The minimum humanitarian rules applicable in periods of internal tension and strife

by Djamchid Momtaz

Many States have in the course of their history faced internal tension and strife, sometimes so serious as to threaten their fundamental interests. These situations, characterized as they are by acts of revolt and violence committed by more or less organized groups fighting either the authorities or amongst themselves, are distinct from those termed non-international armed conflicts, in which the violence is more intense. In order to bring these internal confrontations to an end and restore order, the authorities frequently make massive use of police force or even the armed forces. The inevitable result is a weakening of the rule of law, marked by serious, large-scale human rights violations causing widespread suffering among the population.

It is generally accepted that governments may declare a state of emergency and, provided that the situation so demands (and only then), take steps that depart from international human rights law and suspend some of those rights. There are fundamental rights inherent to human dignity — the so-called inalienable rights from which no derogation is possible under any circumstances. The safeguards provided by those rights to individuals caught up in the maelstrom of internal violence appear today to be inadequate. Initiatives are being taken at the international level to furnish better protection and make up for the shortcomings of international

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human rights law in cases of internal violence, in which atrocities continue to be committed.

Guarantees afforded people caught up in internal tension

Though it is true that all States have relative freedom in assessing whether a situation presents a danger to the public and whether to declare a state of emergency, this option is nevertheless subject to certain conditions of form and substance. No matter how serious the circumstances that have caused the State to resort to such measures, it nevertheless cannot depart from certain fundamental rules, termed *erga omnes* obligations.

Guarantees laid down by national legislation regarding states of emergency

Pursuant to the draft articles on State responsibility, recently adopted on the first reading by the United Nations Commission on Human Rights, a state of emergency can be invoked by a government only if it is "the only means of safeguarding an essential interest (...) against a grave and imminent peril".[1] The seriousness of the situation must therefore be such that, in order to maintain public order and avoid a threat to the very existence of the State, recourse to emergency legislation is inevitable. It is generally agreed that, in order to provide sturdier guarantees, this legislation should already exist before a crisis arises, and it should include mechanisms to monitor implementation before or after; it should also be designed to be applied as an interim measure.[2] This issue was recently studied by an international workshop on minimum humanitarian rules, held in Cape Town, South Africa. The participants were categorical that national constitutions should clearly define that which amounts to a state of emergency and a real danger, and that the declaration of a state of emergency should be made known to the other States.[3] This obligation to notify the other States is obviously intended to avoid the establishment

[1] Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996. UN document A/51/10, p. 137.

[2] Nicole Questiaux, "Study of the implications for human rights of recent developments concerning situations known as states of siege or emergency", UN doc. E/CN.4/Sub.2/1982/15, 27 July 1982, p. 8.

[3] "Report of the international workshop on minimum humanitarian standards" (Cape Town, South Africa, 27-29 September 1996), UN doc. E/CN.4/1997/77/Add.1, 28 January 1997.

of *de facto* states of emergency. This is the reason why human rights instruments comprising derogation clauses generally require participating States making use of them to inform the other States Parties as soon as possible of the provisions from which they have departed and their grounds for so doing.[4] In the series of resolutions on minimum humanitarian rules adopted by it in recent years, the UN Human Rights Commission recognizes the vital importance of suitable national legislation to deal with emergencies whilst respecting the rule of law. It invites the States to re-examine their legislation in order to ensure this.[5]

Guarantees provided by fundamental rules known as erga omnes *obligations*

Most of the human rights instruments that authorize participating States to restrict their obligations in periods of crisis enumerate the rules from which it is forbidden to depart in any circumstances.[6] These are generally rules with which compliance in the event of internal violence offers the best protection against the most serious human rights violations. The rules most frequently involved are the right to life, the prohibition of slavery, the prohibition of inhuman, cruel or degrading treatment — especially torture — and the non-retroactive nature of penal laws.[7] These rules, from which no departure is possible and which are enshrined in the constitution of many States, are known as fundamental rules. The International Court of Justice has on several occasions had cause to remind the international community of the importance of these rules, which it

[4] According to Article 4, paragraph 3 of the International Covenant on civil and political rights, the States exercising the right of derogation must, through the agency of the UN Secretary-General, immediately inform the other States Parties of the provisions from which they have departed, and the reasons for this departure. Similarly, paragraph 3 of Article 15 of the European Convention for the protection of human rights and fundamental freedoms stipulates that the States Parties who exercise this right must keep the Secretary-General of the Council of Europe fully informed of the measures taken and grounds for taking them.

[5] See resolution 1997/21, paragraph 3, of 11 April 1997 of the Human Rights Commission.

[6] Article 4 of the International Covenant on civil and political rights, Article 15 of the European Convention for the protection of human rights and fundamental freedoms, and Article 27 of the American Convention on human rights.

