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Road to Nowhere? The Future of a Declaration on Fundamental Standards of Humanity

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ROAD TO NOWHERE? THE FUTURE FOR A DECLARATION
ON FUNDAMENTAL STANDARDS OF HUMANITY

By Emily Crawford*

Abstract:

In the years following the adoption of the Additional Protocols to the Geneva Conventions in 1977, debate began to emerge regarding the extant lacunae in the international rules relating to situations of conflict. It was felt, by some academic writers and practitioners, that there remained a gap in international humanitarian law (IHL) and international human rights law with regards to what was being termed ‘grey-zone conflicts’ – armed conflicts that did not meet the minimum requirements of either Protocol II or Common Article 3, yet were more than just one-off incidents, such as a riot. Therefore, it was proposed that the international community should look to drafting and adopting a declaration outlining the minimum humanitarian standards applicable in all situations of violence and conflict. By 1990, this debate had crystallised around the Turku Declaration on Minimum Humanitarian Standards. Progression on the declaration quickly stalled once discussion was moved to the United Nations. Since 1995, there have been nine reports by the Secretary-General on the question of fundamental standards of humanity, prepared pursuant to resolutions and declarations of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities and the UN Commission on Human Rights. The question of the scope and content of minimum humanitarian standards – or fundamental standards of humanity as they are now termed – has become clearer with the growth of international criminal case law and works such as the International Committee of the Red Cross (ICRC) study into customary international humanitarian law. Yet the adoption of a document that outlines these fundamental standards is no more imminent than when the issue first moved to the United Nations. It is thus the intent of this article to examine why and how this apparently vital piece of international law policy has stalled.

During the 1974-1977 Diplomatic Conferences in Geneva, where the Additional Protocols to the Geneva Conventions of 1949 were debated and adopted,¹ one of the issues that needed to be settled was the material field of application of Additional

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Protocol II relating to non-international armed conflicts. Discussion at the two Conferences of Government Experts, responsible for drafting the Protocols, had been divided regarding the threshold criteria. Some experts argued for a more restrictive approach to that eventually adopted, while others favoured a more expansive scope.\(^2\) However, once the final formula was presented to the Diplomatic Conference – that the protocol would not apply to “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts”\(^3\) – there was little debate or dissent regarding the adoption of this provision.\(^4\)

In the years following the adoption of the protocols, debate began to emerge regarding the extant lacunae in the international rules relating to situations of conflict. It was felt, by some academic writers and practitioners, that there remained a gap in international humanitarian law (IHL) and international human rights law with regards to what was being termed ‘grey-zone conflicts’\(^5\) – armed conflicts that did not meet the minimum requirements of either Protocol II or Common Article 3, yet were more than just one-off incidents, such as a riot. Therefore, it was proposed that the international

\(^2\) The Conference of Government Experts considered attempting to define when a non-international armed conflicts is deemed to exist, but during debates it became apparent that this would be too difficult to achieve. See ICRC, CONFERENCE OF GOVERNMENT EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA, 24 MAY – 12 JUNE 1971, REPORT ON THE WORK OF THE CONFERENCE at 37 (1971) [hereinafter CE REPORT 1971]. The debates regarding the scope of application of Protocol II can be found at CE Report 1971, 36-41, paras 129-191; and ICRC, CONFERENCE OF GOVERNMENT EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA, 3 MAY – 3 JUNE 1972, REPORT ON THE WORK OF THE CONFERENCE at 67-72, paras 2.45-2.106 (1972) [hereinafter CE REPORT 1972].

