State of Emergency and Humanitarian Law

On Article 75 of Additional Protocol I

by G. Herczegh

In a rich and abundant literature on the subject of international humanitarian law, two trends in the interpretation of the term "humanitarian law" stand out: one takes it in its broad meaning, the other in a narrow sense. According to the definition by Jean S. Pictet, humanitarian law, in the broad interpretation, is constituted by all the international legal provisions, whether written or customary, ensuring respect for the individual and the development of his life.[1] Humanitarian law includes two branches: the law of war and human rights. The law of war, still following Professor Pictet's definition, can be subdivided into two sections, that of The Hague, or the law of war, in the strict sense, and that of Geneva, or humanitarian law, in the narrow sense. It is often difficult to distinguish clearly between these branches of law, and especially between the law of The Hague and the law of Geneva, because of the reciprocal influence each has had on the development of the other, to the extent that some well-known experts considered the traditional difference between them out-of-date and superfluous.[2]

However, in order to avoid misunderstanding, we shall always use the term "humanitarian law" in the narrow sense, i.e. to mean the law of Geneva: the four 1949 Geneva Conventions and their two 1977 Protocols.

Taken as a whole, humanitarian law protects the individual and human dignity during armed conflicts, firstly in international armed

[1] J. S. Pictet: *The Principles of International Humanitarian Law*, ICRC, Geneva, 1966, p. 10.

[2] S. E. Nahlik: *Droit dit de Genève et droit dit de La Haye: unicité ou dualité.* Annuaire français du droit international, 1978, pp. 9-27.

conflicts, and then in non-international armed conflicts,[3] i.e. in abnormal circumstances. In 1968, the Teheran Conference on Human Rights declared that peace is the primary condition for the respect of human rights and that war is the negation of those rights. National legal systems, in order to master abnormal circumstances, recognize a legal institution, the state of emergency, which because of its particular features — i.e. wider powers of certain State organs — may lead those who exercise them into acting arbitrarily and constitutes an added danger for man.

In constitutions or the laws of various countries, there are often provisions stipulating that, in "exceptional" circumstances, the State can suspend or limit citizens' enjoyment of their rights and transfer the powers of an organ of the State to others. The wording of these provisions is not identical and the theoritical arguments put forward to justify them vary considerably from one country to another. It is not the aim of this article to group together the rules of positive law of various countries concerning the state of emergency nor to repeat the definitions of this concept to be found in legal literature. We are, therefore, not going to examine to what extent or how the powers of certain organs of State are widened or transferred to the military authorities. Our approach is defined solely by the effect of the state of emergency on human rights.

According to Article 4 of the International Covenant on Civil and Political Rights: "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin".

From the point of view of humanitarian law, the essential feature of a state of emergency is that it limits the exercise of human rights and basic liberties.

An armed conflict, be it international or not, is generally, but not necessarily, accompanied by the proclamation of a state of emergency. Since the task of humanitarian law consists in safeguarding man's basic rights and essential legal guarantees, it must set up a barrier against the arbitrary nature of civil or military organs. It is necessary that basic human rights and essential guarantees remain in force even in the most

[3] See Article 3 common to the four 1949 Geneva Conventions and Additional Protocol II of 1977.

serious circumstances, in the most widespread armed conflicts, for the benefit of all categories of persons without exception.

Two general trends stand out in the history of humanitarian law: one which endeavours to develop the protection granted by humanitarian law to victims and make it more effective; the other which tends to increase the number of persons protected, by enlarging the scope of protection in turn to more and more groups of people: after the sick and wounded, the shipwrecked and prisoners of war, then the civilian population in territories occupied by the enemy, and finally the civilian population as such, etc.

It is a constant and never-ending struggle, as industrial development is continually producing new arms and exposing large groups of people to added dangers.

