



**UNITED NATIONS
OFFICE OF LEGAL AFFAIRS**

**36th Annual Seminar on International Humanitarian Law for Legal Advisers
and other Diplomats Accredited to the United Nations jointly organized by the
International Committee of the Red Cross and**

New York University School of Law

Statement by Mr. Miguel de Serpa Soares

Under-Secretary-General for Legal Affairs
United Nations Legal Counsel

9.45 a.m., 20 March 2019

**Arthur T. Vanderbilt Hall
40 Washington Square South**

Judge Meron,

Mr. Mardini,

Ladies and Gentlemen,

[Opening Remarks]

It is a great honor for me to be able to address this seminar once again, and I thank the NYU Law School and the ICRC for inviting me to this important gathering on international humanitarian law.

I am very grateful to the NYU Law School and the ICRC for regularly inviting me to this seminar as it provides a unique opportunity for me, as United Nations Legal



Counsel, to engage with diplomats accredited to the United Nations on important issues concerning IHL.

As you can see in the programme, this year's theme relates to 70th anniversary of the Geneva Conventions of 1949.

In line with this theme, in today's address, I would like to discuss the important role which the United Nations has played in ensuring respect for the Geneva Conventions, with particular emphasis on Article 3 common to the Geneva Conventions.

[Common Article 3]

The Geneva Conventions consist of four separate conventions. The First Convention deals with wounded and sick in armed forces in the field; the Second Convention with wounded, sick and shipwrecked members of armed forces at sea; the Third Convention with prisoners of war; and the Fourth Convention with the protection of civilian persons in time of war.

Most of the provisions in these four Conventions are applicable to international armed conflicts; in other words, armed conflicts between States.

However, there is a provision in each of the four Conventions that applies to non-international armed conflicts, which are armed conflicts that take place between government forces and organized armed groups, or between multiple organized armed groups.

The provision in question is Article 3 common to the Geneva Conventions. While many of you might know the contents of common Article 3, I would like to recall some of the main points of this article.





First, common Article 3 requires the parties to an armed conflict not of an international character to treat humanely those persons taking no active part in hostilities. Those persons include members of the armed forces who have laid down their arms or have been placed hors de combat by sickness, wounds, or detention, as well as civilians.

Common Article 3 then specifically prohibits the following acts against persons taking no active part in hostilities:

- Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- Taking of hostages;
- Outrages upon personal dignity, in particular humiliating and degrading treatment; and
- The passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court.

It further requires that the wounded and sick must be collected and cared for.

Common Article 3 also permits an impartial humanitarian body, such as the International Committee of the Red Cross, to offer its services to the parties to the conflict, and provides that the parties to the conflict should endeavor to bring into force, by means of special agreements, all or part of the provisions of the Geneva Conventions other than Article 3.

The inclusion of common Article 3 in the Geneva Conventions was a historic moment for humanity. It was the first instance in which non-international armed conflicts were regulated by a multilateral treaty.





The significance is augmented by the fact that the Geneva Conventions are now universally adhered to. It is recalled in this regard that 196 States are currently parties to the Geneva Conventions.

It is also notable that the International Court of Justice, in the Nicaragua case, declared that common Article 3 reflects elementary considerations of humanity and applies to armed conflicts regardless of their character.

The Court further indicated in its Nuclear Weapons Advisory Opinion that the Geneva Conventions, which includes common Article 3, are fundamental rules to be observed by all States as customary international law.

There is no doubt that common Article 3 has become one of the most important provisions in the Geneva Conventions, not only because of its nature which I have just mentioned, but also because it is perhaps the most frequently applied provision in contemporary armed conflicts, which are mostly non-international in character.

Common Article 3 was subsequently developed and supplemented by Additional Protocol II of 1977, and a number of customary rules have been recognized as being applicable to non-international armed conflicts. But common Article 3 still occupies a special place in international humanitarian law.

Apart from common Article 3, I cannot fail to make reference to another provision that is common to all four Geneva Conventions, which is Article 1 common to the Geneva Conventions.

This article provides that “[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” The International Court of Justice, again in the Nicaragua case, specifically recognized that this





provision requires a State to ensure that other entities do not act in violation of common Article 3.

