International humanitarian law: an Indo-Asian perspective

by
V. S. MANI

Humanitarian law applicable in armed conflict must be as old as armed conflict itself. Resort to arms is, by and large, a demonstration of that barbaric aspect of human nature which led political philosophers like Thomas Hobbes to assume that human life in "the state of nature" is "solitary, selfish, nasty, brutish and short", and argue in favour of a *Leviathan* — an all-powerful sovereign State. The irony of it is, however, that the State, which has over the years come to establish a civilized internal system for the maintenance of law and order and strives for the welfare of the community, behaves on the international plane downright "selfish, nasty, and brutish" in its dealings with other States, often throwing to the winds the high ideals, the moral precepts and the principles of humanity which it swears by and seeks to uphold within its national society.

The seminal problem of all law, and hence of international humanitarian law, is the yawning gap between precepts and practice. That the precepts are ingrained in the accumulated wisdom of all human civilizations is beyond dispute. All civilizations have converged in their acceptance of them. All that the Battle of Solferino of 1859 and Henry Dunant's Red Cross movement have done in prompting such a widespread compassionate response has principally been to revive, intensify, build upon and sustain, on a continuous basis, those traditional precepts. Recognition of this fact is important for several

V. S. MANI is Professor for International Legal Studies, School of International Studies, Jawaharlal Nehru University, New Delhi, India, and Director of its Human Rights Teaching and Research Programme.

reasons. First and foremost, the precepts of international humanitarian law belong to the whole of humanity, both politically and culturally. They are not only products of the nascent European civilization of the post-Westphalian era. While Hugo Grotius spoke of *temperamenta ac belli* (humane moderation during war) in the early seventeenth century, the wise men of India and China discoursed on it some five thousand years ago. Secondly, the famous *Martens clause* lays down the principle (which, it is submitted, must be elevated to the position of a *jus cogens,* i.e. a peremptory norm of international law from which no derogation is permitted, within the meaning of Article 53 of the 1970 Vienna Convention on the Law of Treaties) that "civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience".[1] This principle, now thus crystallized for us, has developed as part of the evolution of human civilization down the ages. It emphasizes the universality of the essence of international humanitarian law. Finally, for that reason alone, compliance with "the elementary considerations of humanity"[2] is both a moral as well as a legal duty of the parties to an armed conflict — nay, it is the most natural thing to do between human beings.

It is therefore pertinent to search for and identify the roots of the principles of international humanitarian law in all great civilizations of the world. Hence this excursus into the historical foundations of the principles of that law in the Indian civilization through the ages, relating them to the contemporary era. It must be noted, however, that

1 Art. 1, para. 2, Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. Indeed, the Martens clause seeks to cover the ground, if any, left open by the various international agreements, so that no party to an armed conflict can avoid international responsibility by arguing with impunity that its impugned actions were not specifically prohibited, and were hence permitted, under international treaty law. But in the process, it has established a basic principle of international law.

2 The International Court of Justice, in the *Corfu Channel* case, spoke of "certain general and well recognized principles, namely elementary considerations of humanity, even more exacting in peace than in war". *I.C.J. Reports 1949,* p. 22. See also its reiteration in the *Nicaragua* case, *ICJ Reports 1986,* p. 112.

since the Indian civilization is no exception with regard to the general gap between precepts and practice, the emphasis will be placed on the precepts, not on aberrations in practice.[3] Indeed, bad and ruthless rulers are no monopoly of any particular civilization.

The present study traces the evolution of humanitarian principles through the evolution of the Indian polity from antiquity through medieval and colonial times to the modern era.

Ancient India (up to AD 711)

In the early, pre-Vedic, period, when Indian society was organized in tribal communities, war between communities was "normal", with no holds barred.[4] Yet in many parts of India, the process of war was divided into five stages: 1. seizure of the enemy's cattle; 2. mobilization for invasion; 3. bombardment of the enemy fortress; 4. actual fighting; and 5. victory. The seizure of cattle was an advance warning of an attack, and gave civilians and non-combatants time to seek shelter.

