



FACULTY OF LAW  
University of Lund

Kathrin Werner

Legal Protection of the Individual  
in Crisis Situations  
within the Territory of a State  
Theoretical Background and Instrumentarium for  
Improvement of the Framework

Master thesis  
20 points

Supervisor:  
Professor Gudmundur Alfredsson

Public International Law/Human Rights Law

Spring 2005

# Contents

<b>SUMMARY</b>	<b>1</b>
<b>1 INTRODUCTION</b>	<b>3</b>
<b>2 SHORTCOMINGS IN THE INTERNATIONAL LEGAL FRAMEWORK FOR PROTECTION OF THE INDIVIDUAL IN INTERNAL CRISIS SITUATIONS</b>	<b>6</b>
2.1 International Humanitarian Law not (yet) applicable: Problem of Threshold Requirements	6
2.1.1 <i>Presentation of Thresholds</i>	6
2.1.2 <i>Lack of rules applicable in situations short of non-international armed conflict</i>	8
2.1.3 <i>States' tendency to negate relevance of humanitarian law</i>	8
2.2 Human Rights Law not fully applicable (any more): Problem of Derogation Possibilities	9
2.2.1 <i>Concept of derogation as provided for by human rights treaties</i>	9
2.2.1.1 Non-derogable rights	10
2.2.1.2 Remaining requirements for derogation	11
2.2.1.2.1 <i>Public emergency which threatens the life of the nation</i>	11
2.2.1.2.2 <i>Proportionality of the measure</i>	12
2.2.1.2.3 <i>Consistency of the measure with the state's other obligations under international law</i>	13
2.2.1.2.4 <i>The principle of non-discrimination</i>	13
2.2.1.2.5 <i>International notification</i>	14
2.2.2 <i>Problematic Aspects</i>	15
2.2.3 <i>Excursion: International human rights treaties not containing a derogation clause – Suspension of obligations according to the international Law of Treaties</i>	16
2.2.3.1 Reason for lack of derogation clause	17
2.2.3.2 Suspension possibilities according to the international law of treaties	17
2.2.3.2.1 <i>Scope of application of the law of treaties; general rule: pacta sunt servanda</i>	18
2.2.3.2.2 <i>Exceptions from pacta sunt servanda to be considered</i>	18
2.2.3.2.2.1 The rule on impossibility	19
2.2.3.2.2.2 <i>Clausula rebus sic stantibus</i>	20
2.2.3.2.3 <i>Further (procedural) requirements for both suspension provisions</i>	20
2.2.3.3 Conclusion as regards the law of treaties	21

2.3	<b>Problematic aspects common to both humanitarian law and human rights law as regards internal crisis situations</b>	<b>21</b>
2.3.1	<i>State-relatedness of international law: The problem of non-state actors</i>	22
2.3.2	<i>Relatively low ratification record of international instruments</i>	22
2.4	<b>Result: A “grey zone”</b>	<b>23</b>
<b>3</b>	<b>NO IMPROVEMENT OF PROTECTION BY WAY OF A NEW UNIVERSAL INSTRUMENT OF INTERNATIONAL LAW</b>	<b>25</b>
3.1	<b>Proposal of an Optional Protocol to the International Covenant on Civil and Political Rights</b>	<b>25</b>
3.1.1	<b><i>Background</i></b>	<b>26</b>
3.1.1.1	Procedural guarantees not listed in Article 4 of the International Covenant on Civil and Political Rights	26
3.1.1.2	Influence from the Regional Human Rights System in the Americas	27
3.1.2	<b><i>The debate and its result</i></b>	<b>29</b>
3.2	<b>Striving for Minimum Humanitarian Standards</b>	<b>31</b>
3.2.1	<b><i>Activities of the International Community</i></b>	<b>31</b>
3.2.1.1	Up to 1990	31
3.2.1.2	The Turku Declaration	32
3.2.2	<b><i>Contents of the Turku Declaration</i></b>	<b>33</b>
3.2.3	<b><i>Discussion</i></b>	<b>33</b>
3.2.3.1	Argument of the gap	33
3.2.3.2	Applicability at all times	35
3.2.3.3	The question of the addressee	36
3.2.3.4	Issue of which legal status the text of standards should have	37
3.2.3.5	The simplicity argument	37
3.2.3.6	Conclusion	38
<b>4</b>	<b>RECOURSE TO EXISTING STRUCTURES AS A VIABLE APPROACH TO IMPROVE PROTECTION</b>	<b>39</b>
4.1	<b>Interpreting existing sources to strengthen the framework for protection of the individual: Recent developments</b>	<b>40</b>
4.1.1	<b><i>The Contribution of The UN Human Rights Committee’s 2001 General Comment on Article 4 of the International Covenant on Civil and Political Rights</i></b>	<b>40</b>
4.1.1.1	The 1981 General Comment on Article 4 of the International Covenant on Civil and Political Rights	41
4.1.1.2	New General Comment – Aspects of Preparatory Works; Result	42
4.1.1.2.1	<i>Scope of non-derogable rights</i>	43
4.1.1.2.2	<i>Definition of “state of emergency”</i>	46
4.1.1.2.3	<i>Envisaged scope of the new General Comment</i>	47

4.1.1.3	Appreciation of the new General Comment	48
<b>4.1.2</b>	<b><i>Evolution of International Criminal Law</i></b>	<b>50</b>
4.1.2.1	Institutional framework	50
4.1.2.2	The specific international criminal law angle on protection of the individual	51
4.1.2.3	Selected aspects from statutes and jurisprudence of the ICTY, the ICTR and the ICC	52
4.1.2.3.1	<i>Definition of armed conflict and distinction from situations of 'civil unrest'</i>	52
4.1.2.3.2	<i>Constatation of a common body of law being applicable for both types of armed conflict</i>	53
4.1.2.3.3	<i>Crimes against humanity: no connection required between act and international armed conflict</i>	55
4.1.2.3.4	<i>Inclusion of non-state actors</i>	55
4.1.2.4	Concluding observations	56
<b>4.2</b>	<b>Compilations of standards for practical purposes: Illustrations</b>	<b>58</b>
4.2.1	<i>Compilations of a more general nature</i>	59
4.2.2	<i>Agreements in specific cases of humanitarian assistance</i>	61
4.2.3	<i>Approach specifically engaging non-state actors</i>	63
4.2.4	<i>Observations</i>	64
<b>5</b>	<b>CONCLUSION</b>	<b>67</b>
	<b>BIBLIOGRAPHY</b>	<b>69</b>
	<b>TABLE OF CASES</b>	<b>77</b>

# Summary

In the traditional model of international law, to which however reality has never exactly corresponded, situations of armed violence fall into clearly defined categories which in their turn appertain to a certain set of rules of international law applicable. For armed conflicts between sovereign states ('war'), international humanitarian law provides a full body of rules. On the other hand, in cases where the armed conflict is to be found within one state only, the range of international law provisions applicable is very narrow, because as an internal situation, it is considered to be within the domestic sphere of the sovereign state and thus not of concern to others. For the very same reason, no international rules are envisaged for internal crisis situations of even lesser intensity.

However factual circumstances have changed considerably. Less than ever can situations of armed violence be classified to belong exclusively to one type of conflict. They may have characteristics of several categories, and involve a number of parties involved that do not pertain to the side of the government.

These trends have provoked changes in the perspective upon international law. Not least, also human rights issues have gained in relevance in this respect, since such situations also commonly entail a breakdown in the functioning of civil life. The development of crisis situations within the territory of a state raises the question of the legal framework available to cover the circumstances in such a way that the need to protect the individual is taken into account.

This thesis examines the legal framework for crisis situations within the territory of a state with a view to possible approaches for strengthening the protection of the individual in these circumstances. For this purpose it also takes up and analyses relevant developments within the international community. In doing so, it concentrates mainly on international treaty law as a background. In its first part, the thesis gives an extensive theoretical background on the international legal framework governing internal crisis situations and presents its inherent shortcomings with regard to both humanitarian law and human rights law. It goes on to analyse in the second part, via two examples, the possibility of improving the framework for protection by way of a new universal instrument of international law. The third part is dedicated to approaches falling back on existing structures of international law and in this context also provides illustrations from practice.

As a basis it is established that there indeed are uncertainties in the legal framework governing internal crisis situations. Provisions of international humanitarian law are only applicable after the threshold of 'armed conflict' has been reached, international human rights law is subject to derogation

and thus not applicable to its full extent. The combination of the two leads to a grey zone in the legal framework.

As an instrumentarium to counter this weakness, two main methods are being considered that can be employed to achieve a strengthened legal conditions for protection of the individual: creation of a new universal document of international law, and recourse to the existing framework of rules.

Creation of a new universal document of international law as a remedy methodologically entails more drawbacks than advantages. Either of its two variations examined will not satisfactorily solve the problematic points that lie at the beginning of the debate. Most prominently, both the proposal of an optional protocol to Article 4 of the International Covenant on Civil and Political Rights and the Declaration of Minimum Humanitarian Standards hold the danger of actually reducing protection instead of improving it, because they might by their approach make encourage states to maintain a lower level of protection than the one envisaged in the new text.

The second approach, drawing on the existing framework, has considerably more positive aspects to it. The interpretative work by the Human Rights Committee and the international criminal tribunals, and the statutes of the ICTY, ICTR and ICC clarify basic points in the framework applicable in internal crisis situations and thus strengthen the conditions for protection of the individual. Compilations of standards for specific purposes fall back on existing structures and at the same time reflect a number of the positive features of the approach of creating a new universal instrument in the form of a declaration of minimum humanitarian standards but without its drawbacks.

Within the entirety of the debate we can generally note that the various fields of law involved – humanitarian law, human rights law, international criminal law, refugee law – are growing closer and there is an increasing realisation of their interdependencies and interaction. This is reflected in the way the approaches looked at seek to integrate contributions from the different sources of law. The thesis also illustrates that non-state actors have received increased attention, and the question of how to adequately deal with them remains an interesting and urgent topic.

# 1 Introduction

In the traditional model of international law, to which however reality has never exactly corresponded, situations of armed violence fall into clearly defined categories which in their turn appertained to a certain set of rules of international law applicable. For armed conflicts between sovereign states ('war'), international humanitarian law provides a full body of rules; these relate to the conduct of hostilities as well as to the protection of certain groups of persons. On the other hand, in cases where the armed conflict is to be found within one state only, the range of international law provisions applicable is very narrow, because as an internal situation, it is considered to be within the domestic sphere of the sovereign state and thus not of concern to others. For the very same reason, no international rules are envisaged for internal crisis situations that were of even lesser intensity. This setup attributing the most importance to international armed conflict for a long time corresponded to the frequency in which the different types of conflict occurred.<sup>1</sup>

However factual circumstances have changed considerably. Less than ever can situations of armed violence be classified to belong exclusively to one type of conflict. They may have characteristics of several categories, as was found to be the case e.g. for the situation in the former Yugoslavia<sup>2</sup>, and involve a number of parties involved that do not pertain to the side of the government. Generally, one can note a decrease in international armed conflicts, while at the same time a rising number of situations of armed violence – of various intensities – take place within the territory of a state; victims are essentially to be found on the side of the civilian population.<sup>3</sup>

These trends have provoked changes in the perspective upon international law. Not least, also human rights issues have gained in relevance in this respect, since such situations also commonly entail a breakdown in the functioning of civil life. Especially when the situation is not part of the classical scope of application of international humanitarian law, protection of the individual becomes all the more important. The guarantee of fundamental rights of the individual is endangered particularly in such exceptional circumstances. Among the rights regularly suspended are the rights of peaceful assembly and to freedom of opinion and expression.<sup>4</sup> Typical patterns of human rights abuse include arbitrary deprivation of the right to life, the practice of torture or cruel, inhuman or degrading treatment

---

<sup>1</sup> cf. Knut Ipsen, *Völkerrecht*, 4. Aufl. (München: C.H. Beck, 1999), p. 1043, at III., margin no. 6

<sup>2</sup> cf. *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision of 2 October 1995 on the Defence Motion for Interlocutory Appeal on Jurisdiction, paras. 72 – 77

<sup>3</sup> while only 5 per cent of the victims were civilians during the First World War, nowadays the percentage is between 80 and 90 per cent, cf. E/CN.4/Sub.2/1997/19, footnote 44

<sup>4</sup> cf. E/CN.4/Sub.2/1997/19, para. 158

or punishment, displacement, arbitrary deprivation of liberty and due process.<sup>5</sup> Women and children's rights are particularly at risk.<sup>6</sup>

It must not be forgotten that state powers and national legal systems can also lend themselves to abuse. Declarations of a state of emergency in an improper way, connected to far-reaching restrictions of the population's rights, have been a rather frequent occurrence.<sup>7</sup>

Finally, still only some states comply with the obligation to notify the other states parties of a state of emergency declared and the derogations made in connection with it.<sup>8</sup>

This development of crisis situations within the territory of a state raises the question of the legal framework available to cover the circumstances in such a way that the need to protect the individual is taken into account. It can be asked whether the existing framework provides sufficient protection and, in case it does not, what possibilities there might be in order to improve upon it. With the areas of international humanitarian law and human rights law as a point of departure, a number of ways to approach this issue are conceivable. Essentially, two lines of thought can be formed: One might either undertake to put the existing framework to use in order to even out the deficiencies; or try to add to the framework new documents to exactly the same end. Both models have been present in the international debate during the past two decades. Initiatives such as the Declaration of Minimum Humanitarian Standards are to be named here as well as e.g. the establishment of international tribunals to deal with atrocities in Rwanda and the former Yugoslavia.

### **Aim and Scope of Thesis**

This thesis, based on textbook and document research, will examine the legal framework for crisis situations within the territory of a state with a view to possible approaches for strengthening the protection of the individual in these circumstances. For this purpose it will also take up and analyse relevant developments within the international community. In doing so, it will concentrate mainly on international treaty law as a background.

What is of central interest is to point out the instrumentarium through which to achieve an improvement of the legal framework. We shall examine and discuss the possible contributions that an employment of the different tools can make towards that end, as well as the problems they can pose.

The term instrumentarium is understood to comprise the methods and tools that international law provides for approaching, and creating a solution for, a given situation.

---

<sup>5</sup> cf. E/CN.4/1998/87, paras. 27, 28, 29, 32

<sup>6</sup> cf. E/CN.4/1998/87, paras. 30 and 31

<sup>7</sup> e.g. in Paraguay during the regime of Alfredo Stroessner between 1954 – 1989, cf. E/CN.4/Sub.2/1997/19, para.148

<sup>8</sup> for the period between June 2001 and May 2003, of 20 situations of state of emergency known, only 12 had been notified by the government to the United Nations Secretary-General, cf. E/CN.4/Sub.2/2003/39



In its first part, the thesis gives an extensive theoretical background on the international legal framework governing internal crisis situations and presents its inherent shortcomings with regard to both humanitarian law and human rights law. It will go on to analyse in the second part, via two examples, the possibility of improving the framework for protection by way of a new universal instrument of international law. The third part will be dedicated to approaches falling back on existing structures of international law and will in this context also provide illustrations from practice.

### **Terminology**

Two aspects especially deserve explicit mention as regards use of terminology throughout the text.

The factual situations that are at the basis of the argument are situations of crisis within the territory of a state. To denote these circumstances, the term “internal crisis situation” is going to be employed. It is to comprise all circumstances of violent armed confrontations within a state’s territory, especially without prejudice to the nature the situation may have in terms of applicability of international humanitarian law; situations qualifying as non-international armed conflict under humanitarian law will therefore equally be included as situations of less intensity than that. At the same time, the situation can be one fulfilling the criterion “state of emergency” under international human rights law.

Any group involved in these violent armed confrontations that does not appertain to the side of the official government will, in accordance with common usage in literature and reports<sup>9</sup>, be referred to as “non-state actor”, regardless of its grade of organisation, its size or a possible special status.

---

<sup>9</sup> cf. e.g. E/CN.4/2002/103, para. 3; E/CN.4/2004/90, para. 5; cf. also Sia Spiliopoulou Åkermark, *Humanitär rätt och mänskliga rättigheter: Samspel under utveckling* (Stockholm: Totalförsvarets folkrättsråd, 2002), pp. 7 and 12

## **2 Shortcomings in the international legal framework for protection of the individual in internal crisis situations**

As the introduction has shown, internal crisis situations can have links to both international humanitarian law and international human rights law aspects. This first part is therefore going to look at the international legal framework in both areas which provides the point of departure for the discussion on an improvement of protection of the individual in internal crisis situations. Specific attention will be given to the problematic points that become relevant in the debate.

### **2.1 International Humanitarian Law not (yet) applicable: Problem of Threshold Requirements**

In applying international humanitarian law to internal crisis situations one needs to be aware of the threshold requirements this area of law establishes. Depending on the character and intensity of the situation, a different range of rules may become applicable, as shown in the following. This entails two main difficulties.

#### **2.1.1 Presentation of Thresholds**

When examining the scope of application of international humanitarian law, it becomes visible that the decisive threshold for application of a large portion of the existing rules is that of armed conflict. The full body of rules is applicable in situations of international armed conflict only; as the internationality of the situation decreases, so does the comprehensiveness of the rules applicable.

Based on the traditional notion of states as the exclusive subjects of international law<sup>10</sup>, the scope of application of the instruments up to 1949 is

---

<sup>10</sup> cf. Oppenheim, L., as quoted in Rebecca M.M. Wallace, *International Law*, 2nd ed. (London: Sweet & Maxwell, 1992), p. 59

international armed conflict ("war"), as illustrated e.g. by Article 2 of the 1899 Hague Convention<sup>11</sup>. There is no further elaboration as to the elements of war; it was however understood that it meant confrontations between sovereign states where war had been officially proclaimed.<sup>12</sup>

In 1949, four international conventions for the protection of certain groups of persons in connection with armed conflict were adopted in Geneva<sup>13</sup> (hereinafter: the Geneva Conventions). According to their common Article 2, they are to their complete extent applicable to international armed conflicts. A formal declaration of war is no longer necessary; the conventions automatically come into operation where a difference between states leads to the intervention of armed forces.<sup>14</sup>

The major innovation introduced by these instruments is Article 3 common to all four Geneva Conventions (Common Article 3), which provides for a minimum protection also in armed conflicts not of an international character.

To take account of more recent developments in the world that could generally be characterised as a huge increase in conflicts of a non-international character, two protocols to the Geneva Conventions were approved in 1977.

The Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)<sup>15</sup> – hereinafter: Protocol I – by reference to Common Article 2 of the Geneva Conventions defines its scope of application in Article 1 (3) as international armed conflicts. In addition, it shall also be applicable to national wars of liberation, as described in Article 1 (4).

The Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)<sup>16</sup> – hereinafter: Protocol II – supplements Common Article 3 and is, according to its Article 1 (1), applicable to armed conflicts not of an

---

<sup>11</sup> Hague Convention II Respecting the Laws and Customs of War on Land of 29 July 1899, entry into force 4 September 1900

<sup>12</sup> cf. Ipsen, p.1063, at II., margin no. 2

<sup>13</sup> Convention (I) For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 U.N.T.S. 31

Convention (II) For the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 U.N.T.S. 85

Convention (III) Relative to the Treatment of Prisoners of War of 12 August 1949, 75 U.N.T.S. 135

Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 U.N.T.S. 287;

entry into force 21 October 1950.

<sup>14</sup> cf. Jean S. Pictet (ed.), *The Geneva Conventions of 12 August 1949 – Commentary* (Geneva: International Committee of the Red Cross, 1952), p. 32

<sup>15</sup> 1125 U.N.T.S. 3, entry into force 7 December 1978

<sup>16</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, entry into force 7 December 1978.

international character. In the context of the Protocol, this comprises conflicts that take place between the state government and dissident armed forces, whereby the latter have to show a certain degree of organisedness, to an extent that they control part of the country and are able to actually in practice implement the Protocol, cf. Article 1 (1). Expressly exempted from this are any kinds of internal disturbances and tensions, Article 1 (2), as characterised by isolated and sporadic acts of violence only.<sup>17</sup>

At the same time Common Article 3 retains its somewhat broader scope of application<sup>18</sup>. Consequently, some cases of internal conflict that do not fully meet the requirements of Protocol II, e.g. because the ongoing conflict does only involve armed fractions but not the state, are still covered by Common Article 3.<sup>19</sup>

### **2.1.2 Lack of rules applicable in situations short of non-international armed conflict**

In situations falling short of non-international armed conflict as defined above, the threshold set out by the international humanitarian law instruments is not being reached

Protocol II will typically not be applicable due to the low intensity of the situation or because the non-governmental party to the conflict does not fulfil the requirements as to its degree of organisedness and its control over part of the country.

Common Article 3 keeps, as its scope of application is not amended by Protocol II, its applicability to armed conflicts not of an international character, so that it might be employed in some cases not covered by Protocol II. The prerequisite however still is the existence of an armed conflict, which is exactly not the feature of a situation of mere internal disturbance or tensions. As a consequence, these kinds of situations are not being covered by any specific conventional standards.

### **2.1.3 States' tendency to negate relevance of humanitarian law**

While in some cases – most likely “traditional” international armed conflicts – the status of the conflict might be rather clear, the views on other situations might be very controversial, with the parties to the conflict

---

<sup>17</sup> cf. Yves Sandoz et al. (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (Geneva: International Committee of the Red Cross, Martinus Nijhoff Publishers, 1987), pp. 1354 and 1355, nos. 4475 and 4476

<sup>18</sup> that is, all armed conflicts not of an international character

<sup>19</sup> cf. Sandoz, p. 1351, no. 4461.

tending to minimize the problem within its borders, thus negating the relevance of international humanitarian law for the situation in question. This will leave them with a wide range of ways to act and as few obligations as possible. For the individuals concerned this correspondingly means that the level of protection might remain rather low.

The issue of Turkey may serve as an example for a situation where the state concerned is loath to acknowledge the relevance of humanitarian law for the case in question.<sup>20</sup>

## **2.2 Human Rights Law not fully applicable (any more): Problem of Derogation Possibilities**

A second reason for deficiencies in the protection of the individual is the possibility to derogate from human rights guarantees. The concept of derogation and the challenges connected to it are dealt with in the following two sections, while the last section of the chapter as an excursion addresses human rights treaties that do not contain a derogation clause.