\(^3\) Additional Protocol II, supra note 1, Art. 1(2).


community should look to drafting and adopting a declaration outlining the minimum humanitarian standards applicable in all situations of violence and conflict. By 1990, this debate had crystallised around the Turku Declaration on Minimum Humanitarian Standards.\(^6\)

Progression on the declaration quickly stalled once discussion was moved to the United Nations. Since 1995, there have been nine reports by the Secretary-General on the question of fundamental standards of humanity, prepared pursuant to resolutions and declarations of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities and the UN Commission on Human Rights. The question of the scope and content of minimum humanitarian standards – or fundamental standards of humanity as they are now termed – has become clearer with the growth of international criminal case law and works such as the International Committee of the Red Cross (ICRC) study into customary international humanitarian law.\(^7\) Yet the adoption of a document that outlines these fundamental standards is no more imminent than when the issue first moved to the United Nations. It is thus the intent of this article to examine why and how this apparently vital piece of international law policy has stalled. Parts I and II of this article will chart the origins and development of the idea of fundamental minimum humanitarian standards, and Part III will explore the progress of the document through the UN organs. Part IV will look at whether such a document is necessary, and finally Part V will explore


\(^7\) **INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOLUME 1, RULES; VOLUME 2, PRACTICE**, (Jean-Marie Henckaerts and Louise Doswald-Beck eds., 2005) [hereinafter ICRC CIHL Study].
alternate mechanisms for how the declaration might be adopted by the international community. The aim is not to criticise the admirable intentions of the drafters of the Turku Declaration, nor to critique the substance of the proposed declaration; rather this article will explore whether the matter of a declaration on fundamental standards of humanity should have been kept out of the UN, and left to academics, practitioners, and other interested parties to bring about via the mechanism of a non-governmental forum, much like the San Remo Manual on the Law of Armed Conflict at Sea.  

I. ORIGINS OF THE CONCEPT OF MINIMUM STANDARDS – THE LAWS AND PRINCIPLES OF HUMANITY

The idea of there being ‘minimum standards’ to be observed in all instances of armed conflict was arguably first espoused during the debates at the Hague Peace Conferences in 1899. The Hague Peace Conferences were one of the first significant international conferences convened to debate and adopt uniformly acceptable laws regulating the conduct of armed conflicts between States. During the Diplomatic Conference, a stalemate came about over the question of resistance fighters – those persons who took up arms against an invading army in an attempt to prevent the occupation of their homeland. The smaller European states wanted such persons to be

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8 SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (Louise Doswald-Beck ed., 1995) [hereinafter SAN REMO MANUAL]. For a review and critique of the substance of the declaration on minimum humanitarian standards, see Marco Odello, Fundamental Standards of Humanity: A Common Language of International Humanitarian Law and Human Rights Law, in INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW: TOWARDS A NEW MERGER IN INTERNATIONAL LAW 15 (Roberta Arnold and Noelle Quinevet eds., 2008).


granted some form of international legal recognition and protection – to be granted official recognition as legitimate combatants or belligerents. The larger military powers of Europe generally felt that such people should be treated as *francs-tireurs*\(^{11}\) and subject to execution. These opposing positions revealed each delegations’ historical experience of warfare in Europe – the smaller states were frequently subject to invasion and domination, and were hoping to enshrine some form of international protection should their people chose to resist foreign invaders. The larger states were often the occupying power, and were unlikely to embrace a set of rules which sanctioned rebellion against their authority.\(^{12}\)

A compromise position was eventually suggested by Russian delegate Fyodor Fyodorich von Martens\(^ {13}\), in the form of a clause, inserted into the preamble to the Regulations, which stated that, where the law was silent on certain matters – such as resistance warfare - States were to consider themselves bound by certain minimum standards of conduct. The “Marten’s Clause” as it would come to be called, outlined that:

> Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised

\(^{11}\) Translated literally as ‘free shooters’; the *francs-tireurs* were irregular French forces who had operated during the Franco-Prussian War of 1870. See Amanda Alexander, *The Genesis of the Civilian*, 20 LEIDEN J INT’L L 359, 364 (2007).

\(^{12}\) *Id.*, at 364.