While the United Nations is not formally a party to the Geneva Conventions, the United Nations has played a crucial role in ensuring respect for international humanitarian law, and more specifically the Geneva Conventions and common Article 3.

This is not particularly surprising as in many places where non-international armed conflicts are taking place, the United Nations is present, or a competent organ of the United Nations is seized of the matter.

[United Nations' role in IHL matters]

Before I discuss the United Nations' role in ensuring respect for common Article 3, I would like to say a few words about the role of the United Nations in international humanitarian law matters generally.

The United Nations was established in the aftermath of World War II, which saw violations of international humanitarian law on a massive scale. It is against this backdrop that its core purposes overlap with those of international humanitarian law.

The Charter of the United Nations, in its preamble, contains a solemn declaration of a determination “to save succeeding generations from the scourge of war, to reaffirm faith in fundamental human rights, in the dignity and worth of the human person”.





Article 1 of the Charter then provides that one of the Purposes of the United Nations is “to achieve international cooperation in solving international problems of a humanitarian character and in promoting and encouraging respect for human rights”.

In this sense, the creation of the United Nations was by no means unconnected to humanitarian issues that arise during armed conflict. The atrocities that took place during World War II were undoubtedly at the forefront in the minds of those drafting the Charter.

For their part, humanitarian law instruments have also recognized the role of the United Nations in situations of serious violations of international humanitarian law. Indeed, Article 89 of the first Protocol Additional to the Geneva Conventions requires that High Contracting Parties act, jointly or individually, in cooperation with the United Nations in situations of serious violations of the Geneva Conventions and of the Protocol.

The United Nation’s role in promoting respect for humanitarian law became particularly prominent since the 1960s when both the General Assembly and the Security Council adopted resolutions relating to international humanitarian law.

First in a series of resolutions adopted by the General Assembly was resolution 2444 entitled “Respect for human rights in armed conflicts” adopted in 1968. In this resolution, the Assembly recognized the necessity of applying basic humanitarian principles in all armed conflicts. It also invited the Secretary-General, together with the ICRC, to study steps that could be taken to secure the better application of existing humanitarian law in armed conflicts, as well as the need for additional legal instruments for better protection of civilians, prisoners and combatants, and the prohibition and limitation of the use of certain methods and means of warfare.





It adopted a similar resolution every year until 1977, when the two Protocols Additional to the Geneva Conventions of 1949 were adopted, including the second Additional Protocol which developed and supplemented common Article 3.

The Security Council has also played an important role in promoting respect for IHL. Since 1967 when it first invoked IHL treaties in the context of the conflict in the Middle East, its role has increased exponentially. Most recently, in its resolution 2286 adopted in 2016, the Security Council reiterated “its primary responsibility for the maintenance of international peace and security and, in this context, the need to promote and ensure respect for the principles and rules of international humanitarian law”.

[United Nations’ role in ensuring respect for common Article 3]

Having outlined the general role of the United Nations in humanitarian law matters, I would like to give some examples of how the United Nations has played an important role in ensuring respect for Article 3 common to the Geneva Conventions specifically.

The most direct example in this regard is the role played by international tribunals and United Nations-assisted tribunals.

As noted earlier, the International Court of Justice, in the Nicaragua case, made authoritative statements concerning common Article 3, including the fact that it reflects elementary considerations of humanity and applies to armed conflicts regardless of their character.

[ICTY and ICTR]





Subsequently, in 1993 and 1994 respectively, the Security Council established the International Tribunal for the former Yugoslavia, also known as ICTY, and the International Criminal Tribunal for Rwanda, also known as ICTR, by means of resolutions adopted under

Chapter VII of the Charter.

Pursuant to their respective Statutes, ICTR specifically had the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions, and ICTY had the power to prosecute persons violating the laws or customs of war, which included common Article 3 pursuant to its established jurisprudence.

During their existence, the two Tribunals made an extraordinary contribution to ensuring respect for common Article 3.

At the most fundamental level, these Tribunals clarified the circumstances in which common Article 3 applied. While common Article 3 indicates that it applies to “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties”, it does not elaborate further on how the existence of an “armed conflict not of an international character” is to be determined.

