of war’. In open wars like the one portrayed in the Mahabharata, declarations were legitimate formalities.

1.4.3 Undefended Localities

There is much support in the Asian traditions for the principle that undefended towns should not be subjected to attacks. The ancient codes in China recognized this principle. It has been claimed that though these rules existed more than 2000 years ago in China, they “are no less in quality” than those found in the modern conventions on international humanitarian law.
1.4.4 Surrender of Enemy

The surrender of the enemy may be more easily obtained if the enemy appreciates that it will be treated humanely. Moreover, attacks against the civilian population, far from reducing into submission, more often incite it to resistance. In the words of Sun Tzu:

Build a golden bridge to the retreating enemy, meaning:

- Treat the captives well, and care for them.
- Generally in war the best policy is to take a state intact, to ruin it is inferior to this.
- To capture the enemy’s army is better than to destroy it; to take intact a battalion, a company or a five-man squad is better than to destroy it.

1.4.5 Protection of Civilians

Mankind’s attempts to protect individuals from the worst consequences of war can be traced back as far as recorded human history. The prohibition against attacks on civilian population is found in all Asian traditions. Injunctions against such attacks are contained in the great Indian epics, the Ramayana and the Mahabharata. The principle of civilian protection was also accepted in Japanese and Chinese traditions. There are numerous references to the protection of civilians and specifically women and children in the Asian texts. Sun Tzu believed that a general should train his troops in reasoning and run the army with strong discipline. One of the important rules was that a soldier shall not attack civilians or damage their property. Such ideas can be said to be the forerunners of certain rules of IHL. It supports Articles 48, 76 and 77 of Additional Protocol I, which provide for respect and protection of the civilian population and objects; protection of women in general and the protection of pregnant women and mothers having dependent infants in particular; and the protection of children.

In the Islamic tradition, there is, similarly, respect for the principle of civilian protection. The Prophet showed his disapproval of the killing of the old and women and children.

### Self Assessment Question

2) State briefly what do you understand by ‘just war’ and ‘unjust war’?

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1.4.6 Limitation to the Means and Methods of Warfare

In ancient India, apart from arrows, weapons like sword, hatchets, and axes were used. Elephants, machines, and carts with lances, javelin, spears, reeds, and arrows were recognized instruments of counterforce against elephant divisions. The same, equipped mostly with stones, clubs, armours, hooks, could be used as a counter force against chariot divisions. While the use of arrows with poisoned tips was perhaps permissible in Vedic times, Manu forbade the use of poison and poisoned weapons in war: “When he fights with his foes in battle, let him not strike with weapons concealed (in wood), nor with (such as are) barbed, poisoned, or the points of which are blazing with fire.”
Kautilya and Arthashastra

Kautilya is generally called Chanakya (derived from his father’s name “Chanak”) but, in his capacity as author of the Arthashastra, is generally referred to as Kautilya derived from his gotra’s name “Kotil” (means “of Kotil”). He was the master of shrewd act of diplomacy. He believed in four ways, namely, Treating with Equality, Enticement, Punishment or War and Sowing Dissension. The Arthashastra identifies its author by the name Kautilya, except for one verse which refers to him by the name Vishnugupta.

The Arthashastra is an ancient Indian Hindu treatise on statecraft, economic policy and military strategy. Chanakya was a professor at Takshashila University and later the prime minister of the Maurya Empire.

The prohibition of killing soldiers who had lost their horses, chariots, or arms, or who had surrendered is undoubtedly a major contribution of Hindu jurisprudence to the humanization of warfare. The Mahabharat declares that a soldier who surrenders by laying down his weapons should not be slain and medical assistance should be given to the wounded soldiers of the enemy. The Aryans forbade the slaughter of those who laid down their arms, of those who begged for mercy with joined hands, and of fugitives.

Such teachings—distinguishing between combatants and civilians, avoiding unnecessary suffering—were also followed by the rulers and generals during the Warring States period (Chunqiu Zhanguo, 453–221 B.C.) in Chinese history. To these were added several more principles such as not to pursue defeated enemies; not to employ ruses in battle; not to kill those who have already surrendered. Some of these principles subsequently became prominent in Western thought, although there may not have been any causal relationship between their influence in China and their crystallization in the West. For example, it was only in 1868 that the Declaration of St. Petersburg formally recognized that the only legitimate object of war is to weaken the military forces of the enemy and this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable.

1.4.7 Protection of the Environment

Considering the fact that the environment even in times of peace is but a recent concern in Europe, it is remarkable that Asian texts speak of the need to protect the environment in times of war. Protection of the environment as a concern does not appear in the early conventions. It makes its appearance only in Article 55 of Protocol I. Ibrahim refers to verses in the Holy Quran which forbid the unnecessary cutting down of trees during wars and the instructions of the Caliph Abubakar against the slaughter of livestock except for food.