\(^ {13}\) For more on Martens, see further V.V. Pustogarov, *Fyodor Fyodorovich Martens (1845-1909) – a Humanist of Modern Times*, 312 INT’L REV. RED CROSS 300 (1996).
peoples, from the laws of humanity, and the dictates of public conscience.\footnote{Excerpted in DOCUMENTS ON THE LAWS OF WAR 70 (Adam Roberts and Richard Guelff eds., 3d ed. 2000).}

The idea that certain minimum rules should be observed in armed conflict in the absence of more definitive guidelines came to fruition in 1949, with the adoption of the Geneva Conventions.\footnote{Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31 [hereinafter Geneva Convention I], Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85 [hereinafter Geneva Convention II], Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135 [hereinafter Geneva Convention III], and Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].} The Conventions included two important statements on minimum applicable standards: the first was the inclusion of the Martens Clause in the articles dealing with renunciation of the Conventions\footnote{Geneva Convention I, supra note 15, Art. 63, para. 4; Geneva Convention II, supra note 15, Art. 62, para. 4; Geneva Convention III, supra note 15, Art. 142, para. 4; and Geneva Convention IV, supra note 15, Art. 158, para. 4.} – namely, that should a High Contracting Party exercise their right of renunciation, such an act “shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.”\footnote{Geneva Convention III, supra note 15, Art. 142.}

The second statement on fundamental rules applicable in armed conflict was contained in Article 3, common to all Four Geneva Conventions of 1949. Common Article 3 provided that:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict. 18

Common Article 3 applies solely to non-international armed conflicts. However, the intent of Common Article 3 was to encapsulate the fundamental principles of the Geneva Conventions in their entirety. 19 Thus, Common Article 3 has often been called “‘mini-convention’ or a ‘convention within the conventions’”. 20 Indeed, Common Article 3 is now considered as outlining ‘fundamental principles of humanity’ applicable in all armed conflicts; this was affirmed by the International Court of Justice, in Nicaragua, 21 where the ICJ determined that certain rules of Common Article 3 “constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court’s opinion, reflect what the Court in 1949 called ‘elementary considerations of humanity.’” 22

By the late 1960s, various political factors 23 highlighted the need for some revision of the Geneva Conventions. 24 When the ICRC convened a conference of governmental

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18 Geneva Conventions I-IV, supra note 15, Art. 3.
22 Id., at 113-114, para. 218.
23 Such as decolonisation and the rise in frequency of non-international armed conflicts – see GEOFFREY BEST, HUMANITY IN WARFARE: THE MODERN HISTORY OF THE INTERNATIONAL LAW OF ARMED CONFLICTS 301-305 (1980); George Abi-Saab, Wars of National Liberation and the Development of
experts in 1971, they started the process that would lead to the adoption of the Additional Protocols in 1977 – where the Martens Clause again found reiteration.25

II. A LEGAL GAP? THE EVOLUTION OF THE CONCEPT OF MINIMUM HUMANITARIAN STANDARDS

As noted above in the introduction to this article, Additional Protocol II regarding non-international armed conflicts sets a considerably higher threshold than its predecessor Common Article 3. The higher threshold was a response to concerns voiced by numerous States that the new protocol not infringe too much on state sovereignty;26 to assuage such concerns, the diplomatic conference accepted a draft protocol which set a minimum threshold excluding riots, internal tensions and disturbances and isolated acts of violence. Unlike Common Article 3, Protocol II thus explicitly established a minimum level of applicability.27

However, following the adoption of the Additional Protocols, commentary emerged regarding the failure of the diplomatic conferences to embrace a more expansive material field of applicability. A few years after the adoption of the protocols, Theodor Meron wrote of the “inadequate reach of humanitarian and human rights law and the need for a


25 Additional Protocol I, supra note 1, Art. 1(2) ; Additional Protocol II, supra note 1, preamble.


27 See COMMENTARY ON THE ADDITIONAL PROTOCOLS, supra note 4, at 1348, paras 4447-4454.
new instrument.”

What concerned Meron was two-fold. Firstly, while lauding the achievements of the conference in adopting Protocol II, which “increased and improved the content of human rights applicable in armed conflicts not of an international character”, Meron nonetheless lamented that the threshold of applicability for the Protocol was set at “an exceedingly high level” making the likely “prospects for the formal application of the Protocol… poor”.

