

## Andrew Clapham

Starting his legal studies in Britain during the 1980s, Andrew Clapham (born in 1963) came into contact with human rights law when looking for a legal framework to constrain abuses of power and bolster civil liberties. His PhD thesis dealt with human rights obligations of non-state actors including private companies and armed groups. He continued to pursue this topic throughout his career. He worked first as the representative of Amnesty International at the United Nations in New York, and then as a scholar at the Geneva Graduate Institute of International and Development Studies. He has worked as a special advisor on business and human rights for High Commissioner on Human Rights Mary Robinson. He has also worked on issues of peacekeeping, the arms trade, and international criminal law.

## Interview

The interview took place on October 13, 2017 in Prof. Clapham's office at the Graduate Institute in Geneva. It was the first encounter between him and Dr. Daniel Stahl, coordinator of the Study Group Human Rights in the 20th Century. The conversation lasted three a half hours with a long interruption.

### Stahl

We should start right away with your family background. What role did political issues play in daily conversations at home?

### Clapham

I was born in Kent in England. My parents were politically active and we did discuss politics at home. My father actually stood unsuccessfully to be a Member of Parliament several times. So I was aware of party politics and political issues. And then there were pamphlets around the house that I would read. So yes, I grew up in a political environment.

### Stahl

Can you tell me a little bit about your father?

### Clapham

He was a lawyer. He was both a solicitor and a barrister, so that's an advocate. He was eventually made a judge. So for most of my childhood and then later as an adult, he was a judge doing civil and criminal work. And then later, he worked as an arbitrator after he retired.

Some of the arbitrations he would do at home because they were very low-level cases to do with tourism at the time. Somebody had a bad honeymoon and they wanted to sue the company. They would come to the living room, and he would sit and listen to their case and then go through the paperwork and come to a decision. My mum would discuss the cases but she had her own career as a social worker, she worked in some quite deprived areas of London and then at a hospital, at St. Thomas's Hospital, as a psychiatric social worker.

Anecdotally, when I was in primary school, they did a careers test as to what you might want to do when you grow up. They give you questions to answer and then they very proudly wrote to my parents, saying, "Well, we think he should either be a lawyer or a social worker based on the answers," which I thought was pathetic, because I was pretty sure they just read the family background and wrote that. But apparently, I was influenced by my parents at that time.

So I did not immediately choose to do law. I was thinking of doing mathematics and science. And to be frank, that was because my father was pushing me in that direction. He said, "Oh, no, don't be a lawyer. It's terrible money, and it's not very interesting." I suppose he was a very clever man, and he realized that the more he pushed me away from something, the more I would want to do it. I chose to do law in fact, but I wasn't encouraged to do it, quite the opposite. But again, in retrospect I think that was just a clever tactic on the part of my father.

So I sort of knew what I was getting myself into, although by the time I finished my legal studies, I suppose having been overexposed to what my father was doing, I wanted to do something less local and more on the international level. I thought dealing with bank robbers and insurance claims and divorce all seemed rather local. And at the end of the 1970s I had traveled a bit as a teenager, come into Geneva on the Interrail and been around Europe, and I wanted to explore. I was staying in youth hostels and at different people's houses in Europe and exploring the world. I could see that there was a lot out there. I didn't feel the need to stay in Kent and be the local lawyer.

### **Stahl**

Were there international political issues during the 1970s that caught your attention in a special way?

### **Clapham**

I can remember one political awakening moment which grew out of me listening to The Clash. I started paying a bit more attention to the lyrics, and there was a reference to the Santiago Stadium.<sup>[1]</sup> And of course, you didn't have the internet in those days where you just typed it in and you got an answer as to what this was about.

I remember I went to see the geography teacher because I thought, well, it's obviously a geographical question. I need to know what the answer is. He explained that this was a reference to the human rights repression and killings in Pinochet's<sup>[2]</sup> Chile, which was not the sort of thing that I would've noticed on the news or at school. I wasn't reading the foreign news in the Times every day at that age. I must've been 14, 15.

I began to realize that maybe there was a level of injustice out there and some quite bad things happening and that this was related to my favorite rock band. So I could probably credit The Clash for my interest in human rights more than my education, formally speaking. But it would be too much to say that I suddenly became a human rights activist as a result of that.

I suppose the next formative moment was at university. I got interested in a lot of the

political struggles at the time, such as the miners' strike<sup>[3]</sup>. The other political event during my education was the Falklands War.<sup>[4]</sup> To be frank, if you were living in the UK, it wasn't seen in geopolitical terms. It was just "our country has been invaded. We have to go and defend ourselves." Nobody really knew where the Falklands were. They had to go and get maps out. I was against the idea that there should be a war and that one should go and kill people because of these islands and these sheep, as it was explained at the time that nobody was being massacred or anything. And at the time, my main activity was theater.

**Stahl**

That was during your studies or in school?

**Clapham**

During my studies at Cambridge.

**Stahl**

When did you begin to study?

**Clapham**

It must've been about 1982. The Falklands War came exactly at that time. There's a Bertolt Brecht<sup>[5]</sup> play, *Mann ist Mann*, *Man is Man*. In the preface, Brecht wrote, "This can be adapted to any war." And so we took *Mann ist Mann* and adapted it to the Falklands War. We interspersed some of the scenes with recordings from Parliament and references to the actual players, to Margaret Thatcher<sup>[6]</sup> and the Defense Minister<sup>[7]</sup> and so on. A lot of my friends were saying that they were going to sign up to join the Navy to fight the Argentinians. Very few people even in Parliament were saying this war would be a bad idea.

The play took an antiwar stance, not necessarily an antigovernment stance, because the Brechtian point is much deeper. People were furious with us. One guy who I knew from school walked out and stormed off saying, "I didn't come here to hear this. I came to the theater to be entertained, not to be told how to think about this. This is totally unpatriotic." People were quite upset. But I also remember there was one review from one of the professors of English, who said something along the lines of; "This is exactly what Brecht was hoping to achieve, that this play would live for any context to allow people to discuss and take a more radical approach to what was going on."

**Stahl**

Were you involved in some way in the unrest that accompanied the miners' strike?

**Clapham**

I was tangentially involved in some of the street theater, because my activity there was much more political theater than international law. Some of my friends, who were much more involved, were already doing legal work to hold the police accountable for violations of what we would now call human rights, but in those days, it was called violations of civil liberties or labour law, UK law, with regards to the charges with the horses and the way in which they were dealing with the miners physically. So I remember two of my friends would have these big yellow waistcoats and go out there as legal advisers on the front lines

of where the picketing was happening.

But then, about 1985, I applied for two things. I applied to go and become a trainee theater director, and I applied to go to Italy to do a master of International Law, at the European University Institute in Florence. The European University Institute offer came through first, and it was paid quite well in fact, because the EU paid any student there a full salary, and there were no fees. So it was a rather generous offer to go and live in Italy and study law, whereas the other thing, as I remember, didn't come through, and I had to take a decision. So I decided to go to Florence and forgot the other option.

### **Stahl**

Did you have sympathies for any political party during the first half of the 1980s?

### **Clapham**

No is the short answer. I would have been able to vote in 1983 but after that I was no longer resident. I wouldn't have voted Conservative at the time. That would've been very strange. My father and mother were both in the Labour Party and active in what's called the Fabian Society, which is an offshoot if you like or a think tank within the left. So that would not have been something that I would have considered at the time. But I wasn't active in any kind of party politics at all. When it came to preparing a research proposal for Florence, I think the title of my project was "A Bill of Rights for the United Kingdom," which would mean that there would be human rights law within the United Kingdom because, at the time, there was nothing. You couldn't make a human rights complaint as a cause of action under UK law. The European Convention had not at that time been incorporated.

There was quite a bit written about this, it was an ongoing debate. But to answer your question, in doing that, I had realized that my angle on this was that if there were to be a bill of rights, it should cover not only what the state does, but also what private entities do. So it should cover corporations and housing associations and so on.

### **Human rights were seen as a tool used by the establishment against the left.**

When the Labour Party had been in power and had looked at this question, under the influence of some of the labor lawyers and the unions, they had said that, if there is to be a bill of rights, it should not cover private power because that would be used to bash the unions, that the unions would be told, "You are denying freedom of expression because you have forced this person to be a member of this union and not that union, or you've thrown this person out of the union. So you've denied them the right to work." So there was a lot of suspicion in the Labour Party and on the left of the human rights project that I wanted to pursue as part of my research in Florence. So I wasn't an easy fit in a political party then because the left concluded against a bill of rights in part because they thought it would be just turned on the unions and that it would never be used against abuse of power. There was also a sense that human rights in a Bill of Rights would be used to restrain a radical left-wing government with a progressive equality agenda.

There was a period of cases which I had studied at the time which showed that the

judiciary, when it came to individual liberties, were applying them against the background of the miners' strike in particular, against unions saying they were denying freedom of association and freedom of commerce to the entities that they were picketing in front of. So human rights was seen as a tool used by the establishment against the left.

**Stahl**

That's interesting.

**Clapham**

Yes, it's a particular period in the 1980s. There was a very influential book I had studied called *The Politics of the Judiciary*,<sup>[8]</sup> which went through a series of cases explaining how the judiciary had taken the concept of individual rights and were using it for an anti-progressive agenda, so pro-business, anti-union. I think the book went into five editions. The author, John Griffith, was a professor at the London School of Economics and very influential. It's a very readable book, and you get the message quite quickly.

Now I'm an academic, and see how it was a correct analysis at the time. I think today, however, the judiciary are in a different place, partly because of the way human rights operates. It's a generational thing, and we had Labour government for a long time. So things have changed. But there was a lot of suspicion about human rights, especially from the left at that time. So I was in an awkward position because I wasn't naturally Conservative either.

**Stahl**

So this debate attracted your attention during your time at university?

**Clapham**

Exactly. I read that book. One of my lecturers was particularly influential, the labor law lecturer, very progressive, left wing, very prepared to explain how the judges were the enemy of the people, if you like. Having a father as a judge, I could probably understand how a judge could be conservative because, obviously, you always see your parents as conservative. And he was much older as well. So I understood that, even though along the spectrum of the judiciary my father would've been classed as a progressive, left-wing judge, leaving too much power in the hands of the judges could be dangerous for progressive change.

**Stahl**

So what was your approach or your solution?

**Clapham**

I went back and forth, but in the end, I came down on the side of pushing for human rights. I thought that human rights, if applied properly, could be a force for progressive change and that they could be applied properly to corporations and if necessary to trade unions, if trade unions really were violating someone's human rights, then they, too, should be held accountable, as should for that matter a liberation army or a progressive revolutionary armed group.

In the end, I took an approach which basically said everybody has to be held accountable for their human rights violations. And if we don't trust the judges, that's not the problem of human rights. That's the problem of getting the right judges. So we should look more carefully at who is chosen to go to Strasbourg<sup>[9]</sup> and how the arguments are made and how judges are selected, rather than saying nobody can have human rights because it'll be a *dictature des juges*.

I was probably helped to come to that result by my supervisor in Florence, who had written about armed groups having obligations under international law and was less interested in the stance adopted by the trades unions in Britain. So I was emboldened to think that the law didn't have to only apply to the state, but that it could also apply to these other actors. And it could be done in a way which recognized the dignity of the individual and not in a way which was just instrumental to trying to undermine those groups.

I thought I'm going to prioritize the dignity of the individual. And if it means holding accountable groups that I like, so be it, rather than saying let's have a system where we don't touch all of these people because we like them, and we will just hold the state accountable.

#### **Do we apply human rights just to the state or also to private actors?**

##### **Stahl**

So would you say you came from England with this idea that human rights are used in a way against the unions, and then in Italy, you learned there are other ways to use human rights, or was this already an answer you came up with when you were still in England?

##### **Clapham**

I think you got it more or less right in the sense that, leaving England, I realized that what I had looked at was a very parochial debate between the Labour Party, the unions, the Conservative Party and judges in one little moment of history, a few years in the 1970s and 1980s. Whereas when I got to Italy, I was quite quickly exposed the writing which said, here's the problem: Do we apply human rights just to the state or also to private actors? There's one book in particular which says, let's look at all 20 or 30 states of the Council of Europe and see how they deal with it.

