Commentary

By I.A. Shearer
Professor of International Law, University of New South Wales

The often cited dictum of Cicero that *inter arma silent leges* was no more than a throw-away line meant as a joke or as a cynical observation. The Greeks and Romans knew well the laws of war — then thought of as practices of chivalry — and for the most part observed them better than we have in the present century. What Cicero no doubt meant was that "when the chips are down and one side despairs of winning by fair means, it will discard legal and moral restraints." This is still the central problem we have to face, even after many hundreds of articles in conventions on warfare, humanitarian protection of the victims of armed conflict, and general instruments on human rights. It underlines the theme of dissemination and education which is the purpose of this Seminar.

It is a mistake to believe that this century alone has been concerned with limiting the horrors of war. Indeed there is an ironic footnote to be recorded here to the role of mercenaries in warfare. For the reasons given by Professor Keith in the latter part of this paper, they get short shrift in Geneva Protocol I of 1977 being singled out for unfavourable mention. And yet in the history of warfare their influence has been the most positive of all in ameliorating the conduct of hostilities and in promoting the observance of humanitarian treatment. The reason is not far to seek. Mercenaries, who became common from the mid-14th century until after the Thirty Years War, had no particular interest in killing opponents. As Machiavelli recorded in *The Prince:*

> "They have taken care to save themselves and their men from the terrors and fatigues of war. They do not kill each other in their combats, but take each other prisoner without a blow being struck. They make no night attacks of fortresses nor do the defenders ever make sorties against the camps of the besiegers, so that there is no need to stockade or entrench these camps. Campaigns are never continued into the winter. All these customs have grown into the military system because they wish to spare themselves both fatigue and danger."

Michael Glover, in his recent brilliant study, *The Velvet Glove* (1982), compares ancient mercenaries with modern professional footballers who can transfer their services from one club to another. Many were old comrades of those on the opposing side and might well be once more on the same side when the time came for contracts to be arranged for the next season's campaign. The only people who hated them were the peasantry who resented having their crops trampled, and the women who were raped, whenever mercenaries marched and counter-marched.

There is a serious point to this apparently frivolous introduction. The most successful restraints on warfare hitherto observed have been those which have been manifestly to the mutual advantage of both sides. Far from poisoning an enemy's water-hole, times were set for both sides to have free access to a stream

for their men and horses. Captured officers were usually given parole, and often lived most comfortably on money they were allowed to receive from home. As late as 1812 British officers who absconded from their parole in France were sent back to France and dismissed from their regiments. It was not so much the means of warfare as such, or the resort to unfair tactics, that were a problem, as the *conditions* of warfare that first prompted international action to ameliorate them. Henri Dunant's observations at Solferino of the sufferings of the sick and wounded, and the consequent establishment and development of the International Red Cross, need no repetition to this audience.

Moderation in warfare began to break down when the clear sight of mutual advantage became blurred by nationalistic ambitions. Armed with weapons of great destructive power, one side would trust either its superior technology or its presumed means of self-defence to launch attacks on the other with impunity. The culmination of this period was the "total war" of 1939–45.

This phase too has now largely come to an end, as a perception of mutual advantage has been restored. Recent wars between more or less evenly matched opponents, such as between Iran and Iraq, India and Pakistan, and Britain and Argentina have been marked by evident restraints and have not led to indiscriminate warfare or the unleashing of horrific weapons.

If then (as is my thesis, and that of Professor Keith's paper) the search for acceptable rules, and the re-affirmation of fundamental principles of humanitarian law, is seen by countries nowadays as both necessary and desirable, and that the chances of substantial observance are moderately high, what of parties to conflicts which are not States, such as guerilla bands or national liberation forces? Unlike ancient mercenaries, and unlike the relatively evenly balanced national forces of today, the restraints deriving from essential self-interest are more difficult to discern. Indeed, being largely invisible in the general population, and inflamed with passion to redress injustice or repression, non-State parties to a conflict are less likely to perceive any great degree of self-interest in having regard to the humanitarian principles of warfare. I shall return to this in a moment when dealing with Professor Keith's second section.

