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PROMOTION AND PROTECTION OF HUMAN RIGHTS

Fundamental standards of humanity

Report of the Secretary-General submitted pursuant to Commission on Human Rights decision 2001/112

I. INTRODUCTION

1. In its decision 2001/112, the Commission on Human Rights, recalling its resolution 2000/69 and taking note of the report of the Secretary-General, decided to consider the question of fundamental standards of humanity at its fifty-eighth session and requested the Secretary-General, in consultation with the International Committee of the Red Cross (ICRC), to submit a further report to the Commission at its fifty-eighth session, covering relevant developments. The present report is submitted in accordance with that decision. The comments and advice of the ICRC in the preparation of the report are gratefully acknowledged.

2. As noted in previous reports (E/CN.4/2001/91, para. 4; E/CN.4/2000/94, paras. 7-12; E/CN.4/1999/92, para. 3; E/CN.4/1998/87, para. 8), the need to identify fundamental standards of humanity arises from the initial recognition that it is often situations of internal violence that pose the greatest threat to human dignity and freedom. However, the need for a statement of principles to be derived from human rights and international humanitarian law, which would apply to everyone in all situations, is clearly not limited to situations of internal emergency. This process aims at strengthening the practical protection of individuals through the clarification of uncertainties in the application of existing international humanitarian and human rights law at all levels (E/CN.4/2001/9, para. 4).

3. Previous reports, in particular the last one, have observed that while there is no apparent need to develop new standards, there is a need to secure practical respect for existing international human rights and humanitarian law standards in all circumstances and by all actors. This may be achieved partly through the clarification of uncertainties in the application of existing standards in situations, which present a challenge to their effective implementation. A starting point in this process is the identification of fundamental standards of humanity in the practices and/or doctrine of States, international tribunals and organizations, non-State actors, and other bodies with responsibility for and/or expertise in the subject. In keeping with this approach, previous reports have looked at the practice of those actors in various dimensions, including the areas of implementation of human rights law and, where applicable, international humanitarian law in situations of internal strife and internal armed conflict.

4. The present report focuses on some of those areas and, additionally, looks at an area of traditional inter-State interaction, the field of State responsibility for internationally wrongful acts. The reason for adding the latter element to the review is that the application and respect for fundamental human rights and humanitarian law considerations in situations where States have defaulted on their international obligations has encountered some difficulties and has consequently become a matter of concern for international law and human rights bodies. In this regard, the recent work of the International Law Commission has shed light on the place and role of fundamental standards of humanity in imposing additional duties or limits on States' action.

5. The present report, therefore, focuses on the most recent developments in old and new areas that contribute to the process of improving the protection of individuals in all situations and the identification of fundamental standards of humanity. A key development has been the adoption in July 2001 by the Human Rights Committee of general comment No. 29 on article 4 of the International Covenant on Civil and Political Rights (ICCPR) (CCPR/C/21/Rev.1/Add. 11) which clarifies the application of human rights norms in situations of national emergencies. A second major development is the adoption, at second reading, by the International Law Commission of the Draft Articles on State Responsibility for Internationally Wrongful Acts. The report also considers the most recent rulings of the International Criminal Tribunals for the Former Yugoslavia and Rwanda that have helped to clarify the definition of crimes and/or contributed to the alignment of international humanitarian law norms, applicable in international and non-international armed conflicts.

II. RELEVANT DEVELOPMENTS IN INTERNATIONAL LAW

A. General comment No. 29 on Article 4 of the International Covenant on Civil and Political Rights.[1]

6. The question of derogations from human rights treaties has long been identified as one of the key issues regarding the protection of fundamental rights in internal crisis situations. The need to clarify the extent of permissible derogations by States from their obligations under human rights treaties has been central to the process of identifying fundamental standards of humanity in order to strengthen the protection provided to individuals in those situations. The Human Rights Committee's general comment No. 29 on article 4 of the ICCPR makes an important contribution to this process.

