

**Human Rights Law Marches into New Territory: The Enforcement of
International Human Rights in International Criminal Tribunals**

I am honoured to have been invited to deliver this Marek Nowicki Memorial Lecture. The object of this lecture is to highlight the increasing convergence between international human rights and international humanitarian law, and to show how international human rights are now being enforced in international criminal tribunals. It is particularly suitable that I am delivering this lecture in Warsaw, because no country more than Poland suffered from the atrocities of foreign occupation during the Second World War. Poland's love of freedom throughout centuries is second to none.

But before I make my primary points, let me briefly examine the traditional relationship between human rights and humanitarian law. Human rights law has applied principally in times of peace and has protected individuals from their own governments, while humanitarian law governed relations between states in time of war and protected individuals from enemy powers.

Violations of human rights law resulted principally in state responsibility, while violations of humanitarian law could lead not only to state responsibility and armed reprisals, but also to individual criminal liability for the perpetrator. The reach of human rights law has been limited to the territory of the state concerned, while humanitarian law also applied extra-

territorially, especially to situations of occupations or wherever an army found itself outside of its national territory. Fortunately, this adversarial relationship has increasingly been superseded by constructive complementarity.

This normative separation was accompanied by institutional divisions as well. The United Nations, human rights institutions and human rights courts oversaw the applicability of human rights law while the International Committee of the Red Cross (ICRC) and protecting states were the guardians of the Geneva Conventions and international humanitarian law.

All of these propositions have now undergone major change. The increasing symbiosis between human rights and humanitarian law was evident decades ago with Common Article 3 of the Geneva Conventions. For the first time in an international treaty, humanitarian law projected into internal conflicts and imposed provisions that can be considered pure human rights law. This humanization of humanitarian law and its penetration into national armed conflicts has also influenced other developments, such as expanding prohibitions and restrictions on the use of certain weapons, especially those that make it impossible to distinguish between civilians and combatants, or weapons considered abhorrent to the public conscience, such as chemical and biological weapons.

With the drastic change in the nature of most armed conflicts – from international to non-international and mixed conflicts – humanitarian law has been further pulled in the direction of human rights. At the same time, human rights bodies have been confronted with situations in which humanitarian law is central, and have thus been compelled to apply that law, at least to some extent.

The role of the International Court of Justice (ICJ) in developing this new theory of the place of international humanitarian law and human rights in contemporary conflicts has been critical. In the Nuclear Weapons Advisory Opinion and the Construction of a Wall Advisory Opinion, the ICJ made it clear that human rights continued to apply in time of war, even outside of the national territory – subject to the *lex specialis* status of international humanitarian law with regard to the right to life and lawful derogations.

The most dramatic change, however, occurred as a result of the establishment of the international criminal tribunals. Although mandated to apply humanitarian law, in practice the Tribunals have been instructed by human rights as well. This jurisprudential move was motivated in part in order to develop due process norms. However, because of the tremendous similarity between the content of Common Article 3 and crimes against humanity on the

one hand, and human rights on the other, international criminal tribunals have also had recourse to human rights with respect to the material elements of substantive crimes.

These developments have enhanced the protective character of both humanitarian law and human rights law. They have also led to the recognition of their growing complementarity and signaled the need for the progressive elimination of their mutually-exclusive characteristics. For example, violations of human rights have not been subject to criminal liability. However, due to the reliance on human rights in international criminal tribunals, gross violations of human rights are now prosecuted along with violations of humanitarian law for the first time.

The object of this lecture is to discuss these developments, particularly in the context of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. I hope to show how tightly interwoven these legal regimes have become and how, as a consequence, for the first time, human rights are subject to criminal enforcement.

I would like to start the discussion by briefly mentioning the jurisdiction of these Tribunals. When the ICTY was established, the Secretary General of the United Nations explicitly directed the Tribunal to take international

human rights into account by stating that “the International Tribunal must fully respect internationally recognised standards regarding rights of the accused at all stages of its proceedings.” He went on to note that those internationally recognised standards were particularly those contained in Article 14 of the International Covenant on Civil and Political Rights (Political Covenant).¹

The Secretary-General’s focus, then, was on procedural, fair trial rights attaching to the accused, such as the right to be informed of the case against him or the right to be tried without undue delay. And in fact, Article 14 of the Political Covenant was the source of Article 21 of the Statute of the ICTY and of Article 20 of the Statute of the ICTR, which provide minimum judicial guarantees to the accused.

However, the Tribunals have gone much further than instructed.

Undoubtedly, human rights have been a vital source of the procedural protections enforced by them. But what is more striking is that the Tribunals have also relied on human rights principles to define, elaborate and interpret substantive humanitarian law. I will discuss each form of reliance – procedural and substantive – in turn.

¹ “Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)” UN Doc, S/25704, para. 106.

