Human Rights and Humanitarian Law — Confluence or Conflict?

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Address to seminar

I'd like to say to you first of all that I had some difficulty knowing how to approach the subject, "Human Rights and Humanitarian Law — Confluence or Conflict?" For an academic to engage in a straight juggling of terms, equating them and differentiating them seemed to me an exercise which would fall very badly on the 5th day of a 6-day seminar. I expected also, and in this I have not been disappointed, that the relationship between human rights and humanitarian law would arise again and again, centrally, sometimes tangentially, in the discussion of the seminar and that I should be able to profit from what other people had said and that I should perhaps draw it together making use of the preceding days of the seminar and not taking you back unnecessarily to the premise.

My other difficulty was in the phrase "confluence or conflict?" Confluence, certainly. Confluence not in the sense of merger but in the sense of mixing. I think we have to drop our metaphor, although I was fond of it, of streams joining each other, because when the Ohio joins the Mississippi you can no longer identify the waters of the Ohio. I think it is a much better metaphor to say "threads of different colours", weaving a piece of worsted, a pattern in which the two contribute to a whole but in which it is important never to lose sight of the separate identity of humanitarian law. Confluence or conflict? Conflict. This is what really worried me. Indeed, in this subject as the last few days have shown, we have enough real problems. But a conflict between Humanitarian Law and the Law of Human Rights surely not. That's one problem we don't have or shouldn't have.

It seemed to me, on the other hand, that this question on confluence or conflict would make very good sense if you put it into an historical perspective. Because, indeed, it is true that for 25 years or so after the foundation of the United Nations, Humanitarian Law and the Law of Human Rights went different ways and found it very hard even to meet. You might say, why put the clock back? Why look back to a problem that has been surmounted? And I think that the answer to that is that for three or four sessions we have deliberately turned our minds back to look at different Asian contributions to the mainstream of human experience in the humanitarian law field and human rights and what I'm doing I think is complementing that. I'm looking, not back into the distant past, not back into the contribution of centuries, but in a "pressure-cooker" period, where the world has an international organisation, and things happen rather faster than they used to happen and where there is a continuing theme of the newer States of the world, and I shouldn't say only newer States because many of them are very old.

But the States of the Third World, the States of Africa, Asia and to some extent the States of Latin America are coming to terms with the more received law when the United Nations was founded and basing themselves more often than not on the United Nations Charter as the ultimate authority on International Law. So that the story with which I am concerned is really a story, and I think, one that ends in the triumph of taking over something that might have been regarded as belonging to a European tradition, rather limited in its outlook and in its antecedents, and making it the property of the whole world.

Before I go on to that, as we have spent so much time on what can be gained from the traditions of individual countries in our region, and since Mr Jaeckli was good enough to mention the war instruments of the Maori people of New Zealand, I should perhaps say just a word about that.

The Maoris, who are a branch of the great Polynesian race that stretches from Hawaii to the Cook Islands, Samoa, Tonga to New Zealand, have an immensely cultured institution of warfare.

And warfare, while involving violence and loss, was regulated extremely carefully in pre-European days. It degenerated and became much more lethal when the Maoris were sold muskets by visiting European whalers and others who landed.

But, about the time of the Battle of Solferino, the Maoris who in the meantime, like all Polynesians, had adopted Christianity and practised it and still practise it with rather more fervour than their mentors, were engaged in warfare with an European force of British soldiers and New Zealand soldiers in troubles over land.

To take one incident only, that was quite close in time to the Battle of Solferino, an occasion arose when a Maori force, beseiged in one of their fortified places, escaped or came out by night and provided water to the wounded on both sides on the battlefield and retreated to their stockade, unseen. This was not known until afterwards. It is not an aberrant story. It is quite typical of many tales of gallantry by the Maori people in warfare. So, from all parts of our region, we make a contribution to this deepening tradition.

Mr Chairman, perhaps before I go any futher, I should take up just briefly the gauntlet that Professor Keith threw to me at the opening meeting of the seminar, when this question of definitions did arise.

I was reminded of the International Court of Justice in the *Corfu Channel* case where the issue is responsibility for loss of life and property to a ship which strikes a mine in the territorial sea. Not being wartime, the Court observes that the Law of The Hague has no direct bearing upon the case and then as it lists the principles which do apply to the case, one it mentions is something like "elementary considerations of humanity", even more compelling in times of peace than in times of war, which might seem to provide some kind of support for the speakers who have emphasized that Humanitarian Law is not of necessity confined to warfare, but the principle of humanity is a thread throughout the law.