As society began to stabilize and became more and more politically and socially organized during the Vedic period, the Vedas, the Sastras and the epics of *Ramayana* and *Mahabharata* started prescribing or assuming the existence of laws and customs of war. There were two kinds of war: *dharma yuddha* (righteous war) and *adharma yuddha* (unrighteous war). A righteous war was fought for a righteous cause. Except for Kautilya's prescriptions, most other early publicists recorded a general theoretical agreement on banning illegitimate methods of warfare: "A war for righteous cause must be righteously conducted."[5]

3 In order to establish the State practice in support of a principle, the ICJ would not expect "complete consistency" on the part of States. "The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as *breaches* of that rule, not as indications of the recognition of a new rule." *Nicaragua* case, *ICJ Reports 1986*, p. 98.

4 See generally K. R. R. Sastry, "Hinduism and international law", *Recueil des Cours*, Académie de droit international, The Hague, Vol. 117 (1966-I), pp. 503-614, pp. 567 ff.

5 See Jawaharlal Nehru, *The Discovery of India*, 5th reprint, Signet Press, Calcutta, 1948, p. 108.

While the idea of non-violence (*ahimsa*) is found in the Scriptures, it was largely ignored, except for the defiant, normative contribution of Buddhism. Yet the impact of Buddhism was so great that it converted Emperor Asoka (273-232 BC), the greatest king of his time, to the faith of non-violence. In Nehru's words: "Unique among the victorious monarchs and captains in history, he [Asoka] decided to abandon warfare in the full tide of victory."[6] But Asoka remains an exception to this day, although his conduct offered the most powerful challenge to the moral legitimacy of the many opportunistic rules of warfare propounded by Kautilya, his grandfather's stern mentor. In terms of humanitarian law, Asoka represents the earliest incarnation of the principle of non-use of force in international relations that is now enshrined in Article 2, paragraph 4, of the United Nations Charter.

Many ancient texts such as the *Ramayana,* the *Mahabharata,* the *Agni Purana,* and the *Manu-smrti* embody a number of ethical precepts that emerged in ancient India.[7] These precepts may be categorized according to four principal aspects of armed conflict as we identify them today: 1. methods of warfare; 2. means or weapons of war; 3. treatment of persons *hors de combat* (i.e. those who, as wounded or as prisoners, have been placed out of action); and 4. treatment of civilians. The main requirements of some of these precepts are given below.

Methods of warfare

The credo of the ancient sages appears to have been that "a war for a righteous cause must be righteously conducted". Combat must be between two warriors similarly placed. A warrior in armour should not fight with another without similar protection. Warriors should fight only with equals. A king should fight only with a king. A

6 *Ibid.*

7 This paper places general reliance on Nehru, *ibid.*; Sastry, *op. cit.* (note 4); and Nagendra Singh, *India and International Law,* New Delhi, 1969. See also J. C. Chacko, "India's contribution to the field of international law concepts", *Recueil des Cours,* Académie de droit international, The Hague, Vol. 93 (1958-I), pp. 121-218.

cavalry soldier should fight only with a cavalry soldier, not with a chariot-borne warrior. He whose weapon has been broken, whose bowstring has been cut or who has lost his chariot should not be struck.

A principle of proportionality seems to have existed with regard to the use of weapons. Nagendra Singh quotes a stanza from the *Mahabharata* highlighting the restraint shown by Arjuna who refrained from using the *Pasupastra* (a "hyperdestructive" weapon granted to him by Lord Siva, the god of destruction), because warfare then was restricted to conventional weapons. Such use of unconventional weapons "was not even moral, let alone in conformity with religion or the recognized laws of warfare".[8]

There should be no deception in methods of warfare. However, a famous deviation, justified by the "righteousness" of war, was the trick played by Yudhishthira on Drona by naming an elephant after the latter's son, Aswathhama, killing it and then shouting aloud that Aswathhama had been killed in war — and this led to the defeat of a heartbroken Drona. Fighting with concealed weapons amounted to treachery and was condemned. Only Kautilya has openly disagreed with this precept.[9] According to the *Mahabharata*, it was customary to fight only during the day, and cease fighting at sunset until daybreak.

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 with gay abandon. A classic demonstration of this was given during Rama's war with the demon king, Ravana, when

8 Nagendra Singh, *ibid.*, p. 6.

9 *Kautilya's Arthasastra*, R. Samasastry (transl.), 5th ed., Mysore, 1956, Books X to XIV. See a typical statement: "He who is possessed of a strong army, who has succeeded in his intrigues, and who has applied remedies against dangers, may undertake an open fight, if he has secured a position favourable to himself; otherwise a treacherous fight." *Ibid.*, p. 394.

