AUSTRALIA AND THE DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW

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International humanitarian law is a subject of universal importance and relevance. Since 1974, the problems of restatement and development have engaged the attention of the Geneva Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts.

In this article, Professor J. G. Starke, Q.C. surveys developments in international humanitarian law over the last quarter century and examines in detail Australia's contribution to those developments. The process by which the idea of "laws of war" has come to be superseded by the concept of international humanitarian law is outlined, while reference is also made to the principal sources of international humanitarian law. Australia's interest in international humanitarian law since World War II is discussed, as is the background to the present continuing Geneva Conference and proceedings at its first three sessions in 1974, 1975 and 1976. The contribution of Australia to the work of the Geneva Conference is thoroughly examined. In particular, the stance of the Australian government on various issues before the Conference is set forth in detail. The article also assesses Australia's contribution to the development of international humanitarian law.

The expression "international humanitarian law" has come to replace, in current terminological usage, the designation of "laws of war" for those recognised rules of international law prescribing the limits within which force may be used in regard to war and hostilities, and governing the humane treatment of individuals who may be involved directly or indirectly in such struggles. So it is that the Geneva Conference which has to date met in three sessions, namely in February-March 1974, in February-April 1975, and in April-June 1976, to revise and update the "laws of war" bears the full title of the "Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts". These three sessions have proved not to be sufficient to allow the Conference to complete its task, and this is not surprising having regard to the ambitious nature of the objective set for this gathering—a root and branch revision and updating of an important branch of international law. It would seem that single-session Conferences to codify and develop particular significant topics of international law are a luxury of the past, for the Vienna

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Convention on the Law of Treaties was concluded only after two sessions of the relevant Conference in 1968 and 1969 respectively, while there have already been four sessions in 1973-1976 of the United Nations Conference on the Law of the Sea, without final result.

The object of the present article is to discuss the approach and contribution of Australia to the development of international humanitarian law applicable in armed conflicts, particularly as reflected in the work of the above-mentioned Geneva Conference on the subject in its three sessions of 1974-1976.

It goes without saying that Australia has neither opposed nor dissented from the process of events which led to the new appellation of "international humanitarian law" for the "laws of war".[1] That process of itself represented an extremely significant advance, for it involved nothing less than the importation of principles and standards of human rights into the field of the laws of war. This may be traced back as a first step to the Teheran Conference on Human Rights in 1968 which, *inter alia*, recommended to the United Nations General Assembly that a study should be made of the rules for the protection of human rights in time of armed conflict, and of the need for new treaties to update these rules. By a resolution adopted on 19 December 1968, the General Assembly gave effect to this recommendation by requiring that the Secretary-General of the United Nations make such study, and declared that in the case of hostilities civilian populations should not be attacked as such, and that the distinction between combatants and civilian non-combatants was one to be observed at all times. The General Assembly's resolution led to the preparation of two significant reports by the Secretary-General in 1969-1970 on respect for human rights in armed conflict (United Nations Documents A/7720 and A/8052), providing detailed studies of the existing "laws of war". The Secretary-General's reports contained proposals related to the revision of the relevant rules. Thus, through the forum of the General Assembly as the most representative body in the world, it became accepted that the law as to human rights and the "laws of war" should be blended into an amalgam of rules more appropriate for the time.

In 1970, the main content of the "laws of war", *i.e.* international humanitarian law, was represented by the four Geneva Conventions of

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[1] For a statement of the steps which led to the Geneva Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts in 1974-1976, and incidentally to the acceptance of the expression "international humanitarian law", see the Introduction (pp. 1-2) to the Draft Additional Protocols to the Geneva Conventions of August 12, 1949 (International Committee of the Red Cross, Geneva, June 1973); Baxter, "The Law of War" in Bos (ed.), *The Present State of International Law and Other Essays* (1973) 121-124; and Baxter, "Humanitarian Law or Humanitarian Politics? The 1974 Conference on Humanitarian Law" (1975) 16 Harvard International Law Journal 1, 4-9.