Sometimes, as in Dr Feliciano's statement this morning, it is seen with very much more clarity. When one is dealing with refugees, although their plight might not arise out of an armed conflict, it is the principle of humanity and the doctrines of humanitarian law to which we turn for support and guidance.

Again, as various people have said, you cannot for long talk about

humanitarian law without considering also the Law of Human Rights. Mr Meurant, in his address the other day, said in passing, "Humanitarian Law not only mitigates the violence of conflict, it also contributes to safeguarding fundamental human rights, even when violence is at its worst". It is quite possible to say that the Law of Human Rights, or Humanitarian Law, is in some abstract ultimate sense the whole of International Law because ultimately International Law, no less than municipal law, is directed to the welfare of individual men and women. But as a matter of convenience we use these terms more out of emphasis than out of sharp distinction. It has often been said during the course of this seminar that humanitarian law is victim-oriented. And it can't be said too often our basic object is not to punish, not to revenge. One basic object is always to prevent, and to succour injury. If we have to choose between justice or obtaining mercy we first obtain mercy.

If one wanted to go a little further, one could say that when we think, for example, of the laws of war and refugee law one can well see the spread of humanitarian law. Whether we are dealing with the consequences of war in Vietnam or whether we are dealing with a forced exodus on a mass scale of aliens from Nigeria, we are dealing still with a victim-oriented strategy.

Again, if you're talking abut either Humanitarian Law or Human Rights Law you're always thinking of the individual. You are setting aside a little of that preponderate notion that International Humanitarian Law is between States and that people are at the best an object of the law. You are beginning to think also, that it is their ultimate right that you are concerned with vindicating. I suppose that if you are thinking about the Law of Human Rights as a subject, the first thing that occurs to you is that this is a branch of the law in which States accept an international accountability for the way in which they treat even their own subjects. And once again, Humanitarian Law and the Law of Human Rights begin to merge in situations such as those that are dealt with in the Second Protocol where Humanitarian Law borrows directly from the Law of Human Rights to set out the fundamental rights of individual people in the worst of all situations.

If one has those kind of distinctions in mind, one realises that we are not really trying to set up fences between the different thoughts but rather to suggest our orientations. I think we won't be greatly troubled by distinguishing the threads of human rights and humanitarian law. And I should say that at this point, that of course, it is not just a matter, not by any means a matter of Humanitarian Law borrowing from the richer Law of Human Rights.

You could put it exactly the other way round. Because in the lead up to the drafting of the United Nations Charter, men such as Hersch Lauterpacht were engaged to stress for the first time in a major international document, that it was people, not States, with whom international law was ultimately concerned. We, the peoples of the United Nations. And in doing that he drew upon two traditions. One was the tradition that States themselves in their municipal law acknowledge the existence of international law and treated it in many cases as a part of their own law. So in the common law system English courts held that customs which were observed by all States must necessarily be observed by England as part of the common law. And so from quite early days international law was administered when the case arose, in municipal courts in matters which

affected the rights and obligations not merely of States, but of individual litigants.

And the other tradition on which Lauterpacht drew was the tradition of the Nuremberg principles, finding that in the laws of war, over centuries, soldiers had been made accountable as individuals under international law for breaches of the laws of war. And if soldiers could have obligations under the laws of war, could not soldiers and other individuals also have rights?

Those two traditions and the insistence that the rights of the individual have a prior place before the rights of States in International Law went into the making of the Charter. So, there is a contribution and not a small one from Humanitarian Law and yet, after that, the two streams parted, and it's quite easy to see why they parted. The United Nations was dedicated to the principle of peace. Resort to war, except in self-defence, had been outlawed, however ineffectually. A tendency in the United Nations to dwell upon the rules of war would in the early days have been regarded as a kind of disloyalty — a failure to believe in the principles by which the organisation was governed. That kind of dichotomy is really quite fundamental. We've seen it arise even in our own deliberations, when we consider the means and methods of warfare, when we look to the elements of Hague Law governing war on the battlefield and we find the point at which military advantage and human suffering are interfaced in a way that doesn't permit easy or clear-cut solutions, then there is a tendency to back away from it all, and to say this is too horrible and the remedies are too weak. We must start again to try to abolish war.