Then I was exposed to another project which said, now let's look at the United States, Germany, Austria, France, Italy and so on, and that led me to think about Canada and South Africa and even Hong Kong. And suddenly, my eyes were opened that this doesn't have to be about whether a particular union in Yorkshire is going to be persecuted by a particular judge in a particular context, but whether human rights in South Africa would deal with the fact of companies discriminating on racial grounds, and what can one do about it, or whether in the United States, where are whole areas of towns and shopping centers which are privately owned and regulated, the US Bill of Rights would not apply as there would be no 'state action'. It opened my mind to the fact that this was a bigger issue than the narrow questions and concerns that I started with.

**Stahl**

So it went from being a domestic issue to an international issue when you moved to Italy?

**Clapham**

I began to see that there might be other contexts and international solutions under international law which opened my eyes to a much more complicated set of factors, and that the dynamic in Canada and the dynamic in the USA and the dynamic in Hong Kong was completely different than what I had been concerned about.

So then I was trying to find some sort of overarching philosophical approach to this rather than saying, well, if I do this, then I'll be on the right side of this party or the wrong side of that group, which is what happens when you're just in a microcosm of the problem. So by going there, I was exposed to things that I probably wouldn't have been exposed to if I'd stayed in the UK as a student.

**Stahl**

And would you say there were some cases in particular that especially caught your attention during this time, for example, South Africa or Canada? You mentioned a few.

**Clapham**

There were two things. I remember one situation as it was the very beginning of people starting to think that you might want to have private companies running prisons and detention. And that got me thinking that if human rights is really only about what the state does, and if private entities are going to be running the prisons, then these would be human-rights-free zones.

I remember approaching one German professor, who I won't name now, and he was asking me what I was working on. So I explained and said, "Well, of course, in the future, a lot of these activities that we consider must be done only by the state might be done by private companies. And therefore, we need a theory which encompasses all of this." And he said, "If you think that prisons are ever going to be run by private companies, you're completely mistaken, young man. That is an essential function of the state, and the state would never give that up." So prisons and private security was definitely one of the things that had caught my attention.

**Stahl**

In which country?

**Clapham**

Well, I knew that they existed in the US and that it was possibly around the corner in the UK. You could see the writing on the wall. But in Continental Europe, when you said that to people, they just thought you were completely mad, that obviously the prison was only the state, and anyone in prison would obviously have human rights, so why would you write a PhD on that?

**Stahl**

So your interest in human rights can also be understood as a reaction to Thatcherism?

**Clapham**

Exactly, yes. There was the beginning of privatization of lots of things under Thatcher, the railways and the post office and so on. At the time, there were plenty of human rights cases about how the post office was not allowed to intercept your mail and open it. Today with email, it all sounds very old fashioned. But I was already thinking, well, what if it's a private company that's delivering parcels and they open them.

The other thing that marked some of my thinking was the emergence of AIDS. I started thinking that the way in which some groups were being denied mortgages and insurance at the time because they were seen to be at risk of contracting AIDS, meaning they wouldn't be able to pay back their mortgage, seemed to be discriminatory on grounds of sexual orientation.

It seems strange now, but at the time, people who were thought to be in a gay relationship, males, were finding it hard to get access to housing because of the perception that they would be more likely to get AIDS.

So that was another factor where the private sector seemed to be denying people rights with no recourse, whereas if it had been the state doing it, it seemed that it would've been easier. So that was probably another thing which, again, is very 1980s or 1990s in retrospect.

Then I also started to get interested in the armed groups that were operating at the time, the extent to which victims were not able to complain that the IRA had violated their human rights. There was quite a lot of violence by the IRA against the civilian population, the kneecapping of collaborators and things like that. And these were issues which were bubbling under, also with regard to some of the other armed groups operating at the time. So that piqued my interest as well. Why would we not want to call those human rights violations? Why would they be outside of the scope of what we're interested in?

**Stahl**

Would you say there was a particular scholar who had a great impact on you?

**Clapham**

There were a few at the time. Obviously, my supervisor Antonio Cassese,<sup>[10]</sup> who took me under his wing, and I worked closely with him. I was helping him on some of his work as his research associate. So we had time for plenty of conversations about this. He introduced me to lots of other people. We went to conferences, and I could see that the life of an academic but also someone who was playing a role in the development of public international law was very fulfilling.

So that was very, very formative. At the scholarly level, he gave me his own work, and he pointed me in the right direction. But there are a couple of other people. There's a man who was a professor, but then he worked at the Council of Europe. He wrote the book that I alluded to before, where he compared all of these countries across the Council of Europe. His name is Andrew Drzemczewski.<sup>[11]</sup> That was a very formative book that I read cover to cover, and he ended up being on my thesis jury and helping me a lot with the thesis. In the



book he does a comparative study of nearly all of the countries in the Council of Europe at the time and how they tackle this problem.

Then there's Michael Mandel's<sup>[12]</sup> book on the Canadian Charter of Fundamental Freedoms,<sup>[13]</sup> where he takes a much more cautious and critical approach, saying judges are going to use this technique to undermine the trade unions and the progressive left. And human rights are therefore not a good idea.

**Stahl**

The argument you already knew.

**Clapham**

I already knew it, but now I found it replicated in Canada, but also articulated in a much more intellectual and academic way than I had actually appreciated. So those were two lodestars, Andrew Drzemczewski pulling in a much more enthusiastic, international organizations, Council of Europe, European Convention on Human Rights, it's-all-great direction, and Mandel putting the brakes on a bit and pointing out all the problems. I found these helpful to navigate my problématique.

Among the other academics who influenced me there was a professor called Cappelletti,<sup>[14]</sup> who was one of the reasons I went to Florence. He did comparative civil law and judicial review, so very much the theories about the extent to which judges should be able to review the activities of government and all that implies about the separation of powers and the tension between the two branches. So he was very influential.

And another professor, Joseph Weiler,<sup>[15]</sup> who later became the President of the EUI in Florence, was very influential, we wrote a couple of things together, and he had a very incisive approach to how judges deal with these questions, particularly in European Union law, which helped me a lot.

I started to develop my theory even within European Union law as well, regarding questions about the extent to which companies within Europe are obliged to respect certain European fundamental freedoms in their activities, and the extent to which European law also attaches to private actors in ways which national or international law can't always do. In order to get a single market and free movement, you might have to have consistent standards for corporations across Europe. So that's another way into the same topic, less based on human rights, more based on European integration. Weiler introduced me to a lot of those ideas, which I found very interesting.

**Stahl**

Apart from this scholarly work, were you involved in human rights activism during your time in Florence?

**Clapham**

It was not as a day-to-day activist as you might use the expression today. So Cassese was very active, for example, in trying to create a treaty which would allow for visits to places of detention to prevent torture. He would invite me to those meetings, and I would take

notes and sometimes make suggestions. He was drafting what eventually became the European Convention for the Prevention of Torture and he eventually became its first president.

So I was involved in the creation of those mechanisms, many steps removed, but just as a young note taker. So for me, at that time, human rights activism was writing treaties. So I started at the wrong end, if you see what I mean. I wasn't involved in a solidarity group for any of the human rights causes at that time. I just wasn't exposed to it. I didn't even really know that existed. I had a vague idea. I knew what Amnesty International was and some other organizations, but hadn't really been exposed to them.

My first exposure was actually at a Cassese meeting. We were all sitting alphabetically, so I found myself sitting next to Helena Cook because I'm Clapham. She was the Head of the Legal and International Organizations Program at Amnesty International. We got on very well and chatted, and actually, she ended up being my boss when I went to work for Amnesty International after that. But I didn't really know what Amnesty did. The meeting was on the prevention of torture.

### **Stahl**

How did you become Amnesty International's representative in New York?

### **Clapham**

In 1991 Andrew Drzemczewski sent me a fax, it was a page from the International Herald Tribune with an advertisement saying that Amnesty International was looking for a representative to the United Nations in New York. And he just wrote across the top of the page, "Job for you?"

I had in my studies come across the fact that Amnesty International had this representation at the United Nations in New York. And it had dawned on me that that would be something very interesting to do, not to be a state representative at the UN, but to represent a human rights organization.

I don't know why, but I thought, "Yeah, that's just a great idea. I'll apply." And so I fired off an application explaining how I was obviously the person for this job, with my CV and my knowledge — by then, I had a bit more knowledge of international organizations because I had done a lot of projects with Cassese at the European Union. So I had been to Parliament, I'd met the Commission, I'd been in the Council of Europe. I kind of knew or at least I thought I knew how international organizations worked at the intergovernmental level and the secretariat and how it all fits together and how law is made.

So I said to Amnesty, "I'm your man, and I should do this." To be honest, I wasn't that sure that they would take me seriously, but they did, and I got the interview. The interview was quite demanding, it was a whole day, and I can remember it really clearly. They give you tasks to do as if you are the representative.

I had a pile of papers about 10 centimeters thick of all Amnesty and UN documents on Guatemala, so all of the Amnesty reports for the last 12 months and then all the UN reports

on Guatemala and resolutions. They said, "Here are the papers. Your task is that the Secretary General of Amnesty International is going to meet the ambassador of Guatemala to the UN in two hours' time. He needs to know what your suggestions as the representative of Amnesty to the UN are. What should he raise in the meeting, and what should he be trying to get out of the meeting?" I had two hours to just go through all this and write it all out by hand.

And then there was another one, something to do with meeting ambassadors about the death penalty and Amnesty's position. I had to argue through about the death penalty, that was more of a power of persuasion thing. The first was about your capacity to deal with heaps of paper and see your way forward.

So that was all quite tough. And then there was a long interview with the Secretary General and some of the senior researchers and directors at Amnesty really quizzing me. But anyway, the end of the story is, somehow, I got the job. I loved that job, it was fantastic. So then I really began to learn what the human rights movement was about and the grassroots work, because I would meet the activists and people from the sections. And I'd do some field visits for Amnesty as a researcher to actually investigate human rights violations and write reports. I was exposed a lot in the press as part of the job. So people would see me then as a human rights activist.

### **Stahl**

This was from 1992 to 1997. How was this office in New York set up? Were you the only person there, or did you have a staff?

### **Clapham**

At the beginning I had one assistant and then it grew. We added a few more people. I think now there are quite a few people more there. And you were the representative of the movement at the UN. At the beginning, there were very few human rights organizations present at the UN in New York. Human Rights Watch did not have a permanent representative at the UN in New York, nor did any of the other major organizations really. The Lawyers' Committee for Human Rights developed more of an office there during my time.

It meant that if a human rights question came up at the UN in New York, the instinct of governments or even the secretariat was to ask what Amnesty's position was. And that meant coming through to our office. So it was a fantastic role because you could have some hope of influencing how decisions are taken. At least you were asked, and you got to present. If there was a meeting on Burundi, for example, you could present Amnesty's work on Burundi, and people cared because they didn't have the same information that we had.

Then you could make recommendations about what to do, and they probably hadn't thought as much as we had about what to do. So it was a fantastic feeling that you were lobbying, but not in a vacuum, that there was some traction. It's difficult to see now, but in the 1990s, the UN in New York was quite active in that it was the end of the Cold War, and the Security Council was not blocked. A lot of peacekeeping operations and field operations were suddenly generated with human rights mandates. There was a flourishing of activity

and particularly activity which was designed to protect human rights.

So that was very exciting and very satisfying. And then came the creation of the High Commissioner for Human Rights<sup>[16]</sup> during that period and the creation of the International Criminal Court.<sup>[17]</sup> So today, it seems amazing, but just in that short space of time you had at least a dozen peacekeeping operations created with hundreds of thousands of troops around the world, and a whole new impetus for human rights with the creation of the Office of the High Commissioner and years and years of work to create an International Criminal Court with all this good will on the part of governments to actually do all of this and take it in the right direction.

