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PROMOTION AND PROTECTION OF HUMAN RIGHTS

Fundamental standards of humanity

Report of the Secretary-General*

* The report was submitted after the deadline in order to complete research.

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Summary

This report is submitted pursuant to decision 2002/112 in which the Commission on Human Rights requested the Secretary-General, in consultation with the International Committee of the Red Cross (ICRC) to submit to the Commission at its sixtieth session an analytical report which would consolidate and update previous reports and studies, cover relevant developments, including regional and international case law and the forthcoming study by the International Committee of the Red Cross on customary rules of international humanitarian law and address the issue of securing implementation.

The need to identify fundamental standards of humanity initially arose from the premise that most often situations of internal violence pose a particular threat to human dignity and freedom. The process of fundamental standards of humanity is not, however, limited to situations of internal strife and aims at strengthening the protection of individuals through the clarification of uncertainties in the application of existing international law standards aimed at the protection of persons in all circumstances. The process of fundamental standards of humanity should thus focus on the clarification of uncertainties in the application of existing standards in situations which present a challenge to their effective implementation.

During the period from 1998 to 2003, the following developments have contributed to the clarification of several problems related to the interpretation and application of the relevant standards: (a) ongoing work of the International Criminal Tribunals for the Former Yugoslavia and Rwanda; (b) adoption and ratification of the Rome Statute of the International Criminal Court; (c) adoption by the Human Rights Committee of general comment No. 29 on article 4 of the International Covenant on Civil and Political Rights; (d) adoption by the International Law Commission of the Draft Articles on State Responsibility for Internationally Wrongful Acts; and (e) increased ratification by States of key international human rights law and international humanitarian law instruments. Furthermore, agreements concluded at the country level between humanitarian agencies and both States and non-State entitles illustrate the importance of promoting fundamental principles of human rights and international humanitarian law on the ground. The upcoming ICRC study on customary rules of international humanitarian law is expected to further contribute to identifying fundamental standards of humanity.

Although substantial progress has been made in clarifying issues discussed in previous reports, some issues remain to be further considered and clarified. The question of how to secure better compliance with fundamental standards of humanity by non-State actors merits further consideration.

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Introduction

1. In its decision 2002/112, the Commission on Human Rights, recalling its resolution 2000/69 and its decision 2001/112, and taking note of the report of the Secretary-General on fundamental standards of humanity (E/CN.4/2002/103), decided, without a vote, to consider the question of fundamental standards of humanity at its sixtieth session and to request the Secretary-General, in consultation with the International Committee of the Red Cross (ICRC), to submit to the Commission at its sixtieth session an analytical report which would consolidate and update previous reports and studies, cover relevant developments, including regional and international case law and the forthcoming study by the International Committee of the Red Cross on customary rules of international humanitarian law, and address the issue of securing implementation. The present report is submitted in accordance with decision 2002/112. The comments and advice of the ICRC in the preparation of the report are gratefully acknowledged.

I. OVERVIEW OF FUNDAMENTAL STANDARDS OF HUMANITY

2. The need to identify fundamental standards of humanity initially arose from the premise that most often situations of internal violence pose particular threat to human dignity and freedom (see previous reports: E/CN.4/2002/103, para. 2; 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). 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 strife. The process of fundamental standards of humanity aims at strengthening the practical protection of individuals in all circumstances.

3. Previous reports (see, in particular, E/CN.4/2002/103, E/CN.4/2001/91) 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. The process should thus aim at strengthening the practical protection through the clarification of uncertainties in the application of existing standards in situations, which present a challenge to their effective implementation. The starting point in this process was the identification of fundamental standards of humanity in the practices or doctrine of States, international tribunals and organizations, non-State actors, and other relevant bodies. Reports have thus looked at the practice of those actors in various dimensions, including the areas of implementation of human rights law in situations of internal strife and internal armed conflict, as well as of international humanitarian law. Additionally, the area of State responsibility for internationally wrongful acts was examined.

4. The following developments have contributed to improving protection of individuals by clarifying certain legal uncertainties. First, ongoing work of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) has contributed to development/clarification of the accountability of non-State actors as well as definitions of genocide and crimes against humanity. Second, adoption and ratification of the Rome Statute of the International Criminal Court advanced the criminalization of offences committed in non-international armed conflicts and reaffirmed the individual criminal responsibility for genocide, war crimes and crimes against humanity. Third, 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) clarified the application of human rights norms in situations of national emergencies. Fourth, adoption by the International Law Commission of the Draft Articles on State Responsibility for Internationally Wrongful Acts contributed to defining States' obligations stemming from customary international law and norms of peremptory character. Fifth, more States have ratified key international human rights law and international humanitarian law treaties, and thus the legal protection provided for by these instruments apply in potentially larger number of situations. Additionally, the overview of agreements concluded at the field level by humanitarian agencies and both States and non-State entities showed the importance attached to fundamental principles of human rights and international humanitarian law.

