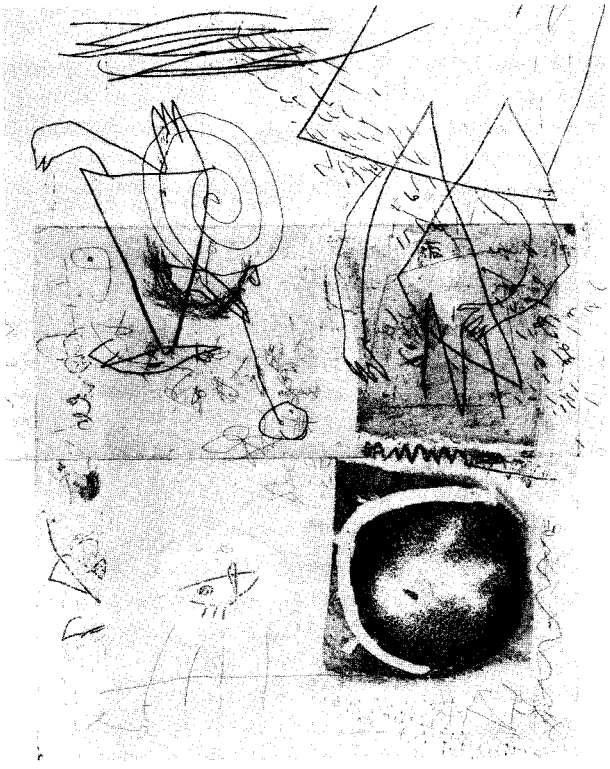
WESTERN CONCEPT OF HUMAN RIGHTS

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Development of Naturalist Legal Concepts on Human Rights

The present-day[1] Western concepts of human rights are deeply rooted in natural law. Fundamental rights of every individual in all advanced Western societies are understood as the natural, inalienable and sacred. They stand above constitutions of States and are protected by a number of international jurisdictions and procedures, such as these before the Commission and the Court of Human Rights within the Council of Europe.

Although in all societies the normative picture differs from the grim reality, there is a tremendous discrepancy between the current level of recognition and respect of dignity of every human person in the member States of the Council of Europe on the one hand, and

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terrifying massacres, ethnic cleansing of occupied territories, and humiliation and slaughtering of civilians and prisoners of war in concentration camps in the Balkans, on the other.

However, the development of positive international law which has increased the level of respect of human rights at least in one part of the world, started only after the Second World War. The conscience of mankind became then shocked by the denial of the right to existence of entire human groups, and of consequences of extermination of individuals just because of their birth and origin.

Yet the so far achievements would be impossible without a previous long time development of concepts of natural law in the center of which has always been the human person. It is likely that just in this respect the Western civilization differs so much from countries with Orthodox Christian tradition. That is in spite of the fact that on the dogmatic level the differences between Catholic and Orthodox creeds are almost insignificant.

* * *

It should be said that this what is called now Western Civilization started by the coronation of Charlemagne as the emperor of the Holy Roman Empire by the pope Leo III in the year of 800. The caesaro-papism, which was very much alike the relationship between emperor and patriarch in Byzantium, was replaced in the 12th century with the so-called hierocratic doctrine of pope as the vicar of Christ on Earth. The pope claimed that he could not be judged by anyone, and that he had a full freedom to change laws, even those of his predecessors. He could excommunicate princes, kings and even an emperor. He claimed the power to declare treaties between kings null and void, to annul secular laws, to order kings to despatch armed troops in support of another king or against pagans and heretics.[2]

That claim for almost unlimited papal authority could not persist indefinitely, even as a doctrine only. If it had survived as such, it could be fatal for Catholic Church. In this case the Church should vanish as many States and other temporal institutions vanished in the course of history.

In the 13th century, side by side with discovery of Gothic arch in the architecture, appeared the school of glosators in law. From the Roman law was restored the concept of an individual as a citizen, and not only as a subject (*sub-ditus*) of a higher power. Aristotle's philosophy, preserved by Arabs, contained the concept of State as a body of citizens sufficing for the purpose of life.

