
Volume 43 | Issue 1

2010

Human Rights and Humanitarian Law - Conflict or Convergence

Christopher Greenwood Sir

Follow this and additional works at: <https://scholarlycommons.law.case.edu/jil>



Part of the [International Law Commons](#)

Recommended Citation

Christopher Greenwood Sir, *Human Rights and Humanitarian Law - Conflict or Convergence*, 43 Case W. Res. J. Int'l L. 491 (2010)
Available at: <https://scholarlycommons.law.case.edu/jil/vol43/iss1/29>

This Speech is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

HUMAN RIGHTS AND HUMANITARIAN LAW—CONFLICT OR CONVERGENCE

*Sir Christopher Greenwood, CMG, QC**

I. PROCEEDINGS	491
II. INTRODUCTION	493
III. THE ORIGINS OF HUMAN RIGHTS LAW AND HUMANITARIAN LAW	495
IV. THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW	500
V. CONFLICT OR CONVERGENCE?	503
VI. CONCLUSION	508

I. PROCEEDINGS

DEAN RAWSON: I judge that by the quiet that came over the room that we are ready to begin. I'm Robert Rawson the Interim Dean of the Case Western Reserve School of Law and in that capacity, it's my privilege and pleasure to welcome you to what will be a splendid presentation.

Before introducing our speaker, I would like to recognize a man who, in a very real sense, has made this occasion possible and has been, in his own right, an advocate for human rights for some time now. Ten years ago, University trustee Bruce Klatsky, then Chairman and CEO of Phillips Van Heusen Corporation and member of the Board of Human Rights Watch, where he's been on the board for some years now, provided a special endowment to the law school for a human rights lecture series and an annual fellowship for two students with Human Rights Watch.

The Klatsky Seminar in Human Rights has become the centerpiece of our expanding program here at the law school in human rights. That human rights program also includes internships, organizations, and institutions dedicated to human rights across the globe, human rights projects in several countries and research assistance to five international tribunals. Our work for the A.B.A. Task Force on reforming the human rights commission won

* Sir Christopher Greenwood has been a Judge of the International Court of Justice since 2009, following his election by the United Nations General Assembly and Security Council. Prior to his election, Sir Christopher was a professor of international law at the London School of Economics and a Queen's Counsel. The following is a transcript of his Klatsky Seminar in Human Rights Lecture presented at Case Western Reserve University School of Law on April 7, 2010.

the A.B.A. Outstanding Policy Initiative Award in 2005 and about that same year, Professor Scharf and our war crimes research program were nominated by the Prosecutor of the Special Court for Sierra Leone for the Nobel Peace Prize.

Bruce Klatsky has been an inspiration for these initiatives and for, obviously, this session itself. Bruce, I wonder if you wouldn't mind standing so others can recognize, along with me, your contribution? (Applause.)

Past Klatsky lecturers have included Assistant Secretary of State for Human Rights Harold Koh, Pulitzer prize winning author Samantha Power, Prosecutor of the International Tribunal David Crane, Head of the Department of Justice's Office of Special Investigations Eli Rosenbaum, Executive Director of Human Rights Watch Kenneth Roth, the President of the Inter-American Commission on Human Rights Michael Reisman, and International Criminal Tribunal Judge Geoffrey Robertson.

Today, joining this illustrious list of lecturers is today's Klatsky lecturer, Sir Christopher Greenwood, Judge of the International Court of Justice. Also known as the World Court, the International Court of Justice is the United Nations' highest court. It has jurisdiction over cases between countries and over the years has decided crucial cases, including: judgments on the legality of nuclear weapons, responsibility for genocide in Bosnia, and the liability of the United States for mining the harbors of Nicaragua.

Before his appointment, Judge Greenwood was one of the world's foremost scholar practitioners. He was a distinguished professor of International Law at the London School of Economics, and as Queen's Counsel, he argued ten cases before England's highest court, as well as dozens of other cases before the International Court of Justice (ICJ), the European Court of Justice (ECJ), the European Court of Human Rights (ECHR), and the International Criminal Tribunal for the former Yugoslavia (ICTY).

Today, we are indeed privileged to hear from Judge Greenwood whose lecture is entitled "Human Rights and Humanitarian Law: Conflict or Convergence." After Judge Greenwood speaks for about forty minutes, our tradition is to open it up for questions for about twenty minutes and then we will hold a reception immediately after that in the rotunda immediately behind me. Please join me, ladies and gentlemen, in welcoming Judge Christopher Greenwood. (Applause)

JUDGE GREENWOOD: Dean, ladies and gentlemen, first of all, thank you, very much, for those extremely kind words of introduction. It is an honor to be invited to give the Klatsky lecture this year, especially to follow in the footsteps of such a distinguished group of lecturers as you have just listed. It is also a particular pleasure to do so in the presence of the founder of the series, Bruce Klatsky, whose commitment to human rights and to this law school led not only to the foundation of this series of lectures but also to the endowment of a number of student fellowships of Human Rights Watch.

Let me just say two words about those fellowships. The first is that one of the cases that is indelibly etched on my mind from my career before I became a judge concerned General Pinochet, the former President of the Republic of Chile. I appeared for the Government of the Kingdom of Spain in seeking to have him extradited on charges of torture. It was the first case I was asked to do in front of the House of Lords, the forerunner of the modern Supreme Court of the United Kingdom.

I was telephoned by a lawyer acting for the Crown's Prosecution Service and asked whether I would be willing to take this brief in the Supreme Court. It is not an invitation you turn down—it really is the offer you cannot refuse. So I said cheerfully, "Yes, of course" and, reaching for my diary for the following year, asked when the hearing would be? He said, "[T]hat's the problem. It's the day after tomorrow." (Laughter.)

This was a bit of a problem, I have to say. There are a number of things that I remember about that hearing, most of them things that wake me up in the middle of the night with a cold sweat. But one of the pleasant memories I have is of the group of student fellows of Human Rights Watch who, at their own expense, flew to the United Kingdom and worked entirely without any fee or public credit to try to provide those of us on the extradition team with research materials and guidance. So I'd like to take this opportunity to pay tribute to them and also to the value of Human Rights Fellowship at HRW.

My second point is that a lot of the work I did as a barrister was for the British Government. Human Rights Watch was, therefore, often involved on the other side. So let me pay them the advocate's tribute to an adversary—I always did a little bit of extra preparation if I knew that Human Rights Watch were involved on the other side of any case.