5. While the developments above have contributed to clarification of various legal uncertainties, there are still important issues that require further consideration. The question of how to secure better compliance with fundamental standards of international human rights law and international humanitarian law by non-State actors merits further consideration. An ICRC study on customary rules of international humanitarian law, which is in the final stage of preparation, is expected to further contribute to the process of identifying fundamental standards of humanity by clarifying, in particular, international humanitarian law rules applicable in non-international armed conflict.

II. RECENT DEVELOPMENTS IN INTERNATIONAL LAW

A. The recent jurisprudence of the International Criminal Tribunals

6. Some recent rulings of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) contribute in important ways to the development of international humanitarian and international criminal law. This includes the scope of criminal responsibility and the definition of crimes.

1. Criminal responsibility (ICTY Statute, arts. 7 (1) and 7 (3))

Joint criminal enterprise

7. In *The Prosecutor v. Milorad Krnojelac*, the Appeals Chamber of ICTY reviewed the law applicable to the joint criminal enterprise, aiding and abetting.

8. The Appeals Chamber found that the very concept of joint criminal enterprise presupposes that its participants, other than the principal perpetrator(s) of the crimes committed, share the perpetrators' joint criminal intent.[1]

9. The Appeals Chamber, in the *The Prosecutor v. Milorad Krnojelac* (hereafter "*Prosecutor v. Krnojelac*"), further held that "although the second category of cases defined by the *Tadic* Appeals Judgement ("systemic") clearly draws on the Second World War extermination and concentration camp cases, it may be applied to other cases and especially to the serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. Although the perpetrators of the acts tried in the concentration camp cases were mostly members of criminal organizations, the *Tadic* case did not require an individual to belong to such an organization in order to be considered a participant in the joint

criminal enterprise. According to the *Tadic* Appeals Judgement, this category of cases - a variant of the first - is characterized by the existence of an organized system set in place to achieve a common criminal purpose. For there to be the requisite intent, "the accused must have had personal knowledge of the system in question (whether proven by express testimony or a matter of reasonable inference from the accused's position of authority) and the intent to further the concerted system. The Prosecution was therefore able to rely upon this form of joint criminal enterprise".[2]

10. In *Prosecutor v. Krnojelac*, the Appeals Chamber also stated that using the concept of joint criminal enterprise to define an individual's responsibility for crimes physically committed by others requires a strict definition of common purpose. The principle applies irrespective of the category of joint enterprise alleged. The principal perpetrators of the crimes constituting the common purpose or constituting a foreseeable consequence of it should also be identified as precisely as possible.[3]

11. The Appeals Chamber confirmed the criterion set out in the *Tadic* Appeals Judgement that, in assessing intent to participate in a systemic form of joint criminal enterprise, it need not be proved that there was an agreement to commit each of the crimes in furtherance of the common purpose.[4]

12. The Appeals Chamber noted that "customary international law does not require a purely personal motive in order to establish the existence of a crime against humanity".[5] It recalled its previous case law which, with regard to the specific intent required for the crime of genocide, sets out "the necessity to distinguish specific intent from motive. … The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide".[6] The Appeals Chamber believed that this distinction between intent and motive must also be applied to the other crimes laid down in the Statute.[7]

Superior responsibility

13. In *Prosecutor v. Krnojelac*, the Appeals Chamber made several clarifications with regard to *mens rea* of superior responsibility.

14. The Appeals Chamber recalled that the *Celebici* case law only shows that, with regard to a specific offence, the information available to the superior need not contain specific details on the unlawful acts which have been or are about to be committed. The Chamber stated that "it may not be inferred from this case-law that, where one offence (the 'first offence') has a material element in common with another (the 'second offence') but the second offence contains an additional element not present in the first, it suffices that the superior has alarming information regarding the first offence in order to be held responsible for the second on the basis of Article 7 (3) of the Statute (such as for example, in the case of offences of cruel treatment and torture where torture subsumes the lesser offence of cruel treatment). Such an inference is not admissible with regard to the principles governing individual criminal responsibility".[8] The Appeals Chamber reiterated that an assessment of the mental element required by article 7 (3) of the Statute should, in any event, be conducted in the specific circumstances of each case, taking into account the specific situation of the superior concerned at the time in question.[9]