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 objective and was classed as a devil-demon himself and hence could be considered outside the then world of civilization".[10] This example is entirely relevant in the context of contemporary debates on nuclear weapons.

Treatment of non-combatants and prisoners of war

There were copious rules relating to the treatment of persons who were not directly involved in the war or who were captured as prisoners of war. Enemy non-combatants, such as charioteers, mahouts (elephant drivers), war musicians or priests, should not be fought with. A panic-stricken foe or an enemy on the run should not be followed in hot pursuit. Guards at the gates should not be killed.

A weak or wounded man, or one who has no son, should not be killed. He who surrendered or was defeated should not be killed, but captured as a prisoner of war and treated with dignity. A wounded prisoner should either be sent home or should have his wounds medically treated. There is an oft-cited instance apparently related to the Macedonian King Alexander's invasion of India in the summer of 326 BC. Alexander, after a hard-fought war, defeated the Indian King Paurava (Poros) and took him prisoner. When he asked the latter how he expected to be treated, Paurava advised him: "Act like a king". So impressed was Alexander by the valour and courage of the Indian king that he not only returned his kingdom to him but also added some more territories to it, and gained a faithful friend.[11]

Treatment of civilians and civilian objects

The ancient texts lay great emphasis on the protection of civilians and civilian objects from the adverse impact of warfare. A

10 Nagendra Singh, *op. cit.* (note 7), p. 5. He cites *Ramayana*, Yuddha Kanda, sloka 39.

11 *Ibid.*, pp. 7-8.

peaceful citizen walking along a road, or engaged in eating, or who has hidden himself, and all civilians found near the scene of battle should not be harmed.

Fruits, flower gardens, temples and other places of public worship should be left unmolested. Protection of civilians is the *leitmotif* in most texts. Even Kautilya, who otherwise so characteristically deviates from the majority of texts with regard to the conduct of war, emphasizes the need to protect civilians and their way of life. Hence his wise counsel chiefly stemming from the rationale of pragmatism or utilitarianism, rather than idealism:

> "When a fort can be captured by other means, no attempt should be made to set fire to it; for fire cannot be trusted; it not only offends gods, but also destroys the people, grains, cattle, gold, raw materials and the like. Also the acquisition of a fort with its property all destroyed is a source of further loss."[12] And again:
>
> "The territory that has been conquered should be kept so peacefully that it might sleep without any fear... By the destruction of trade, agricultural produce, and standing crops, by causing the people to run away, and by slaying their leaders in secret, the country will be denuded of its people."[13]

Indeed, as Jawaharlal Nehru, the eminent Indian historian, notes, it was a common practice in ancient times for the warring parties to enter into formal agreements with the headmen of self-governing village communities, undertaking not to harm the harvests in any way and to give compensation for any injury unintentionally caused to the land.[14] Wars were usually fought on plains, away from inhabited areas.

Medieval India (AD 711-1600)

While the ancient traditions of Hinduism and Islam forbade the committing of excesses during war, seldom were limits placed in actual practice on methods and means of warfare. The Hindu and

12 Samasastry, *op. cit.* (note 9), Book XIII, Chapter IV, p. 434.

13 *Ibid.*, p. 433.

14 Nehru, *op. cit.* (note 5), p. 105.

Muslim versions of the just war doctrine were interpreted in a partisan way to permit, nay even mandate, total elimination of the non-believer. Invaders such as Mahmud of Ghazni, Mohammad of Ghaur, Nader Shah of Persia, and Timur of Samarkand (Tamerlane) invaded India mainly to plunder her riches, and therefore their military campaigns were marked by senseless pillaging, looting, destruction and slaughter. Ala-ud-Din Khalji's incursions into southern India were associated with "the sack of cities, the slaughter of the people and the plunder of temples".[15]

Such was the mood of those times. Yet their history also records dazzling instances of chivalry. From the State practice of the Ranas of Chittoor, in Rajasthan, Nagendra Singh cites some examples of the release of prisoners of war. In AD 1437, Maharana Kumbha of Chittoor defeated Sultan Mahmud Khilji and brought him captive to Chittoor. Khilji remained a prisoner for six months; thereafter he was set free without ransom. Again, Maharana Sanga defeated Mahmud Khilji II, the King of Malwa and took him prisoner. Subsequently, he set him free, "loaded him with gifts and reinstated him on the throne".[16]

