

**37th Annual Seminar for Diplomats on
International Humanitarian Law**

**jointly organized by the International Committee of
the Red Cross and
New York University School of Law**

**Statement by Mr. Miguel de Serpa Soares
Under-Secretary-General for Legal Affairs
United Nations Legal Counsel**

9:15 a.m., 30 June 2020

Judge Meron,
Mr. England,
Ladies and Gentlemen,

[Opening Remarks]

The coronavirus disease pandemic has brought a number of challenges to the United Nations community, and I do hope that all the participants and their families have been staying safe and healthy.

While we face these unprecedented challenges, I am encouraged by the resilience of our colleagues in the United Nations community, and the fact that this Seminar is being held, although virtually, is another sign of resilience – that important work has to continue even in difficult times.

It is a great honour for me to be able to address this seminar once again, and I thank the NYU Law School and the ICRC for inviting me again to this important gathering on international humanitarian law.

I highly value this seminar as it provides a unique opportunity for me, as United Nations Legal Counsel, to engage with diplomats accredited to the United Nations on important issues concerning IHL.

As you can see in the programme, this year's theme is "Bringing IHL home". I understand that this theme is drawn from the title of one of the resolutions adopted by the International Conference of the Red Cross and Red Crescent held last December. The resolution in question is entitled, "Bringing IHL home: A road map for better national implementation of international humanitarian law".

As this title indicates, the focus of this resolution is the implementation of IHL at the national level, such as the adoption of necessary legislative, administrative and practical measures to implement IHL; the dissemination of IHL; and the criminal prosecution of persons alleged to have committed, or have ordered to be committed, grave breaches of the Geneva Conventions and Additional Protocol I.

As States are formally bound by the relevant IHL treaties and customary rules of IHL, the primary responsibility for the implementation of IHL falls on States, and in this regard, it can be said that States are "home" to IHL.

However, I would argue that the United Nations is also "home" to IHL, particularly since IHL has been developed and implemented through the organs of the United Nations. Therefore, in my address today, I would like to discuss how the United Nations has been "home" to IHL in its 75-year history.

[Charter and IHL]

Before I discuss how the United Nations has been "home" to IHL, I would like to briefly touch upon the relevant provisions of the Charter of the United Nations.

The relevance of IHL to the work of the United Nations might not have been so obvious in the early years of the Organization, as the Charter does not specifically refer to IHL. However, the United Nations was established in the

aftermath of the Second World War, which saw violations of IHL on a massive scale.

In this regard, the Charter, in its Article 1, paragraph 3, provides that one of the purposes of the United Nations is “to achieve international co-operation in solving international problems of ... [a] humanitarian character, and in promoting and encouraging respect for human rights”. Today, there is no doubt that IHL has become one of the most important areas of international law that guide the work of the Organization today.

In practice, all competent principal organs of the United Nations have dealt with issues related to IHL law in one way or another. As far as the Security Council is concerned, it has, on several occasions, specifically recalled “its primary responsibility under the Charter of the United Nations for the maintenance of international peace and security, and in this context, the need to promote respect for the rules and principles of international humanitarian law”, such as in resolution 2474 of 11 June 2019.

However, I would also like to draw your attention to another paragraph in Article 1 of the Charter which has often been forgotten. This is paragraph 4 of Article 1, which provides that the United Nations is “[t]o be a center for harmonizing the actions of nations in the attainment of these common ends.” The phrase “these common ends” here includes the United Nations’ role in solving international problems of a humanitarian character which I have referred to just now.

The United Nations has most often fulfilled this purpose in paragraph 4 of Article 1 by providing a forum where Member States and other actors can gather and discuss matters of common concern. In fact, there is no place like the United Nations where all States can gather – not just on an ad hoc basis, but on a regular basis – and discuss a range of issues, such as peace and security, sustainable development, and humanitarian issues. The United

Nations' power to convene is a truly unique feature of the Organization.

This is also the case with respect to IHL matters. The United Nations has used its power to convene a forum where States can harmonize their actions in addressing matters concerning IHL.