But at that point we have to remember that we are a little platoon of stretcher bearers, and we are not entitled to neglect the wounded on the battlefield, in order that we may dwell on the iniquities of war. The two things have to be separated. Of course it is essential not only in relation to nuclear weapons but in relation to war as an institution that we should continue to struggle, to fight with words in the hope that we can someday fulfill the objectives of the Charter to abolish war. But at the same time we cannot let that stand in the way of doing what needs to be done in relation to the tragedies that in any case occur.

In my paper I have quoted that much-disputed subjection of Protocol I which extends the law relating to international conflict to particular types of conflict; wars of colonial liberation which in classic international law would not have been regarded as international. What I would like to do having regard to discussion we have already had, would be just to draw your attention to the technique. It belongs to the other kind of law not to our kind of law. It belongs to the other kind of law to say what are the units between whom rules will apply.

It may be that States are the typical case, that conflicts as we know them should be conflicts between States, But sometimes they aren't and there is nothing inherently wrong in slightly redrawing the boundaries, provided that when the boundaries are redrawn, the laws with which we are concerned are applied with equality and fairness to both sides, irrespective of the standing of the two sides; irrespective of any judgments that may be made about the relative propriety of their actions in heading into the conflict. Now I do think that the two-step business is absolutely vital to the preservation of everything that we are gathered here to discuss. Of course, it is indispensable that other people in other places who may even sneak in and join them with another hat on, that other

people in other places should be applying quite different yardsticks and should be struggling for the evolution of war. But while it goes on it is necessary that we should insist on the fair application of our rules, limiting ourselves to equality in armed conflict.

Mr Chairman, I think I should perhaps look at the great gaps which our discussions have so far revealed. One gap we can only acknowledge and do nothing about. As far as strategic nuclear weaponry is concerned, it lies outside our field for very clear reasons. The whole of humanitarian law is conditioned by the notion that the means of making war are not unlimited, and allow a distinction to be drawn between combatants and non-combatants. The philosophy of overkill and mega-death is not within that compass. It has to yield to other methods in other places. And while it is proper that we in whatever capacity should continue to protest about the failure to resolve or at least to lessen the dangers of strategic nuclear engagement, we must not really let our lamentations about this possibility blind us to the things that are within our own field.

I suppose that in the five days that we have met here very pleasantly, a fairly large number of young men have been killed in the Iran-Iraqi conflict to name only one and very conscious that while I come from a part of the world that seems extraordinarily quiet, some of our colleagues come from countries which even now and not for short periods face the immediate consequences of involvement in armed warfare of the effects of a nearby armed war. So the things that are within our own capacity are also important but, and I don't think this has been stressed in our seminar, that is only half of it. When Mr Jaeckli tells us that at least 50% of the activity of the ICRC is related to situations where there are not governments on both sides to be consulted, and in which all kinds of accommodations have to be made to get things working between unrecognised bodies and recognised bodies, that should serve to underline that we live in a world in which there are a good many conflicts not demonstrably of an international character, yet conflicts which beyond a shadow of a doubt engage the attention and responsibility of the world. Conflict, in which, as in most affairs, there must be some international accountability, some attempt to help.

I'd like to talk just a little about each of those two cases. And I would go back again I think to that rather memorable discussion we had about the means and methods of warfare, because as you look at that group of professions and weigh up whether they've gone a little too far in one direction or in the other, you know that you are dealing with one of the crunch situations.

And I think it is worth stressing that even provisions that are rather vague, even provisions that may permit interpretations which either are derisory in protecting humanitarian goals or are perhaps an interference with legitimate military advantage, even when you are dealing with such rules, you are not wasting your time. It is necessary in all of these things to consider the power of the soft law. Well, we have been doing that this morning, demonstrated very well by Dr Feliciano, in relation to the refugee problem. It is, on the whole, not possible to say that mass exoduses of refugees have a right to enter other countries. It is not possible to give clear-cut rights and obligations in respect of such situations. It is necessary to work upon the interests of the law. Balancing the interests of humanity with the legitimate interests of sovereign States with responsibility for particular pieces of territory. And the good you can do may

depend not on the knife-edge of what is permitted and what is not, but on putting into perspective the kind of values that should be taken into account. I think this is very much the point Professor Shearer was making when he stressed the importance of rules of engagement. It is a subject that figures far too little in the literature, we need to know more about it.

