Commentary

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Mr Chairman, ladies and gentleman, I was delighted to be asked to comment on Professor Greig's paper "The Underlying Principles of International Humanitarian Law", as it gave me an opportunity to focus on some of the central concepts that provide the normative bases for international human rights promotion and protection.

At the outset, I would like to congratulate the organizers of this excellent seminar, as it has brought together an outstanding collection of experts in this field of law who are drawn from the Asian and Pacific area.

The relevance of this topic was brought home to all of us this week in very sharp relief with the return to France from Bolivia of Klaus Barbie, known as the "Butcher of Lyons" for his Second World War activities as the SS Commander of Lyons. Barbie has been charged by the French authorities with crimes against humanity. He is alleged to have tortured and killed scores of resistance fighters and been involved in the murder or deportation of thousands of Jews. Professor Greig has quite properly given a great deal of attention in his paper to the principles involved in the concept of crimes against humanity.

In commenting on Professor Greig's paper you cannot help but be impressed by the clarity of exposition and the felicity of style with which he writes.

He has brought a great deal of scholarly understanding to this complex area of law. In particular his examination of the 1949 Geneva Conventions and the 1977 Protocols is very illuminating as to the principles of International Humanitarian Law that has received widespread recognition through treaty form.

It is a relatively easy task to complement or commend his paper, it is far more difficult to be critical of his work, and my comments are directed, in the main, to matters of emphasis and approach rather than to omissions or perceived errors.

Much has been encapsulated by Don Greig in his 58 pages of text. He has perceptively detailed many of the existing principles that constitute International Humanitarian Law and how some of them have been interpreted and applied by the courts. For instance, he has focussed on important principles such as: crimes against humanity; the laws of war including restraints on means of injuring the enemy; killing or inhumanely treating prisoners of war, the wounded, sick or shipwrecked; limits on the use of weapons or devices including bacteriological warfare; naval bombardment of undefended towns; genocide; the protection of victims of armed conflict; the protection of members of armed forces from acts of perfidy; acts of reprisals and the treatment of hostages.

Mention is also made of the importance of crystallizing underlying principles on customary rules of humanitarian law into treaty form and that a subsequent denunciation of a treaty will not release the denouncing State from principles or

rules which have already become established as part of customary international law.

Despite all of the material Don Greig has included, I have four major comments to make on his paper.

First: There is little analysis of the 'underlying' principles as distinct from the prescribed or judicially created principles of International Humanitarian Law.

There is no extended appraisal of the philosophical or legal bases of those principles. Passing references are made to the historical significance of natural law theories of humanitarian law and there is only a briefly outlined rejection of legal positivism, particularly as it was exemplified by the Nazis.

Most of the appraisal of principles in this paper consists of an examination of detailed principles or rules that have become prescribed through the treaty making or curial processes. The analysis is upon crystallised principles rather than upon the underpinnings, or the policies, or the operative bases that underly those written or judge made rules. It may well be that as the seminar audience is one composed of experts in this field, Professor Greig did not believe it necessary to address some of the critical legal and philosophical questions concerned with the control and regulation of power such as: Why is it that Government or power elites rarely attempt to regulate themselves or to prosecute violators of the law of war within their jurisdiction when many International Humanitarian Law norms are considered peremptory or "absolute obligations" which are owing to all mankind rather than towards particular States?

Why will mankind have to constantly guard against the excesses of individuals, groups, government elites, including armies, in their treatment of fellow human beings when there has been a vast proliferation of certain international norms developed to manage violence and to limit the suffering of the victims of war? Why has the international community thought it necessary to mitigate the horror of war? Why has it placed restrictions on the means of conducting warfare? Why is it that the present system for implementation of humanitarian law does not guarantee protection? Why is it that human society rightfully expects that a soldier's and a civilian's conduct during armed conflict shall conform to certain basic normative precepts?

Why are the expectations of the international community not always realised in practice and why is uncivilized behaviour sometimes allowed to reign supreme in the face of clearly prescribed principles of International Humanitarian Law?

The best formulated prescriptions that Professor Greig focusses on may be illusionary if the appliers of those principles do not understand the basic purposes of the prescriptions.

Second: Professor Greig's explanation of the differences between principles and rules is very unclear: His linguistic analysis and use of examples to highlight those perceived differences does not greatly advance our understanding of the underlying principles themselves or indeed how they have evolved. He uses those words as synonyms without advancing the reader's understanding of them. He also laments about the complementarities inherent in these principles such as the freedom of maritime navigation and the obligation that a State should not knowingly allow its territory to be used contrary to the rights of other States.

