Keynote Address: The Recent Evolution of the International Law of Armed Conflict: Confusions, Constraints, and Challenges

Dr. Yoram Dinstein[*]

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I. INTRODUCTION

1. The distinct honor conferred on me touches my heart, but I promise you that it will not go to my head. I realize that basically I am honored because I have reached an advanced age. Nevertheless, perhaps that age enables me to fully appreciate the trajectory of legal progress made in the past few decades. I was asked by the organizers of this conference to look back to my formative years and share with you insights as regards international law and the law of armed conflict (LOAC). Doing so, what comes first to mind is the unprecedented, immense growth of international law. The universe of international law appears to be very much like the physical universe: it is constantly expanding. There are at present many domains of international law that were entirely unknown when I graduated from law school, got my

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* Dr. Yoram Dinstein is a Member of the Institute of International Law, Professor Emeritus at Tel Aviv University (Israel), and (since 2010) President of the United Nations Association of Israel. In the past, he served as President, Rector and Dean of the Faculty of Law of Tel Aviv University. Professor Dinstein was twice a Stockton Professor of International Law at U.S. Naval War College (2002/2003, 1999/2000). He was also a Humboldt Fellow at the Max Planck Institute for International Law at Heidelberg (Germany), 2000/2001. His latest book is WAR, AGGRESSION AND SELF-DEFENCE (6th ed. 2017). This keynote address was delivered at the 2nd Israel Defense Forces International Conference on the Law of Armed Conflict, in April 2017, and has been lightly edited for publication.

LL.M. degree, and wrote my doctoral thesis: nobody in those distant days heard of *jus cogens* or *erga omnes* norms; nobody was gazing up into outer space or staring down into the deep seabed; a permanent international criminal court did not loom on the horizon; and international environmental law was unexplored ground.

2. A more profound change relates not to the quantitative growth of international law but to its qualitative standing. When I started my academic career as a teacher, international law seemed to my students to be far removed from what they encountered in their studies in other legal courses and what they were likely to pursue as practitioners subsequent to graduation. The common cynical comment at the time was that international law is what the virtuous do not need and the wicked do not obey. The main hurdle was to convince students that international law merited being recognized as true law. This is no longer an issue today. International law has been elevated from a Wagnerian Netherworld to the spotlight of the center-stage. Hardly a day goes by when international law is not in the news, usually on the front pages of the world press. More to the point, perhaps, there is a considerable number of lawyers in many countries—including, to their own surprise, a few of my former students—who actually earn a living thanks to international law.

3. As for LOAC, only half a century ago—to return to the metaphor of international law as a universe—it could be described (in the "Star Wars" lingo) as "a galaxy far, far away." I often feel nostalgia for that long-gone era when LOAC was left alone by non-specialists. At that remote time, in the civil society, only the International Committee of the Red Cross (ICRC) was focusing on this subject (and it was carrying out its mission with panache and professionalism). At present, almost every "do-good" NGO in the world wants "a piece of the action" (whether or not it passes muster in terms of proper professional expertise). The overall setting is like that of a chess game, which attracts a host of *kibitzers*. *Kibitzers* (a Yiddish term that has entered the Webster Dictionary) are spectators who pester the actual players with unsolicited advice and unwarranted critique. The reason for the large number of *kibbitzers* who feel impelled to offer running commentaries on LOAC operations is the desire to impress the galleries of public onlookers. The public, once not particularly *engagé* in the legal intricacies of armed conflict, has a craving now for a steady diet of spicy LOAC tidbits of information. Unfortunately, the public cannot always tell the difference between what is said by the *kibitzers* and what is done by the actual players. Populist absorption of LOAC norms and terminology can be superficial and even misleading. This can become embarrassing, as witnessed over and over again on TV news programs or talk shows, when the name of the Geneva Conventions is taken in vain: they are frequently confused with other instruments and cited even when they are utterly irrelevant to the subject at hand.

