

THE HUMANIZATION OF THE LAW OF WAR

I am honoured to have been invited to deliver this Marek Nowicki Memorial Lecture.

Since ancient times, rules protecting individuals and rules governing the conduct of war have been contradictory. The Bible says, “Thou shalt not kill.” But in the Book of Samuel, God tells the Israelites to kill every man, woman, and child of Amalek. We are torn between our conscientious desire to uphold the sanctity of human life, and acknowledging the stark reality that warfare has existed since the dawn of humankind. How do we reconcile the two? The object of this lecture is to show that such a reconciliation is already taking place, thanks to the development and authority of human rights law. Human rights have humanized the law of war, so that even in time of armed conflict our focus has shifted to protecting individuals to the greatest extent possible. In this lecture, I will argue that idealism and realism are not diametrically opposed by illustrating how international humanitarian law has changed to accommodate both.

While there has been a constant tension between the world of human rights and the world of war, over the past century, the pendulum has swung firmly towards human rights. This process has resulted in an overlap between these two previously distinct disciplines of law, with human rights law informing interpretations of international humanitarian law and vice versa. But it must be noted that neither regime will entirely subsume the other – to some extent different rules will always apply to war and to peace. Nevertheless, I believe that strengthening the reach of

international humanitarian law and the international community's commitment to safeguarding human rights is an inexorable process – and one that should be applauded and fostered.

The Past

To begin the discussion, I would like to briefly review the traditional domains of international humanitarian law and human rights law before moving to discussing their increasing symbiosis. So let me first ask: what exactly is international humanitarian law?

Most of you here in the audience would be able to answer that international humanitarian law refers to the set of rules applicable in armed conflict for the protection of civilians, POWs, soldiers, and property. The term international humanitarian law is, however, probably a bit more opaque than the previous term – the law of war. The change is an important one, however, because it represents not only the unification of Hague law and Geneva law, but also – and most importantly – the profound influence of human rights.

In the very early days when the term *jus in bello* was in vogue, the laws of war chiefly regulated nations' behaviour towards one another. If one nation offended the rules, the other nation was justified in taking action against it, up to and including reprisals against civilians that would otherwise be unlawful. The law of war was therefore inter-state law, and as Georges Abi-Saab put it, driven by “collective responsibility, with the attendant collective sanctions of classical international law: belligerent reprisals *durante bello* and war reparations *post bellum*.” The legality of

such tactics was cold comfort to those caught in the middle – soldiers, POWs, and civilians - who as individuals were not subjects of international law, let alone of the laws of war.

This state-centric character of classical humanitarian law was reflected in the conceptualization of both liabilities and remedies. When a soldier violated the rules, the state for whom he fought was typically liable for the violation, not to the victim, but to the victim's state. The very notion of an individual seeking and receiving reparations from another state for injuries caused during conflict was improbable; the idea that he could seek reparations from his own state was inconceivable.

In that period, states were the only players; they were autonomous, sovereign and, theoretically, equal. Moreover, until the mid-twentieth century much of the world was dominated by monarchies and empires. Democracies were the exception. Consequently, the concept of states' obligations to their citizens was narrow: states owed their citizens protection from the depredations of outsiders, but little more. Until recently, individuals' rights against states were limited and difficult to invoke. We have progressed quite a bit since then, and the way in which relations between states and individuals have changed constitutes the most profound modern shift in international law.

This shift is the consequence of the human rights revolution. The atrocities of World War II gave birth to the human rights movement, and with it a number of important developments: the recognition of human rights as a fundamental principle

in the UN Charter; the recognition of individual criminal responsibility for violations of humanitarian law; the judgements of the Nuremburg Tribunal; and, eventually, the promulgation of the Universal Declaration of Human Rights. Other core human rights instruments were enacted in the wake of the Universal Declaration, including the International Covenant on Civil and Political Rights (Political Covenant), the International Covenant on Economic and Social Rights, and national human rights treaties.

During the Cold War, human rights instruments proliferated further. The Helsinki system proved critical in countries under Soviet domination. These international human rights instruments have been interpreted as conferring rights on individuals against states, and not just his or her own state, but all states. Under human rights law, states are not autonomous, indivisible entities with rights and duties only vis-à-vis one another. Rather, they are conceptualized as wielders of power, with the responsibility to refrain from certain actions against individuals and, affirmatively, to provide for their basic needs. Under human rights law, rights vest not in the state, but in the individual.