1.4.8 Rules and Duties of Occupying Powers

In Asia, there were rules imposing duties on occupying powers which were as exacting as those in the modern conventions. The laws of war in ancient India with regard to occupied territory were more humane and broader than those of international humanitarian law today. For example, Yajna-Valba, an Indian text, illustrates that the laws prevailing in the occupied state should be respected. What adds a totally modern flavour in the context of the principles relating to self-determination, is the rule stated in Manu’s Code that the conqueror should ascertain the wishes of the conquered people and give effect to them. This requirement, of course, goes beyond any of the requirements in modern international humanitarian law. It is a rule of prudence. The conqueror’s task will be much easier if he sets about winning the acceptance of the conquered people rather than courting their hostility.
These examples show that every principle of modern international humanitarian law had a counterpart in the traditions of the peoples of the Asian region. However, the few wars that have been fought in India and the Islamic regions have been as bloody and as brutal as any that have been fought elsewhere. But this criticism does not affect the wisdom of Asian traditions and philosophical thoughts relating to humanitarian law. The gap between moral codes and actual practice in the area of warfare may be wide in other traditions as well. In the area of international humanitarian law, the vital task is to show that its norms have received common acceptance. Stress must be placed on the accumulation of evidence showing that these laws are based on feelings of humanity, of human dignity and fellowship in suffering, and that these qualities are not the peculiarities of any one group of people but are shared by all mankind.

Self Assessment Question

3) State briefly the limitations on the means and methods of war followed in the ancient Asian traditions.

1.5 NEED FOR RESEARCH

The entire list of practices and rules in the ancient Asian traditions similar to modern principles of humanitarian law may not yet have been explored fully. Further research on this area is necessary, not for the reason of pride that Asian traditions produced such civilized rules on warfare many centuries ago, but for the practical consequences they have for the future development of humanitarian law. The advantages of such studies would be:

1) Value as Custom

The existence of these traditional rules on warfare may amount to custom and may indicate a source of humanitarian law other than the Conventions and the Protocols. Even if such custom may not give rise to universally applicable principles, they may constitute regional principles of international law. Their value as custom may be able to fill gaps in the conventional law or to aid in the resolution of doubts as to the interpretation of the texts of the Conventions and the Protocols.

The principles may also be useful in resolving doubts as to the interpretation of the text of the Conventions and the Protocols. A doubt has arisen as regards the interpretation of Article 52(2) of Protocol I. Some interpret it as permitting reprisals against civilians. Others reject this and argue for the absolute protection of civilians. Traditional principles may indicate a preference for the latter view. The usage of the Asian traditions in this manner is supported by the Martens clause which speaks of "the usages established among civilized nations" as sources of the laws of war.

Manu has advised that "a well instructed prince should try to triumph over his enemies by conciliation, corruption or division, employed together or separately -never by warfare at the outset". But if these do not succeed he should fight to conquer his enemies. Manu laid down policies to be pursued with regard to conquered countries. He extols alliance rather than annexation: "While acquiring gold and territory the king does not prosper as much as he would if he had made a faithful ally, who could become powerful in the
Why is IHL Relevant to South Asia?

future. On the other hand, the laws and customs of the neighbouring countries must be respected as they are."

2) Sanctions

In a situation where religious sanctions for humanitarian principles exist, there is a greater likelihood for conformity with the principles. The future evolution of humanitarian law must take this into account and exploit the existence of such sanctions so that humanitarian principles will become more meaningful.

3) Dissemination

Dissemination of the Geneva Conventions and the Protocols is a task imposed upon all signatory States. That task will be easier to accomplish in the Asian region if the principles can be related to traditional rules. It is more meaningful for an Asian to be told that the principles of humanitarian law were similar to those his ancestors had fashioned. There is a certain unity in the Asian region which must be taken into account for purposes of dissemination. The uniformity of the cultural experiences of the region is an asset that must be utilized.

4) Development of IHL

The historical traditions and thoughts of the Asian states is an important source for the future development of international humanitarian law. The uniformity of the cultural experiences of the region is an asset that must be utilized. For example the stories of the Ramayana have influenced the dance forms of Thailand and Cambodia, the puppet theatre of Indonesia and the fables of Sri Lanka and Burma. The possibilities for introducing modern principles of international humanitarian law through these traditional media and making them acceptable to Asian people are immense.