The Church sought to canalize that huge interest in Aristotle, accommodating his philosophy to Christian cosmology. That »Great Synthesis« was accomplished with lasting effect by the Dominican friar Thomas Aquinas (1225–1274). He created within the Church itself an irreparable fissure in the hierocratic doctrine of the unlimited power of pope. In his monumental writing – *Summa Theologiae* – St.Thomas developed a division between Eternal Law, Divine (positive) Law, natural law, and human (positive) law.

Next to St.Thomas, who is worthy of mentioning here was the founding father of the law of nations, Hugo Grotius. His magistral work *De jure belli ac pacis* was published almost four centuries later on, in 1625. In comparison with Grotius one can understand some elements of St.Thomas' teaching on law.

The law of nature is according to Grotius:

»a dictate of right reason which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God.« (*Lib.I, Cap.I, para.X, 1*)

It seems at the first glance that the elementary idea of natural law is almost the same at St.Thomas and at Grotius. St.Thomas preached that the first command of natural law, from which all its other precepts derive, is that good is to be sought and done, and evil to be avoided.

Nevertheless the differences between these two concepts are much deeper. St.Thomas asserted that only God can know the Eternal Law in his own mind. Natural law is for him an imperfect and incomplete perception and sharing by intelligent creatures in the Eternal Law. Grotius has put his concept of the law of nature, which is, as was said, »a dictate of right reason« – and thus intelligible to all human beings – in some way even above God's will.

Hence, both St.Thomas and Grotius resorted to reason, and to man's social nature, in order to deduce rules of natural law. Thus, supposedly there really exists a set of legal rules of objective nature. In St.Thomas' mind human reason serves as an unreliable tool for their perception, while for Grotius these rules are identical to human reason.

In fact all legal concepts of Eternal, Divine and natural law by St.Thomas Aquinas and Hugo Grotius were penetrated by a deep and sincere humanism. According to these teachings man had a very important place between God, creator of nature and nature itself. Nevertheless, these concepts did not necessarily mean equality and freedom of all human beings. Although inhuman positive laws were in these writings considered

[2] *Cf.*, Walter Ullmann: *A History of Political Thought: The Middle Ages*, Penguin Books 1970, pp. 110–115. In order to be more precise it should be stressed that the pope could not change decrees of the Church councils. In addition, even when excommunicating secular princes he did not deprive of inheritance their legitimate heirs.

as unnatural and sinful, these teachings could not alter the harsh reality of slavery and serfdom of that time, and even annihilation of indigenous populations, especially in both Americas.

Another mark of that long epoch was religious intolerance. Jewish communities lived in urban centers of Europe in ghettoes without efficient legal protection. After the Thirty Years War (1618-1648), the religion of subjects was determined according to the religion of the ruling prince, following the principle: *cujus regio, ellius religio*. And since then only Catholics and Protestants could travel through and even settle on the territory of a heterodox prince as aliens. It could however not be conceived that in Christian world islamic or other communities could persist.

Thus, until the French Revolution islamic theocratic rulers were far more tolerant with Christian and Jewish communities than any Christian State. It should be added that although the Ottoman Empire was since the end of the 17th century in full decadence and disorder, it had never perpetrated on the large scale that what is now called as »ethnic cleansing«. Christian and Jewish subjects enjoyed autonomy in religious affairs and in civic status, and they were at least in theory under protection of sultan. But neither in the East, nor in the West, the feudalism guaranteed equal rights and duties to all persons.

* * *

Near the end of the eighteenth century, in a period which roughly corresponds with the larger period of the French Revolution, ensued a revival of natural law. That short time has left to the humanity some legal texts in written form of lasting importance. That period does not seem to be evaluated enough by legal historians. But the celebration of bicentenary of the French Revolution in 1989 threw some new light on it.

It was the period of fecund law creating between two epochs: the time of subjective and free determination of rules of natural law by scholars like Grotius, and the time which followed, that of voluntarist creation of positive law by all-mighty sovereign States. The matter was in fact of an era of sublimation of natural law itself, and of genius transformation of its precepts into written rules of positive law.

All these legal acts of lasting importance confirm the equality and inalienable rights of every human person.

