



## How international humanitarian law develops: Towards an ever-greater humanization? An interview with Theodor Meron

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## Introduction

*In your 2000 article for the American Journal of International Law [AJIL] and your Hague Academy general course, you examined the humanization of international law in depth. What major institutional and normative developments have happened since then which you believe have influenced humanization of the law?*

*In the AJIL article, you discussed the importance of humanization as an all-of-society project – that is, not merely a task for lawyers, but one which must also be participated in by, for example, the media. How have non-legal actors participated in the project of humanization, and what effect do you believe their contributions have had?*

*And while we are on the topic of institutions, the International Committee of the Red Cross [ICRC] occupies a somewhat unique position as concerns international humanitarian law [IHL]. How do you believe the ICRC has contributed to the process of humanization since 2000?*

I appreciate the opportunity to comment on the process of humanization of IHL and the role played by my 2000 AJIL article on “The Humanization of Humanitarian Law” and the 2006 general course edition at the Hague Academy on “The Humanization of International Law”.

Of course, these writings were just signposts in the process, in a continuum, in a work in progress which started earlier and, thankfully, is continuing. It is a process driven by human rights and the principles of humanity, the latter being the very heart of IHL.

In these writings and others,<sup>1</sup> I spoke of the changing character of the law of war and its acquiring of a more humane face, its evolution from an inter-State to an individual rights perspective, the decline of the principle of reciprocity and reprisals, the departure from *si omnes* [“or if other parties are not bound”] clauses, the redefinition of protected persons, the reinterpretation of Geneva Convention III [GC III] regarding repatriation of prisoners of war [PoWs] and their autonomy, the critical role of Geneva Convention IV [GC IV], the concepts of individual rights and their inalienability, crimes against humanity (which, in contrast to Nuremberg, no longer require a nexus with an armed conflict), common Article 3 and crimes against humanity’s reflection of fundamental human rights, the criminalization of violations of common Article 3, the humanizing influence of the Martens Clause (and its invocation of laws of humanity and public conscience as a standard for rules of behaviour, instead of leaving them to the discretion of a military commander when the law is silent), the role played by international criminal tribunals, and the convergence of protection under human rights and IHL.

I further noted the role of the Additional Protocols to the Geneva Conventions in the humanization of IHL. Additional Protocol I [AP I] made a major contribution to enhancing protections of civilians and civilian objects and in basically proscribing reprisals against civilians and civilian objects. AP I contains in its Article 75 an exceptionally broad list of humanitarian and human rights protections, including key norms of due process, and in Articles 76–78 it contains important protections for women and children.

Additional Protocol II [AP II] also makes important contributions to humanization in its chapter on humane treatment,<sup>2</sup> which includes, in Articles 4–6, vital protections including fundamental guarantees, protection of people in detention and penal prosecutions.

Together with the Martens Clause and its invocation of the laws of humanity and the dictates of public conscience, it is the human rights revolution and the Universal Declaration of Human Rights that explain the focus of the Geneva Conventions and their Additional Protocols on the rights of individuals and civilian populations. For instance, in contrast to the Hague Regulations and their limitations on the Occupying Power’s permissible activities, GC IV obligates Occupying Powers to assume a proactive responsibility for the welfare of the populations under their control.

While multiple factors pushed for the humanization of IHL, the critical trigger was the blurring of the distinction between international and non-international armed conflicts. The first prong of these changes occurred in 1995.

1 Theodor Meron, “The Humanization of Humanitarian Law”, *American Journal of International Law*, Vol. 94, No. 2, 2000; Theodor Meron, “International Criminalization of Internal Atrocities”, *American Journal of International Law*, Vol. 89, No. 3, 1995; Theodor Meron, “International Law in the Age of Human Rights: General Course on Public International Law”, Hague Academy of International Law, 2003; Theodor Meron, “The Humanization of International Law”, Hague Academy of International Law General Course, 2006.

2 Part II of the Protocol.

That year, the International Criminal Tribunal for the former Yugoslavia [ICTY] Appeals Chamber in the *Tadić* interlocutory decision on jurisdiction, under the far-seeing presidency of Antonio Cassese, found that as a matter of international customary law, most of the IHL rules governing international armed conflicts applied also to non-international armed conflicts, and that some of these rules established not only responsibility of the States concerned but also individual criminal responsibility of perpetrators of violations.<sup>3</sup>

To be transferable to non-international armed conflicts, rules of IHL had to fulfil, as per *Tadić*, the following conditions: the violation must constitute infringement of IHL; it must be customary in nature; it must be serious; and it must entail individual criminal responsibility of the person breaching the rule.<sup>4</sup>

The decision confirmed that since the 1930s, rules have emerged in customary law to regulate armed conflicts, and that most rules applicable in international armed conflicts apply to non-international armed conflicts as well. A similar proposal by Norway, rejected by the Diplomatic Conference in 1977,<sup>5</sup> was thus accepted by the international community when enunciated by a United Nations [UN] criminal tribunal.

A less visionary bench than Judge Cassese's would probably have considered the entire situation in the former Yugoslavia as an international armed conflict, enabling it to apply the totality of IHL. But that route would have deprived the Tribunal of the opportunity to affirm that serious violations of international law committed in internal wars are crimes under customary law, an affirmation that has proved to be of continued relevance since 2000.

My 1995 AJIL article on "The International Criminalization of Internal Atrocities" provided additional scholarly underpinning for these developments.<sup>6</sup>

The second prong of these developments was the publication in 2005 of the ICRC Customary Law Study.<sup>7</sup> Almost all of its 161 rules apply to both international and non-international armed conflicts. They thus validate and lend the ICRC's authority to the *Tadić* decision. I had the privilege of serving on the steering committee of this project and of being one of its rapporteurs on practice.

Despite continuing disagreement on some aspects of the ICRC Customary Law Study project, it has become a baseline for discussion of customary law aspects of IHL. The project promotes the process of humanization of IHL in various ways, and in particular by the applicability of most of its rules, including command

3 ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision (Appeals Chamber), 2 October 1995.

4 *Ibid.*, paras 94–109.

5 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable to Armed Conflicts, Geneva 1974–1977*, Summary Record of the 56th Plenary Meeting, CGGH/SR/56, 8 June 1977, para. 63.

6 T. Meron, "International Criminalization of Internal Atrocities", above note 1.

7 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1> (all internet references were accessed in October 2022). The Study is freely available online, and its sources are regularly updated in cooperation with the Lauterpacht Centre.

responsibility, to both international and non-international armed conflicts, as set out in Rule 99. The project is a unique study of State practice in humanitarian law, which is often difficult to ascertain because of security and operational confidentiality. It facilitates the identification of customary rules for governments, practitioners and tribunals, both international and national. It contributes to enhancing responsibility for violations – not only responsibility on the part of States, which has historically been a major aspect of IHL, but also the relatively new aspect of individual criminal responsibility. It has helped legitimize the transformation of a system of rules regulating the conduct of States into a system specific enough to govern criminal proceedings against individual perpetrators.

A study of such scope and universality on the restatement of IHL has never been undertaken before. Its volumes are a frequently cited and authoritative source of customary rules of IHL. The Study cites extensively the practice of international criminal tribunals, the venue of many of the principal normative developments taking place in IHL. Fortunately, this collection of IHL practice is continuing, although it is published only on the web and not in print.

Parallel developments have taken place in human rights practice and scholarship. In my 1986 book *Human Rights Law-Making in the United Nations*, I supported Thomas Buergenthal's 1981 argument that the International Covenant on Civil and Political Rights [ICCPR] applies, by virtue of its Article 2 (1), also outside the State Party's own territory whenever persons come under the jurisdiction of that State.<sup>8</sup> I expressed this view also in my 1995 AJIL article on "Extraterritoriality of Human Rights Treaties".<sup>9</sup> However, these scholarly opinions did not gain universal support, as some States still contest the extraterritorial application of the ICCPR.

In 2004, however, a crucial development occurred when the International Court of Justice [ICJ] issued its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.<sup>10</sup> That Opinion confirmed that the obligations of a State party to the ICCPR applied extraterritorially to occupied territories and that human rights obligations applied also in situations of armed conflict. These developments in human rights law combined with the movement of IHL in the direction of intra-State or mixed international/internal conflicts. These developments have, of course, drawn IHL in the direction of human rights law and human rights law in the direction of IHL. In other words, as both systems were to apply in the same territorial space, each had to move towards the other, with a creative synergy between the two.

Of course, none of these developments would have taken place without the ICRC. Obviously, its role in all armed conflicts, its presence in the field, its appeals for additional agreements on humanitarian access and other enhancements of

8 Theodor Meron, *Human Rights Law-Making in the United Nations*, Oxford University Press, Oxford, 1986, p. 106.

9 Theodor Meron, "Extraterritoriality of Human Rights Treaties", *American Journal of International Law*, Vol. 98, No. 1, 1995.

10 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, No. 131, 9 July 2004.

humanitarian protection, its statements on the classification of conflicts, and its occasional statements on obligations of parties and compliance are continuing and essential. It is thanks to the authority of the ICRC, the respect afforded to it by all the parties, and its professionalism that its views are central to the conversation on every conflict, even when they are contested. Its humanitarian mission is of course imbued by the fundamental principles of humanity which are at the very core of its work.

For most observers, more below the radar is what the ICRC is doing normatively to advance the humanization of the IHL. It performed and continues to perform a “quasi-legislative” role in drafting the Geneva Conventions, their Additional Protocols, the Customary Law Study and the Commentaries on the Conventions and Protocols. This immense and unique task could not be done without the excellent in-house legal team of the ICRC and its considerable resources.

Of course, the ICRC has benefited from support by the UN and its specialized agencies, as well as civil society – including such organizations as Human Rights Watch, Amnesty International and the International Crisis Group. Beyond NGOs’ role, intellectual, academic, religious and community leaders also have an important part to play. They promote the principle of accountability and fight against unjustified amnesties, promote the role of human rights and thus the ongoing humanization of armed conflicts, and beyond that, advocate for human rights and IHL to work in tandem.

I have already spoken about the ICRC Customary Law Study. I will now turn to brief comments about the recent ICRC Commentaries on the Geneva Conventions and their Additional Protocols.

