Why is IHL Relevant to South Asia?
“Education is a liberating force, and in our age it is also a democratising force, cutting across the barriers of caste and class, smoothing out inequalities imposed by birth and other circumstances.”

— Indira Gandhi
Block 1

WHY IS IHL RELEVANT TO SOUTH ASIA?

UNIT 1
Postulates of IHL under Different Asian Traditions 5

UNIT 2
Religious Traditions in South Asia 20

UNIT 3
Why Study IHL in South Asia? 36
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BLE-037 IHL ISSUES OF CONCERN IN SOUTH ASIA

The course 1 of this programme introduced you with the concepts of law, international law and international humanitarian law (IHL). Course 2 covered the application of IHL by various national, international and non-governmental institutions. In this course, you will study the IHL issues in south Asian countries. The south Asian countries include: Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Srilanka.

**Block 1** mainly deals with the Asian religious traditions of IHL. 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.

Unit 1 and 2 deals with the Asian religious traditions or IHL. Unit 3 deals with the need for the study of IHL in South Asia.

**Block 2 and 3** cover each south Asian country in separate units. These unit mainly focus on the major conflicts situation, status of the ratification of IHL treaties, national laws implementing the IHL treaties etc.

**Block 4** Deals with the current IHL issues in South Asia. In this block the impact of armed conflict on the different groups of the society has been examined. In this block we have mainly examined the impact of armed conflicts on women, minorities, refugees and internally displaced persons and children. These groups has suffered more than any other by the hostilities in the reason. the result of the use of children as soldiers in armed conflicts is that these children suffer from various kinds of Social, physiological and economic problem. They deprave of any type of education.

**Block 5** Deals with the ameliorative mechanisms available in South Asia. It mainly covers the National mechanism of all south Asian country and the role of various institution such as ICRC, UNHCR etc.
BLOCK 1 WHY IS IHL RELEVANT TO SOUTH ASIA

The South Asian region, inhabited by nearly 1.50 billion people, is one of the most dynamic regions of the world. The countries in South Asia are divergent in their customs and traditions, culture, religion, philosophy and social conditions. The ancient scriptures of this region are replete with detailed rules of waging a war—rules relating to the area where a war could take place, the methods of warfare, proportionality of the use of force, kinds of armed forces and the weapons of war. Some of these laws are reflected in modern rules of international humanitarian law.

The South Asian countries have been involved in many armed conflicts in the last fifty years or so. Besides three major wars in the region, the armed forces in South Asia have had to deal with violent conflicts arising out of what has variously been described as terrorism, insurgency, militancy, proxy war and armed rebellion. A study of IHL is a necessity in South Asia as the students may address and advocate the use of humanitarian law during conflicts of the future as leaders, as members of the military and as informed members of the public. By studying this subject, students will gain an understanding of armed conflicts and IHL, not only as they relate to historic events, but also as they apply to conflicts faced by nations and peoples today.

Unit 1 of this block discusses the historical traditions and philosophical thoughts relating to humanitarian law in the Asian countries.

Unit 2 deals with the religious traditions of Hinduism, Islam, Christianity and Buddhism relating to humanitarian law.

Unit 3 covers the necessity for the study of IHL in South Asia and the likely role the student community can play in promoting respect for the rules IHL.
UNIT 1    POSTULATES OF IHL UNDER DIFFERENT ASIAN TRADITIONS

Structure
1.1  Introduction
1.2  Objectives
1.3  The Asia and South Asian Region
1.4  What are Postulates of IHL in Asian Region?
   1.4.1  The Just War Doctrine
   1.4.2  Declaration of War
   1.4.3  Undefended Localities
   1.4.4  Surrender of Enemy
   1.4.5  Protection of Civilian
   1.4.6  Limitation to the Means and Methods of Warfare
   1.4.7  Protection of Environment
   1.4.8  Rules and Duties of Occupying Powers
1.5  Need for Research
1.6  What is Customary IHL?
1.7  Is IHL Eurocentric?
1.8  Need for Universal Acceptance of IHL
1.9  What are the Modern IHL Treaties?
1.10 Summary
1.11 Terminal Questions
1.12 Answers and Hints
1.13 Glossary
1.14 References and Suggested Readings

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 internmixing 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.

### Manusmruti

Manusmruti, 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 Dharmastras that followed it. According to Hindu tradition, the Manusmruti 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 Taiist 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.
Why is IHL Relevant to South Asia?

**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 *adhamayuddha* (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 modem 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.

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<th>Self Assessment Question</th>
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<td>3) State briefly the limitations on the means and methods of war followed in the ancient Asian traditions.</td>
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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
Examples of rules found to be customary include: the principle of distinctsion 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:

- Anyone who is in the power of an adverse party;
- Anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness; or
- 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.
Why is IHL Relevant to South Asia?

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.

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 endeavour 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
- 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.

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.
## Glossary

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ratification</td>
<td>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).</td>
</tr>
<tr>
<td>Custom</td>
<td>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.</td>
</tr>
<tr>
<td>Hors de combat</td>
<td>A French term (translation: “out of the fight”). A combatant is <em>hors de combat</em> 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.</td>
</tr>
<tr>
<td>Marten Clause</td>
<td>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 Marten 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].</td>
</tr>
</tbody>
</table>
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.
UNIT 2  RELIGIOUS TRADITIONS IN SOUTH ASIA

Structure

2.1 Introduction

2.2 Objectives

2.3 Religious Traditions in South Asia
   2.3.1 Hinduism
   2.3.2 Islam
   2.3.3 Buddhism
   2.3.4 Christianity

2.4 Religious Symbols and Leadership

2.5 Religion and Leadership

2.6 Summary

2.7 Terminal Questions

2.8 Answers and Hints

2.9 Glossary

2.10 References and Suggested Readings

2.1 INTRODUCTION

You know that international humanitarian law (IHL) is designed as a set of rules aimed at limiting violence and protecting the fundamental rights of individuals in time of armed conflicts. IHL deals with the special situation of an armed conflict. In Unit 1 you have learnt that many principles of humanitarian law had their origin in humanity and customs and usages of war practiced by Asian states for centuries to minimize the miseries of war. The purpose of humanitarian law was to regulate acceptable behaviour and spare non-combatants from the savagery of war. With a view to give these rules a firm footing and bring uniformity in the laws of war, these customs and usages have been codified.

Throughout its history, the development of IHL has been influenced by religious concepts and philosophical ideas. Religion has played, and continues to play an important role in defining who is fully human and is thus entitled to be treated with the respect and consideration that is the due of human beings. When religion promotes a wide-reaching concept of humanity, it helps to shore up one of the basic premises upon which modern international humanitarian law is based.

There is much in religious teachings that could be used as a basis for promoting the idea of a common humanity and the proper treatment even of those who are outsiders to the religious group. Religious teachings have dealt with the issue of the appropriate way in which to wage war for thousands of years. Some of those teachings have been used as a basis for developing the modern rules of international law. IHL is defined by its legal instruments and the custom that has grown around them.
2.2 OBJECTIVES

After reading this unit, you should be able to:

- analyse the role played by various religions in South Asia in the development of humanitarian law;
- discuss the religious traditions of Hinduism, Islam, Christianity and Buddhism relating to humanitarian law; and
- discuss why various symbols are used by the International Committee of the Red Cross in the different parts of the world.

2.3 RELIGIOUS TRADITIONS IN SOUTH ASIA

Religion and Humanitarian Law

Buddhism: “Hurt not others in ways that you yourself would find hurtful.” Udana-Varga, 5:18;

Christianity: “All things whatsoever you would that men should do to you, do you even so to them.” Matthew 7:12;

Confucianism: “Do not do unto others what you would not have them do unto you.” Analects 15:23;

Hinduism: “This is the sum of duty: do not do unto others which would cause you pain if done to you.” Mahabharata 5:1517;

Islam: “No one of you is a believer until he desires for his brother that which he desires for himself.” Hadith;

Jainism: “In happiness and suffering, in joy and grief, we should regard all creatures as we regard our own self.” Lord Mahavir 24th Tirthankara;

Judaism: “What is hateful to you, do not do to your fellow man. That is the law; all the rest is commentary.” Talmud, Shabbat 31a;

Zoroastrianism: “That nature only is good when it shall not do unto another whatsoever is not good for its own self.” Dadistan-I-Dinik, 94:5.

The birth and development of humanitarian law was greatly influenced by the ancient civilizations of Asia and by religions such as Hinduism, Islam, Christianity and Buddhism. Let's consider few examples.

2.3.1 Hinduism

Hinduism is a way of life, a dharma. The word dharma is derived from the Sanskrit meaning “to hold together.” Those who profess the Hindu dharma and seek to follow it are guided by spiritual, social, legal and moral rules, actions, knowledge and duties which are responsible for holding the human race together. Dharma does not mean religion: it is the law that governs all actions. The Hindu religion not only consists of rules encompassing the rights and duties of kings and warriors, but also provides norms of desa dharma that govern inter-state relations. Hinduism is based on numerous texts. Because Hindus are considered to have the authority to introduce new elements and ideas into their religion, countless volumes of commentaries, traditions and teachings exist. Let’s understand a few terms relating to Hinduism:
Why is IHL Relevant to South Asia?

- The primary sources of Hinduism are Sruti and Smriti. Sruti literally means what is heard, while Smriti designates what is remembered. In this regard, Sruti is revelation and Smriti tradition.

- Srutis are the four Vedas: the Rig Veda, Sam Veda, Yajur Veda and Atharva Veda. Each Veda consists of four parts: the Samhita (hymns), the Brahmana (rituals), the Aranyakas (interpretations) and the Vedanta (Philosophy).

- Ramayana is an important source of law in various situations. The Bhagavad Gita, part of the epic poem Mahabharata, is the most influential Hindu text.