1949 on, respectively, the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, the Treatment of Prisoners of War, and the Protection of Civilian Persons in Time of War; and the Regulations annexed to The Hague Convention No. IV of 1907 on the Laws and Customs of War on Land (more familiarly known as the "Hague Rules" or the "Hague Regulations"). There are a number of other instruments which should rate a mention in this connection, and which are referred to in detail in the above-mentioned reports of the United Nations Secretary-General on respect for human rights in armed conflict; they include, for example, The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, and the Geneva Protocol of 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, which Protocol was later supplemented by the Convention of 10 April 1972, on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and their Destruction.

At the time they were concluded, the four Geneva Conventions of 1949 were adjudged to be a substantial contribution to the "laws of war", and to have taken into account, in a responsible manner, the experience of the belligerents in the Second World War. It was nevertheless realised that the rules contained in these four Conventions could not be definitive for all time. If any of the participants in the 1949 Geneva Conference which adopted the Conventions held the view that the Conventions constituted a final settlement, they were speedily disillusioned. For instance, problems of the application of the Conventions arose throughout the course of the Korean conflict in 1950-1953. In particular, arts. 118-119 of the Geneva Prisoners of War Convention of 1949, providing on humanitarian grounds that prisoners of war should be released and repatriated without delay after the cessation of active hostilities caused difficulty. These articles had been based, presumably, upon the primary assumption that prisoners would desire to return to their homeland, but it emerged from the so-called "screenings" of thousands of prisoners in the custody of the United Nations Command forces that, owing to fears of persecution, many were unwilling to be repatriated to the territory of North Korea.[2] In the Panmunjom armistice negotiations, this problem led almost to an impasse. On the one hand, claims of humanity had to be weighed against the danger in the future of unscrupulous belligerents purporting to make spurious screenings of captives of war, while, on the other hand, the possibility could not be overlooked that, under pretext of

[2] See Mayda, "The Korean Repatriation Problem and International Law" (1953) 47 American Journal of International Law 414.

political objections to repatriation, prisoners of war might either be guilty of treason or simply wish to desert. A bitterly fought out compromise, giving due emphasis to humanitarian grounds was eventually reached in the terms of arts. 36-58 of the Armistice Agreement of 27 July 1953. Prisoner of war difficulties, again involving the viability of arts. 118-119 of the 1949 Convention, arose both in the Vietnam War and in 1972-1973 between India and Pakistan in connection with their hostilities in December 1971, which saw the birth of the new state of Bangladesh. In the case of the Vietnam War, one of the difficulties was the workability of the concept of "repatriation" to a homeland as applied to the different forces engaged in the conflict; this was solved in arts. 1 and 2 of the Protocol to the Peace Agreement signed at Paris on 27 January 1973, by providing for return to the country, authority, or party of which the prisoners were nationals or under whose command they had served, as the case might be. As to India and Pakistan, the former country claimed the right to detain a number of Pakistani prisoners of war, without repatriating them, upon the grounds, *inter alia*, that the possibility of a renewal of hostilities could not be excluded, and that war crimes trials were contemplated of certain prisoners.[3] The dispute was later settled by agreement, and certain proceedings relative thereto instituted by Pakistan in May 1973, in the International Court of Justice were discontinued.[4]

Difficulties of a more general nature than those concerning prisoners of war arose in the post-1949 period in relation to the application of the four Geneva Conventions of 1949. In part these were due to the vast political and technological changes that had occurred in the years 1949-1974. There had been instances of governments and entities or units engaged in hostilities, refusing to recognise that their armed operations were subject to the rules laid down in the 1949 Conventions. Moreover, new kinds of warfare and of armed conflicts had emerged, which did not belong to the pre-1949 stereotypes of armed struggles, an illustration being the Vietnam War itself, which was partly an international conflict, and partly a civil war, with the large scale involvement of outside nations. Also, it was claimed that so-called "wars of national liberation" and anti-colonial struggles ought to be treated as conflicts subject to the 1949 Geneva régime. This involved incidentally the problem of how guerrilla forces and mercenaries were to be dealt with. Besides, new weapons technology had resulted in the manufacture and use of bombs, mines, and projectiles capable of greater destruction, more unnecessary suffering, and more indiscriminate damage than previously. Then, again, as a result of world-wide moves for the protection of the environment and the conservation of natural resources, which found expression in 1972 in the Stockholm

[3] *Cf.* note by Levie, (1973) 67 American Journal of International Law 512.
[4] See I.C.J. Reports, 1973, 347.

