

## STUDENT CONTRIBUTION

---

# What Can International Law Learn from Indian Mythology, Hinduism and History?

---

Alakh Niranjan Singh\* and Prabhakar Singh<sup>†</sup>

*Modern India has been rather silent on its role in international law. This reticence remains unexplained in the comparative literature on international law. India's history with international relations theories date back to ancient times. Various Hindu texts from some eight millennia ago passed over to generations by the method of "shruti" and manuscripted later, contain one of the most complete sets of international laws and relations. "Dharma" remains the central aspect to this discourse. The opinions of the International Court of Justice (ICJ) in the Nuclear Weapons cases, particularly those delivered by Third World judges, cited these Hindu scriptures as sources of international law. This paper theorizes that modern international law needs a cross fertilisation from Hinduism and Buddhism to become a universal construct. The role of India in the centre-periphery analysis of international law begs a collective answer from the Vedas, the Bhagavad Gītā, the Manu Samhita and the Arthaśāstra. In the post-WWII period, India came quite close to resurrecting the Hindu/Buddhist international law of peaceful co-existence. In an imitative reversal of European discourse in the Panchsheel Agreement with China, India succeeded in establishing new principles of international law. This paper offers an account of the ancient Hindu international laws of India and discusses the possibility of Indian contribution to international law.*

### Keywords

Indian International Law, Hinduism, Religious Conflicts, Manu, Mythology

\* Head, Department of Sociology, SNSRKS College, Saharsa, (B. N. Mandal University, Madhepura), Bihar, India. (singhalakhniranjan@gmail.com). He wishes to acknowledge his Gurudev (Late) Dr. Lakshman Jha, Former Vice Chancellor, L.N. Mithila University, Darbhanga and a Sanskrit Scholar for his understandings on Veda and Hindu Hindu Philosophy. He is equally grateful to Professor M.S. Verma for his timely comments and insights

## I. Introduction: Religious Conflicts

*The India-Pakistan Kashmir Conflict.*

*Tibet and the Dalai Lama's Struggle for Independence from China.*

*Thailand and Cambodia Border Clashes over the Preah Vihear Temple.*

*The Tamil Tigers (LTTE) in Sri Lanka.*

*The Taliban and Afghanistan.*

*Al Qaida and West Asia.*

If you read any recent periodical or newspaper, you are likely to see more and more coverage of conflicts involving religion and state. This troubling pattern is specifically acute in Asia, where the relationship between religion and society is particularly tense. Pathology of this situation reveals that sovereign and religion are not at ease with today's Asian society. This is striking given that many of the founding fathers of modern international law were naturalists and religious scholars. International law in Europe emerged from the works of religious naturalist scholars like Spanish Francisco Suárez (1548-1617), Italian Alberico Gentili (1552-1608), and Dutch Hugo Grotius (1583-1645). In his works, Gentili premised that the God was the legislator.<sup>1</sup> Such premise is not uncommon of the legal scholars of that time.

Gentili's first book on international law, "*De Legationibus Libri Tres*," was published in 1582. Suárez entered the Society of Jesus at Salamanca, studied philosophy and theology, and wrote "*De Triplici Virtute Theologica, Fide, Spe, et Charitate*" (The Three Theological virtues, faith, Hope and Charity). Gentili and Suárez wrote long before the treaty of Westphalia in 1648 and Grotius cited the works of Gentili in his "*De jure belli ac pacis libri tres*" (On the Law of War and Peace: Three books). The forefathers of modern international law, therefore, were mostly naturalists and religious scholars.

<sup>†</sup> LL.M. candidate in International Economic Law and Policy (IELPO) at Universitat de Barcelona, Spain. He holds a B.A./LL.B. (Hons.) from National Law Institute University (NLIU), Bhopal. He was a Visiting Scholar to the Court of Justice of the European Communities in 2007 (psingh@ielpo.org). He is thankful to his mother, Mrs. Savita Singh, for her perpetual encouragement for writing and research and his colleague, Yi Liu (London School of Economics and Political Science and the IELPO, Universitat de Barcelona), for her comments for improvements. The authors are generally thankful to the reviewers of the Journal of East Asia and International Law for their comments on the initial draft of the paper. The author may be contacted at: psingh@ielpo.org/Address: Radha Gyani Niwas, Near Middle School, Donar, DMCH, Darbhanga, Bihar, 846003, India.

<sup>1</sup> See generally Theodor Meron, *Common Rights of Mankind in Gentili, Grotius and Suarez*, 85 AM. J. INT'L L. 110, 112 (1991) (discussing and comparing the contribution of these three scholars).

## A. Gandhi and International Relations: the Making of Modern India and the Role of Hindu Polity

The discussion above brings into light the role and importance of religion, particularly Christianity, in the making of international law. The question now is whether the contribution of Christianity is enough to make international law complete and universal. Are there possibilities of contributions from other major religions of the world? India, with a Hindu population of over 80 percent, continues to be the largest secular democracy. This fact points to the inherent secularism and universalism of Hinduism. After the end of colonisation, India survived the scare of fundamentalism from its division based on a “two nation theory” in 1947, the assassination of Gandhi in 1948 by a Hindu extremist, and the existence of the then only Hindu state, Nepal, on its border. Pakistan, on the contrary, has not been able to cultivate secularism. The Islamic theology with its military nexus has undermined the growth of Pakistan as a democracy. This dichotomy suggests that Hinduism has played a subtle role in the secularisation of the Indian polity and legal system.

The Indian concept of *Gandhian thought* is never spoken of as contributing to international law, but it does have a bearing on international relations and political science. International law and international relations, as disciplines, cross-fertilise each other. In fact, Gandhi’s very effective and rather novel ideas of passive resistance in Ahimsa (non violence) and Satyagraha (truthful request) come directly from the cumulative matrix of Asian religions with major contributions from Hinduism. The universal appeal of his thought and possibility of application was proved by Gandhi himself in South Africa. In fact, he tested his indigenous tools in a foreign laboratory to eventually use it in India.<sup>2</sup> It is therefore not surprising that the modern Indian intellectuals, irrespective of their discipline of research, from Amartya Sen to Ashis Nandy, have gone back to ancient India and to Gandhi to discover the self-belief of modern Indian cultural consciousness.<sup>3</sup> This exuberance of self-discovery needs to be translated into international law as well.

This narration puts the role of ancient Hindu polity into the spotlight. Hindu international law differentiates itself from modern international law in its agelessness,

<sup>2</sup> Prabhakar Singh, *Democracy In India and Criminalisation of Politics: A Solution in Gandhian Perspective*, in REVISITING GANDHI 170-186 (R.P. DWIVEDI ed., 2007).

<sup>3</sup> See generally ASHIS NANDY, *THE INTIMATE ENEMY: LOSS AND RECOVERY OF SELF UNDER COLONIALISM*, (1983); B.S. Chimni, *The Sen Conception of Development and Contemporary International Law Discourse: Some Parallels*, 1 L. & DEVLPM’T. REV., (2008) (a construction of international law from Amartya Sen’s works on welfare economics); Ashis Nandy, *The savage Fraud: The First non-Western Psychoanalyst and the Politics of secret selves in COLONIAL INDIA*, in DECOLONIZING KNOWLEDGE: FROM DEVELOPMENT TO DIALOGUE, 340 (FRÉDÉRIQUE APPEL-MARGLIN & STEPHEN A. MARGLIN ed., 1996).

universalism, and its existence as positive laws. This paper begins by discussing the role that Christianity played in shaping modern international law in Europe (Section II). The paper then discusses the legal counters of Hindu international law, the role of mythology and history in its evolution (section III), and the importance of the *Kautilīya* and *Bhagavad Gītā* (Section IV and V). With a descriptive historical approach to Hindu international law, our article mentions the international natural resource law of *Buddhism* as a part of the Hindu perspective of international law. In so doing, the article views *Buddhism* as a subset of *Hinduism*, from both a historical and an international law perspective.<sup>4</sup>

The paper mandates only a referential and not a detailed study of international law in *Buddhism* (section VI). It then cites, as an example, the most recent case of the application of ancient Indian principles of *Panchsheel* by India translated into nonalignment policy of *Nehruvian* times and how this principle could be used in the European Court of Justice (ECJ) (section VII). The article also seeks to re-establish the origin of these five principles of peaceful co-existence, as legally established principles from Asia, in the larger call for accommodation and appreciation of the oriental “others” (all that was non European was considered “other” for the purposes of defining the boundary of the civilised world). The paper posits a comparative note on Hindu *Dharmayuddha*, Muslim *Jehad* and the Christian Crusade (section VIII). Finally, and most importantly, the paper ends with suggestions of how to apply Hindu international law under existing body of international law, particularly in the International Court of Justice (ICJ) (section IX). This paper seeks to break the academic hibernation of Indian lawyers and social scientists in contributing to the making of a true universal international law from an Indian perspective.

## II. The Nature of Modern European International Law: Between Christianity and Colonialism

### A. Manufacturing Modern International Law

Modern international law, as the name suggests, is rather new. As late as September 8, 1873, eleven men met at the Town Hall of Ghent in Belgium, adopting the Statute of the *Institut de Droit International*, defining the organisation as the organ of the juridical

<sup>4</sup> See generally Harold E. McCarthy, *T.S. Eliot and Buddhism*, 2 PHIL. EAST & WEST 31 (1952) (discussing the relationship between Hinduism and Buddhism).

conscience of the civilised world.<sup>5</sup> But the politics of semantics explains why a particular civilisation was considered superior over “others” that existed in different time and geography. The non-Europeans continued to remain obscured in the occidental narrations of cultural contribution to the making of laws of the civilised states. One can also debate and refute the self-defining narrow European construction of the “civilised” states, which apparently excluded Asian, African and Latin American cultures.<sup>6</sup>

The history of modern international law, as discussed below, explains why it is dominantly European and therefore Christian in origin. In fact, the Americans only entered into this elite group after the vagaries of two World Wars and consequently, when the concept of sovereignty was determined by international relations and not only by international law.<sup>7</sup> The modern international law was enriched by both Universal Catholicism and Protestants. For example, Jonathan Fox explains that religion, surprisingly, is an overlooked aspect of international relations.<sup>8</sup> There are, nonetheless, recent cases, like in post-war Taiwan, of religion acting as a factor of state creation, supporting the view that the religion plays a dominant role in the creation of states and their laws.<sup>9</sup> So why does Hinduism, the most ancient religion of the world, occupies only a marginal role in the shaping of modern international law? The history of colonisation, perhaps, has the key to this secret.

Both international law and international relations are tied to religion; however, geography explains the importance of a particular religion to a specific state or nation.<sup>10</sup> The treaty of Westphalia, arguably, is a symbol of constructive connection between Christianity and European international law.<sup>11</sup> Martti Koskenniemi articulates the birth of this international law from a historical perspective:

... [m]uch of the substance of international law has been received from Roman law. Its origins are profoundly influenced by Catholic universalism of the 16th and 17th centuries and its basic notions have been developed by Dutch Protestants such as Hugo Grotius and Swiss diplomats such as Emer de Vattel. But the theoretical articulation of the nature and problems of modern international law comes from the tradition of German public law ..<sup>12</sup>

<sup>5</sup> Martti Koskenniemi, *Whose international Community? Universalism and the Legacies of Empire*, (paper presented at Columbia University on April 29-30, 2005) available at <http://www.helsinki.fi/eci/Publications/Columbia%200405.pdf> (last visited on April 19, 2009).

