Commentary

By A.A. Khalid
Associate Professor of Law, University of Malaya

It has first and foremost to be said that International Humanitarian Law ought to be seen from the contemporary perspective. Prior to and other than embarking on a discourse of the specific principles, legal or moral, as well as the positivistic rules consented to by States parties to the various humanitarian codes adopted since the turn of the century, it needs to be stressed yet again that this area of international law cannot be looked at in convenient isolation. Just as the area of human rights law is plagued by necessary considerations of the trends in the development of the international political system and economic order, so also is this area of international law.

Professor Greig's extensive, as well as intensive, academic presentation on the underlying principles has not been free from some such references. One notes that when he makes mention of "the continuing conflict on the maritime boundary where the principle of freedom is restricted by the demands of state sovereignty," he also updates with references to "restrictions based upon another principle, the so-called common heritage of mankind." Without necessarily, on this occasion, going into the merits and demerits of this new "so-called" principle, it is an inescapable fact of contemporary international relations that a sovereign state's support for, or opposition to, international legal charters and treaties is inextricably linked with its attitude towards the new International Economic Order, the North-South Dialogue, the global multi-polar security situation, ad nauseam.

It has already been submitted often enough that these extraneous considerations do have an intimate bearing on issues being discussed here. Professor Greig has himself observed that the extension of the ambit of Protocol II was a result primarily of "political and ideological preoccupation with Southern Africa." He also states that "the reactions to proposed prohibitions on the use of various types of weapons could well stem from perceptions of the military value of a particular weapon to the state concerned . . ." etc. Such practical considerations and selfish evaluations by the sovereign state are no doubt conditioned, to no mean degree, by its position and standing in the multifarious economic, political and ideological alignments that the international community is currently fraught with. It is surely a thankless task to unravel such complexities of international life so that the end result is only our fundamental concern for the protection of the human being. Yet, we again hearken to the wise words Professor Greig has extracted from the writings of Professor John Westlake to indicate "the invocation of the social logic of man as the basis of international legal obligations." Professor Westlake states that: "The social nature of man, and his material and moral surroundings in the regions and *at the time in question,* are the ultimate source of international law, in the sense that they are the cause why

any rules of international law exist, and that they furnish a test with which any particular rules of that law must comply on pain of not being durable." (emphasis added).

When Professor Westlake continues to stress that "only the consent of a society can establish rules," we have to strive to ask whether, at the international and national planes, it is truly the individual human being who can freely and willingly attest to the rules so made. In other words, to what extent do international and national legal rules really reflect "laws of *humanity*", "dictates of the *public* conscience" and "*elementary* considerations of humanity" that we espouse here?

We have already been privy to sufficient evidence that enough Asian traditions existed to prove that humanitarian considerations are not purely a western, Judeao-Christian monopoly. It has also been said that the Geneva Conventions have been ratified by virtually the entire international community. Yet it is also pointed out that the Additional Protocols have so far received poor responses from developing countries, the Geneva Conventions have not really been observed, and human rights records are to be deplored. All these, despite a glorious humanitarian past in that by-gone age.

I myself believe in the universalist nature of human rights and humanitarian principles; I care neither for the Eurocentric notion nor the apologetic Third World approach as an answer. The socialist may prompt me to stress that humanitarian ideals are class-based and elitist, that only statesmen and scholars pretend to aspire towards them whilst the ordinary soldier or civilian is preoccupied with the mundane trivialities of life and survival. Yet the fact seems to be that, despite inherent humanitarian feelings of the people as occasionally exhibited, there is still inadequate humanitarian concern.

Perhaps, if I may dare to suggest, the developing world is still too engrossed with the formidable task of nation-building such that it is as yet unable to afford extensive and concerted efforts in this direction?

A consideration of definition of the law also seems relevant. Professor Greig has not limited his treatment of principles to only the laws encompassed by the Law of Geneva or just the Law of The Hague. He has correctly given attention to both and in quite a few instances one can discern references to examples encompassed by "humanitarian law in the wide sense".

These broadened considerations, it is submitted, are of the utmost significance in allowing for departures from traditional notions of equating humanitarian law purely with the laws of war which would otherwise constrain us to primarily working out "a compromise between humanitarian ideals and the realities of the demands of a war situation".

It seems that the dilemma for international humanitarian law *stricto sensu* of giving due recognition to the harsh realities of war and armed conflict, without also losing those ideals of humanitarian conduct despite the vicissitudes of conflict situations, would produce an approach of pragmatism which seems to border on desperation. Pragmatism and convenience, as it were, force many humanitarian lawyers to dismiss suggestions that the law of peace, disarmament, and human rights law be included in this branch. A functional approach has been devised whereby the Laws of The Hague and of Geneva are said to form the primary substance of this law, whilst other areas are somewhat discounted.