In this connection, in my address today, I would like to give you an idea of how the United Nations has used this power to convene, particularly in developing IHL instruments and IHL-related instruments.

[Additional Protocols]

I would first like to discuss the General Assembly's role in the development of the two Additional Protocols to the Geneva Conventions which were adopted in 1977.

The Additional Protocols were adopted at a Diplomatic Conference convened by the Swiss Federal Council and the drafts of those Protocols were prepared by the ICRC in consultation with States and other entities. In this regard, there is no doubt that the Switzerland and the ICRC played a leading role in the process leading to the adoption of the two Additional Protocols.

While the United Nations did not convene the Diplomatic Conference, the United Nations provided a forum for Member States to discuss new rules that would supplement the Geneva Conventions and made an indispensable contribution to the development of the two Additional Protocols.

The General Assembly served as such a forum, and the Assembly's contribution is clearly indicated in the Final Act of the Diplomatic Conference which states that "[t]he United Nations General Assembly supported the efforts of the Diplomatic Conference by adopting successive resolutions relating to human rights in periods of armed conflict", and lists 23 resolutions of the General Assembly.

By these resolutions, the General Assembly, even before the adoption of the two Additional Protocols, declared certain basic principles for the protection of civilian populations in armed conflicts. For example, the General Assembly adopted resolution 2675 on 9 December 1970 – well before the adoption of the two Additional Protocols in 1977 – which contained the “Basic principles for the protection of civilian populations in armed conflicts”. It set out such basic principles as the distinction between persons actively taking part in the hostilities and civilian populations; the prohibition on making civilian populations the object of military operations; and precautions to avoid injury, loss or damage to civilian populations.

Through these resolutions, the General Assembly also indicated the areas which require special attention in the development and reaffirmation of new rules of IHL, such as:

- The protection of the civilian population during armed conflicts;
- Legal restraints and restrictions on certain methods of warfare and weapons;
- Arrangements for humanitarian relief;
- The protection of persons struggling against colonial and alien domination, foreign occupation and racist régimes;
- The status, protection and humane treatment of combatants in international and non-international armed conflicts and the question of guerrilla warfare;
- The protection of journalists engaged in dangerous missions in areas of armed conflict; and
- The use of napalm and other incendiary weapons, as well as other specific conventional weapons which may be deemed to cause unnecessary suffering or to have indiscriminate effects.

To support the deliberations of the General Assembly, the Secretary-General, upon request by the Assembly,

prepared a number of reports dealing with the issues which I have just mentioned.

Furthermore, the General Assembly, through its resolutions, also urged all participants in the Diplomatic Conference to do their utmost to reach agreement on additional rules that would supplement the Geneva Conventions.

[Weapons-related treaties]

While the General Assembly's role in the process of drawing up the two Additional Protocols of 1977 was a supplementary one, the General Assembly played a leading role in completing unfinished work of the aforementioned Diplomatic Conference.

One such area was the regulation of the use of certain conventional weapons.

In one of its resolutions, the Diplomatic Conference "recommend[ed] that a Conference of Governments should be convened...with a view to reaching...agreements on prohibitions or restrictions on the use of specific conventional weapons including those which may be deemed to be excessively injurious or have indiscriminate effects", and "[i]nvite[d] the General Assembly of the United Nations...to take any further action that may be necessary for the holding of the Conference".

In other words, the Diplomatic Conference entrusted this portion of the treaty negotiations to the General Assembly.

Shortly after, the General Assembly, by its resolution 32/152 of 19 December 1977, took note of the resolution adopted by the Diplomatic Conference and "[d]ecide[d] to convene...a United Nations conference with a view to reaching agreements on prohibitions or restrictions of the use of specific conventional weapons".

After two sessions of the Preparatory Conference and two sessions of the United Nations Conference on the matter, the Conference adopted the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects as well as three Protocols in October 1980. These three Protocols deal with non-detectable fragments; incendiary weapons; and mines, booby-traps and other devices.