Turning first to procedural rights, I should clarify that the Secretary General's emphasis on procedural rights is of course not misplaced, because of the critical importance for international criminal tribunals of ensuring fair trials – indeed, trial fairness could plausibly be argued to be the foremost criterion for measuring the success of international criminal justice. The notion of a fair trial encompasses a bundle of protections and requirements, but at the very least requires the application of due process norms and respect for the principle of legality.

To determine what those due process norms are, and what they require, the Tribunals have frequently turned to international human rights. For instance, in the *Jankovi* referral decision, the ICTY determined that, for its purposes, fair trial requirements included the guarantees enshrined in Article 14 of the Political Covenant and Article 6 of the European Convention on Human Rights, as reflected in Article 21 of the ICTY Statute.² This position, that the fair trial standards of the Tribunal must accord with international standards evinced by human rights instruments, has been reiterated numerous times by the Tribunals.

² *Jankovi*}, Decision on Referral of Case under Rule 11bis, 22 July 2005, ft. 99.

In the first case before the ICTY, *Tadić*, the Trial Chamber discussed the Tribunal's relationship to human rights law as a result of a request by the Prosecution for protective measures for witnesses. The Tribunal held that human rights instruments such as the Political Covenant must be "interpreted within the context of the 'object and purpose' and unique characteristics of the ICTY's Statute."³ Further, decisions by other domestic and international judicial bodies interpreting human rights would be "only of limited relevance."⁴

For a Tribunal that had been explicitly directed to take human rights into account, this might be seen as a fairly surprising statement. However, I think the Trial Chamber was guided by the unique context in which the Tribunal operates. At the time of the decision, the conflict in the former Yugoslavia was ongoing and the Tribunal had no witness protection program. The Trial Chamber noted that the Tribunal is, in certain respects, comparable to a military tribunal "which often has limited rights of due process and more lenient rules of evidence."⁵

Although the ICTY has held that international human rights must conform to its unique context, the Tribunals have not been hesitant to borrow human

³ *Tadić*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 26.

⁴ *Ibid.*, para. 27.

⁵ *Ibid.*, at para. 28.

rights principles developed by other judicial bodies. For instance, at appeal, Tadić argued that he was not given a fair trial because of lack of cooperation of the authorities in the Republika Srpska in securing the attendance of certain witnesses. In his view, this imperilled his right to substantive equality of arms with the Prosecution, an aspect of the fair trial guarantee. Although the Appeals Chamber agreed, after examining the jurisprudence of the Human Rights Committee and of the European Court of Human Rights, that the right to a fair trial includes the principle of equality of arms,⁶ it held that this principle “must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts”.⁷ In other words, since the Tribunal is reliant on the cooperation of States, with no power to compel such cooperation, it is only incumbent upon a Trial Chamber to provide every practicable facility it is capable of granting under the Rules and Statute.⁸

In a somewhat similar issue, the ICTY has had to review arrests made by states to ensure that they comply with international human rights and due process standards. In these cases, the controversy is not only whether the states in question made the arrest in a way that violated the accused’s rights, but also whether the states’ violation taints the Tribunal’s jurisdiction.

⁶ *Tadić*, Appeals Judgement, para. 44.

⁷ *Ibid.*, para. 52.

⁸ *Ibid.* para. 52.

In the *Nikolić* case, for instance, the accused claimed that he had been illegally arrested and abducted by unknown persons in the territory of the former Yugoslavia and then transferred to the territory of Bosnia and Herzegovina, where he was arrested and detained by NATO forces.⁹ In his view, his arrest violated internationally recognized human rights, was a breach of the fundamental principle of due process of law, and thus imperilled his right to a fair trial.

The Trial Chamber noted its “paramount duty”¹⁰ to respect human rights norms and noted that due process of law encompasses more than merely the duty to ensure a fair trial for the accused, but also includes how the parties have conducted themselves in the case and how the accused has been brought into the jurisdiction of the Tribunal.¹¹ In that respect, the Tribunal reviewed several decisions of the Human Rights Committee relating to forced abductions in the 1980’s in some Latin American countries. Although those decisions found that the persons concerned had their rights to liberty and security of the person violated, the Trial Chamber was hesitant to wholly adopt the reasoning of the Human Rights Committee.

⁹ *Nikolić*, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002.

¹⁰ *Ibid.*, para. 110.

¹¹ *Ibid.*, para. 111.

In particular, in cases before the Human Rights Committee, the allegations of human rights violations were made against the state which was itself involved in the abduction of the victims. This was of course a different context than that before the Tribunal, because the accused’s alleged abduction was not attributable to the Prosecution or even NATO forces. Still, the Trial Chamber held that there may well be situations “where an accused is very seriously mistreated...before being handed over to the Tribunal, which would constitute a legal impediment to the exercise of jurisdiction over such an accused.”¹² And as the Appeals Chamber later noted, “the correct balance must...be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law.”¹³

Similarly, in the *Barayagwiza* case before the ICTR, the Tribunal turned to human rights jurisprudence to judge various aspects of the accused’s detention.¹⁴ The accused was arrested and detained in Cameroon, but only informed of the charges against him after 11 months in detention. He was held in Cameroon for 19 months before being transferred to the Tribunal, during which time he filed a writ of habeas corpus which was never adjudicated.