1.6 WHAT IS CUSTOMARY IHL?

In December 1995, the 26th International Conference of the Red Cross and Red Crescent officially mandated the ICRC to prepare a report on customary rules of international humanitarian law applicable in international and non-international armed conflicts. Nearly ten years later, in 2005, after extensive research and widespread consultation with experts, this report, now referred to as the study on customary international humanitarian law, was published. To complement the research carried out in national and international sources, the ICRC looked into its own archives relating to nearly 40 recent armed conflicts (21 in Africa, 2 in the Americas, 8 in Asia and 8 in Europe). This report has uncovered a large body of customary rules the majority of which are claimed to apply to both international and non-international armed conflicts.

Research was conducted using both national and international sources reflecting State practice and focused on the six parts of the study identified in the plan of action:

- Principle of distinction
- Specifically protected persons and objects
- Specific methods of warfare
- Weapons
- Treatment of civilians and persons hors de combat
- Implementation

Even though the study did not seek to determine the customary nature of specific treaty provisions, in the end it became clear that there are many customary rules which are
identical or similar to those found in treaty law. Examples of rules found to be customary include: the principle of distinction between civilians and combatants and between civilian objects and military objectives; the prohibition of indiscriminate attacks; the principle of proportionality in attack; the obligation to take feasible precautions in attack and against the effects of attack; the obligation to respect and protect medical and religious personnel, medical units and transports, the prohibition of attacks on non-defended localities and demilitarized zones; the obligation to provide quarter and to safeguard an enemy *hors de combat*; the obligation to respect the fundamental guarantees of civilians and persons *hors de combat*; and the specific protections afforded to women and children.

A few examples of customary rules are:

**Rule 22.** The parties to the conflict must take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks.

**Rule 45.** The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited. Destruction of the natural environment may not be used as a weapon.

**Rule 47.** Attacking persons who are recognized as *hors de combat* is prohibited. A person *hors de combat* is:

a) anyone who is in the power of an adverse party;

b) anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness; or

c) anyone who clearly expresses an intention to surrender; provided he or she abstains from any hostile act and does not attempt to escape.

**Rule 72.** The use of poison or poisoned weapons is prohibited.

### 1.7 IS IHL EUROCENTRIC?

There have been claims that IHL has European origin and is the product of the conscious activity of the European mind. Such a view may not be historically accurate at least to the extent that non-European systems of international law did exist and have influenced the shaping of a universal system of international law. Even if true, a system of international law which is entirely European will be valueless in a world in which non-European States have roles to play. The reshaping of international law to reflect the interests and views of Asia is an urgent need of modern international law.

Such reshaping and re-evaluation is necessary for the study of the development of IHL. There is no doubt that the development of international law, at least in the form of conventions, took place at a period when the nations of Asia were in a state of colonial domination. They were regarded as lacking personality to shape the course of law. It is paradoxical that a branch of law which was intended to confer protection upon an individual by virtue of his being a human, was nevertheless confined to Europeans and regarded as essentially European in origin. If natural law philosophy is the basis of humanitarian law and if the principles of the law are discoverable by a process of human reasoning, then non-European people too should have discovered and applied those principles. It is true that humanitarian law, in the form of conventions, was the creation of European States. Only Japan, which had acquired sufficient capacity for violence to equal the European States, was invited to participate in the early conventions on humanitarian law.
But the fact that IHL, in its conventional form, is predominantly the work of European States does not mean that the principles of the law were European in origin. Such claims can be dismissed as proceeding from the misguided pride in the civilizing mission that European States claimed, if not for the fact that they are positively harmful. They may hinder the universal acceptance of IHL. Non-European countries may come to regard these principles as relics of colonialism when in fact they were principles known to their traditions long before colonialism.

1.8 NEED FOR UNIVERSAL ACCEPTANCE OF IHL

The need for universal acceptance for IHL is great in the modern world. Even if the theory of the European origins of the principles is accepted, there is greater need for research showing that these principles are based on values common to the major religious and cultural traditions of the world. It will have the following advantages:

1) The acceptance of international humanitarian law by non-European States will be made much easier if it can be demonstrated that its principles were known to the other traditions of the world.

2) A soldier on the battlefield will obey IHL more readily if he can be convinced that these laws were made, not by some men in Europe, but by the wise men of his own tradition.

3) The power of tradition in bringing about obedience to law in Asian societies is great and must be harnessed in aid of IHL.

4) The dissemination of the principles of IHL is a task undertaken by State parties to the Conventions. Such a task can be made easy if it can be shown to the military and civilian population that the principles of IHL are akin to the religious traditions and past practices of their people.

Self Assessment Question

4) State whether IHL norms are Eurocentric.