The human rights revolution has, more than anything else, taught us that what states do to their own citizens is the concern of the entire world, a teaching reflected in the development of international law. This does not mean that the old attitude has disappeared entirely, far from it. Nations still frequently invoke sovereignty to prevent others from peering behind their borders. But it does indicate a shift in how we think about human beings and their relationship to the world.

The Changing Present

This shift has had a notable impact on international humanitarian law. The new conception of state responsibility introduced by human rights and the parallel notion that the international community has the responsibility to protect individuals from their own governments, have not been the only drivers of the humanization of humanitarian law. Calamitous events and atrocities have driven the development of international humanitarian law throughout history; the more offensive or painful the suffering, the greater the pressure for adjustment of the law. The American Civil War, with its millions of dead and maimed, generated the Lieber Code of 1863 and ultimately spawned the branch of international humanitarian law known as Hague Law, which governs the conduct of hostilities. The Battle of Solferino inspired the Red Cross movement and Geneva Law which, starting with the first Geneva Convention in 1864, emphasizes the protection of victims of war – the sick, the wounded, prisoners, and civilians.

War has never been kind to civilians, but the twentieth century stands out in the horrors and outrages visited upon them. Nazi atrocities, concentration camps, gas chambers, and the Holocaust, led to Nuremberg, the Geneva Conventions for the Protection of Victims of War, and the Genocide Convention. Those atrocities also helped shift the state-centric focus of international humanitarian law to individuals, and most notably the introduction of individual criminal responsibility. The atrocities in the former Yugoslavia, Cambodia, Rwanda, and elsewhere have also had a pronounced impact not because of their unprecedented nature – there is,

unfortunately, nothing new in atrocities – but because of their breadth and visibility; what is now termed the CNN factor.

The media attention paid to twentieth century conflicts contributed to humanizing international humanitarian law and regulating the behaviour of states. Increased media attention has resulted in rapid sensitization of public opinion, reducing the time between atrocities and international responses. One result was the establishment of the *ad hoc* criminal tribunals for the former Yugoslavia and Rwanda, which have had a tremendous impact both on the development of international humanitarian law and its humanization. Another was the establishment of the ICC and the indictment of Sudanese President Omar Hassan al-Bashir by Prosecutor Luis Moreno Ocampo for genocide and war crimes in Darfur, which the judges of the ICC are currently considering. Moreover, the old *post bellum* paradigm no longer applies. The international community is no longer satisfied to wait for the cessation of hostilities before enforcing international humanitarian law.

The suffering endured by civilians has an unprecedented scale in twentieth century wars. Indeed, in pre-twentieth century wars between modern nations, civilians were generally not seen as worthwhile targets. States were less responsive to their citizens' voices, and low morale and suffering of non-combatants would not necessarily have affected a state's policies. In the modern world, by contrast, a strike on civilians is seen as a strike on the state itself. Conflicts involving non-state actors, such as al Qaeda and other terrorist groups have also proliferated, with civilians caught in the cross-fire.

Technology and new means of warfare have also made the need to protect civilians from the ravages of war all the starker. The first half of the twentieth century saw the first uses of gas attacks, air power, automatic weapons, tanks and nuclear weapons. Each one of these implements of destruction has resulted in increased civilian suffering and death.

From the end of the nineteenth century, a combination of a greater focus on the individual and a heightened need to protect individuals has forced the international community to look at the humanitarian law from an new perspective. This reflects an effort to protect human dignity in the face of overwhelmingly destructive wars. Though we still accept the idea that civilians can be lawfully harmed and killed during conflict, the ways in which that harm and killing can be done have become much more regulated and limited.

Examples

In short, humanitarian law has been humanized. To reveal this process of convergence between human rights and humanitarian law, I am now going to turn to a few specific examples. First, treaty development over the last hundred and fifty or so years demonstrates how humanitarian law has changed to incorporate human rights values. I will then highlight particular aspects of humanitarian law that have changed as a result of the pressure human rights have put on humanitarian law, namely views regarding POWs, protected persons, reciprocity and reprisals. Finally, we will take a

look at judicial interpretation of both human rights and humanitarian law to see how judicial bodies have influenced the humanization of humanitarian law.