4. LOAC is divided into two parts, pertaining to international and non-international armed conflicts (IACs and NIACs). IACs law started to evolve in the mid-nineteenth century, whereas NIACs law made its first steps only in the mid-twentieth century. Currently, most armed conflicts in the world are NIACs. Colombia has just emerged from a prolonged internal armed conflict. But large-scale NIACs are currently raging in Syria, Iraq, Yemen, Afghanistan, Ukraine, the Philippines, as well as in many countries in Africa; and the blood-letting is enormous. Although by now there is a great deal of convergence of the two branches of LOAC, there has been no change at all in three cardinal points of divergence:

(a) The Charter of the United Nations proscribes the use of force in the relations between states: this is nowadays the most important brick in the edifice of international law. Contrarily, neither the Charter nor any other global treaty prohibits the use of force within a state. An insurgency runs counter to the domestic law of the state concerned, but international law maintains silence on the outbreak of internal strife.

(b) LOAC confers on combatants in IACs who get captured by the enemy a privileged status of prisoners of war, which safeguards their life and health although it subjects them to incarceration until the cessation of active hostilities. Prisoners of war are not to be put on trial for waging war unless they have acted in serious breach of LOAC. Insurgent fighters in NIACs do not benefit from a parallel privilege. They can be prosecuted in regular domestic courts—on the ground of taking up arms against the government—and punished as ordinary felons, despite the fact that their conduct fully corresponded with the strictures of LOAC.

(c) The law of belligerent occupation, which is quite extensive in scope, is applicable exclusively in IACs. Simply stated, there is no belligerent occupation in a NIAC. When, for example, a Syrian city falls into the hands of insurgents or is retaken by the incumbent government, it cannot be regarded as occupied territory in the sense of LOAC in either case.

5. What I have just said should be sufficient to denote that LOAC is multifaceted. Many of you deal with issues relating to the classical C^3: command, control, and communications. When I take stock of LOAC, I find it necessary to grapple with a different C^3: confusions, constraints, and challenges. I would like to share with you five of each category.

II. CONFUSIONS

1. One regrettable confusion is derived from a trend to examine LOAC through the lens of ethics rather than law. Numerous

departments in universities—and even in military war colleges—address LOAC as a theme of ethics. By itself, there is nothing wrong in that. But ethicists do not always grasp that LOAC is much more than a body of moral tenets: it is above all a juridical system. As such, it is binding on Belligerent Parties, irrespective of their predilections. For instance, the IDF has a well-known Ethical Code, which I applaud. However, what is this Code? It is a unilateral statement of policy adopted by the IDF General Staff, and—should the IDF General Staff desire to do so—it has the discretion to amend the Code at any time in an equally unilateral manner. By contrast, LOAC—as a multilateral legal system—is not subject to unilateral modification by any country acting alone. LOAC treaties, once adhered to, are binding on Contracting Parties. Customary LOAC is the product of the international community as a whole, and only general state practice can alter it. That is why I find myself less preoccupied with the text of the Ethical Code and more interested in the Israeli tangible contribution to state practice. I would strongly recommend to the Military Advocate General to launch work on an Israeli national manual that would present LOAC as construed and applied by the IDF. In my considered opinion, such a manual (like other national manuals that now proliferate throughout the globe) would far outweigh the Ethical Code.

2. The confusion about ethics and law blends with a frequent mix-up between the causes of war and the waging of warfare. Ethicists, political scientists, and other observers tend to analyze hostilities on the basis of the litmus test of "just war." A not-uncommon inference is that those belonging to the wrong side in a "just war" cannot benefit from the protective umbrella of LOAC. This is a spurious misconception running counter to a rudimentary postulate of LOAC whereby it applies equally to all Belligerent Parties. The point may be looked at as of purely academic interest. It is anything but. Thus, we have recently had in Israel the famous *Azaria* case, relating to the shooting to death of a wounded terrorist. Large segments of the Israeli public took the position that a wounded terrorist—albeit neutralized and disarmed—is literally an outlaw (i.e., out of the law) who can be summarily executed. There were vigorous pressures to treat the culprit shooter leniently, with some laymen putting him on a pedestal as a hero. I would like to commend both the Military Advocate General who decided to press penal charges and the Military Judges who convicted the accused and sentenced him to jail. The fundamental norms of LOAC are epitomized *inter alia* by the protection given to those who are *hors de combat*. We must abide by these norms at all times, even when we are in the midst of fighting "the children of darkness." The justice of war simply cannot justify unjustifiable action under LOAC.