2. Crimes under international law

Grave breaches of the Geneva Conventions (ICTY Statute, art. 2)

15. In *The Prosecutor v. Naletilic and Martinovic*, Trial Chambers contributed to the development of international humanitarian law by prosecuting for the first time[10] the unlawful transfer of a civilian under article 2 (g) of the Statute as a grave breach of the Geneva Conventions of 1949. It found that "transfers motivated by an individual's own genuine wish to leave are lawful".[11] To determine whether a transfer is based on an individual's own wish, the Trial Chamber found assistance in article 31 of Geneva Convention IV which prohibits physical or moral coercion against protected persons, being direct or indirect, obvious or hidden.[12] It defined forcible transfer as "the movement of individuals under duress from where they reside to a place that is not of their own choosing."[13] In order for the Chamber to be satisfied that a violation of article 2 (g) of the Statute has occurred, "proof of the following is required: (i) the general requirements of article 2 of the Statute are fulfilled; (ii) the occurrence of an act or omission, not motivated by the security of the population or imperative military reasons, leading to the transfer of a person from occupied territory or within occupied territory; and (iii) the intent of the perpetrator to transfer a person".[14]

War crimes (ICTY Statute, art. 3 and ICTR Statute, art. 4)

16. In *The Prosecutor v. Naletilic and Martinovic*, Trial Chambers clearly established the elements of unlawful labour under article 3 of the Statute. It found that "the offence of unlawful labour against prisoners of war may be defined as an intentional act or omission by which a prisoner of war is forced to perform labour prohibited under articles 49, 50, 51 or 52 of Geneva Convention III".[15] In determining whether a person was not in a position to make a real choice, a Trial Chamber may consider the following criteria: "(a) the substantially uncompensated aspect of the labour performed; (b) the vulnerable position in which the detainees found themselves; (c) the allegations that detainees who were unable or unwilling to work were either forced to do so or put in solitary confinement; (d) claims of longer term consequences of the labour; (e) the fact and the conditions of detention; and (f) the physical consequences of the work on the health of the internees".[16] In order to establish the *mens rea* for this crime, the Prosecution "must prove that the perpetrator had the intent that the victim would be performing prohibited work" and that the intent "can be demonstrated by direct explicit evidence, or, in the absence of such evidence, can be inferred from the circumstances in which the labour was performed".[17]

17. In *The Prosecutor v. Stanislav Galic*, the Tribunal pronounced itself for the first time on material and mental elements of the crime of terror as a violation of the laws and customs of war. The majority found that the Tribunal had jurisdiction over the crime of terror under article 3 of the Statute.[18] The majority found that the crime of terror against the civilian population "is constituted of the elements common to offences falling under Article 3 of the Statute, as well as of the following specific elements: (1) Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population; (2) The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence; and (3) The above offence was committed with the primary purpose of spreading terror among the civilian population".[19] For the accused to be convicted of the crime of terror, the prosecutor

must prove that the attack on civilians for which the accused has been shown to be responsible was carried out with the primary purpose of spreading terror among the civilian population.[20]

18. The Appeals Chamber in *The Prosecutor v. Kunarac et al*. addressed the issue of the existence of an armed conflict and nexus therewith. The Chamber stated that "there are two general conditions for the applicability of Article 3 of the [ICTY] Statute: first, there must be an armed conflict; second, the acts of the accused must be closely related to the armed conflict".[21] The Appeals Chamber ruled that "the armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict".[22] Consequently, in determining whether the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, inter alia, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties.[23]

19. In *The Prosecutor v. Rutaganda*, the ICTR Appeals Chamber further refined the text set by the Appeals Chamber in *Kunarac* by adding two clarifications. The first is that the expression "under the guise of armed conflict" does not mean simply "at the same time as armed conflict" and/or "in all circumstances created in part by armed conflict". For example, if a non-combatant takes advantage of the loosening of police efficiency, in a troubled situation created by an armed conflict, to kill a neighbour whom he has hated for years, this does not as such constitute a war crime under the terms of article 4 of the Statute. On the other hand, the accused in the *Kunarac* case were combatants who had taken advantage of their positions of authority in the military to rape people whose displacement had been a declared goal of the military campaign in which they had, moreover, participated themselves. Second, the Appeals Chamber emphasized that the determination of the existence of a close link between given infractions and an armed conflict will, in general, require taking into consideration several factors, and not just one of a series of enumerated factors. Particular caution needs to be exercised when the person accused is a non-combatant.[24]