A. Treaties

Turning first to treaty development. The first treaties that significantly adjusted the traditional view of humanitarian law came in the mid-nineteenth century with the Hague Conventions on the Laws and Customs of War on Land of 1899 and 1907. These Conventions prohibited weapons of a nature to cause superfluous injury or calculated to cause unnecessary suffering. In this regard, the Conventions are protective of individuals, though more so of combatants than civilians.

Conceptually, the most important part of the 1899 and 1907 Conventions was the Marten's Clause, which states that all people, regardless of any specific provisions in treaties or laws, must be protected by the principles of humanity and the dictates of the public conscience at all times. Thus, matters not regulated are not simply left to the discretion of the military commander. The strong language of the Marten's Clause explains its resonance and influence in the formation and interpretation of international humanitarian law; the rhetoric and ethics of the clause has compensated for its somewhat vague and indeterminate legal content. The notion that there are certain things so abhorrent to our collective humanity that we absolutely forbid them, and that the sphere of forbidden actions can expand in line with public conscience, has been hugely influential in the more than 100 years since it was promulgated. Indeed, at Nuremburg, the ideas expressed in the clause were called a "legal yardstick" covering the minimum rules in force during times of armed conflict.

But it took time for the ideas enunciated by the Marten's Clause to become reality. While the early international humanitarian law treaties concerned individuals, it was unclear whether they gave individuals enforceable rights. It took until 1949, with the Geneva Conventions, for individuals to be given inalienable rights. Common Article 7/7/7/8 states that protected persons may in no circumstance renounce in part or in entirety "the rights secured to them" by the Conventions. The Commentary by the International Committee of the Red Cross (ICRC) further states that the prohibition upon renunciation of rights is absolute. This prohibition was adopted in light of experience showing that persons may be pressured into making a choice, but that proving pressure is difficult. Several provisions of the Conventions, Articles 5 and 27 of the Fourth Convention for example, similarly use the language of "rights," "privileges," "entitlements," or "claims." States may not waive such rights, and agreements by which states or the individuals themselves purport to restrict the rights of protected persons under the Conventions have no effect.

The Geneva Conventions were followed by the Additional Protocols and conventions on weapons with excessive or indiscriminate effects, mines, booby traps, biological and chemical weapons, and blinding lasers. Each ensuing treaty has placed further restrictions on acceptable methods of warfare and has provided greater protection to individuals, particularly civilians.

The post-World War II instruments have also placed greater restrictions on what kind of killing is legitimate and have disallowed many other wartime actions once

accepted as lawful. Indeed, the Geneva Conventions and the Additional Protocols contain many norms that clash with the old legal regime precisely because of the controlling influence of human rights law. For instance, in both human rights and international humanitarian law instruments we now find provisions relating to the right to life, prohibitions on torture, cruel treatment and arbitrary arrest, detention, guarantees of due process, and rules prohibiting discrimination.

Another important shift in treaty law is that the distinction between internal and international conflicts is disappearing, even though it was still important enough thirty years ago to result in two distinct additional protocols to the Geneva Conventions. The changing nature of the bulk of modern conflicts from international to internal and even mixed has drawn humanitarian law in the direction of human rights law. Common Article 3, the sole article of the Geneva Conventions expressly applicable to internal conflicts, is now accepted as a minimum requirement that is applicable regardless of the territorial nature of the conflict.

It is logical that human rights law would take on a more prominent role as conflicts changed from international to internal, since typically human rights applied solely within states. The more surprising development, perhaps, is that as a consequence of the ascendancy of human rights, human rights law has increasingly applied extraterritorially. This is especially true, for instance, in situations of foreign occupation or when agents of one state exercise temporary jurisdiction over citizens of another state.

B. Particular Elements of Humanitarian Law

In addition to humanitarian law treaties that increasingly incorporate or are a result of human rights norms, human rights law has had a notable influence on the way we interpret, or even re-interpret international humanitarian law, particularly the Geneva Conventions.