This was a prime example where the General Assembly provided a forum where Member States could consider how to take the unfinished work of the Diplomatic Conference forward, and took a concrete decision to convene a conference to negotiate and conclude IHL treaties.

Subsequently, the General Assembly further used its power to convene conferences to negotiate several weapons-related treaties. The General Assembly convened two United Nations Conferences on the Arms Trade Treaty which were held in 2012 and 2013. While these Conferences were unable to adopt an arms trade treaty, the General Assembly subsequently adopted the text which was drafted at those Conferences in April 2013.

More recently, in 2016, the General Assembly decided to convene a United Nations conference to negotiate a legally binding instrument to prohibit nuclear weapons. The Conference was held in March, June and July 2017 and adopted the Treaty on the Prohibition of Nuclear Weapons in July 2017.

[International Criminal Court]

Apart from the weapons-related treaties, the United Nations was instrumental in the development of multilateral treaties to criminalize certain serious crimes, particularly in the 1990s.

The Rome Statute of the International Criminal Court is a clear example in this regard. In the initial phase, the International Law Commission, or ILC, played a leading role in elaborating a draft of the statute of an international criminal court. Based on a mandate given by the General Assembly, the ILC prepared a draft statute for an international criminal court and submitted it to the General Assembly in 1994, with a recommendation that the Assembly convene an international conference to study the draft statute and to conclude a convention on the establishment of an international criminal court.

Following this recommendation, the General Assembly, upon recommendation by the Sixth Committee, established an Ad Hoc Committee in 1994 and then a Preparatory Committee on the Establishment of an International Criminal Court in 1995 to further discuss the major substantive and administrative issues arising out of the draft statute prepared by the ILC.

The General Assembly eventually decided to convene a Diplomatic Conference on the Establishment of an International Criminal Court in 1997, and the conference, which was held in July and August 1998, negotiated a statute based on the text recommended by the Preparatory Committee. The conference then adopted the Rome Statute of the International Criminal Court in August 1998.

Here too, the General Assembly was the centre for harmonizing the actions of Member States in order to take forward the efforts to establish an international criminal court:

- By giving a mandate to the ILC;
- By establishing an Ad Hoc Committee and a Preparatory Committee; and
- By convening a Diplomatic Conference.

[Safety Convention]

During the 1990s, the General Assembly also played a leading role in the process for elaborating a multilateral treaty with a view to enhancing the protection for United Nations peacekeepers. This was in reaction to the sharp rise in the number of peacekeeping operations and the number of casualties suffered by them in the 1990s in the course of their missions.

It was against this background that the Convention on the Safety of United Nations and Associated Personnel, which is often referred to as "the Safety Convention", was adopted in 1994.

The Safety Convention, among other things, prohibits attacks against United Nations and associated personnel; requires States parties to criminalize such attacks in their national laws and to submit relevant cases to the competent authorities of the State party concerned for the purpose of prosecution; and requires States parties to take all appropriate measures to ensure the safety and security of such personnel.

Even before the formal process to negotiate a treaty on the protection of United Nations and associated personnel began, the subject was raised in several United Nations organs, including the General Assembly, the Security Council and the Special Committee on Peacekeeping Operations in 1992 and 1993.

The Sixth Committee played a crucial role in launching the formal process. In October 1993, the Sixth Committee established a Working Group on the Question of Responsibility for Attacks on United Nations and Associated Personnel. Based on the outcome of the Working Group, the Sixth Committee recommended the General Assembly to establish an Ad Hoc Committee to elaborate an international convention dealing with the safety and security of United Nations and associated personnel in December 1993, which was subsequently approved by the General Assembly.

The text drawn up by the Ad Hoc Committee was referred to the Sixth Committee's Working Group, which, in turn, recommended its text to the Sixth Committee. The Sixth Committee recommended the General Assembly that it adopt the draft Convention, and the General Assembly eventually adopted it in December 1994.