There were other instances as well. In AD 1526, when Ibrahim Lodi, Sultan of Delhi, was defeated by Raja Ram Chand and made prisoner, the Raja honoured him by seating him on the throne. Nagendra Singh also notes another "well-known classic example" (one of the "romantic anecdotes of Indian history") of the conduct of the young Mughal emperor, Humayun, soon after the historic Battle of Panipat in 1526. Sultan Ibrahim Lodi and Vikramajit, the ruler of Gwalior, were killed in the battle. The wives and children of the Raja of Gwalior had been left in the Agra Fort and the Mughal army captured them. Hearing of this, Prince Humayun intervened, treated them with courtesy, and protected them from their captors.[17]

15 R. C. Majumdar, A. C. Raychaudhuri and Kalikinov Datta, *An Advanced History of India*, Macmillans, Madras, 1988 (reprint), p. 298.

16 Nagendra Singh, *op. cit.* (note 7), p. 8.

17 *Ibid.*, pp. 8-9. The royal captives, in order to show their gratitude, presented Humayun with jewels and precious stones.

Some treaties concluded at the end of a war contained provisions relating to the repatriation of prisoners of war. Nagendra Singh cites a treaty between the Sultanate of Bahmini and the Vijayanagara Empire in the south. After several decades of war, the two kingdoms concluded a treaty in AD 1367 whereby, "being reproached by the ambassadors of Vijayanagara for indiscriminate massacre of Hindu women and children, Muhammad Shah [Bahmini Sultan] 'took oath, that he would not, hereafter, put to death a single enemy after a victory and would bind his successors to observe the same line of conduct' ". From that time onwards, "it has been the general custom in the Deccan to spare the lives of prisoners in war, and not to shed blood of an enemy's unarmed subjects".[18] Although it is doubtful if such was "the general custom in the Deccan" following the treaty, the treaty represents an illustration, albeit rare, of the moral authority of humanitarian law amidst the clash of arms.

Colonial era (1498-1945)

The era of European colonization began with Vasco da Gama's landing at the Port of Kozhikode on 27 May 1498. European colonialism represented an oriental version of the Dark Ages. It negated all that the composite Indian civilization stood for. The European colonizers refused to apply to Asia and its princes what little international law they had developed in Europe. Indeed, they argued that the rules of international law applied only in Europe.[19]

18 *Ibid.*, p. 10.

19 K. M. Panikkar quotes Burroes, a Portuguese historian, who said: "It is true that there does exist a common right of all to navigate the seas and in Europe we recognize the rights which others hold against us; but the right does not extend beyond Europe and therefore the Portuguese as Lords of the Sea are justified in confiscating the goods of all those who navigate the seas without their permission." K. M. Panikkar, *Asia and Western Dominance: A Survey of the Vasco da Gama Epoch of Asian History 1498-1945*, London, 1959 (8th reprint 1970), p. 35. Burroes' blatant statement comes in justification of the plunder and massacre by Vasco da Gama of Muslim pilgrims returning from Mecca. This occurred during his second voyage to India.

All wars throughout human history have violated the humanitarian law precepts. But colonialism was founded literally on the blood of Asians and Africans. Colonial history was replete with instances of wanton killings, plundering, looting, destruction and devastation, displaying unparalleled cruelty and impunity.

In its struggle for independence India experienced several such inhuman acts of repression (including the Jallianwalla Bagh massacre of 1919). Since the days of Robert Clive, the British colonial army had never had any dearth of General Dyers. It will therefore suffice to cite just one instance of the colonial administration's wanton use of force and inhumane attitude. The 1857 uprising and the British response to it revealed extraordinary depths of inhumanity. The last Mughal emperor, Bahadur Shah Zafar, was taken prisoner and deported for life to Rangoon (now Yangon, Myanmar). His sons and grandson were killed instantly by their British captors after they were taken prisoner, on an unproved charge of murdering Englishmen. In the words of G. B. Malleson, an English historian, "a more brutal or a more unnecessary outrage was never committed. It was a blunder as well as a crime."[20] The scene at Delhi, upon entry of the British troops in September 1857, was described by the British-run *Bombay Reporter* as follows: "All the city people found within the walls when our troops entered were bayoneted on the spot; and the number was considerable, as you may suppose when I tell you that in some houses forty or fifty persons were hiding."[21] In Jawaharlal Nehru's words describing the horror of the British retaliation to the revolt, based on the accounts of British historians: "The days of Timur and Nadir Shah were remembered; but their exploits were eclipsed by the new terror, both in extent and length of time it lasted. Looting was allowed for a week, but actually lasted for a month, and it was accompanied by wholesale massacre."