The American Declaration of Independence of 1776 declared *inter alia*:

»We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.«[3]

Much more exhaustive was however the Declaration of the Rights of Man and of the Citizen, which the French National Assembly has approved on 26 August 1789, less than a month after storming of the Bastille in Paris. Here shall be quoted only some of its articles which have been transformed after the Second World War into peremptory rules of general international law:

»Article 1. Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good.

2. The aim of all political associations is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression«...

4. Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law.

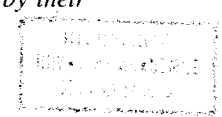
5. Law can only prohibit such actions as are harmful to society. Nothing may be prevented which is not forbidden by law, and no one may be forced to do anything not provided for by law.

6. Law is the expression of the general will. Every citizen has a right to participate personally, or through his representatives, in its foundation. It must be the same for all, whether it protects or punishes. All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents.«

Curiously enough, this Declaration proved to be of little value in the very years of the Revolution in France. During the Reign of Terror by Jacobins in 1793 and 1794 it was not more than a piece of paper. And even after 1815 and 1830, the adoption of its basic guarantees in constitutions, in penal laws and laws on procedure, and their implementation, were a slow, durable and painstaking process in France itself.

On the other hand, voluntarism of the nineteenth century, exalting sovereign States as the unique lawmaker, had a certain contempt for individual and his rights in respect to his State. In spite of a certain progress in positive international law, the protection of human rights was not an end in itself. Inhuman laws were not considered to be lesser or weaker or inferior law, nor less »legitimate«, than any other laws issued by a States' sovereign will.

[3] Needless to say that the founding fathers of the United States did not respect this right in regard to their negro slaves.



The development of positive international law prior to the Second World War has nevertheless made important steps in suppression of slavery, slave trade, servitude, and forced labour. There was also a progress in the protection of minorities in certain States, but on the basis of strictly conventional obligations.

* * *

But as was said, only the large-scale crimes committed during the Second World War, in the first place against civilian population, shocked the conscience of mankind. These crimes issued, in particular from implementation of Nazi laws and from decisions of German administrative and military bodies.

As a result, the UN Charter of 1945 has stressed *inter alia* the faith in and respect of fundamental human rights, the worth of the human person, and human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

The post-war development of positive international law has therefore had, as its end, the same objectives as did natural law prior to the nineteenth century. That is the attainment of natural, inalienable and sacred rights of all human persons without discrimination. Hence, in present international law the term »illegal« has almost the same sense as »inhuman« in naturalist teaching.

The Universal Declaration of Human Rights, adopted by the UN General Assembly on 10 December, 1948, assimilated the substance and all standards of the 1789 French Declaration of the Rights of Man and of the Citizen. But defining particular civil and political rights, its drafters had in mind circumstances of modern times. They adjoined to them a number of economic, social and cultural rights, which mostly remained long time objectives rather than precise legal obligations for all States.

Useless is to-day to enumerate the titles of plenty of other declarations, and of general as well as regional conventions on human rights. In the light of terrible crimes recently committed on civilians in the Balkans just because of their different ethnic or religous affiliation, more important seems to be to summarize here the achieved level of general international law.

It is doubtless that all governments are to-day restrained, by some rules of general international law in their treatment of their own citizens, as well as of foreigners. These obligations are based not only on natural law concepts. Their respect does not depend therefore on the conscience of their own rulers only. At stake are rules of positive international law as well. Their grave violations are the cause of foreign intervention.

Humanitarian Intervention

The Institute of International Law has confirmed in Article 1(1) of its Resolution of 1989, on - »The Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States«[4] the following:

»Human rights are a direct expression of the dignity of human person. The obligation of States to ensure their observance derives from the recognition of this dignity as proclaimed in the Charter of the United Nations and in the Universal Declaration of Human Rights.«

Therefore, the aforesaid obligation of all States does not arise from a volitional, i.e. consensual basis only.

»A State acting in breach of its obligations in the sphere of human rights cannot evade its international responsibility by claiming that such matters are essentially within its domestic jurisdiction.«

In post-war international practice that was not only the UN General Assembly which condemned grave violations of human rights committed by particular governments. The practice of *apartheid* by South Africa, which was abolished only two years ago, was opposed by various individual and collective measures of economic and political boycott in which only a small number of States did not take part.