**One of my first arguments, which at the time was radical, was that the UN doesn't only have a responsibility to ensure the member states respect human rights, but that the UN itself has a set of human rights obligations.**

### **Stahl**

Could you describe the work you did on these topics a bit more? Maybe we can go through it one by one, starting with the peacekeeping missions.

### **Clapham**

The Security Council was passing all of these resolutions and creating peace operations<sup>[18]</sup> that had a huge possibility to do human rights protection as opposed to just debating the meaning of human rights. And so I started saying to London, "I'm going to go to the Security Council, and I want to do this." They said no. I said, "Why?" and they said, "Because if Amnesty is seen to be at the Security Council, it will look as though we are lobbying for military intervention."

I had arrived in the office in 1991, and Amnesty was still suffering an internal trauma from the UK-US intervention against Saddam Hussein<sup>[19]</sup> as a result of the invasion of Kuwait.<sup>[20]</sup> At the time, Amnesty's reports were being used to justify that military action. Amnesty was being painted into a corner as creating human rights reports as a justification for Western military intervention. That's a much too truncated version, but there was an extreme nervousness about being seen to be close to the Security Council. The Security Council imposed sanctions and authorized the use of force. And if Amnesty was hanging around, it looked like, as a human rights movement, we were encouraging this. And a lot of the membership were very much against any kind of advocacy for the use of force including humanitarian intervention.

At the same time, we had the whole debate about whether there should be intervention to protect the Kurds in Northern Iraq.<sup>[21]</sup> The Security Council was blocked on that. So there was a debate as to whether that was legal or not and so on. The Amnesty movement and the human rights movement were very split on these questions. So any kind of optics that suggested that we were close to one or another bloc was bad, so I was told to back off.

Because of my academic background, I suppose, I then decided the way forward was to try to write a more conceptual paper, which we called Peace-keeping and Human Rights,<sup>[22]</sup>

which took what was happening in peacekeeping and made a number of recommendations as to how to do that so as to promote human rights rather than undermine them.

**Stahl**

This was quite new. How did you come up with the idea?

**Clapham**

We did a series of studies. We had a bit on Western Sahara and a bit on different operations so it wasn't purely academic or big theory. It gave some concrete examples based on some of the problems that we had identified in working on this.

Amnesty's sections around the world really liked the paper, because it was something that they could relate to. So the French section could go to the French government and say, "These are our thoughts on peacekeeping. And this is what we should do if we have peacekeepers or if France is taking a decision in the Security Council," so that it wasn't just New York-centric. It had a reach within the movement. I got a lot of good feedback from the activists that this was something they could work with.

**Stahl**

Can you summarize the argument you made in this paper?

**Clapham**

One of the first arguments, which at the time was radical, was that the UN doesn't only have a responsibility to ensure the member states respect human rights, but that the UN itself has a set of human rights obligations. So obviously, this was a development from what I had been working on, that human rights could apply to corporations and to a trade union and to a private security company. And if it could do all of those things for those entities, why couldn't it also apply to the UN.

But of course, people at that time thought the UN is the body that saves us from human rights violations, it's not a human rights violator in itself. Yet, problems were starting to arise, and I could see this of the UN itself threatening human rights. And then there was no thinking, let alone a mechanism to try to bring the UN back under control in human rights terms.

So one of the messages was that the UN as such, especially if it's going to be in country where there's a bad human rights record, has to lead by example and not undermine the very rights which it's supposed to be promoting.

**Stahl**

Was it about the UN not protecting human rights or violating human rights?

**Clapham**

Both.

**Stahl**

Which cases of violating human rights did you come across at the time?

**Clapham**

It wasn't the same as today. We didn't have the sexual abuse scandals then, but there were issues of physical abuse. And we wanted to cover the positive obligations of the UN. So the front piece was about Western Sahara. It was triggered by a suggestion or tension regarding peacekeepers in Western Sahara. There were claims that if they were aware of human rights being violated by the Moroccan authorities or by the other side, they would not do anything because they had to be neutral peacekeepers.

Boutros-Ghali<sup>[23]</sup> had written a report as Secretary-General saying we cannot be a silent witness to human rights abuses. I think that the opening of our report referred to this silent witness idea. So there were these two ideas, one, the UN should behave in accordance with human rights, but secondly, the UN, wherever it is, has to report on human rights violations. They can't say, "We don't have a mandate for human rights. We're just here to do peacekeeping," that that would be to encourage human rights violations, and that was unacceptable.

**Stahl**

How were the reactions within the UN, the General Secretariat?

**Clapham**

Well, not good. When some of the actual abuses came up, my job was to go and meet with UN officials to confront them, this time not as Amnesty telling them about violations committed in a country, but telling them about violations committed by particular peacekeepers.

I don't mind mentioning the incident because I think I was interviewed about it on CNN. This was a particular incident in Somalia, where peacekeepers opened fire on a crowd, and people were killed. So we confronted the UN as human rights violators as such. And the reception was not good at all. I'm not going to get into the detail of who said what and where it was and all the rest of it, but they were not ready for that. Now, the attitude would probably be different. But I think this was the first time that this senior official had ever had somebody in his room accusing the UN of violating international law in a dramatic way where lives were lost.

We were saying, "It's your responsibility to follow this up," not that you personally are responsible for giving that order. And of course, the governments involved also had a responsibility. I think it was the first time that we as Amnesty had confronted the UN, we had a record of all the governments that we had engaged with and high-level meetings where you confront the ambassador or the minister. But there was nothing in the file about ever going to the UN and saying, "Now it's you we've got a problem with." That was quite dramatic, and they didn't take it well at all, to answer your question.

**Stahl**

Did they react somehow?

**Clapham**

We did get into a dialogue, yes. So there were disputes about whose responsibility it was

and how far they followed it up. So it got better. But the actual first confrontation I remember was quite awkward. I was actually with Helena Cook. We went in together to that meeting. I remember it really clearly.

**Stahl**

But on the other side, you mentioned Boutros-Ghali. He had an interest in giving more emphasis to human rights issues, didn't he? So there also must have been something attractive to your new approach or this paper.

**Clapham**

Well it was not really so simple. First of all, Amnesty International was working for the creation of a High Commissioner for Human Rights. So we had done a lot of thinking, and we had a very long paper — I think it was about 50 pages — explaining why the UN needed a High Commissioner for Human Rights. It was actually launched in Strasbourg a few months before, but we carried it physically to the World Conference on Human Rights in Vienna<sup>[24]</sup>. The whole movement was geared up to lobbying capitals to get this new post. This was our main message in Vienna and at the UN.

The day of the Vienna conference Boutros-Ghali published an OpEd in the International Herald Tribune saying now is not the time for a new mechanism or a commissioner or changing the architecture of human rights at the UN. He was totally against it, which was quite a shock, because not only were we fighting against states that didn't want to have something new that might possibly be effective against them, but also, the UN itself was saying it didn't want to have a new commissioner in the form of the Secretary General saying it. So there was a double fight.

On the issue of peacekeeping the Boutros-Ghali was frustrated at his inability to get states to contribute peacekeepers. At that time the idea of adding human rights training as an extra condition for contributing states was not considered feasible. There was also an assumption that peacekeeping was the preserve of the Security Council and inserting a human rights dimension into peacekeeping meant bringing human rights issues before the Security Council and that was a no-no.

**Stahl**

Was it new that you had access to the General Secretary?

**Clapham**

My predecessors in that office had cultivated a very good relationship with the Office of the Secretary General and the senior staff at the UN, so there was a tradition. At least once a year the Secretary General at Amnesty International would meet the Secretary General of the UN for an exchange on substance, not just a handshake.

And that was quite a big deal. So we would prepare for weeks we would send the Secretary General's office a quite detailed letter as to what we wanted to discuss.

Where I had to work hard was to get access to the Security Council, because Amnesty hadn't traditionally done that. And I made a point of saying we would meet all 15 members and we

would try to meet the president as they come in.

We created a group among us called the NGO Working Group on the Security Council, which probably still exists, where NGOs started to work together to see what could be brought to the attention of the Security Council. Security Council incoming presidents were then invited to come and meet the NGOs and have an exchange. We used to host that in the building with all the NGOs. And I did work very hard to ensure that Amnesty would address the Security Council. So we did get to have an address to an informal meeting once. The Amnesty Secretary General set out a whole set of expectations, which again was new and which was very much resisted at the time, with some governments saying it's just absolutely outrageous. We can't possibly have NGOs addressing the Security Council and so on. Today, it doesn't seem so radical. But at the time, it was breaching the hallowed sanctum, was just totally unheard of.

**Stahl**

How did the members of the Security Council react at the time?

**Clapham**

Part of the document said that in the design of peacekeeping operations there should be a human rights component, and there should be human rights monitoring. And we got some way with that with some members for some time. But today, I'm guessing that there's a bit of a kickback on that idea with some states feeling that human rights reporting will get in the way of peace, or asking why can't this reporting be done out of Geneva.

At the time, there was some sympathy. In the early 1990s, you had states that had gone onto the Security Council, waiting to pursue a progressive agenda.

**Stahl**

To which states are you referring?

**Clapham**

From memory, New Zealand, the Czech Republic, Austria. The permanent members were much more difficult. I don't want to get too much into particular tangles I had with them, but I spent a lot of time trying to persuade the British or the Americans that certain things ought to be adopted. Obviously, I had less access to China. I had quite good access to Russia at the time because this was the beginning of the 1990s. It was a completely different mood. And the French could be quite good on some of this at the time, as I remember.

**Stahl**

Would you say that your work had a lasting impact on the field of peacekeeping?

**Clapham**

It would be a bit grandiose to say that. I think we started a debate and framed some ideas that other people then took on, definitely. It probably would've happened without that particular paper or those particular meetings, but we probably accelerated the thinking a little. I think the bigger impact in terms of the amount of time and energy that we put in was in shaping and getting through the High Commissioner for Human Rights mandate.



**I was presenting the High Commissioner as something that would coordinate disparate programs and make things more efficient in ways that states could feel comfortable about, rather than as the entity that is going to hold states accountable.**

### **Stahl**

Let's talk about the High Commissioner. How did the idea of creating this post come up and when did Amnesty International pick it up?

### **Clapham**

There was an announcement that there would be a World Conference of Human Rights, a Second World Conference to be held in Vienna in June 1993. It wasn't very clear what the purpose or the content of that conference would be, just that it would be over a couple of weeks and intergovernmental.

Amnesty International called a meeting in London where they called people, experts from all over the world, to decide what ideas to put in front of that conference in order to go forward. To cut a long story short, out of that consultation in London came the idea that Amnesty would campaign for what we called a Special Commissioner at the time — the idea of High Commissioner was considered a bit British and colonial because British government called their ambassadors to member states of the Commonwealth a High Commissioner.

So the idea of a commissioner was reborn at that meeting, although there were a couple of background papers to that meeting. There were multiple attempts from the 1940s and 1970s to have such a post. Different governments had tried this idea, but we thought at the time that it was appropriate to repackage it as something rather different and also to sell it as fresh with a different name. That was the flagship idea that Amnesty was going to fight for at the conference.

We wrote a paper called Facing Up to the Failures: Proposals for Improving the Protection of Human Rights by the United Nations<sup>[25]</sup> that was then disseminated not only at the conference, but to the membership most importantly. So they were lobbying in capitals and in parliaments around the world that this World Conference should lead to this. It generated quite a lot of interest that there was going to be this new thing, much easier than campaigning for a paragraph in a declaration about how human rights are universal or interdependent and so on. This was something very concrete that people could latch onto. The Vienna Conference approved it and said it would be discussed at the General Assembly. Then we had the negotiations to actually create the mandate, and that was obviously much more complicated, what would go in, which model to use, and then there were various competing resolutions from different countries that were on the table and how to get behind one without alienating another group and causing a vote. It was fascinating to see that play out. I think I will remember that forever.

### **Stahl**

Could you just mention one example of the tactics you applied?

**Clapham**

You can't overly intellectualize that, it was just a negotiation. But I can remember one moment when I was coming under quite a lot of pressure from some governments who thought Amnesty should be campaigning more because each government had put forward their model. The ambassadors there were getting heat from their capital saying, "Why isn't your model making progress? We want this to be the X model. We can claim that we got our vision through."