Meron was also concerned that, despite the high levels of ratification of humanitarian law instruments, international human rights law instruments were, in comparison, not extensively ratified. Furthermore, such human rights instruments frequently included derogation provisions, allowing for the suspension of human rights protections in circumstances of states of public emergency. For Meron, this set up a problematic schema:

the combined effect of derogations from the normally applicable human rights and of the inapplicability of humanitarian law results in denial or elementary protections to denizens of states involved in internal conflicts. The same result occurs when… states either deny altogether the armed character of internal conflicts of claim that the low level of violence does not reach the threshold required for the applicability of humanitarian instruments. In short, it must be acknowledged that there is a legal uncertainty, or perhaps even a lacuna, in the law.

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28 Meron, supra note 5, at 589.
29 Id., at 599.
30 Id., at 600.
31 Id., at 603.
Meron argued that the international community should contemplate the adoption of a “short, simple and modest instrument… [stating the] irreducible and nonderogable core of human rights that must be applied at a minimum in situations of internal strife and violence (even of low intensity)”. Such a declaration, “which would not require formal accession or ratification by states”, would be an important first step towards ensuring that there would be no “twilight zone” in the law, where the applicability of rules could be disputed.

The idea of adopting such a declaration continued to be debated throughout the 1980s; indeed, Meron wrote again on the issue several times. A further step was taken in 1987, when the UN adopted the Oslo Statement on Norms and Procedures in Times of Public Emergency or Internal Violence. This came at the time of ongoing debate and discussion regarding the implementation of human rights norms during states of emergency. A UN study conducted in 1982 examined the issue of human rights violations during states of emergency; this was followed-up in 1985 with the appointment, by the UN Sub-Commission on Prevention of Discrimination and

32 Id., at 606.
33 Id., at 606.
34 Id., at 603.
Protection of Minorities, of Leandro Despouy as Special Rapporteur on States of Emergency.\(^{38}\)

*The Turku Declaration*  The turning point for the push to adopt a declaration on minimum humanitarian standards came in 1990, when an expert meeting was convened by the Institute for Human Rights at Åbo Akademi University in Turku/Åbo, Finland. That meeting of seventeen independent experts\(^{39}\) drafted and adopted a ‘Declaration on Minimum Humanitarian Standards’, which came to be known as the Turku Declaration.\(^{40}\) The declaration’s stated position was that “international law relating to human rights and humanitarian norms applicable in armed conflicts do not adequately protect human beings in situations of internal violence, disturbances, tensions and public emergency”\(^{41}\), and that there are:

- difficulties experienced in protecting human dignity in situations of internal violence that fall below the threshold of applicability of international humanitarian instruments but within the margin of public emergency;… these difficulties are compounded by the inadequacy of the nonderogable provisions of human rights instruments, the weakness of international monitoring and control procedures, and the need to define the character of the conflict situations.\(^{42}\)

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\(^{39}\) Including Theodor Meron and Hans-Peter Gasser, as well as other noted IHL practitioners and academics, including Françoise Hampson, Asbjørn Eide, Luigi Condorelli, Allan Rosas, and Theo van Boven.

\(^{40}\) Turku Declaration, supra note 6.

\(^{41}\) Turku Declaration, supra note 6, preamble.

The declaration adopted by the meeting contains eighteen articles drawn from provisions that form the foundations of international humanitarian law and international human rights law. The principles contained in the declaration apply in all situations, without derogation “to all persons, groups and authorities, irrespective of their legal status and without any adverse discrimination.”\textsuperscript{43} Nearly half of the rules are derived from fundamental rules of international humanitarian law: prohibition on attacks against non-combatants; proportionality in the use of force; prohibition on the use of illegal means and methods of warfare; prohibition on spreading terror throughout the population; special protection for the sick, wounded, and medical and religious personnel; special respect/protection for the dead; and free access to humanitarian organisations.