The Institute defined the right of humanitarian intervention in paragraphs 2 and 3 of Article 2 of its Resolution:

»Without prejudice to the functions and powers which the Charter attributes to the organs of the United Nations in case of violation of the obligations assumed by the members of the Organization, States, acting individually or collectively, are entitled to take diplomatic, economic and other measures towards any other State which has violated the obligation set forth in Article 1, provided such measures are permitted under international law and do not involve the use of armed force in violation of the Charter of the United Nations. These measures cannot be considered as unlawful intervention in the internal affairs of that State.

Violations justifying recours to the measures referred to above shall be viewed in the light of their gravity and of all the relevant circumstances. Measures designed to ensure the collective protection of human rights are particularly justified when taken in response to especially grave violations of these rights, notably large-scale or systematic violations, as well as those infringing rights that cannot be derogated from in any circumstances.«

Article 4(2) provides *inter alia* that:

»...measures taken shall be proportionate to the gravity of the violation...«.

And Article 6 states that,

[4] *Cf.*, Institut de Droit international, *Tableau des Résolutions adoptées* (1957-1991), Paris 1992, pp. 206-213.

»The provisions of this Resolution apply without prejudice to the procedures prescribed in matters of human rights by the terms of or pursuant to the constitutive instruments and the conventions of the United Nations and of specialized agencies or regional organizations.«

The above quoted articles therefore indicate that violation of whatever human rights that might be guaranteed in international instruments, does not justify the same measures of intervention. This Resolution makes in this respect a distinction, though rather *exempli causa*, of rights that cannot be derogated from in any circumstances, and other human rights. Large-scale and systematic violations seek in any event stronger and more urgent measures than incidental and isolated cases of such illegal actions by a State.

Here is proposed a hierarchy of human rights which are all parts of positive international law of present time. The suggested hierarchy of human rights will take into account the gravity of consequences of their violations, the degree of the international responsibility of the wrongdoer, and accordingly, the choice and degree of individual or collective legitimate measures of intervention by thirds against the violator State.

The Concept of International Crimes

The post-war development of positive international law in this respect led to the development of some new legal concepts. Thus, when codifying the rules governing State responsibility, the International Law Commission made a subtle distinction between »international crimes« and other internationally wrongful acts or ordinary international delicts.

In Draft article 16 on State Responsibility the Commission has defined international crime as follows:

»2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as crime by that community as a whole constitutes an international crime.«

Paragraph 3 of Draft article 19 enumerates some of these international crimes »on the basis of international law in force«. This means that by further development of positive international law this list might be enriched. In this respect the most important for our topic is subparagraph (c) of paragraph 3, which states:

»(*c*) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid*;...«[5]

[5] *Cf., Yearbook of the International Law Commission 1980*, Vol.II, Part Two, p.32.

Legal qualification of each of the above mentioned international crimes is provided in respective general conventions: Articles II and III of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948; Article 1 of the Slavery Convention of 1926, and Article 1 of Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1956; and Article II of the International Conventions on the Suppression and Punishment of the Crime of *Apartheid* of 1973.

All States parties to respective conventions cannot rebut qualifications of these international crimes provided in them in regard to themselves. The former Yugoslavia was a party to all these conventions and, as a consequence they legally bind all its successor States, including the so-called »Federal Republic of Yugoslavia (Serbia and Montenegro)«. In respect to third States to these conventions, an international judiciary organ should, when possible, examine the transformation of respective treaty provisions into general customary law.

* * *

Among three above mentioned international crimes the most grievous by its inhuman consequences is the crime of genocide. It is provided as such in the Statute of the International Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law. Its legal qualification is explained below in this text under item (*iii*).

Next to genocide is the crime of slavery, which is happily not peculiar for actual situations of the war in the Balkans.

At the last place is the crime of *apartheid.* It is qualified by Article I of the 1973 International Convention on the Suppression and Punishment of the Crime of *Apartheid*, as a crime against humanity. The country which has had for many years the legal system based on *apartheid* was South Africa. The law and practice of that State was the pattern for the qualification of this crime in the above Convention. By new multiracial and democratic elections held in 1994, that State has abolished the last remnants of *apartheid.* Unfortunately, some elements of this crime can be recognized in parts of some successor States of ex-Yugoslavia, as well as in the occupied territories of Croatia and Bosnia-Herzegovina.