Another point of exactly the same kind would be the importance of guidelines such as those contained, for example, in Articles 35, 36 of the First Protocol, to countries which are arming themselves and looking at a new generation of weapons. It is, as a practical matter, not a very promising argument to persuade a country, which has invested capital which in all probability it can't afford, in a particular line of military hardware, to scrap it and do something else. But rules of this kind articulated clearly and taken to the hearts of the people of the world, may have some influence in how countries re-arm themselves, how they foresee the principles of warfare. We know we are not going to make warfare comfortable, but we have no reason to suppose that rules of this kind cannot play a useful part. Again, in this field the principle of proportionality has been stressed, and the principle of course belongs to the whole of international law. At the present time, in the second part of the law relating to state responsibility, Professor Riphagen has articulated the rule of proportionality as well as the three basic principles that govern all aspects of the practical application of international law. And we are very familiar with its cardinal place not only in the sort of rules we are concerned with but in the right of self-defence which is never more than proportionate to the need.

Now you might feel then that there is a second contradiction between this emphasis on soft law and the need for clear rules, or even something that has figured quite largely in our discussions, international criminal law. As somebody said, it really belongs to the future. But it is undoubted that in all forums the question of international criminal law is now being pushed to the forefront. The International Law Commission has appointed a rapporteur to embark upon a revision of the code of offences. We have already heard that the Human Rights Commission is engaged in various activities of a similar kind. What you might ask, has this business of crime and punishment to do with a victim-oriented law? Well, I think that at least part of the answer is that developments of this kind are not quite so clearly systemic and extra-systemic as Mr Thomson, in dealing with this subject, was disposed to suggest. I don't think for a moment that the massive support in the United Nations General Assembly for articulation for a code of offences is directly related to the hope of catching, trying and punishing a few people here and there. It is merely a vehicle once more to articulate principles which the Third World particularly may believe to be necessary to a more balanced view of international law. Just as the right of self-determination was pushed to the forefront and put in a more absolute way than could later be sustained, so in a society that relies upon the movements of public opinion and debate to develop the law, we must have movements of this kind. In a way it's a bit like the difference between parliaments and courts. Parliaments must have open debate, laws must be changed, and yet there must be a law that can be relied upon.That was really the great worry of the rejoinder of Geneva to New York law. Could we keep the oasis of laws that would be applied indifferently, while joining in the great battle of revision and development of the principles of law?

Let me say then, something more about conflicts not clearly of an international character. These are the Article 3 situations and the situations which we hope will be covered in time by the ratification of Protocol II. As the doctrine of Human Rights, the UN doctrine would present it, most human rights can be suspended in a time of emergency. But when all of those rights have been suspended, there ought to be an irreducible minimum, residue rights, represented by humanitarian law. Rights that apply even at the worst of times. And that concept is certainly a concept that is of very great practical value. As we begin to generate within our own communities a clearer sense of the importance of human rights at the national level so one supposes that it will become a little easier to see also that even in the worst situation where a country is divided, where a civil war is raging, the demands of humanity do not cease. Again, it seems to be worth emphasising in that context, that here there was no division between east and west, north and south.

In 1974 in Geneva there may have been the clearest of lines between developed countries that adhered to Geneva law as expressed in the 1949 Conventions, and other members of the United Nations who were determined to bring its terms and concepts rather more into conformity with the prevailing norms in the United Nations. But about civil war, no difference. Every country has in its heart the greatest fear about being rent internally. Almost no European country escapes this feeling, because not in any way is it limited to newer countries, sometimes with artificial borders with minority problems and so on. So let's say, by all means, let us draw what strength we can from the Law of Human Rights in this area. But let us not suppose that the institutions that in most countries work rather feebly in the Human Rights field in war times, will be able to work with any greater limitations in the event of civil disturbance amounting to war. Here the hope will still largely be for some degree of international support.