Crimes against humanity (ICTY Statute, art. 5)

20. In *The Prosecutor v. Simic et al*., the Trial Chamber considered the forcible takeover of the municipality of Bosanski Samac as persecution. It concluded that "a forcible takeover, per se, does not reach the same level of gravity as the other crimes against humanity and on its own does not amount to persecution". However, "a forcible takeover may serve as the basis for perpetration of other persecutory acts as it provides the conditions necessary for adoption and enforcement of policies infringing upon basic rights of citizens on the basis of their political, ethnic, or religious background".[25]

21. The Trial Chamber also considered the unlawful arrest as persecution. Unlawful arrest had never been defined in the jurisprudence of the Tribunal. Relying on the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and on the right

to be free from arbitrary arrest and imprisonment as enshrined in International Conventions, the Trial Chamber held that "the act of unlawful arrest means to apprehend a person, without due process of law".[26] The Trial Chamber found that "while unlawful arrest may in itself not constitute a gross or blatant denial of a fundamental right reaching the same level of gravity as the other acts prohibited under Article 5, when considered in context, together with unlawful detention or confinement, such acts may constitute the crime of persecution as a crime against humanity".[27]

22. In *The Prosecutor v. Simic et al*., the Trial Chamber further considered interrogation as persecution. It concluded that "the interrogation of … civilians who had been arrested and detained, and forcing them to sign false and coerced statements, *as alleged in themselves*, do not meet the seriousness requirement to constitute persecution and a crime against humanity. They may, however, form part of a series of acts which comprise an underlying persecutory act".[28]

23. The Appeals Chamber in *The Prosecutor v. Kunarac et al.* concurred with the Trial Chamber's definition of rape. It emphasized that the Appellants' requirement of resistance has no basis in customary international law or fact. The use of force in itself is not an element per se constituting rape. Coercive circumstances without relying on physical force may be deemed sufficient to determine the absence of consent.[29]

24. The Appeals Chamber in the *Kunarac* case also concurred with the Trial Chamber's definition of torture. It clarified the nature of torture in customary international law, in particular with respect to the participation of a public official or any other person acting in a non-private capacity. The Appeals Chamber found that the definition of torture in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, inclusive of the public official requirement, reflects international customary law. It considered that "the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention".[30] Despite the fact that existing case law has not yet determined the absolute degree of pain required for an act to amount to torture, "some acts establish per se the suffering of those upon whom they are inflicted".[31] The Appeals Chamber subsequently affirmed that "sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterization as an act of torture".[32] With regard to the intent to commit the crime of torture, the Chamber pointed out that it is important that the appellants "did intend to act in such a way as to cause severe pain or suffering, whether physical or mental, to their victims, in pursuance of one of the purposes prohibited by the definition of the crime of torture".[33] It concluded that "if one prohibited purpose is fulfilled by the conduct, the fact that such conduct was also intended to achieve a non-listed purpose (even one of a sexual nature) is immaterial".[34]

25. In *The Prosecutor v. Kunarac et al.*, the Appeals Chamber also reviewed the elements of the crime of enslavement in its various contemporary forms to assert that what is at stake is the "destruction of the juridical personality" of a victim as a result of the "exercise of any or all the powers attaching to the right of ownership".[35] It concurred with the Trial Chamber that the required *mens rea* for this crime consists of the intentional exercise of a power attached to the right of ownership over the victims without it being necessary to prove that the accused intended to detain the victims under their direct control for a prolonged period in order to use them for sexual acts.

26. The Appeals Chamber in *Prosecutor v. Krnojelac*, examined which acts of displacement may constitute persecution when committed with discriminatory intent. It held that acts of forcible displacement underlying the crime of persecution punishable under article 5 (h) of the Statute are not limited to displacements across a national border.[36] Following the analysis of the relevant provisions of international humanitarian law, the Appeals Chamber concluded that "displacements within a State or across a national border, for reasons not permitted under international law, are crimes punishable under customary international law, and these acts, if committed with the requisite discriminatory intent, constitute the crime of persecution under article 5 (h) of the Statute".[37]

27. In *Prosecutor v. Krnojelac*, the Appeals Chamber also addressed the issue of lack of genuine choice and unlawfulness of displacement. It stated that "it is the absence of genuine choice that makes displacement unlawful. Similarly, it is impossible to infer genuine choice from the fact that consent was expressed, given that the circumstances may deprive the consent of any value".[38]