The large text of Article II of the 1973 Convention does not offer a synthetic definition of this crime with its cumulative elements. On the contrary, its text clearly indicates that any of described unlawful acts forms the crime of *apartheid.* Some of them constitute at the same time the crime of genocide:

»For the purpose of the present Convention, the term 'the crime of *apartheid*', which shall include similar policies and practices of racial segregation and dis-

crimination[6] as practiced in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

(*a*) Denial of a member or members of a racial group or groups of the right to life and liberty of persons:

(i) By murder of members of a racial group or groups;

(ii) By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degradating treatment or punishment;

(iii) By arbitrary arrest and illegal imprisonment of the members of a racial group or groups;

(*b*) Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;[7]

(*c*) Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;[8]

(*d*) Any measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or groups, the prohibition of mixed marriages among members of various racial groups, the expropriation of landed property belonging to a racial group or groups or to members thereof;

(*e*) Exploitation of the labour on members of racial group or groups, in particular by submitting them to forced labour;

(*g*) Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose *apartheid*«.

* * *

The crimes committed on the territory of former Yugoslavia, and so far especially in Bosnia-Herzegovina and Croatia, resulted in the recent establishment of an International Tribunal.[9] The UN Secretary General has proposed the Statute of this Tribunal. Although having a strictly limited territorial competence, this Statute did not empower the Tribunal to act on conventional basis only, i.e. in case of grave breaches of humanitarian law as provided in conventions binding all conflicting parties.[10]

The Statute has defined international crimes according to the respective rules of general international law. In case that this judicial body succeeds in its task, and transforms perhaps later on in a permanent organ competent for prosecuting international crimes world-wide, the qualification of the crimes from its Statute will be of utmost importance for consolidation of international law in this domain. The international crimes, as provided in the Statute, are forbidden in time of peace, as well as in time of armed conflicts of any kind.[11]

The Statute of the Tribunal provides four groups of international crimes: (i) grave breaches of the Geneva Conventions of 1949; (ii) violations of the laws and cus-

[6] According to Article 1 (1) of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, the term »racial discrimination« means »distinction, exclusion, restriction and preference based on race, colour, descent, or national or ethnic origin«. This consequently means that victims of the crime of *apartheid* can be members of a different national or ethnic group, and not necessarily individuals belonging to a particular »race« in the narrowest sense of this term.

[7] Some or all policies and practices described in sub-paragraphs (i) and (ii) of paragraph (*a*), and in paragraph (*b*), constitute at the same time acts of genocide. See the explanation below in this text under the item (*iii*).

[8] Measures described in paragraph (*c*), if committed against the entire population of a territorial entity, constitute grave breaches of human rights of all individuals. They however constitute the crime of *apartheid* if committed discriminately against members of one or several national or ethnic groups »for the purpose of establishing and maintaining domination of one racial (or ethnic) group of persons over any other racial (or ethnic) group of persons and systematically oppressing them«.

[9] *Cf.*, Resolution of the UN Security Council 808 (1993) of 22 February 1993. This Tribunal has in its competence the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of former Yugoslavia since the beginning of 1991.

[10] In such an event the Tribunal should apply both 1977 Protocols additional to the 1949 Geneva Conventions, as well as the 1973 Convention on *Apartheid*. These and many other conventions legally oblige all successor States of the former Yugoslavia.

[11] It is thus not relevant whether these acts were committed in time of internal disturbances and tensions, or during the phases of »non-international« armed conflict (on which apply Article 3 common to four Geneva Conventions of 1949 and the Protocol II of 1977), or in a conflict between States and/or recognized insurgents. Important is only that according to the Statute these crimes were committed in the territory of former Yugoslavia since the beginning of 1991.