With respect to POWs, for instance, the Hague Conventions provide that the repatriation of POWs should be carried out after the conclusion of peace, and the 1929 Geneva Conventions require for this to happen as soon as an armistice is concluded. But there was no formal peace treaty or armistice ending World War II – a problem which the Geneva Conventions answered. The Third Geneva Convention mandates that repatriation should happen after the cessation of active hostilities. This suggests that the right to repatriation inheres in the individual POWs, and that these individuals are not to be used as a bargaining chip by belligerent states prior to the conclusion of a peace treaty.

But what if the POWs do not want to be repatriated? This occurred with North Korean and Chinese prisoners after the Korean War and the question constituted one of the first direct clashes between the human rights law and humanitarian law. The question boiled down to this: whose rights did the Geneva Conventions really espouse? If the right to repatriation belongs to the state, then the POWs must be repatriated when the state of origin demands their return. If the right belongs to the individuals, they should be able to refuse repatriation if they so desire.

The USSR and China felt the right belonged to the state. But the United Nations command, backed up by the General Assembly, declared that forcible repatriation was inconsistent with the Geneva Convention. Rather, the right belonged to the individuals. In the years since the conclusion of the Korean War, the principle of individual autonomy has been further affirmed. After the Gulf Wars and the conflict in the former Yugoslavia, POWs themselves, and not states, could decide whether to be repatriated. Of course, POWs still need a state to grant asylum, which might defeat the newly acquired autonomy.

What I find fascinating about the Korean decision is the basis the United Nations command gave for its conclusion that forcible repatriation was inconsistent with the Geneva Conventions: forcible repatriation clashed with the Conventions' "humanitarian basis." In other words, already in the 1950s, the laws used to regulate the conduct of war were seen as humanitarian, protecting humans. A profound shift from the old state-centric days.

The definition of protected persons has also evolved with the influence of human rights law. The Fourth Geneva Convention defined protected persons as persons who did not have the nationality of the power which held them. The Convention reflected the need to enhance protections for individuals and populations, especially in occupied territories. Belonging to the category of protected persons was the traditional condition for the applicability of the grave breaches provision, and it was supported by the ICTY in the *Tadic* Appeals Judgement of 1995.

More recent ICTY jurisprudence, however, has departed from the traditional construction, introducing more flexible criteria to replace the formal concept of nationality. Individuals are now protected persons vis-à-vis all adversaries, regardless of their nationality. As the ICRC has said, “nobody in enemy hands can be outside the law.”¹ Respect for human rights and for a humanitarian interpretation of the Geneva Conventions thus replaced the literal, rigid, and legalistic approach requiring different nationalities for the definition of protected persons.

The influence of human rights law has also eradicated in theory, and sharply limited in practice, two key features of the old system: reciprocity and reprisals.

Reciprocity, a natural consequence of a system of states equal to one another, was one of the main justifications for the existence of humanitarian law. In a world of armies, each agrees to follow the law for one overriding reason: the expectation that your enemies will follow the same laws and give you the same protection that you afford them. Derived from the medieval tradition of chivalry, this version of legality guaranteed a modicum of fair play. As long as the rules of the game are observed by both parties, it was permissible to cause suffering, deprivation of freedom, and death.

This rationale tends to leave individuals, especially civilians, without adequate protection. But, as humanitarian law has departed more and more from its purely inter-state focus, reciprocity has lost much of its force as a driver of the law. This can

¹ Commentary by the International Committee of the Red Cross, Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, 50-51.

be shown by revisiting the now obsolete *si omnes* clause, and the question of belligerent reprisals.

The *si omnes*, or “if everybody,” clause found in early law of war treaties provided that if one party to a conflict was not a party to the instrument, the instrument would not apply in relations between any parties to the conflict. The *si omnes* clause of the Fourth Hague Convention, which threatened the integrity of the Nuremburg prosecutions, represented the high point of this idea. It was only by considering the Hague Regulations as a mirror of customary law that the International Military Tribunal at Nuremburg avoided the applicability of the *si omnes* clause, which would have emasculated the Hague Conventions. The clause was then explicitly reversed in Common Article 2 of the 1949 Geneva Conventions. This Article provided for the application of the Conventions between belligerents involved in a conflict, even if one of the belligerents was not a Party to the Convention.

Moreover, Common Article 1 of the Geneva Conventions epitomizes the international community’s rejection of reciprocity by providing that all Parties, not only those involved in a particular conflict, undertake to respect and ensure respect for the Conventions in all circumstances. Common Article 1 is thus international humanitarian law’s analogue to human rights principle of *erga omnes*.