Genocide (ICTR Statute, art. 2)

28. In December 2003, for the first time since the conviction of Julius Streicher at Nuremberg, the role of the media was addressed in the context of international criminal justice. The International Criminal Tribunal for Rwanda (ICTR) Trial Chamber I in *The Prosecutor v. Nahimana, Barayagwiza and Ngeze*[39] convicted three media executives for genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, and crimes against humanity (persecution and extermination). In December 2003, the ICTR Trial Chamber II also convicted former mayor Juvēnal Kajelijeli for genocide, direct and public incitement to commit genocide, and for extermination as a crime against humanity.[40]

Occupation in international humanitarian law

29. In *The Prosecutor v. Naletilic and Martinovic*, the Trial Chamber addressed the notion of occupation in international humanitarian law, which was relevant to the charges of unlawful labour of civilians, forcible transfer of a civilian, and destruction of property. The Trial Chamber held that "to determine whether the authority of the occupying power has been actually established, the following guidelines provide some assistance:

- The occupying power must be in a position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly;

- The enemy's forces have surrendered, been defeated or withdrawn. In this respect, battle areas may not be considered as occupied territory. However, sporadic local resistance, even successful, does not affect the reality of occupation;

- The occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt;

- A temporary administration has been established over the territory;

- The occupying power has issued and enforced directions to the civilian population".[41]

The Trial Chamber applied different legal tests to determine whether the law of occupation applies, depending on whether it is dealing with individuals or with property and other matters. It held that forcible transfer and unlawful labour are prohibited from the moment civilians fall into the hands of the opposing power, regardless of the stage of the hostilities, and that there is no need to establish an actual state of occupation as defined in article 42 of The Hague Regulations. With regard to destruction of property, however, the Trial Chamber held that actual authority is required.[42]

B. The recent jurisprudence of regional human rights bodies

30. Regional human rights bodies examined various issues related to the situations of armed conflict and internal strife. This report considers several relevant rulings by regional human rights bodies that contributed to the clarification of international humanitarian law and human rights law.

Relation of human rights and international humanitarian law

31. The Inter-American Commission on Human Rights has affirmed that human rights and international humanitarian law complement each other in situations of armed conflict. The test for evaluating respect for a particular right in a situation of armed conflict may be distinct from that applicable in time of peace. The Inter-American Commission stated: "[I]n situations of armed conflict, the protections under international human rights and humanitarian law may complement and reinforce one another, sharing as they do a common nucleus of non-derogable rights and a common purpose of promoting human life and dignity. In certain circumstances, however, the test for evaluating the observance of a particular right, such as the right to liberty, in a situation of armed conflict may be distinct from that applicable in time of peace. In such situations, international law, including the jurisprudence of this Commission, dictates that it may be necessary to deduce the applicable standard by reference to international humanitarian law as the applicable *lex specialis*".[43]

Right to humane treatment and conditions of detention

32. The question of conditions of detention has been a matter of concern for the regional human rights systems.[44]

33. The European Court of Human Rights (ECHR) reiterated that "under Article 3 of the Convention the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance …".[45] Furthermore, the Court noted that "complete sensory isolation, coupled with total social isolation can destroy the personality and constitutes a form of inhuman treatment which cannot be justified by the requirements of security or any other reason …".[46]

34. The Inter-American Court of Human Rights observed that "[P]rolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being. Such treatment, therefore, violates Article 5 of the Convention ...".[47]

Protection of property

35. There has been a large body of case law dealing with the authorities' role in the destruction of property and homes, the duty to conduct an effective investigation into such acts, and the need for compensation for those acts.

36. The European Court on Human Rights[48] found that "the destruction of the property, as well as the anguish and distress felt by members of their families, must have caused them suffering of sufficient severity for the security forces' actions to be categorized as inhuman treatment within the meaning of Article 3. Even assuming that the security forces had intended to punish the applicants and their relatives for their alleged involvement in, or support for, the PKK, such ill-treatment could not be justified".[49] The Court also found that the fact that the security forces destroyed the applicants' houses and property, forcing them and their families to leave, "constituted particularly grave and unjustified interference with [their] rights to respect for their private and family life and home, and to the peaceful enjoyment of their possessions".[50] The Court further considered that no thorough or effective investigation was conducted into the applicant's allegations and that there had been a violation of the right to an effective remedy.[51]

III. IMPLEMENTATION

37. Implementation of international human rights law and international humanitarian law, especially during the situations of internal armed conflict, poses great challenges. The following section provides examples of recent developments that contributed to the promotion of fundamental principles.