- Manu, Yajnavalkya and Parasara are the most celebrated law-givers of ancient India; the Smritis are named after them. There are eighteen main Smritis or Dharma Sastras. Hindu jurisprudence regards the Smritis as the foundation of law.

In ancient times, the first and foremost duty of the king was to protect his people. Protection consisted in countering internal threats as well as external aggression. Hinduism, like most religions, believes that war is undesirable because it involves the killing of fellow human beings and hence should be avoided as a means of settling disputes. However, it does acknowledge that there might be situations when it is better to wage war than to tolerate evil.

A Just War

The Great War described in the Mahabharata was the culmination of deep enmity between two royal clans, the Pandavas and the Kauravas. The Kauravas had unlawfully seized property belonging to the Pandavas. The war began after all negotiations by Krishna and others failed to avert it and it thus became inevitable. Arjuna’s attachment to his family, kinsmen and teachers came to the fore, and doubt entered his mind as to the “righteousness” of the battle. In his confusion, he no longer knew which course of action he should take. He, therefore, turned to Krishna, who showed him how to rise above the limitations of his own personality so as to do what was best for himself and for society. Krishna taught him spiritual wisdom and the means of attaining union with God. The entire seven hundred verses of the Bhagavad Gita are a dialogue between Krishna and Arjuna on the battlefield of Kurukshetra. [Sinha Manoj Kumar, International Review of the Red Cross, Volume 87, No. 858, p. 288].

The Dharma Sastras and epics recognized two kinds of war: Dharma Yuddha (righteous war), and Adharma Yuddha (unrighteous war). In Dharma Yuddha (righteous war) the warrior is morally obliged to do his duty without thought of a possible reward. This single exhortation encapsulates for eternity the entire foundation of military ethics, and its universal relevance remains unchanged in India to this day. The philosophy of Dharma Yuddha has inspired many great people throughout Indian history. In early days the practice was to declare a war, and the Ramayana and Mahabharata epic poems both stressed the need to do so in the case of a righteous war. The practice of stopping hostilities at sunset and returning to their respective camps to tend more easily to the day’s casualties also dates from very ancient times.

The Mahabharata reflected Hindu beliefs. It required that “a King should never do such an injury to his foe as would rankle the latter’s heart.” It decreed that one should cease fighting when an opponent becomes disabled; that wounded men and persons who surrender should not be killed; noncombatants should not be engaged in combat; and places of public worship should not be molested. The rules contained in the Bhagavad Geeta generally govern issues ranging from the general prohibition of the
use of weapons that causes unnecessary pain, to overcoming the enemy, to the treatment of the enemy’s property and persons in the conquered territory.

THE BHAGAWADGITA: CODE OF THE WARRIOR

“I am a Warrior; defending my Nation is my dharma.

I will train my mind, body and spirit to fight,

Excel in all devices and weapons of war –

present and future,

Always protect the weak,

Be truthful and forthright,

Be humane, cultured and compassionate,

Fight and embrace the consequences willingly.

God, give me strength that I ask nothing of you”

Self Assessment Question

1) Discuss the concepts of Dharma Yuddha (righteous war), and Adharma Yuddha (unrighteous war) in Hinduism.

Manu is considered a law giver in the Hindu tradition. Manusmriti is one of the 18 Smritis. It is important to note that laws given in Manusmriti although followed in some form even today, are not considered divine, and may be modified by the society to keep up with the times. Manusmriti explains that the three duties of a king were “not shrinking from battle, protecting the people and attending on Brahmans.” If a king (raja) is challenged by his enemies, be they equal, superior or inferior to him, he must engage in battle; he cannot avoid it, bearing in mind the religion of the warrior class, which obliges him to defend himself when attacked. It required him to take the lead in attacking those who threaten the lives and ways of life of his subjects. Moreover, it demanded that he sacrifice his own life if that is necessary to protect the lives of others.

It has been speculated that in its current form, Manusmriti represents laws that have been added or modified throughout the history. Some examples of Manusmriti are:

- 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.

- Let him not strike one who (in flight) has climbed on an eminence, nor a eunuch, nor one who joins the palms of his hands (in supplication), nor one who (flees) with flying hair, nor one who sits down, nor one who says ‘I am thine’.

- Nor one who sleeps, nor one who has lost his coat of mail, nor one who is naked, nor one who is disarmed, nor one who looks on without taking part in the fight, nor one who is fighting with another (foe).
Why is IHL Relevant to South Asia?

- Nor one whose weapons are broken, nor one afflicted (with sorrow), nor one who has been grievously wounded, nor one who is in fear, nor one who has turned to flight; (but in all these cases let him) remember the duty (of honourable warriors).

Kautilya’s *Arthasastra* was one of the greatest political books of ancient India. Kautilya counselled that it is best to wage war against an unjust king who has no public support, yet it is wise to avoid war with a righteous king whose subjects will fight vigorously on his behalf. He pointed out that when facing the choice as to whom to attack, it is always best to attack an unjust kingdom. Therefore, a king should march only against an enemy with disaffected subjects. If a king has the option of attacking a strong king who is unjust or a weak king who is just, he should actually attack the stronger king because that king’s subjects, weary of injustice, will not help their ruler and might even join in the war against him.

Kautilya advocated the humanitarian treatment of conquered soldiers and citizens. In particular, he maintained that a humanitarian policy toward a defeated people was practical, pointing out that if a king massacres those whom he has defeated, he frightens all the kingdoms that surround him and terrifies even his own ministers. If the defeated were treated magnanimously, more land and loyal subjects can be gained. Kautilya advised that the conquering king should order the release of all prisoners and give help to the distressed, the helpless and the sick. He thus called for the establishment of a righteous course of conduct for sound military policy. In taking this stance, Kautilya was following the traditional advice given in the *Dharma Sastras* that Aryans condemn the killing of those who have thrown down their weapons, who have disheveled hair, who fold their hands in supplication, or who are fleeing.

Kautilya also held that the fundamental rule about immoveable property was that it did not belong to the victor by right; only such things as chariots, animals, and war material belonged to the conquering forces. The king should personally examine all such captured wealth and should then keep a part for himself and distribute the rest among his armed forces according to rank.

The laws of war in ancient India drew a clear distinction between civilians and belligerents. That same principle is found in Article 48 of Additional Protocol I, while Article 51 thereof protects civilians from military operations. Manu also laid down certain principles that should be followed by both warring parties. For example, combat between mounted and unmounted soldiers was strictly forbidden. Furthermore, combat between warriors of officer rank and foot soldier was not allowed, since the former would generally be much better armed and trained than the latter. Collective attacks against a single soldier and the slaying of a warrior who was temporarily at a disadvantage during battle were strictly prohibited. The *Rig Veda* also laid down the right conduct of war. Vedic rules maintain that it is unjust to strike someone from behind, cowardly to poison the tip of the arrow and heinous to attack the sick or old, children and women.

**Ramayana: Prohibited Weapons of War**

The principle that the use of weapons causing unnecessary suffering was prohibited was recognized in ancient India. Poisoned or barbed arrows were forbidden. The main aim of the use of weapons was to weaken the enemy and place its warriors *hors de combat*, but not to massacre them. A classic demonstration of this was given during Rama’s war with the demon king, Ravana, when Rama forbade his brother, Lakshmana, to use a weapon of war which would have destroyed the entire enemy race, including those who did not bear arms, “because such destruction *en masse* was forbidden by the ancient laws of war even though Ravana was fighting an unjust war with an unrighteous
2.3.2 Islam

Most of the principles of modern IHL can easily be found in the Islamic conception of war. The Quran forbids Muslims from transgressing the divine limits during the conduct of war. However, before we go further into the subject, let us get familiar with the few terms related to Islamic teachings:

- Islam is one of the three Abrahamic monotheistic religions and one of the most widely followed religions in the world. Followers of the religion believe in Prophet Muhammad, whose message was received in the seventh century in the form of scriptures, compiled in the holy book Quran. The Quran is not solely a legal text, but its verses also have religious, spiritual and ethical implications. The Islamic concept of humanitarian law is primarily based on the Quran and the Sunna.

- The Quran is the bedrock of Islamic jurisprudence. It is the basic foundation on which the whole superstructure of the Islamic legal theory rests. The Quran is admitted by the Muslims as the word of God and therefore the basis of all Islamic laws. It is a collection of divine revelations reaching Prophet Muhammad through the agency of the angel Gabriel.

- If the Quran is silent on a given matter, then we rely upon the teachings and examples of the Prophet himself; which is collectively known as the Sunna or the Hadith in Islamic law. The word Sunna literally means a way or rule, or manner of acting or mode of life. Applied to the life of the Prophet this meant, therefore, a rule deduced from the sayings or conduct of the Prophet.

- The majority of rules on regulation of armed conflict are derived from the Sunna rather than the Quran because the battles fought by the prophet and his companions after him offered the jurists with rich material to resort to in developing this legal regime.

- In the absence of a specific Quaranic verse or a Hadith bearing on the matter, one turns to Ijma or Qiyas. The Ijma literally means the general consensus among Islamic scholars of a particular age in relations to the legal rule collectively applicable to the situation. Qiyas means deriving rule by logical inferences and analogy. The Qiyas is an extension of a rule of law to a new case on the assumption that the original context of the two incidents is similar. Owing to an increasing need of society, Qiyas play an extensive role in Islamic legal activity.

- Sharia, is the Islamic traditions encompassing the Muslim approach or path to a pious and Islamic compliant life, which includes but is not solely limited to legal matters.

The conduct of hostilities is strictly regulated by the Holy Quran, the words of the Prophet and the commands of Abu Bakr as-Siddiq, the First Caliph of Islam (CE 632-634), as well as those of other Muslim commanders.