¹² *Ibid.*, para. 114.

¹³ *Nikolić*, Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003, para. 30.

¹⁴ *Barayagwiza*, Decision, 3 November 1999.

The Appeals Chamber recognized that Mr. Barayagwiza’s detention implicated several basic rights enumerated in the Tribunal’s Statute and provided in international instruments, and held that accused were entitled to these protections when detained at the behest of the Tribunal.¹⁵ Although the rights at issue are generally uncontroversial – such as the right to be informed promptly of the reasons for arrest and the nature of the charges – the Appeals Chamber turned to the jurisprudence of the Human Rights Committee and the European Court of Human Rights to flesh out what practical requirements these rights impose.

In other words, human rights jurisprudence has developed norms to ensure that these rights are respected in a meaningful way. Merely being informed of the reasons for arrest is not enough, but rather human rights norms dictate that a suspect “must be notified ‘in simple, non-technical language that he can understand the essential legal and factual grounds for his arrest, so as to be able, as he sees fit, to apply to a court to challenge its lawfulness”¹⁶ – a standard which the Appeals Chamber endorsed.

¹⁵ *Ibid.*, para. 79.

¹⁶ *Ibid.*, para. 82.

With respect to the promptness of the notification, the Appeals Chamber noted that the accused had been left uninformed for a period greatly exceeding periods which have been held to be unlawful under human rights jurisprudence. Even though only a fraction of that time was attributable to the Tribunal itself, the Appeals Chamber dismissed this as irrelevant, given that the accused's claims were being adjudicated by the Tribunal. Regardless of responsibility, the inescapable conclusion was that the Accused's right to be promptly informed was violated.¹⁷

Finally, with respect to the accused's writ of habeas corpus, the Appeals Chamber held that although not specifically provided in the ICTR's Statute, the right to have a judicial officer review the reasons for detention is evident in the Rules and Statute. Moreover, the Appeals Chamber noted that it is a fundamental right enshrined in international human rights. As such, the failure to hear the accused's writ was a violation of his rights.¹⁸

Throughout the jurisprudence of both Tribunals, the Chambers have emphasized that the accused's basic procedural rights will not be satisfied by pro forma enforcement. In *Hadžihasanovi*}, for instance, the ICTY held that the right to be informed of the nature and cause of the charges against the

¹⁷ *Ibid.*, paras 84-86.

¹⁸ *Ibid.*, paras 87-90.

accused also encompasses the form of indictments. Although attaching to the accused, the right “translates into an obligation on the Prosecution to plead the material facts underpinning the charges in the indictment.”¹⁹ As a basis for this principle, the Trial Chamber sought recourse to relevant provisions of several international instruments, including Article 14 of the Political Covenant and Article 6 of the European Convention on Human Rights.

Another procedural right that has been interpreted with the aid of human rights norms is the accused’s right to defend himself in person. Article 21 of the Statute of the ICTY and Article 20 of the Statute of the ICTR provide that the accused has a right to defend himself in person, although the Rules of both Tribunals provide that “The Trial Chamber may, if it decides that it is in the interests of justice, instruct the Registrar to assign a counsel to represent the interests of the accused.” (Rule 45*ter* of the ICTY and Rule 45*quater* of the ICTR).

Although the right to self-representation may seem straightforward, given the size and complexity of the cases before the Tribunals, and because accused are occasionally obstructive, the Tribunals have been confronted with the scope of this right a number of times, and have typically answered with reference to international human rights. While propositions developed under

¹⁹ *Hadžihasanovi*}, Decision on Form of Indictment, paras 8-9.

human rights law have been foundational, given the distinctive circumstances of the work of the Tribunals, the Chambers have explored the contours of the right to self-representation more fully than many human rights bodies and have adapted the right to the international criminal law context.

In the *Milošević* matter, for instance, the Prosecution argued repeatedly for counsel to be imposed on Mr. Milošević.²⁰ Noting his serious health problems, the Prosecution argued that the public interest demanded a comprehensive prosecution of Mr. Milošević and that the international community would not accept the curtailment of the case in a situation where the accused, by insisting on representing himself, has exacerbated his health problems. The Prosecution also submitted that there was no norm of customary international law prohibiting the imposition of counsel.²¹

In considering the matter, the Trial Chamber started from the proposition that a plain reading of Article 21 of the Statute prevents the imposition of counsel on an accused. The Trial Chamber sought confirmation of this principle from international and regional human rights conventions and found that the human rights regime also plainly articulates a right to defend

²⁰ *Milošević*, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel, 4 April 2003.