Namely, the conflict in Croatia has passed all these different phases. It would be however absurd to pretend that some grave breaches of humanitarian law, provided as such in Protocol I, but not in Protocol II, did not constitute international crimes until Croatia's international recognition. *Cf.*, V. D. DEGAN: »The War in Croatia: Temporal Application of Conventional Rules Prohibiting International Crimes«, Croatian Political Science Review 1993, No.2, (Zagreb), pp. 5-18.

toms of war; (iii) genocide; and (iv) crimes against humanity. The prosecution of crimes against peace is therefore not in its competence. However, as will be seen, the qualification of all these crimes involves the protection of basic rights of every person, whether civilian, or combatant, or prisoner of war, and especially their fundamental rights to life, to integrity, to dignity and to property.

It should be stressed further on that in the beginning of 1991 Yugoslavia was a party to all above conventions on warfare and humanitarian law.

(*i*) The comment of Article 2 given in the Report of the UN Secretary-General of 3 May 1993 (S/25704), underlines that the Geneva Conventions of 1949 provide the core of the customary law applicable in international armed conflicts. These Conventions regulate the conduct of war from the humanitarian perspective by protecting certain categories of persons: namely, wounded and sick members of armed forces in the field; wounded, sick and ship-wrecked members of the armed forces at sea; prisoners of war, and civilians in time of war.

Then Article 2 reproduces the list of »grave breaches« or war crimes, contained in four 1949 Geneva Conventions. They are: (a) wilful killing; (b) torture or inhuman treatment, including biological experiments; (c) wilfully causing great suffering or serious injury to body or health; (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power; (f) wilfully depriving a prisoner of war or a civilian of the right of fair and regular trial; (g) unlawful deportation or transfer or unlawful confinement of a civilian; (h) taking civilians as hostages.

(*ii*) In Article 3 are provided violations of the laws or customs of war as mainly provided in the Regulations annexed to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on the Land. Its comment stresses that these provisions were by 1939 recognized by all civilized nations and were regarded as being declaratory of the laws or customs of war.

These rules of customary law, as interpreted and applied by the Nuremberg Tribunal in 1945 and 1946 are the following: (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property.

(*iii*) The crime of genocide is defined strictly according to Articles II and III of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The comment of Article 4 stresses the fact that this crime can be committed in time of peace or in time of war, and that the 1948 Convention is today considered part of international customary law as evidenced by the International Court of Justice in its Advisory Opinion of 1951.[12]

It is there provided that genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) forcible transferring children of the group to another group.

Punishable are according to Article 4 (a) genocide; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; (e) complicity in genocide.

(*iv*) As the comment of Article 5 stresses, crimes against humanity were first recognized in the Charter and Judgement of the Nuremberg Tribunal, as well as in Law No.10 of the Control Council for Germany.

The comment points out the fact that in the conflict in the territory of the former Yugoslavia, such inhumane acts have taken the form of so-called »ethnic cleansing« and widespread and systematic rape and other forms of sexual assault, including enforced prostitution.

Article 5 provides that these crimes, when committed in armed conflicts, whether international or internal in character, and directed - against any civilian population, are the following: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecution on political, racial and religious groups; (i) other inhumane acts.

* * *

Finally, all kinds of war crimes and of crimes against humanity were expressly prohibited by the domestic law of the former Yugoslavia. They formed the Chapter XI of the Criminal law of the SFRY, entitled: »Crimes against Humanity and International Law«.

In addition, the »Instructions on Application of Rules of International Law of War in Armed Forces of the Socialist Federal Republic of Yugoslavia«,[13] is one of the best and the most recent restatements of this part

[12] *Reservations to the Convention of Genocide, I.C.J. Reports 1951*, p. 23.

[13] »Uputstvo o primeni pravila međunarodnog ratnog prava u Oružanim snagama Socijalističke Federativne Republike Jugoslavije«. Its second version was published in »Službeni vojni list« (Military Official Gazette), No 7 of 28 April 1988, and was signed by the then Federal Secretary of National Defence, Colonel General Veljko Kadijević.

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of international law in the world. It provides rules on non-international armed conflicts (paragraph 16), and especially detailed provisions expressly prohibiting war crimes (paragraphs 32 to 35).

Thus, no commanding officer of the former Federal Army will be in a position to successfully disclaim his criminal responsibility, when his committal or failures to act has resulted in violations of these rules of his own country, which are the same as peremptory norms of general international law (*jus cogens*). These very precise rules of municipal law will be subsidiary legal basis for their punishment by the International Tribunal in The Hague.