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1.9 WHAT ARE THE MODERN IHL TREATIES?

IHL today comprises all those rules of international law which are designed to regulate the treatment of the individual — civilians or armed forces, wounded or active in an armed conflict. The most important instruments of IHL are the four Geneva Conventions of 1949 and their Additional Protocols of 1977. They are supplemented by treaties on particular matters including prohibitions of certain weapons (such as chemical and biological weapons, incendiary bombs, antipersonnel landmines, etc.) and the protection of certain categories of people and objects (such as children and cultural property), and include a number of rules of customary international law. You will read in detail about the ratification status of IHL treaties by South Asian countries in Unit 1 of Module IV.
In order to secure the guarantees provided by these instruments, it is essential that the States implement their provisions to the fullest possible extent. Implementation mechanism can be divided into three categories, (i) the preventive measures to be taken in peacetime, (ii) ensuring respect during conflicts, and (iii) repressing violations. For effective implementation of IHL, it is necessary that it is placed within the framework of national legislation.

1.10 SUMMARY

- In this unit we have seen the role played by Asian customs and traditions in the shaping of humanitarian law. We have also seen that the sources of humanitarian rule are universal and timeless.

- We have discussed various traditions that were followed in ancient Asia which attempted to protect civilians from the worst consequences of war. Today no one culture or religion should claim to have a monopoly over it. We have also seen the need for further research in the field and universal acceptance of IHL.

- We also briefly glanced through the recent compilation of the Rules of Customary IHL by the International Committee of the Red Cross.

1.11 TERMINAL QUESTIONS

1) Discuss the historical and traditional role played by Asia in the evolution of international humanitarian law.

2) What are customary international humanitarian laws researched and compiled by the ICRC? Give any three examples of customary IHL.

3) Discuss briefly the ‘just war doctrine’, ‘limitations to the means and method of warfare’ and ‘the protection of environment’ under the traditional Asian humanitarian law.

1.12 ANSWERS AND HINTS

Self Assessment Questions

1) Refer to Section 1.4

2) Refer to Sub-section 1.4.1

3) Refer to Sub-section 1.4.6

4) Refer to Section 1.7

Terminal Questions

1) In Asia, the ancient scriptures are replete with detailed rules of waging a war. These rules related to the area where the war will take place, methods of warfare, proportionality of the use of force, kinds of armed forces, the weapons to be used were precisely laid down and followed. Weapons causing unnecessary suffering were prohibited; rules relating to treatment of prisoners and civilians, the timings of war, etc. were made very much a part of a just war. The respect for human beings and consideration of humanity has always remained the basis for these rules.

Sun Tzu, in “The Art of War” has expressed some important requirements implied by humanity during combat. These are as follows: a commander must show
intelligence, sincerity, humanity, courage and dignity; he may utilize captured enemy equipment but must respect prisoners of war. A commander should endeavouer to win a victory without harming enemy military and civilian personnel and should avoid using needless violence; a commander should not seek the total annihilation of an enemy.

In ancient India, the importance and necessity of a standing military force was understood. This recognition subsequently led to the maintenance of a permanent militia to fight off any kind of opposition and aggression. The armed forces were thus also retained in times of peace. It was widely acknowledged that peaceful remedies should be exhausted before taking recourse to armed force. Ancient India developed a method in four successive stages for the settlement of disputes between States: the first stage is called peaceful negotiation (sama); the second stage consists of offering gifts (dana) to appease the enemy; the third is a veiled threat (bheda); and the last stage allows the use of force (danda). The clash of arms in battle was therefore clearly considered undesirable as long as it can be avoided. The Code of Manu, the basis for the laws, morals and customs of people of India developed between B.C 200. and 200 A.D., also referred to protection of war victims. Many of the rules of humanitarian law are also considered part of customary international law based on widespread, representative and virtually uniform practice of States accepted as legal obligation and therefore mandatory for all parties to an armed conflict.

2) The ICRC was mandated in 1995 to prepare a report on customary rules of international humanitarian law applicable in international and non-international armed conflicts. In 2005, after extensive research and widespread consultation with experts, a report, now referred to as the ‘study on customary international humanitarian law’ was published. To complement the research carried out in national and international sources, the ICRC looked into its own archives relating to nearly 40 recent armed conflicts—21 in Africa, 2 in the Americas, 8 in Asia and 8 in Europe. This report has uncovered a large body of customary rules the majority of which are claimed to apply to both international and non-international armed conflicts. Research was conducted using both national and international sources reflecting State practice and focused on the six parts of the study identified in the plan of action:

- Principle of distinction
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Even though the study did not seek to determine the customary nature of specific treaty provisions, in the end it became clear that there are many customary rules which are identical or similar to those found in treaty law. Examples of rules found to be customary include: the principle of distinction between civilians and combatants and between civilian objects and military objectives; the prohibition of indiscriminate attacks; the principle of proportionality in attack; the obligation to take feasible precautions in attack and against the effects of attack; the obligation to respect and protect medical and religious personnel, medical units and transports, the
prohibition of attacks on non-defended localities and demilitarized zones; the obligation to provide quarter and to safeguard an enemy *hors de combat*; the obligation to respect the fundamental guarantees of civilians and persons *hors de combat*; and the specific protections afforded to women and children.