Conference for the Protection of the Human Environment, it was felt that the old rules governing the conduct of warfare needed updating and reformulation so as to take account of this necessity for the preservation of the environment. The Vietnam War, in which such environmental factors had entered into consideration (*e.g.*, with objections raised against the destruction of jungle growth, plantations, and crops by the large scale use of defoliants) also demonstrated the need for new rules in certain areas, for example, with respect to the matter of speedy evacuation of wounded through the use of more highly developed means of aerial transport than existed in the year 1949, when the four Geneva Conventions were concluded. Finally, there was the controversial matter of the extent to which United Nations peacekeeping or other forces were to be subject, in the course of their activities, to the "laws of war".

The International Committee of the Red Cross (I.C.R.C.) at Geneva played an important role in the progression of steps which led to the summoning of the above-mentioned Geneva Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. The I.C.R.C. was instrumental in calling a Conference in 1971 of Government Experts on the Reaffirmation and Development of International Humanitarian Law to consider proposed additions to the Geneva Conventions of 1949. For this purpose, the I.C.R.C. had prepared two Draft Additional Protocols on, respectively, international armed conflicts and non-international armed conflicts, in as much as it was conceived that the basic law would still be contained in the 1949 Conventions, and would be rendered more precise, a point also reflected in the use of the word "Reaffirmation" to form part of the title of the Conference of Government Experts. The Conference continued its work in a second session in 1972, with the participation of more than four hundred experts delegated by over seventy countries, and at the conclusion of this session, it was announced that the Swiss Government, as depositary of the four Geneva Conventions of 1949, would convene the above-mentioned Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, to commence in February 1974.

In the meantime, in the period 1972-1974, the United Nations General Assembly had continued to maintain its interest in the respect for human rights in the conduct of armed warfare. Thus, before the Geneva Conference entered on its first session in February 1974, it was taken for granted that the relationship between human rights and the rules of international law applicable in armed conflicts was one of an indissoluble nature. The position was well described by Professor Gerald Draper, an eminent authority on the subject, in these terms:

> Within the space of the last decade there has been an increasing awareness that where State revision of the Law of War had failed, State responsiveness to augmenting the régime of Human Rights could go some of the way to make good that defect. By a series of resolutions at Red Cross Conferences, by U.N. Conferences on Human Rights and by resolutions of the General Assembly *a bridge has been built between the Human Rights system and the law of Armed Conflicts.* It seems to have been realized, not all at once, that what could not be achieved through a general revision of the Law of War might be partially secured by regarding the Law of War as something essentially complementary to the Human Rights régime.[5]

According to Professor Draper, not only has the human rights system afforded "a fundamental and novel approach" to the law of war and its revision, but it has led to "awareness among the percipient that respect for human rights cannot be fragmented into time of peace and of war and that such rights are under maximum threat in time of war".[6] This is a standpoint which has indeed commended itself to the Australian Government, as indicated in one way by the fact that Professor Draper himself was called upon to visit Australia in the latter part of 1974 to consult with the Government in regard, *inter alia*, to preparations for the second session in February-April 1975, of the Geneva Conference, and as well to advise on proposed human rights legislation.[7]

Australia has a long standing interest in the improvement of international humanitarian law. This has manifested itself in particular in special concern for the better treatment of Australian prisoners of war, and in ensuring that sanctions are visited upon those who infringe the rules currently in force as to the treatment by belligerents of prisoners of war. Thus, following the Second World War, Australia played an important part in bringing about the establishment of the Tokyo International Tribunal for the trial of major war criminals, and of the special courts set up in Rabaul and elsewhere in the Pacific region for the trials of others allegedly guilty of war crimes. It was also Australian insistence that led to the insertion of art. 16 in the Treaty of Peace with Japan signed on 8 September 1951, providing for compensation for prisoners of war taken by the Japanese forces in the course of the Pacific War.