²¹ *Ibid.*, para. 10.

oneself in person, although subject to exception.²² The Trial Chamber found the decisions of the Human Rights Committee especially pertinent, as the Political Covenant is not only a convention of widespread acceptance, but was also the foundation for Article 21 of the Statute.

However, in the face of Mr. Milošević's serious and persistent health problems, and the resultant extreme delays in the pace of the trial, the Trial Chamber later returned to the matter, and considered whether the right to self-representation is subject to qualification, and if so, what circumstances would justify the imposition of counsel.²³ The Trial Chamber noted that the notion that a trial should be fair is a fundamental, universally recognized human right and that it is under the ambit of trial fairness that a number of rights, including the right to self-representation, fall. As such, the right to self-representation may have to yield to the overarching right to a fair trial if its impact undermined the integrity of the trial.²⁴ Indeed, in *Barayagwiza* before the ICTR and *The Prosecutor v. Norman* before the Special Court for Sierra Leone, international criminal tribunals have recognized that there may be situations where it is appropriate for a Trial Chamber to insist that the defence is presented by counsel.²⁵

²² *Ibid.*, para. 36.

²³ *Milošević*, Reasons for Decision on Assignment of Defence Counsel, 22 September 2004.

²⁴ *Ibid.*, para. 33.

²⁵ *Ibid.*, paras 38-40.

The Trial Chamber therefore imposed counsel on Mr. Milošević and also outlined the working relationship between assigned counsel and Mr. Milošević, thus articulating when Mr. Milošević would be entitled to participate personally in the proceedings. On appeal, the Appeals Chamber agreed that the Trial Chamber was entitled to impose counsel, but held that any restrictions on Mr. Milošević's right to represent himself must be limited to the minimum extent necessary to protect the Tribunal's interest in assuring a reasonably expeditious trial.²⁶ The Appeals Chamber adopted the basic proportionality principle employed in human rights jurisprudence which dictates that when restricting a fundamental right, it must be in service of a sufficiently important objective and must impair the right no more than is necessary to accomplish the objective. The Appeals Chamber thus found that, in sharply restricting Mr Milošević's ability to participate in the conduct of the case, the Trial Chamber did not sufficiently protect his fundamental right to participate in his defence.

In the *Šešelj* case, the ICTY further explored the right to self-representation in more unusual circumstances. The Prosecution argued that the Trial Chamber should impose counsel on Mr. Šešelj not only because of the complexity of the case and the need to safeguard the proper administration of

²⁶ *Ibid.*, para. 17.

justice, but also because of Mr. Šešelj's express intention to cause harm to the Tribunal and to use the proceedings as a forum for Serb national interests.²⁷ Turning again to human rights jurisprudence, the Trial Chamber held that the Human Rights Committee does not go so far as to recognise an absolute right to self-representation and that the European Court of Human Rights has recognized that the interests of justice may well justify the appointment of counsel against the accused's wishes.²⁸ Taking up the notion of the interests of justice, the Trial Chamber held that it has a potentially wide scope, and includes not only the right to a fair trial, but also a fundamental interest of the Tribunal related to its own legitimacy. With respect to trial fairness, the length of the case, its size and complexity should also be taken into account.²⁹ The case is ongoing and the issue of self-representation has returned several times to both the Trial and Appeals Chambers. At present, Mr. Šešelj continues to represent himself.

The *Krajišnik* case has added a further element to the Tribunals' consideration of the right to self-defence, namely whether individuals possess a right to self-representation during appeals from judgement.³⁰ The Appeals Chamber noted the Tribunals' prior jurisprudence, which held that "the

²⁷ Šešelj, Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence, 9 May 2003.

²⁸ *Ibid.*, para.s 18-19.

²⁹ *Ibid.*, para. 21.

³⁰ *Krajišnik*, Decision on Krajišnik's Request to Self-Represent, 11 May 2007.

drafters of the Statute clearly viewed the right to self-representation as an indispensable cornerstone of justice, placing it on structural par with defendants' right to remain silent, to confront the witnesses against them, to a speedy trial, and even to demand a court-appointed attorney if they cannot afford one themselves.”³¹ Because no distinction is made in the Statute between trial and appeal, there was no textual basis for the Appeals Chamber to restrict the right to self-representation on appeal. As established previously however, this “cornerstone” right is not unqualified at the Tribunal.

Human rights law has thus shaped the parallel provisions of humanitarian law. Conversely, this jurisprudence will no doubt have an impact on the consideration of the right to self-representation by human rights bodies and will be one more example of the increasing convergence of humanitarian law and human rights.

The ad hoc Tribunals have drawn on human rights not only to determine what procedural rights accused are entitled to, but also to elaborate the content of those right and their limits – such as how the right to self-representation interacts with the right to a fair and efficient trial. But what about the substantive norms governing culpability? How have the Tribunals

³¹ *Ibid.*, para. 9.

used human rights with respect to the substantive aspects of international humanitarian law?