ICTY, in the Tadic case, elaborated on this point and clarified that “an armed conflict exists whenever there is...protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”

This firmly established the two core criteria that should be met to establish the existence of a non-international armed conflict. First, the armed group involved in the hostilities should have some degree of organization, and second, the hostilities between the parties should reach a minimum level of intensity.





These criteria have been developed to exclude situations such as riots and violent demonstrations, which usually do not involve organized armed groups or protracted armed violence.

The ICTY further elaborated on these two criteria. For example, in the *Dordevic* case from 2011, the Tribunal indicated that the level of organization of an armed group is to be assessed by factors such as the presence of a command structure; the capacity to carry out operations in an organized manner, including logistics; and the existence of discipline; and the ability to implement basic obligations of common Article 3.

The Tribunal also indicated that the level of intensity of the hostilities is to be assessed by analyzing factors such as the spread of clashes over territory and over a period of time; the type of weapons used; the extent of destruction and the number of casualties caused by shelling or fighting; the quantity of troops and units deployed; and the occupation of territory.

While the determination of whether a non-international armed conflict exists or not continues to be difficult in many situations, the jurisprudence of the ICTY provides useful guidance in making that determination.

The two Tribunals have also clarified the personal scope of application of common Article 3. It is recalled that the provisions concerning humane treatment in common Article 3 applies to “persons taking no active part in hostilities”, and specifically lists “members of the armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause”.

However, in the *Karadzic* case, the accused argued that combatants did not fall within the category of “persons taking no active part in hostilities”, and, as a consequence, did not fall within the protective scope of common Article 3.





ICTY rejected this argument and concluded that even combatants are entitled to humane treatment as soon as they cease to take part in hostilities, such as due to detention.

The Karadzic case was also a case where ICTY examined an incident in which over 200 military personnel of the United Nations Protection Force were taken hostage in Bosnia and Herzegovina in 1995.

The ICTY in this case concluded that these military personnel were “persons taking no active part in hostilities” and were afforded the protection of common Article 3, which prohibits taking of hostages.

Furthermore, the ICTR, in the Bagosora case, examined the incident in which 10 Belgian military personnel of the United Nations Assistance Mission for Rwanda were beaten to death by members of the Rwandan army in April 1994 during a non-international armed conflict in Rwanda.

In this case, the Trial Chamber concluded that the Belgian military personnel “were not taking active part in the hostilities” and found the accused guilty of serious violations of common Article 3, as well as of Additional Protocol II, for committing violence to life against the Belgian military personnel.

These cases clearly indicate that UN peacekeeping personnel, including military personnel, fall within the scope of common Article 3. This is of particular interest to the United Nations as there are a number of peacekeeping operations that are deployed to situations of non-international armed conflict, and the protection of their personnel is of particular concern.





The International Residual Mechanism for Criminal Tribunals, which was established in 2010 to carry out residual functions of ICTY and ICTR, continues the material jurisdiction of the two Tribunals, and, therefore, continues to have jurisdiction over serious violations of common Article 3.

[Special Court for Sierra Leone]

Subsequent to the establishment of ICTY and ICTR, the Special Court for Sierra Leone was established in 2002 pursuant to an agreement between the United Nations and Sierra Leone.

The Statute of this Special Court also specifically gave the Court the power to prosecute persons who committed or ordered the commission of serious violations of common Article 3.

From the United Nations point of view, the Sesay case is of particular interest, as the Special Court examined a number of incidents that occurred in 2000, in which the Revolutionary United Front, an armed group in Sierra Leone, attacked, captured, ill-treated, or killed a number of military personnel of the United Nations Mission in Sierra Leone.

In this particular instance, the Court found that the personnel of the Mission were not taking a direct part in hostilities at the relevant time. On that basis, the accused was convicted for murdering several personnel of the mission in violation of common Article 3 as well as Additional Protocol II.

[International Criminal Court]





Shortly after the Special Court for Sierra Leone was established, the International Criminal Court was established after its Statute entered into force on 1 July 2002.