In normative terms, and also as commentaries on the *travaux préparatoires* of the Geneva Conventions, the relatively short Pictet Commentaries from the 1950s were invaluable for governments, the military, academics and NGOs. Given the passage of time and the growth of international practice, the new Commentaries, prepared under the leadership of Jean-Marie Henckaerts, attempt to cover the practice relevant to the application and interpretation of the Conventions and the Protocols since their adoption, while preserving elements of the original commentaries when still relevant. Given the many years of application of the Conventions and the Protocols since their adoption, it is not surprising that the new Commentaries are of unprecedented length and richness. Where relevant, they discuss human rights concerns, including issues such as detention, judicial guarantees and, in particular detail, humane treatment.

The Commentaries consider the relationship between IHL and international criminal law as well as the relationship between IHL and human rights law, including conventions on international criminal law and international human rights law [IHRL].<sup>11</sup> They frequently comment on the status of IHL rules as customary international law. They bring to the interested public information on recent developments in the law, including through the practice of

11 See particularly the discussion of common Article 3 in the Commentaries.

international courts and tribunals. The references to human rights law in the new ICRC Commentary on GC III are particularly interesting:

References to human rights instruments have also been included to provide practitioners with further information on a given topic, when such instruments contain useful clarification or guidance. This may be relevant for [the] Third Convention, which deals, among other things, with conditions of detention, treatment and judicial guarantees in criminal proceedings against prisoners of war, given that human rights law and standards on these issues have developed significantly since the adoption of the Conventions. References to human rights law and standards must nevertheless be read with due regard to the particular context and to the specificities of detention in armed conflict. This Commentary focuses on interpreting the provisions of the present Convention, and not those of human rights instruments.

When both the Third Convention and human rights law regulate a particular issue, a comparison between their provisions may reveal certain differences. In such cases, it is necessary to determine whether the difference amounts to an actual conflict between the norms in question. If there is no conflict, the Commentary has attempted to interpret the different norms with a view to harmonization. An example is the notion of humane treatment under humanitarian and human rights law.

In the event of a real conflict between the respective norms, resort must be had to a principle of conflict resolution such as *lex specialis derogat legi generali*, by which a more specific legal norm takes precedence over a more general one. The clearest example of such a conflict is the fact that humanitarian law provides for the internment of enemy personnel who qualify as prisoners of war under the Third Convention based solely on that status and without court review of the lawfulness of internment. On this particular point, humanitarian law differs fundamentally from international human rights law. In armed conflict, the specific regime for prisoners of war under humanitarian law takes precedence on this point.<sup>12</sup>

The Commentaries pay particular and salutary attention to the ongoing humanization of IHL. Let me give you one example, that of a decision rendered by the International Criminal Court [ICC] Pre-Trial Chamber II, in the decision on confirmation of charges in the 2014 trial of Bosco Ntaganda. The *Ntaganda* case discusses the rather controversial question of whether members of an armed force can be prosecuted for sexual or other abuses committed against members of the same force. In other words, is the concept of war crimes applicable for intra-force abuses, which was not the law in the past? The new ICRC Commentary on Geneva Convention I [GC I],<sup>13</sup> relying on *Ntaganda*, holds that the fact that the

12 ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2020 (2020 Commentary on GC III), paras 102–104.

13 ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016 (2016 Commentary on GC I), para. 547.

trial is undertaken for acts committed by the armed force's own parties should not be a ground for denying the victims the protection of common Article 3, viewed as a minimum standard in all armed conflicts and as a reflection of elementary considerations of humanity. This is a major departure from classic humanitarian law. This position was also taken in the 2009 *Katanga* decision concerning the use of child soldiers.

## **Did the UN contribute to the process of humanization of IHL?**

The UN plays a principal role in promoting the humanization of IHL and in creating the salutary synergy between human rights and humanitarian law. Its most important contributions have been the treaties and declarations on human rights concluded under its auspices, as well as the increasing incorporation of both human rights and humanitarian law in its practice.

The relevant instruments include the Universal Declaration of Human Rights, the two Covenants on Human Rights and the Optional Protocols to those Covenants, treaties prohibiting racial and gender discrimination, the Convention against Torture, the Convention on the Rights of the Child, the Optional Protocol on the Involvement of Children in Armed Conflicts, the UN Convention on the Rights of Persons with Disabilities, the UN Convention on Disappearances, the Standard Minimum Rules for the Treatment of Prisoners, the Code of Conduct for Law Enforcement Officials, the Basic Principles and Guidelines on the Rights to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law, and the Turku Declaration of Minimum Humanitarian Standards.

Many of these treaties have established treaty bodies – that is, committees of experts appointed to review and comment upon periodic reports from States, and, importantly, to adopt General Comments on the interpretation and application of the treaty concerned. Of particular relevance and normative authority to be referred to here are the General Comments made by the Human Rights Committee under the ICCPR.

### **Treaty bodies: The Human Rights Committee**

The Human Rights Committee under the ICCPR has made important statements on IHL, especially constraining abuse of derogations in situations threatening the existence of a nation, on the applicability of human rights in tandem with IHL to occupied territories, confirming that the use of lethal force which is consistent with IHL is not arbitrary for human rights law either, and on the non-derogability of requirements of fair trials. While consistency with IHL theoretically also concerns *jus ad bellum*, it is primarily concerned with *jus in bello*. Let me give you some examples of such statements.

**Human Rights Committee, General Comment No. 29, 2001, paras 3, 9, 11, 16:**

Not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation, as required by article 4, paragraph 1. During armed conflict, whether international or non-international, rules of international humanitarian law become applicable and help, in addition to the provisions in article 4 and article 5, paragraph 1, of the Covenant, to prevent the abuse of a State's emergency powers. The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation.

...

Furthermore, article 4, paragraph 1, requires that no measure derogating from the provisions of the Covenant may be inconsistent with the State party's other obligations under international law, particularly the rules of international humanitarian law. Article 4 of the Covenant cannot be read as justification for derogation from the Covenant if such derogation would entail a breach of the State's other international obligations, whether based on treaty or general international law.

...

... States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.

...

... The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant.

**Human Rights Committee, *Concluding Observations: Israel*, 2003, para. 11:**

[T]he applicability of the regime of international humanitarian law during an armed conflict does not preclude the application of the Covenant, including article 4 which covers situations of public emergency which threaten the life of the nation. Nor does the applicability of the regime of international humanitarian law preclude accountability of States parties under article 2, paragraph 1, of the Covenant for the actions of their authorities outside their

own territories, including in Occupied Territories. The Committee therefore reiterates that, in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law.

**Human Rights Committee, General Comment No. 31, 2004, para. 11:**

While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.

**Human Rights Committee, General Comment No. 36, 2018, para. 64:**

Like the rest of the Covenant, article 6 continues to apply also in situations of armed conflict to which the rules of international humanitarian law are applicable, including to the conduct of hostilities. While rules of international humanitarian law may be relevant for the interpretation and application of article 6 when the situation calls for their application, both spheres of law are complementary, not mutually exclusive. Use of lethal force consistent with international humanitarian law and other applicable international law norms is, in general, not arbitrary. By contrast, practices inconsistent with international humanitarian law, entailing a risk to the lives of civilians and other persons protected by international humanitarian law, including the targeting of civilians, civilian objects and objects indispensable to the survival of the civilian population, indiscriminate attacks, failure to apply the principles of precaution and proportionality, and the use of human shields, would also violate article 6 of the Covenant.

## Charter-based bodies: The Human Rights Council

A great number of Human Rights Council resolutions deal with situations of armed conflict. This is also true of one of the principal tools available to the Council, the Universal Periodic Review, under Council Resolution 5/1.

Importantly, Resolution 5/1 provides that given the complementary and mutually interrelated nature of IHRL and IHL, the Universal Periodic Review shall take into account applicable IHL.<sup>14</sup>

Special Rapporteurs make systematic references not only to human rights but also to IHL.

<sup>14</sup> HRC Res. 5/1, "Institution-Building of the United Nations Human Rights Council", 18 June 2007, Annex I: Universal Periodic Review Mechanism, para. 2.

*International commissions of inquiry, commissions on human rights, fact-finding missions and other investigations*

According to the Human Rights Council,

United Nations mandated commissions of inquiry, fact-finding missions and investigations are increasingly being used to respond to situations of serious violations of international humanitarian law and international human rights law, whether protracted or resulting from sudden events, and to promote accountability for such violations and counter impunity. These international investigative bodies have been established by the Security Council, the General Assembly, the Human Rights Council, its predecessor, the Commission on Human Rights, the Secretary-General and the High Commissioner for Human Rights.<sup>15</sup>

**Commission of Inquiry on Lebanon, 2006: HRC Res. S-2/1, 11 August 2006 (in UN Doc. A/61/53, pp. 108–110).** The Human Rights Council decided to urgently establish and immediately dispatch a high-level commission of inquiry comprising eminent experts on human rights law and IHL, to investigate actions by Israel.

**UN Fact-Finding Mission on the Gaza Conflict, 2009: HRC Res. S-9/1, 12 January 2009 (in UN Doc. A/64/53, pp. 153–156).** The Human Rights Council decided to dispatch an urgent, independent international fact-finding mission, to be appointed by the president of the Council, to investigate all violations of IHRL and IHL by the Occupying Power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory.

**Committee of Independent Experts to Monitor and Assess any Domestic, Legal or Other Proceedings Undertaken by both the Government of Israel and the Palestinian Side, 2010: HRC Res. 13/9, 25 March 2010 (in UN Doc. A/65/53, pp. 101–103), and HRC Res. 15/6, 29 September 2010 (in UN Doc. A/65/53/Add.1, pp. 24–27).** The Human Rights Council decided, in the context of the follow-up to the report of the Independent International Fact-Finding Mission, to establish a committee of independent experts in international humanitarian and human rights law to monitor and assess any domestic, legal or other proceedings undertaken by both the government of Israel and the Palestinian side.

**International Fact-Finding Mission to Investigate Violations of International Law, Including International Humanitarian and Human Rights Law, Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance to Gaza, 2010: HRC Res. 14/1, 2 June 2010 (in UN Doc. A/65/53, pp. 160–161).** The Human Rights Council decided to dispatch an independent, international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law,

<sup>15</sup> Human Rights Council, “International Commissions of Inquiry, Commissions on Human Rights, Fact-Finding missions and Other Investigations”, available at: [www.ohchr.org/en/hr-bodies/hrc/co-is](http://www.ohchr.org/en/hr-bodies/hrc/co-is).

resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance to Gaza.