It should be no cause for surprise that the prescriptions about International Humanitarian Law that have emerged over the past century are often

complementary in form and abstract in their particular formulations. Complementary formulations, framed at many different levels of abstraction are indispensable, both to express the whole range of fundamental demands and expectations, and how to make tentative identification of the different factual contexts so that decisions may be made affecting those demands. The necessities of this complementarity is touched upon by Professor Greig, but he has, respectfully, failed to explore their necessity. First, for the accommodation of particular human rights or humanitarian principles with other human rights and the aggregate common interest. Second, the necessity to derogate from certain human rights in times of high crisis and intense threat to the aggregate community interest.

It should be obvious that the application in particular instances of all these complementary and highly abstract humanitarian legal prescriptions can be no automatic process in which the applier merely interprets the literal words of a single text and maintains a putative fidelity to that text. In any particular instance an applier may be confronted not with a single prescription but with a vast body of allegedly relevant prescriptions.

Third: Professor Greig has not made any concerted attempt to focus on the dynamics inherent in the creation of International Humanitarian Law principles. He has pointed out that "Elementary notions of humanity . . . are available as a basis for principles or rules of law, but they have to be transformed into such principles or rules by the practices of States, or through being recognised and acted upon by an international tribunal" (above p 65). How this transformation process takes place is only hinted at in that paper. What is now apparent, as a fundamental principle of International Humanitarian Law, is that the international system is not a strategic one and that the rules of that system are constantly evolving and changing. For instance, the concept of "crimes against humanity" was very largely expanded by the definition of such crimes employed in the 1968 Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity. In that Convention, crimes against humanity were identified firstly by references to previously adopted international instruments including the charter of the International Military Tribunal of Nuremberg and the crime of genocide in the 1948 Genocide Convention and secondly by particularizing certain inhuman acts. These acts included "eviction by armed attack on occupation" and "inhuman acts resulting from the policy of apartheid" and was thereby designed to encompass modern day examples of such crimes..

Fourth: Professor Greig by focussing very largely on the rules or prescriptions of International Humanitarian Law and by not examining them within a world social and power process has perhaps overlooked several cardinal principles. Regrettably, he has not focussed on the recurring problem of how the international community has dealt with the control and regulation of power. As human beings are organised into groups and since groups are a major power outcome of human social process, the human group is in its most fundamental sense a condition and a consequence of power. We all recognize that power may be abused in the name of the group, community, collective army or other organisation. One of the key underlying principles of International Humanitarian Law is the recognition that there are laws that transcend those of man and that

ascribe responsibility to the individuals who rule and who are ruled. This core principle captures the concept of preventative law and politics; the idea that there must be constraints placed upon those who exercise power in the name of the group and that there must be a measure of accountability and responsibility for the exercise of such power. An individual in the group is always vulnerable, always at risk, and in terms of the reality of power, needs to be in some measure insulated and protected from its abuse even in time of war.

In his examination of specific principles Professor Greig has not always located them squarely in their social context. All laws operate within a dynamic social context. They do not exist in a legal or political vacuum. We can observe that the whole of mankind today constitutes a world community characterized by a high degree of interdetermination and interdependence. Historically, international law permitted State elites to treat citizens as they saw fit. In an interdependent world this view has become anachronistic. There is a growing awareness that any State activity that deprives a segment of its population of its human rights is a matter of international concern. Even when no danger of international conflict exists, ignoring one nation's sub-groups brutality towards another offends basic ideas of civilization. The crematoria of Auschwitz stand as a vivid reminder of the end result of ignoring a State's actions within its own borders.

In his paper Professor Greig has highlighted the existence of numerous principles that permeate this area of law. He demonstrates that there is no lack of relevant basic expectations and demands of the international community concerning the rules for the waging of war or for the protection of human beings involved in an armed conflict. Those rules or principles could in many ways be expanded to cover new situations with greater clarity. It is also evident that those who engage in armed violence could be made more aware of these expectations through a greater emphasis on education and tactical training at all levels.

Similarly there does not seem to be lacking a human acceptance of the need for formal judgment or condemnation after the fact although actual judgment is often ad hoc, and without the benefit of an estabished sanctioning process.

What is clear from Don Greig's paper is that there is a critical need not for rule formation or judgment, but for effectiveness in the development and application of humanitarian principles with an expanded focus on all aspects of the sanctioning process. In particular there is a need for a shared supervision of man's behaviour in war with actual impact upon human perspectives and conduct. It is a need which is closely related to the ability of men to guard against their own excesses, and it stems from a realization that new rules, prancing diplomacy, and episodic judgment cannot protect us from ourselves.

That responsibility remains our own and requires at minimum a broader sanctioning approach. A more effective system of international humanitarian principles would contribute substantially to general world order and provide some basis for peace and improved human existence.