In the system of humanitarian law there were two kinds of gaps: gaps in the material sense, caused by the appearance of new methods and means of warfare, and gaps in the personal sense, as previous legislation always left out a large or small category of persons without adequate legal protection. Humanitarian law must draw up rules concerning the particular problem posed by the state of emergency:

(*a*) rules of which the application cannot be restricted or suspended by civil or military authorities, and

(*b*) rules of which the application to persons is unlimited.

It should be noted, in this context, that paragraph 2 of Article 4 of the International Covenant on Civil and Political Rights contains the following: "No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision" (i.e. the provision quoted above allowing of derogations from obligations under the Covenant).

The articles referred to protect the right to live, prohibit torture and slavery, protect freedom of thought, conscience and religion, and ensure the application of certain legal guarantees.

The need for such provisions exists not only in peacetime, but even more so in wartime. This means that the legal instruments concerning respect for human rights in peacetime and the rules of humanitarian law applicable in wartime must satisfy it. Article 3 common to the four Geneva Conventions was already the result of an endeavour to meet that need: "In the case of armed conflict not of an international character..., each Party to the conflict shall be bound to apply, as a minimum, the following provisions", etc.

This, therefore, concerns a hard and irreductible core of rights which are essential for the protection of the individual and human dignity and are applicable in all circumstances, at all times and in all places.

After the adoption of Article 3 common to the four 1949 Geneva Conventions, applicable to non-international armed conflicts, and that of paragraph 2 of Article 4 of the International Covenant, applicable, in principle, in peacetime, it proved necessary to draw up similar provisions applicable especially to international armed conflicts, to fill one of the last gaps in humanitarian law and reaffirm what we called above the hard core of human rights. This is the role of Article 75 of Additional Protocol I, which covers, with a minimal but absolute protection, all persons affected by an international armed conflict who are not entitled to more favourable treatment by virtue of international instruments.

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Before analysing Article 75, we shall glance at the way it was drawn up. The draft of Additional Protocol I, prepared by the ICRC, included, in Part IV, a Section III entitled "Treatment of persons in the power of a party to the conflict". One article in this section, Article 65, entitled "Fundamental guarantees", was the point of departure for Article 75 of the final text of Protocol I.

According to the text of the draft article: "Persons who would not receive more favourable treatment under the Conventions or the present Protocol, namely, nationals of States not bound by the Conventions and the Parties' own nationals, shall, in all circumstances, be treated humanely by the Party in whose power they may be and without any adverse distinction. The present article also applies to persons who are in situations under Article 5 of the Fourth Convention."

Article 5 of the Fourth Geneva Convention, in the same way as Article 4 of the International Covenant on Civil and Political Rights, governs the exceptions to the rights and privileges of persons protected by the Convention which, if exercised by such persons, could be detrimental to the security of the State or the occupying power, as the case may be.

According to the *Commentary* on the draft, the article in question has a double aim:

(*a*) to set a limit to the arbitrary authority of the parties to a conflict with regard to persons not protected by the Conventions, and

(*b*) to specify the humane treatment to be enjoyed by those who are protected but are justifiably under suspicion; this is because the text

of Article 5, according to the *Commentary*, is rather difficult to interpret.[4]

The humane treatment of the persons defined above is dealt with in the second paragraph; the legal guarantees are mentioned in the third paragraph.

These two paragraphs are not only close to Article 3 common to the four 1949 Geneva Conventions, but are also similar to certain articles in the Fourth Convention, Article 27, 31-34, 65, 71, 73.

The aim of paragraph 4 of the draft was to settle an essential condition of the detention of women, whereas paragraph 5 defined the temporal field of application of the article in question, by stipulating that those specified in paragraph 1 would be entitled to the protection of the article until they were released, repatriated or finally settled.

The drawing up of Article 75 of Protocol I was entrusted to Commission III at the Diplomatic Conference in Geneva (1974-1977), and the work was started on 30 April 1976. In his introduction, the ICRC expert stressed the great importance of the article for the Protocol as a whole and highlighted two of its basic ideas.