**UN Independent Commission of Inquiry on the 2014 Gaza Conflict, 2014: HRC Res. S-21/1, 23 July 2014 (in UN Doc. A/69/53, pp. 224–227).** The Human Rights Council decided to dispatch an independent, international commission of inquiry, to be appointed by the president of the Human Rights Council, to investigate all violations of IHL and IHRL in the Occupied Palestinian Territory.

**Team of International Experts on the Situation in Kasai (Democratic Republic of the Congo), 2017: HRC Res. 35/33, 23 June 2017.** The Human Rights Council requested the UN High Commissioner for Human Rights to dispatch a team of international experts to investigate alleged human rights violations and abuses, and violations of IHL, in the Kasai region.

**UN Commission of Inquiry on the 2018 Protests in the Occupied Palestinian Territory, 2018: HRC Res. S-28/1, 18 May 2018.** In this case, the Human Rights Council decided to dispatch an independent, international commission of inquiry, to be appointed by the president of the Human Rights Council, to investigate all alleged violations and abuses of IHL and IHRL in the Occupied Palestinian Territory, including East Jerusalem, particularly in the occupied Gaza Strip, in the context of the military assaults on the large-scale civilian protests that began on 30 March 2018.

**Office of the UN High Commissioner for Human Rights Investigation Mission to Libya, 2020: HRC Res. 43/39, 22 June 2020 (in UN Doc. A/75/53, pp. 133–139).** In this case, the Human Rights Council requested the High Commissioner to immediately establish and dispatch a fact-finding mission to Libya to document alleged violations and abuses of IHRL and IHL by all parties in Libya since the beginning of 2016, and to preserve evidence with a view to ensuring that perpetrators of violations or abuses of IHRL and IHL are held accountable.

The constant reference to both humanitarian and human rights law in investigations of abuses by the Human Rights Council holds true also for investigative bodies established by other organs of the UN, such as the Secretary-General and the UN General Assembly.

Thus, the 2002 fact-finding mission to Côte d'Ivoire appointed by the Office of the UN High Commissioner for Human Rights [UN Human Rights] to compile information on the human rights and humanitarian situation in the country, upon the request of the UN Secretary-General, was requested to gather information regarding violations of human rights and IHL in Côte d'Ivoire. Similarly, the 2006 UN Assistance Mission in Afghanistan appointed by the Office of the UN High Commissioner for Refugees provided support to the Afghanistan Independent Human Rights Commission in documenting violations of human rights and IHL in Afghanistan between 1978 and 2001. UN Human Rights was to conduct a mapping of violations of human rights and humanitarian

law committed by all parties to the Afghan conflicts between 27 April 1978 and 2 December 2001.

A similar mandate was given by UN Human Rights for the Nepal conflict in 2006, to document and analyze the major categories of conflict-related violations of IHRL and IHL that allegedly took place in Nepal from February 1996 to 21 November 2006.

## The UN Secretary-General

An example of the UN Secretary-General's contribution to the humanization of IHL and addressing IHL violations is the 2008 mapping exercise of the most serious violations of human rights and IHL committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003, established by the UN Secretary-General's report of 13 June 2006.<sup>16</sup>

Another example is the International Commission of Inquiry for Mali, established by the UN Secretary-General on 19 January 2018 in accordance with Article 46 of the June 2015 Agreement on Peace and Reconciliation in Mali to investigate allegations of abuses and serious violations of IHRL and IHL, including allegations of conflict-related sexual violence, committed throughout the territory of Mali between 1 January 2012 and the date of the establishment of the Commission.

## The UN General Assembly

The 2016 International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, established by General Assembly Resolution 71/248 of 21 December 2016, is an important example of the UN General Assembly's contribution to the humanization of IHL. The Mechanism was established to collect, preserve and consolidate evidences of the most serious crimes under international law – in particular the crime of genocide, crimes against humanity and war crimes, as defined in relevant sources of international law – as well as violations of IHL and human rights violations and abuses.

## The UN Security Council

Resolutions concerning specific conflicts, such as Security Council Resolution 2258 on Syria, refer to legal obligations of all parties under IHL and IHRL. So do Security Council thematic resolutions on protection of civilians, women, peace and security, children in armed conflicts and counterterrorism. Thus, for example, Security Council Resolution 2462 reaffirms that member States must ensure that any

<sup>16</sup> *Twenty-First Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, UN Doc. S/2006/390, 13 June 2006, para. 54.

measures taken to counter terrorism comply with all their obligations under international law, in particular IHRL, international refugee law and IHL. So does Security Council Resolution 2482.

**International Commission of Inquiry on Darfur, 2004: UNSC Res. 1564, 18 September 2004.** This commission was mandated to investigate reports of violations of IHL and human rights law in Darfur by all parties, to determine whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable.

**International Commission of Inquiry to Investigate Events in the Central African Republic since 1 January 2013: UNSC Res. 2127, 5 December 2013.** This resolution requested the Secretary-General to establish an international commission of inquiry including experts in both IHL and human rights law to investigate reports of violations of IHL and IHRL and abuses of human rights in the Central African Republic by all parties since 1 January 2013.

## International criminal courts

*After nearly three decades, what would you say has been the cumulative effect of the ad hoc tribunals and the ICC on humanizing IHL? Have those institutions met the promise of protecting the individual as a subject of international law?*

If the human rights revolution and the humanization of the law of war marked the first truly transformative moment in international law during my lifetime, the second such moment came with the creation some twenty-seven years ago of the ICTY, a court established by the UN Security Council to try individuals accused of serious violations of IHL in the conflicts in the Balkans. In the years following the establishment of the ICTY, several other international and hybrid (national–international) criminal courts and tribunals were created to try those accused of crimes during the 1994 Rwandan genocide, the Sierra Leone conflict and the Khmer Rouge regime in Cambodia, as well as the world’s first permanent international criminal court.

The second tidal shift in international law reflected in the establishment and work of these courts came not from an emphasis on the rights of individuals so much as from a growing focus on individual accountability. Indeed, while IHL developed initially as a means to regulate State-to-State behaviour, the creation of these courts and the application of the existing law to individuals reflects the increased (and highly sensible) recognition that it is the individuals – rather than abstract national entities – that make decisions in times of armed conflict as to which weapons may be used, what cities to target, and how to treat civilians, non-combatants and PoWs.

By holding people individually responsible for their acts, these courts will – or so it is hoped – influence how other individuals will act in the future. In the meantime, these courts have made vital contributions to the rule of law. Case after case, they have shown that no individual is above the law, regardless of rank

or stature, and have made plain that justice and accountability require rigorous adherence to fair trial guarantees and due process. Through their rulings, these courts have helped to enhance understanding of both IHL and international human rights law in myriad ways and to elucidate how these bodies of law could be respected and enforced, not simply in a few international courts but in national courtrooms around the world. This is true not only of war crimes but also of crimes against humanity and genocide, and, importantly, in the enforcement of the prohibitions on sexual assault and rape.

It is perhaps useful to ask why we need international criminal tribunals. After all, we did not have any after Nuremberg until the establishment of modern international criminal tribunals in the 1990s.

International criminal tribunals provide a forum for dealing with high-level war criminals. Setting these individuals free is untenable, and so is summary execution or perpetual imprisonment without trial. National prosecutions are a possibility, but standing alone, they present a danger of either pro-defendant or anti-defendant bias. The right mix and constructive synergy of national and international tribunals is the best formula.

One of the greatest contributions of international criminal tribunals has been the fleshing out of norms originally set out at a high level of generality and designed to govern the responsibility of States, not the individual criminal liability of the perpetrators. They have created models for national jurisdictions, such as in novel approaches to gender crimes.

IHL, as it existed in the early 1990s, was inadequate to deal with the challenges of trying atrocity crimes. Before the tribunals' establishment, many commentators believed that the Hague and Geneva Conventions and Additional Protocols constituted a corpus of international criminal law capable of being applied "as is" by courts. Instead, with the establishment of the tribunals, it took the development of rules of procedure and evidence and the vital judicial gloss provided by their jurisprudence to create a credible, viable body of international criminal law capable of being applied to individuals with the degree of specificity required by the principle of legality for criminal proceedings.

Thus, from being a law governing the responsibility of States, IHL has been applied by international criminal courts and tribunals in a multitude of cases pertaining to the criminal responsibility of individuals. Of course, in addition to rules of IHL governing substantive obligations, the statutes of international tribunals contain provisions of international criminal law, procedure and due process.

International criminal tribunals are unique in the sense that they are stand-alone courts, not supported by organs of the State such as ministries of justice, and have no police powers or other enforcement capability. They depend on the cooperation of States for enforcement and resources. Furthermore, they operate in a political environment of ongoing struggles among ethnic, national, and religious groups fighting for the legitimacy of their historical narratives, conflicting visions of rights and wrongs and competing claims of victimhood. For

international courts, this creates pressure for results desired by one party and rejected by the other.

The legitimacy of these courts can only be established and maintained by independence, impartiality and fairness. They must always remember that justice is not about achieving any particular outcome – it is about a principled and fair process that serves the rule of law.

Selective accountability is still a political reality in the international community, sheltered by the veto power of the permanent members of the UN Security Council. Selective accountability is anathema to the rule-of-law requirements of equality of enforcement and non-arbitrariness. These difficulties are compounded by the conflicting agendas of the different stakeholders involved. Here I will mention three such agendas.

**Seeking truth – writing definitive histories of the conflict:** while the quantum of evidence and the judgment itself often offer a detailed account of major atrocities, the core mandate of international criminal tribunals is to try individuals according to the law and the evidence, rather than produce a comprehensive historical record. Inquiries outside the judicial process, such as truth commissions, are freer from such constraints.

**Peace and reconciliation:** of course, fair legal proceedings have a beneficial effect on reconciliation and the restoration of peace, but if the goal of international justice is reconciliation, and if reconciliation weighs in favour of a particular outcome, be it conviction or acquittal, the conflict between that goal and the fair judicial process might be inevitable. Judges may therefore not follow any extraneous agenda, however desirable. Removal from the political scene of abusive actors, such as Karadžić or Charles Taylor, may of course help the process of peace and reconciliation.