3. Another pernicious confusion is spawned by the dual existence in armed conflict of human rights law and LOAC. Naturally, there is some synergy and even a degree of overlap between the two branches

of law. The prohibition of torture, which is reiterated in both bodies of law, is a leading example of such overlap. But human rights law and LOAC do collide head-on in certain critical areas. The archetypical case in point relates to recourse to force. Put in a nutshell, the pivotal question is whether lethal force can be used as a first resort or only as a last resort. In ordinary law enforcement (police) action in peacetime, lethal force can be employed against law-breakers only as a last resort. Conversely, in the course of hostilities forming part of an armed conflict, lethal force can be used against enemy combatants as a first resort on a 24/7 basis. When human rights law and LOAC clash—as they do in this respect—LOAC must prevail over human rights law because—as recognized by the International Court of Justice and other tribunals—it is the *lex specialis*. The trouble is that zealous advocates of human rights law are not willing to yield the moral high ground. They behave like the high priests of a Holy Gospel who regard any deviation from their received dogma as apostasy. They fail to appreciate the special nature of armed conflict and therefore contest the overriding force of LOAC. They ignore the fact that LOAC—which is directly responsive to the unique features of warfare—is a product of a pragmatic compromise between military necessity and humanitarian considerations. They think that, by rejecting military necessity, they will lead us to utopia. But what they are liable to bring about is dystopia. If international law were to ignore military necessity, military necessity would ignore international law. Belligerent Parties would simply shed off any inhibitions in the conduct of hostilities.

4. A further confusion is between LOAC and international criminal law. It has to be perceived that the substantive relevant law is LOAC. International criminal law provides only a means to an end: a tool designed to ensure compliance with LOAC. By its nature, the tool is selective. As the 1998 Rome Statute of the International Criminal Court makes clear, not all breaches of LOAC constitute war crimes. Only assorted—serious—violations of LOAC do (these are enumerated in detail in Article 8 of the Statute). But conventional wisdom has it that, once defined as a war crime, every infraction without fail must lead to trial by either an international court, a domestic court, or a hybrid court (depending on jurisdictional prerequisites). I do not question the need to convict and punish war criminals where grave breaches of LOAC (to use the Geneva Conventions' coinage) are concerned. But I have some reservations about trial by civilian judges in cases that are not open-and-shut. Specifically, I am not sure that such a trial is the most functional filter for evaluating whether collateral damage to civilians ought to have been deemed excessive in targeting a lawful target. The calculus of proportionality in collateral damage is predicated not on hindsight (an

actual civilian body count) but on foresight (the expectation of incidental civilian losses—compared to the anticipated military advantage from the attack—in light of the intelligence gathered and available at the time of action). Decisions may have to be taken in split seconds under tremendous pressure, and reconstruction of the decision-making process after a considerable lapse of time may be exceedingly tenuous. There must be a wide margin of appreciation allowed to the actor, and I doubt whether the best judgment call in such instances is made by civilian judges. Granted, legal oversight of military operations is of vital importance; but I submit that, at least in some circumstances, rigorous "peer review" within the military system (inquiring into what a reasonable commander would do under the similar contingencies) may be more fruitful than second-guessing by civilian judges who may lack any military experience.

5. Yet another confusion relates to the status of organized armed groups in LOAC. There are two separate aspects of this status. One is indisputable: an organized armed group constitutes a party to the conflict in a NIAC when it leads an insurgency against the incumbent government. As a party to the conflict, an organized armed group bears obligations and is vested with rights prescribed by LOAC. Nevertheless, an organized armed group cannot be equated to a state. Hence, notwithstanding its status as a game player, an organized armed group cannot contribute to the formulation of the rules of the game. An organized armed group cannot be a Contracting Party to LOAC treaties, and it does not play a part in the consolidation of customary LOAC. The last point is where the confusion arises. Some scholars and NGOs claim that the practice of organized armed groups qualifies as an engine of customary international law. I cannot accept this contention. It would bring about a seismic change in the present architecture of international law, yet no legal sensors detect vibrations indicating even the slightest tremor confirming it. Today, as in the past, states insist on having a monopoly in the creation of international law and are utterly unwilling to enable insurgent armed groups to become partners in the process of international law-making. It is the conduct of states—and of states alone—that continues to forge and govern LOAC.