As I will attempt to illustrate, the Tribunals have relied on human rights instruments and norms to interpret and lend greater specificity to the prohibitions contained in international humanitarian law. As the Trial Chamber noted in *Kunarac*, because of the paucity of precedent in the field of international humanitarian law, the Tribunals have often resorted to human rights norms to determine the content of customary international humanitarian law.³² For instance, in the *Nahimana* case, the Trial Chamber of the ICTR examined human rights jurisprudence on hate speech and freedom of expression to assist in drawing the boundaries of the offence of direct and public incitement to genocide.³³

While noting their similarity in terms of goals, values and terminology, the Trial Chamber in *Kunarac* also underscored that such reliance must be undertaken cautiously, given the crucial differences between the two bodies of law.³⁴ The Trial Chamber noted, in particular, that the law applied by the Tribunals constitutes a penal regime, concerned with individual criminal

³² *Kunarac*, Trial Judgement, 22 February 2001, para. 467.

³³ *Nahimana*, Trial Judgement, paras 983-1010.

³⁴ *Ibid.*, paras 470-471.

responsibility, whereas the human rights regime is focused on the state, as both the guarantor and abuser of human rights protections.

An example of how this different focus is pertinent to international humanitarian law is the Tribunals' consideration of torture. Although torture is universally condemned and prohibited under both conventional and customary law, in times of peace and during armed conflict, arriving at a definition of torture has been difficult. Although several human rights conventions provide such a definition, international humanitarian law has not. As such, the Tribunals have turned to human rights instruments and jurisprudence to determine when an act constitutes torture in the particular context of international humanitarian law.

In *Kunarac*, the Trial Chamber started with the definition of torture provided in the Torture Convention, but held, after reviewing several human rights decisions, that it was not reflective of customary international law. The Torture Convention provides that torture comprises four main elements, namely, the severity of treatment, the deliberate nature of the act, the specific purpose of the act and that the act is committed by or at the instigation of a public official. While the first three elements are present in other human rights instruments, such as the 1950 European Convention for the Protection

of Human Rights, the final element - the involvement of an authority or state action - is more controversial.³⁵

The Trial Chamber reasoned that this additional element is a result of the context in which the Torture Convention operates – at the inter-state level or to states as respondents, and therefore directed only to states’ obligations. For the purposes of the Tribunal, 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.”³⁶ On that basis, the Trial Chamber held the presence of a state official or other authority is not necessary for the act to be regarded as torture under international humanitarian law, or for the personal culpability of the perpetrator. This development has the potential of strengthening the force of the prohibition against torture.

This decision demonstrates that it should not be thought that the Tribunals, in their enthusiasm for human rights, have wholly adopted this regime. Indeed, as I have noted, the Tribunals have been cautious to ensure that when transplanting human rights norms, the particularities of international humanitarian law as a legal regime have been respected.

³⁵ *Ibid.*, para. 480.

³⁶ *Ibid.*, para. 493.

It should also be noted that the Tribunals have found the human rights regime to be helpful in clarifying another particularly difficult aspect of torture – that is, the degree of suffering sufficient to meet the definition of torture. In *Kvočka*, for instance, the ICTY noted that the UN Special Rapporteur on Torture as well as human rights bodies have listed several acts considered severe enough *per se* to constitute torture, such as beatings, sexual violence, or prolonged denial of sleep, food, hygiene and medical assistance.³⁷ Because the case concerned acts perpetrated in detention camps in the Prijedor area of Bosnia Herzegovina, the Trial Chamber held that it would also take into account the general atmosphere and conditions of detention prevailing in the camps, the absence of any medical care after abuse, the repetitive, systematic character of the mistreatment of detainees, as well as the status of the victims and perpetrators.³⁸

Thus, even when human rights law differs from international humanitarian law, the Tribunals consider that their mandate allows them to ensure that human rights norms are taken into account. For instance, rape is an unusual crime in that it has been specifically prohibited under international humanitarian law and the statutes of all international criminal tribunals and courts, but not explicitly under human rights treaties. In *Furundzija*, for

³⁷ *Kvočka*, Trial Judgement, 2 November 2001, para. 144.

³⁸ *Ibid.*, para. 151.

instance, the Trial Chamber noted that although rape is specifically prohibited by the Geneva Conventions and the Additional Protocols, prohibited in armed conflict by customary law, expressly classified as a crime against humanity under (occupation law) Control Council Law No. 10, and convictions were entered for rape and sexual assaults as violations of the laws or customs of war by the Tokyo Tribunal, no international human rights instrument specifically prohibits rape or other serious sexual assaults.³⁹ However, the Trial Chamber acknowledged that these offences are implicitly prohibited by provisions safeguarding physical integrity, which are contained in all of the relevant international treaties.