Firstly, the article should "fill the gaps in treaty law in respect of persons not covered by such law", and it should cover "all the grey areas which would always exist... between combatants in the strict sense... and peaceful civilian population". It should also "reaffirm clearly the minimum level of humane treatment... for all persons who, for one reason or another, might be denied the protection of the provisions of the Fourth Geneva Convention of 1949 and who, ... might be threatened by abuses of power and inhumane or cruel treatment...".[5]

For two weeks, most of the Commission's time was taken up by an examination of this article. The delegates who took the floor expressed the opinion many times that this was a key article, one of the most important in the Protocol. The interest they took in its provisions was shown in the numerous amendments presented during the course of the Diplomatic Conference.[6] It should be noted that the Commission used the texts of the drafts of Articles 6 and 10 of Protocol II prepared by Commission I, except if there were reasons for change linked with the differences between international and non-international conflicts.

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[4] *Draft of Protocols additional to the Geneva Conventions of 12 August 1949: Commentary*, ICRC, Geneva, 1973, p. 81-82.

[5] See ICRC representative's intervention in CDDH/III/SR. 43 — *Official Records of the Diplomatic Conference*, 1974-77, Vol. XV, p. 25; Berne 1978.

[6] *Ibid.* CDDH/III, 305, 307-308, 310-312, 314-320.

Paragraph 1 was debated for a long time, because it posed a delicate question, namely, whether the protection provided for by this article should be extended to a Party's own nationals. One of the delegates, in presenting an amendment, expressed the opinion that the first paragraph of the article dealt essentially with the nationals of a party to the conflict, "and that meant unacceptable interference in the domestic affairs of that party".[7]

It is easy to put forward several convincing arguments in favour of international humanitarian protection for a State's own citizens, as it is not only useful, but sometimes essential to draw up rules protecting individuals from their own national authorities. Normally, it is the task of States to safeguard the rights and interests of their own citizens, but an armed conflict is an abnormal situation. For reasons of security, authorities can apply measures limiting or abrogating the rights of members of a national, racial or religious minority, whose loyalty is questionable. If the danger threatening the State proves to be imminent and serious, the authorities can exercise discretionary powers. The article in question in no way aims at regulating relations between a State and its citizens in general, but at limiting arbitrary acts by common agreement and ensuring a minimal treatment valid in all circumstances. It is, therefore, an exaggeration to speak of unacceptable interference. States which have recognized the merits of the second paragraph of Article 4 of the International Covenant on Civil and Political Rights cannot deny the need for a similar provision applicable in wartime, when human beings are exposed to much more serious dangers than in peacetime.

With reference to Article 75, the report of Commission III included the followings remarks: "... it was decided that the scope of the article should be restricted to persons affected by the armed conflict and further restricted to the extent that the actions by a Party in whose power they are so affect them. ... Moreover, paragraphs 3 to 7 inclusive are further limited ... to persons ... arrested, detained, or interned for actions related to the armed conflict." The report specifies that, with regard to the controversial question of whether or not it should be stipulated that a State's own citizens are protected by the article, a compromise was reached by deleting all the examples of persons covered by the article.[8]

This alteration did not restrict the categories of protected persons, but made it easier for the article to be adopted.

During the course of the Commission's work, the text of Article 65 of the draft (which became Article 75 of the Protocol) was enlarged in

[7] *Ibid.* CDDH/III/SR. 43, p. 36.

[8] Report of Commission III. CDDH/407/Rev. 1. — *Ibid.*, p. 460.

several respects: apart from some purely editorial changes, the list of guarantees became much longer than in the original draft (any accused person has the right to be present at his own trial, no one can be forced to give witness against himself, or admit that he is guilty, etc.). This lengthened list will undoubtedly give rise to certain difficulties, because of the diversity of penal procedures in different countries. The explanations of the voting, submitted in writing at the plenary session, are proof of this. Those who wish to study the problem in depth will find useful information in them.[9]

Paragraph 3, which stipulates that anyone who is arrested and detained shall be informed of the reasons for these measures, is an addition to the initial draft. Paragraph 7 includes a reference to the prosecution and trial of those accused of war crimes or crimes against humanity. Finally, the last paragraph of the article stipulates that no provision can be interpreted as limiting any other more favourable provision which, through application of the rules of international law, grants greater protection to persons covered by paragraph 1.