In several cities such as Allahabad, Kanpur and Lucknow, "bloody assizes" were held by British soldiers and civilians, and they, with or without any assizes at all, slew Indians regardless of age or sex.

20 Quoted in Nehru, *op. cit.* (note 5), p. 778. **21** *Ibid.*, p. 777.

Even volunteer parties went into districts with amateur executioners.[22] Indeed, a legal technician may not consider the British to have been *legally* bound by any European humanitarian law — the first Red Cross Convention took shape only in 1864. Principles of British constitutional law perhaps did not apply to British colonies either, except when the British Parliament willed so. And there was no "commercial" reason for the British Parliament to have willed it then.

The standard of compliance by the Indian rulers of the colonial era with humanitarian laws was, by and large, better than that of the British, although there were also some rulers who recognized no limits to the use of force, the maltreatment of subjugated people or the besieging and plundering of cities. A few powerful rulers were known for exemplary conduct in their treatment of their enemies and the civilian population. Krishnadeva Raya of Vijayanagara, in a war with King Gajapati Prataparudra of Orissa in 1514, captured the latter's fortress of Udayagiri and took his uncle and aunt as prisoners of war, but treated them with due honour.[23] Chhatrapati Shivaji, the most powerful of the Marathas in the early seventeenth century, respected women, mosques and non-combatants, did not permit the slaughter of humans after battle, and released with honour the captured enemy officers and men. "[T]hese surely are no light virtues", says historian H. G. Rawlinson.[24]

Save for such silver linings, which were few and far between, the colonial period was indeed the Dark Ages in terms of India's cultural and civilizational continuity.

The modern era (since 1947)

Since its accession to independence, India has charted for itself an independent foreign policy. Jawaharlal Nehru, the architect of that policy, proclaimed a year before independence:

22 *Ibid.*, p. 270.

23 Majumdar, *op. cit.* (note 15), p. 363.

24 Quoted in *ibid.*, p. 515. These virtues of Shivaji were appreciated even by his hostile critics, such as Kafi Khan.

> "We propose, as far as possible, to keep away from the power politics of groups, aligned against one another, which have led in the past to world wars and which may again lead to disaster of an even vaster scale. We believe that peace and freedom are indivisible and the denial of freedom anywhere must endanger freedom elsewhere and lead to conflict and war..."[25]

Article 51 of the Constitution of India, 1950, enjoins the State to "endeavour to (a) promote international peace and security; (b) maintain just and honourable relations between nations; (c) foster respect for international law and treaty obligations in the dealings of organized peoples with one another..."[26] Article 253 of the Constitution empowers the Indian Parliament to enact any law in order to implement any treaty or agreement to which India is a party, or even any decision of an international conference, notwithstanding anything contained in the Constitution in respect of distribution of legislative competence between Parliament and State (provincial) legislatures.

India became party to the 1949 Geneva Conventions for the protection of war victims in 1950 (it has not yet become party to the 1977 Additional Protocols), and incorporated them into its statute book through the Geneva Conventions Act, 1960. The Statement of Objects and Reasons made by the government while introducing the bill for this enactment explained that the enactment was required because it was expected of India as a party to the Conventions to provide for:

25 Jawaharlal Nehru's broadcast speech on the All India Radio, 7 September 1946, reproduced in *The Hindustan Times* (New Delhi), 8 September 1946, and *The Hindu* (Madras), 9 September 1946. Nehru was speaking in his official capacity as the Vice-President of the Interim Government of India. Nehru's speech has since been reproduced under the title "Free India's role in world affairs", in Surjit Mansingh, *Nehru's Foreign Policy, Fifty Years On*, New Delhi, 1998, pp. 19-24.

26 For more on Indian law and practice of incorporation of treaties into domestic law, see V. S. Mani, "Effectuation of international law through the municipal legal order: the law and practice of India", *Asian Year Book of International Law*, Vol. 5, 1995, pp. 145-74.

