Commentary

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The task of commenting on a paper is made the more difficult if one finds oneself, as I do, in broad agreement with the analysis and conclusions in Professor Keith's paper, which does, with admirable clarity and precision, what it sets out to do, namely, to highlight the principal developments in the area of international humanitarian law with special reference to recent practice and in particular to the two Additional Protocols to the Geneva Conventions of 1949, which emerged from the Diplomatic Conference in 1977.

Progressive development of the law in this area has certainly been taking place since the end of World War II. Professor Keith has focussed mainly on the changes brought about in the Geneva Conventions framework by the Additional Protocols, thus:

(i) by the inclusion in the first Protocol of wars of national liberation as a category of armed conflict to which international humanitarian rules relating to international armed conflicts would apply;

(ii) by the inclusion of a provision in the Second Protocol which seeks to supplement and develop Article 3 common to the 1949 Geneva Conventions relating to non-international armed conflicts.

(iii) by the inclusion of more elaborate provisions in the First Protocol for the effective protection of civilian populations against the effects of hostilities, and in particular, provisions relating to aerial bombardment (Articles 48–60 of Protocol I and Articles 13–16 of Protocol II).

(iv) by the amendment of criteria by reference to which a distinction can be drawn between civilians and combatants, such that in Professor Keith's judgment, the balance has been moved substantially in favour of guerilla warfare.

(v) by the inclusion of certain provisions relating to enforcement: dissemination, reprisals and fact-finding inquiries.

Professor Keith, in dealing with basic principles, refers to Article 1.2 of this First Protocol which takes us back to the classical nineteenth century foundations of international humanitarian law — the de Martens clause, with only one difference. While that clause spoke of "usages established among civilised peoples, the laws of humanity and the dictates of the public conscience", Article 1.2 has substituted for "usages established among civilised peoples" the words "established custom", this causing a wit to remark that the twentieth century had caused "the disappearance of civilised peoples".

By concentrating his focus on the Additional Protocols and the classical foundations of international humanitarian law, I would suggest the paper may have given insufficient weight to certain post-war developments, which not only provide doctrinal underpinning for some of the changes and powerfully reinforce

the nineteenth century principles, but are relevant for devising strategies to fill gaps which still remain in the framework of international humanitarian law and its enforcement.

Thus, it may be useful to place the changes discussed in Professor Keith's paper in the context of two major streams of development in the sphere of public international law in the immediate post-war period. One was the emergence of the doctrine of individual criminal responsibility for committing "crimes against humanity", a category of international crime consisting essentially of grave breaches of certain rules of international law, and the other on the internationalisation of human rights. The Nuremburg Charter, General Assembly Resolution 95(I) affirming the Nuremburg Principles, the Convention on Genocide adopted by the General Assembly and a series of subsequent declarations and judicial pronouncements provide the foundation for the doctrine of individual criminal responsibility. The United Nations Charter itself, the Universal Declaration of Human Rights, the two U.N. Covenants and a series of declarations and instruments provide the basis for what has been called "the developing international law of human rights".

Indeed Professor Keith observes in his paper that the extension of international humanitarian law to internal conflicts builds in part on this "developing international law of human rights". The human rights doctrine not only disposes of the claim that matters touching upon human rights are under a State's domestic jurisdiction, but provides a fundamental new basis or perspective for dealing with violent assaults on basic human rights — analysis is what international humanitarian law is concerned with.

Post-war developments show a convergence of parallel approaches, the common objective of which is the protection of certain basic rights of individuals against violent assaults, either by external forces or even by those in control of the victim's own state. At least three parallel approaches are found. The doctrine of individual criminal responsibility for committing crimes against humanity is directed against such large-scale violations of basic human rights as: mass murder, enslavement and deportation. It is not without significance that it was the International Conference on Human Rights convened in Teheran by the United Nations to celebrate the twentieth anniversary of that Universal Declaration which identified gaps in the Geneva Conventions' framework cast by Resolution XXIII recorded as follows:

(i) that the 1949 Conventions were not sufficiently broad to cover all armed conflicts and that, in particular, persons who struggle against minority racist or colonial regimes should be protected against inhuman and brutal treatment and should be accorded the status of prisoners of war (Preamble);
(ii) that better protection should be provided for civilians, prisoners and combatants by additional international conventions or by revision of existing instruments (paragraph 1(b));
(iii) that, pending the adoption of new rules, all States should ensure that inhabitants and belligerents are protected in accordance with the principles referred to in the de Martens clause (paragraph 2).

It was this perception that substantial gaps existed in the Geneva Conventions' framework of international protection of the individual against violent assaults and his basic human rights in different types of armed conflict situations, that led

many, including our delegation, at the Diplomatic Conference in 1974 to press for strengthening the Geneva Conventions' framework and making it more effective so that innocent men, women and children may be protected from the kind of atrocities to which our people had been exposed only a few years earlier while seeking to uphold their democratic right to govern themselves. It does less than justice to the sentiment underlying the proposals for extending international protection to victims of all types of armed conflicts to ascribe it, as some do, to ideological predilections of the Third World, more particularly since Professor Keith notes that this basically humanitarian position was praised by countries like Norway on the grounds that victims of all armed conflicts should be entitled alike to international protection and that human values involved are the same whether the conflict is international or internal (and as Professor Keith rightly observes: "indeed if anything, the threats to them may be greater in internal conflicts").