<sup>6</sup> See e.g., Alejandro Alvarez, *Latin America and International Law*, 3 AM. J. INT'L L. 269 (1909).

<sup>7</sup> See David Lake, *The New Sovereignty in International Relations*, 5 INT'L STUD. REV. 303 (2003).

<sup>8</sup> Jonathan Fox, *Religion as an Overlooked Element of International Relations*, 3 INT'L STUD. REV. 53-73 (2001).

<sup>9</sup> Paul Katz, *Religion and the State in Post-War Taiwan*, 174 CHINA Q. 395-412 (2003).

<sup>10</sup> See Gregory J. Levine, *On the Geography of Religion*, 11 TRANSACTIONS OF THE INST. OF BRIT. GEOGRAPHERS: NEW SERIES, 428-440 (1986).

<sup>11</sup> See William George, *Looking for a Global Ethic? Try International Law*, 76 J. REL'N 359-382 (1996).

Modern European international law was born from a defence of secular absolutism against theology and feudalism in the modern age, and therefore, the concept of sovereignty in Europe is newer than in the Indian traditions. The Republics in India were as old as the Vedas.<sup>13</sup> The modern “other” (i.e., all that was non-European) international world led by European explorers, thereafter, became a natural extension of sovereign European governments, as their colonies.

## B. Christianity and Colonisation: The Nexus Explained

In Europe, feudalism was fighting with theology and anarchy prevailed throughout Europe. Scholars and international lawyers were struggling to establish a rule of law that was secular in nature. But the creation of the category of religion and its demarcation from politics, contends Elizabeth Hurd, is a highly politicised decision that is not subject to a final settlement, and the pretense of a final settlement exacerbates international conflict rather than diminishing it.<sup>14</sup> The treaty of Westphalia of 1648 was one such inadvertent effort. Some European scholars argue that the Westphalian treaties successfully solved the:

... [d]eep religious disagreement by imposing proto-liberal religious liberties on the estates of the Holy Roman Empire, which left the subjects with exclusively secular duties towards their authorities. The Westphalian constitution (...) addressed the issue of compliance with its religious provisions by establishing a secular procedure to adjudicate religious disputes that excluded religious reasoning from the courts.<sup>15</sup>

This secular happiness of religious exclusion in Europe, unfortunately, was not contagious enough. The newfound love for secularism in Europe against political theology drove the clergy out of business. Religion had to find a new audience and fresh markets for their product. After all, the industrial revolution was promoting materialism in modern European society.<sup>16</sup> The factors of production were creating new

<sup>12</sup> Martti Koskenniemi, *Georg Friedrich Von Martens (1756-1821) and the Origins of Modern International Law*, IILJ Working Paper 2006/1 (HISTORY AND THEORY OF INT'L LAW SERIES), available at <http://iilj.org/publications/documents/2006-1-HT-Koskenniemi-web.pdf> (last visited on Apr. 19, 2009).

<sup>13</sup> See Benoy Kumar Sarkar, *Democratic Ideals and Republican Institutions in India*, 12 AM. POL. SCIENCE REV. 581-606 (1918).

<sup>14</sup> See Elizabeth Hurd, *The Political Authority of Secularism in International Relations*, 10 EURO. J. INT'L RELATIONS 235-262 (2004).

<sup>15</sup> Benjamin Straumann, *The Peace of Westphalia (1648) as a Secular Constitution*, 18, IILJ Working Paper 2007/7 (HISTORY AND THEORY OF INT'L LAW SERIES), available at <http://iilj.org/publications/documents/2007-7.HT.Straumann.web.pdf> (last visited on April, 19, 2009).

<sup>16</sup> Walter Jaeschke, *Speculative and Anthropological Criticism of Religion: A Theological Orientation to Hegel and Feuerbach*, 48 J. AM. ACAD. REL'G'N 345-364 (1980).

classes with uneven distribution of profits and subsequent accumulation of wealth from the industrial revolution. Christianity could not be sold in Europe anymore: in the Marxist vocabulary, the bourgeois state and Christian clergy clashed in the beginning, and then worked out a formula of mutual benefits. In its wake, the colonies would soon become the laboratory of colonisers' empathy where the class difference in social structure would soon reinvent itself as bourgeois and proletariat struggle.

The old laws of discrimination and the (so-called) savage customs found in the oriental world would soon find solace in the enlightened wisdom of social equality from Europe. This wisdom brought in their wake a package of Western civilisation. The traders of religion evaluated the occidental "others" (non-European) as primitive and ahistorical. They assumed a burden to give civilisation to the savage, history to the ahistorical, and modernity to the primitive.<sup>17</sup> This colonisation obscured the native indigenous knowledge. Unfortunately, the ancient wisdom of the colonised paid the price for this Christian adventure. The colonial hypocrisy and disrespect, however, is not the story for this paper.<sup>18</sup> The narcissistic period of colonial denial of other religious values explains why modern international law is not as universal as it could have become.<sup>19</sup> There was a method to the colonial madness - a purpose to be achieved - to find raw materials and cheap labour. Preaching theology in the colonies was a vocation for the jobless Christian clergy fired from Europe. The Christian empathy, while creating cheap factors of production, cajoled the colonised proletariat into the arms of servitude and cultural surrender. How could the native international law have survived?

<sup>17</sup> See Ashis Nandy, *supra* note 3.

<sup>18</sup> Koskenniemi is definitely a leading voice on the colonial hypocrisy of international law. See Martti Koskenniemi, *The Civilizing Mission: International Law and The Colonial Encounter In the Late 19th Century* (Rechtshistorikertag, Bonn, Sept. 12-17, 2004) draft only ("Like other Europeans, international lawyers have difficulty to come to terms with Europe's colonial past. How to view the role of law in the colonial venture? Has it been a beneficial "civilizer" of the attitudes of colonial officials or tradesmen? Or merely a humanitarian smokescreen for the Great Powers to carry out the ruthless exploitation of non-European societies and resources?").

<sup>19</sup> See generally Prabhakar Singh, *From Narcissistic Positive International Law to Universal Natural International Law: the Dialectics of Absentee colonialism*, 15 AFR. J. INT'L & COMP. L. 56-82 (2008); See also Prabhakar Singh, *The Political Economy of Law of The Seas in the Era of Absentee Colonialism*, NAKKERAM, 225-235 (2006). In the discipline of cultural anthropology, scholars have discussed the exclusion of the colonised in the determined province of the coloniser thereby ignoring its values and knowledge. See Karena Shaw, *Indigeniety and the International*, 31 MILLENNIUM - J. INT'L STUD. 55-81 (2002).

### III. Hinduism and International Law

#### A. Hinduism: Sources and Legal Contours

The vast potential of *Hindu* and *Buddhist* contributions to international law, in the evaluation of centre-periphery dynamics in international law, rightly dispenses with the focus on a single Indian scholar: a single figure is neither capable nor entitled to wisdom accumulated in about eight millennia.<sup>20</sup> *Hinduism*, unlike Islam and Christianity, has not been a religion promulgated by a single saint or prophet? it is a way of life with considerable freedom of belief. Its vast contours are not limited by *Quranic* or Biblical commandments. It is a family of four *Vedas*, eighteen Puranas, 108 *Upanishads*, two epics (*Mahābhārata* and *Ramayana*), various *Neetis*, *Bhagavad Gītā*, *Manu Samhita* (or *Smriti*), comparatively recent *Kautilya's Arthaśāstra* and other big and small texts with regional flavours of the same grand narration to which the concept of *dharma* remains central.<sup>21</sup> The ancient scriptures are rich in the areas of family law, international relations, statecraft and even, surprisingly, environmental law.<sup>22</sup> Binoy Kumar Sarkar elaborates the comparative *Hindu* theory of state:

The Hobbesian “law of beasts and birds” or the *Naturprozess* of Gumpłowicz is the logic (*nyaya*) of the fish (*matsya*) in India. Should there be no ruler to wield punishment on earth, says the *Mahābhārata* (c. B. C. 600-A. D. 200), “the stronger would devour the weak like fishes in water. It is related that in days of yore people were ruined through sovereignlessness, devouring one another like the stronger fishes preying upon the feebler.” In the *Manu Samhita* likewise we are told that “the strong would devour the weak like fishes . . . The *Ramayana* also describes the non-state region as one in which “people ever devour one another like fishes.” And a few details about the conditions in this non state are furnished in the *Matsya-Purana*.<sup>23</sup>

<sup>20</sup> There are many lawyers and advocates who have contributed to the growth of International law from India. Former President of the International Court of Justice (ICJ), Justice Nagendra Singh, and Professor R.P. Anand are two of the most prominent scholars. Bhupinder Singh Chimni, Upendra Baxi and M.P. Singh lead a growing number of contemporary Indian scholars. This paper does not aim to identify the individual advocacy of these scholars, but rather focuses on the Indian civilisation and its potential to educate in contemporary international law.

<sup>21</sup> For a general discussion of the dharma debate, see Austin B. Creel, *The Reexamination of “Dharma” in Hindu Ethics*, 25 *PHIL. EAST & WEST*. 161-173 (1975). There are authors who claim that Hinduism in India was constructed piece by piece during the British Colonisation. See e.g., Robert Eric Frykenberg, *Constructions of Hinduism at the Nexus of History and Religion*, 23 *J. INTERDISC. HIST’Y* 523-550 (1993). However, this debate is only tangentially important to our debate and thus we need not provide an extensive critique of this view.

<sup>22</sup> Vasudha Narayanan, *One Tree Is Equal to Ten Sons: Hindu Responses to the Problems of Ecology, Population, and Consumption*, 65 *J.A.M. ACAD. REL’N*, 291-332 (1997).

<sup>23</sup> Benoy Kumar Sarkar, *The Hindu Theory of the State*, 36 *POL. SCIENCE Q.* 79, 80 (1921).



The true possibility of finding international law of ancient India requires the scientific re-reading of all these texts collectively. The answer to questions of how stable or persistent might be the notion of India as peripheral in the international legal imagery, notwithstanding its obvious power in contemporary geopolitical, economic, and cultural terms, rests upon the possibility of exporting ancient Hindu secular values to international law.<sup>24</sup> The Indian approach to international law teaching, scholarship and practice ought to be based on extracting those ancient values from obscurity of non-use and building both: laud and muted dialogues, depending upon situations, at different academic and judicial *fora*.

## B. Hindu International Law: the Semantics of Mythology and History

Indian mythology, which spans eight millennia, has been able to establish a direct dialogue with the higher wisdom of the Indians for centuries through its constant conversation with India's history.<sup>25</sup> It has been achieved by the method of *Shruti*: to listen and then pass on orally to the next generation. With the invention of ink, the writing began and the "*shrut*" (Sanskrit root meaning hearing) wisdom was transcribed in various forms. The precise sources of international law of ancient Hindu India are: *Rig Veda* (c. 2000 BC), *Yajur Veda*, and *Atharva Veda* (1000 - 800 BC).<sup>26</sup> Other sources are the *dharmaśāstras*, *Manu-Smṛiti*,<sup>27</sup> *Upanishads* and *Yajñavalkya-Smṛiti* and other secular works as *Purana* and *Kautilya's Arthaśāstra* (science of ways and means).<sup>28</sup> This paper identifies three main Hindu sources of law and international relation theories: the *Manu-Smṛiti*, the *Bhagavad Gītā* and the *Arthaśāstra*.