**Abu Bakr** (CE 570-634) was Prophet Muhammad’s father-in-law, one of his closest companions and advisers. Abu Bakr succeeded to the Prophet’s political and administrative functions, thereby initiating the office of the Caliphate. He is credited with collecting the verses of the Quran and putting them into the final book read by Muslims today.
Why is IHL Relevant to South Asia?

War is not an objective in Islam. It is resorted to under extraordinary circumstances when all other means fail. The Quran says: ‘Fight in the cause of Allah, those who fight you. But do not transgress limits; for Allah loveth not transgressors. Therefore under Islam, war is permissible only in defence — specially in defence of religion. It is not permissible for personal glory, or power, or extension of territory. The aggressive war is contrary to the teachings of Islam.

Islam did not acknowledge war as a national policy, a method of conflict resolution or a means to satisfy a desire for hegemony or to gain spoils. Before the declaration of either war or jihad, the enemy should be made to choose one of three options: Islam, as a token of peacefulness; reconciliation or a peace treaty with Muslims; or finally war, if the enemy insists on waging war. It is evident that giving the choice between three options excludes the character of compulsion.

There are three kinds of circumstances that legitimize warfare in Islam, namely:

a) aggression against Muslims, either individually or collectively, as preachers for Islam, or attempts to make Muslims apostates or the launching of war against Muslims.

b) assistance for the victims of injustice, whether individuals or groups.

c) self-defence and to ward off attacks on one’s homeland.

If war does take place, it is subject to clear regulations under Islamic Sharia. Religious teachings had an evident effect on the emergence of the rules of war, which attained the status of legal rules based on three fundamental requirements: necessity, humanity and chivalry. The following principles have accordingly been prescribed since the early days of Islam:

- a non-combatant who is not taking part in warfare, either by action, opinion, planning or supplies, must not be attacked;
- the destruction of property is prohibited, except when it is a military necessity to do so, for example for the army to penetrate barricades, or when that property makes a direct contribution to war, such as castles and fortresses;
- principles of humanity and virtue should be respected during and after war;
- it is permitted to guarantee public or private safety on the battlefield, to prevent as far as possible the continuation of warfare.

Islam also prohibits damage to objects indispensible for the survival of civilian population. The Quran condemning the man who ‘when he holds authority makes efforts in the land to cause mischief in it and destroy crops and cattle’. 

Abu Bakr reiterated several commandments, inspired by Prophetic guidance, to his commander Yazid Ibn Abi Sufyan. This is the text of his famous decree: “I prescribe Ten Commandments to you: do not kill a woman, a child, or an old man, do not cut down fruitful trees, do not destroy inhabited areas, do not slaughter any sheep, cow or camel except for food, do not burn date palms, nor inundate them, do not embezzle, nor be guilty of cowardliness.”

As regards, civilian population, Islam acknowledges: ‘Fight those who fight you’. A Muslim combatant is always under an obligation to distinguish the combatant from a non-combatant and to direct his weapon only at the former. One of the best known hadiths is “Move forward in the Name of God, by God, and on the religion of God’s
Prophet. Do not kill an elderly, or a child, or a woman, do not misappropriate booty, gather your spoils, do good for God loves good doers.”

Self Assessment Question

2) List the Ten Commandments prescribed by Abu Bakr.

Islam forbids Muslim combatants to torture their enemies or to subject them to treatment contrary to human dignity. It prohibits mutilation, torture, and degrading treatment to enemies in an armed conflict. There is a saying by the Prophet: ‘Do not commit treachery and do not mutilate.’ Under Islamic law, perfidy and treason are strictly prohibited. It also forbids the killing of an enemy deserter. The use of poisoned arrows and weapon capable of causing opponents injuries that exceeds military advantage are unjustified in Islam. Ruses of war in form of camouflage, decoys and misinformation are permitted in Islam.

Islam adopts a generous approach towards captured enemy combatants or prisoners of war (POW). Under Islam, the dignity of prisoners is to be respected. The Quaran has specified that way in which prisoners must be treated. In Sura 47, verse 4, it is stated that after the combatants have been subdued and captured ‘thereafter, is time for either generosity or ransom until the war lays down its burden. Islam prescribes fair and humane treatment for POW. At the battle of Badr, the Prophet ordered his men to ‘take heed of the recommendation to treat prisoners fairly’. On other occasion the Prophet said: “prisoners are your brethren. It is by the grace of God that they are in your hands. Since they are at your mercy, treat them as you would treat yourself as regards food, clothing, and shelter. Do not demand of them labour which exceeds their strength; help them rather in what they have to do’. Islam prohibits killing of prisoners. There is no verse in the Quran directly permitting slavery.

2.3.3 Buddhism

What is unique in Buddhism is the total rejection of violence and war and teaching the people a philosophy based on non-violence to be practiced at all times. Long before the UN and other organizations developed humanitarian laws, 2600 years ago, the Buddha propounded what may be called a Declaration on Sanctity of All Sentient Life. This is the Karaniya Metta Sutra where not only human beings but also all sentient beings were elevated to a level of deserving compassion, equal respect and protection. Rather than going into imposing laws pertaining to war, He taught us the laws and modes of conduct applicable to life and society at all times.

Buddhism being a very practical religion does not have many insights to offer which could be useful in the application and development of modern humanitarian law. In the third century BC for the first time, non-violence (Ahimsa), as taught by Buddha, emerged as an important principle pertaining to social organizations and relationships. There was no question of Dharmic or Adharmic war. All wars and violence were rejected in Buddhist teachings.
Ten Duties of the King

The basic framework of Buddhist ethics for rulers is set out in the “Ten Duties of the King” (*dasa-raja-dhamma*):

1) **Dana**: liberality, generosity, charity. The ruler should not have craving and attachment for wealth and property, but should give it away for the welfare of the people.

2) **Sila**: a high and moral character. He should never destroy life, cheat, steal and exploit others, commit adultery, utter falsehood, or take intoxicating drinks.

3) **Pariccaga**: sacrificing everything for the good of the people. He must be prepared to give up all personal comfort, name and fame, and even his life, in the interest of the people.

4) **Ajjava**: honesty and integrity. He must be free from fear and favour in the discharge of his duties, must be sincere in his intentions, and must not deceive the public.

5) **Maddava**: kindness and gentleness. He must possess a genial temperament.

6) **Tapa**: austerity of habits. He must lead a simple life, and should not indulge in a life of luxury. He must have self-control.

7) **Akkodha**: freedom from envy, ill-will, enmity. He should bear no grudge against anybody.

8) **Avhimsa**: non-violence, which means not only that he should harm nobody, but that he should try to promote peace by avoiding and preventing war, and everything which involves violence and destruction of life.

9) **Khanti**: patience, forbearance, tolerance, understanding. He must be able to bear hardships, difficulties and insults without losing his temper.

10) **Avirodha**: non-opposition, non-obstruction, that is to say that he should not oppose the will of the people, should not obstruct any measures that are conducive to the welfare of the people. In other words, he should rule in harmony with his people.

In the *Majjhima Nikaya* it is specifically stated that ‘carrying out duties of the state’ is not an excuse for killing. This clearly formulated pronouncement means also that superior orders are no defence, and in the context of war it gives expression to a principle which can be applied to all forms of wrongdoing such as torture, enslavement, forced disappearance, biological experimentation, use of cruel method of punishment, etc. it also follows from the concept of individual responsibility that one person cannot be punished for the acts of another. Even if punishment is to be imposed for an act of heinous wrongdoing, that punishment must be imposed on the wrongdoer and not on associates of the wrongdoer.

The principle of compassion which lies at the very base of the Buddhist attitude towards other would dictate that compassion be shown to POW. They would need to be treated with the same care and concern as one’s own soldiers. In matters of food, clothing, shelter, and protection a heavy obligation would rest upon the capturing power to ensure humane treatment to prisoners. Upon the termination of hostilities they would need to be given safe passage back to their country of origin. Forced labour during the period of their captivity would be prohibited.
The Buddhist philosophy of respect for all forms of life resulted in a very advanced view regarding the conservation of the environment, and of natural resources and ecosystem. Buddhism formulated two thousand years ago the principle of trusteeship of the earth’s resources — a principle which modern environmental law is only now beginning to formulate and recognize. In the field of humanitarian law this meant that even in wartime, animal and plant life needed to be protected and insured against destruction. Buddhism would totally forbid the destruction of crops and of flocks, the deforestation of the enemy’s territory, the poisoning of water and soil, the contamination of the atmosphere, and other similar environmentally related damage. If you go through Article 35 (3) of Additional Protocol, you will see that it prohibits methods of warfare ‘expected to cause widespread, long-term and severe damage to the environment’.

There are a number of Jataka stories about legitimate kings who willingly gave away their kingdoms to prevent war and violence and were arrested and publicly executed. On one such occasion, at the time of the execution, when the king saw his son in the crowd in disguise, he advised his son never to take revenge as hatred produced hatred. The prince later elevated himself to be the commander of the king who had killed his father. He got three opportunities to kill this king while he was sleeping on his lap on a hunting expedition in the forest. But the advice of his dying father came to his mind and he spared the king. Each time, the king woke up having seen the old king’s son in a dream trying to kill him. The prince then confessed to him that he was indeed the son of the murdered king and also told the him that he would never kill him because of the advice of his father at the time of his execution that violence begets violence. The king immediately handed over to the prince not only his own kingdom but also his other domains.

Buddhism added to all existing patterns of thought a new dimension of immense concern for those who suffer — one of the foundations of Buddhist social attitude. Buddhism accentuated all the humanitarian duties which the existing jurisprudence of the time had prescribed in warfare.