II. INTRODUCTION

The topic I want to talk about this evening is the relationship between two different areas of international law: the international law of human rights and international humanitarian law or, if you prefer, the laws of war (the more traditional term for the same body of rules). That is a topical subject but also a highly controversial one.

Here in the United States, it goes to the heart of debates about the war on terror and, in particular, about the detention facility at Guantanamo Bay. To one group, everything that happens in the war on terror and, in particular at Guantanamo, is a matter solely for the laws of war. It fits into the box marked "laws of war" or "humanitarian law" so that human rights law has nothing whatever to do with it. To another group, it is a human rights and law-enforcement issue that has little or nothing to do with the laws of war.

What I shall try to show in this lecture is that neither of those two perspectives gives you the whole truth. For those of you who are interested

in following that particular theme up, I cannot do better than recommend to you the latest issue of the Case Western Reserve Journal of International Law. The editor, Garrett Lynam, was kind enough to give me a copy of that last night. I've only had a chance to browse through it, Garrett, but I can say that it is an exceptionally good collection of materials on the whole Guantanamo debate which will give you a more balanced view on that than I think you could get from any other single publication, and I congratulate you and your team of editors on having put it together.

But it is not just in the United States of America that these arguments about the relationship between human rights and humanitarian law are raging at the moment. In Canada there is a long-running case about the handover by the Canadian forces in the International Stabilization Force in Afghanistan of detainees that they have captured that are required to hand over to the Afghan government.¹

In Europe there have been a number of cases in the European Court of Human Rights; in particular the case of Bankovic about the bombing of a target in Belgrade during the Kosovo conflict in 1999.² And, there have been cases in the English courts about, for example, Mr. Al-Jedda, a dual British and Iraqi national detained by British forces under a detention without trial power for nearly two years,³ a case which is now before the European Court of Human Rights.⁴ Mr. Al-Jedda's case went to the House of Lords which looked, in particular, at the relationship between powers under the laws of war and restrictions under the European Convention on Human Rights.⁵

The two bodies of law have grown up separately. They are often seen as conflicting cultures. To one group, human rights law is simply un-

¹ See *Amnesty International Canada v. Canada (Chief of the Defence Staff)*, [2008] F.C. 401, [2009] F.C.R. 149 (Can.), available at <http://recueil.cmf.gc.ca/eng/2008/2008fca401/2008fca401.html> (regarding alleged abuse by Canadian Forces in Afghanistan of Afghan detainees). See also *Amnesty International Canada v. Canada (Chief of the Defence Staff)*, [2008] FC 336, [2008] 4 F.C.R. 546. See generally, Gov't of Canada, Canadian Forces Release Statistics on Afghanistan Detainees, CANADA'S ENGAGEMENT IN AFGHANISTAN, available at http://www.afghanistan.gc.ca/canada-afghanistan/news-nouvelles/2010/2010_09_22b.aspx?lang=eng (last visited Nov. 20, 2010) (providing general background on the International Security Assistance Force (ISAF) on Canada's official Afghanistan detainee policy).

² See *Banković and Others v. Belgium and Others*, App. No. 52207/99, Eur. Ct. H.R. 333 (2001).

³ See *R (on the application of Al-Jedda) v. Secretary of State for Defence*, [2007] UKHL 58(Eng.), available at <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd071212/jedda.pdf>.

⁴ Press Release, European Court of Human Rights, Grand Chamber Hearing Al-Skeini and Others and Al Jedda v. United Kingdom (Jun. 9, 2010), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=55721/07&sessionid=60340292&skin=hudoc-pr-en>.

⁵ *Supra* note 3, ¶3.

suited to the waging of warfare in any age but, particularly, the one that we have today. To them human rights law is designed for the quite different environment of a normal state in the condition of peace and are therefore hopelessly unsuited to regulating conditions on or near a battlefield. To another group, human rights are the jewel in the crown of modern international law and the laws of war are being invoked by governments as an excuse to do abroad things that they are not allowed to do at home.

That is the debate that I want to look at. Let me put my cards on the table at the start and say that both these bodies of law are, in my view, part of international law as a whole. Neither is a self-contained entity and their keenest proponents do themselves a disservice by pretending that the two bodies of law are mutually exclusive and must always be in conflict. If you are a human rights lawyer - and I hope that all of you have aspirations to be a human rights lawyer—you should be a humanitarian lawyer as well. Similarly, if your subject is the laws of war and, in particular, if you are a military lawyer, you cannot today overlook the dimension of the international law of human rights. It's a matter of being a good lawyer rather than being a human rights lawyer or a humanitarian lawyer.

III. THE ORIGINS OF HUMAN RIGHTS LAW AND HUMANITARIAN LAW

Let me, by way of preface, say a little bit about each of these bodies of law. I will turn my title on its head and start with humanitarian law because that is the older of the two systems. We find references to it going back into classical literature. You find it in the Bible; you find it in the early codes of Hindu law, for example.⁶ You find references to it in the Koran.⁷

I have to say, however, that one needs to take with a pinch of salt the idea that the modern day Geneva Conventions can be traced right back to the Old Testament and other early texts. The book of Deuteronomy, for instance, contains one or two rather good verses about humanitarian principles but it also contains passages, which would not be out of place in a practical guide to ethnic cleansing.⁸ Early concepts of humanitarian law were fairly primitive and often were not applied when you were fighting people outside your own community. The Greek city-states had one standard for prisoners of war from other Greek city-states and another standard, which certainly would not meet today's Human Rights Watch criteria, for people taken prisoner from non-Greek communities. They were not alone in this.

⁶ Thomson Reuters Foundation, *International Humanitarian Law* (Sept. 12, 2009), <http://www.alertnet.org/db/topics/IHL.htm>.

⁷ *Id.*

⁸ Compare, e.g., Deuteronomy 20, 19–20 with Deuteronomy 20, 12–14.