The rich tapestry of ancient Hindu international law comes from what we call the Indian mythology and *Vedic* history. Dharma is pivotal to this narration.<sup>29</sup> Let us clarify

<sup>24</sup> Ved Nanda, *International Law in Ancient Hindu India*, in RELIGION IN INTERNATIONAL LAW. 51-61 (MARK JANIS AND CARLOLYN EVANS eds., 2004).

<sup>25</sup> Study of pottery styles and cultural artifacts has led archaeologists such as Jim Shaffer of Case Western Reserve University to conclude that the Indus-Sarasvati culture exhibits a continuity that can be traced back to at least 8000 BC. J.G. Shaffer and D.A. Lichtenstein, MIGRATION, PHILOLOGY AND SOUTH ASIAN ARCHAEOLOGY, in ARYAN AND NON-ARYAN IN SOUTH ASIA: EVIDENCE, INTERPRETATION, AND IDEOLOGY 239-260 (J. BRONKHORST AND M. M. DESHPANDE eds., 1999).

<sup>26</sup> Robert E. Hume, *Hinduism and War*, 20.1 AM. J. THEOL'Y 31-44 (1916); Edward V. Arnold, *The Rig Veda and Atharva Veda*, 22 J. AM. ORIENTAL SOC'TY. 309-320 (1901). Edward Delavan Perry, *Indra in the Rig-Veda*, 11 J. AM. ORIENTAL SOC'TY. 117-208 (1882 - 1885).

<sup>27</sup> WENDY DONIGER & BRIAN K. SMITH (trans.) THE LAWS OF MANU (1991).

<sup>28</sup> Nanda, *supra* note 24, at 52.

<sup>29</sup> See S. Radhakrishnan, *The Ethics of the Vedanta*, 24 INT'L J. ETHICS 168-183 (1914) (S. Radhakrishnan was the former President of India and Vedanta scholar); S. Radhakrishnan, *The Hindu Dharma*, 33 INT'L J. ETHICS. 1-22 (1922); D. Mackenzie Brown, *The Premises of Indian Political Thought*, 6 WEST. POL. Q. 243-249 (1953).

that neither the word *Hindu* nor India is Sanskrit in origin.<sup>30</sup> *Hindu*, as a name, came to be known in Greek and Persian literature, referring to those who lived on the other side of the river *Sindhu*, (or Indus) which now flows through Pakistan.<sup>31</sup> Even though the Ganges is the all important river in *Hindu* mythology and Indian religious life, the river Indus dominated the Greek version of the oriental narration of India? because Alexander did not cross the river Beas for the fear of nine thousand strong elephant army of the Magadha Empire; Alexander could never reach the Ganges.<sup>32</sup> The nation now known as India is also a completely different nomenclature from the ancient and original Sanskrit “*Aryavarta*” (the place of the *Aryans*) or *Bhartvarsha* (the place of sons of King *Bharat*).

Alexander later had to reckon his strength with the powerful military republics in his march through the regions Punjab and Sindh (326 BC). The most important of the republics were the *Arattas*, the *Ksudrakas*, the *Khattiyas*, and the *Malavas*. The political constitution of the city of Patala, near the apex of the delta of the Indus, was, according to *Diodorus*, drawn on the same lines as the Spartan.<sup>33</sup> As in this community the command in war vested in two hereditary kings of two different houses, while a council of elders ruled the whole state with paramount authority. The republic of the *Arattas* (*Arajayaakas*, i.e. kingless) came to the help of *Chandragupta Maurya* when a few years later he commanded a successful war against the Greeks succeeded by Alexander.<sup>34</sup> Binoy Kumar Sarkar wrote in 1918:

There are, however, sentiments of a more directly democratic character in oriental political philosophy . . . the *Hindu neeti-shastras* (treatises on state-craft), *dharmashastras* (treatises on law), and epics (especially the *Mahābhārata*) contain frequent discussions as to the restraints on royal absolutism, the responsibility of ministers, and the authority of the people.<sup>35</sup>

Republics with sovereign authority originated very early in India during the *Vedic*

<sup>30</sup> There are some critical literature on the construction of colonial construction of “Hinduism” by Richard King, *Orientalism and the Modern Myth of Hinduism*, 46 NUMEN 146-185 (1999).

<sup>31</sup> Walter Eugene Clark, *The Importance of Hellenism from the Point of View of Indic-Philology*, 14 CLASSICAL PHILG' Y. 297-313 (1919).

<sup>32</sup> W. W. Tarn, *Alexander and the Ganges*, 43 J. HELLENIC STUD. 93, 101 (1923); R. C. Majumdar, *The Indika of Megasthenes*, 78 J. AM. ORIENTAL SOC' Y 273- 276 (1958); Walter Eugene Clark, *The Importance of Hellenism from the Point of View of Indic-Philology*, 14 CLASSICAL PHILOLOGY 297-313 (1919); A. B. Bosworth, *The Historical Setting of Megasthenes' Indica*, 91 CLASSICAL PHILOLOGY 113-127 ( 1996).

<sup>33</sup> Sarkar, *supra* note 13 at 591

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 583. See also JAGDISH SHARMA, REPUBLICS IN ANCIENT INDIA, c. 1500 B.C.-500 B.C. (1968); M. AQUIQUE, ECONOMIC HISTORY OF MITHILA (1905).

times. Some of them survived with complete or modified independence until the fourth century BC. These are mentioned, not only in *Buddhist* and *Jaina* records, but also in the Greek and Latin literature on India and Alexander,<sup>36</sup> as well as in the Sanskrit epics and treatises on politics.<sup>37</sup> The *Hindus* of the *Vedic* age were familiar with republican nationalities. In the language of the *Aitareya Brahmana*, among the *Uttara Kurus* and the *Uttara Madras*, the “whole community was consecrated to rulership.”<sup>38</sup> Such states were called *Vairajya*, i.e. kingless states. Thus, the existence of laws of republics or sovereign state in ancient India should not come as a surprise. Since there existed republics, they had an extensive network of laws and corresponding administrative system to govern the country and its foreign relations.

Ancient India had a simultaneous system of Monarchy with *jana* or tribes as the political units extending to villages bonded by a common language (*Sanskrit*), race (*Aryans*) and religion (*Vedic*). It was a mix of the *Aryans* who settled across the *Indo-Gangetic* belt and extended in the borders of Afghanistan in the west.<sup>39</sup> The Non-*Aryans* or the *Dravidians* lived in the south of the country as sovereigns. *Buddhism* marks the boundary between the mythology and history of Hindu international law in India. As *Buddhism* grew stronger in the country, (400 B.C. approximately), it signalled the era of stronger nation states. Sanskrit was supplemented with *Pali* and *Prakrit*, a derivative of Sanskrit as the common man’s *lingua franca*. Sanskrit gradually grew unpopular with the common people; particularly women, and only people with higher education could read and write it. This *Pali-Prakrit- Buddhist era* witnessed about sixteen identified sovereigns, composed of both *Aryan* and *Dravidians*.<sup>40</sup>

## C. “Manu” and Hindu Law

*Manu*, the father of all *Manav* (the Sanskrit for man), is the most authoritative author of the moral code of conduct in ancient India. The *Brahmanas* narrate the stories of *Manu*, such as his division of inheritance and other family laws. He has been depicted as the primary law-giver. Discussing Manu and his laws, Hopkins opines that:

... having originated from the circumstance that his reputed acts (such as the division of property) were first quoted as authoritative precedent; and then, with the

<sup>36</sup> Edward W. Hopkins, *The Social and Military Position of the Ruling Caste in Ancient India, as Represented by the Sanskrit Epic*, 13 J. AM. ORIENTAL SOC’Y 57, 136 (1889).

<sup>37</sup> Sarkar, *supra* note 13 at 585.

<sup>38</sup> *Id* at 588.

<sup>39</sup> ROGER BOESCHE, *THE FIRST GREAT POLITICAL REALIST: KAUTILYA AND HIS ARTHASHASTRA*, 11 (2003).

<sup>40</sup> See generally J.D.M. DERRETT, *RELIGION, LAW, AND THE STATE IN INDIA* (1968); J. DUNCAN AND DERRETT, *ESSAYS IN CLASSICAL AND MODERN HINDU LAW* (1978).

growth of legal literature, the primeval man, whose acts were thus quoted, grew into a personal authority on legal points, whose words on law (of course invented) attained the influence which citations from such an eminent authority would naturally induce. The *law-Sutras* (keeping 'law' as the most general and at times . . . fitting translation for *dharma*) were those earliest attempts at collecting the rules on duty of every sort . . .<sup>41</sup>

The Hindu code of *Manu* also made formal efforts to prescribe rules of warfare and informal attempts to regulate armed conflict. These are reflected in the *Rajput* code of medieval India following the Gupta period of Buddhism.<sup>42</sup> The governing rules of interstate conduct and diplomacy, peace and war, were based on the concept of *Dharma*.<sup>43</sup> *Manu smriti* is the major codification of the laws governing personal and national life - a comprehensive set of civil and criminal code. The semantics of this all important word, *dharmā*, plays a more important role than expected particularly by the Western audience. *Dharma* in Sanskrit means both religion and duty. However, it is the second meaning, duty, which is of primary importance for understanding the *Hindu* law of ancient India.

The *Manu smriti*, however, also provides the occasions when the *dharmā* could be deconstructed in the instances of *apada*, or crisis, as an emergency clause.<sup>44</sup> One should note that the often romanticised role of a Kshatriya - second in the four fold division of Indian caste system - to fight, is actually an *apad dharma* (*apad dharma* in Sanskrit means duty during an emergency) and not of one's own will or for material pursuits; rather, one should go to war for the defence of the state, women, and the disabled. Reading the implicit contradiction in *Manu's* text, like in the World Trade Organization's laws on trade liberalisation and its explicit exceptions to trade in Article XX and Article XXIV, Doniger notes that:

Manu himself implicitly acknowledges the ultimate inadequacy of all arguments . . . This is the mechanism of *apad*, which may be translated "in extremity," an emergency when normal rules do not *apply* . . . *Apad* is further supplemented by other loophole concepts such as adversity (*anaya*), distress (*ariti*), and near-starvation

<sup>41</sup> Edward W. Hopkins, *On the Professed Quotations from Manu Found in the Māhābhārata*, 11 J. AM. ORIENTAL Soc'y. 239, 240 (1882 - 1885).

<sup>42</sup> Gregory A. Raymond, *Problems and Prospects in the Study of International Norms*, 41 MERSHON INT'L STUD. REV. 205, 208 (1997).

<sup>43</sup> D. Mackenzie Brown, *The Premises of Indian Political Thought*, 6 WESTERN POL. Q. 243-249 (1953). See also Manoj Kumar Sinha, *Hinduism and international humanitarian law*, 87 INT'L REV. RED C. 285-93 (2005).

<sup>44</sup> Wendy Doniger, *Rationalizing the Irrational Other: "Orientalism" and the Laws of Manu*, 23 NEW LITERARY HIST. 25, 36-38 (1992).