So they would say, "You should be out there campaigning, saying, 'High Commissioner now. Support this model,'" and so on. I took a decision not to get hundreds of members of Amnesty outside the General Assembly chaining themselves to the railings saying, "We must have this High Commissioner now, and you have to vote tomorrow," because my judgment at that time was that if states thought that Amnesty and the movement wanted this so badly that it was going to make such a difference, they would make sure that it went away. It couldn't be seen as such a game changer in the human rights movement, so I was presenting it as something that would coordinate disparate programs, some peacekeeping, some field operations, and just make things more efficient in ways that states could feel comfortable about, rather than as the entity that is going to hold states accountable and have an independent voice free from political constraints, which of course, was what we wanted.

**Stahl**

What was the problem of the developing countries?

**Clapham**

Well, they were rightly suspicious that this could be used as a form of conditionality for aid. If the High Commissioner says you've got a bad human rights record, they'd cut off aid. The World Bank won't work with you. Human rights were still seen as a tool of the West to be used how the West wanted it against the developing world. It was changing slightly, but it was not something that people had bought into or were enthusiastic about.

So I worked a lot with the non-aligned movement and the head of the non-aligned movement, who were coordinating their approach to try to help this along. I felt that sometimes less enthusiasm could be more constructive.

**Stahl**

So would you say that it helped you not to come from an activist, but an academic background?

**Clapham**

It might have done, yes, in the sense that I had also realized that trying to achieve things within the EU was not just a question of shouting loudest and hardest, but that you had to build a coalition. And you had to answer the arguments of the doubters. Especially within the EU, where things had to be done by unanimity or consensus, you're not going to get anywhere if you just charge ahead and Luxembourg and Denmark are unhappy. I'd worked on some EU projects on human rights and I'd been in that situation. So I could see that you've got to take everyone with you.

The High Commissioner proposal was pretty unlikely to be voted through, so if it came to a vote, the whole thing would collapse. People didn't feel you could create a UN institution by vote. They did later. They built the Human Rights Council by vote. But at that time, the end of the Cold War, everybody was doing everything together. It was not really viable to do it by vote.

**Stahl**

So which strategy did you pursue to push your ideas, the ideas of Amnesty International?

**Clapham**

With the mandate, the main thing was to ensure that the High Commissioner would be able to address any human rights situation in the world and monitor the situation, that they would not be told, "I'm sorry, you can't speak out, or you can't issue a report, or you can't go to somewhere to look at it," that it couldn't become just a super secretary dealing with all the existing programs, that there had to be the sense that they had an obligation to look at human rights everywhere and to address them. Once we'd got that, I wasn't so worried about how the rest would fall into place.

**Stahl**

Were you satisfied with the result?

**Clapham**

Absolutely, and especially if you look at the activity of the current Office and High Commissioner and what the High Commissioner feels capable of saying and doing, it's more or less what was conceived in 1991. Part of the history of it is that at the time, the Secretary General of the UN, whether it was Pérez de Cuéllar<sup>[26]</sup> or Boutros-Ghali, did not speak out on human rights.

One of the incidents which I talk about in class is that there was a massacre in East Timor around that time by the Indonesian armed forces in a cemetery in Dili, around 270 people were killed.<sup>[27]</sup> As Amnesty at the UN, we helped to get a video of the killings shown in the General Assembly. A journalist who happened to be there had smuggled out the tapes. It was hugely dramatic, the first time, I think, that the General Assembly had watched human rights violations in a state like that. The Secretary General of the UN sent a Rapporteur to go and investigate, who produced a report on what had happened. That report stayed on the Secretary General's desk and was never released. Of course, the Secretary General at the time was negotiating between Indonesia and Portugal about the future of East Timor and had a good offices mandate and felt he could not upset Indonesia by releasing such a report, although I don't know what's in the report.

It struck many of us at the time who were thinking about these issues and what to do for the World Conference that if the Secretary General is going to investigate a massacre but can't actually say anything because it's incompatible with being Secretary General, we need somebody who can say something. When there's a massacre in the world, somebody in the UN has to be able to say, "This is terrible. It should be investigated. People have to be brought to account." It can't be that, "It's going to interfere with peacekeeping or peace mediation or whatever. So the UN's going to be just silent."

So a lot of the impetus was to have a high-level person who did not have to wait for the next session of the Commission and wait for the next treaty body report, but day-to-day address things. And that I think we have now.

The last few High Commissioners, when issues such as the Rohingya<sup>[28]</sup> arise they were in front of CNN addressing it. They didn't say, "Well, I'm sorry. We'll have to wait until the Human Rights Council decides what to do."

**Stahl**

But the first Commissioner, didn't he receive some criticism?

**Clapham**

He was too quiet and too much of a diplomat.

**Stahl**

Was that also your perception of him at that time?

**Clapham**

Well, he was the ambassador. There's really no comparison. He was the ambassador who negotiated the resolution. So he was a diplomat at the General Assembly. He had been friendly to everybody in order to get the resolution adopted in the way I was describing earlier. And he continued as he'd started, as the consensus builder, somebody who wasn't going to step too far out of line.

I think sometimes people don't realize that he did actually try quite hard. When the Rwanda crisis<sup>[29]</sup> broke in his first week in office, he did go there and he did say things. But he didn't have the personality of Mary Robinson,<sup>[30]</sup> the status. She had been an elected President of her country. She knew the leaders of the world. She'd met them. And he was a UN General Assembly Ambassador who knew other ambassadors and maybe some foreign ministers, but there's just no comparison. She was a human rights lawyer. She'd taught international law. She'd pleaded cases at the European Court of Human Rights. It's such a huge contrast.

**Stahl**

But this in retrospect. At the time, you didn't have a comparison.

**Clapham**

Well, people were quite underwhelmed, I suppose. We have a High Commissioner, but it's not going anywhere. You have to remember also that when he was appointed as High Commissioner, he was given maybe two or three staff. I worked a bit on lobbying for the budget. The first budget of the High Commissioner was one million a year.

The way Boutros-Ghali set it up was that there would be a High Commissioner with a couple of staff, and then there would be the Office of Human Rights, which would continue as before. Under Robinson, the two were merged. So she became the head of a staff of 1,000 and a budget of 200 million, which clearly allows you to draw on the resources of your staff, to organize missions, to do huge speeches, to engage in projects with governments that

come out of the office and which are headed by a High Commissioner.

So in historical perspective, it's not only about the personalities, the architecture of the thing radically changed. If Robinson had been left with a staff of two and a budget of a couple of million, I'm not sure she would've stuck it out.

**As delegate of the Solomon Islands I worked quite hard on trying to include jurisdiction over multinationals within the Rome Statute of the International Criminal Court.**

### **Stahl**

And your work in the context of the International Criminal Court? The Rome Conference of 1998, where the Statute was adopted, happened after your time at Amnesty. But the negotiations started earlier.

### **Clapham**

I attended the preliminary meetings as Amnesty, but most of the work was done out of London by my colleague Christopher Hall. So by the time of the actual Rome Statute negotiations, I was no longer with Amnesty. But I got the opportunity to participate as a state.

I was asked by the Solomon Islands to be their legal adviser during the negotiations. There was a constitutional issue in the Solomon Islands. The head of the delegation, the Attorney General, couldn't actually come to Rome. So I ended up being the sole member of the delegation, acting head of delegation, but also its sole member. It was an incredible experience. Obviously, I talked to the NGOs and my colleagues from Amnesty. But I could have my own communication with the capital of Solomon Islands and other states from our group. This time I participated not as an NGO knocking on the door after the meeting and saying, "Maybe you want to think about this," but actually as a state in the negotiation and make the state's own proposals and argue, which was a completely different experience to be in the meeting when the NGOs are out of the room.

### **Stahl**

So was there a specific issue you pushed in these negotiations?

### **Clapham**

Yes. The records will show that the Solomon Islands worked quite hard on trying to include jurisdiction over multinationals within the Rome Statute (at the time the Solomon Islands had had some issues with mercenaries). So I ended up co-chairing a working group of the conference called "A Working Group on Legal Persons." There was a long set of meetings as to how to draft an article which would address the complexity of the court having jurisdiction not only over individuals, but also over corporations. We worked quite hard on that and spoke in the plenary, but also chaired this working group with other states. That didn't succeed. One explanation is that we just ran out of time. It was too complex. And another explanation would be there were some states that were pretty unenthusiastic for legal reasons. They didn't see how this could work within their national legal order. And so without enough consensus or without a big enough majority, it was dropped as a bit before

its time.

In the end, there were some states saying in the final meetings, "Well, if in the future we feel the court needs to have this jurisdiction because corporations are indeed doing this with impunity, then we can adjust the statute." So it wasn't ruled out. And the work was more or less finished as a draft article, which you can find in my writings. So it's pretty easy to do if you want to adjust the statute now after all that work.

So that was one of my focuses. And the other was that each state or most states were given a task of a particular article or chairing a particular group. And the thing that the Solomon Islands was given under the chairmanship of Samoa, which is also in our regional group, was to coordinate the work on the preamble. So I did spend quite a lot of time thinking about the preamble and talking to states about what should go in it and proposing language.

**Stahl**

Are there some attempts at the moment to push this a little bit further?

**Clapham**

Well, I had a meeting just before you, and that was actually the topic of the discussion. So I can't say that it's not happening because, clearly, there are these discussions. There's a meeting going on in Geneva at the moment, which is called the Intergovernmental Open-Ended Working Group on Transnational Corporations and other Business Enterprises with Respect to Human Rights, with the Mandate of Elaborating an Internationally Legally Binding Instrument.

And one of the options within the elements paper, which has just been circulated, is that the statutes of existing courts could be adjusted to include jurisdiction over multinationals.

So in the long view, maybe someone will want to do it. What I can say is the African Union has adopted a protocol which would be an amendment to the statute of the African Court of Human Rights and Justice, which would include criminal jurisdiction over corporations.

So that is based on this idea that we did work on in Rome that it is possible to have an International Criminal Court with jurisdiction over corporations. And they've taken it quite a lot further forward in the African Union context. So it's not a topic which is dead at all.

**Stahl**

Just a last point about this time with Amnesty International. You had to deal with many different branches of Amnesty International. Which branches were especially active during this time?

**Clapham**

Well, of course, it changes from topic to topic. But on the High Commissioner, certainly the Australian, Irish, British, Canadian, Dutch, Swiss, German, Italian and US branches were active, as were I think the Chilean, Argentinean, Senegalese, Phillipines, South African, and Nepalese branches, as I remember.

Then there was the discussion on peacekeeping and humanitarian intervention including the use of force. questions were — there was a sort of separate set of sections that were particularly involved. And I remember Nepal in particular and Philippines and the Netherlands.

**Stahl**

Would you agree to the interpretation that the 1990s were a time of crisis for Amnesty International?

**Clapham**

No, I wouldn't call it a crisis, but certainly a period of introspection. There were very different views over whether Amnesty could ever call for the use of force in the face of ongoing massacres. The wars in Iraq and Bosnia, the genocide in Rwanda and the NATO intervention in Kosovo were all times when human rights activism seemed either futile or too much like war mongering.

Where we talked about a crisis in the 1990s is when the Rwanda genocide took place, it was clear that Amnesty was not prepared for the enormity of it and how to cope. The Amnesty model was having a researcher who works on maybe three countries, Rwanda, Burundi, and Uganda. Then suddenly you've got a genocide with hundreds of thousands of people dying, so how is one person, who's dedicating one-third of their time to that, possibly going to cope?

So Amnesty set up something called the Crisis Response Group in the post-Rwanda period to say, when a crisis breaks in the world, we have to be able to pull people from different parts of the organization into a sort of mobile, flexible group that could work 24/7 to try to deal with this. And we'll have to have different levels of technology and different budget lines. You have to have some flexibility within the organization to cope.