Nevertheless, reciprocity is an old and important basis for the law of war, which drove both its development and enforcement. It has never quite lost its impact and importance. The rule against refusing quarter is illustrative. Professional soldiers

appreciate this rule because an enemy who knows that he will not be given quarter has no incentive to surrender, and will fight all the harder. He may well suffer a greater defeat, but he will kill more opponents in the process. Conversely, granting quarter creates the expectation that it will be reciprocated by the enemy.

Normativity also prevailed over reciprocity in the denunciation clauses of the Geneva Conventions, and in Article 76, paragraph 5, of the Vienna Convention of the Law of Treaties. The latter excludes humanitarian provisions from termination or suspension for breach. Thus, a breach by one party does not allow the aggrieved party to suspend operation of the agreement.

The limitation of legitimate reprisals is an even clearer illustration of the influence of human rights. The classical definition of reprisal in international armed conflict is 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 cease the unlawful act and to comply henceforth with its obligations. Of course, even lawful reprisals cause suffering to innocent persons.

Fortunately, the domain of legitimate reprisals has shrunk dramatically. Treaty law, particularly Additional Protocol I, has basically outlawed any reprisals against civilians and civilian objects. On this matter, however, there may be a gap between norms promulgated by treaty and the maturation of customary international law. In any event, the point remains contentious. The United States, for one, does not accept as customary law a total ban on reprisals against civilians and civilian objects.

C. Judicial Interpretation

Judicial bodies have also encouraged the process of convergence by interpreting both human rights and humanitarian law as legal regimes that have more commonalities than distinctions.

Institutionally, human rights law and international humanitarian law are often applied in tandem; however, this was not always the case. In the early years following World War II, the distinction between human rights law and international humanitarian law was strengthened by institutional duality. The ICRC and the “protecting powers” were in charge of the enforcement of international humanitarian law, while human rights bodies were in charge of implementing and enforcing human rights law. As conflicts became more internal in nature, the institutions charged with enforcing international humanitarian law and human rights law began to branch out – neither could avoid application of the other’s law. The institutional duality of the system was largely eroded. Now, human rights organs often review acts committed in wartime, and humanitarian law tribunals frequently rely on human rights norms.

For instance, the Commission on Human Rights has condemned violations of both human rights law and international humanitarian law in the conflicts in Kuwait, the former Yugoslavia, Rwanda, the Sudan, and others. Indeed, when looking at Kuwait, the Commission’s Rapporteur said that his mandate included violations of all guarantees of international law, including those enshrined in international humanitarian and human rights instruments. The Rapporteur on Colombia similarly

noted that many actions had violated both international humanitarian and human rights law, and he applied both. UN missions, such as the observer mission in El Salvador, have looked at both human rights law and international humanitarian law, as has the Inter-American Commission on Human Rights.

Another example that many here in Budapest may be familiar with is the case of *Korbely v. Hungary*, which was recently decided by the European Court of Human Rights. In that case the Applicant, a former military officer, had been convicted of murder as a crime against humanity for shooting and killing an insurgent during the outbreak of the 1956 Hungarian Revolution. Relying on Article 7 of the European Convention on Human Rights – the “no punishment without law” provision – the Applicant submitted that he had been convicted for an act that did not constitute a criminal offence at the time it was committed.

In finding that a violation of Article 7 had occurred, the Court ruled that murder within the meaning of Common Article 3 of the Geneva Conventions could have provided a basis for a conviction for crimes against humanity committed in 1956; however, other elements also needed to be present for that classification to apply. Such additional requirements, as whether the victim had been a non-combatant, derived not from Common Article 3, but from other international law elements inherent in the notion of crimes against humanity at the time. These included, most notably, Article 6 of the Charter of the International Military Tribunal annexed to the London Agreement of 1945 and customary international law. In the *Korbely* case these elements were not present.

In the instances just mentioned, what is interesting is not the penetration of human rights law into international humanitarian law, but in fact the contrary. These bodies were established to deal with violations of human rights, so should they really be deciding on violations of international humanitarian law? Various domestic players have thought not. Turkey contended that the Human Rights Commission Rapporteur who reported on unlawful executions in Kurdistan was improperly encroaching on the field of international humanitarian law. Similarly, the U.S. argued that the Inter-American Commission on Human Rights, when deciding a case arising from the invasion of Panama, could not even assert its jurisdiction over the invasion because the Organization of American States had not given it competence to adjudicate humanitarian law.