(*ksudha*) . . . *Apad- dharma* is the ultimate . . . realism in Hindu law.<sup>45</sup>

The fulfillment of the prescriptive side of *dharma* was mostly impossible; and the descriptive aspects of the 'principles of life' were necessarily constituted as one large set of 'emergencies.' *Manu* is not so much a text on *dharma* as it is on *apad dharma*—the principles of life led in a perpetual state of crisis.<sup>46</sup>

Surprisingly, Doniger's deconstruction actually expounds the obscured but inherent maturity of *Manu*'s laws. An effective law is a law that reflects the social emergency in its implementation as laws are not applied in a social vacuum. Doniger attempts a critical deconstruction of Hindu law from a socio-legal perspective. The very fact that he has reasons to believe that *Manu*'s laws are more an *apad dharma* or laws with exception than formal directives reflects the functional maturity of this law.

Any body of international law today, which is also functional, is replete with exceptions. Those exceptions are permitted derogations from the main objective of the whole legal text to accommodate the reality of our collective existence. For example, Articles XX and XXIV of the General Agreement in Tariffs and Trade (GATT) 1994, or Article V of the General Agreement in Trade in Services (GATS) are exceptions from the most favoured nation (MFN) obligation of all the WTO members. These provisions exist to ensure derogation from the main objective of Member states in exceptional circumstances like national security. It is a permitted derogation of the central objective of MFN treatment. Likewise, the exceptions in *Manu*'s laws are recognitions of pragmatism and denunciation of impractical idealism that often plagues novice constitutions and other legal rule books. It represents a certain level of maturity in civilisation and its complexities that law makers have to accommodate in the process of rule making. *Manu*'s laws are the positive Hindu law of personal, family and property issues with inherent exceptions to these rules for unforeseen situations.

## D. The Nature of Hindu International Law

Hindu international law has a major noticeable difference from the early Grecian law with respect to treatment of foreigners. Unlike the narcissist Grecian law, which bluntly disrespects and disregards other civilisation in an act of self love, Hindu international law is natural and universal in its application<sup>47</sup> irrespective of the size of the national states, religion or civilisation. It does not discriminate between foreign and the domestic

<sup>45</sup> Wendy Doniger, *supra* note 27, at 36.

<sup>46</sup> *Id* at 38. See also BRIAN K. SMITH, REFLECTIONS ON RESEMBLANCE, RITUAL AND RELIGION (1989).

<sup>47</sup> Prabhakar Singh, *supra* note 19, at 72.

in terms of enforcing justice. This is in sharp contrast to:

[c]lassic notions of antiquity [that] had very imperfect notions of international justice. With the Greeks and Romans, 'foreigners' and 'Barbarians' or 'enemy' were synonymous in language and in fact. By their rude theory of public law, the persons of alien were doomed to slavery . . . Grecian philosophers gravely assert that they [barbarians or foreigners] were intended by nature to be the slaves of the Greeks.<sup>48</sup>

In fact, one of the current authors Prabhakar Singh, *supra* note 19, opines that:

Vedic India actually had a 'natural international law', which advocated the equitable distribution of natural resources building a culture of assimilation rather than that of military and political subjugation and territorial conquest. The entire Vedic vocabulary denies entry to 'positivistic principles' and promotes natural law morals and values.<sup>49</sup>

Even the expansion of an empire in Ancient India, by a *Hindu King* to become a *Chakravarty* (world conqueror) performing *Rajasuya Yajana* (ritual of holy fire), could be done keeping the sovereignty of the defeated state intact - a mechanism rather unseen in any system of the world. This clearly distinguishes Hindu international law from the *Jihad* of Islam and Christian *Crusades* where the aim has been to extend religious states at the expense of welfare and peace. In fact, in *Arthaśāstra*, as explained further in the next section, *Kautilīya*, the advisor of mighty *Mauryan King, Chandagupta*, says that the subjugation of the weak by a sovereign should be done by conciliation.<sup>50</sup> These rules are wonderful expositions of the moral responsibility of a king who, while powerful, has a duty of compassion towards other leaders and their citizens.

<sup>48</sup> H. WHEATON, *ELEMENTS OF INTERNATIONAL LAW: A SKETCH OF THE HISTORY OF THE SCIENCE* 17 (CAREY, LEA & BLANCHARD eds. 1836).

<sup>49</sup> Singh, *supra* note 19, at 72.

<sup>50</sup> See generally, George Modelski, *Kautilīya: Foreign Policy and International System in the Ancient Hindu World*, 58 AM. POL. SCIENCE REV. 549-60 (1964). See also CHAKRADHAR JHA, *HISTORY AND SOURCES OF LAW IN ANCIENT INDIA* (1986).

## IV. *Kautilīya* and his *Arthaśāstra* : the Indian Machiavelli or Bismark

### A. *Kautilīya's Arthaśāstra*: The Most Ancient Treatise on Positive International law

*Kautilīya* is often called the India Machiavelli. However, referring to *Kautilīya* as the Indian Machiavelli does not reflect the true merits of his work. In terms of the depth and coverage of international relations, he was definitely more than Machiavelli as an author and Bismark as a practitioner. This is how the West discovered him in the early 19th century.<sup>51</sup> *Chanakya*, or *Vishnugupta*, is generally spoken of as *Kautilīya* as his most popular name. *Kautilīya* was the key adviser to the Indian king *Chandragupta Maurya* (c. 317-293 B.C), who defeated the *Nanda* kings, stopped the advance of Alexander's successors, and for the first time ever in the history of ancient India, united most of the Indian subcontinent into the *Magadha* empire. Immediately, *Kautilīya* could be credited with two wonderful successes: halting the juggernaut of Alexander's successors and uniting India into one *Magadha* Empire with borders extending to Afghanistan. These are not insignificant achievements in terms of statecraft and strategies of war.

In addition to these accomplishments, *Kautilīya*, was also a profound writer. Written in about 300 B.C., the *Kautilīya's Arthaśāstra* is a science of politics intended to teach a wise king how to govern with elaborate positive international law.<sup>52</sup> This is the most ancient treatise on positive international law. In this work, *Kautilīya* offers wide-ranging and truly fascinating discussions on war and diplomacy. This includes his wish, probably having seen and met Alexander, to have his king become a world conqueror.

The breadth and scope of *Kautilīya's* writings is much broader than what any modern treatise on diplomacy can boast to offer including: an analysis of which kingdoms are natural allies and which are inevitable enemies, his willingness to make treaties he knew he would break, his doctrine of silent war or a war of assassination against an unsuspecting king, his approval of secret agents who killed enemy leaders and sowed discord among them, his view of women as weapons of war, his use of religion and superstition to bolster his troops and demoralise enemy soldiers, the spread

<sup>51</sup> See Virginia Saunders, *Some Allusions to Magic in Kautilīya's Arthaśāstra*, 42 J.A.M. ORIENTAL SOC'Y 75-79 (1922); Franklin Edgerton, *The Latest Work on the Kautilīya's Arthaśāstra*, 48 J.A.M. ORIENTAL SOC'Y 289-322 (1928); Herbert Gowen, *The Indian Machiavelli or Political Theory in India Two Thousand Years Ago*, 44 POL. SCIENCE Q. 173-192 (1929); Thomas R. Trautmann, *A Metrical Original for the Kautilīya's Arthaśāstra*?, 88 J.A.M. ORIENTAL SOC'Y 347-349 (1968).

<sup>52</sup> See I. W. Mabbett, *The Date of the Arthaśāstra*, 84 J.A.M. ORIENTAL SOC'Y 162- 169 (1964).

of disinformation, and his humane treatment of conquered soldiers and subjects..<sup>53</sup> According to one author:

[One of *Arthaśāstra* 's] [k]ey parts contain detailed provisions of civil and criminal law, or recommendations on military tactics or the use of magic. Others discuss the duties of various government officials, and as such are valuable as sources of information . . . *Kautilya's Arthaśāstra* is, above all, a manual of statecraft, a collection of rules which a king or administrator would be wise to follow if he wishes to acquire and maintain power. In inspiration it is therefore close to other digests of rules of statecraft and of advice to princes such as Sun Tzu's work on *The Art of War* or Niccolo Machiavelli's *The Prince*. But unlike *The Prince*, which had little if any influence on the behavior of the ruler to whom it was dedicated, *Kautilya's* work is part of a larger literature disseminated by "schools" and was intended to be learnt, often by heart. Like other Sanskrit writings it has verse passages and such easy-to-learn classifications as the eight elements of sovereign or six types of foreign policy.<sup>54</sup>

*Kautilya's* discussion of problems of foreign policy is based upon the analysis of the seven elements of the state (*prakṛti*): the King, Minister, Country, Capital, Treasury, Friend and Foe.<sup>55</sup> Max Weber has also recognised *Kautilya* wisdom. He thought that *Arthaśāstra* was much more than the radical Machiavellianism.<sup>56</sup> In his famous lecture, 'Politics as a Vocation,' Weber stated that Machiavellism "is classically expressed in Indian literature in the *Kautilya's Arthaśāstra* (written long before the birth of Christ): compared to it, Machiavelli's *The Prince* is harmless."<sup>57</sup> *Kautilya* put forth what

<sup>53</sup> Roger Boesche, *Kautilya's Arthaśāstra on War and Diplomacy in Ancient India*, 67 J. MIL. HIST. 9-37 (2003). Citing the historical foresight of *Kautilya*, Boesche writes:

"*Kautilya* was writing in about 300 B.C.E., a century after Thucydides composed his History of the Peloponnesian War and several decades after the Sophists Callicles and Thrasymachus said to Plato that rule by the stronger was "natural." *Kautilya*, in the boldest of his promises, claimed that one who knows his science of politics can conquer the world, that "one possessed of personal qualities, though ruling over a small territory . . . conversant with (the science of) politics, does conquer the entire earth, never loses" at 16 [footnotes omitted and emphasis added].

<sup>54</sup> Modelski, *supra* note 50, at 550.

<sup>55</sup> R. SHAMASTRY (Trans.) KAUTILYA'S ARTHAŚĀSTRA 287 (1909). In addition to works cited elsewhere in this article, the following works in French and German are also relevant to the international relations aspects of the *Kautilya's* treatise: MAX WEBER, THE RELIGION OF INDIA: THE SOCIOLOGY OF HINDUISM AND BUDDHISM (1958); KALIDAS NAG, LES THEORIES DIPLOMATIQUES DE L'INDE ANCIENNE ET L'ARTHAŚĀSTRA (Faculte' de lettres de l'Universite de Paris, 1923); N. N. LAW, INTER-STATE RELATIONS IN ANCIENT INDIA (Calcutta: Luzac, 1920); M. V. KRISHNA RAO, STUDIES IN KAUTILYA (1958); FRIED - RICH WILHELM, POLITISCHE POLEMIKEN IM STAATSLERH- BUCH DES KAUTILYA (1960); P. C. CHAKRAVARTI, THE ART OF WAR IN ANCIENT INDIA (1941).

<sup>56</sup> MAX WEBER, POLITICS AS A VOCATION, IN WEBER: SELECTIONS IN TRANSLATION, 220, 212-25 (W.G. Runciman, trans, 1978).

<sup>57</sup> *Id* at 220. See also Boesche, *supra* note 53, at 9.