III. CONSTRAINTS

1. A well-known mantra, common in many circles, is that the foremost problem of LOAC is not the need for additional legal norms but the inadequate implementation of existing rules. Admittedly, law is not just liturgy: it is not enough to enact and reiterate legal norms; to be meaningful, these norms ought to be respected in reality. It is also undeniable that the implementation of LOAC leaves a lot to be desired (although—all too often—we tend to see the half-empty glass and

ignore the half-full one). A number of attempts to ameliorate the situation have been made, but it is like using a treadmill: you are walking or even running but you are not advancing. The framers of Hague Convention IV of 1907 thought that liability to pay financial compensation for breaches of LOAC would resolve the problem; it has not. Based on a rather vague wording of the 1949 Geneva Conventions, the ICRC has assumed a right of initiative that comprises persuasion, mobilization (of third parties), and denunciation when confronted with deliberate violations. Still, even the ICRC does not maintain that its interventions have had spectacular results in terms of actual state conduct. The drafters of Additional Protocol I of 1977 envisaged an International Fact-Finding Commission, which has been set up and is meeting regularly. The IFFC could have been an ideal instrument in ensuring implementation of LOAC obligations, but it has a drawback: it has never been activated in practice. International criminal law is operative, but (as pointed out) it has its limitations and so far it has not brought LOAC to the "promised land." New proposals designed to enhance implementation have recently been put on the international agenda. Yet, judging by previous experience, allow me to express skepticism as to whether any new mechanisms (even if agreed upon) will guarantee improvement in real-life performance. The quest for better implementation of LOAC—like the quest for the Holy Grail—may go on for quite a while.

2. In any event, it is a gross mistake to presuppose that better implementation is the sole obstacle that LOAC has to contend with. Every major war serves as a crucible in which LOAC is put to the test of reality. Hostilities expose weaknesses in the pre-war legal system, and it is perennially necessary to adapt the law to new developments. Moreover, as formed over the years, LOAC stitches together diverse layers of the legal fabric in a patchwork manner. LOAC started with the law of the sea, moved to wounded and sick, then prisoners of war, occupied territories, etc. In the post-WWII period, the Geneva Conventions of 1949 focused on *hors de combat* and the protection of civilians. In 1954, under the aegis of UNESCO, it was the turn of cultural property. AP/I of 1977 stressed targeting and methods of warfare. AP/II regulated NIACs. A string of treaties was devoted to sundry types of weapons. Patchwork, almost ineluctably, means gaps and lacunas. What is patently necessary today is a systematic review of LOAC in its entirety, but—sad to say—that is not in the cards any time soon. In the course of the twentieth century, the Geneva Conventions were reviewed on no less than four separate occasions: 1906, 1929, 1949, and 1977. By contrast, exactly forty years after the last occasion (the formulation of AP/I and AP/II in 1977) and seventeen years into the twenty-first century, states are shying away from any proposal to reexamine existing LOAC in a holistic fashion. Whenever

initiatives (however tentative) are taken along these lines—for instance, in the so-called Alabama Process started by the Swiss in 2003—they are strenuously resisted. Governments are unwilling to take the risk of opening a new Pandora's Box of legal toil and trouble after prolonged fights over AP/I, which have brought about a "Great Schism" between Contracting and non-Contracting Parties to the instrument (the latter led by the United States and including Israel as well as India and Pakistan). The "Great Schism" has a price of faulty interoperability, particularly in combined operations where the armed forces of even close allies (like the United States and the United Kingdom) are bound by diverse treaty regimes and march to the beating of different legal drums. Still, the battle needs have so far proved unable to overcome the weight of "battle fatigue" attached to the preparation of new treaties. Instead of new treaties, what we have is several informal restatements of the law: principally, the 1994 San Remo Manual on sea warfare and the 2010 HPCR Manual on air and missile warfare. There is also the Talinn Manual on cyber warfare. Soon there will be the Oslo Manual on select problems of LOAC. Yet, informal restatements—irrefutably useful as they are—cannot fully replace treaties, inasmuch as only treaties can be legally binding. The moral is that inactions by states—like actions—have their consequences.

