Keynote address

International Humanitarian Law: Changing and Unchanging 70 Years after the Geneva Conventions

Yoram Dinstein
Emeritus Professor, University of Tel Aviv; President of the United Nations Association of Israel; Council Member, IIHL

Change and the Geneva Conventions

On the occasion of the 70th anniversary of the 1949 Geneva Conventions for the Protection of War Victims, I would like to address the theme of the dichotomy between change and lack of change in international humanitarian law with special emphasis on the Geneva texts.

The importance of the topic comes into relief against the background of an ascendant tendency to treat the Geneva Conventions (now entrenched in popular culture) with reverential worship. Some lay persons appear to regard them as impervious to change and engraved in stone, lacking altogether elasticity and pliability. Such a
perception of the Geneva Conventions is entirely wrong in terms of both their starting point and their later trajectories.

At the moment of their inception in 1949, the Geneva Conventions already represented change in the pre-existing law. Two of the four Conventions (the Second and the Fourth) were new. As for the other two (the First and the Third), whereas they followed the trail of previous Geneva instruments dated 1929, they too were marked by innovations.

The First Convention on wounded and sick in land warfare was no less than a fourth rendition of the seminal wording crafted in 1864 (the intermediate revisions done in 1906 and in 1929). While much of the First Convention trod familiar ground, it nevertheless contained starkly new clauses like Common Article 3 to which I shall refer later.

The Second Convention transferred into the "Geneva Law" a Hague Convention - No. X of 1907 – that, in itself, had been an adaptation to maritime warfare of the Geneva Convention of 1906. For its part, the 1907 text was a rewrite of Hague Convention No. III of 1899 constituting an adaptation of the original Geneva text of 1864.

The Third Convention on prisoners of war introduced into the earlier version of 1929 radical amendments, deemed indispensable by dint of the dire lessons learned in World War II.

The Fourth Convention for the protection of civilians, currently considered the fulcrum of the Geneva legal regime, was completely novel in 1949. Its raison d'être was the unspeakable Nazi atrocities against civilians perpetrated in the course of World War II.

Thus, the common denominator of all four Geneva Conventions was the desire of the Diplomatic Conference of 1949 for significant reform in international humanitarian law.

When one examines the post-1949 era, it is plain to see that the four Geneva Conventions have by no means frozen in time: indeed, they have undergone permutation both formally and informally. Formal changes occurred in 1977, when the Geneva Conventions were supplemented by Additional Protocols I and II governing the conduct of hostilities (in international and non-international armed conflicts, respectively). Informal changes in the thrust of some stipulations of the Conventions were engendered by subsequent practice; and I shall illustrate this in due course.

The moral of the story is that the Geneva Conventions are and have always been attuned to a constant need for reappraisal.
Law and change

Far be it from me to suggest that change is a unique feature of the Geneva Conventions. Life is about change, and so is the life of the law. No legal status quo can be maintained perpetually. Law is a living organism and as such it must evolve. When a legal system does not readjust itself in tandem with changing circumstances, a gap will be created between law and reality. In the long run, such a gap will be catastrophic to the law by eroding its bedrock, namely, societal respect for the law.

If this is true of all law, it is particularly true of international humanitarian law. Every war (bellum) becomes a crucible for forging new jus in bello in light of the experience gained in the battlefield. The introduction of novel methods or means of warfare prompts a fresh look at the law in force.

This is epitomized in the impetus for the revision of the Geneva Conventions in 1949. In their new configuration, the Conventions reflected an immense pressure brought to bear by public opinion upon Governments to reform a legal system that had been weighed in the balance and found wanting during World War II.

That said, we must be cognizant of the fact that change in the law cannot be unlimited and out of control.

How much change?

The pivotal question is: how much change do we wish for? The quandary relates to the degree of change that can be absorbed by international humanitarian law without a melt-down. Au fond, when Governments are urged to revise binding norms, it is incumbent on them to assess the rectification sought in a manner congruent with the unchanging (i) axiom; (ii) objective; and (iii) cardinal principles of the legal system.