<table>
<thead>
<tr>
<th>Self Assessment Question</th>
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<tbody>
<tr>
<td>3) State how Buddhist philosophy relating to the protection of environment has been incorporated in IHL?</td>
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</table>

2.3.4 Christianity

Non-violence is clearly the foundation of Christianity. Like many religions, Christianity too emphasized the fact that man is the best of God’s creations, and that He created him in the likeness of Himself. Christ advocated compassion towards all fellow beings — ‘Love thy neighbour’.

Based on Christian teachings, Hugo Grotius, the father of international law, spoke of the undesirability of war, a need for justifiable cause for war (causus belli), and humanitarian considerations during warfare. These indeed, are immediate progenitors of the current precepts of international humanitarian law. In fact, there have been two trends in the Christian traditions, one, total pacifism based on Christ’s teachings; and other on the rationalization of these teachings for the state system—which would justify
Why is IHL Relevant to South Asia?

The use of violence in extreme, but justified cases. The latter came to be known as the doctrine of just war. These in fact reflected attempts to regulate and limit the use of violence in inter-state relations, even while seeking to protect Christianity. They represent the European counterpart of dharmayuddha in ancient India. The underlying principles are indeed, the justness of the fight, the proportionality of the use of force, and amelioration of the victims of war. A war in violation of these principles was condemned as unjust war.

There are two types of war that are permissible within Christian thought, the holy war and the just war. Holy war is fought for the goals or ideals of the faith (such as the Crusades) and is waged by divine or religious authority. In a holy war, Christian participation is a positive duty, whereas, in a just war it is permissible, but restricted. Therefore, a holy war is automatically a just war, but a just war is not necessarily a holy war. Initially, differences between holy and just wars were less discernable, as the crusades had both religious motivations and juridical institutions designed to punish those who offended Christian values. However, wars in the name of religion or for conversion later came to be outlawed.

However, it was with the Emperor Constantine’s conversion to Christianity, and after Christianity became the official religion of the Roman Empire that the “just war” doctrine began to develop. The peace that Constantine maintained within the empire, and his many benefactions to the Church may have influenced Christian theologians to accommodate Roman notions on wars. Rome had had a tradition of just war from the time of Cicero (106-43 B.C.). Cicero defined just wars as those undertaken for the defence of honour or for safety. He also stated that wars without provocation are unjust and that only war waged for revenge or defence could be just. He held that to be considered just, a war must be proclaimed and declared, or reparation must first be demanded. Many of these elements later found their way in Christian formulations.

It is from the early Christian writers that the rules of international humanitarian law are generally said to trace their roots. The distinction between jus ad bellum (just war) and jus in bello (right behaviour in the conduct of war), which is still used in international law today, has its roots in Christian teaching. These teachings, however, are not simply historical texts of limited modern relevance. They are used by religious groups and individuals when they engage in modern arguments about the appropriate responses of their own communities or the international community to current conflicts, such as the terrorist attacks on the US, or the use of force against Iraq.

Christianity and Humanism

In his Christmas message of 1944, Pope Pius XII condemned ‘aggressive war’ as ‘a sin’, an offence, and an outrage against the majesty of God’. The Pope said: ‘The theory of war as an apt and proportionate means of solving international conflict is now out of date.’ Interpreting this, Fr. John Murray said: ‘The use of force is not now a moral means for the redress of violated legal rights. The justness of the cause is irrelevant; there simply is no longer a right of self-redress; no individual state may pursue to take even the cause of justice into its own hands. Whatever the grievance of the state may be, and however objectionable it may find the status quo, warfare undertaken on the sovereign decision of the national state is an immoral means for settling the grievance and for altering existing conditions.’

After the attacks of 11 September 2001, the United States Conference of Catholic Bishops released a pastoral message urging compliance with international and moral law in response to the attacks in part because ‘every life is precious whether a person works at the World Trade Center or lives in Afghanistan’. The stand of the Catholic bishops, which is merely one example of leaders from many religious groups, attempted
to emphasise the common humanity of the people of Afghanistan and of the US — an important step in seeking to ensure that the rules of international law were applied to any conflict that arose with Afghanistan.

An early example of religious teaching being used to mitigate the harshness of war can be seen in the Jewish religion. It stated that when the army draws near to a city it should offer the city the chance to surrender without fighting and, if the city accepts this offer, that the army should refrain from the normal practice of killing the men and enslaving the women and children, and rather should accept the service of all the people within the city. The Jewish religion also played an important role in developing rules of war is towards restraint of the cruelty and barbarism that exists in many wars. The basic text of each of the major traditions provides numerous examples of exhortations to treat all people with respect.

### 2.4 RELIGIOUS SYMBOLS AND LEADERSHIP

Religious symbolism has sometimes been harnessed or acknowledged by both domestic and international law. The notion of a church as sanctuary, for example, allowed a space in which the conventional hostilities of war or violence had to give way to a gentler mode of activity. The sanctity of places of worship — and the importance that many civilizations put on protecting that sanctity — has led to the modern prohibition of ‘acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples’. Similarly, the special role of religious personnel attached to armed forces is a recognition by IHL of the important role of spiritual guidance and support for members of the armed forces, and probably has roots in the protection of clerics in many religions.

The most significant example here is the role played by the ‘Red Cross’ symbol of the International Committee of the Red Cross (ICRC). The simple symbol of a red cross on a white background was not originally chosen for its religious import; it was simply the obverse of the Swiss flag. It symbolized national pride. The symbol has played an important role in allowing representatives and places under the control of the ICRC to be readily identified and protected during times of conflict. Once the ICRC expanded its sphere of operation into Arab countries, however, the symbol was perceived as religious. The Red Cross on a white background had painful associations not only with Christianity in general, but with the Crusades in particular, and led to a hostile response by Arabs and later other Muslim states.

In an effort to deal with these sensibilities, the Red Crescent was adopted by the ICRC to work in Muslim countries. However, it had the unfortunate effect of underlining the seeming Christian symbolism of the original cross. This made it unacceptable to states such as Israel that were not prepared to use either the crescent or the cross. You must have read that in 2005, the ICRC introduced the third symbol: Red Crystal on a white background.

### Self Assessment Question

4) State what are the three different kinds of symbols followed by the ICRC world over?

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While the original choice of a clear and plain symbol for the ICRC was not influenced by the religious sentiments of the founders, it was also made without any consideration for the religious sensibilities of others. The ramifications of this lack of consideration continue even now. It is thus clear that in developing modern symbols and seeking modern sources of inspiration, those who seek to promote IHL must be aware of the importance of religion in many parts of the world.

2.5 RELIGION AND LEADERSHIP

Religious leaders, symbols and rituals can also be important for work related to the prevention of conflict or the restoration of peace in a society in transition from conflict to a stable legal system. When there have been significant breaches of international humanitarian law and prolonged conflict, the danger that such conflict will reignite and that the breaches will recur is significant. Religion can play a role in the restoration of societies torn apart by war; a role that may not be able to be played by lawyers or well-meaning outsiders, but that can be essential in helping victims of war and in creating conditions in which atrocities do not recur.

Religious authority can also be important for rebutting religious justifications used by those who breach the rules of warfare. In the first Gulf War, for example, Saddam Hussein attempted to gain support for his invasion of Kuwait and resistance to the Coalition by calling for a jihad against the Western armed forces arrayed against him. His attempt to portray his actions as jihad was opposed by the majority of mainstream Islamic scholars and leaders from many Muslim states. A council of scholars from Al-Azhar University’s sharia faculty, for example, condemned the invasion of Kuwait and also the methods used by Iraq in its occupation as ‘deeply in the wrong and deserving of severe punishment’, and many other scholars and Muslim political leaders utterly condemned his attempts to use Islamic arguments to support his cause.

You have seen a number of examples in various religions about protection of victims of war. However, religious differences are still used to justify treatment of other people as less than human in the modern world. The reports of the United Nations Special Rapporteur on Freedom of Religion or Belief paint a grim picture of the way in which religious minorities are treated in many states. Such mistreatment ranges from mild forms of discrimination, to the use of imprisonment, torture, rape, forced labour and execution as methods of terrorising religious groups. These methods often give rise to resistance and can be a source of the internal conflicts that cause such problems for the application of international humanitarian law.

When deep-seated religious animosity has been the basis for the persecution of a minority group, the parties to any ensuing conflict will often lack a sense of the common humanity of the opposing side. This can lead to some of the most serious breaches of international humanitarian law, including genocide. In the case of the Rwandan genocide, for example, while many religious leaders sought to protect their people (and some were killed doing so) others participated in the genocide, using religious justifications. One of the most notorious of these was the head of Rwanda’s Seventh-Day Adventist Church, Elizaphan Ntakirutimana, who was found guilty of committing genocide, in part using his authority as a Church leader to achieve this end.

2.6 SUMMARY

- In this unit you have read that in Hinduism, the concept of dharma remains central.
- You have also seen that the Islamic concept of humanitarian law is founded on the verses of the Quran, on the words and deeds of the Prophet during the hostilities imposed upon him and, lastly, on the rules deduced by Ijma and Qiyas.
• You have learnt that the Buddhism contains to fundamental principles; *maitri* (friendliness, benevolence) and *karuna* (mercy, compassion) closely related to principle of humanity.

• Lastly, you have seen that Hugo Grotius, based on *Christ's* teachings, spoke of undesirability of war, a need for justifiable cause for war and humanitarian considerations during warfare.

### 2.7 TERMINAL QUESTIONS

1) State briefly the sources of Hindu religion and how they were useful in minimizing the miseries of war.

2) What are the three circumstances that legitimize warfare in Islam? List Ten Commandments of Abu Bakr.

3) State how Christianity has been successful in shaping humanitarian considerations during warfare?