[7] Theodor Meron, *Human Rights in internal strife: their international protection*, Grotius Publications, Cambridge, 1987, p. 52, and Hans-Peter Gasser, "A measure of humanity in internal disturbances and tensions: proposal for a Code of Conduct", *IRRC*, No. 262, January-February 1988, p. 43.

describes variously as "elementary considerations of humanity"[8] and "rules concerning the basic rights of the human person" and which are an integral part of general international law.[9] Moreover, the Court takes care to classify them among the *erga omnes* obligations,[10] whose importance for the international community is such that all States may be viewed as having a legal interest in their being protected in all circumstances. Such a description would alone justify the ineluctable nature of these rules. It was with this in mind that the International Law Commission concluded in the above-mentioned draft articles that under no circumstances may a State cite a state of emergency as grounds for placing itself above the law if the international obligation with which the State's actions are not in accordance is itself based on an imperative norm of general international law.[11]

Ensuring greater protection for people caught up in internal violence

The guarantees afforded by the fundamental rules today appear to be insufficient. These rules do not cover all situations arising from internal tension, especially those that are a consequence of judicial power being made dependent on the executive power. To cover these areas, initiatives are being taken to encourage the international community to adopt a text inspired by international humanitarian law, i.e. one that solemnly affirms the fundamental rights of the individual in periods of internal violence and strife.

The grey areas of international human rights law applicable in times of internal tension

The fundamental rules applicable in times of internal tension do not cover all the cases of serious violations of humanitarian principles that frequently occur in this type of situation. Two that cause large-scale suffering are mass arrests and the suspension of judicial safeguards.

Authorities facing internal tension and strife generally invoke security considerations as grounds for arresting selected individuals from political

[8] The Corfu Channel case (United Kingdom v. Albania), *I.C.J. Reports 1949*, p. 22.

[9] Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), *I.C.J. Reports 1970*, p. 32.

[10] *Ibid.*

[11] *Supra* (note 1), Article 33, paragraph 2.

circles, the labour movement and the media. Periods of administrative detention are unduly extended and the detainees unfortunately sometimes ill-treated. They are frequently held in isolation, with no possibility of communicating with their loved ones. In some cases, the authorities do not even announce their arrest. This practice has become widespread in some areas of the world among governments, opposition movements and paramilitary groups. The aim is to intimidate the population.

Rules have been drawn up to deal with arbitrary arrest and extrajudicial detention and to improve protection for detainees. These are the "Standard minimum rules for the treatment of prisoners", adopted on 30 August 1955 by the first United Nations Congress on the prevention of crime and the treatment of offenders.[12] Their purpose is to provide a well-ordered penal arrangement so as to preserve the human dignity of the detainee. They were updated by the UN General Assembly in a resolution entitled "Body of principles for the protection of all persons under any form of detention or imprisonment".[13] These are applicable without any distinction founded on the race, colour, sex, language, religion, social origin or political opinions of the detainee.

Irregularities in penal procedure are common in periods of internal strife. The right — enshrined in the law — of every detainee to receive a fair and public hearing before an independent and impartial court is often ignored. There are restrictions on the rights of the defence. The detainee generally is allowed neither access to his dossier nor an opportunity to learn the reasons for his arrest and the accusations levelled against him. Caught up in the difficulties of dealing with internal violence, the authorities frequently exploit the resulting state of emergency to amend rules of judicial procedure making these retroactive so that they can be applied to trials already in progress. Innocent people arrested by ill-luck during violent street demonstrations may be sentenced to severe punishment or even summarily executed at the end of hurried proceedings, without receiving a fair trial.

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[12] Stephen P. Marks, "The principles and norms of human rights applicable in emergency situations", in Karel Vasak (ed.), *The international dimensions of human rights*, UNESCO, Paris, 1978, p. 218.

[13] UN General Assembly resolution 43/173 of 9 December 1988. See Peter H. Koojmans, "In the shadowland between civil war and civil strife: some reflections on the standard-setting process in humanitarian law of armed conflict", in Astrid J.M. Delissen and Gerard J. Tanja (Eds.), *Humanitarian law of armed conflict — challenges ahead, Essays in honour of Frits Kalshoven*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, p. 239.

Both the International Covenant on civil and political rights and regional treaties for the protection of human rights contain provisions ensuring the fundamental rights of detainees and defendants both in detention and before the courts. With the exception of the African Charter on human and peoples' rights, these instruments nevertheless leave the States party to them free to exercise the specified right of derogation and to suspend the application of those rights when an exceptional public danger exists.