In case you think that what I am saying now is too abstract, let me give you a concrete example of the ramifications of failing to keep a lid on change. Some air force enthusiasts are clamouring for a new rule of warfare allowing the bombing of enemy civilians, with a view to shattering their morale and bringing the war to a rapid end (thereby, in the final analysis, perhaps saving incalculable numbers of lives of both civilians and combatants). Factually, not much evidence can be
adduced for the proposition that – by themselves - "shock and awe" attacks against the civilian population will force a Government to capitulate. In World War II, devastating Allied air strikes in Germany and in the Pacific – pulverizing and even incinerating whole cities – failed to achieve the purpose of the architects of "strategic bombings". Still, let us assume *arguendo* that large-scale bombings of the civilian population might terminate a war promptly. Could they be reconciled with the existing *jus in bello*? The answer is that direct attacks against civilians – even if effective in practice – are patently incompatible with the cardinal principle of distinction that I shall dwell upon. Given the cardinal nature of the principle, recasting international humanitarian law along the lines proposed would be inherently impermissible.

**Unchanging axiom of international humanitarian law**

The first obstacle to any change in international humanitarian law is the axiomatic major premise of the equal applicability of the *jus in bello* to all Belligerent Parties in an international armed conflict, irrespective of who is the aggressor (and, correspondingly, who is the victim of aggression) under the *jus ad bellum*. This axiom, like all axioms, is a basic postulate with which no rule can be in disharmony.

In many Universities in the world, Professors of Ethics teach the so-called "just war theory", whereby if a war is "unjust" that taints the status of combatants in the conduct of warfare. Since Ethics is not my discipline, I shall not encroach into it. But, from the standpoint of international law, the linkage between the legality of war and the conduct of hostilities is utterly unacceptable. Whether the war is "just" or "unjust" under the *jus ad bellum*, all combatants are equally bound by the same obligations and enjoy the same rights pursuant to the *jus in bello*.

Think about it against the backdrop of World War II. Despite the fact that the Nazi war of aggression was singularly unjust and unlawful, German combatants who fell into the hands of the Allies on the Western Front were still entitled to the privileges conferred on prisoners of war, in conformity with the Geneva Convention of 1929 (which, regrettably, was not applicable on the Eastern Front). Were it not for the profound dis-connect between the *jus in bello* and the *jus ad bellum*, millions of German captives could have been excluded from the benefits of international humanitarian law.
The axiom of equality of the Belligerent Parties is viable today even when UN forces are engaged in an armed conflict: the same corpus of international humanitarian law binds these forces (representing the international community) and their opponents (whoever these opponents are).

Interestingly enough, the axiom of legal equality of the parties is apposite also to non-international armed conflicts, although there is no jus ad bellum regulating such conflicts, and besides there is a built-in disparity in the positions of the two principal adversaries (the Government and insurgents organized armed groups). Equality of the parties denotes that insurgents – no less than the Government - must apply international humanitarian law, including the prohibition imposed by Common Article 3 of the Geneva Conventions on sentencing accused personnel "without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees". Insurgent armed groups must abide by this norm whether or not they are in effective control of territory. Of course, absent control of any territory, insurgents cannot conceivably ensure the operation of a regularly constituted court affording all the judicial guarantees. Still, they are not granted a dispensation from the rule: they will consequently be barred from sentencing offenders.

**Unchanging object and purpose of international humanitarian law**

The object and purpose of the jus in bello were lucidly proclaimed already in the St. Petersburg Declaration of 1868 (four years subsequent to the adoption of the original Geneva Convention): “alleviating as much as possible the calamities of war”.

Unfortunately, war is not a game of chess: it always entails the spilling of blood and the destruction of property. What international humanitarian law does is balance – “as much as possible” - military necessity with humanitarian considerations. The outcome is a compromise between these polar opposites. On the one hand, war is pursued with the goal of winning it; on the other, it is of the essence of the jus in bello that not everything is allowed in war.