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[5] Draper, "Human Rights and the Law of War" (1972) 12 Virginia Journal of International Law 326, 337 (italics added).

[6] Draper, *op. cit.*, 339. The primary humanitarian object of the "laws of war" had been frequently stressed in the writings of the late Sir Hersch Lauterpacht; see, *e.g.*, E. Lauterpacht (ed.), *International Law; Collected Papers of Hersch Lauterpacht* (1975) Vol. 2, 39. For a plea that the Universal Declaration of Human Rights of 1948 should be applicable in time of war, see Dunbar, "The Legal Regulation of Modern Warfare" (1954) 40 Transactions of the Grotius Society 83.

[7] See (1975) 49 A.L.J. 5.

This continuing Australian concern for the betterment of the "laws of war" was shown in December 1971, when, upon an Australian initiative, a Draft Convention was introduced in the Third Committee of the United Nations General Assembly at its Twenty-fifth Session for the protection of journalists engaged in dangerous missions in areas of armed conflict. In a news release announcing this initiative, the then Australian Minister for Foreign Affairs (Mr Nigel Bowen Q.C.[8]) said:

> Although the Third Geneva Convention of 1949 contains provisions designed to protect war correspondents who accompany but are not actually members of armed forces, this Convention does not cover journalists who are engaged on dangerous missions in areas where there is armed conflict but where this conflict is not described as war.
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> A preliminary Draft Convention was adopted by the Human Rights Commission [of the United Nations]. Australia is not currently a member of this Commission but when invited, along with other members of the United Nations to comment on the Draft Convention, decided that a number of changes in it would be desirable. We were particularly interested in this subject because we know only too well the dangers to which Australian journalists are frequently exposed. When we examined the original draft we decided that the improvements that we would like to see in it would warrant the preparation of a new Draft Convention.[9]

According to the Minister, the fundamental point of departure in the Australian text from other drafts was the provision for a journalist's safe-conduct card to be issued by a national committee, rather than by an international body. The Australian Government's concern for the protection of journalists in armed conflicts had been inspired by a number of tragic occurrences in the Vietnam War, affecting press representatives from countries both involved in, and outside, the conflict. The fact that a draft text had been adopted within the framework of the United Nations Human Rights Commission is also, incidentally, further confirmation of the point made above, namely of the post-1968 building of a bridge between human rights and the "laws of war", so as to constitute a body of rules appropriately bearing the title, "international humanitarian law", and of Australia's acceptance of this development.

Another indication of Australia's general interest in the improvement of international humanitarian law was Australia's signature on 10 April 1972, of the above-mentioned Convention on the Prohib-

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[8] Now Sir Nigel Bowen, Chief Judge of the Federal Court of Australia, and formerly Chief Judge in the Equity Division of the Supreme Court of New South Wales.

[9] News Release No. M/78, Department of Foreign Affairs, dated 22 December 1971.

ition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and their Destruction, which had been opened for signature on the same day. In a prior news release announcing the Government's intention to sign this Convention,[10] the Minister for Foreign Affairs, again Mr Bowen Q.C., pointed out that, as far as Australia was concerned, the provisions of the Convention relating to the destruction or diversion to peaceful purposes of existing stocks had "no direct relevance", since Australia neither possessed nor had under its jurisdiction or control biological weapons or means of delivery. However, according to him, "Australia had consistently supported efforts in the United Nations and in the Conference of the Committee on Disarmament" (in the forum of which the Convention had been negotiated over a period of two years) to negotiate such an agreement as the Convention. He added, "The effective prohibition of biological weapons is obviously a good aim in itself". Thus Australia's signature marked a broad concern to give support for all initiatives in the field of international humanitarian law, unconnected with any specially selfish interest in their endorsement. It is true that in a large sense the Convention was a disarmament measure, but it was nonetheless one also sought by the General Assembly in connection with efforts to render more effective the earlier mentioned Geneva Protocol of 1925, which while it prohibited the *use* in war of asphyxiating, poisonous or other gases and of bacteriological methods of warfare, did not prohibit the development, production, stockpiling, acquisition, or retention of biological weapons.

So much then for proof of Australia's continuing interest in the betterment of international humanitarian law.