### **2.2.1 Concept of derogation as provided for by human rights treaties**

The International Covenant on Civil and Political Rights<sup>21</sup> (hereinafter: the Covenant) provides for the possibility of derogation from human rights guarantees, as do two of the regional human rights instruments, the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>22</sup> (hereinafter: the European Convention on Human Rights) and the American Convention on Human Rights<sup>23</sup>.

In their respective derogation provisions<sup>24</sup>, the above-named treaties put at the states parties' disposal the possibility to derogate from human rights obligations under the treaty. The derogation clauses commonly consist of two elements: requirements for derogation to be employed on the one hand, and, on the other, a list of rights which cannot be derogated from.

---

<sup>20</sup> cf. E/CN.4/1998/87/Add.1, paras. 125 – 130

<sup>21</sup> 999 U.N.T.S. 171, adopted 16 December 1966, entry into force 23 March 1976

<sup>22</sup> 213 U.N.T.S. 221, adopted 4 November 1950, entry into force 3 September 1953

<sup>23</sup> 1144 U.N.T.S. 123, adopted 22 November 1969, entry into force 18 July 1978

<sup>24</sup> Article 4 of the Covenant; Article 15 of the European Convention on Human Rights; Article 27 of the American Convention on Human Rights

### 2.2.1.1 Non-derogable rights

Each of the instruments mentioned lays down a number of guarantees that are exempted from derogation. These non-derogable rights are expressly enumerated in each provision.

All three instruments list as non-derogable the right to life<sup>25</sup>, the right to freedom from torture and inhuman and degrading treatment or punishment<sup>26</sup>, the right to freedom from slavery and servitude<sup>27</sup> and the right to freedom from retroactive application of criminal law - "nulla poena sine lege"<sup>28</sup>.

By an additional protocol<sup>29</sup>, the list of the European Convention on Human Rights, Article 15 (2), is extended upon the right to freedom from double jeopardy, whereas the other two instruments add a number of further rights.

As regards the Covenant, also the prohibition of imprisonment for debts, the right to be recognised as a person before the law, and the freedom of thought, conscience and religion are non-derogable according to Article 4 (2).<sup>30</sup>

The American Convention on Human Rights, Article 27 (2), extends its list upon the right to judicial personality, the rights of the family, the right to a name, the rights of the child, the right to nationality, the right to participate in government<sup>31</sup>, and the judicial guarantees essential for the protection of such rights.<sup>32</sup>

The other rights provided for in the instruments, such as e.g. the freedom of expression or the right to peaceful assembly<sup>33</sup>, may be derogated from, provided the rest of the requirements are being met. The following paragraph it going to look at these requirements in more detail.

---

<sup>25</sup> Article 6 of the Covenant; Article 4 of the European Convention on Human Rights; Article 2 of the American Convention on Human Rights

<sup>26</sup> Article 7 of the Covenant; Article 5 (2) of the European Convention on Human Rights; Article 3 of the American Convention on Human Rights

<sup>27</sup> Article 8 (1) and (2) of the Covenant; Article 6 (1) and (2) of the European Convention on Human Rights; Article 4 (1) of the American Convention on Human Rights

<sup>28</sup> Article 15 of the Covenant; Article 9 of the European Convention on Human Rights; Article 7 of the American Convention on Human Rights

<sup>29</sup> Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 22 November 1984, E.T.S. 117, entry into force 1 November 1988

<sup>30</sup> Articles 11, 16, and 18 of the Covenant

<sup>31</sup> Articles 3, 17, 18, 19, 20, and 23 of the American Convention on Human Rights

<sup>32</sup> Article 27 *in fine* of the American Convention on Human Rights

<sup>33</sup> Articles 19 and 21 of the Covenant; Articles 10 and 11 of the European Convention on Human Rights; Articles 13 and 15 of the American Convention on Human Rights

## 2.2.1.2 Remaining requirements for derogation

The remaining requirements for derogation to be legitimate are to a great extent common to all three instruments introduced above. The elements' interpretation lies within the competence of certain bodies established under the respective treaty with a view to monitoring compliance with the instrument. Since the treaty provisions closely resemble each other and a broad overview is intended here, basic features of the doctrines of the Human Rights Committee<sup>34</sup> and the European Commission (up to its abolishment according to Protocol No. 11<sup>35</sup>) and Court<sup>36</sup> of Human Rights are presented here by way of example.

### 2.2.1.2.1 Public emergency which threatens the life of the nation

The first prerequisite to be fulfilled is the existence of a public emergency which threatens the life of the nation.

Within the Human Rights Committee up to 2001 there was no agreement on a definition of the concept of state of emergency. However a certain understanding could be drawn from the Committee's work that the term did presuppose some very serious visible and violent political and social confrontations or turmoil that cannot be controlled by the ordinary means normally available to the authorities. Political and social disturbances only in the form of protest movements and strikes, including general strikes were not per se to be regarded as sufficiently severe to justify the proclamation of a public emergency, neither a high crime rate, or latent subversion.<sup>37</sup>

The only aspect to be found in the Committee's then General Comment on Article 4<sup>38</sup>, issued as an interpretation guideline for the states parties, is an agreement as to the temporary nature of a state of emergency, and the

---

<sup>34</sup> responsible for the Covenant, according to its Article 28 (1)

<sup>35</sup> Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, of 11 May 1994, E.T.S. 155, entry into force 1 November 1998; the Commission's legal basis was formerly to be found in Article 19 (1) of the European Convention on Human Rights

<sup>36</sup> established according to Article 19 of the European Convention on Human Rights; within the American and African systems there are similar institutions, cf. Article 33 of the American Convention on Human Rights and Article 30 of the African Charter on Human and Peoples' Rights of 27 June 1981, 21 I.L.M. 58, entry into force 21 October 1986

<sup>37</sup> cf. Anna-Lena Svensson-McCarthy, *The international law of human rights and states of exception with special reference to the travaux preparatoires and case-law of the international monitoring organs*, International Studies in Human Rights series vol. 54 (The Hague, Boston: Martinus Nijhoff Publishers, 1998), p. 239

<sup>38</sup> CCPR General Comment 5, Derogation of rights (Art. 4), of 31 July 1981; hereinafter: General Comment 5

importance of information and reporting obligations towards the other States parties and the Committee.<sup>39</sup>

From the jurisprudence of the European Commission and Court on Human Rights emerges a basic definition of what constitutes a state of emergency, requiring "an exceptional, actual or imminent situation of crisis or emergency, which affects the whole or part of the population or nation and which constitutes a threat to the organised life of the community of which the state is composed"<sup>40</sup>. This doctrine was to be further specified and slightly modified later on, but remained essentially along the same lines.<sup>41</sup> In determining whether these criteria are being fulfilled, a State party is considered to have a rather wide margin of appreciation.<sup>42</sup>

### 2.2.1.2.2 Proportionality of the measure

Once the existence of a state of emergency has been established, the measure may only derogate from the obligation to the extent strictly required by the exigencies of the situation. This criterion of proportionality is the central standard by which to judge emergency measures. As a test of this proportionality requirement, three criteria can be applied, as set out by the European Commission on Human Rights.<sup>43</sup> Because of the similarities in formulation highlighted above, the approach taken is generally transferable to contexts outside the European Convention on Human Rights.<sup>44</sup>

(1) Are the measures adopted apt to contribute to the solution of a specific problem which forms part of the emergency which is affecting the country in question,

(2) Is the problem such that normal measures - i. e. those which would be compatible with international obligations without derogation - would be inadequate, and

---

<sup>39</sup> cf. General Comment 5, para.3; in the meantime, the Committee has adopted a new and more comprehensive General Comment, cf. *infra*, pp. 38 et seq.

<sup>40</sup> European Court of Human Rights, Series A: Judgments and Decisions, vol. 3, *Lawless Case* (Lawless v. Ireland), judgment of 1 July 1961, The Law, para. 28

<sup>41</sup> cf. European Commission of Human Rights, *The Greek Case (1969)*, as quoted in P. van Dijk and G.H.J. van Hoof, *Theory and Practice of the European Convention on Human Rights*, 2nd ed. (Deventer/Boston: Kluwer Law and Taxation Publishers, 1990), p. 552

<sup>42</sup> European Court of Human Rights, Series A: Judgments and Decisions, vol. 25, *Case of Ireland vs. the United Kingdom*, judgment of 18 January 1978, As to the Law, para. 207

<sup>43</sup> European Commission of Human Rights, *Lawless case* (1960), as quoted in *Report of the meeting of experts on rights not subject to derogation during states of emergency and exceptional circumstances*, in: Daniel Prémont et al. (eds.), *Droits Intangibles et États d'Exception - Non-Derogable Rights And States of Emergency*, Organisation internationale et relations internationales no.36 (Bruxelles: Bruylant, 1996), pp. 27 et seq., p. 32, para. 12

<sup>44</sup> cf. *Report of the meeting of experts on rights not subject to derogation during states of emergency and exceptional circumstances*, in: Prémont, pp. 27 et seq., p. 32, para. 12



(3) Would other emergency measures having a lesser impact on human rights be able to solve the problem in question?

States are conceded a considerable leeway in deciding which measures fulfil the criterion of proportionality. In judicial review, among the aspects considered are the nature of the rights affected and the duration of the emergency situation and derogation measures.<sup>45</sup>

### **2.2.1.2.3 Consistency of the measure with the state's other obligations under international law**

Thirdly, the measure taken needs to be consistent with the state's other obligations under international law.

This requirement has not, as yet, played an important part in the case-law of either the Court or Commission in the European System.<sup>46</sup> Covered by the rather wide formulation are first of all obligations under any other international human rights conventions; in this context the different lists of non-derogable human rights may become relevant, if the state party derogating from a certain instrument is also a party to one under which more rights are non-derogable. Apart from those conventions, other provisions can be considered. One might think of for instance those of the Geneva Conventions and other instruments of humanitarian law, intended to be applied - at least in part - in situations that also derogation provisions deal with. Finally, the wide formulation "other obligations under international law" also covers obligations under other – not humanitarian – conventions and under customary international law.

However, it can be questioned whether the competent organs will readily go beyond the scope of conventional law, unless they can fall back on firm international case-law or on express consensus within the community of States.<sup>47</sup>

### **2.2.1.2.4 The principle of non-discrimination**

A further criterion to be observed is that the measure must not be of a discriminatory nature.

By expressly prohibiting discrimination in the case of derogation, the principle of non-discrimination is being sustained despite the fact that some provisions containing this element are derogable, such as Articles 2 (1) and

---

<sup>45</sup> European Court of Human Rights, Series A: Judgments and Decisions vol. 258-B, Case of *Brannigan and McBride v. the United Kingdom*, judgment of 26 May 1993, As to the Law, para. 43 *in fine*

<sup>46</sup> cf. Peter Duffy, *Note on Article 15 of the European Convention on Human Rights*, in: Prémont, pp. 203 et seq., p. 207, para. 13

<sup>47</sup> cf. van Dijk, p. 555, para. 5

26 of the Covenant or Article 24 of the American Convention on Human Rights.<sup>48</sup>

It can be observed that in both these conventions the non-discrimination element in the derogation clause does appear somewhat reduced if compared to the instruments' general prohibition of discrimination provisions<sup>49</sup>; in Article 4 (1), the word "solely" is to be found, and the criterion of national origin is included neither in that provision nor in the American Convention's article 27 (1). The drafting history of the Covenant's derogation clause can serve to illustrate the issue.

Originally, a proposal had been made to construe the non-discrimination element analogous to the very broad one in Article 26. Considering the circumstances under which derogation is wont to appear, and the fact that in times of emergency nationals of other states (maybe enemy states?) are often discriminated against, ultimately a more restricted formulation was adopted. In it, reference to the criterion of "national origin" was struck, and "solely" was inserted. The wording chosen is to make clear that when emergency measures primarily affect members of a certain race or a certain ethnic, religious or linguistic minority due to, e.g., their geographically limited scope of application, they are permissible as long as they do not intentionally aim at these population groups.<sup>50</sup>

As for the lack of a non-discrimination element in the European derogation provision, it can be conceived that, by way of the general non-discrimination clause of the European Convention on Human Rights in Article 14, the principle of non-discrimination with regard to derogation measures applies in the European context as well.<sup>51</sup>

### **2.2.1.2.5 International notification**

Finally, states are required to give notification of the derogation.

The requirement of international notification is generally not seen as one whose non-fulfilment renders the derogation measures illegitimate. Rather, it is taken to serve international supervision by the other States parties as well as by the competent monitoring body.<sup>52</sup> Therefore, the question of the potential consequences of a failure to notify has remained rather unclear.<sup>53</sup> Possibly, the state concerned will be precluded from invoking Article 15 of

---

<sup>48</sup> cf. Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein, Strasbourg, Arlington: Engel 1993), p. 86, para. 4, margin no. 28

<sup>49</sup> Covenant: Article 2 (1); American Convention on Human Rights: Article 1 (1)

<sup>50</sup> cf. Nowak, p. 86, margin no. 28

<sup>51</sup> cf. van Dijk, p. 559, para. 10

<sup>52</sup> cf. Nowak, p. 80, margin no. 17

<sup>53</sup> cf. Peter Duffy, *Note on Article 15 of the European Convention on Human Rights*, in: Prémont, pp. 203 et seq., pp. 208, 209, para. 18; cf. also van Dijk, pp. 556, 557, para. 8

the European Convention on Human Rights as a justification for derogation measures.<sup>54</sup>

A formula that has been used in this context is the duty to notify “without any (avoidable) delay”. Thus, the specific difficulties which the government in question might encounter in case of an emergency will have to be taken into consideration.<sup>55</sup> In one case, 12 days have been accepted as timely; in another, 4 months were considered too long a lapse of time.<sup>56</sup>

## 2.2.2 Problematic Aspects

Having presented the concept of derogation, some problematic aspects can be noted.

First and foremost, the large margin of appreciation that the states parties are being afforded in determining whether there a state of emergency exists, and what measures are required and proportionate to confront the situation poses considerable difficulties.

The competent monitoring bodies do not always provide clear-cut definitions; especially in the universal context, the Human Rights Committee’s 1981 General Comment<sup>57</sup> does not constitute a helpful guideline to the states parties, because it does not go much beyond a paraphrase of Article 4 of the Covenant.<sup>58</sup>

In addition it has to be taken into consideration that the various instruments do not contain identical lists of non-derogable rights.

The overall picture to be gained is that there are considerable reglementations for derogation to be legitimate, providing for protection of the individual. This is supplemented by procedures under the treaties in the course of which state compliance with the instruments is being supervised.<sup>59</sup> But sometimes interpretation is controversial and therefore not as clear and efficient as it might be.

---

<sup>54</sup> Peter Duffy, *Note on Article 15 of the European Convention on Human Rights*, in: Prémont, pp. 203 et seq., p. 209, para. 18

<sup>55</sup> European Commission of Human Rights, *Lawless Case*, as quoted in van Dijk, p. 555, para. 8, footnote 160

<sup>56</sup> as to the former: European Court of Human Rights, *Lawless Case* (cf. supra note 20), para. 47; as to the latter: European Commission of Human Rights, *The Greek Case*, as quoted in van Dijk, p. 556

<sup>57</sup> see supra, p. 11, footnote 38

<sup>58</sup> this is discussed in more detail infra, pp. 41 and 42

<sup>59</sup> as regards the Covenant: consideration of state reports under Article 40 (1); inter-state complaints procedure, Article 41; individual communications under the Optional Protocol.

### **2.2.3 Excursion: International human rights treaties not containing a derogation clause – Suspension of obligations according to the international Law of Treaties<sup>60</sup>**

Some of the international human rights instruments do not contain a clause governing derogations. In the following passage, after a short reflection on the reasons for that omission, we are going to consider the international law of treaties as a means to be employed in order to temporarily refrain from obligations under human rights treaties.

---

<sup>60</sup> Apart from the law of treaties, also the law of state responsibility (cf. Draft Articles on Responsibility of States for Internationally Wrongful acts, adopted by the International Law Commission at its fifty-third session, held in 2001. Text: Report of the International Law Commission on the work of its Fifty-third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.1 ) offers mechanisms to the end of suspending human rights treaty provisions. However this set of rules takes a different approach. The law of state responsibility constitutes secondary rules applicable when a breach of primary obligations occurs, cf. Ipsen, pp. 535, 536, at 1., margin no. 6. Whereas derogation a priori allows for temporary suspension of treaty obligations, the concept of circumstances precluding wrongfulness as constructed by the draft of the International Law Commission takes its start from an act already finished and prima facie violating international law. The result can still be the same: if the state can invoke any of those grounds, such as e.g. consent of the victim state or counter-measures, the wrongfulness is taken off its act.

The ground relevant here is that of necessity, Article 25 of the draft:

“1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

- (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
- (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

- (a) The international obligation in question excludes the possibility of invoking necessity; or
- (b) The State has contributed to the situation of necessity.

Article 26 [Compliance with peremptory norms] adds:

“ Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law. “

As can be seen from its prerequisites, the legal regime is a very strict one albeit with some similarities to conventional derogation clauses.

### 2.2.3.1 Reason for lack of derogation clause

Among the human rights treaties that do not include provisions on derogation there are the International Covenant on Economic, Social and Cultural Rights<sup>61</sup> and the African Charter on Human and Peoples' Rights<sup>62</sup>. In order to explain this absence of a derogation clause, the nature of the rights dealt with as well as the structure of the instruments' individual clauses have to be taken into consideration.

As regards the International Covenant on Economic, Social, and Cultural Rights, three aspects can be put forward as an explanation. First, it may be that the rights contained (such as the right to food or to health care) by their very nature are less likely to be the ones that call for derogation in the case of an emergency than civil and political rights (e.g., the right to peaceful assembly or to vote).<sup>63</sup> Secondly, other than e.g. the Covenant on Civil and Political Rights, the Covenant on Economic, Social, and Cultural Rights does contain a general limitation clause (Art. 4), allowing, if not for extraordinary restriction of rights via derogation, at least for some limitation.<sup>64</sup> Third, the basic obligation imposed on the states parties by Art. 2 (1), "Each State Party to the present Covenant undertakes to take steps (...) *to the maximum of its available resources*, with a view to achieving *progressively* the full realization of the rights recognized in the present Covenant (...)" [emphases added] is put in a much more flexible way compared to the ones in the Covenant on Civil and Political Rights.<sup>65</sup>

This last point can also be raised as regards the African Charter on Human and Peoples' Rights. The individual articles subject the guarantee of rights to extensive limitations in the first place, so there is no need for rules on derogation. In addition, an interpretation to be considered is the one that by not creating a rule on derogation, the states reserved themselves the right to invoke the possibilities that general international law provides for.<sup>66</sup>

### 2.2.3.2 Suspension possibilities according to the international law of treaties

The field of law one can turn to in order to suspend obligations under international treaties is the international law of treaties. We are now going to

---

<sup>61</sup> 993 U.N.T.S. 3, adopted 19 December 1966, entry into force 3 January 1976

<sup>62</sup> see p. 11, footnote 36

<sup>63</sup> cf. *Report of the meeting of experts on rights not subject to derogation during states of emergency and exceptional circumstances*, in: Prémont, pp. 27 et seq., p. 36, para. 20

<sup>64</sup> cf. *Report of the meeting of experts on rights not subject to derogation during states of emergency and exceptional circumstances*, in: Prémont, pp. 27 et seq., p. 36, para. 20

<sup>65</sup> cf. *Report of the meeting of experts on rights not subject to derogation during states of emergency and exceptional circumstances*, in: Prémont, pp. 27 et seq., p. 36, para. 20

<sup>66</sup> cf. Fatsah Ouguergouz, *L'absence de clause de dérogation dans certains traités relatifs aux droits de l'homme: Les réponses du droit international général*, *Revue générale de droit international public* tome xcvi (1994), 287, p. 292, para. 5 *in fine*

examine its relevant provisions with a view to applying them to human rights treaties.

### **2.2.3.2.1 Scope of application of the law of treaties; general rule: pacta sunt servanda**

The international law of treaties, governing conclusion, validity, and termination of treaties, originally consisted of rules of customary law only. It has by now been codified to a large extent.<sup>67</sup>

The convention relevant here is the Vienna Convention on the Law of Treaties<sup>68</sup>. According to its Article 1, its scope of application is treaties between states. Being of such a nature, also multilateral human rights treaties are included.

The basic rule on the adherence to treaties is to be found in Article 26, declaring that the states parties are bound by the respective treaty and must comply with it (*pacta sunt servanda*). This is strengthened by Article 57, stating that suspension of a treaty in principle is only possible according to the treaty in question or by consent of all states parties.

### **2.2.3.2.2 Exceptions from *pacta sunt servanda* to be considered**

The Vienna Convention on the Law of Treaties itself in Articles 57 to 62 provides for several exceptional grounds upon which a treaty provision can be suspended. Among those, Articles 58 and 59 refer to suspension following an agreement between the states parties. In a situation comparable to that of derogation, the state party however aims to unilaterally express that it is not able for the time being to fulfil its obligations. These provisions thus do not suggest themselves as useful. Neither does Article 60, which ties suspension possibilities to another state party's breach of the treaty. Rather what could be considered here are Articles 61 and 62 because they refer to an exceptional situation that occurs in the state itself.

The rule on impossibility, set forth in Article 61, enables a state party to suspend a treaty obligation in case of temporary impossibility of performing. According to the so-called *clausula rebus sic stantibus*, Article 62 (1) and (3), suspension is allowed when a fundamental change of circumstances occurs. These two provisions may therefore be of relevance for internal crisis situations, which arise in the state itself rather than being dependent on other states parties' conduct.

---

<sup>67</sup> cf. Ipsen, p. 94, margin no. 5

<sup>68</sup> Vienna Convention on the Law of Treaties of 23 May 1969, 1155 U.N.T.S. 331, entry into force 27 January 1980

### 2.2.3.2.2.1 *The rule on impossibility*

The rule on impossibility, Article 61 of the Vienna Convention on the Law of Treaties, can be employed if it is suitable to meet the characteristics of an internal crisis situation where human rights are affected.

In the classic form of impossibility, material impossibility of compliance is required. The most prominent example for this case is the extinction of an object indispensable for performance of the treaty, such as the parching of a river essential to the treaty obligations.