In order to establish the material elements of rape, the Tribunal in *Furundzija* and in the later case of *Kunarac*, turned instead to the general principles of criminal law common to the major legal systems of the world.⁴⁰ The *Furundzija* Trial Chamber drew on human rights norms, such as human dignity and physical integrity, in its discussion – demonstrating just how important human rights have become to the development of humanitarian law. At the very least, the Tribunals want to ensure that the norms developed under humanitarian law conform to those contained in human rights law. Further, the jurisprudence affects the definition of rape in customary law

³⁹ *Furundzija*, Trial Judgement, 10 December 1998, paras 168-170.

⁴⁰ *Kunarac*, Trial Judgement, 22 February 2001, para. 439.

and, as such, it is sure to shape the definition of rape in human rights law as well – thus promoting the convergence between these two regimes.

The delicate interplay between international human rights and international humanitarian law can also be seen in the Tribunals' elucidation of crimes against humanity. Crimes against humanity are inhumane acts of a very serious nature – such as wilful killing, torture or rape – which are committed as part of a widespread or systematic attack against a civilian population.

In *Krnojelac*, the Trial Chamber considered the requirements of imprisonment as a crime against humanity. Although the right of an individual not to be deprived of his or her liberty arbitrarily is enshrined in a number of human rights instruments, the relevant instruments do not adopt a common approach to the question of when a deprivation of liberty become arbitrary. After consideration of the different approaches taken in the Universal Declaration of Human Rights, the Political Covenant, and the Convention on the Rights of the Child, among others, the Trial Chamber concluded that a deprivation of an individuals' liberty will be arbitrary and unlawful if no legal basis can be called upon to justify the initial deprivation of liberty.⁴¹

⁴¹ *Krnojela*} Trial Judgement, paras 110-114.

In another instance, the Trial Chamber in *Kunarac* had to determine what constitutes enslavement as a crime against humanity. Although slavery has long been prohibited, and indeed the legal struggle against slavery was one of the most important forerunners to the international protection of human rights, the definition of slavery in international criminal law has not been clear.⁴²

At issue in *Kunarac* was the abduction, confinement, rape and forced labour of several women and girls after the city of Foča was taken over by Serb forces in April 1992. In order to determine whether such treatment constituted enslavement, the Trial Chamber undertook an extensive examination of international law.

When crimes against humanity were first codified in the Nuremburg Charter, enslavement was proscribed, but not defined.⁴³ Nor did the Nuremburg Judgement provide a definition or draw a distinction between deportation to slave labour and enslavement.⁴⁴ The Geneva Conventions and Additional Protocols provided further particularities, by outlining who may be required to perform what kinds of work under what conditions in armed conflict. Those treaties also provide special protection to women and children.

⁴² *Ibid.*, para. 519.

⁴³ *Ibid.*, para. 522.

⁴⁴ *Ibid.*, para. 523.

Of particular importance is Article 4 of Additional Protocol II, which is entitled “fundamental guarantees”. It enumerates a number of basic prohibitions, including slavery and slave trade in all of their forms, as well as humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault. These provisions are in fact based on the Political Covenant, and have been termed the “hard-core fundamental guarantees”.⁴⁵

Although international human rights treaties routinely prohibit slavery, they fail to provide a definition. Nonetheless, human rights jurisprudence provides assistance by interpreting the relevant provisions, thus elucidating the distinction between servitude and forced labour.⁴⁶ The Trial Chamber in *Kunarac* also drew upon the norms of human rights treaties.

As a result, the Trial Chamber held that enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person.⁴⁷ The Trial Chamber noted that this definition may be broader than the traditional definition provided in the 1926 Slavery Convention in that elements of enslavement include not only control or ownership, but also exploitation, the

⁴⁵ *Ibid.*, para. 529.

⁴⁶ *Ibid.*, para. 534.

⁴⁷ *Ibid.*, para. 539.

extraction of forced or compulsory labour or service, sex, prostitution and human trafficking.⁴⁸ It should be noted that Article 7 of the Statute of the International Criminal Court prohibits enslavement pursuant to this same definition⁴⁹ and assisted the Trial Chamber in concluding that the definition it articulated was reflective of customary international law.

Like torture and enslavement, persecution and other inhumane acts are crimes against humanity, but whose contours are even less clear. Persecution and other inhumane acts are often referred to as “residual” or “umbrella crimes” because these crimes encompass a broad range of conduct.

Because of definitional indeterminacy and the wide range of possible prohibited acts, these crimes give rise a concern that they do not meet the need for specificity in criminal law or respect the principle of legality.

However, by turning to international human rights, the Tribunals have been able to not only provide further precision to these crimes, but also to identify a commonly accepted basic set of rights, the infringement of which may amount to a crime against humanity. In other words, the human rights regime has provided the Tribunals with the legal foundations necessary to

⁴⁸ *Ibid.*, para. 542.