3. Almost all the countries represented here are facing at this juncture enemies—chiefly the so-called Islamic State—consisting of irregular fighters who commit systematic atrocities with total disdain for civilian lives. These fighters are not merely oblivious to civilian casualties: they do their utmost to increase such casualties. The depredations amount to flagrant violations of the principle of distinction between combatants and non-combatants, which is the foundation of LOAC in the literal sense that—if you undermine the foundation—the whole structure might crumble. LOAC is not contingent on reciprocity. When we comply with LOAC, this is not about them (our enemies) but about us. Nevertheless, when systematic atrocities committed by the enemy are not the exception but the rule, it becomes difficult to restrain our own forces from retaliating. Turning the other cheek is not a viable option: it is a theological concept, appropriate for a Sermon on the Mount rather than for a battlefield. Trying to turn the other cheek in the practice of states at war is likely to prove a triumph of hope over experience. It should be remembered that LOAC itself permits belligerent reprisals in appropriate instances (as was confirmed by the ICTY in the *Martić* case of 2007–2008), although the extent of lawful reprisals depends on whether the acting state is or is not a Contracting Party to AP/I.

4. Sporadic atrocities are liable to be committed by our own forces, too. Stories of such atrocities tend to draw our enemies together and to drive us apart. When public opinion is outraged by atrocities committed by our own troops, this can subvert the overall war effort.

As the Vietnam War amply demonstrates, we live in an era in which—regardless of military victories in the field—a war may be lost merely because public opinion swings against it. Public opinion is largely dependent on media coverage, so that ultimate mission accomplishment is often contingent on positive handling by the media. Three significant factors must be taken into account in this context:

(a) While it is quite complicated—perhaps even impossible—to tell what exactly is happening on the "other side of the hill" (where cameras are present only when they serve the interests of our enemies), it is easy for the media to keep a close watch on what our troops are doing.

(b) Either subliminally or overtly, there are higher media expectations from our troops. The same journalists who are likely to turn a blind eye to systematic atrocities perpetrated by our adversaries will start a hue and cry when encountering even an isolated serious breach of LOAC committed by our own forces.

(c) Whereas a lot is being done by all modern armed forces to train soldiers, sailors, and aviators—especially officers of all ranks—in the intricacies LOAC, not enough is being done to instruct journalists as to what is permissible and impermissible in military engagements. Media reports are therefore frequently predicated on false assumptions as to the "do"s and "don't"s of warfare.

5. Frequently, there are passionate debates as to whether what we are doing in war is in full harmony with LOAC. As a rule, when the law is equivocal or controversial, the legal literature can become a useful tool in identifying and interpreting normative obligations. I myself regularly contribute to that literature, and I am not inclined to trivialize its potential import as a roadmap for practitioners. All the same, it is necessary to acknowledge the existence of a cottage industry of law review articles trying to recast LOAC, reconciling it with conditions of some fantasy land in which war can be conducted without putting any civilian in harm's way. These writings are produced not only by preachers of human rights ascendancy but also by LOAC theorists who are constantly citing each other without much concern for battleground realities (of which they seem to know very little). For persons familiar with general state practice, this is a matter of bemusement or perhaps even amusement. It is accordingly advisable to keep in mind that LOAC—just like other branches of international law—is created solely by states, in treaties or in custom. The legal chatter of armchair quarterbacks is no different from static in a telecommunications system. It must be separated from the genuine sound of law.

IV. CHALLENGES

1. An obvious challenge to LOAC is posed by the inexorable advance of battle-related state-of-the-art technology. Yet, the consequences of high-tech developments are sometimes overrated and at other times underrated. They can be overrated because a technological change does not necessarily require a reform of preexisting LOAC principles. By way of illustration, take drones. Legions of civilian commentators are obsessed with drones. However, in the final analysis, drones are aerial platforms: they are remotely piloted but not different in essence from other aerial platforms. The challenge posed by drones to LOAC is consequently overrated: LOAC is perfectly capable of, so to speak, bringing drones under its wings. On the other hand, with some futuristic technologies, my advice is not to underrate their ultimate impact on LOAC and not to theorize in advance of the facts. I am saying that in light of a spate of scholarly conferences being convened, where conjectures are made as to what legal rules will apply to fully autonomous weapons using artificial intelligence (AI), namely weapon systems exercising reasoning powers without the intervention of any "man in the loop" or "man on the loop." These weapons are not likely to be introduced into combat for a decade or two; they raise awesome conundrums about accountability (especially criminal responsibility) in case they malfunction or go rogue; and, to my mind, answers should lie in wait until we have a much better picture of what the technology will actually look like.