The article was adopted by consensus at the plenary session of 27 May 1977.

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The text of the article appears somewhat heavy and complicated, especially in view of the duty of the High Contracting Parties to disseminate the Protocol as widely as possible in their respective countries (Article 83). It would have been preferable had the articles been written more simply, so as to be understood by those who, like soldiers, have no legal training. Unfortunately, the difficulties inherent in international legislation make this aim increasingly more difficult to achieve.

One reads and hears too much criticism of the two Additional Protocols. Far from endorsing it, the author of these lines would rather endeavour to highlight the positive features of Article 75 and its importance for the development of humanitarian law.

The final version of paragraph 1 of Article 75, the fruit of laborious negotiations, is worded as follows:

"In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction..."

[9] See discussions at plenary session of 27 May 1977 (CDDH/SR. 43 and annex) *Official Records*, Vol. VI, p. 243-278.

"The minimum level of humane treatment", the expression used by the ICRC expert, is defined in paragraph 2 of the article. However, paragraph 1 also includes two provisions which can be considered as elements of the "minimum level", i.e. the prohibition of discrimination based upon race, colour, sex, etc., and respect for convictions and religious practices. Of course, we find there a reference to respect for the person and the honour of the people in question, but, in my opinion, this respect cannot be separated from the provisions of the second paragraph.

This paragraph enumerates the acts against the life, health, or physical or mental well-being of persons which are prohibited at any time and in any place: murder, torture (physical or mental), corporal punishment and mutilation. It then forbids outrages upon personal dignity, including humiliating or degrading treatment, enforced prostitution, indecent assault and, finally, the taking of hostages, collective punishments and threats to commit any of the foregoing acts. It should be noted that the list appearing in this paragraph is of prohibitions only and does not exhaust the possibilities of inhumane treatment.

It is easy to recognize in this list the provisions of Article 3 common to the four 1949 Geneva Conventions, which also forbid acts of violence against the life, bodily integrity and dignity of persons. The stipulations of paragraph 2 only differ from the similar provisions of Article 3 by adding a ban on "collective punishments; and threats to commit any of the foregoing acts". In addition, there is a close link between this paragraph and certain articles of the Covenant on Civil and Political Rights. For example: Article 6 on the right to live, which is a prohibition of murder; Article 7 forbidding torture and cruel and humiliating punishments; Article 8 prohibiting slavery and servitude; Article 18 protecting the freedom of religion, etc. But, we should not forget Article 32 of the Fourth Geneva Convention of 1949, which also prohibits murder, torture, corporal punishment, mutilation, medical experiments and any other measures of brutality, Article 33 prohibiting collective penalties and pillage, and Article 34 forbidding the taking of hostages, etc. Finally, the provisions of paragraph 2 of Article 4 of Additional Protocol II are mostly identical or very close to those we have reviewed thus far.

Therefore, the hard core of human rights, which brooks no limitations and derogations, appears well established in every respect. It has been defined and reaffirmed several times by international instruments in force for a long time, and ratified or most likely to be ratified or adhered to by many States. The rights in question, although having their philosophical origin in natural law, now undoubtedly belong to positive law and are an integral part of international treaty law.

Why repeat these basic rights so often? Why prohibit so many times the acts which contravene them? We should not forget that the fields of application of the aforementioned instruments are not identical. Therefore, these are not strictly speaking repetitions. Further, there being no rich and well developed international legal practice, it is parallel legislations, each reaffirming the other, which help in a remarkable way to reinforce the effectiveness of the legal system.

Let us pass from "the minimum level of humane treatment" to the other aspect of the problem: the question of legal procedure, an essential complement to basic human rights. Legal guarantees or the generally recognized principles of regular legal procedure? The text of the Protocol uses both these expressions.