7. The purpose of the adoption of general comments by the Human Rights Committee is to assist States with the implementation of their obligations under the Covenant.[2] The drafting of the general comment on article 4 of the ICCPR lasted for several years partly as a result of the importance and complexity of the subject. The general comment No. 29 replaces general comment No. 5 adopted in 1981. In adopting the general comment the Committee made an important contribution to the clarification of States' obligations under the Covenant in circumstances of internal strife or public emergency. The main contents of general comment No. 29 may be summarized in the following terms.

8. In order to invoke article 4, two conditions must be met. First, there must be a situation that amounts to a public emergency that threatens the life of the nation and, second, the state of emergency should be proclaimed officially and in accordance with the constitutional and legal provisions that govern such proclamation and the exercise of emergency powers (para. 2). Even during armed conflict, measures derogating from the Covenant "are allowed only if and to the extent that the situation constitutes a threat to the life of the nation" (para. 3).

9. The Committee observed that measures derogating from the Covenant should comply with requirements set out in the Covenant itself. One fundamental requirement is that those measures be limited to the extent strictly required by the exigencies of the situation. "[T]his will ensure that no provision of the Covenant, however validly derogated from, will be entirely inapplicable to the behaviour of a State party" and will also reflect the principle of proportionality (para. 4). In many situations of emergency, normal limitations of rights would be sufficient under the circumstances and no derogation from the provisions in the Covenant would be justified by the exigencies of the situation[3] (para. 5).

10. Paragraph 1 of article 4 of the ICCPR requires that measures derogating from the Covenant do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. The Committee noted that even though article 26 or other Covenant provisions related to non-discrimination have not been listed among the non-derogable provisions of article 4, paragraph 2, "there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances" (para. 8).

11. As to the requirement in paragraph 1 that measures derogating from the Covenant are not inconsistent with States' other obligations under international law, the Committee stated that "article 4 cannot be read as justification for derogation from the Covenant if such derogation would entail a breach of the State's other international obligations, whether based on treaty or general international law" (para.9). Further, "in exercising its functions under the Covenant the Committee has the competence to take a State party's other international obligations into account when it considers whether the Covenant allows the State party to derogate from specific provisions of the Covenant" (para. 10).

12. The Committee has also shed some light on the relationship between the non-derogable rights in the Covenant and peremptory norms of international law. Although it distinguished the issues of non-derogability from the peremptory nature of some norms, the Committee recognized also that "[T]he proclamation of certain provisions of the Covenant as being of a non-derogable nature … is to be seen partly as a recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant" (para. 11). Moreover, "States parties may in no

circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law…" (para. 11). Furthermore, in assessing the scope of legitimate derogation from the Covenant, the Committee has found an important criterion in the definition of certain human rights violations as crimes against humanity. "If action conducted under the authority of a State constitutes a basis for individual criminal responsibility for a crime against humanity by the persons involved in that action, article 4 of the Covenant cannot be used as a justification that a state of emergency exempted the State in question from its responsibility in relation to the same conduct" (para. 12).

13. The Committee has also identified elements in the provisions not listed in article 4, paragraph 2, that are non-derogable owing to their character as norms of general international law. Those provisions include the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person, the prohibition against taking hostages, abductions or unacknowledged detention, certain elements of the rights of minorities to protection, the prohibition of deportation or forcible transfer of population, the prohibition of propaganda for war and of advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence (para. 13).

14. Even if not mentioned as a non-derogable provision in article 4, the obligation to provide effective remedies for any violation of the provisions of article 2, paragraph 3, of the Covenant must be always complied with (para. 14). The protection of those rights recognized as non-derogable require procedural guarantees, including judicial guarantees. Therefore, "the provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights. Article 4 may not be resorted to in a way that would result in derogation from non-derogable rights" (para. 15). Furthermore, as certain elements of the right to fair trial are guaranteed under international humanitarian law during armed conflict, there would be no justification for derogations during other emergency situations. "The principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention must not be diminished by a State party's decision to derogate from the Covenant" (para. 16). In this regard, the Committee noted that remedies such as habeas corpus or amparo should not be restricted by derogations under article 4.

15. By clarifying the content and scope of article 4 of the Covenant, the Committee aims at enhancing the protection of fundamental human rights in times of emergency that threatens the life of the nation. The practice of States parties to the Covenant in this regard will be subject to scrutiny by the Committee under stringent conditions to ensure that the conditions for lawful derogation are fulfilled.