That I do remember, and that I was involved in. I ended up being sent to head the Crisis Response Team in Rwanda for about six weeks. I left my UN representative function, and I was the head of this office in Rwanda dealing with the crisis response as to what Amnesty could do in the post-genocidal period in Rwanda of use. And because a lot of it was about the UN in Rwanda and the establishment of the Rwanda Tribunal,<sup>[31]</sup> and by now there was a major UN human rights operation, a lot of it was about trying to improve what the UN was doing as well as talking to the government.

But of course, now you had a new government in response to the human rights violations that you were dealing with. I had been working with the same people when they were in the armed opposition, the RPF,<sup>[32]</sup> and at the UN lobbying the Security Council against the Rwandese government. Amnesty was pointing out all the bad things that the government were doing, so the RPF were with us. But now the RPF were the government. So that was a very interesting period.

For me, that was what Amnesty meant when they talk about crisis response in the 1990s, that one had to be able to have a completely different approach to human rights because of the enormity of what had happened.

I remember as that crisis was breaking, we were completely overwhelmed by what was going on and just not prepared to deal with it. These days, I'm guessing they have an early warning system. Researchers are brought in, satellite phones are set up, and people are sent out into the field. It's a different approach.

**Stahl**

Completely different from what one knows about the work in the 1970s and 1980s.

**Clapham**

Exactly. So that's what I think people may have been alluding to in crisis response and fact finding. One had to have a completely different approach.

**Stahl**

Why did you decide in 1997 to go back into the academic world and start working at the Graduate Institute?

**Clapham**

I had a sabbatical from Amnesty, I'd already done six years by now. You were allowed to take a year out after six years of service. I was talking to Professor Meron,<sup>[33]</sup> who was actually teaching here at the Institute at the time. He said that he was leaving the post here and that, if I had a sabbatical coming up, maybe I could do teach human rights for a while. I knew about the Institute, I had been coming to Geneva two or three times a year as Amnesty because I used to come to represent them in the Commission and the Subcommittee along with the Geneva colleagues.

I didn't have a plan, I had a sabbatical. So I came to Geneva as a visiting professor, and during my sabbatical from Amnesty, enjoyed myself, met the woman of my dreams.<sup>[34]</sup> Under the rules for Amnesty, if you do a sabbatical, you have to come back for at least a year after your sabbatical because, otherwise, why would they let you go? It would be very inefficient for them to just suddenly have an empty spot.

So I came back and settled in again, but by then, the Institute had made it clear that they would be advertising for the permanent job. So they advertised, I applied, and I got it. I suppose you need more of an explanation as to why leave Amnesty than just that I had a sabbatical, but the thing about the UN and what I was doing particularly in the GA is that the diplomats come for about three years to New York. I can remember very clearly in one of the meetings towards the end, they were negotiating on a resolution on something. People didn't quite know what to do. And they said, "Well, let's ask Andrew. He's been around the longest."

And of course, I had been there not just longer than them, but longer than their predecessors in the sense that I'd seen two lots of diplomats come through, and this is now the third generation. And they were all going onto their careers, and I was doing exactly the same thing every year, which was absolutely fascinating, but within that job, I couldn't be promoted because I was the head of the office.

It was not obvious what I could do. So it seemed a good move to see what it would be like to



be in a university and teaching human rights.

Around that time, I was doing cases. I am qualified as a lawyer in England, so I was doing some human rights litigation. I did a bit during my sabbatical and then a bit more during the Rome Conference. Then I was invited to become a founder member of Matrix Chambers, the barristers' chambers in London that was doing a lot of human rights work.

So then the academic thing didn't seem like I was totally leaving the world of human rights practice because I could still do these cases. I wasn't doing a lot, but enough not to feel that I would retire from human rights and was just teaching the new generation. Around that time, 1998, we have the Pinochet litigation.<sup>[35]</sup> I was not doing a lot of legal practice, but some things to do with Pinochet, I started to get involved in and working on some of the cases. I can go into the detail if you want, but it was a very exciting time to be challenging things within the courts. And it seemed as though human rights was not now for me just something that we talk about in the UN, but it was actually something that you could use in law before a judge. And that was quite an exciting period.

### **Stahl**

Can we talk a little bit more about the Pinochet case? It was discussed also outside of England and it played a crucial role in the prosecution of human rights violations.

### **Clapham**

Sure. So my role was very much in the background, but there were two actual applications that I worked on. At the same time that there was the litigation going through the UK courts, we prepared a case for the European Court of Human Rights on behalf of some of the victims of Pinochet to say that the way in which Pinochet was being granted immunity before the British courts would mean that he would not be held accountable. And therefore, the United Kingdom would be in violation of its obligation to grant access to justice to people. We had some clients that had a British connection. So it was a complaint against the United Kingdom in Strasbourg that the failure to hold Pinochet to account within the UK courts was a denial of the victims' rights before the UK courts.

It is not part of the classic textbook about what happened with Pinochet, but it was used behind the scenes to pressure the government and the judges indeed, because they were made aware of this, that their decision as to what they did with Pinochet could ultimately end up in Strasbourg.

I remember working on it quite hard. It's not part of the standard story, but I was involved in that kind of litigation. And there was another one which is quite exotic and which very few people know about. I was on a team led by Philippe Sands<sup>[36]</sup> instructed by the Belgian government to bring a complaint against the UK government in the International Court of Justice. The argument was that there was a rather complicated treaty on judicial assistance, which said that if a European country asked another of these states for information related to a criminal case, they had to provide it. Belgium, who also was prepared to prosecute Pinochet, asked the UK for the medical reports into Pinochet's conditions. The UK was refusing to hand over these medical reports, which were at the heart of why he was not prosecuted in the end.

One case which I have to mention that was very formative in my sense of what I was doing was a case I did with my friend Ben Emmerson<sup>[37]</sup> in the European Court of Human Rights, a case called the Osman case.<sup>[38]</sup>

It came to me quite soon after I finished my PhD, at the beginning of the 1990s, which was about extending human rights not only to the activities of the state, but also to non-state entities. Osman was a teacher at a private school who had been harassing and stalking one of his pupils and his family and tragically ended up killing the boy's father.

The case revolved around the fact that the family were suing the police for not intervening earlier to protect their right to life. This was a rather big challenge for human rights lawyers in the court at the time because it was really saying not only does the state have an obligation not to kill people, but the state has an obligation to protect everybody from private actors killing you. So it was this big chasm that I had been working on as to how to show that human rights law was not only about state actors, but also about non-state actors.

We had to develop a whole set of arguments and precedents and theory as to why the state had this obligation to protect one private individual from another private individual under international human rights law. We chose this case, and we decided to put a lot of effort into it because it was going to have implications not just for this particular family, but also for the whole idea that domestic violence and violence against women was a question of international human rights law because, at the time, you could find people who would say, "Well, that is a question of domestic affairs. Human rights law is about policemen who torture people and put people in prison. It's not about what a husband does to his wife."

We wanted to challenge that public-private perception, but also the gendered breakdown there through this case, which we realized had to be carefully done so as not to close it off in the future that the judges would say, "Well, if the policeman had shot the father, yes, this is a right-to-life case. But as it's a private individual, nothing to say."

So that was a very formative experience because the Strasbourg process in those days was quite long. You had to go to the Commission on Human Rights. You had to win in the commission, and then you had to win again in the court. It was a lot of paperwork and a lot of physically going to court and meeting the family and so on. It was over quite a long period and it was a lot of investment.

It was also a great opportunity for me to see how, from time to time, my academic research and ideas had to be adjusted in order to be suitable for presenting to 20 judges, from all different countries, who were listening maybe in French. What I could write in my PhD was not necessarily something you can cut-and-paste into the courtroom when you've got people with differing backgrounds.

So that was a big learning experience, just how to do advocacy as opposed to PhD research. So fairly early on in my career, I could see that there were two different ways of getting to the same result.

**We soon started to develop a strategy for the office of the High Commissioner toward**

**businesses.**

**Stahl**

In 1997 you were also special adviser to Mary Robinson. Could you briefly explain the work of a special adviser?

**Clapham**

We soon started to develop a strategy for the office toward businesses, but also more particularly in the context of what was just being established then, which was the UN's Global Compact for Businesses. And two or three of the principles that they had to abide by were human rights principles.

This was all quite new conceptually, both for the UN and for the businesses themselves. And the Global Compact when it was first launched had a clause which said something like businesses have to ensure that they are not complicit in human rights violations. So what exactly does that mean? What kind of obligations does it entail? What are their legal obligations? And how could you guide a business if you were a business trainer or manager how to avoid becoming complicit? What are the steps?

Having thought a bit about the war crimes tribunal for Yugoslavia<sup>[39]</sup> and for Rwanda, where there were judgments which had started to work out aiding and abetting liability for individuals, we started to work on what it means to be complicit in a crime committed by someone else, and when would one hold somebody responsible, and what were the tests, and how much knowledge did you have to have, and what kind of precautions did you have to take?

I tried to adapt some of that thinking to the world of business and human rights. Together with the office, we produced some papers about business complicity and human rights violations, which were discussed in various fora. I would go around explaining this at the UN and the Global Compact, but also to businesses themselves.

There would be all kinds of discussions related to companies that quite quickly wanted to get close to the UN in this clichéd way, put the UN logo on their products and say "UN approved." So we had some quite interesting discussions as to how to avoid getting caught in that particular trap with Mary Robinson and her staff.

**Stahl**

Which were the concrete cases on which you developed these papers?

**Clapham**

The criminal law cases related to the genocide in Rwanda and some of the torture and sexual violence that happened in Yugoslavia. So they relate to individuals who were prosecuted.

**Stahl**

How was that related to business?

**Clapham**

It's a good question. In those cases, you might have an individual who knew that somebody was being tortured in the prison that they were not necessarily in charge of but operating in, and maybe they even stood around while somebody was being tortured and could have used their authority to stop it and did nothing. So the question arose whether, even if they weren't the one physically doing something, they did offer some kind of moral support by being there and being in a position of respect or whatever it was, or did they facilitate or provide the equipment that somebody else used to do something?

So we developed layers of complicity, actually physically providing the guns that do the torturing as one level. As a company you could be supplying something that was going to be used to commit human rights violations.

There's another level of allowing your premises to be used and not doing anything, and then on a weaker level, knowing that the government is doing something and you having considerable influence over the government but choosing not to speak up. I think we called that silent complicity.

I was careful to say that that is not actually necessarily a legal obligation. But if you are a corporation, there is a growing expectation that if you're operating in an area where you're working very closely with the government and the government is engaged in violations that may be even indirectly connected to your operation, failing to raise those violations will be seen as silent complicity. It was obviously inspired by what had been going on in Nigeria, where the Shell Petroleum company had been extensively criticized for not intervening with the Nigerian government over the arrest and eventual execution of Ken Saro-Wiwa,<sup>[40]</sup> who was protesting amongst other things about the pollution and other damage caused by Shell.

So this was an emblematic moment in the history of business and human rights, where Shell was expected to have done more. And the overarching popular term for what they were doing was that they were complicit, or there was complicity, even if as an international lawyer I was saying, "Well, complicity actually has a technical meaning of facilitating somebody else's crime," but I was trying to give the companies degrees of complicity, if you like, or different types of complicity, some of which would give rise to international legal obligations, and others to some sort of moral political obligation.

We wanted to inform them they should be aware, but not to take the strict legal view and say, "I didn't supply the arms, and I didn't supply the torture implements. So I'm not involved." That might not be enough in some circumstances to avoid the accusation of being complicit by a human rights group. And hence in those contexts, people were saying, "Well, one should boycott Shell. One should boycott various companies because of what they've done."

So if you're interested in having a good human rights record as a business, the legal stuff might not be as important as the public perception. It was interesting to take off my lawyer's hat and try to push the boundaries to persuade companies as far as they would be persuaded. It led into some other projects, which were to do with ethical investment. I was

invited by the Norwegians to go to a conference where they were talking about the extent to which pension funds and sovereign wealth funds should divest or withdraw their investment from companies that were violating human rights or complicit in human rights violations.

There's a book, I have it here,<sup>[41]</sup> this was the conference. So you can see how the two or three ideas there then get tied together, the idea of corporate complicity, the idea of human rights, and the idea of disinvesting to avoid contributing to human rights violations.