Professor Keith rightly stresses the importance of the general principles firmly anchored in customary law. Even as a lawyer one shares his sense of initial bewilderment at the complexity and technicality of the 1949 Conventions and 1977 Protocols. It is impossible to put these documents into the hands of even an educated law person and expect their import to be immediately apparent, still less into the hands of armed irregulars conducting a liberation struggle or a civil war. The efforts of the ICRC to promote a simpler understanding of the *Fundamental Rules of International Humanitarian Law Applicable in Armed Conflicts* are therefore most necessary and practical. For States parties to conflict, and perhaps also for the oganized non-State forces referred to in Article 96(3) of Protocol I and Article 1 of Protocol II, the development and supplementation of these fundamental principles, and their application to specific circumstances, represent the most significant advance in the evolution of international humanitarian law. The degree to which particular provisions represent law only as between the contracting parties, or by contrast, restate or crystallize norms of customary law is a theme pursued by Professor Greig in his excellent exposition, already circulated, and to be considered on Saturday. The concern rightly expressed by

Professor Keith as to the relatively low number of ratifications thus far deposited to the 1977 Protocols must be balanced against the significance of the Protocols in progressively developing the basic principles of customary law.

There remains that other principle contained in customary law: necessity. Professor Keith cites the interesting judgment of the Japanese court in the case of *Shimoda* (1964). The problem of justifying the possession of atomic weapons on the ground of "necessity" remains as acute as ever. Both the United Kingdom and the United States made reservations to Protocol I stating their understanding that the rules of the Protocol "are not intended to have any effect on, and do not regulate or prohibit the use of nuclear weapons." There are shadows here of the argument used to justify the dropping of the atomic bomb on Hiroshima. That bomb was not the most destructive air raid of the war. Five months earlier an armada of 330 B-29 bombers attacked Tokyo killing more people than at Hiroshima and destroying more than 5 times as many buildings. Its justification was a demonstration of force to compel surrender which, if left to conventional means, would have led to a protraction of the war by a year and the probable loss of a million more lives. The cost-scale of these calculations of necessity leave us understandably appalled. Under the present mutual balance of terror we can hardly expect that question to be resolved by way of interpretation under the 1977 Protocols. The issue of strategic arms limitation, and the ultimate prohibition of all nuclear weapons, has to be pursued as a separate matter by the superpowers, with the encouragement of all other States, in forums specificially devised for the purpose.

The categories of armed conflict, to which rules apply, have been significantly widened by the Protocols. In place of the single category of "conflicts not of an international character" contained in Common Article 3 of the 1949 Conventions, Protocol I has removed liberation struggles against colonialist, foreign or racist regimes to the category of international conflict, and has expanded the protection provisions relating to non-international conflicts in Protocol II. I agree with Professor Keith that the "threshold" of application of Protocol II is not as high as has been suggested by some other commentators, but the doubts still remaining point to the probable conclusion that we have gone about as far as we can go in prescribing rules of conduct for essentially internal conflict. At the heart of conflicts of a non-international character (whether they are technically so or not under the Protocols) is the denial of social and political rights. In the development of the law of armed conflict we have steadily progressed from *jus ad bellum,* through *jus in bello,* to an uneasy compromise between a traditional conception of the individual as the object and not the subject of rights, and the growing perception that international laws on human rights must be expressed to be directly vested in the individual. If we can roughly express the stages of this progression in terms of "Hague law", "Geneva law" and "New York law", it is to the last that we must now begin to turn more and more attention, while not forgetting the importance of consolidating and reinforcing the achievements made in the Protocols, in the UN Weapons Convention of 1981, and other instruments in the earlier frame of reference still to be devised. To expect any significant degree of restraint to be observed in the conduct of essentially internal wars, especially by the non-State parties to such struggles, is unduly optimistic; our task must equally be to prevent the conditions giving rise to them.

Of the protection of the civilian (non-combatant) population the Protocols are most notably solicitous, and in this they are likely to have a high chance of securing a good observance record, save for the problem of civil wars where forces are largely invisible in the local population. Professor Keith questions whether in this set of provisions the right balance has been struck between humanitarian principle and military necessity, and regrets that more precise formulations have not been arrived at. But the concept of necessity, like that of self-defence, is essentially fluid and must be judged in the light of all the circumstances and of the kinds of weapons being used. On the definition of combatant status, Professor Keith records that Article 44 of Protocol I has marked a significant shift in favour of guerilla fighters. The definition as combatants of persons who only reveal themselves as such immediately prior to an attack is unsatisfactory and led to the British and American reservations to that Article, defining the word "deployment" in the phrase "while he is engaged in a military deployment preceding the launching of an attack" as including "any movement towards a place from which an armed attack is to be launched." It is arguable that this is not really a reservation but an interpretative statement, and that the word deployment is capable of this wider meaning.