⁴⁹ *Ibid.*, fn 1333.

protect the rights of the accused, while also punishing serious violations of both human rights and international humanitarian law.

For instance, in *Čelebići*, the Trial Chamber relied on human rights law to define inhuman treatment prohibited in Article 2 of the Statute and cruel treatment contained in Article 3 of the Statute. The Trial Chamber defined both offences as an intentional act or omission that, judged objectively, is deliberate and not accidental and which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.⁵⁰ This definition reflects human rights jurisprudence, which have tended to define inhuman treatment in relative terms – that is, an act or omission that deliberately causes mental and physical suffering but falls short of the severe mental and physical suffering required for the offence of torture. The Appeals Chamber upheld this finding, noting that the material elements of cruel treatment and inhuman treatment are the same.⁵¹ In *Aleksovski*, the Trial Chamber noted the definition of inhuman treatment provided in *Čelebići*, but equally considered the definition provided by the European Court of Human Rights, the only human rights institution that had defined the term.⁵²

⁵⁰ *Čelebići*, Trial Judgement, para. 543.

⁵¹ *Čelebići*, Appeal Judgement, para. 426.

⁵² *Aleksovski* Trial Judgement, 25 June 1999, para. 53.

With respect to persecution, the 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.⁵³ Of course, this definition necessarily implicates international human rights, in order to determine what rights are “fundamental”. Turning to the Universal Declaration on Human Rights and the two UN Covenants on Human Rights of 1966, the Trial Chamber held that it was possible to identify a set of fundamental rights, the gross infringement of which may amount to a crime against humanity.⁵⁴ Trial Chambers in *Krnojelac*⁵⁵ and *Blaškić* followed this approach of drawing upon the rights enumerated in human rights treaties to determine when an act – by denying a fundamental right – could be criminalized as persecution. For instance in *Blaškić*, the Trial Chamber held that there was no doubt that serious bodily and mental harm may be characterized as persecution when members of a group are targeted because they belong to a specific community.⁵⁶

In *Brdanin*, the Appeals Chamber dismissed the argument that the denial of the rights to employment, freedom of movement, proper judicial process and

⁵³ *Kupreškić*, Trial Judgement, para. 621.

⁵⁴ *Ibid.*, para. 621.

⁵⁵ *Krnojelac*, Trial Judgement, para. 434.

⁵⁶ *Blaškić* Trial Judgement, 3 March 2000.

proper medical care do not rise to the level of serious violations of international humanitarian law and therefore did not come within the jurisdiction of the Tribunal.⁵⁷ The Chamber noted that, according to settled jurisprudence, the crime of persecution includes not only the acts enumerated in Article 5 of the Statute, or other articles of the Statute, but also acts which are not listed in the Statute altogether. Further, acts underlying persecutions need not even necessarily constitute a crime in international law. Rather, the act must be of equal gravity to the crimes listed under Article 5, when considered in isolation or conjunction.⁵⁸ Determining whether the acts *actually* constitute persecution is a fact-specific exercise.

In *Simić*, the Trial Chamber reviewed a number of acts alleged to amount to persecution. It began by noting that persecution can involve a number of discriminatory acts, involving violations of political, social or economic rights.⁵⁹ For instance, the Nuremburg Tribunal found that the requirement that the members of the group mark themselves out by wearing a yellow star amounted to persecution.⁶⁰

The Trial Chamber consulted human rights instruments to help define unlawful arrest and determine whether unlawful arrest could constitute the

⁵⁷ *Brdanin*, Appeal Judgement, 3 April 2007, para. 295.

⁵⁸ *Ibid.*, para. 296.

⁵⁹ *Simić*, Trial Judgement, 17 October 2003, para. 57.

⁶⁰ *Ibid.*, para. 57.

underlying act of persecution as a crime against humanity. While unlawful detention and confinement have each been considered persecutory acts, the Trial Chamber had not yet considered whether unlawful arrest may also constitute persecution. The Trial Chamber noted that international human rights conventions enshrine the right to be free from arbitrary arrest and imprisonment and consequently defined unlawful arrest as the apprehension of a person without due process of law.⁶¹ The Trial Chamber found that unlawful arrest, without more, did not constitute a gross or blatant denial of a fundamental right reaching the same level of gravity as the other acts prohibited by Article 5. However, when considered in context, together with unlawful detention or confinement, unlawful arrest might reach this standard and therefore constitute persecution as a crime against humanity.⁶²

The Trial Chamber further held that a decision adopted by the Republika Srpska requiring political parties to freeze their activities did not constitute persecution. First, all parties, without discrimination, were subject to the decision, and second, such a decision may be legitimate under international law. In fact, the suspension of the activity of political parties, if required by special circumstances, is contemplated by both the Political Covenant and the European Convention on Human Rights.⁶³ Freedom of association is a right

⁶¹ *Simi*}, Trial Judgement, para. 60.