- punishment of "grave breaches" referred to in Article 50 of the First Geneva Convention and equivalent articles of the succeeding Conventions;
- conferment of jurisdiction on our courts to try offences under these Conventions, even when committed by foreigners outside India;
- extension of the protection given under the existing law to the emblem of the red cross and to the two other emblems, namely, the red crescent on a white ground and the red lion and sun on a white ground;
- procedural matters relating to legal representation, appeal, etc.[27]

The Act is in five chapters. The first chapter deals with preliminaries such as the title, extent and commencement of the Act, and definitions. It clarifies that the Act provides for punishment of grave breaches of the Conventions, committed by "any person" "within or without India". The second chapter incorporates punishment of offenders committing grave breaches of the Conventions and the jurisdiction of courts to deal with the breaches. The punishment encompasses death or life imprisonment for wilful killing of a protected person, and imprisonment for fourteen years for other offences. The Act specifies the level of civil court (Chief Metropolitan Magistrate in Bombay, Madras or Calcutta, or a Court of Sessions in other places) to exercise jurisdiction under the Act.[28] However, court-martial proceedings under the Army Act of 1950, Air Force Act of 1950 and the Navy Act of 1957 are explicitly excluded from the application of the Act.[29]

27 See *Gazette of India 1959, Extraordinary, Part I, section 2*, p. 1098, quoted in M. K. Balachandran, "Principles of international humanitarian law in the Indian Constitution and domestic legislation", *Bulletin on International Humanitarian Law and Refugee Law*, Vol. 1, New Delhi, 1996, pp. 67-100, esp. p. 74. Balachandran's is one of the very few studies on the Indian law on international humanitarian law.

28 This level of courts in India has ordinary jurisdiction to try serious criminal offences.

29 Section 7 of the Act. This almost confers on the armed forces' top brass the privilege of deciding whether the jurisdiction of the ordinary court should be precluded.

The third chapter provides for the procedure of trial of protected persons and certain other persons, including the requirements of notice and legal representation. The fourth chapter seeks to protect the red cross and other emblems from abuse and provides for penalties there of.

The final chapter deals with matters like the cognizance of offences under the Act and the power of the Government of India to make rules under the Act. A crucial provision, however, is section 17, which specifically forbids courts to take cognizance of any offence under the Act except on a complaint by the Government or of an officer duly authorized, thereby preventing the application of the Act against the government or its agencies.

The Geneva Conventions Act does not seem to have been an adequate piece of legislation incorporating India's international humanitarian law obligations into domestic law.[30] The Supreme Court of India clearly noted some of the limitations of the Act in *Rev. Mons. Sebastiao Francisco Xavier dos Remedios Monteiro* v. *The State of Goa* 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 provides for certain matters based on Geneva Conventions. What method an aggrieved party must adopt to move the Municipal Court is not very clear...
>
> "...It will thus be seen that the Act by itself does not give any special remedy. It does give indirect protection by providing for penalties for breaches of Conventions. The Conventions are not made enforceable by government against itself nor does the Act give a cause of action to any party for the enforcement of

30 For a good critique of the Act, see Balachandran, *op. cit.* (note 27).

Conventions. Thus there is only an obligation undertaken by the Government of India to respect the conventions regarding the treatment of civilian population but there is no right created in favour of protected persons which the court has been asked to enforce. If there is no provision of law which the courts can enforce the court may be powerless and the court may have to leave the matter to what Westlake aptly described as indignation of mankind."[31]

The Supreme Court's jurisprudence has, since 1977, undergone a sea-change, *inter alia* in matters of human rights or fundamental rights in the language of the Indian Constitution: in situations which reveal serious inadequacies in the Indian law, the human rights provisions in the Constitution have since then been interpreted and applied by the Court in harmony with developments in international law, without waiting for the legislature to formally amend domestic law. The Constitution of India makes some of the fundamental rights available to "all persons", not merely to Indian nationals. Thus in the *Chakma Refugees* cases[32] the Supreme Court of India specifically held that the Article 21 guarantee of the right to life and personal liberty is applicable to foreigners as well, and that the Indian State has an obligation to protect the life and personal liberty of even refugees if they have been admitted into the Indian territory. As applied by the Indian Supreme Court, Article 21 encompasses the whole gamut of protection of the person and dignity of an individual, and the reference to "personal liberty" covers most essentials of criminal jurisprudence.