The point made in this section concerning mercenaries does not mean that they are altogether deprived of protection. Mercenaries are entitled to the fundamental guarantees provided by Article 75.

I should like to add only one matter to Professor Keith's treatment of the issue of Enforcement of the Law. This is to say that the translation of the provisions of the Geneva Convention and of the Protocols into the practices of most organized armed forces is secured by what are termed Rules of Engagement (ROE). The drafting of ROE is a matter for the higher levels of government, and *legal advisers* play a vital role in this. The restraints are built into the operational instructions themselves, and hence the common misconception of a field commander with his orders in one hand, and the Red Cross handbook in the other, is false. And happily so, for if flustered, we can guess which book he would drop first!

But it is otherwise with less sophisticated or well-equipped forces, and especially insurgents or freedom fighters. Here, efforts to disseminate the basic principles on the wider planes are urgently required.

I should like to make a point about journalists and their importance in securing respect for humanitarian law rules. Article 79 of Protocol I recognized their protected status as civilians, and this is a significant advance on earlier conventions which entitled them only to a prisoner of war status if captured, Theirs is likely to be the only immediately effective monitoring role in conflict, and hence their mere presence (especially if accompanied by a TV camera) may be a substantial restraining factor in the conduct of operations. (In this context, it is worth mentioning the recently screened Malcolm Bradbury film of the career of Australian correspondent Neil Davis in Indo-China.) This role can, however, be double-edged. By reporting the atrocities of one side, it can help to provoke the retaliation in kind of the other. But this speculative possibility hardly outweighs the undoubted impact that conflicts today make in the living rooms of millions of people around the world, and hence on the complex pressures that are brought to bear on the parties to conflicts to resolve their struggle.

Finally, I should like to return to the broad theme of the present paper and of this Seminar. I earlier cited Michael Glover's book *The Velvet Glove* which is significantly sub-titled "The decline and fall of moderation in war." As an historian, Glover takes a pessimistic view:

> "What then can be salvaged from the wreck of the laws of war? With weapons of intercontinental range and unexampled power and with the privileges, and pains, of combatant status conferred on every civilian regardless of age and sex, little remains of the rules so confidently agreed before the First World War. Nor can there be much hope for the plethora of conventions subsequently negotiated. The most that can be looked for is that in limited operations in which all the participants are professionals in uniform and under discipline the customs of war will be observed so long as the fighting takes place in sparsely populated areas. Under such conditions it is in everyone's interest that moderation should prevail and the experience of the campaigns in Sinai, on the Golan heights, around the Shatt-el-Arab and on the Falkland Islands suggests that this will be the case. Even in the Korean war, also fought by professionals, a measure of moderation was observed on the battlefield, though this was not the case in the prisoner-of-war camps. Experience over the same period equally suggests that the laws of war will break down when combatants are indistinguishable from the local population. In Vietnam both the French and Americans were confonted by opponents able to merge with their surroundings but dependent for many of their supplies on the indigenous population and determined to extract what they needed by fair means or foul. In such circumstances the distinction between combatant and non-combatant, between friend and foe becomes irretrievably blurred. If a peasant furnishes an enemy with food or information how can it be established whether he did so willingly or under irresistable duress? Mistakes, if nothing worse, become inevitable and breed reprisals. A long war exacerbates the problem. Bitterness intensifies as reports, true or false, circulate of enemy atrocities and the level of professionalism falls as discipline becomes dependent on officers with less and less experience. The greatest American atrocity in the Vietnam war, the massaacre of My-lai, was not evidence of the United Sates barbarism but a reflection of the level to which their system for officer training and selection had sunk. In Afghanistan, where Soviet regulars are opposed to an armed and embittered populace, there is no evidence that any respect is being paid to the customs of war by either side. This, like the long French operation in Algeria during the nineteen fifties, is a classic example of a situation in which, since there is no distinction between combatant and non-combatant, the laws of war are as irrelevant as they would be in a nuclear war."

As I have indicated earlier, I think this view is overstated, so far as governments and armed forces under properly organized command are concerned. There remains the problem of other less organized or enlightened groups. Which is where the efforts of the ICRC and groups such as the present are so vitally relevant.

The task of dissemination is thus a crucial one. Can we, the lawyers, the ICRC, and its many supporters around the world, work to prove Glover wrong?