A more recent formulation of the same fundamental idea – contemplated from a different angle - is enshrined in Article 35(1) of Additional Protocol I of 1977, prescribing that “the right of the Parties
to the conflict to choose methods or means of warfare is not unlimited”. Indubitably, the primary precept promulgated in Article 35(1) accurately reflects customary international law (which is binding also on non-Contracting Parties to Additional Protocol I). Wartime cannot become a "kill-free" temporal domain.

**Unchanging cardinal principles of international humanitarian law**

As the International Court of Justice famously pronounced, in the 1996 Advisory Opinion on the *Legality of Nuclear Weapons*, international humanitarian law is underpinned by two cardinal principles:

(i) Distinction (between combatants/military objectives and civilians/civilian objects); and

(ii) Avoidance of unnecessary suffering or superfluous injury (to combatants).

It must be fully appreciated that these two cardinal principles are like legs on which international humanitarian law is standing. Were they to be amputated, the whole body of that law would collapse.

The cardinal principle of distinction is conspicuously momentous. I have already adverted to it in the context of the insupportable notion of "shock and awe" air strikes directed against civilians with a view to shattering morale. Let me add that the principle of distinction protects the civilian population not merely from deliberate attacks (whatever their underlying rationale) but also from indiscriminate attacks that are oblivious to the identity of the potential victims (be they combatants or civilians). That leads me to the principle of proportionality.

**The principle of proportionality**

The principle of proportionality is derived from the cardinal principle of distinction and is an extension of the prohibition of indiscriminate attacks. In the actuality of modern warfare – as waged, at least, by the armed forces of the countries represented in this auditorium – the principle of proportionality has become the gravamen of the protection of the civilian population from injury.
The dilemma of proportionality comes into play when lawful targets (combatants/military objectives) are attacked, instigating collateral damage (or incidental loss) to civilians/civilian objects. The trouble is that civilians/civilian objects cannot be comprehensively insulated from any form of collateral damage or injury, inasmuch as they are almost always present in or near combatants/military objectives. The only exceptions would be attacks mounted in the middle of the desert, in mid-ocean or on the arctic ice-cap, and even then civilians may turn up in the vicinity by chance.

International humanitarian law takes this stubborn fact of life into account. What it lays down – in the form of the principle of proportionality – is that an attack against a lawful target is proscribed if it is expected to cause collateral damage to civilians/civilian objects, which would be "excessive" in relation to the concrete and direct overall military advantage anticipated.

The main feature of the principle of proportionality is the expectation of "excessive" collateral damage to civilians/civilian objects. This is a matter of foresight rather than hindsight: what counts is what is expected in advance of the action on the footing of a reasonable evaluation of the information available at the time. Moreover, "excessive" does not mean "extensive": lawful collateral damage to civilians/civilian objects may be quite extensive, if – but only if – it is commensurate with the anticipated overall military advantage.

A cautionary note: the principle of proportionality must not be read beyond the ambit of the protection of civilians/civilian objects from "excessive" collateral damage. No proportionality is required as regards death, injury or destruction inflicted on combatants/military objectives.

What does – and must – change?

The crucial question, therefore, is: what changes in international humanitarian law are appropriate – indeed, inevitable - and what changes are inadmissible? The axiom remains immutable. The object and purpose are enduring. The cardinal principles are firmly fixed. However, while all these are unswerving, there is an abundant subsidiary body of international humanitarian law that is altered incessantly.
Each generation reinterprets the same cardinal principles differently, coming up with new solutions to both old and new problems. The principle of proportionality – playing such an important role today – is emblematic in having provided a new solution to the old problem of collateral damage. During World War II, it was still possible to rationalize an attack causing devastating carnage to enemy civilians/civilian objects – highlighted by the atomic bombing of Hiroshima – on the ground that the city constituted a military objective. This was the case because Hiroshima was an important seaport, serving as a supply center for the Imperial Japanese military, with several thousand troops stationed there. A classification of a target as a military objective seemed at the time to close the book on the legal analysis of a projected attack. But the principle of proportionality, as developed in the post-War era, recalibrates that analysis. The "excessive" collateral damage to civilians (through blast, heat and radiation) would render illegal today a Hiroshima-like attack, even though it was directed at a military objective.