**Giving victims justice:** naturally we sympathize with this goal, but again, the victims' purpose of punishment and retribution may clash with the requirements of fairness and the rule of law. The tribunals have demonstrated that fair international trials are possible, though they are typically long and expensive. They have elaborated norms on war crimes, crimes against humanity and genocide. They have established a corpus of rulings on procedure and evidence. They have enhanced principles of fairness and legality and have brought about a revival of humanitarian customary law. They have transformed norms originally established to govern the responsibility of States into norms governing the criminal liability of individuals. They have established that most norms governing international armed conflicts also apply to non-international armed conflicts. They have also triggered a rise in national prosecutions of atrocity crimes.

In terms of due process, as well as substantive humanitarian and criminal law, modern international courts and tribunals are light years ahead of the proceedings in Nuremberg.

IHL has the aspiration of protecting not only civilians, but also combatants. This is done by stating that the right of parties to a conflict to adopt means of injuring the enemy is not unlimited; by the general prohibition of employing

arms, projectiles and materials and methods of warfare of a nature to cause unnecessary suffering (Article 23(e) of the 1907 Hague Regulations) or superfluous injury (Article 35(2) of AP I); and by prohibiting specific weapons.

***In 1993, when the ICTY was first established, the normative prohibitions against rape and crimes against humanity were quite weak, and their enforcement even more so. Could you discuss the radical changes in the law and the enforcement of these prohibitions in light of the jurisprudence of international criminal tribunals?***

The most singular achievement of the ICTY and the International Criminal Tribunal for Rwanda [ICTR] has been their focus and success in prosecuting and elaborating the definition of the crime of rape. What a contrast with the Nuremberg and Tokyo trials! In the ICTY alone, eighty individuals, 49% of the 161 accused, had charges of sexual violence included in their indictments, and thirty-six were convicted for such crimes.

In 1993, still as an academic at New York University, I published a piece in the *AJIL* lamenting the state of the law on rape, a law which at that time did not even accept that rape in non-international armed conflicts constituted a war crime. Of course, rape is prohibited under Article 27 of GC IV but is not a grave breach of the Convention.

In 2002, I found myself serving as a member of the ICTY Appeals Bench in the seminal *Kunarac* case, where we determined that rape may constitute an act of torture and that there is no need to bring expert medical evidence regarding the level of mental or physical suffering experienced by the victim. We found the defendants guilty of rape as a war crime and guilty of sexual enslavement as a crime against humanity. We rejected the claim that rape could occur only when the victim showed continuous resistance and when physical force was used.<sup>17</sup> We established that non-consent could be inferred from circumstantial evidence and that coercive circumstances negate the notion of consent.<sup>18</sup>

And, beyond the *Kunarac* case, to protect victims of rape in the course of a trial, we adopted rules of procedure, providing that prior sexual conduct by the victim shall not be admitted in evidence or as a defence. We have clarified the definitions of the crime, actively enforced the prohibitions, and affirmed that command responsibility applies to rape and other sexual crimes. This judicial policy has been applied by other tribunals as well – for example, by the Special Court for Sierra Leone in the *Taylor* case and by the ICC in the *Bemba* case. Additionally, in the *Akayesu* case at the ICTR, the Tribunal considered that rapes committed with the intent to destroy an ethnic group in whole or in part could constitute a genocidal act.<sup>19</sup>

17 See ICTY, *The Prosecutor v. Dragoljub Kunarac et al.*, Case Nos IT-96-23, IT-96-23/1-A, Judgment (Appeals Chamber), 12 June 2002, para. 128, available at: [www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf](http://www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf).

18 *Ibid.*, paras 125–133.

19 ICTR, *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment (Trial Chamber I), 2 September 1998.

In the *Akayesu* case, the ICTR Appeals Chamber concluded also that the minimum protection provided for victims under common Article 3 necessarily implies the need for effective punishment of all persons who violate it, without distinction as to rank, categories of person or official status of the perpetrators.

It bears noting that while they are specifically mandated to apply IHL, in practice the *ad hoc* tribunals have also had recourse to human rights law with respect to the material elements of substantive crimes. This jurisprudential approach reflects the tremendous similarity between the normative content of common Article 3 and crimes against humanity, on the one hand, and norms of human rights, on the other. Importantly, these developments have enhanced the protective character of both IHL and human rights law, including by clarifying the scope of crimes such as persecution or enslavement as crimes against humanity. What is particularly important is that the concept of crimes against humanity is applicable in all situations ranging from peace to international armed conflicts. All that is required is that a widespread or systematic attack against a civilian population takes place. This means that such crimes can be prosecuted without requiring a prior classification of the situation.

I would suggest that, as a result of all of the contributions of international criminal law that I have outlined so far, there has been and will continue to be a slow but steady rise in some real elements of deterrence. In other words, we can expect that the greater the awareness of IHL and its parameters – and the greater the risk of prosecution and punishment run by those who contemplate violating IHL – the greater the likelihood that international criminal law will impact the behaviour of individuals, and in particular individuals in positions of power, thus helping to increase compliance with IHL.

While it is hard to point to individual cause-and-effect relationships between particular decisions of international criminal tribunals and subsequent compliance with the law of war, in recent years there has been an increased emphasis on a more careful distinction in targeting between civilians and combatants and on greater protection to civilian populations. Targeted sanctions on travel and confiscation of assets, and the possibility of arrest and prosecution in foreign travel under the principle of universality of jurisdiction, appear to be taken seriously by persons alleged to have perpetrated violations of IHL. Sadly, however, violations of IHL continue unabated, as in the ongoing war in Ukraine.

***Could you discuss the role of common Article 3 and crimes against humanity in the ongoing humanization of IHL?***

Until the creation of modern international war crimes tribunals, common Article 3 was regarded as establishing civil, not criminal, liability. This changed following the 1995 *Tadić* decision, which determined that violations of common Article 3 may result in individual criminal liability of the perpetrators. This decision gained further support from the ICRC Customary Law Study of 2005, and following the 1986 *Nicaragua* judgment of the ICJ, common Article 3 has been recognized not only as a minimum common yardstick for non-international armed conflicts but

also as a set of minimum norms for international armed conflicts. Furthermore, common Article 3 is regarded not only as customary law but also as part of the *jus scripta*, hard law which has been applied in scores of cases in international criminal tribunals to punish violators of its provisions.

Common Article 3 and crimes against humanity as stated in the statutes of international criminal tribunals are quintessential articulations of human rights, albeit in the IHL context.

I will turn now to additional aspects of common Article 3. First, let me note that the article does not in itself provide rules concerning the conduct of hostilities. However, many such rules are now applicable in non-international armed conflicts through customary law,<sup>20</sup> jurisprudence such as the *Tadić* interlocutory appeal on jurisdiction of 1995, statutes of international criminal tribunals, and treaties which make certain rules regarding prohibited weapons applicable to non-international armed conflicts. Protocol II to the 1954 Hague Convention on Cultural Property is also applicable to non-international armed conflicts. I note that the ICC adopted an amendment to the Rome Statute's Article 8(2)(e) adding prohibitions on the use in non-international armed conflicts of poison or poison weapons, asphyxiating gases and expanding bullets; the Rome Statute also includes several important provisions and amendments prohibiting certain weapons for all conflicts, including blinding laser weapons, and intentionally using starvation of civilians as a method of warfare.

An interesting question is whether common Article 3 protects members of the armed forces of a State from acts committed by members of the armed forces of the same State, rather than only by members of the armed forces of an adversary party. The position of the ICRC, as expressed in the new Commentary on GC III,<sup>21</sup> favours such a broad applicability and focuses on the protective purpose of common Article 3. This is an important departure from classical IHL.

Crimes against humanity are defined in the statutes of international criminal tribunals. The most detailed definition is contained in Article 7(1) of the Rome Statute of the ICC, which further develops and fleshes out definitions of crimes against humanity, emphasizing their human rights dimension by eliminating the requirement that they be committed in armed conflict. The requirement that such acts "be committed as part of a widespread or systematic attack directed against any civilian population, with the knowledge of the attack", means, in effect, that they can be committed not only in situations of armed conflict, whether international or national, but even in situations of peace. Among the crimes listed in Article 7 are many classical violations of human rights: enslavement, deportation or forcible transfer of populations, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape (and other gender crimes), and persecution of an identifiable group on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law in connection with any crime within the jurisdiction of the ICC.

20 See the ICRC Customary Law Study, above note 7.

21 2020 Commentary on GC III, above note 12, paras 578–583.

Additional crimes listed in Article 7 are enforced disappearance of persons, apartheid, and other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental and physical health. Usefully, Article 7(2) contains interpretations of the crimes listed in Article 7(1). Taken together, this list constitutes an important catalogue of mostly human rights norms.

## Protected persons

*How have the war crimes tribunals changed/departed from the definition of protected persons in Article 4 of GC IV? How have these changes contributed to the humanization of IHL?*

Article 4 of GC IV, which addresses the protection of civilian persons in time of war, considers that the only persons protected by the Convention are “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals”. Thus, Article 4 requires that protected persons have a nationality different from that of the State in the hands of which they find themselves. While this requirement of different nationalities may have been adequate for classical inter-State wars, it cannot protect people in situations of fragmentation of States, or non-international armed conflicts, where the persons concerned still have the nationality of the captor State. This is a matter of major importance, because the status as protected persons is necessary for the application of the grave breaches provisions of the Conventions.<sup>22</sup>

Already the Pictet Commentary on GC IV noted that “[t]he expression ‘in the hands of’ is used in an extremely general sense. ... [It] need not necessarily be understood in the physical sense; it simply means that the person is in territory which is under the control of the Power in question.”<sup>23</sup>

Following this approach, the ICTY, in its *Rajić* review of the indictment decision, held that

although the residents of Stupni Do were not directly or physically “in the hands of” Croatia, they can be treated as being constructively “in the hands of” Croatia, a country of which they were not nationals. The Trial Chamber therefore finds that the civilian residents of the village of Stupni Do were – for the purposes of the grave breaches provisions of Geneva Convention IV – protected persons vis-à-vis the Bosnian Croats because the latter were controlled by Croatia.<sup>24</sup>

22 GC IV, Art. 147.

23 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 4: *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958 (1958 Commentary on GC IV), p. 47.

24 ICTY, *The Prosecutor v. Ivica Rajić aka Viktor Andrić*, Case No. IT-95-12, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence (Trial Chamber), 13 September 1996, para. 37.