The Principle of Non-discrimination

In our second category are all other measures of discrimination of human beings, which do not consist in international crimes, on whatever basis, either in applications of municipal laws in force, or committed by an unlawful practice within a State.

There is no doubt that the principle of non-discrimination has become a peremptory rule of general international law (*jus cogens*). It has already been declared in the Preamble and in Articles 1(3), 13(1) and 55(c) of the UN Charter. It has been reinforced later on in Articles 1 and 2 of the 1948 Universal Declaration of Human Rights, and virtually in all subsequent conventions on human rights. It is furthermore the main object of regulation of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination and of such special agreements as is the I.L.O. Convention No.111 concerning Discrimination in respect of Employment of 1960, and the UNESCO Convention of 1969 against Discrimination in Education. There is virtually no State in the world which did not give its consent on this principle in form of one or more conventional obligations.

Discriminations of human beings on whatever basis produces always far-reaching and harmful consequences. It has always caused large-scale and systematic violations of human rights.

Violations of whatever rights of men, when committed as a measure of discrimination against an ethnic or social group bears the risk that the entire group in question becomes compelled »to rebellion against tyranny and oppression« as its last resort, as it was stated in a somewhat different context in the Preamble of the 1948 Universal Declaration.

Peremptory Norms on Civil and Political Rights (jus cogens)

To our third category fall breaches of these civil and political rights of individuals, which are couched in respective multilateral conventions in terms of *jus cogens*, allowing no exceptions or attenuation in their observance.

It is important to stress that the rights of any individual are protected by these norms, whether he or she belongs to a distinct social group or not.

To this class belongs first of all human rights that cannot be derogated in any circumstances, such as war, public danger or other emergency. Different conventions provide somewhat different lists of these non-derogable rights, though they are essentially the same.

Hence, Article 4 of the 1966 International Covenant on Civil and Political Rights, provides in this respect its following provisions as being non-derogable: Article 6 (right to life); Article 7 (right to human treatment); Article 8, paragraphs 1 and 2 (freedom from slavery and servitude); Article 11 (freedom from imprisonment for debt); Article 15 (freedom from *ex post facto* laws); Article 16 (right to juridical personality); and Article 18 (freedom of thought, conscience and religion).[14]

To this list must be added certain other fundamental rights of individuals that perhaps may be derogated in public emergency for a very short time. Nevertheless, their violations justify strong measures of foreign intervention if committed in a longer period of time and on a large scale and systematic basis. According to the text of the aforesaid 1966 International Covenant, these are rights as provided in its Article 9 (right to personal liberty); Article 10 (rights to human treatment of imprisoned persons); and Article 14 (right to a fair trial).

States parties to conventions providing these rights and freedoms cannot rebut their nature of *jus cogens* in their own respect. But if this process has not already been accomplished, it seems the most likely that all above mentioned rights will in a foreseeable future transform into rules of general customary law.

Other Mandatory Rules

In our fourth category belong infringements of certain other civil and especially political rights of individuals which strictly speaking do not constitute *jus cogens*. In question are nevertheless firm legal obligations of States, whose violations cause international responsibility. Respective conventional provisions allow to States parties a large choice of measures in their implementation or even considerable restrictions in application, in order to ensure such loose objectives as »national security«, »public order«, »morality«, etc.[15]

[14] Article 15(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, is in that respect more restrictive providing as non-derogable, the following rights: rights to life, to human treatment, freedom from slavery or servitude, and freedom from *ex post facto* laws. The most extensive is however Article 27 of the American Convention on Human Rights of 1969. In addition to all the foregoing, it provides as non-derogable - right of the family, right to name, rights of the child, right to nationality, right to participate in government, as well as juridical guarantees essential for the protection of these rights.

[15] See for more details - Rosalyn Higgins: »Derogation under Human Rights Treaties«, *British Year Book of International Law 1976-77*, pp. 281-300.