New jus in bello problems arise as a result of either technological developments or a shift in battlefield tactics, and they may make it vital to review and update obsolete rules. There is nothing wrong with such reviews and updates – indeed, these may be ineluctable - as long as they do not tamper with the essential components of international humanitarian law.

**How is change brought about?**

When there are compelling reasons for change in the rules of international humanitarian law, what is the process by which the change can be generated? In this respect, the jus in bello is no different from all other branches of international law: change is spawned either by treaty or by custom.

Custom means the general practice of States (with an accent put on “specially affected” States) plus opinio juris. Custom is unwritten, and it may not be easy to pinpoint. By contrast, a treaty is a written agreement between States. A treaty has an advantage over custom in being jus scriptum, but – unlike custom, which is commonly binding on the entire international community – a treaty is binding only on Contracting Parties. Here is where the Geneva Conventions stand out, since they have been ratified or adhered to by every country in the
A handful of other treaties (primarily, the Charter of the United Nations) are on the cusp of universal acceptance; but, so far, only the Geneva Conventions have achieved that goal.

A treaty may be innovative, deviating from pre-existing customary law in the relations between Contracting Parties (without affecting third States). Conversely, a treaty - in whole or in part - may be, or may become in time, declaratory of customary international law. In that case, the declaratory norms (by virtue of their customary nature rather than owing to the treaty) are binding also on non-Contracting Parties. In the sphere of international humanitarian law, this is a dominant issue whenever edicts of Additional Protocol I of 1977 are relied upon. The perennial question is whether a relevant clause of the Protocol is accepted as declaratory of customary international law. If it does not reflect custom, the provision will usually be contested by non-Contracting Parties (led by the US).

Change in international humanitarian law can be attained not only through treaty, but also by means of customary evolution. Irrefutably, a new custom may modify a previous custom. Furthermore, a new custom may make inroads into a treaty text by reinterpretating it in keeping with subsequent practice. While - on the face of it - the text remains intact, the substance of the norm will undergo a significant transformation in reality. I shall illustrate this, in the context of the Geneva Conventions, in a moment.

**How is change not brought about?**

It is of salient importance to underline that change in international humanitarian law can be brought about solely by States acting jointly under the banner of a treaty or custom. There is no other way to validly effect such change.

This should put in proper perspective the role of the "civil society" in the process. By themselves, non-governmental organizations (including even the foremost non-governmental organization, viz. the ICRC, which is endowed with a special standing under the Geneva Conventions) are incapable of producing change in international humanitarian law. Non-governmental organizations - and other non-State actors – can definitely be instrumental in demanding that Governments conclude innovative treaties or reset their practice. The history of the adoption of the 1997 Ottawa Convention on Anti-
Personnel Mines shows that - through incessant goading of Governments - non-governmental organizations can leave an indelible mark on the unfolding of a groundswell of State support for the creation of new humanitarian norms. But not always do projects championed by the "civil society" come to fruition. Even when they do, the part played by non-governmental organizations is strictly a behind-the-scenes performance. Success in promoting a treaty does not turn non-State lobbyists into accredited members of the cast of actors on the law-making international stage.