Broadening the field of application of international humanitarian law to include internal violence

The question of whether certain rules of international humanitarian law should be broadened to cover internal violence was first raised in 1949 at the diplomatic conference called to adopt the new Geneva Conventions. During deliberations on Article 3 common to the four Conventions, which relates to conflicts of a non-international nature, the lack of any definition of this category of conflict gave rise among many of the delegations to the fear that its field of application might extend to any act of force, including any form of anarchy or rebellion. The Conference's refusal to list conditions for Article 3's application enabled the International Committee of the Red Cross to declare itself in favour of the widest possible application. The commentary on Article 3 published by the ICRC insists that such an interpretation in no way limits the State's right to exercise repression and in no way increases the power of rebel groups.[14] This view is in keeping with the role of intermediary which the ICRC has played since 1921 in connection with internal violence, with the aim of preserving human dignity and preventing the fundamental rights of the individual from being violated.[15]

Article 3 lays down rules described by the International Court of Justice as "general principles of humanitarian law".[16] They are indisputably apt to improve protection of people caught up in internal tension:

[14] Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field, Commentary published under the direction of Jean S. Pictet, ICRC, Geneva, 1952, pp. 56 and 61.

[15] Marion Harroff-Tavel, "Action taken by the International Committee of the Red Cross in situations of internal violence", *IRRC*, No. 294, May-June 1993, pp. 195-220.

[16] Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), *I.C.J. Reports 1986*, p. 114, para. 220.

apart from the safeguards afforded by the principle of inalienability, which are enshrined in the instruments of international human rights law, this article prohibits the passing of sentences and the carrying out of executions without due process of law. Verdicts must be returned by a regularly constituted court affording all the judicial guarantees recognized as indispensable by civilized peoples.

Since then, several drafts prepared as individual initiatives have taken as their basis the rules contained in Article 3 and the provisions of Article 75 of Protocol I additional to the Geneva Conventions to strengthen protection for persons affected by internal violence by providing them with, among other things, additional guarantees while in detention and on trial. The declaration drafted in 1984 by Theodor Meron should be cited in particular.[17] Meron hoped that his declaration would lead in time to the adoption of a new instrument codifying a body of rules applicable in this type of situation. This is also the approach of the draft adopted in 1987 by the Norwegian Human Rights Institute[18] and that drawn up in 1990 by the Institute for Human Rights at the University of Turku/Åbo, in Finland, entitled: "Declaration of minimum humanitarian standards".[19] For his part, Hans-Peter Gasser, editor-in-chief of the *International Review of the Red Cross*, would prefer having a code of conduct to serve as a reminder of the existing rules binding on the parties involved in situations of internal strife.[20]

The idea of grouping together the fundamental rights of the individual as set out by international human rights law and international humanitarian law in a single body of rules taking the form of a declaration intended to improve protection for people affected by internal violence was favourably received by the member States of the Organization for Security and Co-operation in Europe. In the Moscow Declaration of 1991, they renounced their right to depart from human rights guarantees recognized by the legal instruments to which they are party.[21] Then, at the Budapest

[17] Theodor Meron, "Towards a humanitarian declaration on internal strife", *American Journal of International Law*, Vol. 78, 1984, pp. 859-868.

[18] Hans-Peter Gasser, "Humanitarian standards for internal strife", *IRRC*, No. 294, May-June 1993, p. 223.

[19] Text published by the *IRRC*, No. 282, May-June 1991, pp. 330-336, and by the *American Journal of International Law*, Vol. 85, 1991, pp. 375-381.

[20] *Supra* (note 7).

[21] Conference on Security and Co-operation in Europe, Moscow Declaration of 3 October 1991, *International Legal Materials*, Vol. 30, 1991, p. 1670 ff.

summit in 1994, they stressed the importance of a declaration setting out the minimum standards applicable in all situations. Such a declaration, which they propose to have adopted in the UN framework, will take account of the relevant rules of international human rights law and international humanitarian law.[22]

For its part, the UN Human Rights Commission is asking the Secretary-General to prepare, in conjunction with the ICRC, an analytical report on the question of the fundamental rules of humanity, taking into account: "(...) the rules common to human rights law and international humanitarian law which are applicable in all circumstances".[23]

When internal violence erupts, governmental authorities are unfortunately not the only ones to resort to violence and to abuse fundamental human rights. Groups opposing the authorities or each other are not always above such conduct and cause innocent persons to suffer. These groups must also be called upon to moderate their actions and respect minimum humanitarian laws. However, since international law does not address them directly, they are generally little disposed to respect its rules. We may hope that the setting up of an international criminal court with the task of instituting proceedings against individuals suspected of any serious violations of international humanitarian law or international human rights law, and pursuing them wherever they may be, will put an end to impunity, thus ensuring universal respect for those rules.

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[22] Observations of Switzerland, Report of the Sub-Commission on prevention of discrimination and protection of minorities, UN doc. E/CN.4/1997/77/Add.1, 28 January 1997, p. 2.

[23] Human Rights Commission, resolution 1997/21, 11 April 1997.