⁶² *Ibid.*, para. 62.

⁶³ *Ibid.*, para. 507.

expressly subject to derogation in a time of armed conflict under both of these treaties, which demonstrates that although international human rights law is particularly important to the development of international humanitarian law, these two regimes remain different in important respects.

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.”⁶⁴

As such, the Tribunals need to ensure not only that rights, the violation of which is subject to criminal prosecution, are truly fundamental, universally recognized human rights, but also that they are acts which constituted a violation of the law at the time of their commission.

This brings me to the principle of legality. Respect for the principle of legality is particularly important when the Tribunals borrow from human rights norms to inform the substantive crimes of international humanitarian law.

The issue was discussed extensively in the *Čelebići* case with respect to Common Article 3 of the Geneva Conventions. The Defence argued that to punish breaches of Common Article 3 would violate the principle of legality

⁶⁴ *Ibid.*, para. 618.

in that it would amount to the creation of ex post facto law, clearly contrary to basic human rights, as articulated in Article 15 of the Political Covenant.⁶⁵

The Tribunal first considered whether Common Article 3 was customary law, and therefore applied to international conflicts, and not just internal conflicts as provided in the Geneva Conventions. The Appeals Chamber noted that Common Article 3 reflects fundamental humanitarian principles which underlie international humanitarian law 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.⁶⁶ This conclusion was confirmed by a consideration of human rights law which shares with the Geneva Conventions a common core of fundamental standards applicable at all times, in all circumstances and to all parties and from which no derogation is permitted.⁶⁷ As such, 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 conflicts.⁶⁸ Indeed, the ICJ's holding in the Nicaragua Judgement that Common Article 3 is a "minimum yardstick" makes this conclusion compelling.

⁶⁵ *Čelebići*, Trial Judgement, 16 November 1998, para. 311.

⁶⁶ *Čelebići*, Appeal Judgement, 20 February 2001, para. 143.

⁶⁷ *Ibid.*, para. 149.

⁶⁸ *Ibid.*, para. 150.

Turning to the question of whether violations of Common Article 3 are criminal, the Defence further argued that, by excluding the provisions of Common Article 3 from the grave breaches system of the Geneva Conventions, the state parties never intended that individual violators would face criminal sanction. According to the Defence, Common Article 3 imposed duties on States, not individuals.

The Appeals Chamber rejected that argument, holding that although not expressly provided in the Geneva Conventions, violations of Common Article 3 undoubtedly entailed individual criminal liability. The purpose of the principle of legality was to prevent the prosecution and punishment of an individual for acts which he reasonably believed to be lawful at the time of their commission. Notice was thus of the essence. As codified in Article 15 of the Political Covenant, the principle did not prevent the criminalization of acts which are criminal according to the general principles of law recognised by the community of nations. As the Trial 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 recognize the criminal nature of these acts.⁶⁹

⁶⁹ *Čelebići*, Trial Judgement, para. 313.

The Tribunal's consideration of Common Article 3 is helpful for drawing some conclusions regarding the relationship between international human rights and international humanitarian law in the ICTY and the ICTR. First, the influence of human rights has helped humanize international humanitarian law, which is undoubtedly a positive development. Common Article 3 signalled the growing acceptance that human beings are entitled to certain basic, fundamental rights even in times of internal armed conflict. By gaining acceptance first as customary law, then as a set of criminal prohibitions, Common Article 3 demonstrates the convergence of international human rights and international humanitarian law.

Second, Common Article 3 also symbolises the remaining distinctions between human rights and humanitarian law. The rights enumerated by Common Article 3 are, of course, only a small subset of internationally recognized human rights, most of which are subject to derogation in times of war. Indeed, by the very fact that the wholly non-derogable Common Article 3's protections are offered only to civilians and those *hors de combat*, Common Article 3 accepts that combatants may legally be killed, and that important differences between the two regimes persist.

Third, by turning to internationally recognized human rights to inform the procedural and substantive provisions of international humanitarian law, the

Tribunals have enhanced both the scope and legitimacy of international humanitarian law. The application of human rights norms in the ad hoc Tribunals ensures that accused are accorded due process and fair trial protections necessary to show that international accountability can be achieved without violating the accused's rights. Further, by drawing on fundamental human rights to inform the substantive crimes of humanitarian law, the Tribunals have ensured that serious violations of international humanitarian law do not go unpunished because of lack of precedent, while also respecting the principle of legality.

Fourth, by criminalizing the provisions of Common Article 3, as well as other human rights norms, the Tribunals have also enhanced the bite of human rights law. Although victims of human rights violations were once confined to seeking redress from States through civil remedies, by importing human rights norms into the courtroom, the Tribunals are providing additional enforcement mechanisms for human rights against individual actors.

Quietly, almost unnoticed, fundamental principles of human rights have become values protected and enforced by international criminal law. The entire international community may take pride in this development.