A single State is equally unable to convert international humanitarian law unilaterally: it takes a group of States to produce change collectively. If an individual State acts in breach of either a custom or a treaty by which it is bound, the breach remains a breach as long as the acting State is not joined by other States in defying the law. Contrarily, once a number of States share a policy of disapprobation of a law in force, the legal landscape is liable to transmute. At the end of the day, it may be conceded that the first breach of the law was merely a building-block of what has ultimately turned into subsequent practice reshaping a pre-existing treaty or custom. So, the issue of change versus lack of change of a specific norm is not as simple as it sounds at first blush. There are occasions when one has to take a pause and perhaps wait a few years before it is known conclusively whether an incipient breach of the law has (or has not) ripened into an unstoppable subsequent practice.

I shall give two illustrations of subsequent practice impinging on ostensibly sacrosanct provisions of the Geneva Conventions: one relates to the Second Convention and the other to the Third Convention.

**Subsequent practice – second Geneva Convention**

Under Article 34(2) of the Second Geneva Convention, “hospital ships may not possess or use a secret code for their wireless or other means of communication”. The wording can hardly be clearer, yet it no longer represents the law prevailing at the present time. Even the new (2017) ICRC commentary on the Second Convention admits that, bearing in mind State practice since 1949, the mere possession or use of secret codes aboard hospital ships cannot anymore be denounced as
a breach of international humanitarian law (unless the use is harmful to the enemy).

Credit ought to be given where credit is due. The practical problem with Article 34(2) was first identified in Rule 171 of the San Remo Manual of Maritime Warfare (finalized, under the auspices of this Institute, in 1994). By the time of the drafting of the San Remo Manual, it became apparent that failure to receive encrypted communications would jeopardize the ability of hospital ships to function effectively. Since then, the gap between the law and reality has further widened, for naval code messages have totally replaced communications en clair. The San Remo Rule was still hesitant in its language, given natural qualms about challenging a Geneva text. A quarter of a century later, the hesitation is no longer cogent. It is indisputable that the only restriction today on the use of cryptographic equipment on board hospital ships is the prohibition of abuse, and the sole need is to ensure the non-transmission of coded messages harmful to the enemy (e.g., intelligence data).

**Subsequent practice – third Geneva Convention**

Article 118 of the Third Geneva Convention decrees that prisoners of war "shall be released and repatriated without delay after the cessation of active hostilities". The nub of the matter is the phrase "and repatriated", which was adopted in 1949 after ample consideration. Indeed, an Austrian-sponsored amendment - granting released prisoners of war the option not to return home if they did not wish to do so - was rejected at the time.

This became a major bone of contention in the Korean armistice negotiations (it is noteworthy that the Korean War broke out less than a year after the crafting of the Third Convention). The controversy arose as a result of a massive refusal of North Korean and Chinese prisoners of war to return home. Hostilities went on purposelessly for two years – precipitating many casualties with trivial gains for either side on the ground – until, in 1953, the Parties to the conflict agreed not to coerce released prisoners of war to be repatriated involuntarily (an intricate scheme was worked out to verify the true wishes of those released from imprisonment).

The Korean precedent was followed in the Gulf War, in 1991, and the exclusion of compulsory repatriation of prisoners of war (without
prejudice to any agreed-upon formula delineating the mode of their release) may now be viewed as binding customary law. Thus, Article 118 of the Third Convention should no longer be taken as read.

Restatements and change

Since 1977 – the date of the adoption of Additional Protocol I, which has left in its wake a great deal of bitter disputes – States have been overtly reluctant to indulge in new treaty-making efforts in the field of international humanitarian law, except where certain weapons are concerned. Whereas means of warfare are the gist of sundry post-1977 treaties, there has been no new treaty germane to methods of warfare. Every once in a while, appeals are made for an innovative treaty addressing this or that manifestation of the *jus in bello*, but to date none of the initiatives has been crowned with success. The bottom line is that it is not likely that any novel treaty on methods of warfare will emerge in the foreseeable future.