B. Draft articles on Responsibility of States for internationally wrongful acts

16. At its fifty-third session, the International Law Commission (ILC) adopted, at second reading, the draft articles on Responsibility of States on which it had been working since 1955.[4] The draft articles were provisionally adopted at first reading in 1996 and have been regarded

since then as a primary source of reference in international law in the area of State responsibility. The adopted draft articles, which have been sent to the General Assembly for consideration, codify and progressively develop the rules under which State responsibility for internationally wrongful acts arises and those rules governing the implementation of the legal consequences arising from the commission of an internationally wrongful act. Several issues and concepts are relevant for the process of fundamental standards of humanity in that they may strengthen the protection of fundamental human rights and humanitarian law norms in the context of the identification and implementation of States' international responsibility for acts unlawful under international law. The rules in the draft articles focus on the responsibility of States vis-à-vis other States and not on individual responsibility. However, through the identification and development of specific rules applicable in the area, the rules in the draft articles strengthen the practical protection of individuals and populations in the context of inter-State interaction. The rules of the draft articles reveal the central place assigned to the protection of fundamental human rights and humanitarian law norms in the context of inter-State relations and by so doing contribute to the process of securing the practical respect of fundamental standards of humanity in all circumstances.

17. In the light of the above, three sections of the draft articles may be of special relevance for the process of fundamental standards of humanity. The first one is chapter V of Part One on circumstances precluding the wrongfulness of an act of a State. The second is chapter III of Part Two which contains the rules on serious breaches of obligations under peremptory norms of general international law. The third is, Part Three, chapter I, on invocation of the responsibility of a State and chapter II on countermeasures.

18. In Part One, chapter V, the draft articles deal with the issue of circumstances precluding wrongfulness as justifications or excuses for a State's non-compliance with its international legal obligation while the circumstance in question subsists.[5] The circumstances that would make lawful an act that otherwise would be contrary to international law are consent, self-defence, countermeasures in respect of an internationally wrongful act, force majeure, distress and necessity. In this context, article 26 makes it clear that "nothing in [the] chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law". Therefore, none of the circumstances precluding wrongfulness listed in chapter V would justify or excuse a breach of a State's obligations under a peremptory rule.[6] The ILC list of peremptory norms includes the prohibition of aggression and human rights and humanitarian law norms such as the prohibition of "genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination".[7]

19. Part Two, chapter III, deals with serious breaches of obligations under peremptory norms of general international law. This Part replaces article 19 of the 1996 draft articles on international crimes of States[8] and reflects the principle that there are certain consequences flowing from the basic concepts of peremptory norms of general international law and obligations to the international community as a whole in the field of State responsibility.[9] Those consequences are divided into two categories. First, serious breaches of those obligations can attract additional consequences, not only for the responsible State but also for all others. Secondly, all States are entitled to invoke responsibility for breaches of obligations to the international community as a whole[10]. The commentary to article 40 offers some examples of those peremptory norms whose breach entails the special consequences listed in article 41.

Apart from those obligations already listed in the commentaries to other articles, the ILC mentions the prohibition against torture as defined in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the basic rules of international humanitarian law applicable in armed conflict described by the International Court of Justice as "intransgressible" in character.[11]

20. Accordingly, article 41 attaches some particular consequences to those serious breaches. First, it identifies a positive obligation for States to cooperate to bring to an end through lawful means any serious breach of obligations under peremptory norms of general international law. Secondly, it restates a duty for States to abstain from recognizing as lawful a situation created by a serious breach and not to render aid or assistance to the wrongdoing State in maintaining that situation.[12] However, the obligation of non-recognition should not result in depriving the people of the States affected from the advantages derived from international cooperation;[13] that is to say, the sanction of non-recognition should never affect the basic rights of the population.

21. Article 41 also makes it clear that its enumeration of consequences flowing from the commission of a serious breach does not prejudice other consequences that a serious breach of a peremptory norm may entail under international law.