It is to be hoped that the Australian Government will, in the same manner as it has for some time supported the work of The Hague Conference on Private International Law and the Rome Institute for the Unification of Private Law, also give support now to the International Institute of Humanitarian Law, at San Remo, Italy, which is the foremost body in the world for research in, and the promotion of the teaching of international humanitarian law. By so doing Australia will not only contribute to the development of this branch of international law, but will also reap the advantages of co-operation with a body that fulfils so central a role in that domain.

Before turning to deal with Australia's policy at the three sessions, 1974-1976, of the Geneva Conference on the Reaffirmation and Development of International Humanitarian Law, it may be convenient to mention some aspects of the largely non-productive first session of that Conference in 1974. One major difficulty confronting the participants at the outset arose from the fact that the Conference had to

[10] News Release No. M/30, Department of Foreign Affairs, dated 4 April 1972.

proceed upon the basis of two texts, namely Protocol I (international armed conflicts) and Protocol II (non-international armed conflicts), instead of a single negotiating draft, with the consequence that one overriding problem was that of settling the precise scope of each. Indeed it was only at the second session in February-April 1975, that an acceptable definition of a non-international armed conflict, for the purposes of the application of Protocol II, was adopted. The main preoccupation of the Conference at its first session in 1974 was that of dealing with a number of highly politicised issues. There was also the fact that the first session necessarily provided the time and place for the various delegations to clarify their general points of view in respect to each Protocol. It must be remembered that a number of countries which had sent delegations to this Conference had not been represented at the Geneva Conference of 1949 which had adopted the four Conventions referred to above, although these Conventions had been ratified by the great majority of the States attending the new Conference.

Two thorny questions took up a great deal of the time of the first session of the Conference. First, there was the question of the participation of National Liberation Movements in the deliberations. The Conference decided to invite National Liberation Movements, which were recognised by the "regional intergovernmental organisations concerned", to participate fully in the discussions of the Conference and of its main Committees. It also decided that the statements made or the proposals and amendments submitted by delegations of such National Liberation Movements as were so participating should be circulated by the Conference Secretariat as Conference documents to all the participants in the Conference, it being understood that only delegations representing States or Governments would be entitled to vote. This was a procedural compromise without which possibly the Conference could have hardly got under way. The second thorny question was that raised by a bloc of certain developing countries which demanded that wars or struggles of national liberation should be considered as international armed conflicts for the purpose of the applicability of the four Geneva Conventions of 1949, and of the two Draft Protocols I and II. According to one eminent authority, "one single issue dominated the Conference and stood in the way of hard concentrated work on the substance of international humanitarian law",[11] namely the issue of treating wars or struggles of national liberation as international armed conflicts. As a result largely of the time devoted to, and the concentration of effort on solving these two

[11] Baxter, "Humanitarian Law or Humanitarian Politics? The 1974 Conference on Humanitarian Law" (1975) 16 Harvard International Law Journal 1, 11. See also (1975) 49 A.L.J. 299.

questions, the first session of the Conference ended on a somewhat indeterminate note, with little substantive progress made.

In the second and third sessions, such highly charged issues were not present to impede the work of the Conference to the same extent, although nevertheless some questions, such as the applicability of international humanitarian law to mercenaries, gave rise to politically-coloured controversy.

The general Australian approach was indicated in a statement by Mr F. J. Mahony,[12] leader of the Australian Delegation, at the first session in 1974 of the Geneva Conference. According to this statement, Australia expected that all delegations would, in relation to substantial issues, be guided primarily by "humanitarian considerations". Although it was preferable to conduct negotiations on the basis of the two separate Draft Protocols, the Australian Delegation was nonetheless prepared to accept a single text "containing realistic principles applicable to all armed conflicts covered by the drafts before the Conference". The Delegation attached "special importance" to the following provisions namely:

(a) The achievement of an effective system of appointment of Protecting Powers (those whose function is to safeguard the interests of parties to an armed conflict, so far as concerns prisoners of war, *etc.*).

(b) The prohibition of the indiscriminate use of weapons and unnecessary suffering or injury therefrom.