The original purpose of this body of rules was to provide guidance for the military. For example, Francis Lieber's Code, drafted for President Lincoln during the Civil War, was intended as a code of rules for the soldier written by a soldier.⁹ Today, however, their principal purpose is the protection of human values even in the most inhuman environment of warfare. That purpose was brilliantly encapsulated by Sir Hersch Lauterpacht, who later went on to be a Judge at the International Court of Justice, in his preface to the 1935 edition of Oppenheim's *Law of War and Neutrality*, in which he said:

a very considerable part of the laws of war . . . is an attempt to mitigate the unscrupulousness and brutality of force by such considerations of humanity, morality, and fairness as are possible and practicable in a relationship in which the triumph of physical violence is the supreme object and virtue.¹⁰

He went on:

The well-being of an individual is the ultimate object of all law, and whenever there is a chance of alleviating suffering by means of formulating and adopting legal rules, the law ought not to abdicate its function in deference to objections of apparent cogency and persuasiveness.¹¹

Those words, written four years before the outbreak of World War II, are as important and cogent today as they were then. The Geneva conventions of 1949,¹² to which almost every state in the world is now party, bears modern

⁹ General Orders No. 100, Instructions for the Government of the Armies of the United States in the Field ("The Lieber Code") (1863), available at http://avalon.law.yale.edu/19th_century/lieber.asp. See also Jordan Paust, *Dr. Francis Lieber and the Lieber Code*, 95 AM. SOC'Y OF INT'L L. PROC 112 (2001). Lieber had served in the Prussian Army at the Battle of Waterloo in 1815.

¹⁰ H. Lauterpacht, *Preface to the Fifth Edition of INTERNATIONAL LAW; A TREATISE BY L. OPPENHEIM* (H. Lauterpacht ed., 5th ed. 1935). Sir Hersch Lauterpacht's vast contribution to international humanitarian law and the international law of human rights is described in a newly published biography by his son, Sir Elihu Lauterpacht to whom I am indebted for this reference; see ELIHU LAUTERPACHT, *THE LIFE OF SIR HERSCH LAUTERPACHT* (Cambridge Univ. Press 2010).

¹¹ *Id.*

¹² Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. The four Conventions have been supplemented by two Protocols—Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Additional Protocol No. I, June 8, 1977, 1125 U.N.T.S. 3) and Protocol Additional to the Geneva Con-

testimony to the principles of what Geoffrey Best called, “Humanity in Warfare.”¹³

The international law of human rights is of more recent origin. Although there are traces of that law earlier in the twentieth century, it is really only since World War II and the terrible events of the Holocaust that a body of law has emerged which went beyond how one belligerent should treat its adversary and the citizens of that adversary, and instead, looked at how states should treat their own people;¹⁴ something which previously had been regarded as a taboo in international law.¹⁵ International human rights law finds its first general formulation in the Universal Declaration of Human Rights, 1948, in the elaboration of which Eleanor Roosevelt played such a part, and then later in the International Covenant of Civil and Political Rights, 1966, and the European Convention on Human Rights, 1950, to which, nowadays, nearly a quarter of the world is party.¹⁶

These human rights treaties represent a fundamental rejection of the notion that the way a state treats its own people, however bestial that treatment might be, is no business of anybody else and no business of international law.¹⁷ But they also go beyond that. A very telling tribute to the importance of human rights was given many years ago by Professor Colonel Gerald Draper, an officer in the Irish Guards, who, at the end of World War II was seconded to what later became the Army legal service in the British Army, to act as a prosecutor in some of the war crimes trials.¹⁸ Whether he

ventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (Additional Protocol No. II, June 8, 1977, 1125 U.N.T.S. 609). At the time of writing 194 States were parties to the Geneva Conventions. There were 169 parties to Additional Protocol No. I and 165 to Additional Protocol II; INTERNATIONAL COMMITTEE OF THE RED CROSS, ANNUAL REPORT 2009 487. The United States is party to Additional Protocol II but not to Additional Protocol I.

¹³ See GEOFFREY BEST, *HUMANITY IN WARFARE* (Columbia Univ. Press 1983); see also GEOFFREY BEST, *WAR AND LAW SINCE 1945* (Oxford Univ. Press 1997).

¹⁴ See, e.g., Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/index.shtml>.

¹⁵ *Id.*

¹⁶ G.A. Res. A/810, ¶ 217, U.N. Doc. A/RES/A/810 (Sept. 21, 1948); G.A. Res. A/6316, ¶ 2200, U.N. Doc. A/RES/A/6316 (Sept. 20, 1966); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

¹⁷ See Michael A. Meyer & Hilaire McCoubrey, *Prefatory Note* to G.I.A.D. DRAPER, *The Relationship Between the Human Rights Regime and the Law of Armed Conflict*, 1 ISRAEL YEARBOOK ON HUM. RTS. 191, 191–197 (1971) reprinted in REFLECTIONS ON LAW AND ARMED CONFLICTS: THE SELECTED WORKS ON THE LAWS OF WAR BY THE LATE PROFESSOR COLONEL G.I.A.D. DRAPER, OBE 123 (Michael A. Meyer & Hilaire McCoubrey eds., 1998) (“One of the primary foci of human rights law lies in the control upon the conduct of a State towards its own citizens.”).

¹⁸ See Brevet Major The Count de Salis, *Biographical Note* to REFLECTIONS ON LAW AND ARMED CONFLICTS: THE SELECTED WORKS ON THE LAWS OF WAR BY THE LATE PROFESSOR

ever met your own, Henry King, I do not know. Although Gerald Draper was not at the Nuremberg trial, he did prosecute in several other war crimes trials, including that of the Commandant of Belsen concentration camp.¹⁹ Draper paid a terrible price for his involvement, because it was while working in Belsen that he developed scoliosis, a terrible condition that left him in very poor health for the rest of his adult life.²⁰

In 1971 Draper wrote:

Starting with the Universal Declaration of Human Rights in 1948, we have witnessed an escalating movement for the establishment in international law, of a régime designed to assure to every human being defined standards of good treatment at the hands of the state upon which he depends or where he is located, and not merely the grosser forms of maltreatment. In other words, the human rights regime has gone over to the offensive.²¹

So what I suggest to you is that the two bodies of law, although they have grown up in quite different environments, have much in common. The humanitarian purpose that they both serve to promote is illustrated in one of the founding texts of the laws of war, the famous Martens clause introduced into the first general treaty on the laws of war, adopted by the 1899 Hague Peace Conference.²² Martens was a jurist in the service of the Russian government of the day.²³ And he was concerned that, because the treaty that had been agreed only covered some matters, lawyers would rely upon the maxim “*expressio unius est exclusio alterius*” to argue that states had a free hand

COLONEL G.I.A.D. DRAPER, OBE *supra* note 17, at xviii (listing Professor Colonel G.I.A.D. Draper's Curriculum Vitae which includes his experience as an officer in the Irish Guards before becoming a prosecutor for war crimes trials).