22. Part Three of the draft articles deals with the implementation of the international responsibility of a State in terms of how to give effect to the obligations of cessation of the wrongful act and reparation of the injury as well as in terms of the rights and duties of other States in the face of a breach of an international obligation. Chapter I, article 48, recognizes the right of a State other than the injured State to invoke responsibility of another State that has breached an international obligation if "(b) The obligation breached is owed to the international community as a whole". The purpose of this provision is to give effect to the distinction made by the International Court of Justice between obligations owed to particular States and those owed to the international community as a whole.[14] The State invoking responsibility under article 48 would not be acting in its individual capacity by reason of having suffered injury but in its capacity as a member of a group of States to which the obligation is owed, or indeed as a member of the international community as a whole.[15] Article 48, paragraph 2, limits the claims that a State other than an injured State may make to (a) cessation of the wrongful act, assurances and guarantees of non-repetition and (b) reparation "in the interest of the injured State or of the beneficiaries of the obligation breached". Although the ILC admitted that a list of those obligations owed to the international community as a whole would be of limited value as the scope of the concept is evolving, it nevertheless referred to the judgement of the International Court of Justice in the *Barcelona Traction* case that mentions the prohibition of aggression and genocide as well as the "principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination"[16] within the purview of those obligations.[17]

23. Chapter II of Part Three deals with the use of countermeasures as a response to wrongful acts with the aim of establishing rules to prevent its abusive use by States. Countermeasures are defined as measures which would otherwise be contrary to the international obligations of an injured State vis-à-vis the responsible State if they were not taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation.[18]

Therefore, the right to take countermeasures accrues only to the injured State. However, this right is not unqualified, and article 50 specifies certain obligations the performance of which may not be impaired by countermeasures. Among those obligations that "are sacrosanct" are obligations for the protection of fundamental human rights, and obligations of humanitarian character prohibiting reprisals. In restating those prohibitions, the ILC made reference to the jurisprudence of international tribunals, the legal doctrine and also the practice of bodies in charge of the supervision of human rights treaties. In particular, mention is made of general comment No. 8 of the Committee on Economic, Social and Cultural Rights (E/C.12/1997/8) that discussed the effect of economic sanctions on civilian populations and especially children. The general comment stressed that "whatever the circumstances, such sanctions should always take full account of the provisions of the International Covenant on Economic, Social and Cultural Rights" (para. 1).[19]

24. The draft articles constitute an important contribution to the clarification of international humanitarian law norms in the context of States' responsibility for internationally wrongful acts. Through its work of codification and development of the rules on State responsibility for breaches of human rights and humanitarian law obligations and the legal consequences flowing from such breaches, including the rights of other States to take action and the limitations to the right to take countermeasures, the ILC draft articles has indirectly reinforced the protection of human rights and international humanitarian law. The breach of certain international human rights and humanitarian law obligations not only always give rise to responsibility for States but also raises positive duties to take action to counter those breaches. Further, action by States in the context of implementation of the responsibility of other States by, for instance, adoption of countermeasures, should always respect fundamental human rights and humanitarian law norms.

C. The recent jurisprudence of the International Criminal Tribunals

25. The jurisprudence of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) continue to contribute to the development of international humanitarian law and international criminal law, which in turn contributes to the process of identifying and/or clarifying fundamental standards of humanity applicable to everyone and in all circumstances. This has been achieved in particular through the developments related to the scope of individual criminal responsibility and the definition of crimes within the jurisdiction of the two ad hoc International Criminal Tribunals.

1. Individual criminal responsibility

26. By clarifying and developing the content and scope of individual criminal responsibility and that of command responsibility for violations of international humanitarian law, the ad hoc criminal tribunals may have also reinforced the protection of human beings in contexts other than armed conflict.