2. What is plainly underrated today is the challenge to LOAC presented not by high-tech means of warfare but by low-tech methods of warfare. Those who constantly lift their eyes to the sky (drones) and crystal-ball the future (fully autonomous AI weapons systems) seem to be prone to losing their footing when it comes to here-and-now mundane stumbling blocks relating to military operations on the ground. The paradigmatic methods of warfare that I have in mind are the use of suicide bombers and the willful screening of combatants by involuntary human shields. Take the use of suicide bombers who deliberately cause carnage among civilians (like the massive attack of 9/11 or smaller-scale but still horrendous attacks characteristic of the various armed conflicts in Middle East). How can we deter the perpetrators of such crimes? Evidently, you cannot punish the dead and a successful suicide bomber is beyond the reach of the law. Still, the question that must be faced is: Are there any counter-measures, likely to deter a future suicide bomber from his or her mission, that can be taken in conformity with LOAC? Israel believes that demolition of the family house of the suicide bomber is an effective deterrent counter-measure. Whether it is or is not, demolition of a house as an administrative sanction is—in my opinion (and, of course, not only in mine)—incompatible with LOAC. I prefer the sealing off (or locking up) of the family house without demolishing it: this is less drastic, equally

deterrent, and not as such necessarily a breach of LOAC. Some creative thinking may lay the ground for taking additional, hopefully even more effective counter-measures that are not illicit. To my way of thinking, such thinking is indispensable: we cannot afford to sit idly by, watching terrorist infringements erode LOAC to a vanishing point.

3. That brings me to the broader challenge to LOAC presented by civilians directly participating in hostilities. The failure of an ICRC endeavor to engender a consensus on the range and repercussions of this omnipresent phenomenon has left much of the relevant law shrouded in doubt. Suffice it to mention the controversial ICRC-advocated requirement of continuous combat function against three different backgrounds:

(a) The incidence of the so-called revolving door of "farmers-by-day, fighters-by-night" and their susceptibility to attack at a time slot in between engagements in hostilities. The ICRC looks at every fraction of DPIH activity separately. I (and others like me) highlight the continuum.

(b) The DPIH standing of members of organized armed groups who serve as cooks, drivers, administrative assistants, legal advisers, etc. In my opinion, it is wrong to discriminate between legal advisers in the government armed forces (like many present here)—who are categorized as combatants and are susceptible to attack—and those who are members of organized armed groups and are consequently exempt from attack according to the ICRC. For sure, organized armed groups are not inclined to issue membership cards. But for that very reason, the expectation that in the thick of battle a distinction can be made between actual fighters and accompanying support staff is illusionary.

(c) The DPIH status of those who orchestrate behind the scenes the combat activities of others through military planning, training, and recruiting of personnel. Those who fire arms are often pawns manipulated by others who are literally calling the shots while purportedly belonging to a political rather than military wing of the organized armed group. The problematics of these and other outstanding DPIH issues is fraught with battlefield dilemmas that refuse to go away.

4. Adapting LOAC to new modes of fighting like DPIH is crucial: if not by treaty (and I have drawn attention to the general reluctance of states to engage in new LOAC treaty making), then through customary law. But is customary law capable of developing swiftly enough when the exigencies of the situation demand it? Some scholars argue that a quick fix and custom are a contradiction in terms. I disagree. Customary international law has displayed an astounding capability of rapid growth in the dawn of the new legal regime of the continental shelf. In the field of LOAC itself, the exponential upsurge

of NIAC customary law—within the span of a single generation—furnishes reassuring proof for the potential velocity of general state practice. That said, an acceleration in the rate of growth of customary LOAC does not happen by itself. It is fully contingent on a general perception of an imperative need for the emergence of new law. Such a perception must emanate from a prevailing zeitgeist. The rub is to shape this zeitgeist.

5. Here is where you come into the picture, ladies and gentlemen. I think that you—the legal personnel of the armed forces and Ministries of Defense—are ideally positioned to influence the hearts and minds of your military and civilian masters; to prompt them to face the challenges of LOAC, despite all the confusions and the constraints. It is the kind of mission for which no medals are struck, the kind of campaign at the conclusion of which no triumphs are celebrated, yet the mission and the campaign are invaluable in their importance. I hope that, by working together, you will create and maintain a C^2: a consortium of the concerned. May such a consortium develop through conferences like the present one and go from strength to strength.