That whole discussion, again, is not necessarily about human rights complicity as you would find it in a court of law, but as determined in the Norwegian system by parliament. It's a much looser and more political set of criteria.

**Stahl**

How much did you discuss this issue with the people from the companies?

**Clapham**

Quite a lot. I would go to a lot of meetings which included businesspeople. It wasn't a negotiation with them because I was just writing what I thought was the appropriate meaning of the terms in the Global Compact.

**Stahl**

So these meetings had the goal of getting their perspective?

**Clapham**

Most interesting thing for me was to hear about the issues that arose for them day to day, where they would have a dilemma, and then they would want advice on how to deal with it.

**Stahl**

Which enterprises or companies were these?

**Clapham**

There were a lot of oil and extraction companies involved and then sportswear manufacturing companies. Those were the two sectors that were most active. Nike and Adidas and all of those groups were very much involved. And then on the extractives, it was Shell and BP and Texaco and Total. Those were all players. In mining you had Rio Tinto Zinc and others.

Then I got interested in the security companies that were used to protect the mines. So now we had the private business obligations, but then there were the obligations of them towards the people who were going to come into contact with the security companies that they were using to protect their enterprises. So now we've got two sets of private actors and two slightly different sets of obligations. I became quite involved in trying to work out what would be the exact obligations on the private security companies that were protecting the mines.

**Stahl**

Which results did all these talks and discussions have for human rights overseas?

**Clapham**

The private security company talks resulted in the creation of a code of conduct for private security companies and now the association for the code of conduct for private security companies. So there's now an international institution just over there sitting in the OMM Building, which is called the Association for the International Code of Conduct for Private Security Service Providers. It has a lot of members and they have adopted this code of conduct. The members have certain obligations towards the association to report, and they can be investigated. They have to qualify for membership of the code of conduct by going through a whole series of steps. Ultimately, they could be found to be in violation of that code, which would then reduce their attractiveness for future contracts.

Also, the code is designed so that it becomes part of the contract, say, between the private security company and the mining company. The code is part of the contract. So if the private security company tortures or kills or denies trade union activity or whatever it is, then they will be in breach of contract, and it would be enforced through the contractual arrangements between the two.

So to say that it's a voluntary arrangement is a bit too quick because it's designed to take effect in law. It's a complicated arrangement and the association has just been founded.

**It became obvious to me teaching here in Geneva that most of my students were not European. So to give courses just on the case law of the European Convention on Human Rights was not necessarily what they wanted.**

**Stahl**

At this time you were teaching and doing research at the Graduate Institute. Did these activities influence one another?

**Clapham**

They did, perhaps not as much as you might expect because the work, say, on private security companies or on health and human rights was quite technical and detailed. And you're trying to achieve a result with a group of people, convincing them to adopt certain language on the right to health or trying to adopt a code of conduct that everybody can sign.

The academic work and the teaching work has to be much more broad brush. But I would from time to time give a specialized class on some of this for advanced students, which people appreciated because you get a real insight. But it's not so much that you just take everything you're doing on the practical side and just build it into the teaching because you still have to teach the law of treaties, what is a treaty, how does it get adopted, before you can explain the minutiae of how you might choose one phrase over another in a treaty. Otherwise students leave not really understanding how it works, but just understanding one little tiny thing that the professor happened to be doing that week, which is not helpful. It's exciting for them for a while and then they realize, "I haven't actually learned

anything." So I was quite careful I think to stick to the teaching program and not just tell stories about what I happened to be doing in the UN.

**Stahl**

Did your teaching focus especially on human rights or more general on international law?

**Clapham**

Both. I was teaching international law and human rights. And then I did run courses on human rights and non-state actors for a while, and then I would bring in some of this work that I had been doing, but in a more theoretical way.

How you teach the business responsibilities under international law to a class is very different than if you're talking to Shell and BP. It's just completely different discourse. One, the students have to understand the framework for the whole world and not just one little sector. Most likely you're dealing with the guy from BP from Russia, and he's only interested in how this affects Chechnya and armed conflict. So that's a very specific kind of discussion, as opposed to when you're trying to teach students in two hours everything there is to know about business and human rights, much broader brush stuff.

Perhaps within the doctoral supervision I was able to guide people into issues that I had studied in the practical sphere that would help them, contacts and documents which otherwise they wouldn't find.

**Stahl**

What was the status in the development of human rights in international law here in Europe in the 1990s? In the United States, there was not exactly a boom, but a growing number of human rights classes offered during the 1970s, and it became more and more a topic of teaching and research. So I was wondering whether there was a similar development here in Europe. Were the 1990s a special moment?

**Clapham**

The short answer is yes, but it's very context specific. In the United Kingdom, the Human Rights Act was adopted in 1998. So this idea that I had been thinking about of having a bill of rights in the UK was adopted by the Labour government as the Human Rights Act.

It meant you could apply the European Convention in the UK courts, which meant that all the judges were trained, and all the lawyers started to realize that this might be an interesting area of practice. All the textbooks were rewritten. When I went to university, human rights hardly existed as a topic in the basic syllabus. And now there were classes starting, just starting at the end of the 1990s in the UK.

Here, at the Graduate Institute, human rights had been a long tradition. One of my predecessors in this post was Bindschedler-Robert, who was a Swiss lawyer who went on to become the Swiss judge at the European Court of Human Rights.<sup>[42]</sup> So the European Convention on Human Rights had been taught in Geneva for years because Switzerland had been a party, and the Swiss judges were applying not only the Convention but some of the case law. People come to Geneva to learn about human rights, and most human rights

courses would've been centered around the case law of the European Convention. That was how it was mostly taught.

What probably changed is that it became obvious to me teaching here that most of my students were not European in any class that I was giving. So to give courses just on the case law of the European Convention on Human Rights, as I did for a few years, was not necessarily what they wanted from a human rights education because they were going to go back to Burkina Faso or Guatemala or Nepal or China, and it's not that helpful to understand how it works in France and Germany and all this detailed case law.

So I adjusted my teaching to look at what I called human rights through the concepts. Instead of going through how you bring a case at the European Convention on Human Rights, which was the traditional textbook way of teaching it that I had picked up, I started to look at human rights as a series of concepts that we needed to understand, such as torture, development, education, disappearance, some of those ideas.

### **Stahl**

Like your book on human rights.<sup>[43]</sup>

### **Clapham**

Exactly, there was a gap. There were books on The Law of the European Convention on Human Rights, or how to bring a complaint at the European Court of Human Rights but I struggled to find books on what human rights really were beyond that system in law and not just philosophy.

So that's how Susan and I came to write the human rights lexicon where we tried to get away from all the procedural stuff.<sup>[44]</sup> If you are teaching over 14 weeks you can basically spend 10 weeks explaining all the procedures and what happens in court and how judgments are enforced and the follow up and so on. I was realizing that by the end students had no idea really what the substance of human rights law was. They're pretty good at knowing how to go to court and what would happen. But they couldn't actually argue about whether something was freedom of association or not. So I tried to shift my teaching away from discussing the institutions. And I think that probably changed in other places, too, now. I think there's also been more emphasis now on drilling down to try and find out, say, about religious freedom and the headscarf ban and all of that is more interesting in a way than studying the cases, to study the dilemmas.

I think what's also changed is the arrival of the international criminal courts. It's impossible now to think about human rights work without also understanding the role of the International Criminal Court and the role of classifying something as crimes against humanity instead of calling it a human rights violation. What does that change? You can't really introduce students to the world of human rights without touching on that because, the next day, there'll be a massacre, and the High Commissioner will be calling it a crime against humanity. And they need to know why. If you've only taught them human rights narrowly understood, they don't know what this means and what the implications are.

So International Criminal Law, which didn't exist as such when I started teaching suddenly



is a huge topic. We now have other courses on that and other professors who are specialists.

**Stahl**

Were there cases when students who came from different parts of the world challenged your way of thinking about human rights?

**Clapham**

The most dramatic example I can remember is when I was lecturing after September 11 and I was explaining the International Law which would apply to the acts of the hijacking of the airplanes. I don't remember the exact context, but somebody, an American, started screaming at me, something like, "These guys had box cutters, and they killed thousands of people with airplanes, and you're saying we have to look at human rights!"

I think I was giving them the legal framework as to what would happen if you caught somebody and what they would be tried for and how their rights would have to be respected, and they couldn't be tortured, I can't remember the exact discussion.

But the feelings were too raw for those who saw this as an attack on themselves and who perhaps, unlike someone like me, had never really been exposed to terrorism which would affect them or their families. So an American student who comes to the institute in the year 2001 has probably never really had the idea that there could be a terrorist attack on them or their family. It's just too weird.

My father, when he was a lawyer, was actually blown up by the IRA and hospitalized. I came home with my mom; I remember she was in a great state. We watched TV, and he was on TV because, for some reason, they had chosen to interview him in hospital, maybe because he was not so injured that he could speak to camera. His face was completely covered in blood, he obviously had stitches and bandages. But I remember the image. So that was pretty dramatic. But growing up in the UK in the 1980s, there were IRA attacks and you would be evacuated, and then you would watch on the news that somebody had been killed in a pub or whatever.

You learned to talk about it and to think about it. I also used to teach cases about how the IRA had been mistreated by the UK, and then there were some quite famous cases that I used to teach in quite a lot of detail about IRA bombers and their human rights. In one case, even though the bombers were killed, their families won in Strasbourg, a very controversial case.

I was used to talking about the rights of individuals who were engaged in terrorism as part of the whole story of human rights, that it's not always just about somebody that you're intensely sympathetic to. It might be people that you don't like, but they still have human rights, and that's part of the story because if it was only about discussing people who we're sympathetic to, it wouldn't really be such a problem. But often it's people who are rejected or a minority or not tolerated where those rights are the hardest to defend, and they might need them the most in some ways.

I had internalized that, and I could talk about it. But that was a time particularly when I got shouted at in class, and where my views were obviously diametrically opposed to those of the student, although it wasn't really an intellectual disagreement. It was just the words that I had chosen, and it was just too raw. Maybe I should've been more sensitive to the fact that some people were still digesting this.

**Stahl**

How was your impression of the students during this time, also if you take a long view from the 1990s to the 2000s, and their political involvement or the political attitudes they had?

**Clapham**

That's a good question. The Institute students are a particularly interesting group because they have self-selected to do human rights when they come to me, or at least most of them. I wasn't really teaching anybody who was there under duress. They had chosen to come and study in my class and they had chosen to do human rights. So they tended not to come with a skeptical attitude to human rights.

Did they become more progressive or less progressive over time? I think that be difficult to judge. I would say that today they are probably more engaged and activist than I remember. I'm not sure quite what to put that down to. It's probably a very unempirical idea, but I think the connectedness between students because of social media means that they are more likely to suddenly congregate at a human rights event than I remember.

If you're interested in human rights, they're on some chat group or something, and so people are more active, but they also show up more. I think there's more of a feeling of connectedness, whereas before students would be in their box working for their exam, and maybe they didn't care as much as the current generation, but I have a feeling it's more the way in which they interact that's changed.

**Stahl**

In 2006, you became director of the Geneva Academy. How did you try to shape the work of the academy?

**Clapham**

This was an enterprise between the Graduate Institute and the University. The ICRC was involved and later the UN and University of Lausanne. So it was quite a coalition to create a new academic unit which would draw on the strengths of the Institute and the University together and to run training. Then it turned into something which actually ran degrees, LL.M degrees. But I was always keen that it would contribute research and practical ideas as well.

So there was a twofold mission, running postgraduate degrees for students and then the research and applied policy research, as we used to call it, because it wasn't research in the sense of just another academic strain of research, which of course, you could do anyway at the university. There'd be no point in creating a whole new thing.

It was quite a challenge, one, because nobody gave me any money to do all this, but they wanted me to do everything. So I had to fundraise to make the thing work, which was quite a strain. If I knew now, I would've put some conditions early on. But at the time, it seemed doable.

The other hard thing was to start something from scratch. There was a University Center that we were building on, but the Academy had to be bigger and more ambitious and have greater profile on the world.