What is the alternative? The emphasis has shifted from treaties to custom. And, in order to articulate customary law in an authoritative up-to-date manner, a technique has evolved of preparing non-binding restatements of the law in the form of manuals. Such restatements/manuals are the products of groups of experts consisting of both academics and practitioners, collaborating in their individual capacity albeit in some consultation with Governments of core States (as well as the ICRC). The prototype of restatements/manuals was first moulded in the 1994 San Remo Manual on Armed Conflicts at Sea. Since then, we have had several additional restatement/manual on selected problems of international humanitarian law – for instance, Air and Missile Warfare – all emulating the San Remo model.

A critical dimension of restatements/manuals is that, to be useful, they must predominantly mirror the *lex lata*. After all, unlike official organs of States who may devise new law, experts are not qualified to do so. There is no genuine value added in a restatement/manual reflecting the *lex ferenda* from the experts’ standpoint. What experts wish for may be interesting as a moot academic exercise, but it is of little empirical use to the end-users of their product (military operators and their legal advisers). What the experts have to do is examine the actual practice of States, trace patterns of behaviour, and conclude by portraying the law as it is. The experts may illuminate a burgeoning
trend in the practice of States that may be indicative of a law in the
offing (in statu nascendi). Still, the experts' paramount task is to
establish what the law is de lege lata.

The search for lex lata means identifying any applicable custom;
invoking all relevant treaties (expounding their innovative or
declaratory status); explaining when custom (obligatory for all States)
and treaties (binding as such only on Contracting Parties) are at odds
with each other; construing ambiguous treaty provisions; and trying to
elucidate diverse diagnoses of the general practice of States.

A restatement/manual must be au courant: it has to show when an
article or a paragraph in a treaty (which was innovative at the outset)
has generated new custom, and (the other way around) when
subsequent practice has modified a treaty clause. This is a complicated
mission, and not always do the experts manage to build a consensus.
Unresolved disagreements must be reflected in a commentary
accompanying the black-letter rules of the restatement/manual. The
commentary will also shed light on the choice of words in drawing up
those rules and include cite-references to treaty texts underlying them.

Naturally, no less than other texts, a restatement/manual must be
reconsidered after a reasonable lapse of time. A restatement/manual,
even if flawless when inaugurated, is liable to lose its cutting edge over
the years. It therefore has to be periodically reviewed through the lens
of any posterior growth of international humanitarian law. Accordingly, the San Remo Manual - after a quarter of a century of
successful existence (in the course of which it has been cited countless
times) - will soon be undergoing reexamination by a new group of
experts. The reason is plain to see: whether or not the San Remo
Manual was 100% perfect in 1994, it can scarcely be a 100% perfect
a quarter of a century later. Subsequent practice must be reckoned
with.

The pace of change

The pace of change in customary international law is usually slow,
yet the rate may accelerate very swiftly. Although the phrase "instant
custom" is an oxymoron, sometimes custom can consolidate over a
relatively short period of a few years. The remarkable development of
the customary law of the sovereign rights of a coastal state in its
continental shelf, within a single decade from the debut of this
construct, is a paradigmatic example. And one of the best illustrations of a quickening momentum of customary germination can be elicited from international humanitarian law itself where non-international armed conflicts (NIACs) are concerned.

For a long stretch of time, there was simply no international humanitarian law governing NIACs. The genesis of NIAC humanitarian law is to be found in 1949, in Common Article 3 of the Geneva Conventions. This was a very pregnant moment, but it must be seen in proportion: there was one single clause on NIACs - common to all four Conventions - compared to more than four hundred other provisions focused on international armed conflicts.

In 1977, Additional Protocol II (devoted exclusively to NIACs) was signed. Additional Protocol II was much shorter and less impressive than its twin, Additional Protocol I (regulating international armed conflicts). But, even in its truncated form, Additional Protocol II had to overcome strong opposition by numerous States.