¹⁹ See Brevet Major The Count de Salis, *Biographical Note* to REFLECTIONS ON LAW AND ARMED CONFLICTS: THE SELECTED WORKS ON THE LAWS OF WAR BY THE LATE PROFESSOR COLONEL G.I.A.D. DRAPER, OBE *supra* note 17, at xxi (discussing Professor Colonel Draper's experience as a war crimes prosecutor at Bergen-Belsen).

²⁰ See Brevet Major The Count de Salis, *Biographical Note* to REFLECTIONS ON LAW AND ARMED CONFLICTS: THE SELECTED WORKS ON THE LAWS OF WAR BY THE LATE PROFESSOR COLONEL G.I.A.D. DRAPER, OBE *supra* note 17, at xxii (discussing Professor Colonel Draper's physical disability).

²¹ See GERALD DRAPER, REFLECTIONS ON LAW AND ARMED CONFLICTS 128 (Michael A. Meyer & Hilaire McCoubrey eds., 1998).

²² See Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. No. 403, available at <http://www.icrc.org/ihl.nsf/WebPrint/150-FULL?OpenDocument> (“[P]opulations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience . . .”).

²³ See M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECTS, AND CONTENTS 386 n.59 (3d ed. 2008) (“The Martens Clause is named after Fyodor Martens, the Russian diplomat and jurist who drafted it.”).

in respect of matters not regulated by the Convention.²⁴ So, he inserted in the preamble to the treaty the following passage:

Until a more complete code of the laws of war has been issued the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established among civilized nations, from the laws of humanity, and the requirements of the public conscience.²⁵

Quite what that meant is open to very considerable argument but it is an important marker that sets the scene for the link between humanitarian law and human rights law.

In addition, both systems apply directly to individuals. In that sense, they are very different from international law as a whole. For your generation it may be much easier to imagine that international law applies to the individual, but for the generations that went before, this was by no means axiomatic. I was brought up with a legal system that assumed that international law applied between states and only between states. What applied between states and individuals was another matter. But humanitarian law has always been an important exception. It does confer rights on individuals. Article 7 of the Prisoner of War Convention of 1949, for example, provides that prisoners of war may in no circumstances renounce the rights secured to *them* by the present convention.²⁶ And, there are similar provisions in the other Geneva Conventions.²⁷ It also imposes obligations directly on individuals. The individual who tortures a prisoner of war or who murders a civilian is guilty, not only of a breach of domestic law, but of a breach of international law, of international humanitarian law.²⁸

Human rights law deals less in the obligations imposed on individuals but it certainly deals with the rights conferred upon them. Moreover, it provides the means by which those rights can be enforced by the individu-

²⁴ See Theodor Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, 94 AM. J. INT'L L. 78, 79 (2000).

²⁵ 1899 Hague Convention (II) Respecting the Laws and Customs of War on Land with Annex of Regulations, July 29, 1899, 32 Stat. 1803, 1 Bevans 247.

²⁶ Geneva Convention relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135.

²⁷ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31.

²⁸ See Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; See also Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516.

al.²⁹ Talk to any member of any British government over the last thirty years about the enforcement of human rights and he or she will know exactly what you are talking about, because the European Convention on Human Rights and the and the judgments of the European Court of Human Rights did much to transform the civil liberties position in the United Kingdom.³⁰

IV. THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW

What, then, is the relationship between the international law of human rights and international humanitarian law? As I mentioned at the start of this lecture, there are two extreme theories which are advanced in answer to that question. I used to be a professor and students here will know that whenever a professor tells you that there are two extreme theories you know that they are both wrong and within a few minutes time he's saving, for you, the real answer, which is his own middle course. (Laughter.) It's perhaps best if I'm open and honest and say that that is what I'm going to try and do.

The first theory, in the red corner shall we say, is the "ne'er the twain shall meet" theory. Human rights are for peacetime; humanitarian law applies in war. It's a very neat theory, a "bright line" theory but it has three fatal flaws. First, nobody knows when war begins and ends any longer. States no longer make formal declarations of war and treaties of peace are seldom concluded to mark the end of a conflict.³¹ It is impossible to make that clear-cut divide.

Secondly, the theory does not reflect what the relevant treaties actually say. Take the European Convention on Human Rights as an example. Article 15 of that Convention says:

(1) In time of war or other public emergency threatening the life of the nation any high contracting party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

²⁹ See Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90; European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 16.

³⁰ See STEVE FOSTER, HUMAN RIGHTS AND CIVIL LIBERTIES (2008).

³¹ Christopher Greenwood, *The Concept of War in Modern International Law*, 36 INT'L & COMP. L. Q. 283 (1987) reprinted in CHRISTOPHER GREENWOOD, ESSAYS ON WAR IN INTERNATIONAL LAW (Cameron May 2006).

(2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.³²

Since this provision does not automatically exclude the operation of the Convention in times of war but merely permits a state to derogate from *some* of its provisions, it is plainly incompatible with the theory that human rights treaties necessarily do not apply in time of war.

Thirdly, the theory is contrary to what international courts have said when they dealt with this issue. The International Court of Justice in the *Nuclear Weapons* case, to which the Dean referred in his opening remarks, stated that “the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant, whereby certain provisions may be derogated from in a time of national emergency”.³³ In principle, therefore, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The International Court has said the same in more detail in both its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*³⁴ and its judgment in the case between the Democratic Republic of Congo and Uganda in 2005.³⁵ The European Court of Human Rights and the Inter-American Commission of Human Rights have come to the same conclusion as have the English courts in a number of cases that they have faced.³⁶ The “red corner” theory must therefore be rejected.

In the “blue corner”, we have the rival theory that human rights trump everything. According to this theory, international human rights law is so important that nothing can be allowed to depart from it. Accordingly, it governs everything that states do in all circumstances, including in warfare, and makes no allowance for the prescriptions of international humanitarian law or the practical exigencies of warfare. Once again, there are three reasons, which to my mind are compelling, why this theory must also be rejected.