Heinrich Zimmer rightly calls “timeless laws of politics, economy, diplomacy, and war.”<sup>58</sup>

## B. The *Kautilīya* Conception of International Relations

The *Kautilīya* conception of the international system was embodied in the idea of *mandala*, commonly translated as the circle of states.<sup>59</sup> The concept of *mandala* occupies a prominent place; both in *Hindu* and in Buddhist writings, but in relation to international politics it has been most fully developed in the *Arthaśāstra*. It has been described as a bi-centric international system.<sup>60</sup> According to *Kautilīya*, the king’s status determines his foreign policy. *Kautilīya* devotes a chapter to ‘*sadhgunyas*’ or the “six-fold policy” which represents a typology of foreign policy which is based upon the status of the actor. The six-fold policy consists of: accommodation (*sandhi*); hostility (*vigraha*); indifference (*asana*); attack (*yana*); protection (*samsraya*); and double policy (*dvaividhibhava*). The policy differs according to whether it is being directed toward kings who are superior, inferior, or of equal stature. The bulk of the international portions of the *Arthaśāstra* are a discussion of the policies that may be appropriately pursued by ‘superior’ or ‘inferior’ kings. Having to choose between them, an inferior king pursues accommodation, seeks protection or resorts to double policy. The superior king, however, can afford hostility or attack, while one facing an equal king maintains indifference.<sup>61</sup> This six fold policy could be used to explain why China and the United States will not try to indulge in an armed conflict. The short time taken by the United States of America while deciding to bomb Afghanistan and Iraq can also be explained by the concept of relative strength of states codified as rules of state behaviour in *Arthaśāstra*. It also explains the double policy of Indo-American and American-Pakistan relationship. *Arthaśāstra* beautifully explains how the USSR was dismantled with the use of the tactics that *Kautilīya* wrote some c. 317-293 B.C.<sup>62</sup>

The six-fold policy needs to be distinguished from the *upayas* (or the four influence techniques). The *Kautilīya* conception of *upaya* (translated as solution or as ‘means of policy’) is more systematic than those to *sadhgunyas*. The *upayas* are contained in such varied chapters as “Procedures for Issuing Royal Writs,” “Conquered King” and

<sup>58</sup> HEINRICH ZIMMER, *PHILOSOPHIES OF INDIA* 36 (1967).

<sup>59</sup> Benoy Kumar Sarkar, *Hindu Theory of International Relations*, 13 AM. POL. SCI. REV., 400 (1919). For a graphic account of *mandala*, see ADDA BOEZMAN, *POLITICS AND CULTURE IN INTERNATIONAL HISTORY* 122-23 (1960).

<sup>60</sup> Modelski, *supra* note 50, at 554.

<sup>61</sup> *Id.* at 552.

<sup>62</sup> Kalidas Nag & V. R. Ramachandra Dikshitar, *The Diplomatic Theories of Ancient India and the Arthashastra*, 6 J. OF INDIAN HIST. 15-35, 15, 18 (1927).

“Methods for Dealing with Internal and External Enemies.” The four *upayas* are: conciliation (*sama*), gift (*dana*), dissension (*bheda*) and punishment (*danda*). As concepts, the *upayas* are more universal and of greater analytical power than the *sadhgunyas*; indeed they are applicable to both national and international policy.<sup>63</sup> In the current WTO system of Generalised System of Preferences (GSP) to weaker countries and the increasing Free Trade Agreements under the WTO multilateralism between developed, developing and poor countries can be explained by *dana upaya*. The ultimate arbitration panel in a WTO dispute under article 22.6 of the Dispute Settlement Understanding (DSU) seemingly works on *sama*. In the case of non compliance, the retaliation is *danda*. Breaking coalitions with meta-trade tactics is *bheda*.

In the Indian tradition, the world conqueror, or *Chakravarti*, was not one who conquered regions beyond the borders of India. In short, India did not include the land of “barbarians” or *malecchas*, those outside of Indian culture. But the history is witness to the fact that India never adopted aggression as its foreign policy to extend its boundaries. However, Narasingha Prosad Sil notes that “for *Kautilīya* a world conquest is the true foundation for world peace.”<sup>64</sup> Nonetheless, ancient Hindu India never produced an equivalent of Alexander though *Chandragupta* had the capability, historically and militarily, to achieve such a feat.<sup>65</sup> The greatest kings of India actually focused on the conquest of within and there lies the greatness of those kings.

<sup>63</sup> Modelski, *supra* note 50, at 553.

<sup>64</sup> Narasingha Prosad Sil, *Political Morality vs. Political Necessity: Kautilīya and Machiavelli Revisited*, 19 J. OF ASIAN HIST. 101, 123 (1985).

<sup>65</sup> Evaluating the power and military strength of the Empire, Boesche writes:

“The Mauryan Empire established by Chandragupta and continued by his son Bindusara (c. 293-268 B.C.E.)- whom Kautilya also advised- and by his grandson Ashoka (c. 268-232 B.C.E.) was, and still is, astonishing. With a population of about fifty million people, the Mauryan Empire was larger than the Mughal Empire two thousand years later and even larger than the British Empire in India, extending in fact all the way to the border of Persia and from Afghanistan to Bengal.<sup>7</sup> (The map on the previous page shows the extent of the Mauryan Empire under Ashoka.) Pliny- borrowing from Megasthenes, the ambassador of Seleucus to Chandragupta- wrote that Chandragupta’s army totaled about six hundred thousand infantry, thirty thousand cavalry, eight thousand chariots, and nine thousand elephants.<sup>8</sup> Chandragupta’s capital was Pataliputra (near modern Patna in northeast India, just below Nepal), which he apparently seized from the Nandas sometime between 324 and 322 B.C.E. Pataliputra was probably the largest city in the world at that time, a city eight miles long and a mile and one-half wide, with 570 towers and sixty-four gates, all surrounded by a moat six hundred feet wide and forty-five feet deep. Also protecting the city were wooden walls- stone was very scarce- with slits to be used by archers.<sup>9</sup> Pataliputra “was about twice as large as Rome under Emperor Marcus Aurelius.” *supra* note 53 at 12. See also E. J. RAPSON, *ANCIENT INDIA: FROM THE EARLIEST TIMES TO THE FIRST CENTURY AD* (Asian Educational Services 1995); BALKRISHNA GOVIND GOKHALE, *ASOKA MAURYA* (1966).

## V. The Bhagavad Gītā and the Nuclear Proliferation: From Oppenheimer to Weeramantry

### A. The Bhagavad Gītā and Robert Oppenheimer: the Father of Nuclear Bomb

In her native Hindu cosmos, the *Bhagavad Gītā* (celestial hymns) is an appealing, divinely beautiful and altogether wisest daughter in the large family of Sanskrit texts.<sup>66</sup> The *Bhagavad Gītā*, part of *Mahābhārata*, is a pre-war narration of the concept of *dharma* and the logics of just war.<sup>67</sup> There are, however, various kinds of *dharma*.<sup>68</sup> These are the words, the legend says, spoken by the Lord *Vishnu* Himself in an effort to persuade his disciple and friend *Arjuna* to shun earthly emotions and fight for just war, which is his *dharma* or duty even if this means fighting his own relatives.<sup>69</sup> The *Bhagavad Gītā* is the most extensive treatise of ancient oriental wisdom from India.

In reference to the Trinity test of Atomic Bomb in New Mexico, the father of atomic bomb, Robert Oppenheimer, famously recalled the *Bhagavad Gītā*: "If the radiance of a thousand suns were to burst at once into the sky that would be like the splendour of the mighty one. . . . Now I am become Death, the destroyer of worlds."<sup>70</sup> With these words from the *Bhagavad Gītā*, the architect of the nuclear conflagration, anointed the birth of the *Kaliyuga* (age of Kali). How fitting, indeed, that when the sun rose from the east to steal a look upon the charred and stillborn desert of New Mexico, it brought in its wake a wisdom from the ancient land of India.<sup>71</sup>

It remains a matter of debate whether Oppenheimer misunderstood the overall import of *Bhagavad Gītā*. However, he did misquote a particular verse as a half-truth under an impression that the *Bhagavad Gītā* is a treatise on war and peace only. The non-ephemeral message of the *Bhagavad Gītā* is something more fundamental, with sublime universal prescriptions, in the overall perspective of civilisation, and cosmic and earthly order of which the question of war and peace is only a chapter. Moreover,

<sup>66</sup> Gerald James Larson, *The Song Celestial: Two Centuries of the Bhagavad Gītā in English*, 31 PHIL. EAST AND WEST 513 (1981).

<sup>67</sup> G. Hanumantha Rao, *The Basis of Hindu Ethics*, 37 INT' L J. OF ETHICS 19, 33 (1926).

<sup>68</sup> *Id.* at 33.

<sup>69</sup> See Israel Selvanayagam, *Asoka and Arjuna as Counterfigures Standing on the Field of Dharma: A Historical-Hermeneutical Perspective*, 32 HIST. OF RELIG'N. 59-75 (1992).

<sup>70</sup> James Hijiya, *The Gītā of Robert Oppenheimer*, 144 PROCEEDINGS AM. PHIL. SOC'Y (2000); DANIEL J. KEVLES, *THE PHYSICISTS: THE HISTORY OF A SCIENTIFIC COMMUNITY IN MODERN AMERICA*, 333 (1995); HERBERT F. YORK, *THE ADVISORS: OPPENHEIMER, TELLER, AND THE SUPER-BOMB* (1976).

<sup>71</sup> Gautam Dasgupta, *The Mahābhārata: Peter Brook's "Orientalism,"* 10 PERF. ARTS J. 9-16 (1987).

as envisaged by the *Bhagavad Gītā*, war is not incompatible with a life of peace and righteousness if waged for its preservation (as *dharmayuddha*).<sup>72</sup> Oppenheimer made a quotation out of context. In fact, the importance of *Bhagavad Gītā* stems from its prescribed value of human life and fighting for its maintenance and resurrection if need be. Human beings then, perhaps, not only knew how to destroy but also realised the peaceful use of nuclear energy.

## B. The *Vishnu* Strategy: Misrepresentation and Continued Misquotation

Since the quote by Robert Oppenheimer, this verse of *Bhagavad Gītā* was recently misquoted to justify the cluster bombings in Afghanistan, Iraq and Lebanon.<sup>73</sup> The tactic, as called by its authors, is *Vishnu* Strategy.<sup>74</sup> However, this second misquoting of the same verse presents a half-truth and reminds us of the potential dangers of citing such texts to justify wars. This so-called and ill-founded *Vishnu* Strategy does not explain the *dharma* behind the bombings. The basic principle of *Bhagavad Gītā* recommends a war only for the protection of *dharma* in pursuit of assigned *karma* (duty) of the addressee. The *dharma*, encompassing more than religion, is primarily about duty. This was never the actual import of what Lord *Vishnu* preaches to *Arjuna* in his just war - *Vishnu*, by his nature a god responsible for preservation of mankind, would not preach an unequal battle that is not a *Dharmayuddha* - or righteous war without allocating the burden of *karma* (duty).

Recently, the US Special Representative for Nuclear Non-proliferation, Christopher Ford, while giving the opening remarks to the 2007 Preparatory Committee Meeting of the Treaty on the Non-Proliferation of Nuclear Weapons in Vienna, Austria, reminded the world about the second part of Oppenheimer's quote.<sup>75</sup> He rightly pointed out Oppenheimer's mistake.<sup>76</sup> He pointed out that Oppenheimer did not mention the next words in the same breadth - *I am the Source of things that are yet to be*. The US representative, fortunately, quoted the verse in the right perspective. His quotation was an effort to sketch the imagery of devastation (so vividly painted in various chapters of the *Mahābhārata*) which an irresponsible use of nuclear weapon can cause.

<sup>72</sup> K. N. Upadhyaya, *The Bhagavad Gītā on War and Peace*, 19 PHIL. EAST & WEST 159-169 (1969).