Now, again, the Law of Human Rights has taught us that one of the techniques is to find an impartial body to administer a regime equally. It is extraordinarily hard to do. In most parts of the law it has been done with limited success. We could, I suppose, single out something for praise like the Committee of the International Labour Organisation that reviews compliance with labour conventions. But in the context of the topic, humanitarian law has such a large gift to the law of human rights — the institution of the Red Cross and particularly the International Committee of the Centre, with its reputation not impeachable; its support drawn from National Societies all around the world not in doubt; its access to governments guaranteed by the four Geneva Conventions; its word trusted; and its organisation efficient. So confident in this fact, States who may be in a position to foresee the possibility of civil war in their own territories should be encouraged to ratify the Convention. Not with the sense that such a State is performing an act for which it should be congratulated, but rather because sooner or later we may have to join with others in making a plea to some country where a war rages, for a little more kindness, a little more gentleness, even when dealing with a disaffected faction. We can not do that with much credibility if we are not ourselves a party to the instruments we would wish to see applied. But even if the Protocol is not applied, there remains common Article 3 of the 1949 Conventions.

There remains also the great goodwill of National Red Cross and Red Crescent Societies whose interests in humanitarian law extend beyond the province of the International Committee, to natural disasters and to other areas not covered by the laws of war.

So, my final message is that by looking at all kinds of problems squarely in the eye we should not be in any doubt of the very great victory that is represented by the 1974-77 Diplomatic Conference, the adoption of those Protocols, the making of a new meeting place between the United Nations and an institution which is well-established and has already served the world well. In this way we have ensured that the Red Cross movement has become the property of the whole world and we can deepen our support for it in many ways including meetings of this kind.

Paper presented

The question I have been asked to discuss has in recent years attracted a good deal of attention. I shall therefore try to evoke, rather than restate, the main sequences of ideas and events. After the Second World War there was both a determination to end the scourge of war, and an age-old wariness lest the return of war should find a new generation unprepared. In the Purposes and Principles of the United Nations Charter, mankind reached for the stars, reaffirming the criminality of war as an instrument of policy, and proclaiming the individual rights of all men and women as the ultimate aim of world order. In 1948 in Paris, in its last demonstration of harmony before the onset of the "cold war", the United Nations General Assembly adopted the Universal Declaration of Human Rights.

A few months later in Geneva, a Diplomatic Conference, convened by the Swiss government at the instance of the International Committee of the Red Cross, revised the three Geneva Conventions for the protection of the sick and wounded of armed forces on land and at sea, and of prisoners of war. This 1949 Conference also added a long new chapter to the record of humanitarian law, detailing the lessons of military occupation in a Convention for the protection of civilians in time of war. Few, if any, of those who had attended the Paris Assembly came also to the Conference in Geneva; but at that conference were assembled soldiers, administrators and diplomats with unrivalled first-hand knowledge as combatants and as war victims. This concentration of experiences, which would not have been possible at any other time, helped to persuade governments that the 1949 Conventions had drawn the line as objectively as possible between the necessary freedom to pursue military advantage and the avoidance of unnecessary suffering.

The 1949 Conference had not been indifferent to the wind that was blowing through the United Nations. The proof of this lay in the new Article 3, common to all four Conventions, providing a simple code of humane conduct in conflicts not of an international character. This innovation was not made easily; for, then as now, States accept grudgingly any fetter upon their discretion to combat an internal uprising. Even so, the article was at length accepted, because it was expressed not to confer any legal status upon those to whom it applied, and because it required no more than a minimum standard of humane treatment that few States would disavow. In short, Article 3 did not belie the cautious Geneva

tradition, which keeps sentiment in double harness with commonsense. Yet, for the first time since the founding of the United Nations, States had acknowledged in a treaty instrument a degree of international accountability for their dealings with their own citizens; and "an impartial humanitarian body, such as the International Committee of the Red Cross", had been authorised to raise questions of compliance.

In spite of this initial gesture of solidarity, there were many discouragements to the development of close relations between the legal systems centred in Geneva and in New York. To begin with, the law of Geneva presupposed the recurrence of the very situations which the United Nations Charter had outlawed. The early breakdown of the Charter principle of collective security reduced the force of that objection, but raised others. The failure of the Great Powers — and therefore of the United Nations — to avoid the possibility of nuclear warfare still calls in question the first premises of humanitarian law: these are that the lawful means of making war are not unlimited, and that methods of warfare should allow and require a distinction between combatants and others. Again, it could reasonably be feared that United Nations ideological controversies, in which legal arguments are made to serve political ends, might undermine the firm commitment of Geneva law to the impartial treatment of all parties to a conflict.