³² See European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 16. Article 2 protects the right to life, Article 3 prohibits torture, inhuman and degrading treatment and punishment, Article 4(1) prohibits slavery and Article 7 precludes punishment for conduct not prohibited by law at the time it occurred.

³³ Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 240 (July 8).

³⁴ 2004 I.C.J. 136, 177–178 (July 9).

³⁵ Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶¶ 242–243 (Dec. 19).

³⁶ Rule of Law in Armed Conflicts Project, *Interaction Between Humanitarian Law and Human Rights in Armed Conflicts*, GENEVA ACADEMY OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS, http://www.adh-geneva.ch/RULAC/interaction_between_humanitarian_law_and_human_rights_in_armed_conflicts.php (last visited Oct. 20, 2010).

First, there are serious practical problems. An approach to human rights, which takes no account of the exigencies of warfare, would go much further than the restrictions on military action imposed by humanitarian law. In reality, such an approach would lead to the conclusion that waging war is inevitably incompatible with the human rights obligations of States and is consequently unlawful. At first sight, such a conclusion might not be so terrible but the briefest pause for reflection shows that it cannot be right. To hold that a State that is the victim of aggression cannot take up arms against the invader without violating its own human rights obligations would be completely unacceptable. Despite the fact that its preamble speaks of a determination to “save succeeding generations from the scourge of war” and its provisions contain the most extensive prohibition on the use of force ever seen in international law, the Charter of the United Nations does not outlaw all recourse to force. On the contrary, Article 51 states unequivocally that “nothing in the present Charter shall impair the inherent right of individual or collective self-defence,” while Articles 39-42 permit recourse to force under the authority of the Security Council.

Secondly, the indications—in the texts and the negotiating histories of human rights treaties—is that states had no intention of abolishing by the back door all possibility of taking lawful military action. Many human rights treaties contain provisions (such as Article 15 of the European Convention, which I have just quoted) that permit derogation from some or all of their provisions in time of war. Even where derogation is not permitted (as is the case, for instance, with the right to life under Article 6 of the Covenant), the *travaux préparatoires*, show that the intention was not to override the provisions of international humanitarian law by outlawing acts which are compatible with that law.

Thirdly, the “blue corner” approach is also incompatible with the way in which international courts have dealt with the application of human rights treaties in war. The jurisprudence of the International Court of Justice, to which I referred earlier, makes clear that, while human rights treaties continue to apply in warfare, they do so in a manner that takes full account of the relevant provisions of international humanitarian law. For example, in its advisory opinion on *Nuclear Weapons*, the International Court of Justice rejected an argument that any use of a nuclear weapon would necessarily be unlawful on the grounds that it would be contrary to Article 6 of the Covenant, which prohibits the arbitrary deprivation of life. While recognizing, as we have seen, the continued applicability of Article 6 in warfare, the Court made clear that that provision had to be applied in the light of international humanitarian law. It is also instructive to consider the judgment of the Eu-

European Court of Human Rights in *Bankovic v. Belgium*.³⁷ *Bankovic* concerned an attack by a NATO aircraft on a television studio in Belgrade during the Kosovo conflict in 1999. The attack killed sixteen people.³⁸ The relatives of some of those sixteen brought a complaint in the European Court of Human Rights against all of the European NATO members, that is the whole of NATO, except the United States and Canada, claiming that there had been a violation of the right to life and a violation of the right to freedom of expression.³⁹

Article 1 of the European Convention on Human Rights provides that “the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.” Accordingly, unless the deceased had been within the jurisdiction of one of the respondent States at the time of their death, the Convention was not applicable to them.⁴⁰ The Federal Republic of Yugoslavia, as it was then known, of which Belgrade was the capital, was not, at the time, a party to the European Convention, so the applicability of the Convention turned on whether the NATO States could be said to have brought the deceased within their jurisdiction by carrying out air attacks on Belgrade. The Grand Chamber of the European Court of Human Rights, in a unanimous judgment of its seventeen judges, concluded that the deceased were not within the jurisdiction of any of the respondent States at the time of their death. The Convention was not, therefore, applicable to them because they did not meet the threshold requirement for the application of the Convention rights.

So, the result is that neither of the two extreme theories can really hold water. International humanitarian law and international human rights law cannot be mutually exclusive. Nor can it be said that one automatically trumps the other. The reality is that they co-exist. But is that coexistence a helpful one or one of conflict? Is it a case of convergence of two bodies of law or of a conflict between them?

V. CONFLICT OR CONVERGENCE?

Neither the relevant treaties nor the decisions of international courts give a clear answer to that question. But I think we can discern certain threads of what the answer could be and, in my view, what it should be.

The starting point is that neither humanitarian law nor human rights law is, to borrow John Donne’s phrase, “an island entire of itself” but, ra-

³⁷ *Banković v. Belgium*, (Admissibility), App. No. 52207/99, Eur. Ct. H.R. (2001), *available at* 41 I.L.M. 517.

³⁸ *Id.* at para. 11.

³⁹ *Id.* at para. 28.

⁴⁰ Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 16, art. 1.

ther, each is “a piece of the continent, a part of the main.”⁴¹ Both are parts of the legal system that is international law, and that system is not divided up into self-contained boxes which have no bearing upon one another. That essential feature of international law was explicitly recognized in *Bankovic* where the Grand Chamber held that the European Convention on Human Rights had to be interpreted in the light of international law as a whole.⁴² It is also the underlying principle behind the Martens Clause.

There is, however, a more general point, and as an ex-professor I cannot resist making it to the students here. International law has to be looked at as a whole. If you imagine that you can make a difference, or even make a living, out of being a specialist in the law of the sea or the World Trade Organization or humanitarian law, you're wrong. You have to come to terms with the whole of the international legal structure, just like you cannot be successful U.S. lawyer if you only know the law of antitrust or the rules of the Securities and Exchange Commission. Indeed, one would question whether you could be a successful human being. (Laughter.) But that is a debate for another day.

So it follows that there has to be a proper appreciation of the scope of each of the two bodies of law. *Bankovic*, in my view, was clearly right in saying that the population of an enemy state in an armed conflict does not automatically come within the jurisdiction of the rival belligerent simply because it is affected (sometimes in the most terrible way) by the acts of that belligerent. But that is not to say that certain individuals in the population may not fall within the jurisdiction of the rival belligerent. A prisoner, for example, or even, perhaps, some or all of the population of territory occupied by that belligerent may do so and thus attract the operation of the relevant human rights treaty, as well as the protection of international humanitarian law.