Material impossibility is also imaginable during an internal crisis situation: e.g. courts can have ceased to function because courthouses have been destroyed and judges killed or expelled. This would certainly make respect for the right to a prompt and fair trial materially impossible. However, cases for derogation of human rights typically have their origin not in a situation of factual impossibility; rather, compliance is still possible but there is a strong legal interest or necessity to derogate in order to protect the nation, or the state, or the *ordre public*, for the sake of protection of human rights.<sup>69</sup>

Taking up the literal meaning of the rule on impossibility, it could be retained that because of the requirement of factual impossibility, Article 61 cannot serve as a means of enabling suspension of obligations.<sup>70</sup> As mentioned above, at the core of the situation lies mostly not a factual impossibility of compliance but rather a legal interest to suspend certain rights, so the condition of Article 61 would not be met.

A different approach however suggests itself, considering the specific object of human rights treaties, namely, protection of a certain “*ordre public*” in the form of human rights, as distinct from treaties that aim at integrating reciprocal interests of states.<sup>71</sup> Following the classical interpretation of the impossibility rule would mean that measures of suspension would almost never be legitimate. Consequently that way of responding to a threat would be completely blocked to states, even though it aims at maintaining the “*ordre public*” as a whole. This prohibition would eventually not be consistent with the object and purpose of the human rights treaty. An application of suspension provisions of the law of treaties would therefore seem adequate, if they are handled in a way appropriate to the specific characteristics of human rights in internal crisis situations. This could be achieved by importing elements of interpretation of human rights derogation provisions as discussed above into the interpretation of the rule on impossibility.<sup>72</sup>

---

<sup>69</sup> cf. *Report of the meeting of experts on rights not subject to derogation during states of emergency and exceptional circumstances*, in: Prémont, pp. 27 et seq., p. 39, para. 27

<sup>70</sup> cf. Ouguergouz, p. 307, para. 34; the author instead suggests falling back on the *clausula rebus sic stantibus* or the law of state responsibility

<sup>71</sup> cf. *Report of the meeting of experts on rights not subject to derogation during states of emergency and exceptional circumstances*, in: Prémont, pp. 27 et seq., p. 39, para. 28

<sup>72</sup> cf. *Report of the meeting of experts on rights not subject to derogation during states of emergency and exceptional circumstances*, in: Prémont, pp. 27 et seq., p. 39, para. 28

#### **2.2.3.2.2 *Clausula rebus sic stantibus***

The other rule that can be thought about in this context is Article 62, fundamental change of circumstances, also referred to as *clausula rebus sic stantibus*, the clause that puts performance of the treaty obligations under the condition of "things staying the same (as they were at the time the treaty was concluded)". Article 62 (1) states five conditions to be met for suspension of the operation of a treaty: There has to be a fundamental and unforeseen change of the circumstances that at the time of conclusion constituted an essential basis for the treaty, such that the change radically transforms the extent of obligations still to be performed under the treaty.

The requirements of *fundamental* change and *radical* transformation already reveal the exceptional nature of the *clausula rebus sic stantibus*. Accordingly, both these elements have been interpreted by the International Court of Justice in a rather strict way.

According to the International Court of Justice, the change has to be such that it puts in danger the present existence or the future of one of the parties<sup>73</sup>, and it must have increased the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken<sup>74</sup>. International armed conflict could be a prototype of such a case; still, it may also be possible to subsume a specific internal situation short of armed conflict under these criteria.

As can be seen from the above, there is a possibility to invoke Article 62. However, one has to be aware that the conditions to be met are not easily fulfilled.

#### **2.2.3.2.3 Further (procedural) requirements for both suspension provisions**

Once all five conditions are cumulatively fulfilled, the Vienna Convention on the Law of Treaties provides for several procedural points that are to be observed.

According to Article 65 (1), the state party that wants to suspend certain treaty obligations has to notify the other states parties, indicating the measure(s) proposed and the reasons for them. Execution of the suspension is allowed three months after notification at the earliest, Article 65 (2). Conventional derogation provisions mostly require "immediate" notification but assuming in their formulation that this is done after putting the

---

<sup>73</sup> cf. International Court of Justice, *Fisheries Jurisdiction Case* (United Kingdom v. Iceland) (Jurisdiction), I.C.J. Rep. 1973, pp. 3 et seq., p. 19, para. 38

<sup>74</sup> cf. *Fisheries Jurisdiction Case*, p. 21, para. 43



derogation measures into effect.<sup>75</sup> It would therefore be difficult to take over the time frame set forth in Article 65 (2) in its original form.

The suspension may furthermore not affect other obligations the state may have under international law, Article 43. This corresponds to conventional derogation provisions and can be understood to comprise other human rights treaties as well as international humanitarian law instruments and customary international law.

### **2.2.3.3 Conclusion as regards the law of treaties**

The law of treaties can provide a valid mechanism for suspension of a treaty in the situation of an internal crisis situation. Both the rule of impossibility and the *clausula rebus sic stantibus* may be applicable. Some conditions to be met resemble conventional derogation clauses' requirements. Yet compared to suspension under conventional derogation clauses the procedure is more likely to meet obstacles because either the suspension rule's interpretation has to be modified or core prerequisites set a rather high threshold. In order for the law of treaties to be successfully employed under circumstances of an internal crisis situation, its rules will therefore have to carefully be examined and adjusted and aligned to the interpretation of conventional derogation provisions.

Even in the case of absence of a derogation clause from the human rights instrument, there are, as has been seen, regulations that both open the state the possibility to react to crisis situations and at the same time subject it to restrictions, which serves protection of the individual.<sup>76</sup>

## **2.3 Problematic aspects common to both humanitarian law and human rights law as regards internal crisis situations**

Two aspects that concern the applicability of both humanitarian law and human rights law in internal crisis situation are the state-relatedness of international law and the fact that not all relevant instruments are widely ratified.

---

<sup>75</sup> cf. Article 4 (3) of the International Covenant on Civil and Political Rights; Article 15 (3) of the European Convention on Human Rights; Article 27 (3) of the American Convention

<sup>76</sup> As regards the law of state responsibility, the conclusion to be drawn would be that considering the strict regime (cf. supra, note 60), its practical application reveals itself to be at least as difficult as invocation of the *clausula rebus sic stantibus*, cf. Ouguergouz, p. 334, para. 91.

### **2.3.1 State-relatedness of international law: The problem of non-state actors**

One difficulty in identifying a scope of law applicable in internal crisis situations is the state-relatedness of international law. This becomes apparent especially with regard to non-state actors.

As does international law in general and by tradition, instruments of humanitarian law address themselves to state parties only, as already pointed out above. Considering the increasing number of non-international armed conflicts, the existence of non-state actors as parts of such conflicts poses a twofold problem.

First, the question arises of how to bind these non-state actors. Both Protocol II and Common Article 3, covering internal armed conflicts, bind the parties to the conflict of a non-international character. However, as far as Protocol II is concerned, the only non-state groups covered are “...organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”, Article 1 (1) of Protocol II. Groups who fall short of that standard remain outside the scope of application.

At the same time, on the states’ side, when it comes to insurgent armed groups as the other part of a conflict within a state, states are rather reluctant to in any way recognise the opponent and thus possibly give legitimacy to his striving. Thus, legal rules might not be applied even though the situation in question lies within their scope of application. In order to take account of this, Common Article 3 states that the legal status of the parties to the conflict shall not be affected by an application of the article. However, a possible *political* - as opposed to legal - effect of an application of Common Article 3 on the status of the non-state actor cannot be hindered by that provision.

Also human rights law relates to states as the traditional actors of international law, and the question of whether and how far non-state actors might be bound by those rules is a highly controversial one<sup>77</sup>.

### **2.3.2 Relatively low ratification record of international instruments**

An aspect that further adds to the shortcomings in the protection of the individual in crisis situations is the fact that not all international human

---

<sup>77</sup> cf. Spiliopoulou Åkermark, p. 12, para. d); cf. also e.g. E/CN.4/1998/87, para. 60

rights and humanitarian law instruments do have high ratification records. Despite rather recent sustained efforts to increase the quatae<sup>78</sup>, ratification of relevant international instruments remains rather unequally distributed.

While some treaties do indeed enjoy almost universal ratification – such as e.g. the Geneva Conventions, with 192 states parties<sup>79</sup>, and the Convention on the Rights of the Child<sup>80</sup> (192 states parties) – others do not receive the same attention. The Covenant may be offered by way of example here (152 state parties<sup>81</sup>). Not least instruments which are of special importance in internal crisis situations have lower degrees of ratification: Protocol II can only fall back on 157 state parties<sup>82</sup>; the two optional protocols to the Covenant<sup>83</sup> have 104 state parties and 50 state parties, respectively<sup>84</sup>; to the Convention against Torture<sup>85</sup> there are 136 state parties.<sup>86</sup> Simultaneously it can be observed that especially states in which there is a tendency towards internal crises are not among the state parties to a number of relevant instruments.<sup>87</sup>

## 2.4 Result: A “grey zone”

From the above examination of the fields of human rights law and humanitarian law it emerges that the legal framework governing internal crisis situations is somewhat deficient. This is mainly due to four of its characteristics already addressed: In the specific circumstances of an

---

<sup>78</sup> e.g. carried out in connection with the Millennium Summit; in preparation for that event, the Secretary-General encouraged signature and ratification of a core group of 25 multilateral treaties reflecting key policy goals of the United Nations. A number of states seized the opportunity of the Summit to sign or deposit instruments of ratification, cf. E/CN.4/2001/91, para. 38 and footnote 43

<sup>79</sup> ratification status as of 2 June 2004, source: International Committee of the Red Cross, <[http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/party\\_gc](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/party_gc)> (3 December 2004)

<sup>80</sup> Convention on the Rights of the Child of 20 November 1989, A/44/49 (1989), entry into force 2 September 1990; ratification status as of 2 June 2004, source: Office of the UNHCHR, Status of Ratifications of the Principal International Human Rights Treaties, <<http://www.unhchr.ch/pdf/report.pdf>> (12 November 2004) (in the following referred to as UNHCHR Report)

<sup>81</sup> as of 9 June 2004, source: UNHCHR Report

<sup>82</sup> ratification status as of 2 June 2004, source: International Committee of the Red Cross, <[http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/party\\_gc](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/party_gc)> (3 December 2004)

<sup>83</sup> Optional Protocol to the International Covenant on Civil and Political Rights of 19 December 1966, 999 U.N.T.S. 302, entry into force 23 March 1976

Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty of 15 December 1989, U.N. Doc. A/44/49 (1989), entry into force 11 July 1991

<sup>84</sup> as of 9 June 2004, source: UNHCHR Report

<sup>85</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, 1465 U.N.T.S. 85, entry into force 26 June 1987

<sup>86</sup> as of 9 June 2004, source: UNHCHR Report

<sup>87</sup> cf. Background Paper for the Expert Meeting on Fundamental Standards of Humanity in February, 2000, provided by Professor Martin Scheinin, E/CN.4/2000/145, Annex, pp. 2 et seq., Appendix 2, pp. 17 et seq., p. 24 para. on “Gap No. 2”

internal crisis situation, the scopes of applicability of both humanitarian law and human rights law are not entirely identified. In addition, on a more general level and concerning both these fields of law, difficulties arise from the state-relatedness of international law in general as well as a rather unequal ratification of international instruments.

Situations of internal crisis thus constitute a certain ‘border area’ in which applicability of international human rights and humanitarian law is not quite clear.

To denote this border area, partly the term “grey zone” is being employed.<sup>88</sup> At other occasions, the situation is being referred to as “gap”.<sup>89</sup> The term “grey zone” appears to be preferable for a number of reasons.<sup>90</sup>

To start with, the concept of “grey zone” does not presuppose genuine legal gaps but rather refers to uncertainties about the scope of applicability of certain provisions. An aspect that belongs into this category are the various application thresholds to be established in order to determine the applicability of humanitarian law, e. g. as concerns the “armed conflict of a non-international character” in Common Article 3.

In addition, “grey zone” can also mean to include situations upon which several rules from different sets of law are applicable, therefore also influencing one another. A number of regulations, such as the prohibition of torture, are contained in both humanitarian and human rights law; consequently, certain parallels in interpreting the provisions might suggest themselves.

Finally, with the notion of a “grey zone” there is room for points unclear due to the existence of new situations which at the time of drafting of the international instruments were not an issue. An example that can be given is the case of humanitarian assistance in situations of internal conflicts. On such a case a combination of provisions from both humanitarian law and human rights law can apply – such as Common Article 3 and Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights –, but since the topic of humanitarian assistance is a rather new one, there is no clear-cut set of rules.<sup>91</sup>

---

<sup>88</sup> cf. e.g. Asbjörn Eide et al., *Current Development: Combating Lawlessness in Gray Zone Conflicts Through Minimum Humanitarian Standards*, 89 *American Journal of International Law* (1995), 215

<sup>89</sup> cf. Background Paper for the Expert Meeting on Fundamental Standards of Humanity in February, 2000, provided by Professor Martin Scheinin, E/CN.4/2000/145, Annex, pp. 2 et seq., Appendix 2, pp. 17 et seq., pp. 23 et seq.

<sup>90</sup> cf. Spiliopoulou Åkermark, pp. 12 and 13

<sup>91</sup> cf. Spiliopoulou Åkermark, p. 13

### **3 No improvement of protection by way of a new universal instrument of international law**

In the first part, we have seen that part of the reason for the difficulties in protecting the individual in internal crisis situations lies in the fact that, in these situations, human rights are often being derogated from, the application of humanitarian law is subject to certain thresholds and both of these areas of law have their limitations as regards inclusion of all possible parties involved.

This gives rise to considerations of the possibility of creating a new universal instrument that would address the issues outlined above and solve them in a way such as to improve protection. This methodological approach in different forms imaginable will be discussed in the following.

#### **3.1 Proposal of an Optional Protocol to the International Covenant on Civil and Political Rights**

Derogation from human rights is a common occurrence during internal crisis situations, as we have seen. We have also seen that there are provisions that are non-derogable; however this status of non-derogability does but comprise a limited number of rights.

One idea for strengthening human rights in internal crisis situations would therefore be a new international treaty enlarging the list of non-derogable rights. An attempt to this effect was undertaken by the Sub-Commission on Prevention of Discrimination and Protection of Minorities with its plan of an optional protocol to the Covenant in 1993. The following passage is going to deal with this project.

## 3.1.1 Background

### 3.1.1.1 Procedural guarantees not listed in Article 4 of the International Covenant on Civil and Political Rights

All of the international human rights instruments set out a number of rights that are conceded non-derogability status. For the Covenant, by way of example, these are enumerated in Article 4 (2): the right to life, the right to freedom from torture and inhuman and degrading treatment or punishment, the right to freedom from slavery and servitude, the right to freedom from retroactive application of criminal law ("nulla poena sine lege"), the prohibition of imprisonment for debts, the right to be recognised as a person before the law, and the freedom of thought, conscience and religion.

The question of whether this list of non-derogable rights is sufficient, and of what rights might consequently have to be added, has been a recurring issue.

The reason for these reflections is the fact the catalogue in Article 4 (2) of the Covenant exclusively contains rights of a substantive character. Procedural guarantees are not included in the provision. Given that, the question of expansion of the list of non-derogable rights centres around rights that provide for procedural protection. Most prominently these are the rights of *habeas corpus* and due process.

The term *habeas corpus* denotes the guarantees embodied in Article 9 (3) and (4) of the Covenant, most notably providing for the right to challenge the legality of detention.

To the due process rights, or the right to a fair trial, there are various facets, as spelt out by Article 14 of the Covenant. This includes guarantees such as a fair and public hearing or the presumption of innocence. A differentiation is made as regards civil and criminal proceedings, with the provision's larger part dedicated to the latter. Article 2 (3) of the Covenant completes the reference to procedural guarantees, stipulating the states parties' obligation to ensure the individual an effective remedy in case of a violation of rights put down in the Covenant.

A term occasionally used in the context of due process rights is that of "amparo"<sup>92</sup>. It originally refers to a specific feature in Article 25 (1) of the American Convention on Human Rights, providing for a simple, prompt remedy for protecting all constitutional rights and laws recognized by the State parties and by the Convention (which incorporates the habeas corpus right in some cases)<sup>93</sup>. Subsequently it has also been used outside that context and in a more general manner, understood to mean structures of procedural protection.

---

<sup>92</sup> literally translated from Spanish: protection

<sup>93</sup> cf. E/CN.4/Sub.2/1994/24, para. 152

Being of a procedural character, the aforementioned rights fulfil an important part in securing the non-derogable substantive guarantees contained in the covenant. In order to implement the non-derogability status of certain rights during situations of internal crisis, their judicial protection has to be ensured also under such circumstances. If however the set of procedural rules and judicial guarantees is itself subject to derogation (as is formally the case with the Covenant), what is conceded on the substantive side is rendered less meaningful. Thus, the non-derogability status will be in danger of being undermined in practice.

### 3.1.1.2 Influence from the Regional Human Rights System in the Americas

The realisation of this connection is reflected in the American Convention of Human Rights, the sole instrument to do so. According to its Article 27 (2) *in fine*, the non-derogability status also comprehends “the judicial guarantees essential for the protection of such rights [the rights expressly declared non-derogable in article 27 (2)]”. However, Article 27 (2) does not name any specific articles of the convention. Its formulation has therefore given rise to interpretative problems and has been the subject of two advisory opinions of the Inter-American Court of Human Rights<sup>94</sup>, dealing with *habeas corpus* and judicial guarantees in situations of state of emergency. A short presentation of the court’s reasoning can serve to illustrate the line of thought as regards this issue.

According to the court in Advisory Opinion OC-8/87, the guarantee of *habeas corpus* classically relates to the right of individual liberty<sup>95</sup>, a right construed as derogable by the American Convention on Human Rights. However the court notes that it in fact also fulfils an important function as an instrument for the judicial protection of detainees against disappearances, torture and other inhumane treatment. This is inferred from observation of the realities within the geographical scope of application of the American Convention, which confirm “that the right to life and to humane treatment are threatened whenever the right to *habeas corpus* is partially or wholly suspended”.<sup>96</sup> Thus, *habeas corpus* also serves the protection of the right to life and physical integrity, both of which are non-derogable. Being essential in order to accomplish an efficient protection of these non-derogable rights, the right of *habeas corpus* comes under the ‘essential judicial guarantees’ clause in Article 27 (2) and therefore has to be considered non-derogable itself.<sup>97</sup>

---

<sup>94</sup> Inter-American Court of Human Rights: *Habeas Corpus in Emergency Situations*, Advisory Opinion OC-8/87 of January 30, 1987, Series A No. 8; *Judicial Guarantees in States of Exception*, Advisory Opinion OC-9/87 of October 6, 1987, Series A No. 9.

<sup>95</sup> cf. Advisory Opinion OC-8/87, para. 33

<sup>96</sup> cf. Advisory Opinion OC-8/87, para. 36

<sup>97</sup> cf. Advisory Opinion OC-8/87, paras. 42, 44

In Advisory Opinion OC-9/87, the court in essence states the obligation of states parties to in emergency situations respect the due process guarantees (contained in Article 8 of the American Convention on Human Rights) “in the main”<sup>98</sup> to the extent in which they have to provide for the ‘essential judicial guarantees’ required by Article 27 (2) *in fine*. Considering Article 8 in connection with the articles guaranteeing judicial protection such as *habeas corpus* (Articles 7 (6) and 25 (1)) the court draws the conclusion that the principles of due process are “necessary conditions for the procedural institutions regulated by the American Convention on Human Rights to be considered judicial guarantees”, and therefore are not to be suspended.<sup>99</sup> According to the court this result is even more valid where protection of non-derogable rights such as *habeas corpus* is concerned.<sup>100</sup>

The Court’s opinions naturally refer to the specific wording of the American Convention on Human Rights. However, the situations underlying the discussion are largely common to the structure of all other human rights treaty regimes that provide for derogation. In each of these systems, procedural guarantees are not among the rights named as non-derogable while at the same time without them the non-derogable rights do in fact lose their efficiency. For that reason, the argument put forward by the Court is compelling in a way that makes it generally transferable to other contexts as well.<sup>101</sup> The Court’s opinion can therefore be seen as a decisive impetus, along with early recommendations to extend non-derogability status to more rights<sup>102</sup>, to in-depth studies on the right to a fair trial and related areas on the international level.

In 1989, the Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed two Special Rapporteurs to prepare a report on the issue<sup>103</sup>, including relevant international norms and standards and recommendations as to provisions that should be made non-derogable. Their subsequent reports covered existing international norms and standards pertaining to the right to a fair trial, summaries of monitoring bodies’ interpretations of international fair trial norms, and national practices regarding the right to a fair trial.<sup>104</sup> The final report<sup>105</sup> was submitted in 1994. In this report, the Special Rapporteurs recommended, amongst other things, adoption of a third optional protocol declaring Articles 2 (3), 9 (3), 9 (4) and 14 of the Covenant non-derogable<sup>106</sup>; a draft text was annexed to the

---

<sup>98</sup> cf. Advisory Opinion OC-9/87, para. 29; albeit without any further specification as to what aspects of due process might be covered.

<sup>99</sup> cf. Advisory Opinion OC-9/87, para. 30

<sup>100</sup> cf. Advisory Opinion OC-9/87, para. 30

<sup>101</sup> cf. Daniel O’Donnell, *International Human Rights Standards concerning Criminal Law and Procedure and Derogation*, in: Prémont, pp. 167 et seq., p. 172, next-to-last para.

<sup>102</sup> cf. *Study of the implications for human rights of recent developments concerning situations known as states of siege or emergency*, E/CN.4/Sub.2/1982/15, as quoted in *Report of the meeting of experts on rights not subject to derogation during states of emergency and exceptional circumstances*, in: Prémont, pp. 27 et seq., p. 34, para. 17

<sup>103</sup> cf. E/CN.4/Sub.2/1994/24, para. 1

<sup>104</sup> cf. E/CN.4/Sub.2/1994/24, paras. 3 – 10

<sup>105</sup> E/CN.4/Sub.2/1994/24

<sup>106</sup> cf. E/CN.4/Sub.2/1994/24, para. 165



report.<sup>107</sup> The Human Rights Committee duly considered the draft during its 50<sup>th</sup> session.<sup>108</sup>

### 3.1.2 The debate and its result

Two critical points are to be raised in connection with this proposal of declaring Articles 2 (3), 9 (3), 9 (4) and 14 of the Covenant non-derogable by way of an optional protocol.