In 1999, the Appeals Chamber in the *Tadić* judgment went further in broadening the interpretation of protected persons in a way which no longer required different nationalities. First, GC IV, the Appeals Chamber ruled, also intends to protect those civilians in occupied territory who, while having the nationality of the party to the conflict in whose hands they find themselves, are refugees escaping the captor country, and thus no longer owe allegiance to this party and no longer enjoy its diplomatic protection.<sup>25</sup> Accordingly, “when they lose it or in any event do not enjoy it, the Convention automatically grants them the status of ‘protected persons’”. Thus, as in the case of refugees from Nazi Germany, already in 1949 the legal bond of nationality was not regarded as crucial and allowance was made for special cases. The lack of both allegiance and diplomatic protection by their State of nationality was more important than the formal link of nationality.<sup>26</sup> As stated by the ICTY:

This legal approach, hinging on substantial relations more than on formal bonds, becomes all the more important in present-day international armed conflicts. While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance. Under these conditions, the requirement of nationality is even less adequate to define protected persons. In such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention’s object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.<sup>27</sup>

This approach was followed also by the *Blaškić* Trial Chamber in 2000, which explained that nationals of a co-belligerent or allied State, as long as they have the protection of their State, do not need protected status under GC IV.<sup>28</sup>

In the *Prlić* Appeals Chamber judgment of 2017, the ICTY Appeals Chamber agreed with the Trial Chamber that Muslim members of Croatian forces detained by Croatian forces could not be PoWs under GC III, as they did not belong to Bosnian forces and thus did not belong to the armed forces of a party other than the detaining party, but they could nevertheless be considered protected persons under GC IV because they were in enemy hands – that is, in the hands of Croatian forces.<sup>29</sup>

25 ICTY, *Tadić*, above note 3, para. 164.

26 *Ibid.*, para. 165.

27 *Ibid.*, para. 166.

28 ICTY, *The Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14, Decision (Trial Chamber), 3 March 2000, para. 144.

29 ICTY, *The Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74, Judgment (Appeals Chamber), 29 November 2017, para. 359.

Finally, I turn to the *Delalić* Trial Chamber decision of 1998. In this case, the Bosnian government detained Bosnian Serb men and women in the Čelebići prison camp. They were detained because of their Serb identity. The Chamber considered that they must be considered protected persons under GC IV because they were regarded by Bosnia as belonging to an opposing party in an armed conflict.<sup>30</sup>

The Trial Chamber made a statement here reflecting the humanization of IHL:

This interpretation of the Convention is fully in accordance with the development of the human rights doctrine which has been increasing in force since the middle of this century. It would be incongruous with the whole concept of human rights, which protect individuals from the excesses of their own governments, to rigidly apply the nationality requirement of Article 4, that was apparently inserted to prevent interference in a State's relations with its own nationals. Furthermore, the nature of the international armed conflict in Bosnia and Herzegovina reflects the complexity of many modern conflicts and not, perhaps, the paradigm envisaged in 1949. In order to retain the relevance and effectiveness of the norms of the Geneva Conventions, it is necessary to adopt the approach here taken.<sup>31</sup>

These salutary interpretations of protected persons also informed other international criminal tribunals. In the *Katanga* decision on confirmation of charges, the ICC acknowledged that nationality is not the crucial test for determining whether an individual has protected status under GC IV. Citing *Tadić*, the *Katanga* Pre-Trial Chamber stated that the crucial test is that the victim belongs to an adversary party to the conflict to which they do not owe allegiance.<sup>32</sup>

The importance of these developments is also reflected in the fact that the tribunals interpreted here a provision – Article 4 of GC IV – applicable to international armed conflicts to broaden the notion of protected persons for non-international armed conflicts and mixed conflicts, thus extending humanitarian protection. This was reasonable and necessary in light of the 1995 *Tadić* interlocutory decision on jurisdiction and because most of the armed conflicts in the former Yugoslavia involved both international and non-international aspects.

30 ICTY, *The Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21, Judgment (Trial Chamber), 16 November 1998, para. 266.

31 *Ibid.*

32 ICC, *The Prosecutor v. Germain Katanga and Matheiu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges (Pre-Trial Chamber I), 30 September 2008, paras 289–293.

## From State rights to individual rights

***In your writings you have often focused on the move in IHL from the principle of reciprocity between States to respect for the rights of the individual person. Could you discuss this development by way of some examples?***

Let me start from the *si omnes* clause, the general participation clause, now entirely obsolete. That clause provided that if one party to the conflict was not a party to a treaty, that treaty would not apply in relations between all parties. It was thus an extreme articulation of the principle of reciprocity. Its *locus classicus* was Article 2 of Hague Convention IV. Since not all of the belligerents in World War II were parties to the Hague Convention, the invocation of Article 2 by the defendants threatened the integrity of the Nuremberg proceedings. This result was avoided only by the Tribunal treating the principal provisions of the Convention as customary law. Although Article 2 is formally still in force, since most of the Convention is regarded as customary law, it is largely regarded as having fallen into desuetude.

In departing from reciprocity, both the 1929 PoW Convention and the 1929 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field provided that if one of the belligerents is not a party, the belligerents who are parties will be bound by these instruments. Moreover, common Article 2(3) to the Geneva Conventions provides that even if one of the belligerents is not a party, the party belligerents will be bound in relation to the non-party if the latter accepts the Convention for the specific conflict.

A particularly telling manifestation of the reciprocal character of the law of war is the concept of reprisals. The classical definition of reprisals is, of course, an act by one belligerent, otherwise in violation of the law of war, in response to an unlawful act of war by another belligerent, and carried out to compel that other belligerent to stop the unlawful acts of war and comply with its obligations. Because in practice reprisals were directed or extended to persons not responsible for the violations, they involved harm to innocent bystanders or at least guilt by association. Reprisals were thus a real anathema to the humanization of the law of war.

Yet from the 1929 PoW Convention, with its prohibition of reprisals against PoWs, the domain of legitimate reprisals has shrunk dramatically. The 1949 Geneva Conventions prohibit reprisals against persons protected by each of the four Conventions, collective punishment and terrorization of the civilian population in occupied territory, and the taking of hostages. The 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict prohibits reprisals against cultural property. AP I prohibits reprisals against entire civilian populations, individual civilians and civilian objects, cultural objects, objects indispensable for the survival of the civilian population, the natural environment, and works and installations containing so-called

dangerous forces. Protocol II to the Convention on Conventional Weapons prohibits reprisals through the use of mines, booby traps and other devices. Conventions on chemical and bacteriological weapons contain absolute prohibitions and make no exception for reprisals.

Modern treaties have thus reduced legitimate reprisals to those against the armed forces of the enemy. Since attacks against enemy armed forces are not prohibited under the *jus in bello*, hardly any scope is left for the State to consider resort to legitimate reprisals. The international legal system has however failed to establish effective sanctions against States that violate or abuse the rules prohibiting reprisals against civilians, or that breach the principles of distinction and proportionality. Deterrence of unlawful reprisals has not proved adequate, so far. In this area, the practice of States and non-State actors falls far below the normative developments. Consider, for example, the constant tit-for-tat by both sides in the Palestine conflict. In the 1995 *Martić* case, the ICTY ruled, helpfully, that the prohibition of reprisals against civilians is an integral part of customary law and must be respected in all armed conflicts even when the other party engages in wrongful conduct.

Finally, I note that reprisals are defined in law as enforcement measures, in proportional reaction to previous violations by the adversary, and are intended to compel the adversary to desist from violations. Pure and simple acts of vengeance are always prohibited, though they are still resorted to in practice.

The influence of human rights on the prohibition of reprisals is clear. Indeed, reprisals always involve some measure of collective responsibility and are antithetical to the whole notion of individual responsibility that is so fundamental to human rights. The outlawing of reprisals is supported by the ICRC Customary Law Study, in Rules 146–148.

Although reciprocity still applies to the creation of obligations under the Geneva Conventions – for example, common Article 2(3) or Article 4(2) of GC IV – it does not permit termination of obligations on grounds of breach. The denunciation clauses of the Geneva Conventions – common Article 63/62/142/158 – provide that a denunciation cannot take effect until peace has been concluded and the release and repatriation of the persons protected by the Conventions have been completed.

A similar position is taken by Article 60(5) of the Vienna Convention on the Law of Treaties [VCLT], which is generally regarded as declaratory of customary law. This article, while permitting a party which is a victim of a breach of treaty to invoke the breach as a ground for terminating the treaty or suspending its operation, excludes from termination or suspension provisions in a treaty of humanitarian character relating to the protection of the human person, in particular those that prohibit any form of reprisals against persons protected by such treaties. A breach, and thus the principle of reciprocity, may therefore not be invoked to justify derogations from humanitarian law with regard to protected persons, especially civilians.

## Common articles of the Geneva Conventions and crimes against humanity

*Could you comment on the ongoing significance of common Articles 1, 3, 6/6/6/7 and 7/7/7/8 for the humanization of IHL?*

I will discuss several of the common articles of the Geneva Conventions – that is, articles which, depending on changes resulting from the different subjects of the Conventions, appear in all of them, though not necessarily with the same numbering. These articles have made a great contribution to the development and the humanization of IHL as a whole, including the recognition of inalienable humanitarian rights which cannot be waived by individuals or States. These articles demonstrate the humanization of the law, a process driven by human rights and the principles of humanity, which are at the very heart of the Conventions, and especially of GC IV.

### From an inter-State to an individual rights perspective: Reciprocity

The extent to which humanitarian law has already departed from its inter-State and reciprocal focus can be seen by starting our discussion from common Article 1.

Common Article 1 of the 1949 Geneva Conventions, which provides that “[t]he High Contracting Parties undertake to respect and ensure respect for the present Convention *in all circumstances*” [emphasis added], epitomizes the denial of reciprocity. The Pictet Commentary on GC I emphasizes the unconditional and non-reciprocal character of the obligations: “A State does not proclaim the principle of the protection due to wounded and sick combatants in the hope of saving a certain number of its own nationals. It does so out of respect for the human person as such.”<sup>33</sup> The phrase “in all circumstances” covers not only international armed conflicts as defined in common Article 2 but also non-international armed conflicts as per common Article 3. Because common Article 1 speaks of High Contracting Parties and not parties to the conflict, it does not, however, address non-State armed groups; the obligations of such groups are introduced in common Article 3.