Among other crimes, the Court has jurisdiction over war crimes committed in non-international armed conflicts. Those war crimes include serious violations of common Article 3, namely the provisions therein concerning the humane treatment of persons taking no active part in hostilities.

The Statute also codified the two criteria that are required to determine the existence of a non-international armed conflict, which I referred to earlier. The Statute, therefore, provides that non-international armed conflicts are “armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.”

In practice, the International Criminal Court has dealt with cases involving the murder of persons in violation of common Article 3, such as the Katanga case, which involved an incident in which at least 60 civilians were killed during a battle between armed groups in the eastern part of the Democratic Republic of the Congo, and the Bemba case, which involved the killing of several civilians during an operation by an armed group in the Central African Republic.

However, it is noted that Bemba was acquitted on appeal for the charges of war crimes and crimes against humanity in June 2018, as the Appeals Chamber was not able to uphold, among other things, the Trial Chamber’s conclusion that the accused failed to take all necessary and reasonable measures within his power to prevent or repress the crimes in question.

[Other mechanisms]





Apart from international tribunals, other United Nations entities have also played an active role in ensuring respect for common Article 3.

In this regard, a number of commissions of inquiry and similar bodies have been established to date to investigate, among other things, alleged violations of international humanitarian law. They have often been established with respect to situations in which non-international armed conflicts were taking place. Therefore, common Article 3 played a central role in those commissions of inquiry.

For example, the Security Council requested the Secretary-General to establish a commission of experts on Rwanda in 1994 which, among other things, concluded that serious breaches of common Article 3 were perpetrated during the conflict in Rwanda in 1994. This formed a basis to specifically authorize ICTR to prosecute persons committing, or ordering to be committed, serious violations of common Article 3.

More recently, the Security Council requested the Secretary-General to establish a commission of inquiry on the Central African Republic in 2013 to, among other things, investigate reports of violations of international humanitarian law in that State and to compile information to help identify the perpetrators. The commission found possible violations of common Article 3 based on alleged executions of specific civilians and alleged ill-treatment and torture of detained persons.

The Human Rights Council has also established a number of commissions of inquiry to investigate, among others, alleged violations of international humanitarian law, including common Article 3. Recent instances are the Independent International Commission of Inquiry on the Syrian Arab Republic and the Commission on Human Rights in South Sudan.

In recent years, several mechanisms that are different in nature from commissions of inquiry have also been established.





In December 2016, the General Assembly established a Mechanism for Syria which would assist in the investigation and prosecution of, among other things, war crimes, by collecting, consolidating, preserving and analyzing evidence of violations of international humanitarian law and human rights violations and abuses, and by preparing files in order to facilitate and expedite fair and independent criminal proceedings in national, regional or international courts or tribunals.

In September 2017, the Security Council requested the Secretary-General to establish an Investigative Team to support domestic efforts to hold ISIL accountable by collecting, preserving, and storing evidence in Iraq of acts that may amount to war crimes, crimes against humanity and genocide committed by ISIL in Iraq.

Most recently, in September 2018, the Human Rights Council established a similar mechanism with respect to Myanmar for most serious international crimes and violations of international law committed in Myanmar since 2011.

My Office has been involved in the setting up of these mechanisms and provides support to them to ensure their smooth functioning.

While the two types of bodies have some similarities, commissions of inquiry typically focus on establishing violations of international humanitarian law and identifying their perpetrators, whereas the mechanisms which I have just mentioned focus on the collection and preservation of evidence, with the aim of building files which could assist courts to prosecute, in the future, alleged perpetrators of serious international crimes, including war crimes.

There is no doubt that common Article 3 has played an important role in both types of bodies, as the situations in question have, in most cases, involved non-international armed conflicts.





[Concluding remarks]

In this brief address, I have tried to illustrate the role of the United Nations in ensuring respect for Article 3 common to the four Geneva Conventions.

I believe that the 70th anniversary of the Geneva Conventions is an excellent opportunity to renew our attention to the role of common Article 3 in contemporary armed conflicts.

I encourage all participants in this seminar to also reflect upon how Member States could collectively work towards ensuring respect for common Article 3 and more generally, the Geneva Conventions and international humanitarian law, through the competent organs of the United Nations.

Thank you.