First and foremost, the creation of such an optional protocol might suggest to states that respect for these rights were optional and that, for the time being and as long as they do not ratify the protocol, the rights in question may be freely derogated from. The realisation that at least elements of these rights, given the structure of the Covenant and the rights' function within that frame, have already risen up to non-derogability status is not taken into account.

Accordingly, in its consideration of the proposal the Human Rights Committee remained sceptical. Its concerns in this respect, which were also transmitted to the Sub-Commission, it formulated as follows:

“[...] Based on its experience derived from the consideration of States Parties' reports submitted under article 40 of the Covenant, the Committee wishes to point out that, with respect to articles 9 (3) and (4), the issue of remedies available to individuals during states of emergency has often been discussed. The Committee is satisfied that States Parties generally understand that the right to habeas corpus and amparo should not be limited in situations of emergency. Furthermore, the Committee is of the view that the remedies provided in articles 9 (3) and (4) read in conjunction with article 2 are inherent to the Covenant as a whole. Having this in mind, the Committee believes that there is a considerable risk that the proposed draft third optional protocol might implicitly invite States Parties to feel free to derogate from the provisions of article 9 of the Covenant during states of emergency if they do not ratify the proposed optional protocol. Thus, the protocol might have the undesirable effect of diminishing the protection of detained persons during states of emergency.”<sup>109</sup>

The Committee's doubts as to this point were shared by the International Committee of the Red Cross, as can be seen in the latter's comment on the issue:

“[...] However, we would like to point out that there may be a certain danger in doing this by way of an optional protocol because this may give the impression that the non-derogability of fundamental judicial guarantees is optional. States which do not ratify may well then derogate from these

---

<sup>107</sup> cf. E/CN.4/Sub.2/1994/24, pp. 59 et seq. (after para. 184)

<sup>108</sup> cf. E/CN.4/Sub.2/1994/26, p. 13, chap. II, sec. A, para. 1, footnote 1

<sup>109</sup> cf. E/CN.4/Sub.2/1994/26, p. 13, chap. II, sec. A, para. 2

standards arguing that the protocol does not bind them. It may be useful, therefore, to study whether there may be some other way to make it clear that certain essential guarantees are already non-derogable in order to respect in fact the non-derogable character of the right to life and the prohibition of torture and inhuman treatment.”<sup>110</sup>

A second aspect to be kept in mind is the fact that Article 14 offers a large number of elements. Not all of them can be said to be of the same non-derogable quality; some elements can be accorded a less fundamental importance than others. For example, the presumption of innocence takes a much more absolute standing compared to the right to be tried in public, because for the latter, reasonable grounds for restriction are imaginable.<sup>111</sup> There are different views on the exact list of aspects to be considered derogable – some studies would only recognise three elements to be derogable, while others are more cautious.<sup>112</sup> However it is clear that it would be unrealistic to stipulate that a state party keep fully in force all provisions of Article 14 during a situation of state of emergency. Thus, the inclusion of Article 14 as a whole, without differentiation, would not be suitable.<sup>113</sup>

As a result, it can be noted that extending the Covenant’s range of non-derogable rights by means of an optional protocol would have been likely to give a misleading sign to the states parties, as well as partly making too high a demand on states parties during states of emergency.

Thus no support for further elaboration of the proposed draft protocol was to be found within the Human Rights Committee. Also among the states parties there were doubts as to the appropriateness of this approach.<sup>114</sup> In its recommendation to the Sub-Commission the Committee therefore declared it “inadvisable” to continue striving for such a protocol.<sup>115</sup> The plan has subsequently not been pursued any longer.<sup>116</sup>

---

<sup>110</sup> cf. E/CN.4/Sub.2/1994/26, p. 14, chap. II, sec. B, para. 2

<sup>111</sup> cf. the comment submitted by Denmark, E/CN.4/Sub.2/1994/26, pp. 4 et seq., 5, paras. 6 and 7

<sup>112</sup> cf. *Report of the meeting of experts on rights not subject to derogation during states of emergency and exceptional circumstances*, in: Prémont, pp. 27 et seq., p. 43, para. 36

<sup>113</sup> cf. E/CN.4/Sub.2/1994/26, p. 13, chap. II, sec. A, para. 3

<sup>114</sup> cf. the comments received from Egypt, the Netherlands and Spain, E/CN.4/Sub.2/1994/26, pp. 6, 8, 9

<sup>115</sup> cf. E/CN.4/Sub.2/1994/26, p. 13, chap. II, sec. A, para. 4

<sup>116</sup> A confirmation of the Committee’s then point of view that certain aspects of Articles 9 and 14 of the International Covenant on Civil and Political Rights have to be seen as non-derogable is to be found in the debate preceding its new General Comment on Article 4 (especially as regards the question of how far the committee can go beyond what’s in the covenant) and in the new General Comment itself, containing explicit statements on non-derogable aspects. This topic is going to be dealt with later on in this thesis (pp. 40 – 50)

## 3.2 Striving for Minimum Humanitarian Standards

In parallel to the development just presented, the past two decades also saw the beginning of initiatives to confront the issue of internal crisis situations and their impact on human rights as such. In contrast to the optional protocol approach just discussed, one could also conceive a concept trying to identify a universally applicable, comprehensive list of guarantees to be respected at all times. This is the reasoning behind the elaboration of “minimum humanitarian standards” which we shall now deal with.

### 3.2.1 Activities of the International Community

Before turning to the methodological issues connected to a declaration of such standards, the extensive activities both within United Nations bodies and the academic community in working towards minimum humanitarian standards will be briefly outlined at this point.

#### 3.2.1.1 Up to 1990

Following the increase in situations below the level of international armed conflict, the issue of states of emergency and their impact on human rights started to gain importance. In 1977, the Sub-Commission on Prevention of Discrimination and Protection of Minorities considered that a comprehensive study of the implications for human rights of those recent developments connected to states of emergency might be of use. In 1982, said study<sup>117</sup> was presented to the Sub-Commission by Ms Nicole Questiaux.<sup>118</sup> To continue research on the issue, the Economic and Social Council by resolution 1985/37 authorized the Sub-Commission upon the latter’s request to appoint a Special Rapporteur in this area.<sup>119</sup> From 1985 up to 1997, annual reports by the Special Rapporteur, Mr Leandro Despouy, dealt with the developments and presented factual information.<sup>120</sup>

Towards the mid-80s a debate came up among international experts about how to tackle the problem of efficient protection of individuals during the situations in question. Early working results in this area include the Siracusa

---

<sup>117</sup> *Study of the implications for human rights of recent developments concerning situations known as states of siege or emergency*, E/CN.4/Sub.2/1982/15, cf. *Report of the meeting of experts on rights not subject to derogation during states of emergency and exceptional circumstances*, in: Prémont, pp. 27 et seq., p. 32, para. 17

<sup>118</sup> cf. e.g. E/CN.4/Sub.2/1996/19, para. 1

<sup>119</sup> cf. e.g. E/CN.4/Sub.2/1996/19, para. 4

<sup>120</sup> for a complete list of the previous reports cf. E/CN.4/Sub.2/1996/19, para. 6; tenth and final report: E/CN.4/Sub.2/1997/19 and Add.1.

Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (1984)<sup>121</sup>, the Paris Minimum Standards of Human Rights Norms in a State of Emergency (1985)<sup>122</sup>, and the Oslo Statement on Norms and Procedures in Times of Public Emergency or Internal Violence (1987)<sup>123</sup>.

The discussion culminated in the draft of a Declaration of Minimum Humanitarian Standards (hereinafter: the Turku Declaration) that was created by a meeting of academic experts convened by the Turku/Åbo Akademi Institute of Human Rights in 1990, to be looked at more closely in a moment.

### 3.2.1.2 The Turku Declaration

The Turku Declaration was submitted to the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities<sup>124</sup>, and from there on to the Commission on Human Rights, with a view to its eventual adoption.<sup>125</sup> On the Commission's invitation<sup>126</sup>, a number of governments and international organisations (both governmental and non-governmental ones) commented on it.<sup>127</sup> By a resolution passed in its 53<sup>rd</sup> session, the Commission on Human Rights requested the UN Secretary-General to prepare an analytical report on this issue, to be presented at the Commission's then following session.<sup>128</sup> Already before presentation of the report, member states submitted information as to their national legal frameworks on states of emergency and their views on the project of 'minimum humanitarian standards'.<sup>129</sup> Parallely, an international workshop on the issue took place in Cape Town in September 1996, the report on which was also circulated as a UN document.<sup>130</sup> The analytical report of the Secretary-General<sup>131</sup> is the first in what has become a series of annual reports on the issue. Upon invitation, various States and institutions transmitted their comments on the subject.<sup>132</sup>

---

<sup>121</sup> adopted by a meeting of experts in 1984, cf. *Declaration of Minimum Humanitarian Standards*, p. 2

<sup>122</sup> adopted by the International Law Association in 1984, cf. P.R Gandhi, *The Human Rights Committee and Derogation in Public Emergencies*, German Yearbook of International Law vol. 32 (1989), 323, p. 345

<sup>123</sup> adopted at a meeting in Oslo in 1987; cf. Theodor Meron and Allan Rosas, *Current Development: A Declaration of Minimum Humanitarian Standards*, 85 American Journal of International Law (1991) 375, p. 376

<sup>124</sup> cf. Sub-Commission resolution 1994/26, introductory clause 6

<sup>125</sup> cf. Sub-Commission resolution 1994/26, operative clauses 1 and 2

<sup>126</sup> cf. Commission on Human Rights resolution 1995/29

<sup>127</sup> see E/CN.4/1996/80 and E/CN.4/1996/80/Add.1, Add. 2 and Add.3, respectively

<sup>128</sup> cf. Commission on Human Rights resolution 1997/21

<sup>129</sup> as can be seen in E/CN.4/1997/77 and E/CN.4/1997/77/Add.1

<sup>130</sup> annex to E/CN.4/1997/77/Add.1

<sup>131</sup> E/CN.4/1998/87, reflecting all the previous research results

<sup>132</sup> these comments can be found in E/CN.4/1998/87/Add.1.

## 3.2.2 Contents of the Turku Declaration

The revised text<sup>133</sup> (the original version containing 18 articles) consists of 20 articles of both formal and material content. This overview refers to the revised edition.

Articles 1 (1) and 2 determine the scope of application of the Turku Declaration. According to Article 1 (1), it shall be applicable at all times, regardless of the declaration of a state of emergency; derogation is not permitted. All groups and persons, whatever their legal status, are equally bound to apply the standards (Article 2).

The substantive part of the Turku Declaration comprises elements of both human rights and humanitarian law. The provisions draw to a large extent on standards set forth in established international instruments such as Common Article 3 and Protocol II, granting basic protection such as humane treatment without discriminatory distinctions (Article 3 (1)), prohibition of violence to life and well-being (Article 3 (2) a)), care for the wounded and sick (Articles 12 and 13). The Turku Declaration does go further, however, by including provisions such as e.g. on weapons (Article 5 (3)), on forced population transports (Article 7), and on the right to life (Article 8). Article 18 envisages enforcement of the standards contained in the Turku Declaration in a manner that could be described as decentralised; instead of one specific organ or authority, all possible actors on the international scene are called upon to see to that the standards are being complied with.

## 3.2.3 Discussion

For a considerable while, adoption of the Turku Declaration as an instrument was in the air. However the proposal encounters a number of concerns when it comes to its suitability as a means to deal with the problematic issues laid out above, i.e., the shortcomings of the existing legal framework in connection with internal crisis situations. In the following we are going to deal with the main questions in this respect.

### 3.2.3.1 Argument of the gap

At the time of drafting, the existence of a considerable gap in the application areas of international law as regards the protection of individuals in internal crisis situations was the basic premise upon which the initiative was

---

<sup>133</sup> for the original text, cf. *Declaration of Minimum Humanitarian Standards*, pp. 8 et seq.; the changes are set out in *Declaration of Minimum Humanitarian Standards*, pp. 23 and 24, footnotes 11 – 17

founded. The realisation of this gap becomes visible in almost all contributions in the debate.<sup>134</sup>

However one can also take a somewhat different view. It could be pointed out that it has to be considered whether the problem the Turku Declaration addresses resulted from actual deficiencies in international law or rather from non-compliance by states and other actors of existing provisions of international law.<sup>135</sup> The argument could be made that there already are rules that are applicable in cases of internal crisis, and that there is in fact no gap. Humanitarian law will generally not apply because its scope of application is limited to armed conflicts;<sup>136</sup> however, Common Article 3 is possibly phrased in a way that might make it applicable in a number of internal crisis situations.<sup>137</sup> The rules of human rights law remain valid, and derogations are subject to strict requirements that can be applied.<sup>138</sup>

Consequently, not drafting new standards but strict application of existing ones would have to be seen as the solution.

The necessity to also strengthen existing rules was widely acknowledged<sup>139</sup>; it was however still pointed out, firstly, that Common Article 3 does not contain a definition of ‘armed conflict not of an international character’ and therefore leaves room for governments to contest its applicability.<sup>140</sup> Furthermore, even the recognition of Common Article 3 for specific situations would not entail a general applicability. Finally, it had to be kept in mind that the protection provided for by Common Article 3 is only a minimum one.<sup>141</sup> As regards the human rights aspect, it will have to be added that the relatively vague wording of some human rights provisions involves considerable difficulties. The right to life served as an example: while humanitarian law instruments set out detailed rules as to what conduct is prohibited, human rights instruments’ provisions are kept in a rather general way.<sup>142</sup>

---

<sup>134</sup> e.g. in the contribution by Switzerland, cf. E/CN.4/1996/80/Add.1, p. 6, para. 2; also in the contribution by Ecuador, cf. E/CN.4/1998/87/Add.1, paras. 69, 71; cf. also the Background Paper for the Expert Meeting on Fundamental Standards of Humanity in February, 2000, provided by Prof. Martin Scheinin, E/CN.4/2000/145, Annex, pp. 2 et seq., Appendix 2, pp. 17 et seq., pp. 24, 25

<sup>135</sup> a point raised e.g. by Canada, E/CN.4/1998/87/Add.1, para. 8;

<sup>136</sup> cf. e.g. the comments submitted by Mexico, E/CN.4/1996/80, pp. 3/4, para. 4; Turkey, E/CN.4/1998/87/Add.1, para. 126

<sup>137</sup> cf. Spiliopoulou Åkermark, p. 21

<sup>138</sup> cf. the comment made by Mexico, E/CN.4/1996/80, pp. 3 et seq., 4, para. 6

<sup>139</sup> e.g. by Switzerland, cf. E/CN.4/1998/87/Add.1, para.123; by the Friends World Committee for Consultation (Quakers), cf. E/CN.4/1997/77, chap. III

<sup>140</sup> cf. E/CN.4/1998/87, para. 74

<sup>141</sup> cf. E/CN.4/1998/87, para. 74

<sup>142</sup> cf. E/CN.4/1998/87, paras. 66, 67

### 3.2.3.2 Applicability at all times

The feature highlighted as being the most innovative aspect<sup>143</sup> of the Turku Declaration is its applicability at all times, as stipulated in its Article 1 (1). Hence, no application thresholds limiting the scope of application are contained in the text. The advantage of this concept, as can be put forward, is that the individual's need for protection is not neglected in favour of lengthy controversies about the status of the conflict in question.<sup>144</sup> In that way, the Turku Declaration puts down the 'lowest common denominator' of applicable standards.<sup>145</sup>

It is exactly this very tendency towards a lowest common denominator, however, which meets considerable criticism. The Turku Declaration contains a very basic set of standards. As regards applicability of protection of a higher level, as provided for e.g. in the Geneva Conventions, the necessity of qualifying a given situation would remain. With the basic principles applicable anyway, states might be even less willing to determine the status of a situation because it might eventually require them to respect a higher level of protection. As a consequence, there is the risk of limiting the scope of protection to the minimum set out in the Turku Declaration.<sup>146</sup> Thus, adopting the Turku Declaration might weaken existing international legal standards.<sup>147</sup>

This point was anticipated by the drafters of the Turku Declaration, as can be seen from the inclusion of Article 18 (1) (original version), stating that "Nothing in the present standards shall be interpreted as restricting or impairing the provisions of any international humanitarian or human rights instrument." In the revised edition the provision was even moved to a more prominent place in the Turku Declaration, Article 1 (2). While this is a valid statement, it is still questionable whether its programme will actually influence the *political* attitudes of states.

An issue related to the scope of application including situations below the level of internal armed conflict also needs to be noted: According to some states, a text applicable in internal crisis situations potentially interferes with states' internal affairs.<sup>148</sup> They are especially concerned about the use of concepts such as "state of emergency" of which there is no clear legal definition and on which there is no consensus (yet).<sup>149</sup>

---

<sup>143</sup> e.g. by Poland, cf. E/CN.4/1996/80/Add.3, pp. 16 et seq., 18, third para. after (e)

<sup>144</sup> cf. the comment submitted by Norway, E/CN.4/1996/80/Add.1, pp. 2 et seq., 3, para. 9

<sup>145</sup> cf. the comment submitted by Poland, E/CN.4/1996/80/Add.3, pp. 16 et seq., 18, fourth para. after (e)

<sup>146</sup> cf. the comments submitted by the International Commission of Jurists, E/CN.4/1996/80/Add.3, pp. 20/21, 21, para. 4; by the Friends World Committee for Consultation (Quakers), E/CN.4/1997/77, p. 12, para. 2 (a)

<sup>147</sup> cf. the concern raised by UNHCR, E/CN.4/1996/80/Add.3, pp. 19/20, 20, second para.

<sup>148</sup> e.g., Cuba, cf. E/CN.4/1997/77, p. 4, paras. 2, 8; Mexico, cf. E/CN.4/1996/80, pp. 3 et seq., 3/4, paras. 4, 5

<sup>149</sup> e.g., Cuba, cf. E/CN.4/1997/77, p. 4, paras. 4, 7

### 3.2.3.3 The question of the addressee

As a complement to the applicability at all times, Article 2 of the Turku Declaration states that the declaration is also to apply to all persons, groups and authorities, irrespective of their legal status.

This feature could, first, be expected to be strongly opposed by some states with a view to non-state opponents in a conflict within their borders. It has always been the concern of states with internal problems to not in any way recognize the opponent, thus possibly giving legitimacy to his political goals and admitting to considerable problems inside the country. Already Common Article 3 *in fine* confronts this by stating that “[t]he application of the preceding provisions shall not affect the legal status of the Parties to the conflict”. In Article 17, also the Turku Declaration points out that the legal status of those involved in the internal disturbance shall not be affected. Despite this ‘disclaimer’, criticism was presented. Especially Turkey stressed the need to internally act against international terrorism and to not make the terrorists’ responsibility a subject of international law.<sup>150</sup> Reservations on the same grounds could also be put forward regarding the enforcement mechanism (Article 18); states as the traditional subjects of international law should be the only ones to see to the provisions’ implementation.<sup>151</sup>

Secondly, there is the problem of how to impose obligations on non-state groups. By creating a legally binding instrument of international law this objective could not be reached, since states only - as the traditional subjects of international law - can accede to a treaty. However, a possibility for non-state actors to declare their acceptance of the standards (much as has been provided for in Protocol I<sup>152</sup>) could be constructed. The same would be valid with a declaration not of a binding character. These groups have however not been included in the drafting of the Turku Declaration, whatever its nature, as opposed to e.g. the negotiations to Protocol I, wherein national liberation movements took part.<sup>153</sup> Taking this into account, non-state groups’ acceptance of the minimum standards set forth in the Turku Declaration and the willingness to abide by them might turn out to be rather limited.

---

<sup>150</sup> cf. E/CN.4/1998/87/Add.1, para. 130; Turkey was also concerned about making minimum humanitarian standards the subject of “hard law”, para. 131.

<sup>151</sup> a point raised e.g. by Mexico, cf. E/CN.4/1996/80, pp. 3 et seq., 5, para. 10

<sup>152</sup> cf. Article 96 (3) of Protocol I, which envisages a unilateral declaration by the authority representing the non-state party to the conflict, with the effect that the legal regime becomes equally binding on all parties to the conflict

<sup>153</sup> cf. Adam Roberts and Richard Guelff (eds.), *Documents on the Laws of War*, 2nd ed. (Oxford: Clarendon Press, 1989), p. 387



### 3.2.3.4 Issue of which legal status the text of standards should have

Closely connected to the point just dealt with is the question of which legal form a declaration containing the standards should take. The two basic options in this respect are to either adopt the Turku Declaration as a convention, thus giving it binding force on the states parties to it, or as a statement of commitment of a purely political nature.

According to the above considerations, constructing the Turku Declaration in the form of an international convention did not seem advisable. Both the aspect regarding the question of efficiently putting responsibility on non-state actors<sup>154</sup> and the fear of negative impact on existing standards<sup>155</sup> speak against proceeding in that way. In addition it has to be taken into account that the legal form of the Turku Declaration would not least depend on the specific purpose envisaged for the standards.<sup>156</sup> It might finally be added that, if the Turku Declaration eventually were to be adopted as a convention, it would be in danger of suffering from the same lack of ratification that lies at the origin of the debate.