### 2.8 ANSWERS AND HINTS

#### Self Assessment Questions

1) Refer to Section 2.3

2) Refer to Sub-section 2.3.2

3) Refer to Sub-section 2.3.3

4) Refer to Section 2.4

#### Terminal Questions

1) Hinduism is a way of life, a *Dharma*. *Dharma* does not mean religion: it is the law that governs all actions. The sources of Hindu religion are following.

   1) The primary sources of Hinduism are *Sruti* and *Smriti*. *Sruti* literally means what is heard, while *Smriti* designates what is remembered. In this regard, *Sruti* is revelation and *Smriti* tradition.

   2) *Srutis* are the four *Vedas*: the *Rig Veda*, *Sam Veda*, *Yajur Veda* and *Atharva Veda*. Each *Veda* consists of four parts: the *Samhita* (hymn), the *Brahmana* (rituals), the *Aranyakas* (interpretations) and the *Vedanta* (Upanishads).

   3) *Ramayana* and *Mahabharat*.

   4) Manu, Yajnavalkya and Prasara are the most celebrated law-givers of ancient India; the *Smritis* are named after them. There are eighteen main *Smritis* or *Dharma Sastras*. Hindu jurisprudence regards the *Smritis* as the foundation of law.

   5) The *Sruti*, *Smriti* and *Dharma Sastras* prescribe the rules for society based on *Dharma*; the laws of war can be singled out from them.

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*). In early days the practice was to declare a war, and the *Ramayana* and *Mahabhararta* epic poems both stressed the need to do so in the case of a righteous war. The practice of stopping hostilities at sunset and returning to their respective camps to tend more easily to the day’s casualties also dates from very ancient times.
Why is IHL Relevant to South Asia?

Manu has laid down certain principles that should be followed by both warring parties. For example, combat between mounted and unmounted soldiers was strictly forbidden. Furthermore, combat between warriors of officer rank and foot soldier was not allowed, since the former would generally be much better armed and trained than the latter. Collective attacks against a single soldier and the slaying of a warrior who was temporarily at a disadvantage during battle were strictly prohibited. The *Rig Veda* also laid down the right conduct of war. Vedic rules maintain that it is unjust to strike someone from behind, cowardly to poison the tip of the arrow and heinous to attack the sick or old, children and women. The laws of war in ancient India with regard to occupied territory were more humane and broader than those of international humanitarian law today.

2) Three circumstances that legitimize warfare in Islam are:

1) Aggression against Muslims, either individually or collectively, as preachers for Islam, or attempts to make Muslims apostates or the launching of war against Muslims.

2) Assistance for the victims of injustice, whether individuals or groups.

3) Self-defence and to ward off attacks on one’s homeland.

The Ten Commandments of Abu Bakr are: do not kill a woman, a child, or an old man, do not cut down fruitful trees, do not destroy inhabited areas, do not slaughter any sheep, cow or camel except for food, do not burn date palms, nor inundate them, do not embezzle, nor be guilty of cowardliness.

3) Non-violence is clearly the foundation of the Christian religious order. Based on the Christian teachings, Hugo Grotius, the father of international law, spoke of undesirability of war, a need for justifiable cause for war (*causus belli*), and humanitarian considerations during warfare. These indeed, are immediate progenitors of the current precepts of international humanitarian law.

In fact, there have been two trends in the Christian traditions, one, total pacifism based on Christ’s teachings; and other on the rationalization of these teachings for the state system — which would justify use of violence in extreme, but justified cases. The latter came to be known as the doctrine of just war. These in fact reflected attempts to regulate and limit the use of violence in inter-state relations, even while seeking to protect Christianity. They represent the European counterpart of *dharmayudha* concept in ancient India. The underlying principles are indeed, the justness of the fight, the proportionality of the use of force, and amelioration of the victims of war. A war in violation of these principles was condemned to be an unjust war.

There are two types of war that are permissible within Christian thought, the holy war and the just war. Holy war is fought for the goals or ideals of the faith and is waged by divine or religious authority. In a holy war, Christian participation is a positive duty, whereas, in a just war it is permissible, but restricted. Therefore, a holy war is automatically a just war, but a just war is not necessarily a holy war. However, wars in the name of religion or for conversion later came to be outlawed.

The distinction between *jus ad bellum* (just war) and *jus in bello* (right behaviour in the conduct of war), which is still used in international law today, has its roots in Christian teaching.
2.9 GLOSSARY

**Jus ad bellum**: (right to wage war or just war) is a set of criteria that are consulted before engaging in war, in order to determine whether entering into war is justifiable.

**Jus in bello**: (laws governing the conduct of hostilities) serves as guidelines for fighting once war has begun. Jus in bello requires that the agents of war be held responsible for their illegal actions like use of illegal means and methods in war, attack on undefended localities, war crimes, etc.

**Monotheism**: In theology, monotheism is the belief that only one God exists. The concept of “monotheism” tends to be dominated by the concept of God in the Abrahamic religions, such as Judaism, Christianity and Islam.

**Perfidy**: In the context of war, perfidy is a form of deception, in which one side promises to act in good faith (e.g. by raising a flag of surrender) with the intention of breaking that promise once the enemy has exposed himself (e.g. by coming out of cover in order to capture the surrendering forces). The examples of perfidy are (i) the feigning of an incapacitation by wounds or sickness; and (ii) the feigning of civilian, non-combatant status. IHl prohibits perfidy.

**Ruse of war**: is an action taken by a belligerent in warfare to fool the enemy in order to gain intelligence or a military advantage against an enemy. Legitimate ruses include: camouflage, concealment, transmitting false or misleading radio or telephone messages. IHl permits ruses of war.

2.10 REFERENCES AND SUGGESTED READINGS


UNIT 3 WHY STUDY IHL IN SOUTH ASIA?

Structure

3.1 Introduction
3.2 Objectives
3.3 Conflict Situation in South Asia
3.4 Importance of the South Asian Region
3.5 Why Study IHL in South Asia?
3.6 What Role can Students Play?
3.7 Implementation of IHL
3.8 Who should Implement?
   3.8.1 What Needs to be Done?
3.9 The Application of IHL in South Asia
3.10 Training in IHL
3.11 Summary
3.12 Terminal Questions
3.13 Answers and Hints
3.14 Glossary
3.15 References and Suggested Readings

3.1 INTRODUCTION

The South Asian region is one of the most dynamic regions of the world. 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. Every independent nation in this area has internal and external feuds that often erupt into border conflicts and sometimes even into declared wars.

The South Asian countries together have active armed forces consisting of over 2.4 million personnel and about 1.8 million paramilitary forces. Induction in the armed forces is voluntary. There have been four major international conflicts in the region in 1947, 1962, 1965 and 1971. The armed forces in the South Asian countries have also been deployed in internal conflicts in the last 50 years or so. The armed forces have had to deal with violent conflicts arising out of what has variously been described as terrorism, insurgency, militancy, proxy war, armed rebellion and naxalism. While being deployed in these operations, the armed forces function under special legislations. It has been claimed by various national and international NGOs that the provisions of special legislations are against the international norms of human rights. Human rights organizations have alleged that the armed and paramilitary forces in the South Asian countries, while being deployed in internal security duties have violated IHL. They have been accused of systematic and widespread human rights violations, including illegal arbitrary arrest, enforced disappearance, extrajudicial killing, rape, illegal detention and torture.
ARMED FORCES IN SOUTH ASIA

The activities of the armed forces, in the South Asian context, could be divided into three: (a) combat activities like attacks, raids and direct activity, (b) governance of the country, and (c) non-combat activities.

The non-combat activities could be further sub-divided into three: (i) domestic assistance to the civil authorities such as assistance during natural calamities and riots, and assistance in the maintenance of law and order; (ii) assistance in refugee control and unconventional warfare, security assistance (combating terrorism, counter-insurgency), psychological operations and show of force; and (iii) international assistance and peacekeeping operations.

Today, roughly 40 per cent of the soldiers deployed around the world in the United Nations peacekeeping missions belong to South Asian countries.

3.2 OBJECTIVES

After reading this unit, you should be able to:

• discuss the need for the greater dissemination and understanding of IHL in the region;

• appreciate the role which could be played by the students in the dissemination and research and development of IHL; and

• learn the need of effective implementation of IHL in the South Asian countries.

3.3 CONFLICT SITUATION IN SOUTH ASIA

Some of the recent reports related to conflict situations in the South Asian countries are as follows.

India

• The armed forces have been involved in internal conflicts since the last five decades. The use of the armed forces to aid the civil authority has raised the question of violation of human rights. The armed forces have often been accused of extra-judicial execution of innocent civilians; illegal imposition of curfew; rape, molestation and sexual harassment of women; torture; forced labour; and large-scale looting of homes and granaries under the powers vested in them by the special laws. [Noorani A G. 2009. 'Armed Forces (Special Powers) Act: Urgency of Review', Economic & Political Weekly, Vol. XLIV No. 34, August 22, 2009, p. 8-11].

• The Indian armed forces have been involved in counter-insurgency operations in Jammu and Kashmir and the North-East since the 1950s. The excessive use of the armed forces in counter-insurgency operations has raised the question of violation of common article 3 of the Geneva Conventions of 1949. Various human rights organizations in the country and abroad and foreign and local media have criticized the effectiveness of Indian laws dealing with violation of human rights by armed forces personnel. They have also criticized the special laws—The Armed Forces (Special Powers) Act (AFSPA), giving enhanced power to the armed forces for dealing effectively with disruptive activities in specific areas. [Amnesty International Report 2007, p. 134].

• In July 2004, there was an allegation of rape and murder of a 33-year-old lady by security forces in Manipur. Following the incident there were widespread protests...
Why is IHL Relevant to South Asia?

and demands for the withdrawal of the AFSPA. The movement, spearheaded by 32 social organizations, spiralled into civil disobedience and turned violent after a student leader immolated himself. [MANIPUR ON FIRE, Frontline, Volume 21, Issue 18, August 28 - September 10, 2004].