Not surprisingly, the Commission disagreed. In a later case, it explained why a human rights body was competent to apply international humanitarian law. First, the charges before it – a claimed arbitrary deprivation of the right to life – was clearly within its competence. But human rights law, it found, did not supply all the answers when the claimed violation occurred during an armed conflict; the Commission had to look to international humanitarian law to fill in the gaps. This is very similar to the ICJ's invocation of *lex specialis* in the *Nuclear Weapons* opinion, which I shall discuss shortly. Incidentally, such a move will probably result in less protection for individuals, who face a greater risk of lawful killing under international humanitarian law than under human rights law.

Important milestones in the convergence of human rights and humanitarian law have been achieved by international judicial bodies. For instance, the Inter-American Commission of Human Rights found that Common Article 3 of the Geneva Conventions is pure human rights law, and in *Nicaragua*, the ICJ held that Common Article 3 provides rules which “constitute a minimum yardstick” and reflect “elementary considerations of humanity” from which no derogation is permitted. Based on these findings, it is now accepted that Common Article 3 is customary law that requires minimum standards of humane treatment to all forms of armed conflict.

The contribution made by the ad hoc criminal tribunals such as the ICTY and the ICTR should also be noted. Due to lack of humanitarian law precedent, the Tribunals have frequently turned to human rights jurisprudence to interpret and elaborate both the procedural and substantive provisions of their Statutes. In so doing, the Tribunals have ensured that the full range of due process rights provided by human rights law have been accorded to the accused and, as a result, have met the international community’s expectation of fair trials. Moreover, by drawing on human rights, the Tribunals have ensured that serious violations of humanitarian law have not gone unpunished for lack of specificity.

One of the most important achievements, however, is the notion that human rights continue to apply in wartime. In the *Nuclear Weapons* opinion, the ICJ first determined that human rights provisions continue to apply in times of armed conflict, unless a party has lawfully derogated from them. In particular, the provision of the Political Covenant that “no one shall be arbitrarily deprived of life” did not cease in

times of armed conflict. Of course, humanitarian law permits a number of acts that constitute violations of human rights. How can this conflict be resolved?

The ICJ provided an answer in the *Nuclear Weapons* opinion by turning to the notion of *lex specialis*. Human rights law can be understood as an umbrella law generally applicable to everybody. International humanitarian law, on the other hand, is a specifically targeted law, applicable only in times of war. Therefore, where there is a conflict between the two bodies of law, we need to resort to a *renvoi* to the system which is most particular to the situation.

Through a *renvoi* to the applicable *lex specialis*, the law of armed conflict, the legality of a deprivation of life would turn on humanitarian, not human rights, law. The Court thus interpreted the right to life provision of the Political Covenant in light of principles of international law applicable in armed conflict, and found that a deprivation of life is arbitrary if it does not conform to that law.

Some will object that the ICJ legalized killings in the time of war. But did it have a choice? Warfare has existed since the dawn of humankind, and it is an unfortunate reality that it will probably continue.

The holding of the ICJ in the *Nuclear Weapons* opinion raises another question: if human rights law is applicable during times of armed conflict, where is it applicable and to whom? I have spoken about how human rights law has infiltrated international humanitarian law in general. It is equally clear that a consensus has developed that

human rights law, like international humanitarian law, is applicable extraterritorially. Like international humanitarian law, human rights law applies to all actions taken by a state or its agents that involve the exercise of the state's power over individuals. This is so whether the individuals are in the state's sovereign territory or not, such as in areas under temporary occupation.

An opinion that supports the extraterritorial application of human rights law is the 2004 Advisory Opinion on the Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territories.