Consequently, only very few of those involved explicitly stated a preference for having the Turku Declaration in the form of an international convention.<sup>157</sup> The positions taken mostly reflected the state of flux of the process, indicating that it was too early to decide upon the best form. The Secretary-General's first report on the issue left the question open as well, pointing out that only when the precise need for and contents of the standards had been agreed upon could the form be dealt with.<sup>158</sup>

### 3.2.3.5 The simplicity argument

Finally, the Turku Declaration is drafted in an easily-understood, relatively clear-cut language. This simplicity can be emphasised as an advantage in two respects. First, provisions phrased that way could be immediately and efficiently applied by everyone and thus contribute to an easier enforcement in practice.<sup>159</sup> Secondly, the Turku Declaration might be going to be easier to handle, compared to comprehensive conventions, when it comes to educational tasks and dissemination of the standards applicable in such situations.<sup>160</sup> The Secretary-General's report specifically emphasises the

---

<sup>154</sup> Turkey, E/CN.4/2000/94, at no. 6; cf. also E/CN.4/1998/87/Add.1, para. 131

<sup>155</sup> Switzerland, E/CN.4/1998/87/Add.1, paras. 118, 119

<sup>156</sup> considered e.g. by the ICRC, cf. E/CN.4/2000/94, paras. 12, 13

<sup>157</sup> cf. the comment of the Institute of Inter-Balkan Relations, E/CN.4/2000/94, para. 6

<sup>158</sup> cf. E/CN.4/1998/87, paras. 100, 102

<sup>159</sup> Finland, E/CN.4/1996/80/Add.2, p. 2, para. 5; Switzerland, E/CN.4/1996/80/Add.1, p. 6, para. 3; Norway, E/CN.4/1996/80/Add.1, p. 3, para. 10

<sup>160</sup> cf. Switzerland, E/CN.4/1996/80/Add.1, p. 6, para.3; cf. also Eide, p. 217; ICRC in E/CN.4/1996/80/Add.1, p. 9, para. 2 (b); cf. further E/CN.4/1998/87, para. 92

perspective of making the principles known rather than to explain the complex legal regime in detail.<sup>161</sup>

However, it can be said that there also is a certain reason behind this very complexity of the existing instruments, since the matter is a complex one. Radically reducing the rules to core provisions would entail the risk of keeping protection halted on this minimum level, to the detriment of a range of more specific rules of both humanitarian law and human rights.<sup>162</sup>

### 3.2.3.6 Conclusion

As the discussion progressed, none of the points that stood at the beginning of the debate were seen to receive a satisfying solution through codification of minimum standards in the Turku Declaration of Minimum Humanitarian Standards. The lack of threshold requirements appeared to be a good idea in the first place; it then turned out to entail a considerable risk of weakening existing standards by making the parties involved rely on the minimum protection set out. Considering the political realities, also integrating non-state actors seemed not feasible in an effective way. More and more, voices have been raised that these groups need to be involved in the discussion because their existence and factual power and the respective states' lack of it must not be ignored.<sup>163</sup>

There is today the unanimous view that a general compilation of standards in a binding document would not serve the cause<sup>164</sup>; but also a document as such has gradually lost priority. It has to be added that inter- and nongovernmental organizations remained rather sceptical, as shown by the various comments submitted; neither had the topic been endorsed by a broader public.

---

<sup>161</sup> cf. E/CN.4/1998/87, para. 92

<sup>162</sup> a criticism that the International Commission of Jurists put forward, cf. E/CN.4/1996/80/Add.3, p. 21, para. 5

<sup>163</sup> cf. *Ends & means: human rights approaches to armed groups* (Geneva: International Council for Human Rights Policy, 2000), pp. 1 and 2

<sup>164</sup> cf. Spiliopoulou Åkermark, p. 26

## 4 Recourse to existing structures as a viable approach to improve protection

A nevertheless certainly positive aspect of the proposal of a declaration of minimum humanitarian standards is that it has initiated a process of discussion in which both governments and various organizations are still engaged.<sup>165</sup> Following the first report of the Secretary-General, further ones have been submitted to the Commission on Human Rights.<sup>166</sup> Additionally, a number of meetings, most notably an expert meeting in Stockholm in 2000<sup>167</sup>, were held. The continuing research and study rendered two main results:

First – a priori merely an outward aspect –, the heading under which the topic was dealt with changed its name. Repeatedly, it had been pointed out that the terminology “*humanitarian standards*” [emphasis added] was not appropriate, since it might wrongly imply that the standards were only concerned with humanitarian law. The suggestion was to use “standards of humanity” instead.<sup>168</sup> The qualification “minimum” likewise met criticism, most notably at the Cape Town workshop, as giving the misleading impression that the level of protection was being lowered, while in fact the opposite was envisaged.<sup>169</sup> These aspects had been taken up by Commission resolution 1997/21, which now referred to “fundamental standards of humanity”.<sup>170</sup> The analytical report of the Secretary-General takes on board this point.<sup>171</sup> Subsequently the term “fundamental standards of humanity” has been applied to denote the discussion.

Secondly, the awareness that situations of internal crisis pose particular challenges to securing human rights and humanitarian law remains.<sup>172</sup> The international community has however come to realise that actual legal gaps in the protection of the individual do not exist; and that rather, the way

---

<sup>165</sup> this already pointed out by Poland, E/CN.4/1996/80/Add.3, pp. 16 et seq., 19, next-to-last para.

<sup>166</sup> E/CN.4/1999/92 of 18 December 1998; E/CN.4/2000/94 of 27 December 1999; E/CN.4/2001/91 of 12 January 2001; E/CN.4/2002/103 of 20 December 2001; latest one E/CN.4/2004/90 of 25 February 2004 (60<sup>th</sup> session).

<sup>167</sup> cf. E/CN.4/2000/145 and annex

<sup>168</sup> cf. the comment by Switzerland, E/CN.4/1996/80/Add.1, p. 6/7, para. 3 and p. 6, footnote 2; the country reiterated its position in E/CN.4/1997/77/Add.1, p. 2, para. 1, and E/CN.4/1998/87/Add.1, para. 104

<sup>169</sup> cf. E/CN.4/1997/77/Add.1, annex, p. 17, para. 47

<sup>170</sup> cf. Commission on Human Rights resolution 1997/21, para. 4

<sup>171</sup> cf. E/CN.4/1998/87, para. 5

<sup>172</sup> cf. E/CN.4/2001/91, para. 6

forward lay in clarification of uncertainties in the application of existing humanitarian law and human rights law.<sup>173</sup> Activities in this respect have therefore shifted their focus towards pointing out and clarifying standards for situations of internal crisis by referring to the existing framework.

## **4.1 Interpreting existing sources to strengthen the framework for protection of the individual: Recent developments**

In trying to enhance the framework for legal protection for the individual, one can fall back on the existing structures of both human rights and humanitarian law. One appropriate method of the legal instrumentarium available is that of interpretation. It may be applied on derogation provisions in favour of the individual, as undertaken by the Human Rights Committee in its new General Comment on Article 4 of the Covenant. Also, implications can be drawn from international criminal law. Statutes and jurisprudence in this field refer to and interpret provisions of both humanitarian law and human rights law that are relevant to the individual in internal crisis situations.

These two sources just mentioned are going to be dealt with in the following in order to identify their possible contribution to a stronger legal framework for the protection of the individual.

### **4.1.1 The Contribution of The UN Human Rights Committee's 2001 General Comment on Article 4 of the International Covenant on Civil and Political Rights**

Twenty years after its General Comment on Article 4 of the Covenant<sup>174</sup>, the Human Rights Committee in 2001 replaced that text with a new one. This chapter is going to briefly present the 1981 General Comment before going on to look at the drafting process of the new General Comment in detail and analysing the input of the text towards increased protection.

---

<sup>173</sup> cf. E/CN.4/2001/91, para. 6

<sup>174</sup> General Comment 5, cf. *supra*, p. 11, footnote 38

#### 4.1.1.1 The 1981 General Comment on Article 4 of the International Covenant on Civil and Political Rights

In 1981, the Human Rights Committee published a three-paragraph General Comment on Article 4 of the Covenant. The comment is not legally binding<sup>175</sup> and forms part of the Committee's series of General Comments designed to put at the states parties' disposal sets of guidelines for their implementation and reporting activities under the Covenant<sup>176</sup>.

The general comment takes its cause from uncertainties in state compliance with Article 4 of the Covenant.<sup>177</sup> It largely paraphrases the contents of Article 4 of the Covenant<sup>178</sup> before turning to the actual interpretative 'holding' of the Committee. Here, the Committee expresses its conviction that

- measures taken under Article 4 are of an exceptional and temporary nature
- measures may only last as long as the life of the nation is threatened
- in times of emergency, the protection of human rights becomes all the more important, especially of non-derogable ones.

It further stresses the importance for states concerned to inform other states parties of the nature and extent of, and reasons for the derogation, and to fulfil their reporting obligations under Article 40 of the Covenant.<sup>179</sup>

The 1981 General Comment is mainly concerned with situations where derogation had been employed but information by the state party was insufficient.<sup>180</sup> Although it does stress the importance of the exceptional character of derogation, it remains, in its holding, on a rather general level and doesn't take up and clarify specific substantial points:

To begin with, the elements of exceptionality and proportionality of the measure are addressed<sup>181</sup>, but the comment does not go as far as to actually try to explain, or elaborate upon, certain circumstances or criteria that can be employed.

It does not undertake to define the term "state of emergency", nor does it give a hint on what kinds of situations might be included. Thus, it remains

---

<sup>175</sup> because the Covenant does not give it that status

<sup>176</sup> this competence provided for in Article 40 (4) of the Covenant ("... such general comments as it may consider appropriate...")

<sup>177</sup> cf. General Comment 5, para. 2

<sup>178</sup> cf. General Comment 5, para. 1

<sup>179</sup> cf. General Comment 5, para. 3

<sup>180</sup> cf. General Comment 5, para. 2

<sup>181</sup> see the first and second bullet point on this page

difficult to relate the scope of application of Article 4 of the Covenant to that of other texts that might also be of relevance in a situation of internal crisis (e.g., provisions of international humanitarian law instruments).

The comment also limits itself to refer to “those rights from which no derogations can be made”. This can be presumed to only include the rights expressly mentioned in Article 4 (2) of the Covenant; there is no reflection on specific aspects, or even possible extensions to be made for reasons of efficiency.

The 1981 text’s aptitude to act as a guideline for the Member States would therefore have to be regarded as rather limited, although it does have its validity as a statement of opinion. The comment above all reflects the context of the time in which it was issued, both as regards the Committee’s own situation as well as the circumstances on the international plane. After entry into force of the Covenant in March, 1976<sup>182</sup>, the Human Rights Committee had taken up work in March, 1977.<sup>183</sup> When it adopted the comment during its 13<sup>th</sup> session in 1981, it could look back on four years’ practice that however included the start-up period. Hence, its experience in dealing with its mandate and its mechanisms had only started to evolve. At that same time, the phenomenon of internal crisis situations was but a relatively recent one and the realisation that derogations pose urgent problems was just beginning to appear, and so were tentatives to discuss possibilities to extend the range of non-derogable rights<sup>184</sup>.

The development on the international plane brought about a rising number of situations that could not clearly be classified as an “international armed conflict”.<sup>185</sup> On the theoretical side subsequently a debate emerged about how to address these situations with the help of international law and about potential needs for adaptation. In this context, drafting a new general comment on Article 4 of the Covenant and the related aspects suggested itself. The debate on the draft new comment, its problematic points and the result reached are presented here.

#### **4.1.1.2 New General Comment – Aspects of Preparatory Works; Result**

The Committee took up work on the new General Comment on Art. 4 at its 67<sup>th</sup> session in October 1999<sup>186</sup> and adopted the result as General Comment

---

<sup>182</sup> the 35th instrument of ratification/accession having been deposited, cf. Article 49 (1) of the Covenant

<sup>183</sup> cf. Arthur Henry Robertson and John Graham Merrills, *Human Rights in the World - An introduction to the study of the international protection of human rights*, 3rd ed. (Manchester, New York: Manchester University Press, 1989), p. 39

<sup>184</sup> cf. *Report of the meeting of experts on rights not subject to derogation during states of emergency and exceptional circumstances*, in: Prémont, pp. 27 et seq., p. 34, para. 17

<sup>185</sup> cf. Introduction, supra, p. 3

<sup>186</sup> cf. CCPR/C/SR.1797, para. 1

No. 29 entitled “States of emergency (Article 4)” during its 73<sup>rd</sup> session on 24<sup>th</sup> July 2001.<sup>187</sup>

The aim of the project was to take account of recent developments by addressing the problem of insufficient protection of the individual due to a “grey zone” in the application of human rights law and humanitarian law<sup>188</sup>; the main subject was to be the catalogue of rights that has to be considered non-derogable<sup>189</sup>.

In the course of the discussion, the scope broadened and a number of issues emerged as core problems. Most notably they group around the questions of which rights are to be considered non-derogable and of what situations are covered by “state of emergency”. Further main points addressed include the question of how comprehensive and detailed the general comment should be.

#### 4.1.1.2.1 Scope of non-derogable rights

As regards the issue of which rights are conceded the status of being non-derogable, the Committee was faced with balancing the wording of the Covenant with considerations from more recent interpretative work both by itself as by others.

The question takes its starting point from Article 4 (2) of the Covenant, which specifically enumerates a set of seven Covenant provisions as not being subject to derogation.<sup>190</sup> These are of a substantive character; guarantees of a general procedural nature are not explicitly mentioned in Article 4 (2) of the Covenant. However, as already seen above, substantive guarantees will be of but little practical effect if not accompanied by procedural guarantees.<sup>191</sup> There has thus been recent debate within the international community about treating at least certain procedural aspects as non-derogable.<sup>192</sup> The question of a possible extension of the list of non-derogable rights of a substantive character had also arisen in that context.<sup>193</sup>

The initial draft centred around the range of rights both of a substantial as well as of a procedural nature that can be considered non-derogable. Apart from the rights expressly mentioned in Article 4 (2) of the Covenant, the Committee sees a possibility of including an enlarged scope of guarantees.

As for rights of a substantive nature, an argument is developed that “... international criminal law, customary international law or humanitarian law

---

<sup>187</sup> cf. CCPR/C/21/Rev.1/Add.1 (=General Comment no. 29) and CCPR/C/SR.1950

<sup>188</sup> cf. supra, pp. 23 and 24

<sup>189</sup> cf. CCPR/C/SR.1797, para. 1

<sup>190</sup> Articles 6, 7, 8 (paras. 1 and 2), 11, 15, 16 and 18 of the Covenant

<sup>191</sup> cf. supra, pp. 25 – 30

<sup>192</sup> cf. supra, pp. 25 – 30

<sup>193</sup> cf. *Report of the meeting of experts on rights not subject to derogation during states of emergency and exceptional circumstances*, in: Prémont, pp. 27 et seq., p. 34, para. 17

must be seen to establish obligations that, as a State party's other international obligations, require that careful attention is paid by States parties and the Committee to whether a derogation from Covenant provisions not mentioned in article 4, para. 2, can be accepted."<sup>194</sup> This is followed by a list of examples of Covenant rights not named in Article 4 (2). The Committee elaborates that these can be considered as having non-derogable aspects due to their strong inherent link with rights that are non-derogable by virtue of being mentioned in Article 4 (2) of the Covenant<sup>195</sup>, or with rules elsewhere in international law<sup>196</sup>.

The approach taken by the Committee underwent significant change with the second draft.<sup>197</sup> The basic idea of presenting examples of rights or dimensions of rights that might qualify as non-derogable in addition to the ones listed in Article (4) of the Covenant was maintained.<sup>198</sup> However the Committee had shifted towards a preference for a formulation that didn't as much refer to non-derogable covenant rights outside those named in Article 4 (2), but rather takes the position that if a certain right was not included on the list of non-derogable rights, that alone could not sufficiently justify derogation from it if the right concerned is among certain otherwise internationally protected rights.<sup>199</sup>

In the final version the comment states that "... Article 4 of the Covenant cannot be read as justification for derogation from the Covenant if such derogation would entail a breach of the State's other international obligations, whether based on treaty or general international law."<sup>200</sup> The Committee expresses its opinion that "[i]n those provisions of the Covenant that are not listed in article 4, paragraph 2, there are elements that [...] cannot be made subject to lawful derogation under article 4."<sup>201</sup> This is followed by a list of "[s]ome illustrative examples"<sup>202</sup>, such as the rights of persons deprived of their liberty to humanity and respect for the inherent

---

<sup>194</sup> cf. CCPR/C/66/R.8 (hereinafter: first draft), para. 12, as reproduced in E/CN.4/2000/145, annex, pp. 26 et seq., pp. 31/32; this is highlighted as a major innovation by the responsible Committee member, cf. CCPR/C/SR.1797, para. 6

<sup>195</sup> e.g., para. 12 (c) of the draft is dedicated to the taking of hostages, enforced disappearances or unacknowledged detention. These actions are looked upon as strongly tied to Article 9 (1) of the Covenant, dealing with arbitrary detention. Though not mentioned in Article 4 (2), the non-derogable nature of Article 9 (1) is attributed to the provision's "intimate connection" to the non-derogable provision in Article 7 of the Covenant

<sup>196</sup> here, para. 12 (e) of the draft can serve as an example: The Covenant provision that relates to questions of freedom of movement and thus also to the displacement of the population or parts thereof, Article 12, is not included in the list in Article 4 (2). However the Committee relates this right to other sources of international law, most notably the (then) Draft Statute of the International Criminal Court, cf. footnote 19 of the draft (E/CN.4/2000/145, annex, p. 33) in order to support its opinion that the displacement dimension of the freedom of movement have to be considered non-derogable.

<sup>197</sup> cf. CCPR/C/SR.1850/Add.1, para. 1

<sup>198</sup> cf. CCPR/C/66/R.8/Rev.1,(hereinafter: second draft), para. 11

<sup>199</sup> cf. second draft, para. 6 and CCPR/C/SR.1850/Add.1, para 1

<sup>200</sup> cf. General Comment no.29, para. 9

<sup>201</sup> cf. General Comment no.29, para. 13

<sup>202</sup> explicitly described as such in the introductory passage of para. 13



dignity of the human person; the prohibitions against the taking of hostages, abductions or unacknowledged detention; the rights of persons belonging to minorities; prohibition of deportation or forcible transfer of population; and the prohibition to engage in propaganda for war or in advocacy of hatred. For most of those rights, the non-derogable character is being derived from the nature of the right as a norm of general international law<sup>203</sup>; partly this is specified by reference to concrete international law instruments<sup>204</sup>. In a few cases the argument is also supported by the close link of the provision not expressly listed as non-derogable to one included in Article 4 (2).<sup>205</sup>

Still in the context of what is contained in the scope of rights to be considered non-derogable, the Committee dedicates several paragraphs<sup>206</sup> to reflections on procedural guarantees to complement the substantial side. The two issues covered here are the question of effective domestic remedies and that of procedural protection. In his exposé on these aspects, the responsible Committee member made reference to the position the Inter-American Court of Human Rights on the non-derogability of certain procedural guarantees<sup>207</sup>: While the two systems were not entirely comparable, still the approach for discussion was similar.<sup>208</sup>

Both drafts deal with the requirement of Article 2 (3) of the Covenant to provide for effective domestic remedies in cases where the Covenant has been violated.<sup>209</sup> Article 2 (3) is considered a right inherent to the Covenant as a whole and as such not subject to derogation, since Article 2, much as Article 4, is situated in Part II of the Covenant. With Part II establishing the general framework for the functioning of the human rights that follow in Part III, the rules on derogation contained in Article 4 thus refer to Part III and are themselves not subject to derogation. Likewise, Article 2 (3) with its intimate connection to the other ‘general’ provisions in Part II, cannot be regarded as derogable. The final version takes over the position in the drafts but does not include the reasoning described.<sup>210</sup>

Aspects of procedural protection for rights explicitly mentioned as non-derogable are equally being dealt with.<sup>211</sup> If there is a dimension of procedural protection connected to a non-derogable right, then this procedural guarantee must equally be conceded non-derogability status. If this were not done, enjoyment of the right concerned could not be enforced

---

<sup>203</sup> cf. General Comment no.29, paras. 13 (a) – (d)

<sup>204</sup> in para. 13 (c): prohibition of genocide; cf. 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, entry into force 12 January 1951. Para. 13 (d): explicit reference to Rome Statute of International Criminal Court, Articles 7 (1) (d) and 7 (2) (d)

<sup>205</sup> para. 13 (a), where Article 10 (1) is put into close relation to non-derogable Article 7; and 13 (c), where esp. non-derogable Article 18 is put forward.

<sup>206</sup> first draft, paras. 13 – 15; second draft, paras. 12 – 14

<sup>207</sup> cf. supra, pp. 25 and 26

<sup>208</sup> cf. CCPR/C/SR.1797, para. 7

<sup>209</sup> cf. first draft, para. 13; second draft, para. 12

<sup>210</sup> cf. General Comment no.29, para. 14

<sup>211</sup> cf. first draft, para 14; second draft, para. 13

and thus the non-derogability status would not translate into practice.<sup>212</sup> In the final version of the comment, the Committee retains this position in a slightly more compact wording.<sup>213</sup>

The Committee also deals with basic elements of procedural protection in general.<sup>214</sup> This regards mainly Articles 9 (4) and 14 of the Covenant. In the drafting stage, it explained that the right to judicial review of any deprivation of liberty, Article 9 (4), has to be non-derogable with respect to all cases related to other non-derogable rights.<sup>215</sup> This is due to the observations made above that the protection of non-derogable rights may not be circumvented<sup>216</sup>. The Committee went on to state that, given the intimate tie of Article 9 (3) with the prohibition of torture under Article 7, the latter's non-derogability status should be understood to be applicable in all circumstances.<sup>217</sup> When adopting the General Comment, the Committee put less specific focus on Articles 9 and 14 as such. In its view, the requirements governing derogation in Article 4 of the Covenant are an expression of the principles of legality and the rule of law underlying the Covenant as a whole. Consequently, fundamental elements of fair trial must be guaranteed during a state of emergency.<sup>218</sup> This is to include the right to be tried by a court of law in case of a criminal offence, as well as the presumption of innocence. Where non-derogable rights are concerned, the right to judicial review of the lawfulness of detention must be respected. For this latter point, the Committee makes reference to its recommendation to the Sub-Commission in the discussion on a draft third optional protocol to the Covenant.<sup>219</sup>

#### **4.1.1.2.2 Definition of “state of emergency”**

In the beginning, the Committee had not intended to deal with a definition of “state of emergency” at all<sup>220</sup>. Following criticism by various Committee members during the initial debate<sup>221</sup>, the point was integrated into the discussion<sup>222</sup>.

---

<sup>212</sup> The example used is that of Article 6 of the Covenant on the right to life, which is a non-derogable provision according to Article 4 (2). In order not to evade the protection provided by means of the non-derogability status, the procedural rights necessary to put the protection into effect must be considered non-derogable as well. Therefore any trial connected to Article 6 must be carried through in accordance with the standards stipulated by the Covenant. Most notably, this is to include the rules on a fair trial as set out in Articles 14 and 15 of the Covenant.

<sup>213</sup> cf. General Comment no. 29, para. 13

<sup>214</sup> first draft, para. 15; second draft, para. 14

<sup>215</sup> cf. first and second draft, para. 14, respectively

<sup>216</sup> see preceding para. about not circumventing the protection of non-derogable rights.