I think the Academy achieved some significant results, first, because it has a very successful teaching program, which is not something that I could take any credit for. It's really the work of Paola Gaeta<sup>[45]</sup> and Louise Doswald-Beck<sup>[46]</sup> and Robert Roth.<sup>[47]</sup> And second, because a number of the projects were influential in their own way I would say.

**Stahl**

In which sense?

**Clapham**

Well, the code of conduct that I mentioned earlier, that was something that really was a child of the Academy. We worked on the first draft, and we hosted a lot of the meetings.

**Stahl**

So you picked up this issue you had been working on before.

**Clapham**

It came naturally to the Academy, I suppose. The Academy worked together with the Swiss government, because the Swiss government then were very much involved in that code and the Montreux process.

There are two other projects which spring to mind immediately: we had something called a Rule of Law in Armed Conflicts Project, which developed into something called the War Report, where we would try to track the situation of armed conflicts around the world and categorize them in legal terms. Is this an international armed conflict? Is it violence? Is an armed conflict that triggers the Geneva Conventions? Does Protocol II apply, and so on? That started out as an internet project and then became an annual publication called the War Report.<sup>[48]</sup> I would like to think it's quite influential.

I certainly have a nice anecdote in the sense that I was in court once, and the judge said, "Well, is there an armed conflict in Afghanistan, and which treaties apply?" And one of the parties said, "Well, yes, there is, and this treaty applies." And the judge said, "Well, how do you know that?" And then they said, "Well, it's in the War Report." And I was on the other side, and I was thinking, "fantastic."

The other major one which I should mention is when we produced the commentary to the Geneva Conventions.<sup>[49]</sup>

It was a team of around 75 people run out of the Academy, which was incredibly hard work

for all involved. It is used and cited, and it's significant. The Supreme Court of the UK is referring to chapters in it. So you feel like you're contributing to legal thinking. So that was very satisfying.

And then there are multiple other projects in the academy. There's one which we're running now on people with disability in times of armed conflict, which was quite an overlooked area. We're doing a research project on that which involves trips to Colombia, Palestine, the DRC, Ukraine and Viet Nam, so some field work connected to legal interpretation, and then working with NGOs and governments and the Special Rapporteur at the UN to try to come up with greater clarity and more action-orientated recommendations.

There's one project on peasant's rights, there has been a lot on the right to food, as well as on realizing the right to health. WE also did a lot of work on drones and on weapons and international law.

One of the most time-consuming but satisfying was another project which ended up in a book, which was this one on the Arms Trade Treaty.<sup>[50]</sup> We went to all the arms trade treaty negotiations as the Academy and produced a daily blog during the negotiations. One of my coauthors, Stuart Casey-Maslen,<sup>[51]</sup> who's really the main author, was included in the Swiss delegation so that we were able to get access to the thinking within the delegation and of the delegations as to the meaning of some of these texts. That helped us to write a more authoritative book as to what the treaty means.

I think without the Academy and without that structure, we wouldn't have been able to carry out that kind of work. So in that sense it became a very exciting place to try to contribute to the formation of international law, which I probably wouldn't have predicted when we started. I think we managed to insert ourselves into the private security issues, into the arms trade issues, into the drone issue, and into quite a few ongoing topics and convene people and contribute to the effectiveness of the various branches of international law that apply in armed conflict.

Another interesting project which is still having a big effect is the project on guidelines for protecting educational institutions in armed conflict, which was done with a group of states and organizations so that that were principles which were developed relating to not putting arms caches near schools or in schools to protect educational establishments beyond just explaining what the rules are, but more practical guidance as to what should apply in times of armed conflict.

### **Stahl**

How would you explain that you managed to have this kind of impact?

### **Clapham**

I don't think it was me particularly. Stuart was an excellent head of research, and he would work hard with other organizations to convene these meetings, which is easy in Geneva because you've got lots of organizations who are here, and then it's easy to bring people in because people like coming to Geneva, and they realize it'll be a serious meeting. If we were

holding a meeting on protection of educational establishments or people with disabilities, you fly people in, and the Academy has a fantastic venue, which is the Villa Moynier, where you could host people for a two-day solid discussion drafting principles, fleshing out ideas in a confidential space.

With enough determination, you can make progress, even though we weren't a very well-established institution. I think we had the cachet of being connected to the University and the Institute, which makes it a lot easier.

**Stahl**

In 2003 you became adviser on international humanitarian law to Sergio Vieira de Mello, Special Representative of the UN Secretary-General in Iraq.<sup>[52]</sup> How did you get this position?

**Clapham**

Again, I had a sabbatical. My wife had been deployed with Sergio to Iraq to work as his gender adviser and adviser on human rights. While she was there working with him, it was still occupied territory and the Fourth Geneva Convention applied. Some issues arose with regard to how the American Coalition were treating their detainees. It's pre-Abu Ghraib. This is not the torture scandal. It was more to do with the legal basis for their detention and their capacity to challenge the grounds for their detention.

So I think he, together with my wife Mona, thought, maybe we'll get an expert on the laws of war or IHL here who could be part of our team and who could sit with them and argue, not just advocate, "Treat people in a certain way because they've got human rights," but really say, "This is an Article 78 case or Article 68," or whatever it is and really discuss.

Because I was available, it was suggested that I go down there as his adviser on IHL generally. We went to Iraq and stayed there until the bomb. I was in the building when the bomb went off. I had been drinking coffee with a representative from UNICEF, we were discussing the plight of children in Iraq. After a number of coffees, I decided it was time to go to the bathroom. And luckily I did, because that was when the bomb went off. My office was destroyed, but the bathrooms were in the basement. It was an old hotel, so they were all marble walls and no windows. So there was no flying glass, and nothing collapsed on me. So I was very lucky. The mission had to stop, and we were all evacuated. Sergio was killed, and that was really the end of that team.

**Stahl**

What was your work in Iraq?

**Clapham**

I'd written a few memos, and I was about to have a meeting with British and American authorities on the detainee regime and the basis for detention.

**Stahl**

Did you also go to the locations?

**Clapham**

I did. I went to some of the prisons, not inside at that point, but we talked to some of the families trying to get news about the people in the prisons. I went to the Bar Associations. I remember I met some judges and some NGOs in various meetings. I went to the ICRC a couple of times. It seems like not very many days I was there, but I couldn't tell you how long it was. I had a full program every day, I was traveling around, getting information. I had been drafting my own legal memo about the regime and I had been discussing with the various partners as to how this all fitted together. So it was going to be a legal discussion that I was building up to.

**Stahl**

This was before Abu Ghraib?<sup>[53]</sup>

**Clapham**

We were just beginning to get worried about the conditions, but the Abu Ghraib thing hadn't broken.

**Stahl**

But had you some hints that something was going on there?

**Clapham**

We never had a discussion about torture or mistreatment. But we were concerned about the secrecy and the lack of access that they had to the outside world. So it was with a view to preventing torture that we were having those discussions at that stage, and then it broke later. I think if I had had information about Abu Ghraib, I would've been totally freaked out and been trying to do something. But at that stage it was much more technical. How can we get access? How can we get people seen? How could we get the people to challenge the fact of their detention?

**Stahl**

In 2012 and 2013, you were at the Arms Trade Treaty Conference<sup>[54]</sup> for the International Commission of Jurists.

**Clapham**

The International Commission of Jurists were kind enough to let me be accredited for them as an observer so that I could gather impressions and information for the Commentary.

**Stahl**

So it was more of an academic project?

**Clapham**

Yes, it was to help to understand the treaty with a view to writing the commentary. That was my aim of being there.

**Stahl**

But were there some issues you were trying to influence in one way or another?

**Clapham**

Oh, yes. Probably the biggest one was trying to ensure that attacks on civilians would be covered as a particular category of violation which would mean that any arms which could be used to attack civilians would be prohibited.

To get a bit technical, some of the early language talked about grave breaches of the Geneva Conventions. And grave breaches of the Geneva Conventions, although it sounds very serious, does not actually cover indiscriminate bombardment of civilians because it's not in the Geneva Conventions.

My point was that this conference was designed to stop the sort of things that are happening in Syria. And if you talk about the grave breaches of the Geneva Conventions, that only covers international armed conflict, which Syria is not. So it would mean that you can transfer as many arms as you want to Syria, and you're not violating the arms treaty. I'm exaggerating a bit for effect, but the point was there were some quite technical things there that some of us were trying to advocate for.

There were human rights and humanitarian law experts, certainly from Amnesty and the ICRC and amongst the NGOs, absolutely. But amongst the governments, not so many, partly because of the way the conference emerged. It didn't emerge as a human rights conference or even an IHL conference, it emerged through arms control. It's a different sort of expertise. It's diplomatic expertise. There were some people there from trade looking at the trade implications. But I didn't find a lot of people to talk to about the difference between a serious violation and a grave breach.

**Stahl**

The ATT negotiations can be seen as a continuation of the landmine ban of the 1990s.<sup>[55]</sup> Amnesty International had been involved in the landmine issue. Did the continuities and connections of these years still play a role for you?

**Clapham**

Not really, no. I was never really involved in the arms issues at Amnesty. It hardly ever came up at the UN in those days. And land mines was after my time at Amnesty, or if it was during my time, it wasn't considered something to give to the New York representative.

So I didn't follow that at all. No, the Arms Trade Treaty was really just me waking up one day and thinking, "I think the Academy should be involved in this," because the point about the Academy was that instead of focusing just on human rights or on humanitarian law or on international criminal law, it would be a place where you could look at all three together so that students would be encouraged to understand all three branches of how the law applies in armed conflict.

We developed a specialization in arms, looking at the extent to which arms could violate human rights as such. When I heard that there was going to be this arms trade treaty about the transfer of arms in which arms would be banned because they could be used in a particular violation in the future, I thought that this negotiation was something that we should be involved in from the beginning with a view to writing not only explanatory

reports as things evolve, but also writing a definitive commentary at the end on the treaty, so from the very first preparatory meetings we were attending.

But it wasn't really because of Amnesty. It was more that I felt that this was something the Academy should be involved in because I could see that it had a role to play in stimulating the double discussion about human rights and international humanitarian law and using our criminal law expertise. So I felt we had a special place.

**Stahl**

Was there any divergence from the approach of Amnesty International?

**Clapham**

Not really, we had different roles, sometimes I think NGOs are right to argue for a more expansive interpretation of the language in the treaty. In our work and in the eventual Commentary we published we took a rather cautious approach and looked very carefully at the words of the provisions in their context. But such treaties are interpreted over time and the meaning evolves, so you need multiple actors in such circumstances. Obviously there was also an element of policy choice in the interpretations we chose but civil society need not be so strict when making an argument for a how a treaty should operate.

So I was keen that the Academy become known as a place where you could get the answer on a question of international law rather than a place where people advocate for the most progressive or restrictive ruling in order to get a human rights result to their liking. So we tried to separate out any advocacy points that we might have, which we then did with a slightly different hat from the Commentary work, which was to be academic with a university press and under my supervision as a professor rather than as an advocate.

Switching hats like that is perhaps not as simple as it sounds. You can exaggerate this a bit in the sense that every professor, of course, in their interpretation is probably putting in a bit of their own personal approach to things. But we were trying to be careful not to bend what ought to be the interpretation of the law.

**Stahl**

Just one week ago you became a member of the UN Commission on South Sudan. Will this involve that you go to South Sudan?

**Clapham**

Yes, I'm going in a couple of weeks.

**Stahl**

Why were you nominated?

**Clapham**

I was invited to let my name go forward to the High Commissioner, who then forwarded three names to the President of the Human Rights Council.

I have no idea how they come to take that decision. They don't tell you. But my guess is that



it is important that one works well and complements the others on the commission. Yasmin Sooka,<sup>[56]</sup> who is the Chair, has a lot of experience with regard to transitional justice. She was in the Truth and Reconciliation Commission in South Africa.<sup>[57]</sup> And she also did a lot of work in Sri Lanka.