27. The meaning and scope of individual criminal responsibility and command or superior responsibility have been developed in recent rulings by the ICTY. The relationship between individual direct responsibility under article 7(1) and command responsibility under article 7(3) of the ICTY Statute has been addressed in several cases. The ICTY has expressed the view that in cases where the evidence presented demonstrates that a superior would not only have been

informed of subordinates' crimes committed under his authority, but also exercised his powers to plan, instigate or otherwise aid and abet in the planning, preparation or execution of these crimes, the type of criminal responsibility incurred may be better characterized as direct individual criminal responsibility under article 7(1) than under article 7(3) as command responsibility. Any responsibility under article 7(3) is subsumed under article 7(1), and the same would apply to the commander who incurs criminal responsibility under the joint criminal enterprise doctrine through the physical acts of his subordinates.[20] Moreover, "[w]here the omissions of an accused in a position of superior authority contribute (for instance by encouraging the perpetrator) to the commission of a crime by a subordinate, the conduct of the superior may constitute a basis for liability under article 7(1)".[21]

28. The recent jurisprudence of the International Criminal Tribunals has reaffirmed the three elements necessary for superior criminal responsibility to arise: (i) the existence of a superior-subordinate relationship; (ii) the superior knows or has reason to know that the criminal act is about to be or has been committed; and (iii) the superior fails to take necessary and reasonable measures to prevent the criminal act or to punish the perpetrator.[22] This jurisprudence also suggests that no formal superior-subordinate relationship is required for a finding of "ordering" so long as it is demonstrated that the person accused possessed the authority to order. Only those superiors (whether de jure or de facto, military or civilian) who are directly or indirectly part of a chain of command and have effective control over subordinates, with the actual power to control or punish their acts, may incur criminal responsibility.[23] The existence of a position of authority must be assessed on the basis of the reality of the accused's authority.

29. In this context, Trial Chamber II of the ICTY observed in the Prosecutor v. Kunarac et al case that "[d]epending on the circumstances, a commander with superior responsibility under article 7(3) may be a colonel commanding a brigade, a corporal commanding a platoon or even a rankless individual commanding a small group of men".[24] as long as they exercise effective control over their subordinates. It also held the view that "[b]oth those permanently under an individual's command and those who are so only temporarily or on an ad hoc basis can be regarded as being under the effective control of that particular individual".[25]

30. As an important development in this area, the ICTR upheld the conviction for genocide of Jean Kambanda, former Prime Minister of Rwanda. He was the first former Head of Government ever to be convicted of genocide.[26] In the Krstic case, the ICTY achieved the first conviction and sentence for genocide after the Second World War in the person of a former Bosnian Serb General.[27]

2. Crimes under international law

War crimes (ICTY Statute, art. 3)

31. In Prosecutor v. Delalic et al, the Appeals Chamber confirmed the views held in Prosecutor v. Tadic as regards the scope and status of common article 3 of the Geneva Conventions of 1949. Further, it considered "indisputable that common article 3, which sets forth a minimum core of mandatory rules, reflects the fundamental humanitarian principles which underlie international humanitarian law as a whole. These principles had already become customary law at the time of the adoption of the Geneva Conventions because they reflect the

most universally recognized humanitarian principles" that are applicable in international and internal armed conflicts.[28] "It is these very principles that the ICJ [International Court of Justice] considered as giving expression to fundamental standards of humanity applicable in *all* circumstances",[29] the Appeals Chamber concluded.

Crimes against humanity (ICTY Statute, art. 5)

32. In Prosecutor v. Kunarac et al, Trial Chamber II of the ICTY discussed the different elements of "an attack directed against any civilian population" as part of the definition of crimes against humanity under article 5 of the ICTY Statute. In the understanding of the Trial Chamber the mental element requires that the perpetrator know of the attack and that its act is part of it although he does not need to know the details of the attack. The Trial Chamber also stated that "as a minimum, the perpetrator must have known or considered the possibility that the victim of his crime was a civilian", and stressed that "in case of doubt as to whether a person is a civilian, that person shall be considered to be civilian".[30]

33. In Prosecutor v. Kunarac et al the ICTY has also clarified the elements of the crime of rape within the meaning of articles 3 and 5 of its Statute. In principle, the Trial Chamber agreed with the definition given by the Trial Chamber in the Furundzija case, but considered it necessary to clarify its understanding of the second element of the definition. In the Furundzija case the Trial Chamber stated that the act of sexual penetration would constitute rape only if accompanied "by coercion or force or threat of force against the victim or a third person".[31] The Trial Chamber in the Kunarac case considered that such definition is "in one respect more narrowly stated than is required by international law" in that it does not refer to other factors which would render an act of sexual penetration non-consensual or non-voluntary.[32] In the Kunarac case the Trial Chamber adopted a broader view and defined the *actus reus* of the crime of rape in international law as sexual penetration that "occurs without the consent of the victim". The Trial Chamber stressed that "consent for this purpose must be given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances".[33]