Another key point is that each body of rules contains a measure of reference to the other. Sometimes, the reference is explicit. Take Article 84 of the Prisoners of War Convention, which provides that:

In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality, as generally recognized . . .⁴³

Where do you look for the criteria of what is an independent and impartial court and what constitutes “generally recognized” guarantees due process?

⁴¹ JOHN DONNE, DEVOTIONS UPON EMERGENT OCCASIONS 415 (1624).

⁴² *Banković v. Belgium*, 12 Eur. Ct. H.R. 335, 345 (2001) (regarding 1999 NATO aerial bombing of a radio and television station in Belgrade, Serbia).

⁴³ Geneva Convention Relative to the Treatment of Prisoners of War art. 84(2), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

Surely, human rights law is going to give you more of an indication of that than any other source. In the application of a humanitarian law provision like Article 84, there is an inevitable reference to international human rights treaties and the case-law interpreting them since these offer the best and most detailed guidance as to what constitutes the essential guarantees generally recognized by the international community.

Even where there is no express cross-reference, there may be an implicit renvoi by one body of law to the other. Take Article 6 of the International Covenant on Civil and Political Rights, the provision which protects the right to life and to which the International Court of Justice referred in the *Nuclear Weapons* case. Article 6 prohibits not the deprivation of life, *per se*, but the *arbitrary* deprivation of life.⁴⁴ But what is meant by “arbitrary” taking of life in the context of warfare? In its advisory opinion on *Nuclear Weapons*, the International Court of Justice thought the answer to that was clear. The Court said:

In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus, whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.⁴⁵

In other words, the taking of life in warfare is arbitrary, for the purposes of Article 6, only if it is contrary to the specialist body of rules devised in humanitarian law to cover the taking of life. The killing of a helpless wounded person or of a prisoner, for example, or the deliberate killing of a civilian, all of which are prohibited by international humanitarian law, are, for that reason, also contrary to Article 6 of the Covenant.⁴⁶

This cross-reference between international humanitarian law and international human rights law is particularly important where, as is so often the case today, the precise character of the conflict, whether it is international or internal, is uncertain.

I do not want to finish with the impression that this is all a bed of roses and that there are not any difficult cases for you to go out and argue in the future. There are a great many. Let me just conclude with a couple of specific instances of difficulties that may arise.

⁴⁴ International Covenant on Civil and Political Rights art. 6, Dec. 19, 1976, 999 U.N.T.S. 171, 176 (“No one shall be arbitrarily deprived of his life.”).

⁴⁵ Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 240 (July 8).

⁴⁶ *Id.*

First a State becomes involved in a war or armed conflict with another State and, in the course of the fighting, takes prisoner a number of enemy soldiers. Those soldiers are prisoners of war and are entitled to the protection of the Geneva Prisoners of War Convention. But what is their position under international human rights law? Prisoners of war are detained without trial, not because of any wrongdoing on their part but solely to prevent their further participation in hostilities. Yet, detention without trial is generally treated as incompatible with the principal human rights treaties. Is it, therefore, lawful to take prisoners of war at all today? Under the International Covenant on Civil and Political Rights, I think the answer is fairly straightforward. Just as Article 6 prohibits only the *arbitrary* deprivation of life, Article 9 prohibits detention only if it is arbitrary.⁴⁷ The reasoning of the International Court of Justice regarding Article 6 would seem to apply here also; the detention of a person whom the Third Geneva Convention permits to be detained as a prisoner of war would not, in itself, constitute a violation of Article 9, because compliance with the Third Geneva Convention would prevent that detention from being considered arbitrary.

The answer might not be so straightforward under other human rights treaties. Article 5(1) of the European Convention on Human Rights, for example, provides that no-one shall be deprived of his liberty except for one of the reasons enumerated in the provision, none of which would cover the case of a prisoner of war.⁴⁸ Of course, a European state engaged in an armed conflict might be able to derogate from its obligations under Article 5(1) in accordance with the provisions of Article 15 (to which I have already referred) but Article 15 has generally been restrictively construed and has seldom been employed. Must we, therefore, conclude that the very act of detaining prisoners of war will entail a violation of the European Convention, even though the detention is compatible with both the Third Geneva Convention and the International Covenant. That question has yet to come before the European Court of Human Rights. Nevertheless, the European Commission of Human Rights, some thirty-five years ago, in a little noticed ruling about Cyprus, held that, although in principle prisoners of war had the benefit of the Convention, the fact that their treatment was regulated by the Third Geneva Convention was, itself, sufficient protection in these circumstances.⁴⁹

Secondly, problems can arise regarding the relationship between human rights law and humanitarian law in occupied territory. There is, of

⁴⁷ International Covenant on Civil and Political Rights, art. 9, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

⁴⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 16, art. 6.

⁴⁹ *Cyprus v. Turkey*, 4 E.H.R.R. 482 ¶ 313 (European Comm Human Rights 1976).

course, a detailed body of international humanitarian law applicable in occupied territory⁵⁰ but, until recently, it had generally been assumed that this was the only body of law with which an occupying power had to comply. The United States Supreme Court, for example, decided, at the end of World War II, that the United States Constitution did not apply in occupied territory.⁵¹ More recently, however, the International Court of Justice has treated the International Covenant on Civil and Political Rights as applicable, alongside the provisions of international humanitarian law, to the conduct of Israel in the occupied territory in the Middle East.⁵² There are, however, a number of potential problems in holding that some human rights treaties are applicable in a case of belligerent occupation. The European Convention on Human Rights, for example, imposes a number of positive obligations upon States, which may require them, for example, to introduce substantial changes into the law in force in a territory where they are required to apply the Convention.⁵³ At the same time, international humanitarian law requires a belligerent occupant to respect, unless absolutely prevented, the existing law in force in the occupied territory.⁵⁴ Should a European State in occupation of territory outside Europe be required to alter local law and customs so as to enforce the norms of the European Convention when its presence in the territory is temporary? If it did so, would it be acting in breach of its obligations under humanitarian law? These questions remain to be resolved.