According to the aforementioned 1966 International Covenant on Civil and Political Rights, the question is of its Article 12 (freedom of movement and residence); Article 17 (right to privacy); Article 19 (right of expression); Article 22 and Article 8 of the 1966 International Covenant on Economic, Social and Cultural Rights (freedom of association in trade unions); Article 23 (right of the family); Article 24 (special rights of child); and Article 25 (right to participate in government).

Large-scale and flagrant violations of these rights may also justify measures of foreign intervention. But it is perhaps more essential that in States in which the full respect of these rights is eluded by restrictive municipal legislation or practice, that leads in the long run to the disintegration of their own political and economic order. That has dangerous consequences for all citizens. All East-European States, and especially the former Soviet Union, offer a plenty of negative examples in this respect.

Economic, Social and Cultural Rights of Individuals

In our last category belong faults in implementation of the so-called economic, social and cultural rights. In the respective 1966 International Covenant they are defined rather as long-term objectives than firm legal obligations. Their disrespect does not give rise in all circumstances the international responsibility. The implementation of these rights depends on economic might and welfare of respective States parts of it. That means that in wealthier societies these objectives become source of stronger and more definite legal obligations than in very poor and backward States.

Hence the 1966 International Covenant on Economic, Social and Cultural Rights binds its parties in its Article 2(1), to achieve - »progressively the full realization of these rights«. According to its text, they are: right to work (Article 6); right to just and favourable conditions of work (Article 7); right to social security, including social insurance (Article 9); protection and assistance to the family, special protection of mother and children (Article 10); right of everyone to an adequate standard of living (Article 11); right of everyone to the enjoyment of the highest attainable standard of physical and mental health (Article 12); right to education (Articles 13 and 14); and right of everyone to take part in cultural life, to enjoy the benefits of scientific progress and of the rights of author (Article 15).

Although the matter is here not of *jus cogens* in regard to all States in the world, Article 2(2) of the said Covenant strictly forbids the discrimination of their citizens in enjoyment of these objectives on whatever basis as to race, colour, sex, social origin, property, birth or other status. This means that if one State is unable to assure all the above mentioned rights to all its citizens, its discriminatory measures in enjoyment of any of them against any particular group, do not differ from discrimination in regard to any other human rights or freedoms. This specific obligation furthermore proves that the principle of non-discrimination is a *jus cogens*, and that it is as such of universal application.

Conclusion

The post-war expansion of conventional legal obligations in this subject-matter evidences a curious merging of natural and positive law in the domain of human rights. This branch of international law has developed in fact under the impact of that what Grotius loosely called in the 17th century as rational and social nature of man. Hence, almost all provisions from the French Declaration of 1789, which were themselves based on reason and on social nature of man, have already been assimilated into rules of positive international law of universal scope of application. The most important among them have even transformed into *jus cogens*.

Thus the Western concept of human rights as a direct expression of the dignity of all human beings, is nowadays deeply rooted in positive international law. These rights have become thus a direct legal obligation of all Governments in the world.

A State which, by committing international crimes in an aggressive war tries to change its existing frontiers by force and perpetrates ethnic cleansing of territories thus occupied, cannot expect an early lifting of economic sanctions against it.

It has been proved in practice that exactly these States which strictly observe all above rights in regard to all their citizens, are more fitted to economic and technological progress than States in which fundamental rights of individuals and of groups are disregarded and despised.

It has also been proved that especially in multiethnic and multiconfessional countries the contempt of human rights is the first cause of disorder, riots, civil strife and of total chaos. The actual situation in ex-Yugoslavia, Lebanon, Somalia, etc., is the best confirmation of this truth.

There exists therefore a delicate link in the present world between the observance of natural rights of individuals, such as defined in the French declaration of 1789, and peace, progress, economic stability and social justice.

But on the other side of the medal, there is a harsh reality of human sufferings because of the lack of will of international community, including the United Nations, to intervene in order to stop international crimes. In situations like these in Bosnia-Herzegovina, Somalia, Rwanda or Angola, the affirmation of the right to humanitarian intervention does not suffice. That what is needed is a duty to intervene. The early prevention of further atrocities is for actual and potential victims of these crimes more important than the prosecution of their perpetrators by the newly established International Tribunal. The international community thus needs new and much advanced forms of its organization ■