I suppose my value added might be that I want to understand the detail of the Geneva Conventions and how they apply, so I can help identify the exact provisions of international humanitarian law that would translate into crimes which could be prosecuted in the eventual hybrid court that they want to establish for South Sudan. The Commission is asked to make recommendations towards this new hybrid court.

**Stahl**

And why not the ICC? If we have an International Criminal Court, why should one establish another tribunal?

**Clapham**

It's a good question. I think, first of all, there's no appetite in the Security Council for adding new jurisdictions to the ICC because the Security Council is divided on a lot of things, and this would be another reason to be divided.

South Sudan might be unenthusiastic about the ICC because there's general suspicion of the ICC amongst African governments. There's a move to saying, "We should have an African set of courts." So they might feel more comfortable having a hybrid court with South Sudanese, some judges involved, and integrating it more into South Sudanese law and having it be more local.

So I can see how they got to that point. And it's not so unusual these days. We have a special Kosovo court. There's a special Cambodian court. There was a Sierra Leone Tribunal, it's not so bizarre. But I agree. You could say, why not the ICC? But the ICC is struggling to do what it's already got to do. But I can see why people might hesitate.

**Stahl**

In retrospect, would you say that you overstressed the concept of human rights at some point?

**Clapham**

Well, that's what I was accused of. Some people wrote some quite tough things. One statement — it wasn't actually addressed to me, but I responded to it — was to say that this approach was to turn human rights on their head. Other people said it was very likely misleading and would trivialize human rights and was dangerous and so on.

But no, I don't regret any of that. I think there is a danger, of course, that one could take it too far. And I would be ready to criticize what's going on in the UN, where you have situations where they're only interested now in talking about ISIS in Iraq and not what the government is doing.

But that is not because of my thinking about human rights. That's high politics because

governments don't want to admit what they're doing, and other governments are prepared to let them off the hook. But that's not the fault of also focusing on ISIS. One can do two things at the same time. So I wouldn't regret asking people to focus on ISIS because the victims of ISIS deserve to have their cases treated as human rights violations, and we should be going after ISIS. And it's also possible to go after the governments at the same time. So I don't see it as a zero sum game, but that would be the argument that people put out there, that we should concentrate on what governments are doing, and the rest is a distraction in very gross terms. But no, I think I don't feel I ever pushed it too far. I felt it was a necessary recalibration.

**Stahl**

There has been much broader criticism that the human rights treaty system has become too big. How do you see that?

**Clapham**

I don't buy that argument, and I would push back against it. But again, I've come across it a lot, why do we need another convention on this or that, to which my answer is, well, new issues arise and new concerns arise. There was a time when people said, "Everybody has human rights. We don't need a special convention on children or a special convention on women or disabilities." But there are aspects to what one needs to do with regards to children's rights which are not found in the other texts and what we need to talk about.

To say that children can't be recruited into the armed forces is important. You can call it a proliferation of human rights if you're very narrow minded. But if you're interested in preventing children from being forcibly recruited or voluntarily recruited or used in armed conflict, it's important.

Issues that are new, like the one which is coming around the corner, the rights of elderly persons, we can all get more interested in that as time goes on. It could be incredibly useful to have an expert body addressing some of these questions, say, related to dementia and care and access and all sorts of things that are not going to be covered by just saying, "Everybody has all the rights in the Universal Declaration"

Similarly, the debate on corporations, I think it is useful to have a discussion about what they should do, rather than saying, "We have enough to deal with. You're just making things too complicated."

So no, I don't buy the argument that the human rights agenda is full, and we should all just concentrate on the old stuff. I think there are new things in all the issues about sexual orientation and gender identification and so on. It's important.

If you are interested in freedom of expression, not to address what happens on the internet is a dereliction of duty. You have to address cyber-bullying and child pornography in these questions. You have to be constantly trying to keep up with the new dangers. And addressing it all in terms of what was decided in 1948 doesn't make sense. That's ill-equipped to decide how to regulate a service provider or a Facebook page or whatever it is. You have to get down and deal with it.

Other people say, "We have treaty body fatigue. We're fed up with creating treaty bodies and reporting. We're too tired." Of course, I can see that perspective, but it doesn't make sense if you're in touch with the issues and you care about them and you're thinking, "That person doesn't have a remedy, or it's pretty unclear what their rights are." You just want to try and clarify it.

**Stahl**

You said when you talked about the 1990s that this was a time where a lot was going on. How do you see the trend in the moment?

**Clapham**

People say, "There's much less enthusiasm now." But it's not necessarily true. I just came from a meeting of the business and human rights treaty body. There's a lot of activity about that. There's a lot of activity about international criminal justice, it's amazing to think that there's perhaps going to be a new hybrid tribunal on South Sudan. Who would've thought they would be creating new ad hoc tribunals now?

I think there's a lot of enthusiasm and energy for the rights of the elderly and the work around sexual orientation and LGBTIQ. It may be different constituencies and a different type of end result that people are looking for. When I was referring to that time in the 1990s, there was a lot of institution building and UN global conferences, conference on women, conference on human rights, conference on population, conference on social justice and these things. They were big meetings and very top down. Today the energy often comes from below.

But changing how people think about same-sex marriage, that's a very fast-moving field. A few years ago, people said, "This has nothing to do with human rights. It will never happen." And now it's legal in more and more countries and part of the human rights discussion, so very, very fast moving.

**Stahl**

That is an optimistic outlook. Thank you for this insightful interview!

## Fußnoten

1. The Clash, Washington Bullets from the Album Sandinista! (1980).
2. Augusto Pinochet (1915-2006), 1973-1990 president of Chile from.
3. The miner's strike took place in 1984/1985 in protest against the closures of collieries.
4. War between the UK and Argentina over the Falkland Islands, which took place in 1982.
5. Bertolt Brecht (1899-1956), German poet, playwright, and theatre director.
6. Margaret Thatcher (1925-2013), 1979-1990 Prime Minister of the United Kingdom.
7. Sir John William Frederic Nott (born in 1932), January 1981 to January 1983 Secretary of State for Defence, UK.
8. John A.G. Griffith: The Politics of the Judiciary. London 1977
9. European Court on Human Rights.
10. Antonio Cassese (1937-2011), Italian jurist, 1993-2000 judge at the ICTY (1993-1997 as President of the court), 2004-2005 Chairperson for the International Commission of Inquiry on Darfur.
11. Andrew Drzemczewski (born 1951), British jurist, who worked since 1985 for the Council of Europe on human rights issues.
12. Michael Mandel (1948-2013), Canadian jurist, 1974-2013 part of the faculty of the Toronto based Osgoode Hall Law School's.
13. Michael Mandel: Charter of Rights and The Legalization of Politics in Canada. Toronto 1989.
14. Mauro Cappelletti (1927–2004), Italian jurist at the University of Florence.
15. Joseph Halevi Horowitz Weiler (born 1951), South African jurist, 1978-1985 member of the Department of Law at the European University Institute, Florence.
16. The post of the High Commissioner for Human Rights was created in 1993. His duty is to coordinate human rights activities throughout the UN System.
17. During the 1990s, negotiations to establish an international criminal court started, the statute was adopted in 1998.
18. Since the late 1980s, the number of peacekeeping missions had been growing constantly.
19. Saddam Hussein (1937-2006), 1979-2003 President of Iraq.
20. In August 1990, Iraq invaded Kuwait. At the beginning of 1991, a United States-led coalition expelled Iraqi forces.
21. After an unsuccessful uprising, the Kurds were threatened by the Iraqi government. Consequently, the UN Security Council established a no-fly zone to protect the civil population of

Kurdish areas.

22. Amnesty International: Human Rights and Peacekeeping (1994), AI Index IOR 40/01/94.
23. Boutros Boutros-Ghali (1922-2016) is an Egyptian politician and diplomat who served as secretary general of the United Nations in 1992-1996.
24. June 14-25, 1993.
25. IOR 41/016/1992.
26. Javier Felipe Ricardo Pérez de Cuéllar y de la Guerra (born 1920), 1982-1991 UN Secretary General.
27. During a demonstration on November 12, 1991, in Dili, the capital of occupied East Timor, Indonesian military forces killed 271 people, 382 were wounded, 270 disappeared.
28. Persecuted Muslim minority in Myanmar.
29. Between April and July 1994, an estimated 500,000-1,000,000 Rwandans considered as Tutsis were killed by compatriots who considered themselves Hutus.
30. Mary Robinson (\*1944) was president of Ireland from 1990 to 1997 and served as the UN high commissioner for human rights in 1997-2002.
31. The International Criminal Tribunal for Rwanda (ICTR) was established in November 1994 by the UN Security Council to prosecute crimes committed during the genocide in Rwanda.
32. Rwandan Patriotic Front
33. Theodor Meron (born 1930), Polish-Israeli lawyer, 1994 to 2006 Professor at New York University School of Law, also from 1991 to 1995 Professor of International Law at the Graduate Institute of International Studies in Geneva; Legal advisor to the State Department. Later he was appointed as judge at the ICTY (Fn 42).
34. Link to the interview with Mona Rishmawi.
35. In the course of investigations into human rights violations under the 1973-1990 Chilean dictatorship, Spanish magistrate Baltasar Garzón (b. 1955) issued an extradition order in October 1998 on the former dictator, Augusto Pinochet, invoking the principle of universal jurisdiction. Pinochet was in London at the time and was held by the British government for a year and a half before finally being released in March 2000.
36. Philippe Sands (born 1960), British lawyer, 1993-2001 Professor of Law at New York University Law School.
37. Ben Emmerson (born 1963), British lawyer, specialized in European human rights law.
38. Judgement of the European Court of Human Rights in the case Osman vs. United Kingdom, October 28, 1998.
39. The International Criminal Tribunal for the Former Yugoslavia (ICTY) was established in May 1993 by the UN Security Council to prosecute crimes committed during the wars in the former

Yugoslavia.

40. Kenule Beeson Saro-Wiwa (1941-1995), Nigerian writer, television producer, environmental activist, killed by the Nigerian military on November 10, 1995.
41. Gro Nystuen, Andreas Follesdal, and Ola Mestad (eds.), *Human Rights, Corporate Complicity and Disinvestment* (Cambridge, 2011), 222-242.
42. Denise Marcelle Bindschedler-Robert (1920-2008), 1975-1991 judge at the European Court on Human Rights.
43. Andrew Clapham, *Human Rights. A Very Short Introduction* (2nd edition Oxford, 2015).
44. Andrew Clapham, Susan Marks, *International Human Rights Lexicon* (Oxford, 2005).
45. Paula Gaeta, 2010-2014 Director of the Geneva Academy of international Humanitarian Law and Human Rights.
46. Louise Doswald-Beck, 2002-2007 Director of the Centre Universitaire de Droit International Humanitaire, predecessor of the Geneva Academy.
47. Robert Roth, since 2014 Director of the Geneva Academy of international Humanitarian Law and Human Rights.
48. *The War Report. Armed Conflict in 2013, 2014, 2015, 2016.*
49. Andrew Clapham, Paola Gaeta, Marco Sassòli, eds.: *The 1949 Geneva Conventions. A Commentary.* Oxford 2015.
50. Multilateral treaty to regulate the international arms trade, negotiated 2012/2013, in force since December 2014.
51. Stuart Casey-Maslen, Legal Adviser to the Swiss delegation in the negotiations of the ATT in 2013.
52. Sérgio Vieira de Mello (1948-2003), Brazilian diplomat, 2002-2003 UN High Commissioner for Human Rights, 2003 Special Representative of the UN Secretary General to Iraq.
53. During the occupation of Iraq by the US and its allies after the invasion of 2003, Abu Ghraib Prison was administered by US military. In 2003 it became known that the prisoners of Abu Ghraib were exposed to torture and cruel treatment. This caused a major international scandal.
54. July 2012, March 2013.
55. *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*, signed in 1997, in force since 1998.
56. Yasmin Sooka, South African jurist, 1996-2001 member of the TRC, 2001-2003 chair of the committee responsible for TRC's final report.
57. The Truth and Reconciliation Commission was a court-like institution established 1994 in South Africa to deal with gross human rights violations committed during the apartheid regime.

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