A. Improving compliance with international humanitarian law[52]

38. In 2003, the ICRC, in cooperation with other institutions and organizations, organized a series of regional expert seminars on the subject of "Improving compliance with international humanitarian law". Seminars were held in Cairo, Pretoria, Kuala Lumpur, Mexico City and Bruges, Belgium. Government experts, parliamentarians, academics, members of regional bodies, representatives of National Societies of the Red Cross and Red Crescent, and NGOs were among the participants. The focus of the discussions was on ways in which article 1 common to the four Geneva Conventions, i.e. States' obligation to "respect and ensure respect" for international humanitarian law, could be operationalized, and how the potential of article 89 of Additional Protocol I could be better utilized. Emphasis was also placed on the specific problem of improving compliance with international humanitarian law by parties to non-international armed conflicts. Three main observations should be made in this context.

39. First, participants in the seminars confirmed that common article 1 entails an obligation, both on States parties to an armed conflict and on third States not involved in an ongoing conflict. In addition to a clear legal obligation on States to "respect and ensure respect" for

international humanitarian law within their own domestic context, third States are bound by a negative legal obligation to neither encourage a party to an armed conflict to violate international humanitarian law nor to take action that would assist in such violations. Furthermore, third States have a positive obligation to take appropriate action against parties to a conflict who are violating international humanitarian law. All participants affirmed that this positive action is at minimum a moral responsibility and that States have the right to take such measures, with the majority of participants agreeing that it constitutes a legal obligation under common article 1.

40. Second, when discussing existing international humanitarian law mechanisms, most participants agreed that, in principle, the existing mechanisms were not defective but suffer from lack of use linked to lack of political will by States to seize them. The great potential of the International Humanitarian Fact-Finding Commission (art. 90, Additional Protocol I) was noted. A number of proposals were also made regarding new international humanitarian law mechanisms that could improve compliance with international humanitarian law.

41. Finally, participants affirmed that both State actors and armed groups are bound by the provisions of international humanitarian law applicable in situations of non-international armed conflict, and called on all actors to work towards a better compliance with these provisions. Some suggestions of how to practically improve international humanitarian law compliance by armed groups included (a) the conclusion of special agreements between parties to a conflict provided for in common article 3 (3) to the four Geneva Conventions; (b) unilateral declarations by the armed groups; and (c) various legal and non-legal incentives for international humanitarian law compliance by armed groups.

B. Strengthening the human rights culture within the armed forces

42. The Office of the High Commissioner of Human Rights is currently working on the production of tools to strengthen the human rights culture within the armed forces. The overall objective of one such tool, i.e. a training manual on human rights for the armed forces, currently in draft form and expected to be finalized by the end of the year, is to ingrain the culture of human rights within the functioning of the armed forces.

43. The manual provides information on the international instruments and treaties, with a commentary on the relevant laws. It includes prohibition against genocide, torture and summary executions, war crimes and crimes against humanity; it supports human rights during states of emergency and internal conflicts, the rights of vulnerable groups such as women, children, minorities and indigenous peoples, refugees, and internally displaced persons (IDPs); it also outlines prisoner's rights, etc.

44. All these aspects are addressed by the manual such that soldiers can relate to them as principles of humanity or minimum acceptable standards of behaviour that will *enhance* their work as peacekeepers, peace enforcers and defenders of their nations. This integration of human rights law within the functioning of the armed forces will allow effective implementation of human rights on the ground.

C. Application of the norms and standards protecting children in armed conflict

45. The office of the Special Representative of the Secretary-General for Children and Armed Conflict continued its extensive public advocacy, awareness-raising activities, and contributed to monitoring and accountability. In 2002, the Secretary-General's third report to the Security Council on children and armed conflict (S/2002/1299) broke new ground by sending a strong message to parties to conflict that a new "era of application" of the norms and standards protecting children has begun. The report specifically named and listed 23 parties to conflicts, including Governments and non-State actors, who violate standards for the protection of war-affected children. In the follow-up to the report, the Security Council adopted resolution 1460 (2003) supporting the Secretary-General's call for an "era of application" and expresses the intention of the Council to develop clear and time-bound action to end the practice of recruiting or using children as soldiers. In its annual report to the Commission on Human Rights (E/CN.4/2003/77), the Special Representative of the Secretary-General for Children and Armed Conflict stressed that the Commission and OHCHR have an important role to play in achieving an "era of application" and urged them to ensure that the protection, rights and well-being of war-affected children become central concern throughout their work. The Special Representative also encouraged the human rights mechanisms, including the Special Rapporteurs and Representatives as well as the treaty body mechanisms, to integrate international norms and standards on children affected by armed conflict in their examination and recommendations with regard to country situations.