- The internal conflict in Chhattisgarh has irreparably damaged children’s lives. All parties to the conflict — Maoist rebels (Naxalites), state-supported anti-Maoist vigilante groups (known as Salwa Judum), and government security forces—have recruited children in different capacities that expose them to the risk of injury and death. [Dangerous Duty: Children and the Chhattisgarh Conflict, Human Rights Watch, September 2008, 1-56432-374-9].

Pakistan

- The Pakistan army has been involved in internal conflicts since the last five decades. There were allegations that the army personnel tortured suspected Taliban militants and sympathizers in Swat where the army recently carried out anti-Taliban operations. The 10.17 minute video, showing uniformed soldiers beating, kicking and whipping civilians was put on the BBC website. There were also reports of hundreds of mutilated bodies of suspected Taliban militants at various places in Swat and other parts of the Malakand region. The bodies have given rise to allegations of extra-judicial killings by the military; but Pakistan army strongly denied the allegation. [THE HINDU, New Delhi, Saturday, October 3, 2009, p. 15].

- 63 civilians were killed in Sra Viala area of Tirah in air strikes on 10 April 2010 by the Pakistani forces. The incident was widely condemned and forced the Army Chief to apologize, a first for the Pakistan Army, who announced a compensation of Rs 200,000 each to the families of those killed and Rs100,000 each to the injured.

Nepal

- In the year 2001, the Nepal Government promulgated the Terrorists and Disruptive Activities (Control and Punishment) Ordinance (TADO), and declared the Communist Part of Nepal-Maoist (CPN-M) a terrorist organization under the TADO. With this legislation, the government of Nepal surrendered its authority to the military, and gave it a green signal to continue with gross human rights violations including arbitrary detentions, torture, disappearances, and extrajudicial and summary executions.

The security forces targeted journalists, lawyers, human rights defenders, and witnesses of their atrocities. There were around 2000 cases of disappearances reported and army officers are said to have been involved in a large number of the recorded cases. On February 1, 2005, King Gyanendra declared a state of emergency and with the army’s backing assumed all executive authority, citing the inability of the civilian government to resolve the conflict. He ordered the detention of thousands of political activists, journalists, and human rights monitors, and imposed severe restrictions on civil liberties. In the low intensity conflict, which followed, about 38,400 people were killed, the majority being supporters of CPN-M. The Maoists taken prisoners were also eliminated. [The Asian Human Rights Commission statement available at:http://www.globalpolicy.org/component/content/article/154-general/26730.html]

- The Nepalese Army has been accused of forced disappearance, extra-judicial killing, excessive use of force, torture, prolonged arrest, custodial death, and inhuman treatment. A total of 4704 cases of violations have been instituted at

- The Supreme Court of Nepal, in its landmark 2007 judgment Rajendra Dhakal v. The Government of Nepal (Writ No. 3575, registration date Jan. 21, 1999, decision June 1, 2007), ordered the Government “to urgently enact a law which includes provisions that the act of disappearance is a criminal offence, defining the act of disappearance pursuant to the definition stated in the International Convention for the Protection of All Persons from Enforced Disappearance, 2006.” This decision was taken despite the fact that Nepal was not yet a party to the Convention on Enforced Disappearances.


Bangladesh

- The High Court Division of the Supreme Court of Bangladesh on 15 December 2009 briefly heard the Government and two human rights groups acting as interveners in a suomotu petition regarding recent reported ‘extra-judicial killings’ by the Rapid Action Battalion (RAB), a paramilitary force. The Court expressed its concern that as many as 11 incidents of “extra-judicial killings” had taken place in the country in 26 days, and requested the Attorney General to take an initiative to ensure that no such killings take place till the next hearing. (State v. Major Kazi Waheduzzaman and other).

Sri Lanka

- On May 19, 2009, the Sri Lankan government declared victory over the LTTE, marking an end to a 26-year-long armed conflict that had caused between 80,000 and 100,000 deaths. During the last months of the war both the Sri Lankan armed forces and the LTTE repeatedly violated the laws of war, causing unnecessary civilian suffering and casualties. Forced to retreat by government offensive operations, the LTTE drove civilians into a narrow strip of land on Sri Lanka’s northeastern coast, effectively using several hundred thousand people as human shields. The LTTE shot at and injured or killed many of those trying to flee from the war zone to government-held territory.

Government forces repeatedly and indiscriminately shelled densely populated areas, sometimes using heavy artillery and other area weapons incapable of distinguishing between civilians and combatants. The UN estimated that at least 7,000 people were killed and 13,000 injured during the last five months of the war. [Human Rights Watch, World Report 2010, p. 347-348. See http://www.hrw.org/world-report-2010].

- In Sri Lanka, increasing human rights abuses were attributed not only to the LTTE but also the government security forces. Amid increased military activity, police and security forces were responsible for arbitrary arrests and detention, torture, disappearances, and extrajudicial executions. There was a marked rise in allegations of rapes by police, army and navy personnel. In March 1997, two sisters were raped by four soldiers in Batticaloa district. There were many allegations against government forces of causing injury and death of civilians while carrying out their military operations.[Rajasinghe Thushara. 2007. ‘International Humanitarian Law in Conflict Situations’, in Mani V.S. (ed), Handbook of International Humanitarian Law, New Delhi: OUP, p. 141].
Why is IHL Relevant to South Asia?

<table>
<thead>
<tr>
<th>Self Assessment Question</th>
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<tr>
<td>1) List various allegations made against the armed forces for violations of IHL in South Asia.</td>
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### 3.4 IMPORTANCE OF THE SOUTH ASIAN REGION

The seven countries representing South Asian area—Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka — account for about one-fifth of the world’s population. The economic, political and military importance of the region is growing. For example, India has recently made for the first time in recent years, an important financial contribution to the work of ICRC.

Unfortunately, South Asia has been affected, and continues to be affected by non-international armed conflicts. For example, in 2007, there were 3607 incidents of terrorist violence in South Asia, which claimed the lives of 4737 people. This represents a quarter of all terrorist attacks worldwide, second only to Iraq. Nepal and Sri Lanka have seen an end to their non-international armed conflicts. Nepal is developing the institutions and legal framework necessary to build a democratic state based on the rule of law, while Sri Lanka has to settle displaced persons and bring normalcy in the northern region.

One of the most serious humanitarian consequences of armed conflicts and other situations of violence in South Asia is the internal displacement of people, often as a result of violations of IHL by parties to a conflict—with women and children particularly hard hit.

In the South Asian region there has been mistrust between human rights advocates who question the legitimacy of the military missions and security specialists who share military suspicion of a hidden human rights agenda. There have been allegations that South Asian militaries have frequently targeted human rights activists and violated IHL as part of their perceived internal security threat.

South Asia currently contributes nearly 40% of the world’s military and police deployed in peacekeeping operations under United Nations auspices. Thus, it is essential that South Asian countries should also be leaders in the implementation of IHL, and ensure that it is respected whenever applicable.

### 3.5 WHY STUDY IHL IN SOUTH ASIA?

Students today will address and advocate the use of humanitarian law during the conflicts of the future—as leaders, as members of the military and as informed members of the public. By studying this subject, students will gain an understanding of the armed conflicts and IHL, not only as they relate to historic events, but also as they apply to conflicts faced by nations and peoples today. Understanding the concepts presented in the Modules of the Certificate Course on IHL is a critical first step in a student’s study of International Humanitarian Law.

Higher education in most of the South Asian countries is based on the British system. After twelve years of schooling, a student has the option of joining any of the professional...
courses such as medicine, engineering or law. There is also the possibility of opting for basic graduate programmes in arts, science, commerce, etc. Moreover, a student can switch to professional courses after obtaining a basic degree. A certificate programme in IHL would be an added qualification for students of all the streams. Once professional qualifications in law have been achieved, an academic career can be pursued by taking up postgraduate studies and research in IHL.

The South Asian countries have signed the Geneva Conventions and are required to educate their military and the public about these laws. General audiences among the public include youth, government officials, legal and medical professionals, high school and university students, the academic community and the media. Informing the public and the military about the rules and principles of IHL through this certificate programme would ensure respect and adherence to the law. Greater public awareness worldwide helps save lives and reduce suffering.

There are over 4.2 million active military and paramilitary personnel in South Asia. They are required to be trained and retrained in IHL on a continuous basis, a task which may be difficult for the governments to achieve. A flexible training programme available through an Open University system can give an opportunity to these personnel to have a better understanding of IHL. At its heart, IHL is a matter of discipline. Promoting the highest standard of will ensure that the military chain of command is protected from the consequences of politically motivated disciplinary actions or court-martial.

The ICRC, through its Regional Delegation in New Delhi, is closely involved in promoting international humanitarian law in academic institutions in South Asia. The ICRC regularly organizes South Asian Teaching Session on international humanitarian law for postgraduate students and young university lecturers; and supports research and publications in this field. Basic training in IHL could help furtherance of ICRC’s mission in the dissemination of IHL.

Self Assessment Question

2) Discuss the importance of the study of IHL in South Asia.

3.6 WHAT ROLE CAN STUDENTS PLAY?

Currently, dozens of conflicts are raging throughout South Asia. Each day brings news of yet another atrocity perpetrated in the name of conflict: massacres, tortures, summary executions, rapes, deportation of civilians, children taking part in hostilities, killing of innocent civilians... the list is endless. Some may argue that these are just some of conflict’s necessary evils. They are not. They are illegal. They are outright violations of a universally recognized body of law known as IHL.