The *Construction of a Wall* opinion set squarely before the Court the question of whether human rights law applies to territories beyond a state's sovereignty, yet under its control. The answer was an unequivocal yes. The Court, citing the *lex specialis* holding in *Nuclear Weapons* held, more generally, that except for derogations of the kind stated in Article 4 of the Political Covenant, which relate to issues of security in times of emergency, the protections offered by human rights instruments do not cease in case of armed conflict, and that both humanitarian and human rights law were applicable in the Occupied Territories. Israel had argued that international humanitarian law is the sole protection granted in a conflict situation, while human rights law is intended only for the protection of citizens from their own government in times of peace. This argument reflected antiquated notions of mutual exclusivity of international humanitarian and human rights law. In putting aside the arguments of Israel, the Court decided that human rights law and treaties applied wherever the

state exercised jurisdiction, alongside humanitarian law and subject to lawful derogations.

The Court turned to numerous sources to support its conclusion, include the jurisprudence of the Human Rights Committee. The ICJ also relied on the texts of the core human rights instruments. The Political Covenant, for instance, provides that states must protect the rights of individuals within their territory *and* subject to their jurisdiction. The reasons for this are clear. As the Human Rights Committee has said in regards to Uruguay, it would be “unconscionable to interpret the Covenant so as to permit a state to perpetrate violations on the territory of another state, which violations it could not perpetrate on its own territory.” A statement which makes eminent sense.

So, what does this all mean? The major message is that the ICJ ruled that there is always space for human rights law – it never disappears, whether at home or abroad, in times of peace, war, or in one of the grey areas in between. The actions of states must be looked at through the prisms of both international humanitarian law and human rights law. The ruling in the *Construction of a Wall* opinion, and the development it exemplifies, will result in increased protection for individuals from various inhumane acts that states have often carried out.

D. Differences

Although I have spent quite a bit of time arguing that humanitarian law has been humanized by human rights, and that as a result there are increasing similarities

between these two regimes, I should acknowledge that human rights law and humanitarian law have not become one and the same. The law of armed conflict regulates aspects of a struggle for life and death between contestants who operate on the basis of formal equality. As long as the rules of the game are observed, the causing of suffering, of deprivation of freedom, and of death, is allowed.

By contrast, human rights protect human dignity and physical integrity in all circumstances. Human rights concern relationships between unequal parties, protecting the governed from governments. Under human rights law, no person may be deprived of his or her life except for serious crimes pursuant to a judgement by a competent court – except for countries that have ratified Protocol No. 6 to the European Convention and the 2nd Optional Protocol to the Political Covenant.

The differences do not stop there. International humanitarian law permits certain deprivations of freedom without judicial process; it allows warring powers to intern people in camps, to limit their appeal rights, and to put broad restrictions on the right to freedom of speech and assembly. Yet human rights law strictly forbids, except for lawful derogations, all of these actions.

The Future

In sum, while the humanization of the law of war has been immensely beneficial for both combatants and civilians affected by armed conflict, this process must take into account the reality of armed conflict. We will never be able to make war completely safe. Yet, under the influence of human rights law, international

humanitarian law has come to offer far greater protections for both civilians and combatants. We can, I believe, expect these protections to continue to grow. There is no doubt that the old regime of state-centric international humanitarian law has been replaced in huge part by a new homocentric regime. And this is due, largely, to the influence of human rights law.

In practice, of course, respect for international humanitarian law and human rights law has not always developed as rapidly as relevant legal doctrines. Indeed, the tremendous progress we have made in humanizing the law of war brings into sharp relief the stark contrast between promises made in treaties and declarations, on the one hand, and the harsh, often barbaric practices continually employed in times of war. Fortunately, however, our arsenal of newly humanized norms is accompanied by an emerging system of international criminal courts and various other sanctions against the violators. These courts will help encourage combatants and non-combatants alike to take the norms of international humanitarian law and human rights law more seriously.

Yet, norms and courts are not enough. Humanitarianism in the application of the law of war must continue and also be accepted in the public's consciousness if respect for the rules is to be ensured. Today, in our attempt to avoid future cruelty, some of the most serious problems that we face stem not from the inadequacy of the law, but from a lack of shared universal values. This can be seen vividly in the rise of terrorist groups, such as al Qaeda, that reject these values. As we move forward, efforts to promote ethical values that lie outside the law must be vigorously pursued.

States, organizations and individuals that deliberately flout the most basic humanitarian rules should be universally condemned, de-legitimized, and prosecuted. The creation of a culture of values is thus indispensable. The job cannot be left to legal scholars alone. Nor can it be left to those involved in armed conflicts.

Thank you very much.