In the middle '60s these considerations had lost none of their persuasiveness; but they had to give way to arguments even more compelling. In the era of the United Nations war did not disappear, but cloaked its identity. Nearly all modern conflicts were anomalous, lacking the old punctilio that signalled the suspension of friendly relations and the invocation of the laws of war. Accordingly, there were difficult questions of threshold, to which Geneva law did not provide ready answers; and guerilla activities had assumed a prominence which the 1949 Conventions had not foreseen. More than that, the international community had grown and changed beyond recognition since 1949. New States, born into the world of the United Nations, seldom looked beyond the relationships regulated by the law of the Charter. Many of these States were barely conscious of the regime of the Geneva Conventions, and did not understand the central place assigned by that regime to the International Committee of the Red Cross. Even less accessible to the influence of Geneva law were parties to a conflict whose claim to international status was disputed.

If we approach these issues from the standpoint of the United Nations, corresponding perspectives emerge. As long as there is hope of implementing the Charter system of collective security, proposals for United Nations involvement in revision of the laws of war are considered tantamount to disloyalty. Only when that hope fades do people begin to worry that Hague Law relating to the choice and use of weapons has not been revised since 1907, and that existing law fails to take account of air warfare and other technological advances. The baffling problem of nuclear disarmament remains a major, unresolved preoccupation; but there is also growing concern that a balance of nuclear deterrence cannot restrain the use of conventional weapons. Localised conflicts may occur because the world is dangerously divided into Power blocs; but such conflicts may equally well be an extension of political actions undertaken in pursuance of goals of the United Nations Charter.

The right of self-determination — that is, the right of all men and women to

have full citizenship in a sovereign, self-governing community — is placed by the developing countries at the head of all other human rights. In the afternmath of decolonisation, there is a perceived need to remake the world in closer accordance with the dreams of peace and justice that animate the United Nations Charter. Human rights are a fighting creed that must sustain an endless wave of protest, and use every means to redress injustice. When all is change and turmoil, law is the bottom line that safeguards minimum order; but it is also the top line that provides room and incentives for progress and regeneration.

Side by side with these aspirations, there prospers the old Adam of untrammelled national sovereignty. Member States scramble for the gifts that the Charter promised to the Peoples of the United Nations. Insofar as the world is made safe at all, it is made safe for assertions of authority by sovereign States. In the name of their sovereignty and by courtesy of international law, States can be tyrannical in the management of their own territorial domains. Conventional armaments and the use of organised force are the ultimate means both of enforcing tyranny and of deposing it. The elements of international accountability are still rudimentary, and almost all of the mechanisms are subject to political manipulation. When a United Nations agency sets out to evaluate a human rights situation everyone has a thumb in the scales of justice.

Small wonder, then, if the International Red Cross movement trembled as it chose to risk turbulence in preference to stagnation.

Resolution of the issues

Depending upon one's standpoint, the law of the Geneva Conventions may be seen, either as a poor relation of human rights law, or as an outstandingly successful example of a specialised branch of human rights law at work. War is, of course, a reversion to the most barbarous level of collective human behaviour; and humanitarian law has sometimes seemed tarnished by its association with the form of human behaviour which it is designed to regulate. It is, however, more realistic to regard humanitarian law as the last lifeline, when nothing else stands between mankind and a relapse into savagery. The doctrine of human rights, like the constitutional guarantees that protect individual rights and liberties in democratic societies, permits derogation from normal standards in time of extreme crisis. Humanitarian law is the exceptional regime which then springs into action to safeguard the most fundamental of human values.

Moreover, humanitarian law offers a model of completeness and maturity, to which other, nascent branches of the law of human rights can only distantly aspire. Its rules are not guidelines that trespass upon the good nature of governments: they are universal and mandatory rules, not conditioned by reciprocity, commanding obedience. They speak directly to every individual involved in armed conflict, and to every *de facto* military authority, as well as to governments; and anyone who violates these rules is liable to sanctions. The rules are not subject to derogation, and — as the Vienna Convention on the Law of Treaties expressly provides — the operation of international agreements setting forth such rules cannot be suspended.

Above all, these rules have an independent and incorruptible guardian. The unique position and authority of the International Committee of the Red Cross are acknowledged and guaranteed by all States parties to the Geneva

Conventions. The International Committee's support comes also from the grass roots in every country, filtered through National Red Cross and Red Crescent Societies. In its own specialised field, determined by the scope of the four Geneva Conventions, the International Committee has indeed been outstandingly successful. It is able to take initiatives, and it has assured access to governments. It has also the freedom from improper government influence that is most often associated with highly reliable international, non-governmental organisations.