<sup>73</sup> Conn Hallinan, *The Vishnu Strategy*, FOREIGN POL. IN FOCUS (Feb. 1, 2007).

<sup>74</sup> Hallinan, *supra* note 73.

<sup>75</sup> Christopher A. Ford, *A Work Plan for the 2010 Review Cycle: Coping with Challenges Facing the Nuclear Non-proliferation Treaty*, Opening Remarks to the 2007 Preparatory Committee Meeting of the Treaty on the Non-Proliferation of Nuclear Weapons 3 (Apr. 30, 2007, Vienna), available at <http://www.ploughshares.ca/abolish/NPTReports/USA07-1.pdf> (last visited on Mar. 10, 2009).

<sup>76</sup> *Id.*

Evidently enough, the above examples point to the rather explicit code of conduct and sovereign behaviour in the *Bhagavad Gītā* for states armed with nuclear arms. They are waiting to be re-discovered by teachings, advocacy and scientific research. A scientific study of this text can produce a much more objective and sophisticated code of nuclear conduct than the world has now. Because this discovery would resurrect the role of Hindu oriental wisdom in contemporary times, the chances of signing and abiding such a treaty by the third world states would be much higher than expected. This would send a very positive signal to the Asian countries where Hinduism is respected and practiced directly or indirectly (for example through Buddhism in Thailand, and Cambodia, through Sikhism in Pakistan, through migration in the Caribbean countries, Fiji and Mauritius, and certain pockets of Kazakhstan and neighbouring countries).

There are extensive dialogues between various characters in the war of *Mahābhārata* on not using the *Brahmastra* (ancient equivalent of nuclear weapon) or the weapon of Brahma, the creator.<sup>77</sup> This weapon along with the *Pasupat-astra* (the weapon of Shiva, the destroyer) is the ultimate nuclear weapon that any Maharathi (great chariot rider) can possess. In fact, when *Drona*,<sup>78</sup> the teacher of *Pandavas* (righteous side fighting the *dharmayuddha*)<sup>79</sup>, commander of the *Kurus* (the non-righteous or *adharma* side)<sup>80</sup> and the chancellor of the best military school of the time,<sup>81</sup> intends to use it, *Brahma* expressly prohibits him and declares this use of weapon against his *dharma*.<sup>82</sup> A dialogue ensues between them and *Drona* decides to change his mind. At the end of the epic war, *Aswathama*, son of *Drona*, frustrated by defeat in war uses this weapon only to be cursed by Kishna, who diffuses the weapon resulting in minimal devastation. Thus there emerges, from the detailed dialogues between the characters in the middle of the war, a considerable state code of nuclear practice. These codes, as evidenced from the conversation of characters of *Mahābhārata*, appears to be a treaty more respected and prohibitive than the Treaty on the Non-Proliferation of Nuclear Weapons and the Comprehensive Test Ban Treat (the CTBT).

<sup>77</sup> K. R. Chandrasekharan, *Emerson's Brahma: An Indian Interpretation*, 33 NEW ENG. Q. 506-512 (1960).

<sup>78</sup> Martine Millon, Anna Husemoller, Richard Schechner, *Talking with Three Actors*, 30:1 DRAMA REV. 82-91 (1986).

<sup>79</sup> L. R., *Review: Indische Handschriften, pt. 12: Die Sammlung der Niedersächsischen Staats- und Universitätsbibliothek Göttingen* by Gerhard Ehlers, 119 J. AM. ORIENTAL SOC'Y 200 (1999).

<sup>80</sup> David Gitomer, *King Duryodhana: The Mahābhārata Discourse of Sinning and Virtue in Epic and Drama*, 112 J. AM. ORIENTAL SOC'Y 222-232 (1992).

<sup>81</sup> Edward W. Hopkins, *supra* note 36, at 157.

<sup>82</sup> Hopkins, *supra* note 36, at 184. The fact that *Drona* rewards his favourite disciple *Arjuna* with *Brahmastra* is proof of the fact that *Drona* possessed the nuclear weapon. See André Couture, *Kautilya's Initiation at Sandipani's Hermitage*, 49 NUMEN 37, 53 (2002).

## C. ICJ's Dialogue with Semantics of Indian Mythology

The ICJ established a direct dialogue with Indian mythology when Judge C. G. Weeramantry made an express reference to the *Bhagavad Gītā* in his dissent in the court's advisory opinion regarding the legality of the threat or use of nuclear weapons.<sup>83</sup> Judge Weeramantry's dissent in the ICJ advisory opinion is probably a post-colonial moment of cultural and epistemic resurrection of the ancient international law of India.<sup>84</sup> This ancient international law is rather obscured in the contemporary epistemology of international law's dominant vocabulary.

Encompassing ecological and environmental perspectives to other grave issues of international law, this case led to five declarations, three separate opinions and six dissenting opinions. Justice Weeramantry's opinion, for example, refers to the maintenance of obligations arising from treaties and "other sources of international law."<sup>85</sup> It sought support from *Bhagavad Gītā* as other sources of international law. The argument against the legality of nuclear weapons rests principally not upon treaties, but upon such other sources of international law (mainly humanitarian law), whose principles are universally accepted.<sup>86</sup> This ICJ reference to oriental wisdom came from the *Bhagavad Gītā* and the mythological exchange between Lord Kishna (Vishnu in Human incarnation) and his disciple *Arjuna* in the middle of a Dharmayuddha or righteous war where both sides were armed with nuclear weapons (called *divyastra* e.g. *Brahmastra* and *Pashupatiastra*). In *Mahābhārata*, there are thirty seven references to this nuclear weapon. Before *Arjuna* acquires those nuclear weapons from the respective gods, he is strictly advised by them to use it as a "threat weapon" rather than a weapon to be actually used in the war. This case presented before the ICJ the issue of the legality of nuclear weapons. The gravity of the matter under adjudication called for the greatest values attributed to human existence attached by any religion in any corner of the world. The universal human tenets of *Hinduism* were particularly applicable because:

<sup>83</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8) (dissenting opinion of Judge C.G. Weeramantry), available at <http://www.icj-cij.org/docket/files/95/7521.pdf> (last visited on April 19, 2009).

<sup>84</sup> M. Siddharth, *Postcolonialism, International Law and the Nuclear Question*, 37 INT'L STUD. 129-142 (2000).

<sup>85</sup> Dissenting opinion of Judge C.G. Weeramantry, 454 available at <http://www.icj-cij.org/docket/files/95/7521.pdf> (last visited on Apr. 24, 2009).

<sup>86</sup> See generally Weeramantry, *supra* note 85; See also, C.G. WEERAMANTRY, *UNIVERSALISING INTERNATIONAL LAW* (2004); See also, C.G. Weeramantry, *International Law and the Developing World: A Millennial Analysis*, 41 HARV. INT'L L.J. 277-86 (2000).

... as though, with remarkable prescience, the founding fathers had picked out the principal areas of relevance to human progress and welfare which could be shattered by the appearance only six weeks away of a weapon which for ever would alter the contours of war - a weapon which was to be described by one of its creators, in the words of ancient oriental wisdom, as a 'shatterer of the world' ...<sup>87</sup>

The rules contained in *Bhagavad Gītā* 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 essence of the *Hindu* laws of war has been to prohibit inequality in fighting and to protect those who exhibit helplessness. If the modern laws of war were to require that when war breaks out fighting must be conducted on the basis of 'like with like' or by using like weapons, it would not only minimise the impact of war but would also deter aggression and make war more humane.<sup>88</sup> "The world would be a better place to live in," says Surya Subedi, "if the modern laws of war based on the Geneva Conventions were to incorporate some of the rules of Hindu laws of war."<sup>89</sup> Thus, the concept of just war in Hinduism is not necessarily a Hindu war against foreign nations or the people of other faiths; it is against the evil characters of the day, whether national or alien. In simple terms, the *Hindu* concept of just war is based on right and wrong, on justice and injustice in the everyday life of all mortals, whether *Hindus* or non-*Hindus*. Unlawful and unjust actions, for example, the denial of the rights to which one was entitled, give rise to just wars.<sup>90</sup>

<sup>87</sup> P. GOODCHILD & J. ROBERT OPPENHEIMER, SHATTERER OF WORLDS (1981).

<sup>88</sup> K. R. R. Sastry, *Hinduism and international law*, *Recueil des Cours*, 117 ACADEMIE DE DROIT INT'L 503, 567 (1966).

<sup>89</sup> Surya Subedi, *The Concept In Hinduism Of 'Just War'*, 8 J. CONFLICT & SEC. L. 339-361 (2003). The *Manu Smriti* further elaborates the concept of a just war. See generally NAGENDRA SINGH AND EDWARD McWHINNEY, NUCLEAR WEAPONS AND CONTEMPORARY INTERNATIONAL LAW 15 (1989); STERLING JOHNSON, PEACE WITHOUT JUSTICE: HEGEMONIC INSTABILITY OR INTERNATIONAL CRIMINAL LAW? (2003); HARBANS SINGH BHATIA, INTERNATIONAL LAW AND PRACTICE IN ANCIENT INDIA (1977), Katherine Young, *Hinduism and Ethics of WMD*, in ETHICS AND WEAPONS OF MASS DESTRUCTION: RELIGIOUS AND SECULAR PERSPECTIVES 277, 307(SOHAIL H. HASHMI AND STEVEN LEE eds., 2004); DANIEL WARNER, HUMAN RIGHTS AND HUMANITARIAN LAW: THE QUEST FOR UNIVERSALITY (1997).

<sup>90</sup> Subedi, *supra* note 89, at 343.

## VI. Buddhism and International Law

Buddhism has been aware of the necessity and desirability of peace, order, and harmony in this world, as evidenced by the scattered references regarding Gautama Buddha's attitude toward monarchs and principalities. In general, *Buddhism* accepted certain Indian concepts such as those of elective kingship and conventional law while some Buddhist statesmen were marked by their high moral attitudes and qualities.<sup>91</sup>

Scholars have debated the role of the *Buddhist* teachings in developing various other international laws.<sup>92</sup> Emperor Asoka's political *Buddhism* and social ethics committed the kingship and state to the creation of welfare facilities and a prosperous society and for the escape from suffering and the realisation of a moral law (the *dhamma* the *Prakrit* of Sanskrit *dharma*) in society as a whole.<sup>93</sup> Thus the role of *Buddhism* in law creation is undisputed. New literature suggests the possibility of developing humanitarian, environmental and natural resource law from *Buddhism*.<sup>94</sup> Justice Weeramantry is one of the chief architects of the idea that various religions of the world could be used to enrich international law. Judge Weeramantry recalls the ancient conversation in Sri Lanka which reveals the existence of international environmental law exported from India of which Sri Lanka is just one example.<sup>95</sup> Sri Lanka was converted to *Buddhism* through the mission of *Mahinda*, the Emperor Asoka's son 23 centuries ago:

He came to Sri Lanka as a monk and accosted the king when he was on a hunting expedition. 'What is this you are doing?' he asked. 'You are hunting these poor animals and behaving as if you are the owner of this land. You are not the owner of this land. You are only the trustee, bear that in mind. And you hold it in trust for all living creatures who are entitled to use it.' This is the first principle of modern environmental law. The trusteeship principle is as old as humanity, as old as human beings living together on the planet in a common environment.<sup>96</sup>

Since *Buddhism* developed as a religious reform movement to purify *Hinduism*, it took almost everything the *Hindu* wisdom of the various Sanskrit literatures of

<sup>91</sup> Joseph M. Kitagawa, *Buddhism and Asian Politics*, 2 ASIAN SURV. 1 (1962).