<sup>217</sup> cf. both first and second draft, para 14, last sentence

<sup>218</sup> cf. General Comment no. 29, para 15

<sup>219</sup> in General Comment no. 29, footnote no. 9; cf. supra, pp. 27/28

<sup>220</sup> cf. first draft, para. 2

<sup>221</sup> cf. CCPR/C/SR.1797, paras. 32, 34, 37

<sup>222</sup> cf. CCPR/C/SR.1850/Add.1, para. 2 and second draft, para. 2 and CCPR/C/69/R.4. chapter A, para. 2.3 For the sake of consistency both within the comment as well as with

In the course of the drafting, examples that might qualify as a state of emergency constituting a threat to the life of the nation were discussed in a rather detailed way.<sup>223</sup> This included the general question of the possible impact of regional events, as well as reflections on occurrences such as a natural catastrophe, mass demonstrations including instances of violence, or a major industrial accident. The position taken with regard to all of these was that while Article 4 did not exclude these situations, the common case aimed at in Article 4 was that of armed conflict.<sup>224</sup>

The comment as adopted confines itself to the more general statement that “[n]ot every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation, as required by article 4, paragraph 1.”<sup>225</sup> It goes on to name armed conflict as the typical situation in which Article 4 becomes applicable and stresses the requirement that the situation constitute a threat to the life of the nation. The other examples just mentioned are to be refound in the context of the issue of proportionality.<sup>226</sup>

#### 4.1.1.2.3 Envisaged scope of the new General Comment

The 1981 General Comment on Article 4, despite its short text, was laid out to comprehensively cover all aspects of Article 4. In formulating a new one, the fundamental question underlying the work process as a whole was that of what the new General Comment should contain.

After discussions on whether to have a more narrow approach or a more “general” General Comment<sup>227</sup>, the Committee decided to fully replace the old one.<sup>228</sup> Thus, the result goes beyond the original question of what rights may be derogated from during a state of emergency that has been lawfully proclaimed.<sup>229</sup> The General Comment’s 17 paragraphs equally aim at clarifying the other elements connected to Article 4 of the Covenant.

By way of an overview, the following contents can be highlighted:

- an attempt to define “state of emergency”<sup>230</sup>, examples for it<sup>231</sup>, but no definition of “threat to the life of the nation”
- emphasis on the principle of proportionality<sup>232</sup>

---

regard to Article 4 of the Covenant, “state of emergency” was the term chosen for usage in the text.

<sup>223</sup> cf. CCPR/C/69/R.4, para. 2.3

<sup>224</sup> cf. CCPR/C/69/R.4, para. 2.3

<sup>225</sup> cf. General Comment no. 29, para. 3

<sup>226</sup> cf. General Comment no. 29, para. 5

<sup>227</sup> with both poles being represented among Committee members, cf. CCPR/C/SR.1797, para. 40. Voices advocating a narrow scope were mainly warning not to be overambitious, cf. CCPR/C/SR.1797, para. 38.

<sup>228</sup> cf. CCPR/C/SR.1850/Add.1, para. 2

<sup>229</sup> cf. first and second draft, para. 2, and CCPR/C/SR.1797, para. 1

<sup>230</sup> cf. General Comment no. 29, para. 3

<sup>231</sup> cf. General Comment no. 29, para. 5

- reference to states parties' other obligations under international law<sup>233</sup>
- examples for additional non-derogable aspects<sup>234</sup>
- appeal to states to carefully follow their reporting and notification obligations<sup>235</sup>.

The General Comment also takes on board references to recent developments in international law that, in the view of the Committee, are of relevance for interpretation of Article 4 of the Covenant. Most notably, these are the codification of crimes against humanity in the Rome Statute of the International Criminal Court<sup>236</sup> and the development of fundamental standards of humanity<sup>237</sup>.

#### 4.1.1.3 Appreciation of the new General Comment

The new General Comment rather comprehensively covers all elements of Article 4 in order to act as a guideline for the states parties of the Covenant. In the following we shall be having a look at the contribution of the comment to some of the key issues of Article 4 in order to then see in what way it can be put to use in favour of the individual.

The very foundation for the concept of derogation lies in the criterion “state of emergency that constitutes a threat to the life of the nation”. According to the Committee, the concept is to be narrowly defined.<sup>238</sup> It then refers to the rather obvious case of armed conflict, but also indicates the possibility of other situations. Some are mentioned later on in a different passage of the comment.<sup>239</sup> These certainly serve to illustrate the point for the reader.<sup>240</sup> However the comment does not make clear when exactly a situation can be regarded as one that “threatens the life of the nation”. Quite clearly an armed conflict can fulfil this criterion, as outlined by the Committee.<sup>241</sup> But any other possible situations beneath that level the Committee does not further discuss. Especially with regard to other international law provisions that might be of relevance for the situations in question there is no analysis. Thus, it remains difficult to relate Article 4 of the Covenant to the application requirements of other international law texts such as e.g. Protocol II.

To take account of the broad range of possible circumstances amounting to a state of emergency that it does not (and cannot) individually discuss, the

---

<sup>232</sup> cf. General Comment no. 29, para. 4

<sup>233</sup> cf. General Comment no. 29, paras. 9 – 12

<sup>234</sup> cf. General Comment no. 29, para. 13

<sup>235</sup> cf. General Comment no. 29, paras. 2, 10, 17

<sup>236</sup> cf. General Comment no. 29, para. 12

<sup>237</sup> cf. General Comment no. 29, footnote 6 (to para. 10)

<sup>238</sup> “Not every disturbance ... qualifies...”, General Comment no. 29, para.3, first sentence

<sup>239</sup> cf. General Comment no. 29, para. 5

<sup>240</sup> cf. CCPR/C/SR.1850/Add.1, paras. 31, 32, 33

<sup>241</sup> cf. General Comment no. 29, para. 3, second sentence

Committee elaborates on the importance of the principle of proportionality.<sup>242</sup> In its obligation on the states parties this does of course leave room for interpretation but any attempt to remove this leeway in a General Comment could well be doomed to failure.

One field where proportionality becomes visible is the relationship of derogation to the concept of restriction as provided for in a number of Covenant provisions<sup>243</sup>. The General Comment does not undertake to analyse the relationship of the two notions in general<sup>244</sup>, confining itself to the statement that “[d]erogation from some Covenant obligations in emergency situations is clearly distinct from restrictions or limitations allowed even in normal times under several provisions of the Covenant”<sup>245</sup>. However as regards proportionality, the comment gives a rather clear direction as to the hierarchy of the two concepts. It states that when a provision allows for restriction as well as for derogation, then restricting the right would normally already be sufficient in order to meet the circumstances; the exigencies of the situation would not justify derogation from the provision.<sup>246</sup>

Certainly the most delicate point in the new General Comment is the issue of what rights have to be considered non-derogable. The Committee clearly states that, in its view, the guarantees explicitly listed as non-derogable in Article 4 (2) of the Covenant are not the only ones to be considered non-derogable. The General Comment presents examples of elements of rights contained in the Covenant as being non-derogable in addition to those expressly named.<sup>247</sup>

The Covenant is an international treaty that is based on consensus between the states parties, changes or amendments to which are equally subject to agreement between the states parties.<sup>248</sup> In “adding” non-derogability by way of interpretation the Committee was faced with a balance between its well-founded opinion and its striving for a forward-looking and relevant interpretation on the one hand and the possible reaction of states parties on the other hand.<sup>249</sup> The states parties might regard the comment as going too far beyond the body’s competences.<sup>250</sup> This bears the risk of producing an effect opposite to the one wished for, with the comment being rejected and the explanations set forth ignored. Ultimately the General Comment would then be counterproductive.<sup>251</sup> However the Committee has, compared to the draft versions, made its explanations less disputable and taken a rather prudent approach. To a larger extent than the draft texts do, the final comment embeds the substantive and procedural aspects it intends to

---

<sup>242</sup> cf. General Comment no. 29, paras. 4 and 5

<sup>243</sup> e.g. Articles 12 and 21 of the Covenant

<sup>244</sup> a criticism also put forward by Spiliopoulou Åkermark, pp. 49/50

<sup>245</sup> cf. General Comment no. 29, para. 4, third sentence

<sup>246</sup> cf. General Comment no. 29, para. 5, last sentence

<sup>247</sup> cf. General Comment no. 29, paras. 13 – 16

<sup>248</sup> cf. Article 51 of the Covenant

<sup>249</sup> cf. CCPR/C/SR.1797, para. 35

<sup>250</sup> cf. CCPR/C/SR.1797, para. 35

<sup>251</sup> cf. CCPR/C/SR.1797, para. 30

proclaim as non-derogable into a broader context of international law.<sup>252</sup> This corresponds to the dedication of the Committee to take into account the states parties' other international obligations and also developments within international law in this field.<sup>253</sup>

The above shows that the new General Comment is very comprehensive and covers all elements of Article 4 of the Covenant. Compared to the 1981 text, the guideline qualities have increased considerably although some points might not be as plainly put as one may have wished for.

However the General Comment does follow a clear line: Derogation must be limited to the extent strictly necessary because it affects the rights of the individual. When examining state compliance with Article 4, all relevant areas of international law must be taken into account. Insisting on the states' obligations under the entirety of international law can limit derogation and maintain a maximum of guarantees for the individual. Not least the comment's emphasis on procedural guarantees is important in this respect. Thus employing the interdependencies of Covenant provisions and of the different fields of law, the Committee contributes to an enhanced protection of the individual.

## **4.1.2 Evolvement of International Criminal Law**

International criminal law is a further area that lends itself to use for clarification of uncertainties in the law applicable in internal crisis situations with a view to upgrading the framework for protection for the individual.

### **4.1.2.1 Institutional framework**

Establishment of an institutional framework in the field of international criminal law started with the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter: ICTY). Its foundations lie in a Security Council resolution of 1993.<sup>254</sup>

The tribunal has jurisdiction over four groups of crimes under international law: grave breaches of the Geneva Conventions of 12 August 1949, violations of the laws and customs of war, genocide and crimes against humanity.<sup>255</sup> In a similar way the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of

---

<sup>252</sup> cf. General Comment no. 29, para. 11, with a reference to preemptory norms of international law

<sup>253</sup> cf. General Comment no. 29, paras. 10 and 12

<sup>254</sup> S/RES/827 (1993)

<sup>255</sup> cf. Articles 2, 3, 4 and 5 of the ICTY Statute

Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, was created in 1994<sup>256</sup> (hereinafter: ICTR). Its jurisdiction as to subject-matter differs from that of the ICTY. The ICTR Statute covers genocide, crimes against humanity and violations of Common Article 3 and of Protocol II to the Geneva Conventions.<sup>257</sup> Finally, 1998 saw the adoption of the Rome Statute of the International Criminal Court<sup>258</sup> (hereinafter: ICC), in which jurisdiction is conferred upon the court for the crime of genocide, crimes against humanity, and war crimes<sup>259</sup>.

#### **4.1.2.2 The specific international criminal law angle on protection of the individual**

By its nature, international criminal law sets out to identify behaviour that is to be the subject of prosecution and punishment; it attributes criminal responsibility to the individual in a specific case. This reflects the increasing recognition of the individual in international law in general<sup>260</sup> and adds an aspect that is rather recent: international law imposing duties and negative consequences onto the individual.

At the same time and seen from a reverse perspective, the prohibitions set forth by international criminal law contain statements on what rights are supposed to be ensured to the individual. In this approach, international criminal law takes a different way towards protection of the individual if compared to human rights law, which in turn is immediately directed at guaranteeing certain rights to the individual. International criminal law could therefore be said to contribute indirectly to the protection of the individual.

The provisions of the statutes and subsequent jurisprudence thus help to a clarify rules of international law that protect the individual in internal crisis situations, and can help to enforce these rules. Hence, some aspects of the statutes and jurisprudence of the ICTY and the ICTR as well as of the Statute of the ICC are looked at more closely in the following.

---

<sup>256</sup> S/RES/955 (1994)

<sup>257</sup> cf. Articles 2, 3 and 4 of the ICTR Statute

<sup>258</sup> 2187 U.N.T.S. 3, adopted 17 July 1998; entry into force 1 July 2002, ratification status: 97 States parties; source: United Nations Treaty Collection  
<<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp>> (30 November 2004)

<sup>259</sup> cf. Article 5 (1) (a) – (c) of the Statute. Jurisdiction over the crime of aggression, Article 5 (1) (d) of the Statute, will only come into effect after the States Parties have adopted an agreement setting out two points: a definition of aggression, and the conditions under which the Court could exercise its jurisdiction, cf. Article 5 (2) in connection with Articles 121 and 123 of the Statute.

<sup>260</sup> cf. e.g. E/CN.4/Sub.2/1997/19, paras. 2, 27

### 4.1.2.3 Selected aspects from statutes and jurisprudence of the ICTY, the ICTR and the ICC

#### 4.1.2.3.1 Definition of armed conflict and distinction from situations of ‘civil unrest’

In international humanitarian law, the existence of armed conflict is frequently employed as a requirement setting a threshold for application of international humanitarian law.<sup>261</sup> Only after the situation in question has been identified to fulfil this criterion can a certain set of rules be assigned for application to that situation. However a detailed definition of armed conflict is not to be found in the instruments.

The relevant provisions do give some indications. By combining Articles 2 and 3 common to the four Geneva Conventions with Article 1 (3) and (4) of Protocol I and Article 1 (2) of Protocol II, one can construct that the concept of armed conflict is to include ‘traditional’ international armed conflicts, but also more recent phenomena such as wars of liberation<sup>262</sup>. In contrast to those situations, the scope of application does expressly not extend onto cases of “internal disturbances and tensions, isolated and sporadic acts of violence and other acts of a similar nature”<sup>263</sup>. What is comprised by that term however remains unclear to a certain extent even when taking these points into account.

The ICTY for its jurisprudence has therefore developed an interpretation of, on the one hand, armed conflict, and, as a necessary complement, mere internal disturbances and civil unrest.

In the view of the Tribunal, “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state.”<sup>264</sup> With this definition the Tribunal adds some clarity as to the parties possibly involved in an armed conflict. The broad scope given to the term can be of help for interpreting Common Article 3 that requires the existence of an armed conflict not of an international character. Thus the important threshold of application can more easily be marked.

The Tribunal in a later decision<sup>265</sup> added an aspect on the distinction between non-international armed conflict and mere internal disturbances and civil unrest. This distinction needs to be addressed in order to later on facilitate further differentiation with a view to Article 1 (2) of Protocol II.

---

<sup>261</sup> cf. e.g. Articles 2 and 3 common to the Geneva Conventions

<sup>262</sup> cf. Article 1 (4) of Protocol I

<sup>263</sup> cf. Article 1 (2) of Protocol II

<sup>264</sup> cf. *Prosecutor v. Tadic*, paras. 67 and 70

<sup>265</sup> cf. *Prosecutor v. Mucic et al.* (“Celebici camp”), Case No. IT-96-21, Trial Chamber Judgement of 16 November 1998



According to the Tribunal, the criterion to be employed should be whether there is a protracted extent to the armed violence and to what extent the parties involved are organised.<sup>266</sup>

In the context of the ICC, the Statute can be understood to even contain a positive definition of armed conflict not of an international character, along the same lines as the ICTY view.

Article 8 (2) outlines the meaning of the term “war crimes” for the purpose of the ICC Statute. Article 8 (2) (a) and (b) refer to situations of international armed conflict, whereas Article 8 (2) (c) to (f) are dedicated to armed conflicts not of an international character. Twice – in paragraphs 2 (d) and (f) first sentence – the provision stresses the distinction between such armed conflicts and situations below that level, stating that the relevant paragraphs of the provision “... [apply] to armed conflicts not of an international character and thus [do] not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.” In paragraph 2 (f), it adds that “[Paragraph 2 (e)] applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.”

Its wording and the systematic position of the sentence suggest that this explanation is valid for paragraph 2 (e) only, without any connection to the other passages of Article 8 (2) that deal with non-international armed conflict. However other aspects speak in favour of applying this as a definition to all paragraphs in Article 8 that refer to armed conflict not of an international character. Firstly, all paragraphs 2 (c) to (f) refer to situations of non-international armed conflict and the first part of paragraph 2 (f) is identical to paragraph 2 (d), which in turn applies to paragraph 2 (c). Secondly, other kinds of armed conflict than the ones described in paragraph 2 (f) are hardly imaginable when situations of internal disturbances and similar are already excluded. Therefore the second sentence of paragraph 2 (f) can in the end be understood to be a definition of armed conflict of a non-international character for the purposes of Article 8 as a whole.<sup>267</sup>

What becomes visible from the above is that “armed conflict” receives a rather broad definition. It adds situations in which only non-governmental groups are involved and in this respect goes beyond the elements set forth e.g. in Article 1 (1) of Protocol II.

#### **4.1.2.3.2 Constatation of a common body of law being applicable for both types of armed conflict**

There is also a growing realisation that a core stock of international humanitarian law applies to both international and non-international armed

---

<sup>266</sup> cf. *Prosecutor v. Mucic et al.* (“Celebici camp”), para. 184

<sup>267</sup> cf. E/CN.4/2001/91, paras. 33 and 35, however without further reasoning

conflicts. This is reflected in a number of points in both statutes and jurisprudence.

Firstly, the jurisprudence of the ICTY refers to the decision of the International Court of Justice in the Nicaragua case, which in turn declares Common Article 3 to be an expression of “elementary considerations of humanity” in international law and that those rules form a minimum yardstick for all types of armed conflict.<sup>268</sup> Taking up that approach, the Tribunal describes the fundamental elements of the law applicable in armed conflicts not of an international character, to conclude that the general essence of the rules and principles governing international armed conflicts, as opposed to the detailed regulation these rules may contain, extends to internal armed conflict.<sup>269</sup> Further evidence to that effect is to be found in another proceeding before the ICTY. Here, the Tribunal puts forward that there is a body of principles of customary international law applicable to all armed conflicts, regardless of their status as international or non-international.<sup>270</sup>

The ICTR Statute confirms this view by expressly including violations of Article 3 common to the Geneva Conventions in its jurisdiction as set out in Article 4 of the Statute.

The third source from which one can infer that there is a common body of law applicable in all types of armed conflict is the Statute of the ICC. The Statute in Article 8 (2) paragraph (b) and (2) paragraphs (c) to (f) upholds international and non-international armed conflict as two different types of armed conflict. Nevertheless at the same time, Article 8 (2) paragraphs (c) and (e) extend the status of war crimes onto certain acts committed during armed conflict not of an international character. The fact that there is individual criminal responsibility for acts committed in both cases shows that a certain ensemble of rights is to be guaranteed in any case.

Although this point refers to armed conflict exclusively, it could have medium-term repercussions on situations below that level. The legal regimes applicable to international armed conflicts and non-international armed conflicts moving closer together could be understood to be a tendency that spreads further, towards situations of internal disturbance. It resembles a development much as the one to be observed with respect to crimes of humanity, where even the requirement of armed conflict has already partly vanished. The upcoming passage is dedicated to that aspect.

---

<sup>268</sup> cf. *Prosecutor v. Tadic*, para. 102; and International Court of Justice, *Case concerning military and paramilitary in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment of 27 June 1986, I.C.J. Rep. 1986, 14, p. 114, para. 218

<sup>269</sup> cf. *Prosecutor v. Tadic*, para. 126 (with reasoning in preceding paras. 96-127)

<sup>270</sup> cf. *Prosecutor v. Milan Martić*, Case No. IT-95-11-R61, Review of the Indictment Pursuant to rule 61, ICTY Trial Chamber, 8 March 1996, as quoted in Patel, Faiza and La Rosa, Anne-Marie, *The Jurisprudence of the Yugoslavia Tribunal: 1994-1996*, in *European Journal of International Law* vol. 8 (1997), 123, p.133

#### **4.1.2.3.3 Crimes against humanity: no connection required between act and international armed conflict**

The two Tribunals' Statutes and the Statute of the ICC all prohibit certain acts as crimes against humanity.<sup>271</sup> As illustrated e.g. by Article 5 of the ICTY Statute, this includes murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds; and other inhumane acts.

It is noteworthy that, in all the texts, the nature of an act as a crime against humanity does not depend on it being committed during international armed conflict.

According to the ICTY Statute, Article 5, only connection to an armed conflict is necessary, "whether international or internal in character"<sup>272</sup>.

The ICTR Statute does go further by not including a reference to armed conflict at all in its Article 3 outlining crimes of humanity. Neither does the ICC Statute require a crime against humanity to be committed in the context of armed conflict, Article 7 of the Statute not containing a prerequisite to that effect. It is sufficient that the act be committed "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack"<sup>273</sup>.

Consequently, the acts prohibited therein are prohibited even in situations that amount to internal disturbances without reaching the threshold of armed conflict. Seen from the reverse perspective, this enhances protection of the individual in these circumstances.

#### **4.1.2.3.4 Inclusion of non-state actors**

The involvement of non-state actors in crisis situations has generally become an issue of increasing importance. International criminal law has taken this development up. As the most recent text, the Statute of the ICC takes account of non-state groups in a number of aspects.

In its provision on crimes against humanity, Article 7, the Statute makes no general mention of a requirement of official capacity for committing the crimes listed; however for particular crimes the requirements differ. The crimes of torture and enforced disappearances may serve for further explanation.

The prohibition of torture is considered to be part of customary international law<sup>274</sup>, as also reiterated by the ICTY in its jurisprudence<sup>275</sup>. It has

---

<sup>271</sup> cf. Article 5 ICTY Statute, Article 3 ICTR Statute, Articles 5 (1) (b) and 7 ICC Statute

<sup>272</sup> cf. Article 5 ICTY Statute

<sup>273</sup> cf. Article 7 (1) of the ICC Statute

<sup>274</sup> cf. e.g. *Prosecutor v. Mucic et al.* ("Celebici camp"), para. 452 – 454

employed the definition established by Article 1 (1) of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>276</sup>. Among other elements, in the Convention's definition the act must be committed by a public official or other person acting in an official capacity, Article 1 (1).

In the Statute of the ICC, the crime of torture receives a broader definition. Article 7 (2) (e) does not refer to the criterion of the accused acting in an official capacity. This enlarges the range of possible perpetrators upon non-state actors involved.

Article 7 (1) (i) in connection with (2) (i) of the ICC Statute declares enforced disappearances of persons "by, or with the authorization, support or acquiescence of, a State or a political organization" a crime against humanity. The provision thus explicitly names the possibility of the act being committed by an entity other than a state. Hence, one could conceive any non-state actors to be included.