The following principles provide and ensure those guarantees: any accused person must be informed of the particulars of the offence alleged against him; right to defence in general; individual penal responsibility; "nullum crimen sine lege"; "nulla poena sine lege"; presumption of innocence; the accused has the right to be tried in his presence; no one shall be compelled to testify against himself, or to confess guilt; right to interrogate the witness for the prosecution and have witnesses for the defence; "ne bis in idem"; the sentence must be made public; right to appeal; etc.

It is not the task of international law, but that of comparative penal procedure, to decide whether or not these principles are all "generally recognized". Our task is to stress the almost unanimous opinion which was expressed at the Diplomatic Conference concerning their inclusion in the provisions of the Protocol. Without these principles, man's protection would be incomplete.

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A very clear distinction should always be made between a state of emergency and a state of necessity. The first, as we have seen, permits measures limiting or abrogating certain human rights, whereas the second may justify acts which would otherwise be illegal. The notion of a state of necessity, or simply military necessity, played a big part in the theory of the law of war ("Kriegsnot kennt kein Gebot" or "Kriegsraison geht vor Kriegsmanier"). Eminent authors have refuted the "Kriegsraison" theory by proving its harmfulness and denying that it can be admitted as a cause of exemption. [10]

[10] W. G. Downey Jr.: "*The Law of War and Military Necessity*" in American Journal of International Law, 1953, Vol. 47, pp. 251-262.

According to a very widely held opinion, the rules of the laws of The Hague and of Geneva are all a compromise between humanitarian and military considerations. During the drawing up of the rules applicable in armed conflicts, military requirements and military necessity, etc. were taken into account and cannot therefore be invoked to justify derogations from the law of war.

Humanitarian law, according to an accepted distinction, recognizes two types of prescription: (1) absolute prescriptions, i.e. permitting of no derogation; and (2) relative prescriptions, i.e. rules, where the adverse effects and circumstances of their application are studied and exercise a certain influence on the content of the rules. A considerable number of the provisions of humanitarian law belong to this second category, such as the well-known rule of proportionality, which establishes a certain balance between losses in human lives and damage to civilian property caused incidentally by attacks on the one hand, and the military advantages, either gained or expected, on the other hand.[11]

Neither military necessity, "force majeure", nor any of the other causes of exemption, can justify torture, humiliating or degrading treatment, rape, etc. The protection provided by Article 75 is not only general, but also absolute, in the strict sense of the term.

Unfortunately, we must admit that, nowadays, torture is a standard practice in several parts of the world and there are even people who dare argue that this terrible crime is justified by military advantages or a state of necessity: one more reason for stressing the importance of Article 75, which we consider as belonging to the field of *jus cogens*.

Since the preparatory work began on the codification of the law of treaties, the problem of *jus cogens*, or rather the existence of peremptory norms in international law, has given rise to lively discussions on doctrine. However, without going into detail, we may say that the dominant opinion has approved the concept of peremptory norms and that the Diplomatic Conference of Vienna has decided in their favour. According to the definition of Article 53 of the Convention on the Law of Treaties, "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same

[11] See Article 51, para. 5, b (Protection of the civilian population) and Article 57, para. 2, a (iii) (Precautions in attack).

character".[12] The peremptory norms of international law have not yet been codified, but, among the examples quoted most often, is always the principle of respect of human rights and, therefore, the provisions fixing the "minimum level of humane treatment" belong to *jus cogens.*

In addition to the protection it grants in armed conflicts to persons who do not benefit from more favourable treatment, Article 75 of Additional Protocol I, by reason of its content and the nature of its provisions, will influence all future legislation in this field.

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[12] This article was adopted at the Vienna Conference by an imposing majority, 87 for and 8 against, with 12 abstentions. In spite of the delay in ratification of the Convention on the Law of Treaties, the article in question is the expression of the legal conscience of the international community.