<sup>92</sup> K N Jayatilake, *The Principles of International Law in Buddhist Doctrine*, 2 RECUEIL DES COURS, 24 (1967).

<sup>93</sup> S. J. Tambiah, *Buddhism and This-Worldly Activity*, 7 MOD. ASIAN STUD. 1-20 (1973).

<sup>94</sup> Eyal Benvenisti, *Asian Traditions and Contemporary International Law on the Management of Natural Resources*, 7 CHINESE J. INT'L L. 273-83 (2008).

<sup>95</sup> See C.G. Weeramantry, *Justice Can be Short-sighted*, 15 OUR PLANET 7, 8 (2005).

<sup>96</sup> *Id* at 8.



*Mahābhārata*, *Ramayana*, *Bhagavad Gītā*, *Puranas* and *Vedas* had to offer. The *Buddhist* idea of revolution is a direct import from Hinduism.<sup>97</sup> However, since it came much later, the major *Buddhist* wisdom was manuscripted in Pali and *Prakrit*, a language derived from *Sanskrit* and developed at the time when *Buddhism* was the state religion of the *Magadha* Empire under *Asoka*.

## VII. The “*Panchsheel Principle*” as the Modern Recognition of The Hindu-Buddhist Code of State Behaviour

### A. The China-India *Panchsheel* Treaty of 1954

*Panchsheel* is a Sanskrit word that literally translates into five disciplines or principles. In 1954, India promoted these five Principles as the basis for Sino-Indian relations on the issues regarding Tibet.<sup>98</sup> One of the leaders of the nonaligned movement and the first Prime Minister of India, Pt. Jawaharlal Nehru, argued for a peaceful co-existence policy with China.<sup>99</sup> This is how the five Principles or *Panchsheel* appeared in an international treaty and this policy by no means applied only to China - India considered these principles as the main foreign policy prescription with all of East Asia.<sup>100</sup> It was a desperate effort of the post-colonial India to revive its traditional methods and philosophy of state governance and foreign relations in a world that was about to plunge into a cold war soon. The *Panchsheel* agreement was seen to be a triumph of Asian statesmanship and Indian opinion over American-supported European hegemony. It was a matter of pride that the *Panchseel* agreement had Indian ideas: independence, neutralisation, and non-interference by foreigners.<sup>101</sup>

The *Panchseel* Principle, now a widely recognised international law principle,<sup>102</sup> is the modern contribution of Indian thought to international law. India, during the medieval times, along with *Buddhism*, exported the *Panchsheel* principles to East Asia

<sup>97</sup> R. Puligandla and K. Puhakka, *Buddhism and Revolution*, 20 PHIL. EAST & WEST 345-354 (1970).

<sup>98</sup> Dawa Norbu, *Tibet in Sino-Indian Relations: The Centrality of Marginality*, 37 ASIAN SURV. 1078-1095 (1997).

<sup>99</sup> Swaran Singh, *Three Agreements And Five Principles Between India And China*, ACROSS THE HIMALAYAN GAP AN INDIAN QUEST FOR UNDERSTANDING CHINA 57 (TAN CHUNG ed., 1998).

<sup>100</sup> D. R. SARDESAL, INDIAN FOREIGN POLICY IN CAMBODIA, LAOS AND VIETNAM 1947-1964 14-15 (1968).

<sup>101</sup> Ramesh Thakur, *India's Vietnam Policy, 1946-1979*, 19 ASIAN SURVEY 957, 960 (1979).

<sup>102</sup> John Cherian, *India and China celebrate the 50th anniversary of the signing of the Panchsheel agreement*, 21 HINDU (2004).

leading to the internationalisation of the *Panchsheel* philosophy very early in Asia. It is rather unusual for a non-European value to be absorbed in the dominant western international law fold. The refusal by some scholars, we believe, to accept the novelty and origin of these principles from the Asian civilization matrix is indicative of the disrespect for anything “other” in international law.<sup>103</sup> The reason, partially, is political and the rest explained by the superiority complex of the advanced states of the world.<sup>104</sup> One should not forget that the *Panchsheel* diplomacy played a more significant role than emphasised in the legal literature. Disinterest in accepting *Panchsheel* as an international legal document is partially because it was primarily a diplomatic instrument. However, the fact that international law has developed from diplomacy is an open secret. The international law still remains European in constitution and character. The exclusionary attitude to the Asian and African aspect of contribution to international law is detrimental to the overall health of international law.<sup>105</sup>

With respect to the old public international law principle of *pacta sunt servanda*, any Sino-Indian dispute would have to be resolved according to the *Panchsheel* Agreement. This was an important international legal agreement between two large countries, the democratic India and the communist China, although only lasting for a rather short time of seven and a half years. *Panchsheel* was an ancient Sanskrit phrase in India that Lord Buddha had used in the moral context of self-governance and the references to this could also be found in China as well as in Indonesia. Therefore, *Panchsheel* was a product of the ancient civilisational matrix of Asia where India had a defining role. Former President of India, K. R. Narayanan, speaking at the 50th Anniversary of the promulgation of the Five Principles of Peaceful Co-existence reiterated that:

In China, the idea of the Five Principles can be traced back to ancient times. The Great Chinese Philosopher Confucius spoke of harmony in the midst of the differences and outlined certain ethical principles of human conduct. Thus it might

<sup>103</sup> See Werner Levi, *International Law in a Multicultural World*, 18 INT’L STUD. Q. 417, 422 (1974). He refuses to accept that these principals existed before the modern international law accepted these principles as customary international law.

<sup>104</sup> Singh, *supra* note 19.

<sup>105</sup> James Thuo Gathi alone has been a very strong voice from Africa presenting a strong case for international trade law and Public International Law from the “Third World Approaches to International Law” (TWAIL) perspective. Taxonomy of his work is significant for an understanding of an alternate vision of the world order that is more accommodative and less excluding. See generally James Gathi, *A Critical Appraisal of the International Legal Tradition of Taslim Olawale Elias*, 21 LEIDEN J. INT’L L. 317 (2008), *Third World Approaches to International Economic Governance*, in, INTERNATIONAL LAW AND THE THIRD WORLD: RESHAPING JUSTICE 255 (RICHARD FALK, BALAKRISHNAN RAJAGOPAL AND JACQUELIN STEVENS eds., 2008), *Introduction: The Third World and International Law*, 9 INT’L COMM. L. REV. 331 (2007), *Imperialism, Colonialism and International Law*, 54 BUFF. L. REV. 1013 (2007), *International Justice and the Trading Regime*, 19 EMER’Y. INT’L L. REV. 1407 (2005).

be said that the Five Principles arose from the civilisational matrix of Asia and, in its modern form, as stated in the 1954 Agreement between China and India, was a new and creative contribution to the theory and practice of international relations form the ancient continent of Asia.<sup>106</sup>

*Panchsheel* was India's nonaligned and own foreign policy card to insulate the region from the aftermath of post-colonial legacies<sup>107</sup> through the good neighbour policy in *Nehruvian* era of 1950s.<sup>108</sup>

## **B. *Panchseel* as the Customary International Law Principle: the Role of International Courts and Tribunals**

"*Panchsheel* suggested," remarks Deepa Ollapally, "a certain lack of attention to realist precepts and instead a faith that a common anti-imperialist and pan-Asian ideological orientation could overcome regional ambitions of two large and powerful neighbors."<sup>109</sup> But how often do we find a reflection of realism in international law? To the contrary, it is the idealism and universalism which keeps international law progressing. An excessive dependence on realism, we believe, could push international law into an inferiority complex and depression beyond redemption. Thus the non-realist and idealistic *Panchsheel* is an instrument of admiration. In fact, so dominant is this principle in the Asian subcontinent that the first Maoist Prime Minister in Nepal declared, as soon his party came into power in 2007, that *Panchseel* will be the main foreign policy plank with neighbours.

With the advancement of today's technology, the world is becoming more integrated than ever before. There is no reason why *Panchseel* could not become the universal policy of international relations among the states for long lasting peace and security. The fact that *Panchseel* could not prevent an Indo-China war in 1962 and subsequent Indian war in 1965 with Pakistan, does point to issues that undermine

<sup>106</sup> K. R. Narayanan, 50<sup>th</sup> Anniversary of *Panchsheel*, 2 CHINESE J. INT'L L. 369, 369 (2004). Other voices compiled by the Chinese Journal of International Law on this issue are, Wen Jiaobao, *Carrying Forward the Five Principles of Peaceful Coexistence in the Promotion of Peace and Development*, 3 CHINESE J. INT'L L. 363 (2004); Boutros Boutros-Ghali, *The Five Principles*, 3 CHINESE J. INT'L L. 373 (2004), Edward McWhinney, *The Renewed Vitality of the International Law Principles of Peaceful Coexistence in the Post-Iraq Invasion Era: The 50th Anniversary of the China/India Pancha Shila Agreement of 1954*, 3 CHINESE J. INT'L L. 379 (2004).

<sup>107</sup> For example, the McMahon boundary disputes, the suzerainty of Tibet in British period, etc.

<sup>108</sup> For details of the shared history of India and China on Tibet see Basil Gould, *Tibet and Her Neighbours*, 26 INT'L AFF. 71-76 (1950). Earlier insights in the issues are available in Charles Bell, *Tibet and its Neighbors*, 10 PACIFIC AFF. 428-440 (1937).

<sup>109</sup> Deepa Ollapally, *Third World Nationalism and the United States after the Cold War*, 110 POL. SCIENCE Q. 417, 427 (1995).

*Panchsheel*'s effectiveness. But the reasons for the two wars were are ineffective use of the principles, rather than the principles themselves. One cannot accuse the principles for its effectiveness unless they are practised properly. Increasingly, these principles need more references in the judgements of the ICJ, and other international courts for its formal recognition as a customary principle of international law. This is one of the ways through which the *Panchseel* could be universalised and legitimised.

Given the unique role of the European Court of Justice (ECJ), as the powerful court for resolution of disputes among the EU member states, the *Panchseel* could be recommended as the guiding principle for managing relations between member states. The ECJ has in the past, as noted by Professor Bronckers, used a muted dialogue mechanism to borrow solutions from the other courts like the WTO Appellate Body: "the ECJ has found more subtle ways than direct effect to give domestic law effect to international agreements."<sup>110</sup> Similarly, formal and regular recognition of the *Panchseel* principles in the EU through ECJ decisions and references would boost the possibility of *Panchseel* as customary international law. Professor Bronckers' solution is a wonderful way of avoiding the political controversy associated with direct effect of alien principles and yet borrowing the best wisdom on the solution: it kills two birds with a single stone.

## VIII. *Dharmayuddha, Jihad and the Crusade: the Obscured Differences*

The significant difference in the basic tenets of social regulation can be found in the way people have approached defending their various religions. The comparisons between *Hindu Dharmayuddha*, Muslim *Jihad*<sup>111</sup> and the *Christian Crusade*, help elucidate these differences.<sup>112</sup> These so-called religious wars, pleasantly absent in Buddhism, represent the meeting point of clergy and commander, state and church, and weapons and religious scriptures. The main difference between the *dharmayuddha*, on the one hand, and *Jihad* and Crusade, on the other hand, is in their respective treatment of foreigners and non believers. The single figure of speech called Crusade with similar religious agenda, allegedly, led Islam and Christianity in directions that were culturally

<sup>110</sup> Marco Bronckers, *From 'Direct Effect' To 'Muted Dialogue': Recent Developments in the European Courts' Case Law on the WTO and Beyond*, 11 J. INT' L ECON. L. 885, 885 (2008).