Lastly, modern coalition military operations can cause real difficulties in this respect, since the States concerned may well be subject to very different human rights obligations. Suppose that a person is detained during operations conducted by a multinational force. Detention is ordered by a British military commander but affected by United States forces and he is held in a detention centre run by a Norwegian officer who is replaced after a few months by a Ghanaian, while the prison guards are a mixture of Canadian soldiers and police officers from Brazil. While all the States concerned

⁵⁰ See, e.g., EYAL BENVENISTÍ, *THE INTERNATIONAL LAW OF OCCUPATION* (Princeton Univ. Press 2004).

⁵¹ See *Johnson v. Eisentrager*, 339 U.S. 763, 781 (1950).

⁵² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (July 9).

⁵³ See JEAN-FRANCOIS AKANDJI-KOMBE, *POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A GUIDE TO THE IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 15* (Council of Europe 2007), available at http://www.echr.coe.int/echr/en/50/50_hrhandbooks.htm (discussing “positive obligations and the horizontal effect of the Convention”).

⁵⁴ See 1899 Hague Convention (II) Respecting the Laws and Customs of War on Land with Annex of Regulations art. 43, July 29, 1899, 32 Stat. 1803, 1 Bevans 247, available at <http://www.icrc.org/ihl.nsf/FULL/195>.

are party to the Geneva Conventions of 1949, their human rights obligations will be very different.

VI. CONCLUSION

Is there, therefore, an optimistic conclusion on which we can finish? I believe that there is. I think the challenge today is a simple but demanding one. It is to uphold the humane values, which are what humanitarian law and human rights law are all about, while, at the same time, still enabling states to protect themselves and their people effectively. It is not the purpose of human rights law or of humanitarian law to outlaw war. Still less is it their purpose to prevent states from exercising their duty to protect their own people. But the pursuit of security has to be reconciled with human values because those values are an essential part of what it is that states are seeking to protect.

Let me give the last word to Professor Colonel Gerald Draper. "The international community has need," he said, "of an extended regime of human rights and of an improved law of war in their respective and proper spheres. Confusion of the two would have resulted in harm to both. The ultimate notion of humanity was served by a certain precision of theory combined with a modest measure of pragmatism."⁵⁵ (Applause.)

I shall be happy to take any questions you might like to ask, both about what I have said and about anything you feel I've left out and should have said. The only caveat I have to give is this: I am now a serving judge and therefore, I have a duty to behave myself, which I didn't have to when I was a professor. So if you are going to ask me about something that is a case coming up before the Court, I'm afraid I won't be able to answer it. But otherwise, I'll try to answer you as candidly as I can.

Who would like to go first? Nobody at all? (Laughter.)

MR. ELFOURTEIA: I have a question.

JUDGE GREENWOOD: There are some roving microphones. Could I ask you to, please, say who you are? This is not because I am going to follow the John F. Kennedy principle of forgive your enemies but never forget their names. (Laughter.) It is because I like to know who I am talking to.

MR. ELFOURTEIA: My name is Ali, I am an international student here at Case Western and first, I would like to thank you, very much, for your lecture.

I have a question. What standards does the ICJ use to define human rights? We all hear every day, human rights, human rights. What standards

⁵⁵ GERALD IRVING A. DARE DRAPER, REFLECTIONS ON LAW AND ARMED CONFLICTS: THE SELECTED WORKS ON THE LAWS OF WAR BY THE LATE PROFESSOR COLONEL G.I.A.D. DRAPER, OBE 150 (Hilaire McCoubrey & Michael A. Meyer eds., 1998).

does the ICJ use to define this human rights? I can give you cases where there are arguments about the definition of the human rights. There are some that say that they are protecting our rights. The other sides say that there is impingement to the human rights. So, my main point is what standards is the ICJ using to define human rights? Thank you.

JUDGE GREENWOOD: Thank you. I think that is a very important question, what standards are used to determine what is the content of human rights because there is a tendency to generalize about it, which is unhelpful.

First of all, let me just say a word about the Court and how it works. We hear two types of cases. We cannot hear cases brought by individuals. We have a large number of individuals who write in each week wanting to bring cases. I went into the office the other day and the receptionist was desperately trying to explain to somebody on the telephone that she could not put him through to the President to talk about his divorce. (Laughter.) This is not what we do.

The two types of cases we hear are cases brought by one state against another, like the case brought by Bosnia against Serbia on the genocide convention.⁵⁶ And we give advisory opinions at the request of the General Assembly or other U.N. bodies.⁵⁷ The opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* was an Advisory Opinion given at the request of the General Assembly.⁵⁸ And the answer to your question will vary slightly, depending on which type of case we're talking about.

If it is a case between states, the Court can only apply international law as it applies between those two countries and within the limits of the jurisdiction those two countries have accepted.⁵⁹ Now that's critical because it means, for example, that in the Bosnia-Serbia case, the only basis on which the Court would hear that case was the Genocide Convention. So when it applied standards of human rights there, it was applying, exclusively, the standards in that treaty. It could not apply the Geneva Conventions, the International Covenant on Civil and Political Rights, or the Convention Against Torture because that was not what the jurisdictional title in the case they gave the court authority to do.

⁵⁶ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 1996 I.C.J. 595 (July 11), available at <http://www.icj-cij.org/docket/index.php?sum=479&code=bhy&p1=3&p2=3&case=91&k=f4&p3=5>.

⁵⁷ NAGENDRA SIGNH, THE ROLE AND RECORD OF THE INTERNATIONAL COURT OF JUSTICE 397-98 (1989).

⁵⁸ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 28 (July 9).

⁵⁹ Statute of the International Court of Justice art. 36, June 26, 1945, 59 Stat. 1055, 3 Bevans 1153.

If, on the other hand, is the Court is giving an Advisory Opinion it is not limited in that way and it can look at any relevant and appropriate law. But the standard it will apply then consists of the human rights defined in international agreements and most of those agreements are, either global ones, which, virtually, all states are parties to, like the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, or the Convention Against Torture. Or, there are regional treaties that apply only to the states within one particular region like the European Convention or the Inter-American Convention.

In some cases the Court may also be able to apply the customary law of human rights to the extent that some rights have moved from the treaties into the general, unwritten, customary law. A good example would be the prohibition on torture. That, I think, is now a customary rule or principal of international law, which binds all states.