At the same time it has to be noted that according to Article 7 (1) of the ICC Statute, a crime against humanity is an act committed "as part of a widespread or systematic attack directed against any civilian population". "Attack" in turn according to Article 7 (2) (a) is defined to mean that the acts must be committed "pursuant to or in furtherance of a State *or organisational policy* to commit such attack" (emphasis added). This formulation leaves room for the interpretation that a certain degree of organisation might be required after all, despite the broad scope originally suggested in Article 7 (2) (e) and (i) of the ICC Statute.

#### **4.1.2.4 Concluding observations**

The Statutes and jurisprudence discussed demonstrate that there is an awareness of both the need and the possibilities for clarification. All the sources mentioned set about specifying certain basic elements of international humanitarian law, which in turn serves more comprehensive protection for the individual.

Main aspects contributed to, as has been seen, are a definition of the characteristics of armed conflict on the one hand and of internal disturbances on the other hand. Along with that, there is a confirmation for the development of a common body of law to apply to all types of armed conflict; for crimes against humanity, even no armed conflict is required any more under the ICC Statute.

In all of the above, two basic points become noticeable.

---

<sup>275</sup> cf. *Prosecutor v. Mucic et al.* ("Celebici camp"), paras. 455 – 459; *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Trial Chamber II judgement of 10 December 1998, paras. 159 – 162

<sup>276</sup> 1465 U.N.T.S. 85, adopted 10 December 1984, entry into force 26 June 1987

In some respects the differentiation between international and non-international armed conflict is receding; rules that apply in international armed conflict are extended onto non-international armed conflict, the remaining criterion being merely the existence of armed conflict. This entails a more easily recognisable common body of law applicable, which ultimately improves the position of the individual. Especially with regard to non-international armed conflicts, where only a few conventional provisions expressly apply – that is, mainly Common Article 3 – this is a major progress. The ICTR and ICC Statutes’ provision that crimes against humanity can be committed under any kind of circumstances, de-linked from armed conflict, further adds to this.

Not insisting any more on an official capacity of the accused for a number of crimes gives room to include non-state actors as responsables. With a view to the fact that non-state armed groups are regularly involved, this is a considerable achievement of the ICC Statute.

However at the same time several aspects merit further consideration.

As regards a possible inclusion of non-state actors just mentioned, there are doubts connected to that as well. Non-state armed groups were not involved in the drafting of the Statute. It will therefore be questionable to what extent these groups will respect the rules incorporated therein<sup>277</sup>, especially when keeping in mind that they will not be able to directly bring a case before the ICC<sup>278</sup>.

Furthermore, for crimes against humanity, non-state actors are included in the scope of the provision but at the same time there is the requirement of the act following an organisational policy, thus insinuating a certain degree of organisation for the non-state armed group. Some crimes also presuppose the existence of a “political organisation”. These terms remain to be specified.

An issue similar to the latter question and that remains largely open for interpretation is that of the relationship of the abovenamed definition of “armed conflict” to the requirements of the scope of applicability of Protocol II. In order for Protocol II to be applicable, the organised armed group needs to “under responsible command, “exercise such control over a part of its territory as to enable [it] to carry out sustained and concerted military operations and to implement this Protocol”<sup>279</sup>. The control element, central to the threshold of application, does not feature in any of the texts dealt with above. Some authors specifically note this omission, vaguely implying that the existence of “armed conflict” is lower than the one for applicability of Protocol II and that therefore the control issue is losing

---

<sup>277</sup> cf. Spiliopoulou Åkermark, p. 47

<sup>278</sup> the only ones to directly initiate proceedings being the States parties, the Security Council, and the Prosecutor, cf. Articles 13 – 15 of the ICC Statute

<sup>279</sup> cf. Article 1 (1) of Protocol II

importance.<sup>280</sup> However it is to be noted that in the context in which the definition of armed conflict is dealt with, the applicability requirements of Protocol II are not the subject under examination. Rather, the Tribunal seeks to establish the existence of an armed conflict in order for the case to fall under its Statute. For the purposes of applicability of Protocol II, the control element can thus be considered to still be of relevance.<sup>281</sup> Nevertheless there is still room for clarification.

Beyond that, it needs to be kept in mind international criminal law has its inherent limitations:

In contrast to the Tribunals' restricted missions, the ICC's mandate is constructed as a broader one. However in order to effectively make use of this, the ICC also depends on the states' collaboration. First of all, its jurisdiction only covers crimes that have been committed within a state party's territory or by a national of a state party, Article 12 (2). At the same time a number of states have not signed the Statute yet or refuse to ratify it. Furthermore, the ICC will only be able to deal with acts committed after its entry into force, Article 11 (1).

## **4.2 Compilations of standards for practical purposes: Illustrations**

In the efforts of clarifying the rules applicable in the different situations of armed conflict and internal disturbances, as has been shown, the problematic aspects of the thresholds to be reached and involvement of non-state actors have already made some progress, as has the area of derogability and non-derogability of human rights.

The individual approaches outlined above however deal with a number of particular points and do not, and do not intend to, cover the entire complex. In addition, the aspects they contribute are spread over a variety of sources such as judgements or monitoring bodies' opinions. In order to in practice make use of the rules and explanations thus identified and highlighted, they will therefore have to be assembled in some way.

Throughout the debate, attention has been drawn to the fact that it is important to keep in mind the use that one intends to make of such an assembly of rules.<sup>282</sup> The overall aim being an improvement of protection, a variety of uses in practice is imaginable for compilations of the rules thus specified. Using the rules in actual crisis situations in order to establish a reference frame for all parties involved is the possible application that

---

<sup>280</sup> cf. E/CN.4/2001/91, paras. 14, 35

<sup>281</sup> cf. Spiliopoulou Åkermark, p. 39

<sup>282</sup> cf. E/CN.4/2000/94, para. 13

would come to mind first. Beyond that, an ensemble of standards could also be employed for dissemination purposes and in education and training.<sup>283</sup>

Indeed various such compilations have emerged over the past years in order to implement these possibilities in practice, with a view to both use at field level and for educational purposes. Under the title of ‘codes of conduct’, ‘principles’, or ‘agreement on ground rules’, they have for the most part been drafted for application in concrete cases where humanitarian work was being conducted in a state. A further type of compilation on the other hand rather addresses certain situations in general, aiming to assemble all relevant rules. Yet another approach tries to specifically engage non-state actors in commitment for certain rules of international law. The various kinds of tools are going to be considered here in turn.

#### 4.2.1 Compilations of a more general nature

Some documents deal with specific situations in general and set out to provide a condensed set of fundamental rules applicable. Two examples are presented below by way of an overview.

As guidance for humanitarian personnel in the field in general, the UN Office for the Coordination of Humanitarian Affairs (OCHA) in 1999 has developed *An Easy Reference to International Humanitarian Law and Human Rights Law*<sup>284</sup> (hereinafter: Easy Reference).

It is constructed to act as a quick guide to rules applicable in internal armed conflict. Accordingly, it is divided into three sections. The first section is the actual ‘tool’ intended. It gives examples of seven situations (denial of humanitarian assistance and humanitarian access; forced displacement; arbitrary executions, systematic killings of civilians; torture, mutilation, rape, beatings; arbitrary arrest, detention, taking of hostages; forced conscription of children; targeting of humanitarian personnel) which humanitarian personnel might encounter in the field. For each of the issues it then provides a short list of international law provisions relevant to the situation. The ‘backbone’ to this tool is contained in Section II, where there is an outline of the scope of the Easy Reference and of the concepts of international humanitarian law and human rights law in general. An annex naming key international instruments and the ratification status of some of them makes up the third section.

In listing the relevant international standards for each issue, the text draws on international humanitarian law and human rights law as well as the

---

<sup>283</sup> cf. Jean-Daniel Vigny and Cecilia Thompson, *Standards fondamentaux d'humanité: quel avenir?*, *Revue internationale de la Croix Rouge*, vol. 82 (2000), 917, p. 938

<sup>284</sup> *An Easy Reference to International Humanitarian Law and Human Rights Law* (New York: UN Office for the Coordination of Humanitarian Affairs, 1999); available at ReliefWeb <[www.reliefweb.int/ocha\\_ol/pub/Easy References to IHL and HR.htm](http://www.reliefweb.int/ocha_ol/pub/Easy%20References%20to%20IHL%20and%20HR.htm)> (12 November 2004)

ICTY, ICTR and ICC Statutes and, occasionally, other international instruments.

Similar in its approach but with a different background, the *Guiding Principles on Internal Displacement*<sup>285</sup> address the specific needs of internally displaced persons. This compilation is the result of extensive work by the UN Secretary-General's Representative on internally displaced persons<sup>286</sup> in collaboration with other pertinent actors such as experts from international humanitarian organisations, from NGOs and the academic community.<sup>287</sup>

The document defines internally displaced persons as “persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result, of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.”<sup>288</sup> Hence its scope of application covers a broad range of possible situations, including armed conflict but also cases below that level. The principles are intended to be observed by all authorities, groups and persons.<sup>289</sup> The document explicitly states that “[t]he observance of these principles shall not affect the legal status of any authorities, groups or persons involved”.<sup>290</sup>

The rights assembled in the Guiding Principles on Internal Displacement stem from international humanitarian law as well as human rights law and are grouped according to the different phases of displacement (protection against displacement, protection and assistance during displacement and guarantees during return or alternative settlement and reintegration).

A project that also has to be named in this respect is the *ICRC Study on Customary Rules of International Humanitarian Law*, yet to be published.<sup>291</sup> The report is based on extensive research into state practice as reflected in international as well as national sources and is to compile customary rules of international humanitarian law applicable in international and non-international armed conflicts.<sup>292</sup> Its two volumes envisaged are to a large part going to deal with rules regarding the conduct of hostilities; one

---

<sup>285</sup> contained as annex in E/CN.4/1998/53/Add.2, pp. 5 – 14

<sup>286</sup> The mandate of the Representative of the Secretary-General on internally displaced persons derives from resolution 1992/73 of 5 March 1992 of the Commission on Human Rights, approved by the Economic and Social Council in its decision 1992/243 of 20 July 1992, cf. E/CN.4/1993/35, para. 9

<sup>287</sup> cf. E/CN.4/1998/53/Add.2, para. 12

<sup>288</sup> cf. E/CN.4/1998/53/Add.2, p. 5, Introduction, para. 1

<sup>289</sup> cf. E/CN.4/1998/53/Add.2, p. 6, Principle 2, para. 1, first sentence

<sup>290</sup> cf. E/CN.4/1998/53/Add.2, p. 6, Principle 2, para. 1, second sentence

<sup>291</sup> currently in its final stage of preparation, cf. E/CN.4/2004/90, para. 5;

<sup>292</sup> cf. the announcement by the ICRC, available at

<<http://www.icrc.org/Web/Eng/siteeng0.nsf/iwplList133/CE72DB35175CA0FEC1256D330053FA7B>> (8 December 2004)



part is specifically dedicated to the treatment of civilians and combatants hors de combat.<sup>293</sup>

## 4.2.2 Agreements in specific cases of humanitarian assistance

In a number of cases of international humanitarian assistance being provided in states, there have been agreements at field level, linking the various parties involved; in general, this comprises humanitarian agencies (including NGOs), official authorities of the state concerned, as well as non-state actors. These accords, concluded between the agency or agencies and the authorities and/or groups involved, aim at implementing humanitarian assistance.

Such agreements have been concluded e.g. in the Democratic Republic of Congo<sup>294</sup>, in Timor<sup>295</sup>, Sierra Leone<sup>296</sup>, Sudan<sup>297</sup>, and Liberia<sup>298</sup>. Given their specific focus on humanitarian assistance, they largely contain

---

<sup>293</sup> cf. the provisional table of contents available on the ICRC website at <<http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList:133/CE72DB35175CA0FEC1256D330053FA7B#a1>> (8 December 2004)

<sup>294</sup> *Principles of engagement for emergency humanitarian assistance in the Democratic Republic of Congo* (in the following footnotes: *the Congo Principles*), in: United Nations Consolidated Inter-Agency Appeal for the Democratic Republic of the Congo, January – December 2000 (Geneva: UN Office for the Coordination of Humanitarian Affairs (OCHA), November 1999), available at ReliefWeb

<<http://www.reliefweb.int/library/appeals/drc00.pdf>> (25 November 2004), pp. 66 et seq.

<sup>295</sup> *Humanitarian Framework for East and West Timor*, in: United Nations Consolidated Inter-Agency Appeal for East Timor Crisis, October 1999 – June 2000, Geneva: UN Office for the Coordination of Humanitarian Affairs (OCHA), October 1999, available at ReliefWeb <<http://www.reliefweb.int/library/appeals/etimor99.zip>> (24 November 2004), pp. 13 et seq. (East Timor Section), p. 131 (West Timor Section)

<sup>296</sup> *Code of Conduct for Humanitarian Assistance in Sierra Leone* (in the following footnotes: *the Sierra Leone Code of Conduct*), in: United Nations Consolidated Inter-Agency Appeal for Sierra Leone, January – December 1999 (New York and Geneva: UN Office for the Coordination of Humanitarian Affairs (OCHA), December 1998), available at ReliefWeb <<http://www.reliefweb.int/library/appeals/sle99.pdf>> (23 November 2004), pp. 86 et seq.

<sup>297</sup> two agreements have been concluded in Sudan over the course of time:

*SPLM/OLS Agreement on Ground Rules* (hereinafter: *the Sudan Ground Rules*), July 1995; document available as Appendix 2 in Mark Bradbury et al., *The 'Agreement on Ground Rules' in South Sudan*, HPG Report 4, Study 3 in: *The Politics of Principle: the principles of humanitarian action in practice*. (London: The Humanitarian Policy Group at the Overseas Development Institute, 2000), pp. 74 et seq.

Government of Sudan, Sudan Peoples' Liberation Movement and the United Nations-Operation Lifeline Sudan, *Agreement on the Implementation of Principles Governing the Protection and Provision of Humanitarian Assistance to War Affect Civilian Populations*, Geneva, 15 December 1999, available at ReliefWeb <<http://www.reliefweb.int/w/rwb.nsf/0/23fe1d7d401215dec12568540034daa2?OpenDocument>> (24 November 2004)

<sup>298</sup> *Principles and Protocols for Humanitarian Operations* (in the following footnotes: *PPHO*), November 1996, extracts available at <[http://coe-dmha.org/Unicef/HPT\\_Session8Handout8\\_3.htm](http://coe-dmha.org/Unicef/HPT_Session8Handout8_3.htm)> (6 December 2004)

provisions aimed at coordinating and facilitating the process in practice. These include e.g. rules on employment of staff<sup>299</sup>, on the use of armed escorts<sup>300</sup>, freedom of access to aid beneficiaries<sup>301</sup>, or monitoring and evaluation of the engagement<sup>302</sup>.

However there are usually also general statements of principles which shall apply for all parties. Among such principles as impartiality/neutrality of humanitarian aid, transparency, or accountability, also references humanitarian law and human rights are to be found.

The *Code of Conduct for Humanitarian Assistance in Sierra Leone* lists human rights in its statement of principles, stating that “[p]rotection of basic human rights is a fundamental aspect of humanitarian action. The fundamental human right of all persons to live in safety and dignity must be affirmed and protected.”<sup>303</sup> The text also mentions humanitarian law and human rights instruments, most notably the Geneva Conventions and the Convention on the Rights of the Child.<sup>304</sup> In its passage on guiding principles for states and non-state entities, it holds insurgent groups and militia to the same standard of responsibility as governments.<sup>305</sup>

Also the *Principles of engagement for emergency humanitarian assistance in the Democratic Republic of Congo* contain a passage on human rights, to the effect that “[t]he promotion of human rights is an essential part of humanitarian assistance and may range from passive monitoring of respect for human rights to pro-active human rights advocacy. These activities will be guided by International Human Law and by the mandates given by International Instruments to various humanitarian organisations such as OHCHR, UNHCR and ICRC.”<sup>306</sup> As the text has been endorsed by UN agencies, NGOs, the Rassemblement Congolais pour la Démocratie, and the Government of the Democratic Republic of Congo<sup>307</sup>, this statement – albeit falling short of the one formulated for Sierra Leone – is valid for all parties involved.

---

<sup>299</sup> cf. e.g. Sudan Ground Rules, chapter D

<sup>300</sup> cf. PPHO, section Protocols, chapters Escorts and Criteria for armed escorts; Congo Principles, chapter 2) Protocol, section Escorts; Sierra Leone Code of Conduct, chapter Specific Operating Guidelines, section Needs Assessment

<sup>301</sup> cf. Congo Principles, chapter 2) Protocol, section Freedom of access

<sup>302</sup> cf. Congo Principles, chapter 2) Protocol, section Monitoring and Evaluation; Sudan Ground Rules, chapter A. Statement of humanitarian principles, para. 4.iii; Sudan Agreement, para. 6

<sup>303</sup> cf. Sierra Leone Code of Conduct, chapter Statement of Principles, section Human Rights; the Sudan Ground Rules, chapter A. Statement of humanitarian principles, para. 7, make a similar point

<sup>304</sup> cf. Sierra Leone Code of Conduct, second paragraph of introduction to Statement of Principles; cf. also the Sudan Ground Rules, introductory paragraph

<sup>305</sup> cf. Sierra Leone Code of Conduct, chapter Guiding Principles for States and Non-State Entities

<sup>306</sup> cf. Congo Principles, chapter 1) Overarching Principles, section Human Rights

<sup>307</sup> cf. United Nations Inter-Agency Consolidated Appeal for the Democratic Republic of the Congo, January – December 2000, annex I, pp. 64 et seq., p. 65

The text that most clearly puts all parties to the conflict under an obligation to guarantee to beneficiaries protection according to international humanitarian law and human rights law is the *Agreement on the Implementation of Principles Governing the Protection and Provision of Humanitarian Assistance to War Affect Civilian Populations* (hereinafter: the Sudan Agreement). Concluded between the Government of Sudan, Sudan Peoples' Liberation Movement (SPLM) and the United Nations – Operation Lifeline Sudan, the agreement in its paragraph 3 recognises the responsibility of the government and of the movement for guaranteeing these rights. The passage specifically mentions that “[t]his provision applies to the SPLM even though it is not a formal signatory to the various treaties and conventions that constitute International Human Rights Law.”

### 4.2.3 Approach specifically engaging non-state actors

Yet another approach specifically sets out to commit non-state actors to respect for international humanitarian norms.

An international non-governmental humanitarian organisation, Geneva Call, undertakes to engage non-state actors in adherence to the antipersonnel mine ban stipulated in the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction<sup>308</sup>, as well as to other humanitarian norms.<sup>309</sup> Non-state actors cannot participate in the drafting of, and cannot be a party to, a treaty under international law. The organisation's project provides a mechanism for them to nevertheless express their will to be bound by the rules set forth in the Mine Ban Treaty. Non-state parties can sign a *Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action*<sup>310</sup> (hereinafter: Deed of Commitment), for which document the Government of the Republic and Canton of Geneva acts as a custodian.<sup>311</sup> In the Deed of Commitment, the signatories subject themselves to adherence to a total ban of anti-personnel mines, and to cooperation in mine action, as well as to monitoring and verification measures.<sup>312</sup> The Deed of Commitment explicitly states that the signatory's legal status shall remain unaffected.<sup>313</sup>

---

<sup>308</sup> Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction of 18 September 1997, entry into force 1 March 1999

<sup>309</sup> cf. the organisation's website at <[www.genevacall.org/home.htm](http://www.genevacall.org/home.htm)> (12 November 2004)

<sup>310</sup> available on the organisation's website at

<[www.genevacall.org/about/testi-mission/doc04oct01.htm](http://www.genevacall.org/about/testi-mission/doc04oct01.htm)> (12 November 2004)

<sup>311</sup> cf. Deed of Commitment, para. 10

<sup>312</sup> cf. Deed of Commitment, paras. 1 – 3

<sup>313</sup> cf. Deed of Commitment, para. 6

As of November 2004, 26 armed groups have signed this Deed of Commitment.<sup>314</sup> Visible steps have already been undertaken towards implementation of the obligations entered into. This emerges from the first conference of signatories which took place in the autumn of 2004.<sup>315</sup>

#### 4.2.4 Observations

In all of the documents examined, a suitability for practical use can be observed, even though the range of protection covered differs according to the nature of the texts. The texts of a more general nature, being more comprehensive, offer a broader spectrum of possible uses. Thus, the Easy Reference or the The Guiding Principles on Internal Displacement lend themselves to use both as guidance in field work and for dissemination. The same is valid for the forthcoming ICRC study, which in addition may also be employed for reference e.g. by an international criminal tribunal or court.

The field agreements concluded in various cases of humanitarian assistance are, by their very nature, more limited in their sphere of applicability. They can still be put to use as examples for similar cases. Furthermore, also a field agreement may serve training purposes: a training manual on humanitarian principles prepared by UNICEF refers to the 1996 SPLM-United/Operation Lifeline Sudan Agreement on Ground Rules<sup>316</sup> and the *Principles and Protocols for Humanitarian Operations* for Liberia, among other materials.<sup>317</sup>

Beyond that, looking at the basic features of the texts, common elements can be noted as regards the addressees, the situations covered and the body of law drawn upon.

Three tendencies are visible in these themes (To what extent the ICRC Study on Customary Rules of International Humanitarian Law may fit into these considerations can only be analysed once the report has issued).

An increasing integration of non-state actors is to be noted. The documents seek to address themselves to all parties possibly involved in a situation, be

---

<sup>314</sup> as of November 2004, cf. the list published by the organisation at <[www.genevacall.org/resources/testi-referencematerials/deeds-signatory-groups.htm](http://www.genevacall.org/resources/testi-referencematerials/deeds-signatory-groups.htm)> (12 November 2004); among them, there are groups in Burma, Burundi, India, Iraq, the Philippines, Somalia and Sudan.

<sup>315</sup> cf. Geneva Call press release of 4 November 2004 for First Meeting of Signatories to Geneva Call's Deed of Commitment, available at <<http://www.genevacall.org/news/testi-pressreleases/gskonference02nov2004.doc>> (12 November 2004). A full report of the meeting is to be expected for the end of December 2004.