31 Decided on 26 March 1969, reported in *All India Reports 1970 Supreme Court 329*, as also in *Supreme Court Reports 1970*, pp. 87-102. This case bore upon the issue of applicability of the Geneva Conventions to Goa as an "occupied territory". The Court held the Conventions and the Act inapplicable as the wartime occupation had ceased with the cessation of armed conflict.

32 *National Human Rights Commission* v. *State of Arunachal Pradesh*, reported in (1996) 1 *Supreme Court Cases* 742; *State of Arunachal Pradesh* v. *Khudiram Chakma*, reported in (1994) *Supp.* 1 *Supreme Court Cases* 615; *Louis De Raedt* v. *Union of India*, reported in (1991) 3 *Supreme Court Cases* 554.

In the light of the human rights jurisprudence of the Indian judiciary, however, the Geneva Conventions Act along with the rest of the armed forces legislation referred to above awaits revision.[33]

Concluding remarks

South Asia in general, and India in particular, can rightly be proud of its cultural heritage. The basic principles of international humanitarian law are an intrinsic part of that heritage. They have at times been dimmed, but never diminished as central to it, and are found intermingled with the ethos of each passing historical era.

India, as the largest democracy in the world, is rightly expected to live up to these principles. The Indian legal and institutional framework, based on respect for fundamental rights, is extremely conducive, sensitive and responsive to the implementation of the principles of international humanitarian law. Indeed, the Indian laws, such as the 1960 Geneva Conventions Act, need to be brought in line with these general cultural and constitutional contours of the Indian polity.

India's armed forces have by now established a proud and enviable record of compliance with the dictates of international humanitarian law, to which their Military Manual by and large conforms. The various engagements across India's borders, as well as those under the aegis of the United Nations in which India's peacekeeping forces participated, have largely demonstrated this compliance.

One of the important aspects of the 1949 Geneva Conventions, and hence of the Act of 1960, is that specific procedures are laid down for the execution of these treaties. At least two of the provisions found in common in some or all of them may be high-

33 The Indian judiciary has, however, been in the habit of making sure that the court martial proceedings conform to the human rights standards of the Indian Constitution. Thus, for instance, the Supreme Court of India held in *S. N. Mukherjee* v. *Union of India*, (1990) 4 *Supreme Court Cases* 594, para. 42:

"This Court under Article 32 and the [State] High Courts under Article 226 [of the Constitution] have, however, the power of judicial review in respect of proceedings subsequent thereto [i.e., in respect of the court martial proceedings] and can grant appropriate relief if the said proceedings have resulted in denial of the fundamental rights guaranteed under Part III of the Constitution or if the said proceedings suffer from a jurisdictional error."

lighted. First, each party to an armed conflict has an obligation, acting through its commanders-in-chief, to "ensure the detailed execution" of each of the Conventions, and "provide for unforeseen cases, in conformity with the general principles of the present Convention".[34] Secondly, States party to these treaties have undertaken, "in time of peace as in time of war, to disseminate [the texts of the Geneva Conventions] as widely as possible in their respective countries, and in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population".[35] It is heartening to note that the Indian armed forces have taken meaningful steps towards implementation of these solemn international undertakings, which are now part and parcel of Indian law.

●

34 First Convention, Article 45, Second Convention, Article 46.

35 First Convention, Article 47, Second Convention, Article 48, Third Convention, Article 127, and Fourth Convention, Article 144.

Résumé

Droit international humanitaire : une perspective indo-asiatique

par V. S. MANI

Par son analyse de l'histoire indienne, l'auteur démontre que les principes humanitaires font partie de l'héritage intellectuel et culturel de toutes les civilisations. Loin d'être une exclusivité de l'Occident européen, les principes fondamentaux du droit international humanitaire ont des racines profondes en Inde également. L'auteur rappelle des règles et la pratique en matière humanitaire observées au cours de différents conflits du passé, de l'Antiquité jusqu'à l'époque moderne. Dans la seconde partie de son essai, V. S. Mani examine la législation actuellement en vigueur en Inde pour la mise en œuvre des Conventions de Genève de 1949. Par ailleurs, il souligne l'importance du travail de diffusion entrepris au sein des forces armées indiennes afin de mieux faire connaître les règles de base du droit international humanitaire au personnel militaire.