The requirement to respect the Conventions in all circumstances suggests that a State party may not violate its obligations even when its adversary violates its obligations. The duty to ensure respect means that every State Party must do whatever is reasonable in its power to ensure that the provisions of the Conventions are respected universally. Every State party thus has obligations *erga omnes contractantes vis-à-vis* other parties to the Conventions.

Common Article 1, which the ICJ in its *Nicaragua* judgment of 1986 held to be declaratory of customary law, derives from the rejection of reciprocity and goes to

33 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 1: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952 (1952 Commentary on GC I), pp. 28–29.

the heart of accountability for violations of IHL. The article may initially have been intended to address the obligation of a party to ensure that its entire civilian and military apparatus and all its organs, and perhaps its entire population, respect the Conventions, but it has subsequently been interpreted as providing standing for States party to the Conventions vis-à-vis violating States. Parties must therefore endeavour to bring a violating party back into compliance, thus promoting universal application.

The non-reciprocal and normative nature of the Conventions has been recognized by Article 60(5) of the VCLT, which excludes the termination or suspension of a treaty as a consequence of a material breach with regard to provisions relating to the protection of a human person contained in treaties of humanitarian character and in particular to provisions prohibiting reprisals.

The duty to ensure respect is a duty of due diligence to prevent and repress breaches by persons and organs over which a State Party has jurisdiction, as well as a duty of due diligence to ensure respect by other States Parties. This duty has both positive and negative dimensions. Going beyond the parameters of the principle of *pacta sunt servanda*, the positive obligation suggests that every State Party must do everything reasonably possible to prevent and bring violations to an end. The negative obligation means that a State Party may not aid or encourage violations by a State party to the conflict. Although the obligation to ensure respect by other contracting States is still controversial, it has been recognized by a convening of three conferences of States Parties to discuss the West Bank, by the Security Council in Resolution 681, by the ICJ in the *Nicaragua* case, the *Wall* Advisory Opinion and the *Armed Activities in the Congo* case, and in the practice of the ICRC.

There is a certain similarity between the goals of the common Article 1 and the goals of the responsibility to protect as recognized by the UN. But the responsibility to protect is still somewhat of a soft-law concept. In contrast, the duty to ensure respect under common Article 1 is based on universally accepted treaty and customary law and has a firmer basis for diplomatic and legal action against violating States.

To a large extent, the *erga omnes* interpretation of common Article 1 was triggered by the Pictet Commentaries of the 1950s and the supportive literature generated by them, as by Abi-Saab, Condorelli and Boisson de Chazournes. The exact scope of the rights of third parties under common Article 1 is still not entirely clear, however, as suggested by the continuing controversies regarding conferences of States Parties to discuss the occupied West Bank. Whether the parties must act jointly or may take individual measures with respect to a violating State is uncertain, as is the precise nature of the actions that may be taken.

The ICJ judgment in the *Barcelona Traction* case of 1970 made it clear that every State has a legal interest in the protection of human rights by other States. In my opinion, common Article 1 can be seen as the humanitarian law analogue to the human rights principle of *erga omnes*.

While even the early Geneva Conventions conferred protections on individuals, as well as on States, whether those protections belonged to the

contracting States or to the individuals themselves was unclear at best. The treatment to which those persons were entitled was not necessarily seen as creating a body of rights. The 1929 PoW Convention paved the way for the recognition of individual rights by using the term “right” in several provisions. It was not until the 1949 Conventions, however, that the existence of rights conferred on protected persons was affirmed through several key provisions. These provisions are of cardinal importance: they clarified that rights are granted to the protected persons themselves, and they introduced into IHL or the law of war the concept of an analogue to *jus cogens*, which is so central to human rights law. Thus, *jus cogens* in humanitarian law preceded by two decades the recognition of *jus cogens* in the VCLT.

According to common Article 6/6/6/7, agreements by which either States or the individuals themselves purport to restrict the rights of protected persons under the Conventions will have no effect. Common Article 6/6/6/7 reads in part:

No special agreement shall adversely affect the situation of the wounded and sick, of members of the medical personnel or of chaplains, as defined by the present Convention, *nor restrict the rights which it confers upon them.* [Emphasis added.]

Humanitarian law’s notion of *jus cogens* differs conceptually from that found in Article 53 of the VCLT. Like *jus cogens*, it is supposed to bring about the nullity of the proscribed agreements. Unlike *jus cogens*, however, it derives from explicit provisions in the Geneva Conventions, rather than from classical customary law. Of course, most provisions of the Geneva Conventions are declaratory of customary law, and some rise to the level of *jus cogens*.

Article 6/6/6/7 safeguards, as the minimum, protections stated in the Conventions and in the Protocols and prohibits any derogation from them.

The conclusion of special agreements has long been a tradition of IHL permitting the adaptation of the provisions of the Conventions to specific circumstances. Common Article 3, for example, encourages the parties to non-international armed conflicts to conclude special agreements bringing into effect additional provisions of the Conventions. Several such agreements were concluded in the conflicts in the former Yugoslavia. Special agreements under AP I are also covered by common Article 6/6/6/7.

I note that the agreements which are prohibited are those which adversely affect the rights which the Conventions confer on protected persons. In reality, it is not always easy to foresee whether an agreement would adversely affect or enhance the situation of protected persons. I draw attention to the new commentary on Geneva Convention III, paragraph 1163: “In practice, in its representations to the Parties, the ICRC will invoke special agreements that conform to humanitarian law and that enhance protection.”

Common Article 6/6/6/7 was adopted in reaction to agreements during World War II between belligerents, such as that between Germany and the Vichy government, which, under pressure by the former, deprived French PoWs of certain protections under the 1929 PoW Convention. States participating in the

1949 Conference resolved not to leave the product of their labour “at the mercy of modifications dictated by chance, events or under the pressure of wartime circumstances”.<sup>34</sup>

A proposal at the Conference to replace the phrase “confers upon them” in common Article 6/6/6/7 with the phrase “stipulates on their behalf” was rejected and the wording proposed in the ICRC draft was maintained.

Common Article 7/7/7/8 further provides that protected persons “may in no circumstances renounce in part or in entirety *the rights secured to them* by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be” [emphasis added].

The Pictet Commentary on GC IV recognizes that:

In selecting [the term “confers”] the International Committee had doubtless been influenced by the concomitant trend of doctrine, which also led to the universal proclamation of Human Rights, to define in concrete terms a concept which was implicit in the earlier Conventions. But it had at the same time complied with the unanimous recommendation of the Red Cross Societies, meeting in conference in Geneva in 1946, to confer upon the rights recognized by the Conventions “a personal and intangible character allowing” the beneficiaries “to claim them irrespective of the attitude adopted by their home country”.<sup>35</sup>

The Pictet Commentary on GC I states that the prohibition on renunciation of rights is absolute.<sup>36</sup> This prohibition was adopted in light of experience showing that persons may be pressured into making a particular choice, but that proving duress or pressure is difficult. Several provisions of the Geneva Conventions – Articles 5 and 27 of GC IV, for example – similarly use the language of “rights”, “privileges”, “entitlements” or “claims”. Neither States nor persons protected by the Geneva Conventions may waive such rights. Article 5 of GC III confers on persons who have committed belligerent acts and fallen into the hands of the enemy the protection of the Convention until such time as their status has been determined by a competent tribunal. Obviously, such persons thus have the right of access to a competent tribunal. Article 75 of AP I contains a broad catalogue of human rights to which individuals are entitled, even against their own State.

Article 7/7/7/8 clearly recognizes that the rights of protected persons are inalienable and that the protections are inviolable. A State is thus unable to deviate from its obligations under the Conventions by relying on the consent of the protected person. It recognizes that in circumstances of occupation or armed conflict, exercise of free choice by the protected person may be seriously undermined. During World War II pressure was put on some PoWs to abandon their PoW status and become civilians, and thus be deprived of access to and

34 *Ibid.*, p. 71.

35 1958 Commentary on GC IV, above note 23, p. 83.

36 1952 Commentary on GC I, above note 33, pp. 79–80.

protection of the ICRC. Difficulties in proving coercion explain the logic of making the prohibition on renunciation of rights absolute.

There is one exception to the prohibition on renunciation of rights by the protected person. In recognition of the principle of individual autonomy, international practice recognizes that the right of PoWs to be repatriated, stated in Article 118 of GC III, is subject to the individual decision of the POW. This is confirmed in the new Commentary on GC III.<sup>37</sup>

The principle that States may, through treaties, grant individuals direct rights or impose direct obligations on them without a previous act of transformation of norms of international law into national law was recognized already by the Permanent Court of International Justice in its 1928 *Advisory Opinion concerning Jurisdiction of the Courts of Danzig*. Direct rights for individuals, and sometimes direct obligations, are now commonplace in human rights treaties and declarations. They are invoked and enforced by international bodies and, frequently, by national courts.

The law of war has always operated on the assumption that its rules bind not only States but also their nationals. Traditionally, violations of the laws and customs of war by soldiers could only be prosecuted by either their national State or the captor State. Increasingly, however, violations of the laws and customs of war, the crime of genocide and crimes against humanity have been recognized as justifying third-country prosecution under the principle of universality of jurisdiction and the penal provisions of the Geneva Conventions, and by international criminal tribunals. Under the Geneva Conventions, all Contracting Parties have the duty either to prosecute or to extradite persons alleged to have committed grave breaches or to have ordered that they be committed.

The creation of the two *ad hoc* international criminal tribunals for the former Yugoslavia and for Rwanda, and the adoption, in July 1998, of the Rome Statute of the ICC signal an important change in the status of individuals as subjects of international law. Violations of the law of war—and of certain fundamental human rights, including those protected by common Article 3 and by crimes against humanity—which could under some national laws be prosecuted before national courts can now be prosecuted directly before international tribunals without the interposition of national law. This is an important advance, especially given the high standards of due process applied by international courts. The Rome Statute provisions establishing crimes against humanity no longer require any nexus with an armed conflict. The jurisprudence of the ICTY recognizes that such a nexus is not required by customary law, even though it is required by its Statute. The norms protected are in fact indistinguishable from fundamental human rights. IHL/the law of war and its institutions have thus become central to the protection of human rights.