<sup>111</sup> See Marcel A. Boisard, *On the Probable Influence of Islam on Western Public and International Law*, 11 INT' L J. OF MIDDLE EAST STUD. 429-450 (1980).

<sup>112</sup> For the account of Buddhism-Islam cross feeding see, David Scott, *Buddhism and Islam: Past to Present Encounters and Interfaith Lessons*, 42 NUMEN, 141-155 (1995).

unintelligible and logically antagonistic.<sup>113</sup> However, we do not see that difference as both Islam and Christianity wielded sword for religious expansion: one was better than other only in terms of scheme and management.

This is a significant departure from how the Hindu polity viewed “others” or non-followers. These tenets later directly translated into foreign policy behaviours of the ancient *Hindu* world. The *Hindu* laws were rather secular and mandated the same punishments to national and foreign citizens if the same crime was committed. The rights of the foreigner residing in the kingdom were recognised and the *dharmayuddha* was not a religious war against the foreigners and non-followers unlike *Jihad* and *Crusade*.

During the Roman times, crusades for religious control were executed in a different manner. In 1100 AD, the Church under the Roman Empire was very strict with regard to heresy. In 1231 AD, Pope Gregory the IX began the inquisitorial process - a trial in which people could be executed with no evidence and the lynching mob could stone the accused to death. The mid-thirteenth century witnessed the emergence of theological brutality in Christian Europe.<sup>114</sup> Rumours and spy reports were used as evidence to convict the non-believers of Christianity. It was believed that if the torture leads to a confession, the torturer only benefitted the accused because a confession leads to one's union with God - clearly a theological tool to silence secular opposition. This is not to say that there are no apologetic patterns in *Hinduism*: many *Vedanta* scholars see *Bhagavad Gītā*'s hero, *Arjuna*, as the *Renaissance* man.<sup>115</sup> But Roman tactics appear rather barbaric and primitive if compared to *Kautilya's Arthaśāstra* and *Manu's* detailed and analytical laws of governance that were in practice before the birth of Christ. These Roman laws also lack the sophistication found in handling the secular and religious aspects of state management illustrated in *Mahābhārata*. Also unlike in Europe, the Church or temple in India never replaced the King as the effective ruler. The temple always worked in co-ordination with Kings and therefore India never saw a phenomenon similar to medieval Roman theological brutality. The effects of religion in India were more subtle and gender biased.

<sup>113</sup> David Edwards, *Mad Mullahs and Englishmen: Discourse in the Colonial Encounter*, 31 COMP. STUD. SOC'Y & HIST. 649, 670 (1989).

<sup>114</sup> See W. R. Jones, *The Image of the Barbarian in Medieval Europe*, 13 COMP. STUD. SOC'Y AND HIST. 376-407 (1971); Philip Gorski, *Historicizing the Secularization Debate: Church, State, and Society in Late Medieval and Early Modern Europe, ca. 1300 to 1700*, 65 AM. SOC. REV. 138, 158 (2000).

<sup>115</sup> See Agehananda Bharati, *The Hindu Renaissance and its Apologetic Patterns*, 29 J. OF ASIAN STUD. 267-287 (1970).

## IX. Conclusion

### A. How to Implement the “Abstract”

There is an obvious question about the inclusion through application of such an abstract idea. How can Hindu international law be applied and integrated into the contemporary body of international law? The answer is not as elusive as it seems. However, the solution would have systemic effects if applied. Article 38 (c) and (d) of the statute establishing the International Court of Justice (ICJ) speaks of the sources of international law:

c. the general principles of law recognized by civilized nations;

d. to the provisions of Article 59, judicial decisions and the *teachings of the most highly qualified publicists of the various nations*, as subsidiary means for the determination of rules of law.<sup>116</sup>

The status of nations considered “civilised” as stated in Article 38(c) of the ICJ’s statute should be expanded as wide as possible by including and accommodating the ancient civilisation of India. Indian scholarly papers can also be cited as a case in point for this systemic advocacy under “publicists of various nations.”<sup>117</sup> Also, the Vienna Convention on the Law of Treaties (VCLT) has a significant role to play. Article 31.3(c) of the VCLT should be used to interpret the above mentioned Hindu texts to expand the scope of modern international law. In the *European Community - Biotech* (GMO) case, the WTO panel shed light on the role of this particular article and its ability to bridge the fragmentation of international law.<sup>118</sup> There is no reason why such an approach cannot be taken by the world courts and other regional courts, i.e., using article 31.3(c) of the VCLT in interpreting and universalizing international law.

<sup>116</sup> The STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, available at [http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER\\_II](http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II) (last visited on Apr. 6, 2009) [Emphasis added].

<sup>117</sup> For systemic issues in public international law see Georges Abi-Saab, *Fragmentation or Unification: Some Concluding Remarks*, 31 N. Y. UNIV. J. INT’L L. & POL. 919 (1999); Roger Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA J. INT’L L. 675 (2003); CHITTHARANJAN AMERASINGHE, JURISDICTION OF INTERNATIONAL TRIBUNALS (2003); Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 N.Y.U. J. INT’L L. & POL. 791 (1999); Philippe Sands, *Treaty, Custom and the Cross-fertilization of International Law*, 1 YALE HUM. RTS. & DEV. L.J. 85 (1998).

## B. Post Modern Anxieties of Modern International Law

Post-WWII international law literature has not seen a phenomenon akin to the postcolonial revolution in critical studies in social sciences - the critique has been rather mute.<sup>119</sup> There is neither Sartre nor Franz Fanon or Edward Said in critical international legal studies - Koskenniemi is the closest that we have. But he has his limitations of self-critique in the oriental narration of occidental international legal narcissism: a discipline that refuses to recognise the “other” or anything non-European. The critique as contribution, in the western notion of democratic freedom of speech, has to come from the periphery of international law and not from the centre. And “the task,” as Koskenniemi rightly points out, “is to move from doctrinal critique to progressive practice.”<sup>120</sup> After all, law, national or international, is about practice. The dictating role of Christianity in the making of modern international law is well documented in the current literature as a problem of political theology.<sup>121</sup> However, what is not appreciated is the fact that this European juggernaut crushed the possibility of other religions of the world in playing a role in the development of modern international law.<sup>122</sup> Nonetheless, despite a guilty conscience about dependence on Western analytical tools, oriental study of international law continues to ignore the oriental cultural articulations of law and indigenous universal values.

## C. Contextual Position of the Debate: What Should be Done?

We need to work towards the creation of a complementary oriental vocabulary of universal relevance - irrespective of the anxiety of its absorption in the Western lexicon of international law. Exploring Hindu international law and international relations theories is only a part of this required exercise. There are some Indian voices on human rights but other aspects of international law remains untouched. India has much more to offer than just enriching the vocabulary of human rights. A South forum called “Third World Approaches to International Law” (TWAIL) has developed where new

<sup>118</sup> *European Communities - Measures Affecting the Approval and Marketing of Biotech Products*, DS291.

<sup>119</sup> See Donald R. Wehrs, *Sartre's Legacy in Postcolonial Theory; Or, Who's Afraid of Non-Western Historiography and Cultural Studies?* 34 NEW LITERARY HIST. 761-789 (2004).

<sup>120</sup> Martti Koskenniemi, *What Should International Lawyers Learn from Karl Marx?* 17 LEIDEN J. INT'L L. 229, 229 (2004).

<sup>121</sup> *Id.* at 233, 234, 238, 244. Originally discussed in, G. SCHWAB (TRANS.) CARL SCHMITT, *POLITICAL THEOLOGY. FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 36 (1988).

<sup>122</sup> Prabhakar Singh, *The Political Narratives of International Law and International Relations: In the Defence of Universal Constitutionalism* (Jan. 11-13, 2008) (paper presented at the First Graduate Student Conference of Toronto Group for the Study of International, Transnational, and Comparative Law, University of Toronto) (on file with author).

authors are developing a vocabulary of international law that explores the non-western sources (particularly Indian and African) and identifying universal human values so integral to the “other” world.<sup>123</sup> Bhupinder Chimni, for example, offers a parallel between modern international law and Amartya Sen’s conception of development as freedom.<sup>124</sup> Sen, an economist, does not shy away from going into the secular values of ancient India.<sup>125</sup> However, the idea is not to dislodge the “Western” in international law in the wake of Asian resurgence, but to make the modern international law rather accommodative and universal.

International law was never created as a solution of today’s international world; perhaps at best it was a Western cover up for political theology of medieval Europe. International law has been a victim of cost-benefit calculation for desired goals of dominant states. In the gradual dislocation in the epicentre of power to Asia, China and India have emerged as the large actors. This explains the anxiety concerning the future of international law. There are suspicions about the systemic implications of this tectonic movement. But one should rest assured - these tectonic movements are not going to create a tsunami that would wipe the West out of the legal universe. At best, it would irrigate the otherwise barren and infertile land of international law where nothing other than the “Western” grows.

Historically, the post-WWII decolonisation of the Asian and African states had issues more important than staking their claim in the formation of international law. They were net importers rather than exporters of foreign policy prescriptions to the UN system and related international law mechanism. The newborn Asian and African sovereigns legitimised the existing public international law by resorting to it using the ICJ as the forum for adjudication of disputes between them. Nonetheless, *Hinduism* and *Buddhism*, among other major religions of the world, have the potential to export secular legal values to the modern international law. This exchange of values, carried out in the judgments, opinions and suggestions of the international courts, as discussed above, can

<sup>123</sup> Scholars like Bhupinder Chimni, Balakishnan Rajagopal, James Thuo Gathii, M.P. Singh, Upendra Baxi, Surya Subedi, Antony Anghie, Obiora Okafur, and M. Sornarajah are leading the effort at TWAIL. See B. S. Chimni, *Alternative Vision of World Order: Six tales from India*, 46 HARV. INT’L L.J. 389-402 (2005); M. Sornarajah, *Power and Justice: Third World Resistance in International Law*, 10 SING. YEAR BOOK INT’L L. 19-57 (2006); A. ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005), BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE* (2003).

<sup>124</sup> B.S. Chimni, *supra* note 3.

<sup>125</sup> Amartya Sen now heads the project of resurrecting the oldest university of the world, Nalanda University, located in Bihar, India. See Prudence R. Myer, *Stupas and Stupa-Shrines*, 24 ARTIBUS ASIAE, 25, 26 (1961). *Nalanda* is the Sanskrit term for “giver of knowledge.” *Nalanda* University, which existed until 1197 AD, attracted students and scholars from Korea, Japan, China, Tibet, Indonesia, Persia and Turkey besides being a pedestal of higher education in India. See Aurel Stein, *The Desert Crossing of Hsüan-Tsang, 630 A. D.*, GEOGRAPHICAL J. 265-277 (1919).



play an enriching role in their formal codification as international legal documents of universal modern international law. India has traditionally been, according to Sen, an argumentative and critical society.<sup>126</sup> To affect a renaissance of international law, India only needs to look back to its history.

<sup>126</sup> AMARTYA SEN, *THE ARGUMENTATIVE INDIAN: WRITINGS ON INDIAN HISTORY, CULTURE AND IDENTITY* (2005).