46. The Secretary-General's fourth report to the Security Council (A/58/546-S/2003/1053) continued the practice of listing parties to armed conflict that recruit or use children as child soldiers. The report also includes best practices and lessons learnt in the protection of children affected by armed conflict. Significantly, it pays particular attention to establishment of systematic and coordinated monitoring and reporting mechanisms, with the view to expose violations and recognize positive developments. The report makes several proposals to that effect, including: (a) specific and clear standards must constitute the basis for monitoring and reporting; (b) the most egregious violations should receive priority attention in monitoring operations; and (c) a coordinated framework to ensure the effective flow, integration and reporting on information gathered should be developed. In this regard, the report discussed the role of United Nations entities (including the Security Council, United Nations field presence, United Nations human rights regime, the International Criminal Court, and the office of the Secretary-General for Children and Armed Conflict) in monitoring, reporting and action to contribute to a regime of compliance with norms and standards protecting children in armed conflict.

D. Ground rules, codes of conduct and memorandums of understanding

47. Agreements concluded at the field level between humanitarian agencies, State and non-State entities contribute to the promotion of fundamental principles of international humanitarian law and human rights law. Generally, the first category of agreements constitute codes of conduct stating guiding principles for humanitarian agencies in their work. A second category of agreements consists of agreements between humanitarian agencies and local actors working towards implementation of humanitarian aid. Examples of above-mentioned agreements are provided below.

48. The Standards of Accountability to the Community and Beneficiaries for all humanitarian and development workers in Sierra Leone[53] requires them to, inter alia, promote fundamental human rights without discrimination of any kind; treat all persons with respect, courtesy, and according to Sierra Leonean law, international law and taking account of local customs; never commit any act that could result in physical, sexual or psychological harm or suffering to individuals, especially women and children; never condone or participate in corrupt activities or participate in the trafficking of children, drugs, diamond dealing and the trading of arms; and never abuse their position to withhold humanitarian and development assistance, nor give preferential treatment, in order to solicit sexual favours, gifts, payments of any kind or advantage.

49. An agreement on the distribution of humanitarian aid and assistance in Liberia[54] was concluded on 17 August 2003 between the Government of Liberia, Liberians United for Reconciliation and Democracy (LURD), the Movement for Democracy in Liberia (MODEL), ECOWAS, the United Nations and the African Union. The parties agreed to ensure free and unimpeded access to all territories under their control to enable the delivery of humanitarian aid and assistance by international organizations and non-governmental organizations as well as to guarantee the security and safety of all members and equipment of international organizations and non-governmental organizations operating in territory under their control.

50. In addition to the above-mentioned categories of agreements, Geneva Call, an international humanitarian organization, provides an innovative mechanism to engage non-State actors in adhering to the mine ban provided for in the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (the Ottawa treaty) and other humanitarian norms. Non-State actors, which are not eligible to sign or accede to the anti-personnel mine ban treaty, can sign a "Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action" (DoC) or deposit their own mine ban declarations with the authorities of the Republic and Canton of Geneva. Signatories recognize the DoC "as one step or part of a broader commitment in principle to the ideal humanitarian norms, particularly of international humanitarian law and human rights, and to contribute to their respect in field practice as well as to the further development of humanitarian norms for armed conflicts". The DoC holds non-State actors accountable to an anti-personnel mine ban and provides a platform for other humanitarian commitments.

51. As of January 2004, more than 25 non-State actors signed the DoC. Engagements with non-State actors, inter alia, have occurred in Burma, Burundi, Iraqi Kurdistan, Philippines, Somalia and the Sudan.

IV. CONCLUDING REMARKS

52. **Previous reports observed that, while there is no apparent need to develop new standards, there is a need to secure respect for existing rules of international law aimed at ensuring the protection of persons in all circumstances and by all actors. The process of fundamental standards of humanity should thus continue to focus on strengthening protection through the clarification of uncertainties in the application of existing**

standards. Progress already achieved in this regard is largely based on the increasingly recognized interplay between human rights law, international humanitarian law, international criminal law, international refugee law and other bodies of law that may be relevant.

53. **Despite this substantial progress, some issues remain to be further considered and clarified. The question of how to secure better compliance with fundamental standards of humanity by non-State actors merits further consideration.**

Notes

[1] *The Prosecutor v. Milorad Krnojelac*, case No. IT-97-25-A, para. 84.