(c) The extension of prisoner of war status to captured members of organised resistance movements (although, as mentioned *infra* the Delegation preferred the use of the phrase "members of irregular forces" to the expression "members of organised resistance movements").

(d) The protection of persons, especially women and children, in territories over which a belligerent power exercised control.

(e) The specification of certain breaches, committed against protected persons or protected objects, as "grave breaches".

(f) The right of a serviceman to refuse to obey superior orders which, if carried out, would constitute a "grave breach" of the rules in the 1949 Conventions and in the two Protocols.

(g) Extradition for "grave breaches" of these rules.

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[12] Deputy Secretary of the Attorney-General's Department of the Commonwealth of Australia. The notes on Australia's contribution to the debates of the Geneva Conference are based on roneoed minutes of the proceedings of the first three sessions of the Conference (in 1974, 1975 and 1976), recording statements by Australian delegates, and kindly made available to the writer by the Department of Foreign Affairs. For accounts of the first session, see Baxter, *op. cit.*, and of the second and third sessions of the Conference in 1975 and 1976, see (1975) 49 A.L.J. 298 and (1976) 50 A.L.J. 370 respectively.

Two other general points were mentioned by Mr Mahony. One was that the Australian Delegation would suggest the insertion in the Draft Protocols of an article seeking to prohibit ecological damage as a technique of war. The other was that, in the Delegation's view, Draft Protocol II (non-international armed conflicts) "should be extended to apply at least to identifiable combatants occupying some territory and carrying on an armed conflict *with an obvious degree of intensity*".

Mr Mahony's statement thus more than confirmed that the Australian Government accepted without reservation the importation of a human rights approach to the updating and revision of the "laws of war", that is to say the reaffirmation and development of these laws as a body of international humanitarian law. This general approach was reflected in statements made by Australian delegates, other than Mr Mahony, in the course of Conference debates. Thus delegates stressed the basic concept of protection of the individual; this meant more than his well-being, but extended to safeguarding his physical and mental integrity. Others supported a wider protective reach of the 1949 Conventions and Draft Protocols to include the sick and wounded of all parties to an armed conflict, and all medical and hospital transport craft at sea, including civilian hospital ships, lifeboats, and small medical surface vessels, and as well medical staff thereon. The Australian Delegation supported the recognition in the Draft Protocols of the role of civil defence organisations in times of armed conflict, and the protection to be given thereunder to such organisations.

It may be of interest to mention Australia's contribution, in matters of drafting, to the debates. The Delegation opposed the introduction into the Protocols of imprecise concepts or unclear distinctions, *e.g.* the distinction between a "just" and an "unjust" war, and such expressions as "racist régimes". On the matter of the extension of prisoner of war status to certain categories of lawful combatants as under draft art. 42, the Delegation advocated the substitution of the expression "members of irregular forces" for the phrase "members of organised resistance movements" on two grounds, namely, that the term "irregular forces" was one of long standing in international law, and that the expression proposed to be substituted was of a more representative nature as describing the lawful combatants envisaged by the article, while ultimately it would make for a greater protection of the civilian population. For this reason, the Delegation was also prepared to accept as a substitute the expression proposed by the Finnish Delegation, which was "members of organised armed units". In regard to draft art. 46 for the protection of the civilian population from armed attack, the Delegation would have preferred two separate articles, one of which would deal in a distinct manner with the permissible limits of area bombardment, in as much as this was a type of attack that was unlikely to be abandoned. Nor would this involve any derogation from the prin-

ciple of "proportionality", proclaiming that the results (*e.g.* by way of incidental injury and devastation) should not be disproportionate to the military objectives of the attack. These examples do not exhaust the instances in which Australian delegates moved for greater precision and clarity, with the prime object in view of extending the protective range of the provisions in the two Draft Protocols.