The essential problem, outlined earlier in this paper, is that the scope of the Geneva Conventions no longer catches many contemporary situations of armed conflict. Some of these conflicts may be associated with decolonisation, or with other United Nations policy objectives in the field of human rights. Sometimes there may be differences of appraisal, corresponding to differences in political standpoint, about the character and classification of a particular armed conflict. Sometimes the respect which international law pays to the prerogatives of State sovereignty may leave the international community without means to offer succour to the victims of an armed conflict that is not clearly of an international character. Sometimes unnecessary hardship may be caused by a weakness of the rules relating to military objectives, or by the inability of the rules to accommodate guerilla activities.

There may for a long time be differences of expert opinion about the military significance of some of the innovations made by the Protocols adopted at the Diplomatic Conference which met in Geneva from 1974 to 1977. It can, however, hardly be doubted that this Conference was instrumental in preserving the universality of Geneva law, not only as an existing code, but also as a living institution which can continue to respond to the needs and demands of the evolving international community. Without sacrificing the secure base of the 1949 Conventions, the Red Cross movement, led by the International Committee, had dared to make a rendezvous with the United Nations, offering by way of credentials its own massive contribution to the cause of human rights, and espousing that cause as the mainspring of its own endeavours.

The response of the United Nations was characteristic, and unnerving. At the first session of the Diplomatic Conference, all work upon the substance of the proposed new instruments was suspended, while argument raged about the application of Protocol I to

> "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations."

This was indeed the strangest indication of scope ever to appear in a treaty instrument dedicated to an automatic application of rules of armed conflict; but the reasons for its appearance were logical and clear. Self-determination had shown itself to be the most potent of Charter principles: neither technical objections, nor the opposition of a minority on policy grounds, could be permitted to encroach upon that position of principle.

It was then for the minority, mainly of developed countries, to decide whether their objection should be carried to the point of abandoning the Conference. The

fact that the objection was not maintained is, in its way, a vindication of the policy that had been pursued by the Red Cross leadership. It is submitted that the rewards of forebearance have been very great. In particular, the Confernce was able to plug some of the worst gaps in Hague law, giving civilian populations increased protection against the effects of hostilities. Moreover, in the last days of the Conference, Protocol II — extending the coverage of common Article 3 of the 1949 Conventions in relation to armed conflict, not of an international character — was saved in most of its essentials, after more elaborate provisions had been jettisoned.

In my view, however, the final assessment of this great meeting between United Nations and Geneva law depends, not on texts, but on intangibles. In the matters with which the 1949 Conventions deal, the Red Cross movement can now feel much surer that all States maintain and value their allegiance to Geneva law. Similarly, when the International Committee moves outside the strict scope of its conventional duties — for example, to monitor the detention of political prisoners — there are better guarantees that its actions will be well received. In relation to armed conflicts not clearly of an international character, there will be a better basis for the International Committee to seek an appropriate regime of protection, and perhaps a greater willingness to concede the case for such a regime.

It was probably a mistaken, though much-canvassed, notion that new scope provisions could determine automatically the application of Geneva law in various shadowy situations which the 1949 Conventions had passed by in silence. It would certainly have been a mistake to suppose that a reference to the right of self-determination could be omitted from the scope article of Protocol I, merely because it would introduce an element of subjectivity. Thirty years ago it was argued unsuccessfully that self-determination was a political principle, not a legal right, because the conditions of its exercise had always to be predetermined; but we are now more accustomed to the notion that legal rights may have different levels of intensity.

Hersch Lauterpacht had insisted that the United Nations Charter mirrored pre-existing law by placing fundamental human rights above the law of the sovereign State. Waldock and many others had borne witness to the fact that the Universal Declaration has achieved the status of positive law. Those concerned with preparations for the 1974 Diplomatic Conference had considered all these factors and saw a progressive principle at work. Even between belligerents, there was a mutal interest in avoiding needless wasteage of human and material resources. This self-determining motivation was reinforced by the spirit of compassion which inspired Henry Dunant at Solferino, and led to the founding of the Red Cross movement. The ideals of that movement in turn contributed to the modern affirmation that all law — including international law — has the ultimate purpose of preserving human dignity and promoting human welfare.