Whereas this division may have been apt in times past when events were more easily categorised in international legal terms of peace or war, the contemporary setting no longer knows such simple classifications. No doubt, the Laws of War (either in the wide or narrow senses) need to be demarcated and yet co-related to other areas of international law. The two Additional Protocols themselves also do take note in their Preambles of the "earnest wish to see peace prevail among peoples," that "nothing [therein] can be construed as legitimising or authorising any act of aggression or any other use of force . . .", and that "in cases not covered by the law in force, the human person remains under the protection of *the principles of humanity and the dictates of the public conscience*" (emphasis added). Such demarcation certainly produces concrete results for more effective action by humanitarian organisations to help alleviate suffering and minimise injury and destruction "in many cases covered by the law". But as is apparent from earlier discussion, can such cases be so easily defined and determined? What of cases caused, not directly by war or armed conflict during the duration thereof, but prior to, after, or pursuant to the threat of, impending hostilities? Humanitarian considerations surely ought also to apply.

The dilemma referred to earlier is indeed a real one, and realistic demarcations have understandably had to be made. The point here is not the wisdom of the very existence of demarcations and the utilisation of laws thereto, but rather the dubious value of any attempt at compartmentalising the underlying principles of humanitarianism accordingly. The broad moral principles of humanitarian conduct, it could be agreed, apply in all such instances, whilst the legal *rules* may not. Undoubtedly, protection of war victims and the treatment of prisoners of war differ from the rights to be accorded to refugees and political prisoners. Yet humanitarian treatment cannot really be justified merely by the existence of hostilities between or within nations. If it were so, it would make nonsense of the vitally important role of the dissemination of any education on the principles of humanitarian law during situations of peace in preparation for eventual application during war-time.

The relevance of humanitarian ideals and principles at all times in international and national life needs to be stressed such that its educative role would contribute significantly towards prevention of conflict or reduction of unnecessary force when tensions erupt into violence.

It is undeniable that violations of humanitarian protection are not limited to the battlefield context alone. They appear to become manifest or increase in propensity by virtue of the conflict situation, when nation and people pit strength against nation and people. Whilst national self-interests myopically spur soldier and militiaman to wreak death and destruction upon "the enemy" in wars regarded as just wars, the extent to which violence is unleashed cannot be said to depend primarily on national and military advantage or emotive calls to uphold sovereign honour.

Individuals called upon to wage war are but the same citizens who had experienced the law and order of a society at peace. How much internal peace existed and how much respect there had then been for the dignity of the human person would go a long way to ensuring humanitarian conduct during the exigencies of war. A closer nexus then between humanitarian and human rights laws would serve to benefit the two far more than any rigid delimination would

assist in defining vague boundaries or mapping out areas of convergence.

The doctrine of necessity has been said to be a principle that legitimates the use of force — for the sake of maintenance of public order during normal times, and because of military exigencies during a state of war. Thus can be observed a factor that is common to both situations — necessity. Whereas the latter situation takes necessity out of the sole ambit and control of any one party to the conflict, the former falls more squarely within the direct supervision and direction of the state and the national society.

It is submitted that the closer nexus proposed for the two laws can correspondingly be transplanted to the peace/war situation, such that common underlying principles could be stressed at all times. Thus could emerge an all-encompassing International Humanitarian Law devoid of artificial divisions and free of the constraints of relative peace/war. These are the *common* areas of international law that none could compromise, restrict or limit, and from these common areas could then emerge explicit moral and legal principles more in keeping with contemporary general standards of "civilised" behaviour, moral actions and justice in international relations.

When reference had at one point been made about the necessary influences by Geneva Law upon the value system of world society, I feel that this is again one manner in which that law can contribute positively to human rights endeavours, especially in authoritarian and militarised societies. The modest achievements of human rights movements can only be spurred on by humanitarian ideals and approaches, usually received with much credibility and trustworthiness. In societies where the term "human rights" itself has assumed anti-government and subversive connotations to government and even the masses, the numerous non-governmental organisations and voluntary associations could gain added support and much-needed public confidence by adopting the humanitarian approach. This could prove to be yet another new strategy, to be added to those other new strategies already adopted by the new breed and new generation of human rights activists. Such a new strategy, untainted by suspicions of overt or covert political manipulation, could not be so easily repressed and can help national societies work towards greater democratisation.

This is indeed a fervent call that the differing approaches thus far adopted by human rights and humanitarian "laws" ought to be discarded, that the humanitarian law applicable to armed conflict has to enter more actively the mainstream of international political-economic processes — for the sake of both and ultimately in the interests of the individual. Together these two branches of international law would form a force to be reckoned with, to answer the typical excuses of authoritarianism, shielded by the heavy cloak of state sovereignty and domestic jurisdiction, which consistently deny humanitarian protection in the name of internal security, economic development and national pursuits.