<sup>316</sup> virtually identical in content to the Sudan Ground Rules (cf. supra pp. 60/61, footnote 297), cf. Bradbury, p. 3, para. 1

<sup>317</sup> cf. *Humanitarian Principles Training: A Child Rights Protection Approach to Complex Emergencies*, Unicef, 1999, available at <<http://coe-dmha.org/unicef/unicef2fs.htm>> (6 December 2004), session 8, handouts 8.1 and 8.3

it a concrete one dealt with (as is the case with the agreements at field level), be it a text of a more general nature (such as e.g. the Guiding Principles on Internal Displacement). The Geneva Call Deed of Commitment takes a special position in that it even exclusively aims at non-state actors.

It appears that somewhat less attention is attributed to the specific status of a given situation as an international or non-international armed conflict. The texts do have a different starting point and are thus not as comparable in this respect: The field agreements do not need to theoretically establish their scope of applicability in advance but can confine themselves to referring to the situation in question. The more general texts, on the other hand, need to define theirs; the Guiding Principles on Internal Displacement are the most progressive one in that respect, stipulating applicability in all kinds of circumstances.

Finally, one can see a growing recognition and use of the interconnection between the various branches of international law relevant in emergency situations. For their respective purposes, the documents draw upon a body of law that comprises both international humanitarian law and international human rights law. The Geneva Conventions as well as the Convention on the Rights of the Child are sometimes explicitly mentioned.<sup>318</sup>

All these points bear a certain resemblance to facets of approaches undertaken earlier, most notably aspects of the debate on a Declaration on Minimum Humanitarian Standards. There, the striving had been for a set of rules to be applied to every actor without affecting its status, no matter what the status of the situation under international law, and including relevant guarantees taken from various sources of law.

In the compilations presented here, some of these goals can be found. At the same time, several of the weaknesses to a Declaration on Minimum Humanitarian Standards, as identified above, are being avoided: the documents do not claim universal applicability, but rather are limited to a certain emergency situation (the agreements) or a certain phenomenon (internal displacement). Unlike the declaration, they take account of non-state actors with a view to including them in negotiations on the texts. This becomes most noticeable with an agreement such as the Sudan Agreement, to which the non-state entity is a regular party despite its status, equally subjected to rather detailed obligations. Also the Guiding Principles on Internal Displacement enjoy respect not least because, due to the integrative approach in their drafting, their perspective is not exclusively state-related.<sup>319</sup>

This is not to say that there are no drawbacks to the documents as well. The field agreements in particular do not contain very specific lists of norms for protection of the individual. Furthermore they sometimes suffer from the

---

<sup>318</sup> e.g. in the Sierra Leone Code of Conduct and the Sudan Ground Rules, cf. supra, p. 62 , footnote 304

<sup>319</sup> cf. Spiliopoulou Åkermark, p. 36

uncertainty about their status as a text<sup>320</sup> and from a certain incompleteness.<sup>321</sup> At the same time it needs to be kept in mind that these documents are not primarily instruments aimed at the protection of fundamental rights, but rather texts on the provision of humanitarian assistance and, consequently, of a somewhat technical nature.

However, it must be borne in mind that the mere existence of these field agreements already reflects a not unconsiderable progress made; the awareness of its existence and the different possible interpretations could be said to be a least equally important as the actual provisions of the text.<sup>322</sup> In addition, studies confirm that, for the purposes of involving non-state actors at least, legal uncertainties have not hindered a pragmatic approach in the practice, drawing on all sources of law that appear effective.<sup>323</sup>

---

<sup>320</sup> problematic aspects being e.g. lack of a legal status under national or international law; unclarity about to whom it applied and what its relationship was to agencies arrived on site after the agreement's development; cf. Philippa Atkinson and Nicholas Leader, *The 'Joint Policy of Operation' and the 'Principles and Protocols of Humanitarian Operation' in Liberia*, HPG Report 3, Study 2 in: *The Politics of Principle: the principles of humanitarian action in practice* (London: The Humanitarian Policy Group at the Overseas Development Institute, 2000), p. 21, section The status of the PPHO. Although the study refers to the PPHO for Liberia, these points can be seen as translatable onto similar scenarios.

<sup>321</sup> e.g. the lack of a procedure for adjustment later on, and the lack of a convincing compliance mechanism, cf. Atkinson, p. 21, section The status of the PPHO (see further explanation in footnote 320)

<sup>322</sup> cf. Atkinson, p. 20, section 2.1.3

<sup>323</sup> cf. *Ends & means*, p. 63

## 5 Conclusion

The outset of this thesis was formed by the question whether, due to considerable changes in the landscape of crisis situations in the world, the legal framework governing internal crisis situations provides for sufficient protection for the individual. The thesis was to analyse the legal framework as to its shortcomings and to identify the instrumentarium available in international law for possible improvement of the framework as such.

We have established as a basis that there indeed are uncertainties in the legal framework governing internal crisis situations. Provisions of international humanitarian law are only applicable after the threshold of ‘armed conflict’ has been reached, international human rights law is subject to derogation and thus not applicable to its full extent. The combination of the two leads to a grey zone in the legal framework.

As an instrumentarium to counter this weakness, two main methods have been considered that can be employed to achieve a strengthened legal conditions for protection of the individual: creation of a new universal document of international law, and recourse to the existing framework of rules.

Creation of a new universal document of international law as a remedy methodologically entails more drawbacks than advantages. Either of its two variations examined will not satisfactorily solve the problematic points that lie at the beginning of the debate. Most prominently, both the proposal of an optional protocol to Article 4 of the International Covenant on Civil and Political Rights and the Declaration of Minimum Humanitarian Standards hold the danger of actually reducing protection instead of improving it, because they might by their approach make encourage states to maintain a lower level of protection than the one envisaged in the new text.

The second approach, drawing on the existing framework, has considerably more positive aspects to it. The interpretative work by the Human Rights Committee and the international criminal tribunals, and the statutes of the ICTY, ICTR and ICC clarify basic points in the framework applicable in internal crisis situations and thus strengthen the conditions for protection of the individual. Compilations of standards for specific purposes fall back on existing structures and at the same time reflect a number of the positive features of the approach of creating a new universal instrument in the form of a declaration of minimum humanitarian standards but without its drawbacks.

Within the entirety of the debate we can generally note that the various fields of law involved – humanitarian law, human rights law, international criminal law, refugee law – are growing closer and there is an increasing

realisation of their interdependencies and interaction. This is reflected in the way the approaches looked at seek to integrate contributions from the different sources of law.

Non-state actors have also received increased attention, and the question of how to adequately deal with them remains an interesting and urgent topic. New practical steps can be found in the project of a Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines. A first conference meeting attended by over 20 signatories to the Deed of Commitment took place in November 2004. The conference report due for the end of the year can be expected to provide material and issues for additional research and study.

To carry on the process of strengthening the framework of protection for the individual by recourse to existing structures, the current developments will have to be closely observed and made use of for contributions. Ratification by states of international humanitarian law and human rights instruments is an important issue; a follow-up of previous efforts to increase ratification suggests itself. Future jurisprudence in the field of international criminal law will continue to clarify the contents and scope of international law with relevance to internal crisis situations. Especially with regard to non-international armed conflicts, in which area treaty law is not as strongly developed, also the forthcoming ICRC study mentioned can be expected to bring additional positive elements into the discussion.



# Bibliography

## Books and Articles

**Eide**, Asbjörn et al. *Current Development: Combating Lawlessness in Gray Zone Conflicts Through Minimum Humanitarian Standards*. 89 American Journal of International Law (1995), 215

**Ghandhi**, P.R. *The Human Rights Committee and Derogation in Public Emergencies*. German Yearbook of International Law vol. 32 (1989), 323

**Ipsen**, Knut. *Völkerrecht*. 4. Auflage. München: C.H. Beck, 1999

**Meron**, Theodor and Allan Rosas. *Current Development: A Declaration of Minimum Humanitarian Standards*. 85 American Journal of International Law (1991), 375

**Nowak**, Manfred. *U.N. Covenant on Civil and Political Rights: CCPR Commentary*. Kehl am Rhein, Strasbourg, Arlington: Engel 1993

**Ouguerguez**, Fatsah. *L'absence de clause de dérogation dans certains traités relatifs aux droits de l'homme: Les réponses du droit international général*. Revue générale de droit international public tome xcvi (1994), 287

**Patel**, Faiza and Anne-Marie La Rosa. *The Jurisprudence of the Yugoslavia Tribunal: 1994-1996*. European Journal of International Law vol. 8 (1997), 123

**Pictet**, Jean S. (ed.). *The Geneva Conventions of 12 August 1949 – Commentary*. Geneva: International Committee of the Red Cross, 1952

**Prémont**, Daniel et al. (eds.). *Droits Intangibles et États d'Exception - Non-Derogable Rights And States of Emergency*. Organisation internationale et relations internationales no.36. Bruxelles: Bruylant, 1996

**Roberts**, Adam and Richard Guelff (eds.). *Documents on the Laws of War*. Second edition. Oxford: Clarendon Press, 1989

**Robertson**, Arthur Henry and John Graham Merrills. *Human Rights in the World - An introduction to the study of the international protection of human rights*. Third edition. Manchester, New York: Manchester University Press, 1989

- Sandoz, Yves et al. (eds.).** *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949.* International Committee of the Red Cross. Geneva: Martinus Nijhoff Publishers, 1987
- Svensson-McCarthy, Anna-Lena.** *The international law of human rights and states of exception with special reference to the travaux préparatoires and case-law of the international monitoring organs.* International Studies in Human Rights series vol. 54. The Hague, Boston: Martinus Nijhoff Publishers, 1998
- van Dijk, P. and G.H.J. van Hoof.** *Theory and Practice of the European Convention on Human Rights.* Second Edition. Deventer/Boston: Kluwer Law and Taxation Publishers, 1990
- Vigny, Jean-Daniel and Cecilia Thompson.** *Standards fondamentaux d'humanité: quel avenir ?* Revue internationale de la Croix Rouge vol. 82 (2000), 917
- Wallace, Rebecca M. M.** *International Law.* Second edition. London: Sweet & Maxwell, 1992

### **Studies**

- Atkinson, Philippa and Nicholas Leader.** *The 'Joint Policy of Operation' and the 'Principles and Protocols of Humanitarian Operation' in Liberia.* HPG Report 3. Study 2 in: The Politics of Principle: the principles of humanitarian action in practice. London: The Humanitarian Policy Group at the Overseas Development Institute, 2000
- Bradbury, Mark et al.** *The 'Agreement on Ground Rules' in South Sudan.* HPG Report 4. Study 3 in: The Politics of Principle: the principles of humanitarian action in practice. London: The Humanitarian Policy Group at the Overseas Development Institute, 2000
- Declaration of Minimum Humanitarian Standards.* Second and revised edition. Institute for Human Rights. Turku/Åbo: Åbo Akademi University, 1997
- Ends & means: human rights approaches to armed groups.* Geneva: International Council for Human Rights Policy, 2000
- Spiliopoulou Åkermark, Sia.** *Humanitär rätt och mänskliga rättigheter: Samspel under utveckling.* Stockholm: Totalförsvarets folkrättsråd, 2002

## **UN-related documents**

In so far as the documents have an official UN document symbol, the characterisation as a UN document will be omitted in footnotes. Thus, e.g. UN document E/CN.4/1995/23 will be cited as E/CN.4/1995/23.

### **Security Council**

S/RES/827 (1993)	Resolution adopted by the Security Council at its 3217 <sup>th</sup> meeting, on 25 May 1993
S/RES/955 (1994)	Resolution adopted by the Security Council at its 3454 <sup>th</sup> meeting, on 8 November 1994

### **Commission on Human Rights**

E/CN.4/1993/35	Comprehensive study prepared by Mr. Francis M. Deng, Representative of the Secretary-General on the human rights issues related to internally displaced persons, pursuant to Commission on Human Rights resolution 1992/73
Resolution 1995/29	Minimum Humanitarian Standards, adopted on 3 March 1995
E/CN.4/1996/80	Minimum humanitarian standards Report of the Secretary-General prepared pursuant to Commission resolution 1995/29
E/CN.4/1996/80/Add.1	Minimum humanitarian standards Report of the Secretary-General prepared pursuant to Commission resolution 1995/29
E/CN.4/1996/80/Add.2	Addendum Minimum humanitarian standards Report of the Secretary-General prepared pursuant to Commission resolution 1995/29
E/CN.4/1996/80/Add.3	Addendum Minimum humanitarian standards Report of the Secretary-General prepared pursuant to Commission resolution 1995/29
Resolution 1997/21	Addendum Minimum humanitarian standards,

E/CN.4/1997/77	adopted on 11 April 1997 Minimum humanitarian standards Report of the Secretary-General
E/CN.4/1997/77/Add.1	Minimum humanitarian standards Report of the Secretary-General Addendum
E/CN.4/1998/53/Add.2	Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39 Addendum Guiding Principles on Internal Displacement
E/CN.4/1998/87	Minimum humanitarian standards Analytical report of the Secretary- General submitted pursuant to Commission on Human Rights resolution 1997/21
E/CN.4/1998/87/Add. 1	Minimum humanitarian standards Analytical report of the Secretary- General submitted pursuant to Commission on Human Rights resolution 1997/21 Addendum
E/CN.4/1999/92	Fundamental standards of humanity Report of the Secretary-General submitted pursuant to Commission resolution 1998/29
E/CN.4/2000/94	Fundamental standards of humanity Report of the Secretary-General submitted pursuant to Commission resolution 1999/65
E/CN.4/2000/145	Letter dated 30 March 2000 from the head of the delegation of Sweden to the fifty-sixth session of the Commission on Human Rights addressed to the Chairman of the Commission on Human Rights Annex: Report of the Expert Meeting on Fundamental Standards of Humanity, Stockholm, February 2000
E/CN.4/2001/91	Fundamental standards of humanity Report of the Secretary-General submitted pursuant to Commission resolution 2000/69
E/CN.4/2002/103	Fundamental standards of humanity Report of the Secretary-General submitted pursuant to Commission

E/CN.4/2004/90

on Human Rights decision 2001/112  
Fundamental standards of humanity  
Report of the Secretary-General

**Sub-Commission on Prevention of Discrimination and Protection of Minorities**

E/CN.4/Sub.2/1994/24

The right to a fair trial:  
Current recognition and measures  
necessary for its strengthening  
Final report prepared by Mr.  
Stanislav Chernichenko and Mr.  
William Treat

E/CN.4/Sub.2/1994/26

The Administration of Justice and  
the human rights of detainees: The  
right to a fair trial  
Report of the Secretary-General  
prepared pursuant to Sub-

Resolution 1994/26

Commission resolution 1993/26  
Minimum Humanitarian Standards  
adopted on 26 August 1994

E/CN.4/Sub.2/1996/19

Ninth annual report and list of States  
which, since 1 January 1985, have  
proclaimed, extended or terminated  
a state of emergency, presented by  
Mr. Leandro Despouy, Special  
Rapporteur appointed pursuant to  
Economic and Social Council  
resolution 1985/37

E/CN.4/Sub.2/1997/19

Tenth annual report and list of  
States which, since 1 January 1985,  
have proclaimed, extended or  
terminated a state of emergency,  
presented by Mr. Leandro Despuoy,  
Special Rapporteur appointed  
pursuant to Economic and Social  
Council resolution 1985/37

E/CN.4/Sub.2/1997/19/Add.1

Final report of the Special  
Rapporteur, Mr. Leandro Despuoy,  
appointed pursuant to Economic and  
Social Council resolution 1985/37  
Addendum:

E/CN.4/Sub.2/2003/39

Tenth annual list of States which,  
since 1 January 1985, have  
proclaimed, extended or terminated  
a state of emergency  
List of States which have  
proclaimed or continued

a state of emergency  
Report of the Office of the High  
Commissioner for Human Rights  
submitted in accordance with  
Commission on Human Rights  
decision 1998/108

## **UN Human Rights Committee**

General Comment No. 5	CCPR General Comment 5 Derogation of rights (Article 4) 31 July 1981
CCPR/C/66/R.8	Draft General Comment on Article 4: Non-derogable rights under the CCPR
CCPR/C/SR.1797	Summary record of the first part of the 1797 <sup>th</sup> meeting, at the Palais des Nations, Geneva, on Wednesday, 27 October 1999
CCPR/C/66/R.8/Rev.1	General Comment on Non- derogable rights Second Draft
CCPR/C/69/R.4	Draft General Comment on Article 4 Amendments proposed by Mr. Scheinin to the second draft
CCPR/C/70/Rev.5	Draft General Comment on Article 4 Paragraphs 1, 3, 4 and 5 as adopted in the first reading during the 69th session
CCPR/C/SR.1850/Add. 1	Summary record of the second part of the 1850 <sup>th</sup> meeting, at the Palais Wilson, Geneva, on Monday, 17 July 2000
CCPR/C/SR.1950	Summary record of the 1950th meeting, held at the Palais Wilson, Geneva, on Tuesday, 24 July 2001
CCPR/C/21/Rev.1/Add.11	General Comment No 29 States of Emergency (Article 4) adopted at the 1950th meeting, on 24 July 2001

United Nations Consolidated Inter-Agency Appeal for the Democratic  
Republic of Congo  
January – December 2000  
Geneva: UN Office for the Coordination of Humanitarian Affairs (OCHA),  
November 1999

available at ReliefWeb  
<<http://www.reliefweb.int/library/appeals/drc00.pdf>> (25 November 2004)

*An Easy Reference to International Humanitarian Law and Human Rights Law*

New York: UN Office for the Coordination of Humanitarian Affairs, 1999  
available at ReliefWeb <[www.reliefweb.int/ocha\\_ol/pub/Easy References to IHL and HR.htm](http://www.reliefweb.int/ocha_ol/pub/Easy%20References%20to%20IHL%20and%20HR.htm)> (12 November 2004)

**Agreements involving non-state actors**

*Principles of engagement for emergency humanitarian assistance in the Democratic Republic of Congo*

in: United Nations Consolidated Inter-Agency Appeal for the Democratic Republic of the Congo, January – December 2000

Geneva: UN Office for the Coordination of Humanitarian Affairs (OCHA), November 1999

available at ReliefWeb

<<http://www.reliefweb.int/library/appeals/drc00.pdf>> (25 November 2004)  
pp. 66 et seq.

*Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action*

available on the website of Geneva Call

<[www.genevacall.org/about/testi-mission/doc04oct01.htm](http://www.genevacall.org/about/testi-mission/doc04oct01.htm)> (12 November 2004)

*Principles and Protocols for Humanitarian Operations*

November 1996

extracts available at

<[http://coe-dmha.org/Unicef/HPT\\_Session8Handout8\\_3.htm](http://coe-dmha.org/Unicef/HPT_Session8Handout8_3.htm)>  
(6 December 2004)

*Code of Conduct for Humanitarian Assistance in Sierra Leone*

in: United Nations Consolidated Inter-Agency Appeal for Sierra Leone, January – December 1999

New York and Geneva: UN Office for the Coordination of Humanitarian Affairs (OCHA), December 1998

available at ReliefWeb <<http://www.reliefweb.int/library/appeals/sle99.pdf>>  
(23 November 2004)

pp. 86 et seq.

*SPLM/OLS Agreement on Ground Rules*

July 1995

available as Appendix 2 in **Bradbury**, Mark et al. *The 'Agreement on Ground Rules' in South Sudan*. HPG Report 4. Study 3 in: *The Politics of Principle: the principles of humanitarian action in practice*. London: The

Humanitarian Policy Group at the Overseas Development Institute, 2000,  
pp. 74 et seq.  
Government of Sudan, Sudan Peoples' Liberation Movement and the United  
Nations-Operation Lifeline Sudan, *Agreement on the Implementation of  
Principles Governing the Protection and Provision of Humanitarian  
Assistance to War Affect Civilian Populations* Geneva, 15 December 1999  
available at ReliefWeb  
<[http://www.reliefweb.int/w/rwb.nsf/0/23fe1d7d401215dec12568540034da  
a2?OpenDocument](http://www.reliefweb.int/w/rwb.nsf/0/23fe1d7d401215dec12568540034da<br/>a2?OpenDocument)>  
(24 November 2004)

*Humanitarian Framework for East and West Timor*  
in: United Nations Consolidated Inter-Agency Appeal for East Timor Crisis,  
October 1999 – June 2000  
Geneva: UN Office for the Coordination of Humanitarian Affairs (OCHA),  
October 1999  
available at ReliefWeb  
<<http://www.reliefweb.int/library/appeals/etimor99.zip>> (24 November  
2004)  
pp. 13 et seq. (East Timor Section), p. 131 (West Timor Section)



# Table of Cases

## International Court of Justice

*Fisheries Jurisdiction Case* (United Kingdom v. Iceland) (Jurisdiction)  
Judgment of 2 February 1973  
I.C.J. Rep. 1973, 3

*Case concerning military and paramilitary in and against Nicaragua*  
(Nicaragua v. United States of America) (Merits)  
Judgment of 27 June 1986  
I.C.J. Rep. 1986, 14

## International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

*Prosecutor v. Dusko Tadic*, Case No. IT-94-1-AR72, Decision of 2 October 1995 on the Defence Motion for Interlocutory Appeal on Jurisdiction

*Prosecutor v. Milan Martić*, Case No. IT-95-11-R61, Review of the Indictment Pursuant to rule 61, ICTY Trial Chamber, 8 March 1996, as quoted in: **Patel**, Faiza and Anne-Marie La Rosa, *The Jurisprudence of the Yugoslavia Tribunal: 1994-1996*, European Journal of International Law vol. 8 (1997), 123, 132 – 134

*Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1, Trial Chamber II  
Judgement of 10 December 1998

*Prosecutor v. Zdravko Mucic et al.* (“Celebici camp”), Case No. IT-96-21,  
Trial Chamber Judgement of 16 November 1998

## European Court of Human Rights

*Lawless Case* (Lawless v. Ireland), judgment of 1 July 1961  
Series A: Judgments and Decisions, vol. 3

*Case of Ireland vs. the United Kingdom*, judgment of 18 January 1978  
Series A: Judgments and Decisions, vol. 25

*Case of Brannigan and McBride v. the United Kingdom*, judgment of 26 May 1993  
Series A: Judgments and Decisions, vol. 258-B

**Inter-American Court of Human Rights**

Habeas Corpus *in Emergency Situations*, Advisory Opinion OC-8/87 of January 30, 1987, Series A No. 8

*Judicial Guarantees in States of Exception*, Advisory Opinion OC-9/87 of October 6, 1987, Series A No. 9.