37 2020 Commentary on GC III, above note 12, paras 4467–4473.

## Common Article 3 and crimes against humanity

The creation of the ICTY in 1993 and the ICTR in 1994, followed by the establishment of other international criminal courts and tribunals, as well as hybrid tribunals – including the world’s first permanent international criminal court – represents a tidal shift. This transformative moment comes from the increased recognition of the criminal responsibility of individual actors based upon norms of behaviour first developed principally for States.

This development led to the tendency to fill an important lacuna in the law through international criminal tribunals increasingly judging and punishing violations which constitute in effect, even if not in the nomenclature, violations of human rights, or in many cases, violations of both human rights and humanitarian law.

What truly sets modern international criminal courts apart from Nuremberg and from early efforts aimed at ensuring accountability is the degree to which these modern courts, while formally mandated to apply IHL, have tried gross violations of human rights. This is of great importance because regional human rights courts have exclusively civil competence.

While human rights law has provided a major due process dimension and an interpretative tool in areas of IHL inadequately addressed by treaty law, through trials of violations of common Article 3 and crimes against humanity in international criminal courts and tribunals, human rights have acquired a growing component of individual criminal liability. This has led to an increasing impact of international criminal courts and tribunals on human rights protections not only as a matter of principles of fairness, but also as a matter of substantive law.

While human rights treaties have traditionally protected individuals from abuse in times of peace, many of these protections may, alas, be derogated on the grounds of national emergency. What is more, these treaties often offer little protection against the acts of non-governmental actors, such as rebel groups during internal armed conflicts. At the same time, instruments governing IHL such as the Geneva Conventions, while non-derogable, have generally focused on international armed conflicts. Indeed, common Article 3 – a quintessential statement of human rights, albeit in the IHL context – is the sole article of the Conventions to apply to internal armed conflicts expressly, and its provisions are far more limited than those applicable to international armed conflicts. There were, thus, gaps both in the conventional protections applicable in internal armed conflicts and in the criminal enforcement of gross violations of human rights. I will return to these questions in the context of the Turku Declaration.

This situation has undergone a major change thanks in great part to the 1995 *Tadić* interlocutory decision on jurisdiction of the ICTY, where Judge Cassese and his bench made plain that customary international law rules governing internal armed conflicts have emerged over time and that many of the rules and principles governing international armed conflicts apply to internal armed conflicts as well. This decision stated, also, that those rules established

individual criminal responsibility of the perpetrators and not only the civil responsibility of the parties concerned. The decision gained further support from the ICRC Customary Law Study of 2005.

This is not the only way in which international criminal tribunals such as the ICTY have contributed to human rights law and protections. In construing the material elements of crimes under IHL, international criminal tribunals have also had recourse to human rights law and jurisprudence, thereby strengthening human rights law and opening new avenues for its penal enforcement.

The beginnings of these developments can be traced, first, to the drafting of crimes against humanity clauses in the Nuremberg Charter and, second, to the drafting of common Article 3. For the first time in an international treaty, humanitarian law projected into internal conflicts and articulated provisions containing human rights law. Common Article 3 proved critical for enabling international criminal tribunals to try and punish gross violations of IHRL.

This was certainly true of such proscriptions stated in common Article 3 as resort to mutilation, cruel treatment and torture, outrages upon personal dignity, humiliating and degrading treatment, and passing of sentences except by a regularly constituted court ensuring all judicial guarantees. At the very least such provisions could be regarded as having a dual character of both human rights and humanitarian norms.

This decision gained further support from the ICRC Customary Law Study of 2005. In the years that followed the ICTY has been at the forefront of articulating and applying these protections, thus helping to redress through customary law and case law the gaps between treaty-based human rights law and IHL.

In the *Semanza* case at the ICTR,<sup>38</sup> charges were pursued and entered on appeal based on such violations of common Article 3 as murder, cruel treatment, torture, mutilation and any form of corporal punishment.

With the growing criminalization of the violations of essentially human rights norms, the question arose in the context of the *ad hoc* tribunals of how to distinguish war crimes from purely domestic offences. The *Kunarac* appeal judgment of 2002 helpfully clarified that

[w]hat ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed. ... [T]he existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.

And of course, as the recent ICRC Commentary on the Geneva Conventions points out, alleged perpetrators of serious violations of common Article 3 can also be tried by the competent national courts, typically the courts of the State on whose territory the offences were committed. The commission of acts prohibited by common

38 ICTR, *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence (Trial Chamber III), 15 May 2003, para. 522.

Article 3 has been prosecuted multiple times in UN war crimes tribunals. Acts charged have included murder, mutilation, cruel and inhuman treatment, torture, hostage-taking, and outrages upon personal dignity. The proscription of such acts has been included in the statutes of the ICTY, ICTR, ICC and Special Court for Sierra Leone. Additional crimes applicable in non-international armed conflicts are listed in Article 8(2)(e) of the Rome Statute.

Importantly, the tribunals have confirmed the customary law status of common Article 3, and have agreed that the article states the minimum common yardstick applicable to both non-international and international armed conflicts.

The Rome Conference on the establishment of the ICC made the text of common Article 3 a part of the Rome Statute of the ICC, in its Article 8(2)(c). And of course, the ICJ, in the *Nicaragua* case of 1986, defined common Article 3 as a “reflection of elementary considerations of humanity” and a minimum standard applicable to both international and non-international armed conflicts. This statement can also be seen as a recognition of common Article 3 as customary international law.

The humanization of the law of war continued with the definition of crimes against humanity in the statutes of the ICTY and the ICTR and subsequently in the Rome Statute, the Mechanism for International Criminal Tribunals, and hybrid courts.

Of course, common Article 3 has been drafted at a high level of generality. Note, for instance, the proscription of violence to life and person. In applying common Article 3, the war crimes tribunals had to be careful not to transgress on the principle of legality. In the *Kunarac* judgment, the Trial Chamber noted the similarity between humanitarian law and human rights law in terms of goals, values and terminology, but underscored that these two bodies of law’s reliance on each other must be undertaken cautiously, given the crucial differences between them. The Trial Chamber noted, in particular, that the law applied by the tribunals constitutes a penal regime, concerned with individual criminal responsibility, whereas the international human rights regime is focused on the State, as both the guarantor and abuser of human rights protections.

In the *Čelebići* case the defence argued that to punish breaches of common Article 3 would violate the principle of legality in that it would amount to the creation of law, and would thus be clearly contrary to basic human rights.<sup>39</sup> The ICTY first considered whether common Article 3 was customary law applicable to international armed conflicts, and not just to non-international armed conflicts. The Appeals Chamber noted that common Article 3 reflects fundamental humanitarian principles which underlie IHL as a whole. Indeed, the norms in common Article 3 were customary even before being codified in the Geneva Conventions, as the most universally recognized humanitarian principles.<sup>40</sup> This conclusion is confirmed by a consideration of human rights

39 See ICCPR, Art. 15.

40 ICTY, *The Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgment (Appeals Chamber), 20 February 2001, paras 141, 149–150.

law, which shares, with the Geneva Conventions, a common core of fundamental standards which are applicable at all times, in all circumstances and to all parties. The Appeals Chamber concluded that it would be legally and morally untenable to hold that common Article 3, which constitutes mandatory minimum rules, would not be applicable to international armed conflicts. Indeed, the ICJ's holding in the *Nicaragua* judgment that common Article 3 is a "minimum yardstick" makes this conclusion compelling.

The defence in *Čelebići* further argued that, by excluding the provisions of common Article 3 from the grave breaches system of the Geneva Conventions, the States Parties intended that individual violators would not face criminal sanctions. According to the defence, common Article 3 imposes duties on States and other parties to non-international armed conflicts, not individuals. The Appeals Chamber rejected that argument, holding that although not expressly provided in the Geneva Conventions, violations of common Article 3 undoubtedly entail individual criminal liability. The purpose of the principle of legality is to prevent the prosecution and punishment of individuals for acts which they reasonably believed to be lawful at the time of their commission.

As codified in Article 15 of the ICCPR, which protects individuals from being convicted for acts that did not constitute a criminal offence at the time they were committed, the principle of legality does not prevent the criminalization of acts that are criminal according to the general principles of law recognized by the community of nations. As the *Čelebići* Appeals Chamber noted, it is undeniable that acts such as murder, torture, rape and inhuman treatment are criminal according to this standard. It would strain credulity to contend that the accused would not understand the criminal nature of these acts.

Not all of common Article 3 is regarded as suitable for criminal enforcement, however. The ICTY Trial Chamber held in the 2002 *Vasiljević* case that although common Article 3 mentions the term "violence to life and person" as a prohibited act, and although the Appeals Chamber had earlier held that customary international law imposed criminal liability for all serious violations of common Article 3, the Trial Chamber could not convict the accused of "violence to life and person" because this crime was not recognized or defined with sufficient clarity by customary international law. The Trial Chamber therefore acquitted the accused of that charge.

Much has been written on the legal situation arising when a foreign State controls a non-State armed group in its armed conflict against a State's armed forces, thus turning a non-international armed conflict into an international armed conflict. In the *Nicaragua* case, the ICJ found that complete dependence on an intervening State by a non-State armed group, or effective control of specific operations, was necessary for the internationalization of the conflict and for the attribution of responsibility to the foreign State.

In the *Tadić* judgment of 1999, the ICTY Appeals Chamber developed a softer criterion of overall control by the foreign State over the non-State armed group for purposes of the classification of the conflict. The ICRC has expressed a preference for the ICTY overall control test, as it was more protective. In 2007,

the conflict between the ICJ and the ICTY jurisprudence was largely resolved when in its 2007 *Genocide* judgment, the ICJ accepted the overall control test for classification of conflicts but maintained the effective control test for the attribution of responsibility to the intervening State. I note that international criminal tribunals do not normally address the question of attribution of civil responsibility to States for wrongful acts.

An important provision of common Article 3 states that the parties to the conflict should endeavour by means of special agreements to bring into force other provisions of the Geneva Conventions. A case in point would be to bring into force provisions providing for PoW protections. PoW protections are usually not applicable in situations of non-international armed conflict. Of course, such agreements can only be used to enhance, not to derogate from, protections already available under common Article 3.