In this instance, the Sixth Committee played a crucial role in providing a platform for Member States to discuss the subject and negotiate the text of the Convention, and the General Assembly also played a key role in harmonizing the actions of Member States by establishing an Ad Hoc Committee and ultimately adopting the Safety Convention.

The same modalities were later used with respect to the Optional Protocol to the Safety Convention which was adopted in 2005, and which extended the protection of the Convention to United Nations operations involved in the delivery of humanitarian, political or development assistance in peacebuilding as well as the delivery of emergency humanitarian assistance.

The Optional Protocol was negotiated through the Working Group established by the Sixth Committee and the Ad Hoc Committee established by the General Assembly, and was ultimately adopted by the General Assembly.

While the Safety Convention is usually not considered as being part of IHL, I have referred to this example as the scope of protection of the Safety Convention and the scope of protection of IHL could potentially overlap, which is an issue that has prompted some debate.

[ILC's role]

I would also like to briefly refer to the role of the International Law Commission in matters related to IHL. As I have mentioned earlier, the ILC was instrumental in the development of the Rome Statute of the International Criminal Court.

However, it has also been involved in other matters related to IHL. For example, the topic “Protection of the environment in relation to armed conflicts” is currently on the programme of work of the ILC. The Commission provisionally adopted the entire set of draft principles on protection of the environment in relation to armed conflicts on first reading in July 2019, and adopted the commentaries to those draft principles in August 2019.

These draft principles have been transmitted to Governments and other relevant entities for comments and observations, which should be submitted by 1 December 2020.

The current draft principles deal with issues such as the protection of the natural environment in the conduct of hostilities; protected zones for areas of major environmental and cultural importance; and the general obligations of an occupying power to protect the environment of the occupied territory.

The International Law Commission has also dealt with other topics that are closely related to armed conflict and IHL.

For example, the Commission adopted the draft articles on the effects of armed conflicts on treaties in 2011. While the draft articles were not intended to set out rules that specifically regulate the conduct of the parties during armed conflicts, they address the question of treaty relations between States in the event of an outbreak of armed conflicts, and specifically mention treaties that would continue in operation during armed conflict, including treaties for the international protection of human rights and treaties on international criminal justice, and, obviously, treaties on international humanitarian law.

More recently, the Commission adopted the draft articles on prevention and punishment of crimes against humanity in 2019. These draft articles were drawn up since, unlike genocide and war crimes, there is no global treaty

dedicated to preventing and punishing crimes against humanity, even though crimes against humanity are no less prevalent than genocide or war crimes.

The Commission recommended the elaboration of a convention by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles, and the General Assembly decided to continue examining that recommendation at its seventy-fifth session.

[Cyber security]

This brings me to my last point which I would like to highlight, which is the United Nations' role in facilitating discussions amongst States on how international law applies to the use of informational and communications technologies, or ICTs, by States.

This topic has particularly generated concerns and debate in recent years as more States develop ICT capabilities for military purposes which, if used, could have serious consequences on civilian infrastructure, including health infrastructure.

Most recently, the General Assembly, in 2018, established an open-ended working group and a group of governmental experts to study how international law applies to the use of ICTs by States. This is another example where the United Nations plays a unique role in providing a forum where Member States can get together and discuss matters of common concern.

There is no doubt that the question of how IHL applies to the use of ICTs is an important component of the discussions in these two processes, and I encourage Member States to actively participate in these discussions.

[Concluding remarks]

In concluding, I would emphasize once more that the United Nations provides a unique forum where Member States can get together and discuss a diverse range of issues. In my statement today, I have tried to illustrate this by giving concrete examples where the United Nations has provided forums to discuss IHL issues, including to develop new IHL instruments.

While we often take this unique aspect of the United Nations for granted, I would encourage delegates to think about what it means “[t]o be a center for harmonizing the actions of nations in the attainment of” the Purposes of the United Nations, as provided for in Article 1, paragraph 4, of the Charter, and how that can make a useful contribution in the field of IHL.

Thank you.