For more than a decade and a half, it looked as if progress stopped in its tracks, and Additional Protocol II seemed to be destined to remain the final word on NIACs. Then, in the mid-1990s, there was a quantum leap catapulted by the Statutes of the ad hoc International Criminal Tribunals on the former Yugoslavia (ICTY) and Rwanda (ICTR), and the spate of Judgments delivered by these Tribunals. Alongside a vigorous move forward of NIAC humanitarian law, individual criminal accountability was attached to serious violations of the law. For the first time, legal breaches were recognized as war crimes when committed in a NIAC setting.

The trend culminated in the 1998 Rome Statute of the International Criminal Court (ICC), which in Article 8 recites a long roster of NIAC war crimes (their listing being augmented further in Kampala in 2010). Thus, there has been a sea-change in the NIAC law. Commencing with zero NIAC humanitarian law prior to 1949, and going through a phase of moderate expansion in 1977, NIAC law has now grown exponentially making headway in the province of war crimes. One can only marvel at a metamorphosis in the legal canvas within a relatively short time span.
Changes in international humanitarian law due to technological developments

Technological developments affecting the means and methods of warfare inexorably require constant changes in international humanitarian law. That has always been the case. The invention of warplanes and missiles, the introduction to land warfare of tanks, etc., all contrived to alter the *jus in bello*. There was no way for the law to ignore the repercussions of the new destructive capabilities of Belligerent Parties. Currently, we are going through a period in which the march of endless technological developments is even more pronounced: the tempo gets faster and faster from one generation to another.

Prime illustrations of current technological developments are: (i) cyber warfare; (ii) semi-automated weapon systems; (iii) drones (remotely piloted aircraft); (iv) unmanned maritime surface vessels and underwater devices; (v) land robots; and (vi) satellites in outer space. These will be discussed in detail in the present Round Table.

There are a host of lawyers who desire to scrutinize also the impact on international humanitarian law exerted by artificial intelligence, a technology that still has quite a distance to go before it fully materializes. For my part, I find it premature to thrash out, e.g., the penal consequences of a robot determining by itself whether collateral damage to civilians/civilian objects is expected to be "excessive" compared to an anticipated military advantage of a lawful attack. The issue of human accountability for rogue actions by futuristic autonomous contraptions is undeniably fascinating. All the same, I would prefer to let technology advance further before its legal reverberations are submitted to a coherent legal discourse.

Technological developments improving the ability to comply with international humanitarian law

Technological developments are usually looked upon as impediments to the implementation of the existing *jus in bello*, and (as a corollary) catalysts for relentless change. But it must be perceived that exceptionally technological developments may also lay the ground for a better implementation of the law in force, thus fending off any incentive for change.
Two leading examples should suffice. The first is the use of PGM enabling an attack against a lawful target to have a surgical effect, thereby alleviating the danger of indiscriminate bloodshed and substantially minimizing – possibly eliminating altogether - collateral damage to civilians/civilian objects.

Secondly, surveillance drones (remotely piloted aircraft) can furnish real-time information about the presence of civilians/civilian objects in proximity to a military objective. People are disposed to think of drones as weapon-carrying aerial platforms. Yet, by far the large majority of drones in use today are surveillance drones. By loitering over a prospective target, drones can overcome the "fog of war" and collate accurate data about the contiguity of civilians/civilian objects. Upon inspecting the intel gathered by the drone, the planners of an attack may reliably determine whether the expected collateral damage would impel aborting the attack. Evidently, there is also the possibility of opting for alternative courses of action, such as embarking on the attack in a different time-frame (say, night-time) or in a divergent mode.

Use of latent technological developments

Not all technological developments have direct palpable effects, for better or worse, on the jus in bello. There are a raft of technological developments that may influence that law latently or tangentially, depending on context.

Thus, international humanitarian law obligates an attacker to use feasible precautions, including - where possible - the issuance of warnings to civilians about an impending attack. Obviously, not always can warnings to civilians be released in practice, for surprise may be of the essence of the plan of attack. But, if warnings are feasible, they may serve as decisive precautionary measures, precluding "excessive" collateral damage to civilians.