There is also a striking parallel between, on the one hand, the protection sought to be afforded by Article 3 common to the Geneva Conventions when it casts a derogation to treat protected persons humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, and prohibits such acts in respect of them as: violence to life and person, in particular; murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity, in particular, humiliating and degrading treatment and the passing of sentences and carrying out of executions without due process of law; on the other hand the doctrine of non-derogable or non-suspendable rights developed in the context of the U.N. Covenants, and the European Convention and the Inter-American Convention on Human Rights. Each of those instruments, in dealing with states of exception, when constitutional protection of human rights, often along with the Constitution, is sought to be suspended on grounds of national security, have provided that certain core rights are in no circumstances derogable or suspendable; these include the right to life, prohibition of torture and inhumane treatment, prohibition of slavery and the prohibition of retroactive application of criminal laws. The same trust is evident in the Declaration adopted by the General Assembly on 9 December 1975 condemning the act of torture or other cruel, inhuman or degrading treatment as "an offence to human dignity" providing in paragraph 3 that:

> "No State may permit or tolerate torture or cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or threat of war, internal political instability or any other public emergency may not be involved as justification of torture or other cruel, inhuman or degrading punishment."

International Humanitarian Law, along with human rights law, are essential components of a framework for protection of individuals against violent assaults on their basic rights. Any assessment of the present state of international humanitarian law would be incomplete without tracing its linkages with the international law of human rights, as they must complement and reinforce each other, if the gaps in the existing framework are to be filled and more effective protection is to be secured for individuals who are threatened by violent assaults against their basic human rights.

This linkage between international humanitarian law and the international law

of human rights is of specific importance in relation to the question of enforcement. Under the head of enforcement, Professor Keith deals with three matters: dissemination, reprisals (with the respectful note that "the real threat of an illegal reprisal might well be effective"), and inquiries (with the note that the Diplomatic Conference had further to agree on the establishment of a permanent independent commission, with compulsory jurisdiction).

I would like to suggest that certain other concerted international initiatives and action could effectively contribute towards improved enforcement of international humanitarian law.

The following measures merit serious consideration:

(i) establishing universal criminal liability for individuals who commit "grave breaches" and setting up machinery for prosecution and trial of delinquent individuals: thus those who order or inflict wilful killing, torture or inhuman treatment, including biological experiments, or similar atrocities, or grave breaches of the obligations prescribed by Article 3, or who are responsible for gross violations of the non-derogable human rights, should by analogy with pirates, criminals and aerial hijackers, be subject to trial and punishment wherever they may be found.

Indeed, with regard to war criminals, such universality of jurisdiction has been recognised. The 1949 Geneva Conventions themselves place the parties under an obligation to search for and try persons alleged to have committed "grave breaches". Under the Geneva Conventions parties undertake to enact legislation so as to enable the imposition of effective penal sanctions on any persons, whatever their nationality, who are alleged to have committed or ordered a "grave breach". The Conventions do require that national courts be conferred by national legislation, with penal jurisdiction that is of universal application in respect of all those who have committed grave breaches.

This system of enforcing the individual criminal liability of delinquent individuals has been testified by Articles 86 and 87 of the First Protocol. Article 86 provides for penal responsibility of a superior authority in respect of a breach committed by a subordinate, if the superior authority knew or should have concluded in the circumstances that the breach was being or about to be committed, but also failed to take feasible measures to prevent or repress its commission. Article 87 prescribes that governments should ensure that their military commanders are instructed to prevent and suppress breaches, and to make certain that their subordinates are aware of their obligation under the Conventions and Protocol I. A duty is cast on governments to ensure that their military commanders comply with the requirements of Article 87.

A significant initiative which could be mounted is to remind governments of their obligations under the Geneva Conventions and the First Protocol to enact necessary national legislation and discharge their obligations to search and try delinquent individuals. The conscientious implications of this measure could act as a substantial deterrent to would-be delinquents — since it is the demonstration of "conspicuous indifference" by States parties to the Geneva Conventions which enables delinquents to evade the dictates of justice, and thus provides positive encouragement to would-be delinquents.

(ii) Simultaneously, as part of the movement for enforcement of internatinal humanitarian law, the ratification of the UN Human Rights Covenants should be vigorously promoted, along with ratification of regional human rights instruments where these exist, and the establishment of such instruments along with appropriate machinery, where these do not at present exist, as in the Asian and Pacific regions.

(iii) Dissemination in the form of only formal instruction in the contents of the Geneva Conventions and the Additional protocols, if it is to be effective, should form part of integrated courses on human rights. A limited approach at making international humanitarian law acceptable on the basis of some sort of "threats and retaliation" — a kind of reciprocity based on mutual threats of retaliation by the weak against the powerful, inevitably lacked credibility. If a new strategy is to be adopted for effective enforcement of international humanitarian law and the protection of human rights which has to contend against the creeping brutalisation of a world, which has learnt to live with atrocities, to look the other way, and to cover up, what is needed to right this is not just dissemination of information, but what in the sociologist's jargon is called "conscientisation" — a revival of moral sensibility and of the public conscience, so that men may become human again in order to resist man's inhumanity to man.