34. The Trial Chamber in the Kunarac case also discussed the meaning and scope of the crime of torture in international humanitarian law. In its attempt to provide for a definition of torture under international humanitarian law, the Trial Chamber considered "crucial structural differences" between international human rights law and international humanitarian law[34] and departed from a previous definition adopted by the Trial Chamber in the Delalic et al case and Furundzija case. In those cases the judges had considered that the definition of torture in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 reflects a consensus that is representative of customary international law.[35] The Trial Chamber in the Kunarac case held the view that the definition contained in the Torture Convention was intended to apply only in the context and for the purposes of the Convention and cannot be regarded as customary law. The definition in the Torture Convention was also meant to apply only to the extent that other international instruments or national laws did not give the individual broader or better protection.[36] In the view of the Trial Chamber, the definition of torture under international humanitarian law does not comprise the same elements as the definition used in human rights law. In particular, "the presence of a State official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law".[37] According to the Trial Chamber, the

offence of torture in customary international humanitarian law comprises the following elements: (i) infliction, by act or omission, of severe pain or suffering, whether physical or mental; (ii) intentional acts or omissions; (iii) acts or omissions whose aim is to obtain information or a confession, or to punish, intimidate or coerce the victim or a third person, or to discriminate, on any ground, against the victim or third person".[38] From the discussion of the matter undertaken by the Trial Chamber it is obvious that the adoption of a different definition of torture in international humanitarian law does not supersede the definition of torture under the human rights instruments. On the contrary, both definitions may coexist inasmuch as they operate in different contexts and purposes, providing protection to the individuals in different circumstances.

35. The Trial Chamber also defined for the first time in the Kunarac case the crime of enslavement as a crime against humanity under article 5 of the ICTY Statute, but made it clear that its definition in the instant case was not intended to be exhaustive as it related only to the charges concerning the treatment of women and children and allegations of forced or compulsory labour or service. The Trial Chamber considered various sources, including international humanitarian law and human rights law, and adopted a definition of enslavement as an offence under customary international law. It found that "the *actus reus* of the violation is the exercise of any or all of the powers attaching to the right of ownership over a person. The *mens rea* of the violation consists in the intentional exercise of such powers".[39]

36. In Prosecutor v. Kordic the Trial Chamber also defined for the first time the crime of imprisonment as a crime against humanity. It held the view that the term imprisonment in article 5 of the ICTY Statute "should be understood as arbitrary imprisonment, that is to say, the deprivation of liberty of the individual without due process of law, as part of a widespread or systematic attack directed against a civilian population".[40] The Trial Chamber concluded that the imprisonment of civilians is unlawful if they have been detained in contravention of article 42 of the Fourth Geneva Convention, without respect to the procedural safeguards of article 43 of the same Convention - even where the initial detention was justified and the acts occur as part of a widespread or systematic attack directed against a civilian population.[41]

37. The crime of outrages upon personal dignity was discussed as an offence within the meaning of article 3 of the ICTY Statute in Prosecutor v. Kunarac. In this case the Trial Chamber recalled the definition given in the Aleksovski case in which it considered as one element of the offence that it must cause real and lasting suffering to the individual arising from humiliation or ridicule. The Trial Chamber did not agree with the requirement of "lasting suffering" in the definition. "So long as the humiliation or degradation is real and serious, the Trial Chamber [could] see no reason why it would also have to be 'lasting'". In the view of the Trial Chamber, "it is not open to regard the fact that a victim has recovered or is overcoming the effects of such an offence as indicating of itself that the relevant acts did not constitute an outrage upon personal dignity".[42] In the instant case, the Trial Chamber adopted a definition of the offence of outrages upon personal dignity as requiring: (i) that the accused intentionally participated in an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity ; and (ii) that he knew that the act or omission could have that effect.[43]

Genocide (ICTY Statute, art. 4)