[2] Ibid., para. 89.

[3] Ibid., para. 116.

[4] Ibid., para. 97.

[5] Ibid., para. 102.

[6] See ibid., para. 102, referring to the *Jelisic* Appeals Judgement, para. 49.

[7] *Prosecutor v. Krnojelac*, para. 102.

[8] Ibid., para. 155.

[9] Ibid., para. 156.

[10] The *Blaskic* Trial Judgement, the *Krnojelac* Trial Judgement and the *Krstic* Trial Judgement dealt with forcible transfer and/or deportation as a crime against humanity under article 5 of the Statute.

[11] *The Prosecutor v. Naletilic and Martinovic*, case No. IT-98-34-T, para. 519.

[12] Ibid., para. 519.

[13] Ibid., para. 519.

[14] Ibid., para. 521.

[15] Ibid., para. 261.

[16] Ibid., para. 259.

[17] Ibid., para. 260.

[18] *The Prosecutor v. Galic*, IT-98-29-T, para. 138.

[19] Ibid., para. 133.

[20] Ibid., paras. 133, 136 and 138.

[21] *The Prosecutor v. Kunarac et al*, IT-96-23 and IT-96-23/1-A, para. 55, referring to the *Tadic* Jurisdiction Decision, paras. 67 and 70.

[22] *The Prosecutor v. Kunarac et al*., para. 58.

[23] Ibid., para. 59.

[24] See *The Prosecutor v. Rutaganda*, case No. ICTR-96-3-A, para. 570; original text in French only.

[25] *The Prosecutor v. Simic et al.*, case No. IT-95-9-T, para. 56.

[26] Ibid., para. 60.

[27] Ibid., para. 62.

[28] Ibid., para. 69.

[29] *The Prosecutor v. Kunarac et al.*, case No. IT-96-23 and IT-96-23/1-A, paras. 128 and 129.

[30] Ibid., para. 148.

[31] Ibid., para. 150.

[32] Ibid., para. 150.

[33] Ibid., para. 153.

[34] Ibid., para. 155.

[35] Ibid., para. 117.

[36] *Prosecutor v. Krnojelac*, para. 218.

[37] Ibid., para. 222.

[38] Ibid., para. 229.

[39] Case No. ICTR-99-52-T.

[40] *The Prosecutor v. Kajelijeli*, case No. ICTR-98-44A-T.

[41] *The Prosecutor v. Naletilic and Martinovic*, case No. IT-98-38-T, para. 217.

[42] Ibid., para. 222.

[43] *Precautionary Measures in Guantanamo Bay*, Cuba, Inter-American Commission on Human Rights, 12 March 2002.

[44] See also Human Rights Committee, general comment No. 29 (CCPR/C/21/Rev.1/Add.11, para. 13) (2001). Although article 10 of the Covenant is not specified as non-derogable in article 4 of the same treaty, the Human Rights Committee has taken the view that the right of persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person is nevertheless not subject to derogation.

[45] *Ocalan v. Turkey*, ECHR, 12 March 2003 (para. 231).

[46] *Ocalan v. Turkey*, ECHR, 12 March 2003 (para. 232).

[47] *Velásquez Rodríguez* case, I/A Court H.R., Judgement of 28 July 1988 (para. 156).

[48] See also an ICTY judgement in *The Prosecutor v. Kupreskic et al.*, where the Trial Chamber considered the comprehensive destruction of homes and property and deemed that "such an attack on property in fact constitutes a destruction of the livelihood of a certain population. This may have the same inhumane consequences as a forced transfer or deportation. Moreover, the burning of a residential property may often be committed with a recklessness towards the lives of its inhabitants". The Trial Chamber concluded that the comprehensive destruction of property "may constitute a gross or blatant denial of fundamental human rights, and, if committed on discriminatory grounds, it may constitute persecution". (Case No. IT-95-16-T, para. 631.)

[49] *Ayder and others v. Turkey*, ECHR, 8 January 2004, para. 110. See also *Yoyler v. Turkey*, ECHR, 24 July 2003.

[50] *Ayder and others v. Turkey*, para. 119.

[51] See ibid., para. 128.

[52] Based on the report "International humanitarian law and the challenges of contemporary armed conflicts", prepared by the International Committee of the Red Cross for the 28th International Conference of the Red Cross and Red Crescent, 2-6 December 2003, 03/IC/2003, Geneva 2003.

[53] Concluded in May 2002.

[54] Concluded in Accra, 17 August 2003.