Influential individuals and institutions can play an important role, directly or indirectly to curb, avoid or put an end to violations of IHL or other fundamental rules protecting persons in situations of violence. They can protect or aid those affected when humanitarian problems arise. Being members of civil society, young people, university students and academic institutions can play a prominent role in this regard. The ICRC endeavours to
persuade them to take action, in the manner most conducive to promoting full respect for those fundamental rules and to ensuring that people in need receive protection and assistance.

Women and girls mostly experience armed conflict as civilians, and as such are often exposed to acts of violence. Such acts include death or injury from indiscriminate attacks and mine explosions, and also direct assaults. Sexual violence, including rape, is widespread and often used as a method of warfare against the civilian population, with women and girls as the main victims. In addition, the loss of male relatives, deprivation of access to the basic means of survival and health care makes women and girls vulnerable. Students trained in humanitarian programmes can contribute to alleviating the plight of affected women and girls.

The student community can promote respect for the rules of IHL. They can urge their respective governments and non-state actors of their region to implement the obligations under IHL. The student community can provide necessary assistance in processing, implementing and enforcing a variety of reparation schemes and awards. In addition, they can contribute to research, development and implementation of IHL.

The UN Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law was adopted by the Commission on Human Rights [Resolution E/CN.4/RES/2005/35 of 20 April 2005] and by the General Assembly Resolution 60/147 of 16 December 2005. It stipulates that reparation for serious violations of IHL include the restitution, compensation, rehabilitation, and guarantees of non-repetition. The student community could play an important role in the reparation process.

In South Asia, the student community has shown keen interest in IHL dissemination sessions conducted by the ICRC. For example, in Pakistan about 1,000 students participated in IHL dissemination session and about 500 law students participated in IHL certificate course during the year 2008. Students and lecturers from Bangladesh and Indian universities participated in ICRC-led IHL seminar and regional and national moot court competitions to increase their knowledge of IHL. In particular, a total of 625 law lecturers and students attended IHL dissemination sessions held for first time in Bangladesh in 2008. In Jammu & Kashmir, India, 19 schools took part in the pilot phase of the Exploring Humanitarian Law (EHL) programme in 2008.

3.7 IMPLEMENTATION OF IHL

As you are aware, IHL sets out detailed rules that seek to limit the effects of armed conflict. In particular, it protects those who are not, or are no longer, taking part in the fighting, and sets limits on the means and methods of warfare. Humanitarian law is a universal set of rules. Its main treaties have been accepted by nearly every State in the world. The main treaties of IHL are the following:

1) Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.


4) **Convention (IV)** relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.

5) **Protocol (I)** Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Geneva, 8 June 1977.

6) **Declaration** provided for under article 90 of Additional Protocol I: Acceptance of the Competence of the International Fact-Finding Commission.

7) **Protocol (II)** Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, Geneva, 8 June 1977.


21) Convention on Prohibition of the Use, Development and Destruction of Cluster Munitions, 2008. This treaty will come into force since 1 August 2010.

However, becoming party to these agreements is only a first step. Efforts must be made to implement humanitarian law – to turn the rules into action. The term implementation covers all measures that must be taken to ensure that the rules of international humanitarian law are fully respected. It is not sufficient merely to apply these rules once fighting has begun. There are also measures that must be taken in peacetime. These measures are necessary to ensure that:

- Both civilians and the military personnel are familiar with the rules of humanitarian law
- The structures, administrative arrangements and personnel required for compliance with the law are in place
- Grave breaches of the four Geneva Conventions are suitably punished
- Other violations of humanitarian law are prevented, and punished when they occur.

Such measures are essential to ensure that the law is truly respected.

Grave Breaches of four Geneva Conventions of 1949:

- Wilful killing; torture or inhuman treatment, including biological experiments; wilfully causing great suffering or serious injury to body or health (Art. 50/51/130/147 of GC I-IV respectively).
- Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (Art. 50/51/147 of GC I, II and IV respectively).
- Compelling a prisoner of war [or a protected person] to serve in the forces of the hostile Power (Art. 130 and 147 of GC III and GC IV respectively).
- Wilfully depriving a prisoner of war [or a protected person] of the rights of fair and regular trial prescribed in this Convention (Art. 130 and 147 of GC III and GC IV respectively).
- Unlawful deportation or transfer or unlawful confinement Art (147 GC IV).
- Taking of hostages (Art. 147 GC IV).
### 3.8 WHO SHOULD IMPLEMENT?

All States have a clear obligation to adopt and carry out measures implementing humanitarian law. These measures may need to be taken by one or more government ministries, the legislature, the courts, the armed forces, or other State bodies. There may also be a role for professional and educational bodies, the National Red Cross or Red Crescent Society or other voluntary organizations. Measures may also be taken at the national level to deal with violations of humanitarian law by the security forces. As signatories to Geneva Conventions, the States bear primary responsibility for effectively implementing the law, and must adopt measures at the national level.

#### 3.8.1 What needs to be done?

Under international humanitarian law – that is, the 1949 Geneva Conventions, their Additional Protocols of 1977 related to the protection of victims of armed conflicts, the 1954 Hague Convention on Cultural Property and the latter’s Second Protocol of 1999 – a range of measures must be taken. The main ones are:

a) to have the Conventions and Protocols translated into the national languages;

b) to spread knowledge of their provisions as widely as possible both within the armed forces and the general population;

c) to repress all violations listed as such in the above-mentioned instruments and, in particular, to adopt criminal legislation that punishes war crimes;

d) to ensure that persons, property and places protected by the law are properly identified, marked and protected;

e) to adopt measures to prevent the misuse of the red cross, the red crescent, the red crystal and other symbols and emblems provided for in the Conventions and Protocols;

f) to ensure that protected persons enjoy judicial and other fundamental guarantees during armed conflict;

g) to appoint and train persons qualified in international humanitarian law, in particular legal advisers within the armed forces;

h) to provide for the establishment and/or regulation of (i) National Red Cross and Red Crescent Societies and other voluntary aid societies, (ii) civil defence organizations, and (iii) National Information Bureaux;

i) to take account of international humanitarian law when selecting military sites and in developing and adopting weapons and military tactics;

j) to provide for the establishment of hospital zones, neutralized zones, security zones and demilitarized zones.
Some of these measures will require the adoption of legislation or regulations. Others will require the development of educational programmes, the recruitment and/or training of personnel, the production of identity cards and other documents, the setting up of special structures, and the introduction of planning and administrative procedures. All these measures are essential to ensuring effective implementation of humanitarian law. Careful planning and regular consultation is the key to effective implementation. In South Asia, Nepal and Sri Lanka have established national humanitarian law committees for this purpose. They bring together government ministries, national organizations, professional bodies and others with responsibilities or expertise in the field of implementation. Such bodies have generally proved to be an effective means of promoting national implementation.

**Legal Provisions for Implementation**

"The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances". (Article I common to the four Conventions).

"The High Contracting Parties shall...in peacetime endeavour...to train qualified personnel to facilitate the application of the Conventions and of this Protocol....". (Article 6, Protocol I).

"The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject". (Article 82, Protocol I).

"The High Contracting Parties shall, if their legislation is not already adequate, take the measures necessary for the prevention and repression, at all times, of any abuse of the distinctive signs....". (Article 45, Second Convention).

"The High Contracting Parties shall communicate to one another through the Swiss Federal Council and, during hostilities, through the Protecting Powers, the official translations of the present Convention, as well as the laws and regulations which they may adopt to ensure the application thereof". (Article 48/49/128/145 common to the four Conventions).

"The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention.... Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts". (Article 49/50/129/146 common to the four Conventions).

"The present Convention shall be applied with the cooperation and the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict. For this purpose, the Protecting Powers may appoint, apart from their diplomatic or consular staff, delegates from amongst their own nationals or the nationals of other neutral Powers". (Art. 8, GC I, II, III; and Article 9, GC IV).

"The High Contracting Parties may at any time agree to entrust to an international organization which offers all guarantees of impartiality and efficacy the duties incumbent on the Protecting Powers by virtue of the present Convention (...). If protection cannot be arranged accordingly, the Detaining Power shall request or shall accept, subject to
the provisions of this Article, the offer of the services of a humanitarian organization, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by Protecting Powers under the present Convention". (Article 10, GC I, II, III; and Art. 11, GC IV).

"The depositary of this Protocol shall convene a meeting of the High Contracting Parties, at the request of one or more of the said Parties and upon the approval of the majority of the said Parties, to consider general problems concerning the application of the Conventions and of the Protocol". (Article 7, Protocol I).

"The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of wounded and sick, medical personnel and chaplains, and for their relief". (Article 9/9/9 common to the four Conventions).

"In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in cooperation with the United Nations and in conformity with the United Nations Charter". (Article 89, Protocol I).

"The High Contracting Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol...... When circumstances permit, the High Contracting Parties shall cooperate in the matter of extradition....". (Article 88, Protocol I).

"An International Fact-Finding Commission....consisting of 15 members of high moral standing and acknowledged impartiality shall be established. The Commission shall be competent to: (i) enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol". (Article 90, Protocol I).

**Self Assessment Question**

4) List what measures must be undertaken at the state level for implementation of IHL treaties?