Few examples of customary rules are:

Rule 22. The parties to the conflict must take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks.

Rule 45. The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited. Destruction of the natural environment may not be used as a weapon.

Rule 72. The use of poison or poisoned weapons is prohibited.

3) The culture and traditions of Asia accepted certain principles of humanitarian law. The laws relating to ‘just war’, ‘limitations to the means and methods of warfare,’ and ‘protection of environment’ are as follows.

The just war doctrine seems well entrenched in the traditions of Asia. Sun Tzu, in his famous book *The Art of War* advocated that one should try to defeat the enemy by morality. He asserted that a skilful strategist should be able to subdue an enemy army without engaging it, to take an enemy city without laying siege to it, and to overthrow an enemy State without bloodying swords. In other words, unnecessary suffering should be avoided. There is sufficient evidence to surmise that the idea akin to what international lawyers call the doctrine of *bellum justum* (just war), played a significant role in the evolution and development of what is termed the *just ad bellum* in ancient India. There was a distinction between a *dharmayuddha* (just war) and *kutayuddha* (unjust war). Though the history of India is full of violent wars, these resulted in repugnance towards wars in philosophy and law. In theory and law, warfare was never sanctioned unless it was *dharmayuddha* meant to uphold the sovereignty of law. However, the use of war for demonstration of prowess through *ashwamedha yagnya* was also permissible in ancient India.

In ancient India, Manu forbade the use of poison and poisoned weapons in war: “When he fights with his foes in battle, let him not strike with weapons concealed (in wood), nor with (such as are) barbed, poisoned, or the points of which are blazing with fire.” The prohibition of killing soldiers who had lost their horses, chariots, or arms, or who had surrendered is undoubtedly a major contribution of Hindu jurisprudence to the humanization of warfare. The Mahabharat declares that a soldier who surrenders by laying down his weapons should not be slain and medical assistance should be given to the wounded soldiers of the enemy. The Aryans forbade the slaughter of those who laid down their arms, of those who begged for mercy with joined hands, and of fugitives.

The Asian texts also speak of the need to protect the environment in times of war. Protection of the environment as a concern does not appear in the early conventions. It makes its appearance only in Article 55 of Protocol I. Ibrahim refers to verses in the Holy Quran which forbid the unnecessary cutting down of trees during wars and the instructions of the Caliph Abubakar against the slaughter of livestock except for food.
### 1.13 GLOSSARY

| **Ratification** | The ratification of international treaties is accomplished by filing instruments of ratification as provided for in the treaty. In most democracies, the legislature authorizes the government to ratify treaties through standard legislative procedures (i.e., passing a bill). |
| **Custom** | Custom is comprehensive and uniform repetition of behavior over a long period, in the belief that such behavior is obligatory. In the law of armed conflict, custom has often preceded written regulations, sometimes by thousands of years. The laws of war stem from the practice of war. They are adopted because they are necessary and therefore become customs. Custom then often becomes part of international law, which may in turn lead to a custom that becomes binding even on nations not party to international instruments. |
| **Hors de combat** | A French term (translation: “out of the fight”). A combatant is *hors de combat* if he or she is in the power of an adverse party, clearly expresses an intention to surrender or has been rendered unconscious or is otherwise incapacitated by wounds or sickness and is therefore incapable of self-defense. Provided that in any of these cases he or she abstains from any hostile act and does not attempt to escape, he or she may not be made the object of attack. |
| **Marten Clause** | The Marten Clause was based upon and took its name from a declaration read by Professor von Martens, the Russian delegate at the Hague Peace Conferences 1899. Martens introduced the declaration after delegates at the Peace Conference failed to agree on the issue of the status of civilians who took up arms against an occupying force. The Martens Clause states: “Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.” [Laws and Customs of War on Land (Hague IV), 1907]. |
1.14 REFERENCES AND SUGGESTED READINGS


7) Sornarajah, M. An Overview of the Asian Approaches to International Humanitarian Law, *Australian Year Book of International Law*, p. 238-244.