38. In Prosecutor v. Krstic the Trial Chamber shed some light on the *mens rea* in the offence of genocide. It distinguished between the individual intent of the accused and the intent involved in the conception and commission of the crime. "The gravity and the scale of the crime of genocide ordinarily presume that several protagonists were involved in its perpetration. Although the motive of each participant may differ, the objective of the criminal enterprise remains the same. In such cases of joint participation, the intent to destroy, in whole or in part, a group as such must be discernible in the criminal act itself, apart from the intent of particular perpetrators". It will only be necessary to establish whether the accused shared the intention that genocide be carried out.[44] Accordingly, two elements were identified as components of the special intent requirement of the crime of genocide. First, the act or acts must target a national, ethnical, racial or religious group and second, they must seek to destroy all or part of that group. As to the second element, and for the purposes of the instant case, the Trial Chamber adhered to the characterization of genocide as encompassing "only acts committed with the *goal* of destroying all or part of a group".[45] Further, "[a]rticle 4 of the Statute does not require that the genocidal acts be premeditated over a long period. It is conceivable that, although the intention at the outset of an operation was not the destruction of a group, it may become the goal at some later point during the implementation of the operation"[46]. Since the facts in the Krstic case involved primarily the killing of Bosnian Muslim men of military age, the Trial Chamber had to deal with the question of whether the intent to destroy them qualified as an "intent to destroy the group in whole or in part". In this regard the Trial Chamber held the view that "the intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it. Although the perpetrators of genocide need not seek to destroy the entire group protected by the Convention, they must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such".[47]

Fair trial and procedural rights

39. The jurisprudence of the International Criminal Tribunals has also contributed to the identification of certain human rights as part of customary law or as norms of peremptory character. In a judgement on allegations of contempt against defence counsel in Prosecutor v. Tadic, the Appeals Chamber held the view that the Rules of Procedure and Evidence of the International Tribunal should be interpreted in conformity with the Statute of the Tribunal, which in turn must respect the internationally recognized standards regarding the rights of the accused. The Appeals Chamber considered that article 14 of the International Covenant on Civil and Political Rights, which includes the recognition of the right to appeal a conviction, "reflects an imperative norm of international law to which the Tribunal must adhere".[48]

III. CONCLUDING REMARKS

40. In the period covered by the present report there have been substantive developments in the process of clarifying uncertainties in the application of international human rights and international humanitarian law, and in identifying fundamental standards of humanity at various different levels. To a great extent, the developments in the area are the result of the interplay between different sources of law and the practice of different actors at various levels. In this

context, it is worth noting the creative manner in which human rights law, international humanitarian law, international criminal law and general public international law have been used to define or clarify the content of international crimes, non-derogable rights or peremptory norms of general international law. For instance, the Human Rights Committee's general comment No. 29 on article 4 of the ICCPR has used concepts and definitions of international humanitarian law and customary international law to identify the provisions in the ICCPR that are non-derogable. Likewise, the International Law Commission has put strong emphasis on international human rights and international humanitarian law rules to define some of the rules applicable in the context of State responsibility, in particular to define those obligations flowing from customary international law and norms of peremptory character. It is expected that future developments in the area will continue to draw on the progress made in the various branches of general international law to identify fundamental standards of humanity.

41. As stated in previous reports, there remain some issues requiring further discussion and clarification. Although substantial progress has been made in clarifying issues considered unresolved in previous reports, in particular the general comment on article 4 of the ICCPR which constitutes a great contribution in that regard, important areas still await further consideration and clarification. The ICRC study on customary rules of international humanitarian law, which is in its final stage of preparation, will be a key element in this process.

Notes

[1] Article 4 of the ICCPR reads as follows:

> "1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
>
> "2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
>
> "3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation."

[2] "The purpose of these general comments is to make [the Committee] experience available for the benefit of all States parties in order to promote their further implementation of the Covenant; to draw their attention to insufficiencies disclosed by a large number of reports; to suggest

improvements in the reporting procedure and to stimulate the activities of these States and international organizations in the promotion and protection of human rights". Report of the Human Rights Committee, Official Records of the General Assembly, Thirty-sixth Session, supplement No. 40 (A/36/40), annex VII.