It may be convenient to deal enumeratively with a number of specific matters in respect to which Australia's approach was clarified by statements of delegates:

(1) *Nature of a non-international armed conflict under Protocol II*: The Delegation envisaged as falling within the scope of Protocol II major civil war conflicts at one end of the scale, and at the other end of the scale, conflicts amounting to a state of insurgency rather than belligerency, and which went beyond a mere situation of internal disturbance or internal tension, with sporadic riots or acts of violence. The conflicts would thus have to be of a certain level of intensity. The actual definition of non-international armed conflicts adopted by the Conference at its second session in 1975 was that of conflicts taking place "in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised groups which, under responsible command, exercise such control over part of its territory as to enable them to carry out sustained and concerted military operations and to implement the present Protocol". The words "sustained and concerted military operations" in this definition seem to meet the requirement of intensity, as contemplated by the Australian Delegation.

(2) *Protection of the environment*: According to the Delegation's view, there should be an absolute prohibition of all action destructive of, or detrimental to, the environment, in the case of both international and internal armed conflicts.

(3) *Attacks on works and installations containing dangerous forces* (*e.g.* dams, dykes, and nuclear generating stations): As opposed to the provision (draft art. 49) in the Draft Protocols forbidding attacks on, or the destruction of such works or installations, the Australian proposal, more realistically, was that parties to the conflict should endeavour to avoid attacks on or the destruction of these works or installations.

(4) *Protecting Powers*: The Australian Delegation supported the establishment of effective machinery to enable the system of Protecting Powers to work. However, in its view, any such system should not involve any infringement of national sovereignty. The rules should nevertheless be so framed as to place the maximum pressure upon States engaged in warfare to accept a system of Protecting Powers. The Delegation did not however accept any proposal that the United

Nations should be empowered to designate a body to undertake Protecting Power functions, without the consent of the relevant parties. The Delegation's preference was for flexibility in the mechanics of appointment of a Protecting Power, without compulsion or constraint.

(5) *Reprisals*: The Delegation entertained reservations concerning the extent of the admissibility of reprisals, particularly as the law in this area was far from settled. In any event, it did not regard the concept of reprisals as applicable to non-international armed conflicts, since one party was not a State and the other contestant, a government or régime, was fighting within its own territory and against its own people.

(6) *International Enquiry Commission*: The Delegation supported the establishment of an independent International Enquiry Commission to investigate alleged violations of international humanitarian law. This would fill a procedural gap in the 1949 Conventions.

(7) *Superior orders*: The Delegation supported the provision that if a serviceman, in the circumstances existing at the time, should reasonably have known that he was committing a "grave breach" (see *infra*) of the 1949 Conventions and the Protocols, he should abstain from committing the act which constituted a "grave breach", whatever the consequences might be for him. It should at least be specifically provided that if he actually knew as a fact that he would be committing a grave breach, the commission of the act should be prohibited.

(8) *Grave breaches*: The Delegation supported the making of a distinction between "grave breaches" and other breaches of international humanitarian law, with the consequences of extradition and universal jurisdiction for the trial of those guilty of grave breaches. An article specifying acts that constituted "grave breaches" should be included in Protocol I.

(9) *Weapons*: While Australia supported the need, as a broad humanitarian objective, for restrictions or prohibitions, as the case might be, on the use of conventional weapons which might cause unnecessary suffering or have indiscriminate effects, it felt that there was a danger in attempting to move ahead too quickly without allowing governments sufficient time to consider all the questions involved in a complex balancing of military, medical, humanitarian, legal and technical factors. In some areas, many of the facts about the use and effects of weapons were themselves in dispute. Any agreement on the subject would have to be acceptable to the major powers and to the major arms producers of the world, otherwise the agreement would be empty of reality. There were also difficult problems involved of verification and control. It was important to allow sufficient time for consideration of all aspects. Moreover, it would be preferable to

consider restrictions or prohibitions on existing specific weapons, rather than to attempt to ban broad categories of actual or emergent weapons or weapon systems.

There were numerous other issues of varying importance as to which Australia made clear its attitude in the course of the three sessions of the continuing Geneva Conference. With one session or possibly two more sessions of the Conference remaining necessary for the completion of final texts, it is not possible at this stage to postulate definitely to what extent the different Australian proposals for changes in international humanitarian law will be reflected in the wording of the Protocols eventually adopted by the Conference, but the Australian Government is to be commended generally for an approach to the problems of the development of this branch of international law which is both enlightened and realistic.