I think, though it also has to be borne in mind that human rights come in many different shapes and sizes. There are, I think, certain core rights like the right not to be subjected to torture, which are much more firmly established at a global level than some other rights.

So, I hope that gives you a sufficient answer. The court does not engage in some kind of sociological exercise about what rights we might like to see. Our job is to apply the existing international law, treaty based or customary law, within the limits of the jurisdiction we have in any given case.

JUDGE GREENWOOD: Sir.

AUDIENCE 1: You said, at the end, you introduced the notion of war protecting people but if war, in fact, cannot protect people, but only perpetuate an unending cycle of violence and if only intelligence and law enforcement can protect people, then aren't we stuck with the viewpoint that human rights do, in fact, trump all?

JUDGE GREENWOOD: Yes, I see your point, but I think the critical thing to keep in mind is that you should not stretch a particular body of law beyond what it is capable of dealing with.

There are other rules of international law, particularly those based around the United Nations Charter, and in particular, Article 2 paragraph 4 of the Charter, which deals with when it is lawful for one state to resort to force against another. If you try and stretch the law of human rights to prohibit warfare by some kind of indirect means, it will not work, in my opinion. And what you will do is you will, fatefully, undermine the whole notion of respect for human rights. Stretching a law beyond its purpose and beyond its reasonable affect does, I think, no good to anyone.

Other questions? Yes. Down here.

PATRICK: Thank you, Judge Greenwood. My name is Patrick. I'm a recent alumnus of Case Western. You addressed the enforcement of human rights law before the European Court on Human Rights and liability for

human rights law violations with regard to *Bankovic*. My question is do you think that when it comes enforcement and liability for human rights law violations that that should include a duty to prosecute those violations? Because my understanding is that, typically, it's looking backwards and accounting, in a monetary sense, when it comes to liability and I know this is an ongoing debate with respect to the European Convention and the ICCPR and, I do want to stress, that I'm not asking you to pass judgment on anything that's going on, recently, in the United States. I am really interested in more the meta-debate that goes on with respect to the duty to prosecute.

JUDGE GREENWOOD: Yes. Certainly. The duty to prosecute is explicit in some conventions. The Geneva Conventions, for example contain a compulsory, mandatory universal jurisdiction in respect of grave breaches.⁶⁰ The Convention against Torture contains an extremely elaborate set of provisions which amount to universal jurisdiction in substance in cases where somebody is accused on firm evidence of committing the offense of torture as it's defined in that convention.⁶¹

General human rights treaties don't normally go into that level of particularity. But the European Court of Human Rights in interpreting the key provisions in the European Convention, particularly, the right to life and the right not to be subjected to torture or inhuman and degrading treatment have read those as laying down not merely negative obligations—not to kill or torture - but also positive obligations to a state to investigate and to take serious remedial action.⁶² Now that may take the form of taking sensible action to try and protect somebody who is under threat. It makes it forward-looking in that sense. Or it may take the form of imposing an obligation to prosecute or, at least, to conduct some kind of procedure that is retrospective, that seeks to put right an injustice that has happened in the recent past.

Now whether that same line is going to be followed in other human rights regimes, such as under the International Covenant or under the Inter-American Convention, I'm afraid I'm simply not qualified to say.

I'm sorry, I had my back to this side of the room. Is there anybody over here?

MR. SCHARF: Last question.

JUDGE GREENWOOD: I'm sorry.

MR. SCHARF: One last question.

⁶⁰ Roger O'Keefe, *The Grave Breaches Regime and Universal Jurisdiction*, 7 J. INT'L CRIM. JUST. 811, 811 (2009).

⁶¹ See Amnesty Int'l, *Universal Jurisdiction: the Duty of States to Enact and Implement Legislation 3*, AI Index No. IOR 53/012/2001 (2001), available at <http://www.amnesty.org/en/library/asset/IOR53/012/2001/en/ab942919-d8ef-11dd-ad8c-f3d4445c118e/ior530122001en.pdf>.

⁶² See 7 JEAN-FRANÇOIS AKANDJI-KOMBE, HUMAN RIGHTS HANDBOOKS, POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2007).

JUDGE GREENWOOD: One last question. Please.

AUDIENCE 2: I would like to just throw out a hypothetical to get your opinion on it. Do you believe that either the responsibility to protect doctrine, or the right to self-defense would allow a country to use its military to bring humanitarian aid to a geographic neighbor that had denied international aid, assuming the Security Council is seized on the matter but has found it to be a threat to international peace?

JUDGE GREENWOOD: I always worried when I was in practice when somebody said they wanted to ask me a hypothetical question. (Laughter.) You just made it clear to me that now I'm a judge, it's an even a bigger threat than it was when I was a practitioner.

I think, if you don't mind, I'd better not answer that. That's a little too close to a concrete scenario that could easily have been brought before the court. So, I'll "duck it" if I may. (Laughter.) The only thing I will say, which, perhaps, may be of help, is that I think there is a difference here between the law of self-defense and any concept of right to protect or humanitarian intervention, if that exists because self-defense can only ever cover the defense of your own state or the defense of another state which has requested your assistance. It cannot extend to the protection of a foreign community against their own government.⁶³ For that you would have to find a legal justification elsewhere.

The Security Council has certainly given that legal justification in mandates for assistance in a number of cases since the early 1990s.⁶⁴ Whether there is justification that exists in the absence of a Security Council mandate—well, go on reading the reports of the International Court of Justice and you may have the opportunity to answer your question.

DEAN RAWSON: Judge Greenwood, someone who can, so precisely, time a lecture as you just did may have less need of this. (Laughter.) We present you this clock as a token to remember us and this occasion. Thank you, very much. (Applause.)

JUDGE GREENWOOD: That's very kind of you.

DEAN RAWSON: As I indicated, reception starts immediately right behind.
(Lecture concluded.)

⁶³ Miriam Sapiro, *Iraq: The Shifting Sands of Preemptive Self-Defense*, 97 AM. J. INT'L L. 599, 600–604 (2003) (explaining how Article 2(4) of the U.N. Charter explicitly requires that countries "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state").

⁶⁴ Ruth Wedgwood, *Unilateral Action in the UN System*, 11 EUR. J. INT'L L. 359, 357–359 (2000) (presenting military interventions in Rwanda, Liberia, Kosovo, and Iraq that have received Security Council authorization since 1990).