When feasible, how are warnings to civilians to be issued? In the past, the technology was limited in its range to the use megaphones; recourse to Radio/TV broadcasts; dropping of leaflets from the air, and so forth. In the electronic age, warnings can also be issued to the civilian population through messages sent by SMS, via the “social networks” (such as Facebook) on the Internet, etc. Large numbers of civilians who were once literally beyond reach can now be effectually
contacted. Thus, new technologies designed for normal peacetime purposes may induce unforeseen benefits in wartime by safeguarding civilians from some collateral damage.

**Changes unrelated to new technologies**

New technologies are not the only roots of change in warfare or in the *jus in bello*. Innovations are often made necessary by exposure to ever-changing tactics that are not necessarily linked to any state-of-the-art technologies. Curiously enough, international humanitarian law is apt to find it harder to tailor itself to non-technological challenges.

A rudimentary illustration relates to the use of "human shields" (*i.e.* civilians) to screen lawful targets from attack, a forbidden tactic which of late has become flagrant in multiple armed conflicts. The issue of unlawfully emplacing (voluntary or involuntary) "human shields" in front of or amid combatants/military objectives was probed by a special session in Rome organized by this Institute with Judge Pocar in the Chair. Regrettably, no unanimity has emerged about pragmatic sanctions against such tactics. All that could be agreed upon across the board was that international humanitarian law must somehow come to grips with this test of its authority.

A related issue, not sufficiently studied in my opinion, is the lack of adequate response by international humanitarian law to the mushrooming phenomenon of the use of “suicide bombers” (masquerading as civilians). “Suicide bombers” are launched today all over the world, but international humanitarian law is still baffled by the question of how to deter them. After all, by definition, a "suicide bomber" is bent on suicide; so it is impossible to deter that person by simply threatening him/her with death. Other means of deterrence are elusive by reason of the existing prohibition of collective punishments against innocent kith or kin.

These and other conundrums posed by deceitful methods of warfare must command proper attention by lawyers and States. An ostrich-like policy of burying our heads in the sand will merely encourage military operators to improvise counter-measures that lawyers may not be happy about. Remember that, however unpalatable, such counter-measures may ultimately insinuate
themselves on international humanitarian law under the mantle of subsequent practice.

A new Matrix?

A failure by international humanitarian law to grapple with new challenges (“the decision not to decide”) leads to persistent calls in the legal literature for a new matrix. The contention is that, since contemporary conditions of warfare (especially in so-called asymmetrical warfare) are not dealt with in a suitable fashion, there is no escape from the necessity of reshaping the very matrix of international humanitarian law.

As I have argued in this presentation, there is always room for law reform. But I do not believe that the present matrix of international humanitarian law is irremediably defective only because some issues (like “human shields” and “suicide bombers”) remain for the time being unsettled. As I see it, even if we are dissatisfied with lack of progress in certain directions, there is nothing that is drastically wrong with the nucleus of international humanitarian law.

In any event, it must be underscored that States – the ultimate stakeholders here - do not reveal any inclination to revisit the fundamental structure of international humanitarian law on account of peripheral deficiencies.

Conclusion

There are three points that I want to bring to the fore in conclusion:

(i) International humanitarian law (like all law) invites constant review and updating, and it must be continuously scanned in order to verify whether change has actually occurred (perhaps unnoticed) or is forthcoming. Nevertheless, there is no real need for a revision of its basic tenets.

(ii) Since no new general international humanitarian law in the form of a treaty is envisioned any time soon, the challenge of change in this field can only be confronted through evolution in customary international law. Progress by custom can be attested to by restatements/manuals elaborated by experts.
(iii) Although change in customary international law is ordinarily a slow process, the NIAC example amply demonstrates that – when the international community is ready and willing – law reform can be speedily accomplished. Quick transformation of international humanitarian law has happened in the past, and it can safely be prognosticated that this will happen again – as and when warranted - in the future.