[3] In international law doctrine a derogation clause in a treaty permits the State party to suspend or breach certain of its obligations in circumstances of war or public emergency. By contrast, limitations upon the exercise of rights are normally permitted for the purpose of securing respect for the rights of others. For instance, article 29.2 of the Universal Declaration of Human Rights states: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society". See Rosalyn Higgins "Derogations under human rights treaties" *The British Yearbook of International Law, vol. 48* (1976-77) pp. 281- 283.

[4] Report of the International Law Commission on the work of its fifty-third session, Official Records of the General Assembly, Fifty-Sixth session, Supplement No. 10 (A/56/10), chap. IV, sect. E.

[5] Commentary to chapter V, para. 2.

[6] Commentary to article 26, para. 6.

[7] Ibid., para. 5.

[8] In this regard, the ILC quoted the decision of the International Criminal Tribunal for the Former Yugoslavia relating to the subpoena duces tecum in the Prosecutor v. Blaskic case, in which it stated "[u]nder present international law it is clear that States, by definition, cannot be the subject of criminal sanctions akin to those provided for in national criminal systems" (paragraph 6 of commentary to chapter III of Part Two).

[9] Commentary to chapter III, para. 7.

[10] Ibid.

[11] Commentary to article 40, para. 5.

[12] Commentary to article 41, para. 4.

[13] Ibid., para. 10

[14] Commentary to article 48, para. 8.

[15] Ibid., para. 1.

[16] Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. reports 1970, para. 29.

[17] Commentary to article 48, para. 10.

[18] Commentary to chapter II, para. 1.

[19] Commentary to article 50, para. 7.

[20] Prosecutor v. Kordic and Cerkez, case No. IT-95-14/2-T, Judgement of the Trial Chamber, of 26 February 2001, para.371; Prosecutor v. Krstic, case No. IT-98-33-T, Judgement of the Trial Chamber of 2 August 2001, para. 605.

[21] Prosecutor v Kordic and Cerkez, para. 371

[22] Prosecutor v. Delalic, et al (Celebici), case No. IT-96-21-A Appeals Chamber, Judgement of 20 February 2001, paras. 189-198; Prosecutor v. Kunarac et al, case Nos. IT-96-23-T and IT-96-23/1-T, Judgement of 22 February 2001, para. 395; Prosecutor v. Krstic, para. 604; Prosecutor v. Kordic, para. 418.

[23] Prosecutor v. Kordic, para. 416 and para. 840; Prosecutor v. Delalic et al, (Celibici), paras. 193, 197, 198, 256; Prosecutor v. Kunarac et al, para. 396.

[24] Prosecutor v. Kunarac et al, para. 398.

[25] Ibid., para. 399.

[26] Prosecutor v. Kambanda, case ICTR 97-23, Appeals Chamber Judgement of 19 October 2000.

[27] Prosecutor v. Krstic, op. cit.

[28] Prosecutor v. Delalic et al, para. 143.

[29] Ibid., para. 144.

[30] Prosecutor v. Kunarac, para. 435.

[31] Prosecutor v. Furundzija, case No. IT-95-17/1, Trial Chamber Judgement of 10 December 1998, para. 185.

[32] Prosecutor v. Kunarac, para. 438.

[33] Ibid., para. 460.

[34] Ibid., para. 470.

[35] Article 1(1) of the Torture Convention reads as follows: "For the purposes of this Convention, the terms 'torture' means any act by which severe pain and suffering …is intentionally inflicted upon a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third party has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discriminations of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity…".

[36] Prosecutor v. Kunarac, para. 482.

[37] Ibid., para. 496.

[38] Ibid., para. 497.

[39] Ibid.,paras. 539-540.

[40] Prosecutor v. Kordic, para. 302.

[41] Ibid., para. 303.

[42] Prosecutor v. Kunarac, para. 501.

[43] Ibid., para. 514.

[44] Prosecutor v. Krstic, para. 549.

[45] Ibid., para. 571.

[46] Ibid., para. 572.

[47] Ibid., para. 590.

[48] Prosecutor v.Tadic, Appeal Judgement on allegations of contempt against prior counsel, Milan Vujin, Judgement of 27 February 2001.