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3.9 THE APPLICATION OF IHL IN SOUTH ASIA

In the 60 years or so since the adoption of the Geneva Conventions of 1949, the South Asian countries have experienced an alarming number of armed conflicts. You have come across a few examples in paragraph 1.3 of this Unit. During this time, the four Geneva Conventions have provided legal protection to persons not or no longer participating directly in hostilities (the wounded, sick and shipwrecked, persons deprived of their liberty for reasons related to an armed conflict, and civilians). Even so, there have been numerous violations of these treaties, resulting in suffering and death which might have been avoided had international humanitarian law been better respected.
Although South Asia has a proud humanitarian traditions and rule protecting civilians and combatants dating back to thousands of years, IHL treaty accession and implementation rates are low in the region as compared to other parts of the world. The South Asian countries are in a pivotal position in the adherence to the principles of IHL because of their cultural heritage, which accord great value to human dignity in every adversity. Most of the countries are parties to the present-day IHL in the form of the Geneva Conventions. Apart from India and Sri Lanka no country has taken measures to make them a part of domestic law, a fact which is crucial for their enforceability. Other than Bangladesh and Maldives, no country in South Asia has ratified the two Additional Protocols of the 1949 Geneva Conventions. Nepal and Sri Lanka are the only two countries in the region which have established a National Committee for the implementation of IHL. Bangladesh is the only country which has ratified the Rome Statute of the International Criminal Court, while Ottawa Treaty relating to Anti-Personnel Landmines has been signed and ratified by Bangladesh, Bhutan and Maldives. The ratification status of South Asian countries as regard to IHL treaties is as follows.

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<th>India</th>
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**India: Geneva Conventions Act, 1960**

The Geneva Conventions Act, 1960, does not seem to have been an adequate piece of legislation incorporating India’s international humanitarian law obligations into domestic law. The Supreme Court of India has noted some of the limitations of the Act in Rev. Mons. Sebastiao Francisco Xavier dos Remedios Monteiro v. The State of Goa, AIR 1970 SC 329, as follows: “To begin with, the Geneva Conventions Act gives no specific right to any one to approach the court. The Act was passed under Art. 253 of the Indian Constitution read with entries 13 and 14 of the Union List in the Seventh Schedule to implement the agreement signed and merely provide for certain matters based on Geneva Conventions. What method an aggrieved party must adopt to move the Municipal Court is not very clear. The Act by itself does not give any special remedy. It does give indirect protection by providing for penalties for breaches of Conventions.”
3.10 TRAINING IN IHL

The 1949 Geneva Conventions and their 1977 Additional Protocols require States Parties to disseminate the content of these humanitarian treaties as widely as possible in their respective countries. Of course, their inclusion in military instruction is indispensable to ensure their implementation in time of armed conflict. But it is equally important to promote knowledge of humanitarian law among those whom it is intended to protect — the civilian population — as well as among those who have to apply it — public officials. The ICRC encourages the parties to armed conflicts to fulfil their duty to integrate IHL into their doctrine, training, and rules of engagement, and assists them where necessary. This duty stems from the obligation of all parties to respect and ensure respect for IHL. The duty to train members in IHL is recognized, in customary law, as binding both States and armed groups party to non-international armed conflicts.

In treaty law, the duty of States to provide instruction in IHL to their armed forces is found in Articles 47/48/127/144, respectively, of the four Geneva Conventions, and in Article 83 of Protocol I additional to the four Geneva Conventions. This treaty obligation is applicable both in peacetime and in times of international armed conflict. Specific to non-international armed conflicts, Additional Protocol II requires, in Article 19, that the Protocol “shall be disseminated as widely as possible.” It is important also to promote and teach IHL to the civilian population. As provided for in the four Geneva Conventions (Articles 47/48/127/144) and in Additional Protocol I (Article 83), the teaching of humanitarian law to the civilian population should be undertaken even in peacetime.

3.11 SUMMARY

- In this unit we have examined the conflicts situations in South Asia and also discussed various allegations made against the armed forces for violations of the provisions of IHL.
- We have also examined the importance of the South Asian region in the present context and the importance of IHL education in the region. As a rule the activities of the ICRC Delegation in New Delhi are conducted in collaboration with universities and other educational institutions in South Asia, and also with academic societies. Academic institutions have generally shown a keen interest in introducing international humanitarian law in higher education courses.
- We have seen the roles which could be played by the student community in the dissemination and research of international humanitarian law.
- Finally, we have examined the need for training in the IHL for military and government officials as well as the general public.

3.12 TERMINAL QUESTIONS

1) List the various allegations made against the armed forces for violations of IHL in South Asia. What is the responsibility of the state parties under the Geneva Conventions for the training of the armed forces in IHL?

2) Justify the need for the study of IHL in the South Asian countries.

3) State the measures which must be undertaken by the state parties for the effective implementation of IHL.
Why is IHL Relevant to South Asia?

3.13 ANSWERS AND HINTS

Self Assessment Questions

1) Refer to Section 3.3

2) Refer to Section 3.5

3) Refer to Section 3.7

4) Refer to Sub-section 3.8.1

Terminal Questions

1) The allegations against the armed forces of South Asia for the violations of IHL are following:

   1) Killing of civilians in air strikes.

   2) The extra-judicial execution of innocent civilians; illegal imposition of curfew; torture, rape, molestation and sexual harassment of women; forced labour; and large-scale looting of homes and granaries under the powers vested in them by the special laws.

   3) Recruiting children in different capacities that exposes them to the risk of injury and death.

   4) Illegal detention of political activists, journalists, and human rights monitors, and imposed severe restrictions on civil liberties.

   5) The bombing of densely populated areas, sometimes using heavy artillery and other area weapons incapable of distinguishing between civilians and combatants.

   6) While operating in the East Pakistan (now Bangladesh) in 1971, the Pakistan armed forces were also accused of atrocities and were involved in gross violations of IHL.

In treaty law, the duty of States to provide instruction in IHL to their armed forces is found in Articles 47/48/127/144, respectively, of the four Geneva Conventions, and in Article 83 of Protocol I additional to the four Geneva Conventions. This treaty obligation is applicable both in peacetime and in times of international armed conflict. Specific to non-international armed conflicts, Additional Protocol II requires, in Article 19, that the Protocol “shall be disseminated as widely as possible.” The 1949 Geneva Conventions and their 1977 Additional Protocols require States Parties to disseminate the content of these humanitarian treaties as widely as possible in their respective countries. Their inclusion in military instruction is necessary to ensure their implementation in times of armed conflict.

2) Students today will address and advocate the use of humanitarian law during the conflicts of the future—as leaders, as members of the military and as informed members of the public. By studying IHL, they will understand the laws of war and armed conflict, not only as they relate to historic events, but also as they apply to conflicts faced by nations and peoples today.

Higher education in most of the South Asian countries is based on the British system. After twelve years of schooling, a student has the option of joining any of the professional courses such as medicine, engineering or law. A certificate
programme in IHL would be an added qualification for students of all the streams to get associated with humanitarian tasks. Once professional qualifications have been attained, such as a degree in law which qualifies a person for entry into the legal profession as a lawyer, an academic career can be pursued by taking up postgraduate studies and research in IHL.

The South Asian countries have signed the Geneva Conventions and are required to educate their military and the public about these laws. General audiences among the public include youth, government officials, legal and medical professionals, high school and university students, the academic community and the media. Informing the public and the military about the rules and principles of IHL through this certificate programme would ensure respect and adherence to the law. Greater public awareness worldwide helps save lives and reduce suffering.

The ICRC, through its Regional Delegation in New Delhi, is closely involved in promoting international humanitarian law in academic institutions in South Asia. It has conducted teaching sessions on IHL for postgraduate students and young university lecturers; and also encourages support for research and publications in this field.

3) Under the 1949 Geneva Conventions, their Additional Protocols of 1977, the 1954 Hague Convention on Cultural Property certain measures are essential for the effective implementation of IHL. Some of these measures will require the adoption of legislation or regulations. Others will require the development of educational programmes, the recruitment and/or training of personnel, the production of identity cards and other documents, the setting up of special structures, and the introduction of planning and administrative procedures. The measures are:

a) Translation of the Conventions and Protocols into the national languages

b) Spreading knowledge of the provisions of conventions as widely as possible both within the armed forces and the general population

c) Repressing all violations listed as such in the Conventions and instruments and, in particular, to adopt criminal legislation that punishes war crimes

d) Ensuring that persons, property and places protected by the law are properly identified, marked and protected

e) Adopting measures to prevent the misuse of the Red Cross, the Red Crescent, the Red Crystal and other symbols and emblems provided for in the Conventions and Protocols

f) Ensuring that protected persons enjoy judicial and other fundamental guarantees during armed conflicts

g) Training and appointing persons qualified in IHL, as legal advisers in the armed forces

h) Providing for the establishment and/or regulation of (i) National Red Cross and Red Crescent Societies and other voluntary aid societies, (ii) civil defence organizations, and (iii) National Information Bureaux

i) Considering IHL when selecting military sites and in developing and adopting weapons and military tactics

j) Establishing hospital zones, neutralized zones, security zones and demilitarized zones.
3.14 GLOSSARY

Command Responsibility: In an armed conflict, each belligerent party bears the responsibility for the conduct of the members of its armed forces. The doctrine of command responsibility can be defined as the responsibility of commanders for war crimes committed by subordinate members of their armed forces or other persons subject to their control. This responsibility includes the failure to prevent or punish subordinates for their unlawful actions.

Fundamental Principles of IHL: The fundamental principles of IHL can be summarized as follows:

I. Attacks must be confined to military objectives, and neither civilians nor civilian property may be attacked. If there is a doubt about whether a target is a civilian or military one, it must be assumed to be civilian.

II. An enemy who has surrendered or who cannot take part in fighting any longer may not be killed or wounded.

III. The wounded and sick must be cared for by whichever party to the conflict has taken them under its control. Medical personnel and equipment are exempt from attack.

IV. Prisoners of war and civilians who are in the power of an enemy must have their rights protected.

V. There are practical constraints on the methods and means of warfare that are allowed. In particular, those which cause unnecessary losses or sufferings are illegal.

VI. Reprisals are forbidden.

VII. Unavoidable civilian casualties are acceptable, but every effort should be made to keep them to a minimum, and they should be proportionate to the military advantage expected to be gained.

Implementation: the term implementation covers all measures that must be taken to ensure that the rules of IHL are fully respected.

3.15 REFERENCES AND SUGGESTED READINGS