The new relationship between human rights and humanitarian law has been recognized by the ICJ. In the *Nuclear Weapons* and *Wall* Advisory Opinions, the ICJ made it clear that human rights continued to apply in times of war, even outside of the national territory – subject to the possibility of lawful derogations and to the *lex specialis* status of IHL with regard to the right to life.

When the ICTY was established, the Secretary-General of the UN, Boutros Boutros-Ghali, stated that the ICTY must take international human rights into account: “It is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings.”<sup>41</sup> The Secretary-General’s focus was on fair trial rights attached to the accused. Undoubtedly, IHRL has been a vital source of procedural protections recognized by the tribunals, but the tribunals have gone further. They have invoked human rights to define, elaborate and interpret substantive humanitarian law, and they have also tried and punished gross violations of human rights.

Crimes against humanity – especially persecution and inhumane treatment – are somewhat indeterminate, of course. They have been an important vehicle through which the tribunals have imported human rights law into their jurisdiction, but the very flexibility of the appellation “crimes against humanity” has forced the tribunals to analyze particular charges in some detail so as to guard against overbroad categorizations.

An example of how this different focus is pertinent is provided by the ICTY’s consideration of torture in the *Kunarac* case. The Convention against Torture provides that torture comprises four main elements – namely, the severity of the treatment, the deliberate nature of the act, the specific purpose of the act, and the requirement that the act is committed by or at the instigation of a public official. The *Kunarac* Trial Chamber reasoned that the public official requirement is a result of the context in which the Convention against Torture operates – at the inter-State level, with States as respondents – and is therefore

41 *Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993)*, UN Doc. S/25704, 3 May 1993, para. 106.

directed only to States' obligations. For the purposes of the ICTY in this case, however, the involvement of the State does not modify or limit the guilt or responsibility of the individual who carried out the crimes in question.

On that basis, the Trial Chamber held that the presence of a State official or other authority is not necessary for the act to be regarded as torture as a matter of personal culpability of the perpetrator, but only as a matter of State responsibility. This development has strengthened the scope and value of the prohibition on torture.

The tribunals have also made immense contributions to strengthening the proscriptions of rape as war crimes, crimes against humanity and genocidal acts.

Persecution and other inhumane acts, which are listed as crimes against humanity, are often referred to as "residual" or "umbrella" crimes because they encompass a broad range of conduct. By turning to IHRL, the tribunals have been able to provide further precision to crimes against humanity. With respect to persecution, the ICTY Trial Chamber in *Kupreškić* held that persecution is the gross or blatant denial, on discriminatory grounds, of a fundamental right laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited as crimes against humanity. Of course, this definition necessarily implicates international human rights, in order to determine which rights are "fundamental".

An act that does not constitute a crime in itself can constitute persecution due to the presence of a discriminatory element and the severity of the deprivation of fundamental rights. As the *Tadić* appeal judgment made clear, only the crime of persecution requires a discriminatory intent. Other crimes against humanity listed in Article 5 of the ICTY Statute do not have a discriminatory intent requirement.

In the *Blaškić* case of 2000, the ICTY Trial Chamber held that there was no doubt that causing serious bodily and mental harm may be characterized as persecution when members of a group are targeted because they belong to a specific community.

Other cases have also opened the door to using human rights law jurisprudence to address the scope of "persecution". In the *Brđanin* case of 2007, the ICTY Appeals Chamber dismissed the argument that the denial of the rights to employment, freedom of movement, proper judicial process and proper medical care did not rise to the level of serious violations of IHL and therefore did not fall within the jurisdiction of the Tribunal. The Chamber noted that it was settled jurisprudence that the crime of persecution includes not only the acts enumerated in Article 5 of the ICTY Statute, or other articles of the Statute, but also acts that are not listed in the Statute altogether. Furthermore, acts underlying persecution need not even constitute crimes in international law – rather, the act must be of equal gravity to the crimes listed under Article 5, when considered in isolation or conjunction. Determining whether the acts *actually constitute* persecution is a fact-specific exercise.

In the *Simić* case of 2003, the ICTY Trial Chamber reviewed a number of acts alleged to amount to persecution. It reasoned that persecution could involve a number of discriminatory acts involving violations of political, social or economic

rights. For example, the Trial Chamber noted that the Nuremberg Tribunal found that the requirement that the members of a group mark themselves out by wearing a yellow star amounted to persecution.<sup>42</sup>

Indeed, as the Trial Chamber in *Kupreškić* noted, although every crime against humanity can be described as a gross violation of human rights, “not every denial of a human right may constitute a crime against humanity”.<sup>43</sup> As such, the tribunals need to ensure not only that a right whose violation is the subject of criminal prosecution is truly fundamental and universally recognized, but also that any transgression constituted a violation of the law at the time of its commission.

## The Turku Declaration

*In your article “The Humanization of Humanitarian Law”, you discuss the Minimum Humanitarian Standards (also known as Fundamental Standards of Humanity).<sup>44</sup> These standards were intended to fill any gaps not or poorly covered by IHL and IHRL. These standards, despite being read into the UN Doc. system as a record, encountered some resistance from both the ICRC and the UN Secretary-General, in 2000 and 2008 respectively. The Secretary-General, in a report to the Human Rights Council, instead referred to the 2005 ICRC Customary Law Study, the 2005 UN Reparation Principles and the 2006 Convention on Disappearances,<sup>45</sup> and suggested that there was no need for new standards. How do you reflect on the experience of the Turku Declaration in retrospect? Is the non-adoption of Fundamental Standards of Humanity a missed opportunity, or are the alternatives good substitutes?*

It always seemed clear to me that repression of human dignity occurs in a continuum of situations of strife, from normality to full-blown international armed conflict, and that all these situations must be covered to provide protection to human beings.

The establishment of the ICRC group on internal strife was, in part, triggered by my advocacy for a declaration of minimum humanitarian standards. When I was first settling in at NYU in 1981, an invitation arrived to present a paper at a Red Cross conference in Hawaii on the relationship between human rights and humanitarian law. My work on the paper led me to believe that there was a gap in the protections offered by humanitarian and human rights law. In my paper in Hawaii and in follow-up papers for the *AJIL* and other journals, I

42 ICTY, *The Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9-T, Judgment (Trial Chamber II), 17 October 2003, para 57.

43 ICTY, *The Prosecutor v. Zoran Kupreškić et al.*, Case No. IT 95-16, Judgment (Trial Chamber), 14 January 2000, para. 618.

44 T. Meron, “The Humanization of Humanitarian Law”, above note 1, pp. 273–275.

45 *Fundamental Standards of Humanity: Report of the Secretary-General*, UN Doc. A/HRC/8/14, 3 June 2008, para. 39.

explained that the conventions on IHL protect victims of international wars but offer only very limited protection to victims of internal armed conflicts, disturbances or strife.

Moreover, disputes over the characterization of conflicts create opportunities for States to evade the law altogether. Human rights treaties protect individuals from abuses in times of peace, but important protections may be derogated from on grounds of national emergency. In some situations, non-governmental actors exercise control over people while denying that they are bound by international standards. Furthermore, most of the rules on permissible weapons and the conduct of hostilities were not considered applicable to non-international armed conflicts, and there was thus a significant gap between humanitarian and human rights instruments, to the detriment of victims. This was occasionally referred to in the literature as the “Meron gap”.

As a partial remedy, I proposed the adoption of a declaration of minimum humanitarian standards that would state norms capable of filling that gap for all situations of strife. I was grateful to Professor Oscar Schachter and Professor Louis Henkin, the editors of the *AJIL* at the time, for publishing the first of my articles on this subject, which challenged many received wisdoms. I pursued these ideas in my Hersch Lauterpacht Memorial Lectures on “Human Rights in Internal Strife” at the University of Cambridge.

One of the joys of academic law as a discipline is that it allows a give-and-take within the profession – the chance to use the law, which is naturally fluid, to overcome the stark barriers put up by the academic and organizational division of subjects. Fortunately, Alexandre Hay, the president of the ICRC at the time, expressed interest in my ideas and the first consultations of experts started, eventually resulting in the text of the so-called Turku Declaration of Minimum Humanitarian Standards of 1990, a document which has been quoted in ICTY decisions and in UN documents and studies. I thought that such a declaration could be useful in four areas where humanitarian norms and human rights are contested: where the threshold of applicability of IHL is disputed; where the State in question is not a party to the relevant treaty or declaration; where a derogation from specific standards is invoked; and where the actor is a non-governmental group.

The proposal encountered opposition, however. Some critics feared that a non-binding declaration would dilute existing legal obligations under the treaties in force; others felt that the declaration went too far in trying to impose additional commitments, albeit of a non-binding character. Eventually the project drifted into a deep coma.

Since then, however, the world seems to have moved in the direction envisaged by the project, not through law-making, but through the ICRC project on customary law, treaties and statutes and the jurisprudence of international criminal tribunals, and particularly the 1995 *Tadić* interlocutory decision on jurisdiction, which went beyond the previous rigid distinctions between the law applicable to internal and to international armed conflicts. My 1995 *AJIL* article on “International Criminalization of Internal Atrocities” has also helped to

stimulate interest in the subject. These developments led to a growing recognition that many rules of IHL previously applicable only to international wars apply to non-international armed conflicts as well. All of these factors contributed to expanding the applicability of protective norms to internal armed conflicts and strife. What happened was a kind of bottom-up transition from the field and practice to theory. The net result was that many customary and treaty rules formerly only applicable in international armed conflicts are now often regarded as non-derogable rules in non-international armed conflicts as well – conflicts which are especially frequent and bloody. So the need for something like the Turku Declaration is certainly less now than it was when I first started to promote the need for action. Moreover, quite a few recent treaties were made explicitly applicable to non-international armed conflicts, and at the same time, the Human Rights Committee made it more difficult to resort to excessive derogations.

Still, in some respects it may have been a missed opportunity. The Turku Declaration is a short, clear document stating human rights and humanitarian rights applicable in all situations, which could have been a useful tool in such long-lasting internal/international conflicts as that in Syria, or in Myanmar. Moreover, while many of the provisions of the Turku Declaration can now be addressed by customary law, others – for example, Article 5(3) of the Declaration, which states that “[w]eapons or methods prohibited in international armed conflicts must not be employed in any circumstances” – cannot. Given the lack of clarity as to the weapons or methods of warfare which may not be used in non-international armed conflicts, Article 5(3) would have provided the ICRC with an additional tool and argument.