A number of principles in the declaration are drawn from international human rights law\textsuperscript{44} but are nonetheless found in many IHL instruments, such as: recognition of persons before the law; respect for the person, honour and convictions of any person; freedom of thought, conscience and religion; right to humane treatment; prohibition on acts that are illegal under general international law such as murder, torture, rape, collective punishments, hostage-taking, looting, enforced disappearance and deliberate deprivation of food and health care; upholding the fundamental rights of detainees; right to life; right to fair trial; upholding norms applicable in cases of forced population displacement; including the right to remain in once’ country but no principle of non-refoulement; legal guarantees in situations of house arrest, internment or deprivation of liberty due to

\textsuperscript{43} Turku Declaration, supra note 6, Art. 2

administrative detention; and protection of children, including the prohibition on recruiting children under a certain age, as well as forcing them to commit acts of violence.\textsuperscript{45}

The Turku Declaration was then transmitted to the Sub-Commission on the Protection and Promotion of Human Rights in 1991.\textsuperscript{46} Three years later, the declaration was sent to the Commission on Human Rights,\textsuperscript{47} with an idea of studying the document, expanding its scope, and eventually adopting the Turku instrument as a UN Declaration. Transmitting the instrument to the UN for consideration was based on the idea that UN involvement would legitimize the document; as Petrasek noted:

although the Turku Declaration is an important and useful document in its own right, it does not carry the imprimatur of an official text, formally agreed to by states... the unofficial character of the text weakens its significance as a document intended to further develop international law.\textsuperscript{48}

Following the declaration’s transmission to the UN, analytical reports were commissioned, leading to the decision to abandon the Turku instrument, in favour of an entirely new document.\textsuperscript{49} As such, Resolution 1995/29 called on “States to consider reviewing their national legislation relevant to situations of public emergency with a view to ensuring that it meets the requirements of the rule of law and that it does not involve

\textsuperscript{45} See Vigny and Thompson, supra note 44 at 188-189.


\textsuperscript{48} Petrasek, supra note 38 at 558.

\textsuperscript{49} UNCHR, Res. 1995/29, 51st sess., 52nd meeting (Mar. 3, 1995).
discrimination on the ground of race, colour, sex, language, religion or social origin”, and transmitted the text of the Turku Declaration to governments, intergovernmental organisations and non-governmental organisations for their comments. In addition, Resolution 1995/29 also called on the UN Secretary-General and to submit a report on this matter to the Commission on Human Rights at its fifty-second session.  

At the fifty-second session, the Commission acknowledged that “the need to address principles applicable to situations of internal violence and disturbance of all kinds in a manner consistent with international law, including the Charter of the United Nations”. It also acknowledged an offer, made by five member States of the Nordic group, with the cooperation of the International Committee of the Red Cross, to convene a workshop to further debate the concept of minimum humanitarian standards. To that end, the Workshop on Minimum Humanitarian Standards was organised in Cape Town in 1996, addressing the question of what was now called “fundamental standards of humanity”. The results of the workshop were presented to the Commission on Human Rights, who then requested that the Secretary-General, in consultation with the ICRC, present an analytical report on ‘fundamental standards of humanity’. The idea behind the request

50 Id., at para 3.
51 Id., at para 4.
53 Denmark, Finland, Iceland, Norway and Sweden.
was to identify common principles of international human rights and humanitarian law applicable at all times.

The Cape Town Workshop was unable to come to any agreement as to the necessity of a specific legal instrument on fundamental standards of humanity, nor of the exact scope of such a document. By this time, the UN, through its organs, had already issued a number of reports, resolutions, and statements on the question of fundamental standards of humanity (or minimum humanitarian standards). In the years that followed, numerous other reports and resolutions would follow.

III. THE CURRENT SITUATION REGARDING FUNDAMENTAL STANDARDS OF HUMANITY

It has now been twenty years since the document outlining fundamental standards of humanity was drafted. Since then, the prototype instrument has progressed through two UN committees, has been dropped from annual consideration by the UN to biennial revision, and has undergone a name change; still, it seems that the UN is no closer to the adoption of such a document than when the experts first convened in Turku in 1990. The instrument seems to have reached an impasse.


Not that the stalemate has been fruitless. With every new report on fundamental standards of humanity, a clearer picture is developed regarding precisely what can be considered as the constituent elements of those fundamental standards. In the most recent Secretary-General’s report, a number of recent developments in international law were included, such as the publication of the ICRC study into customary international humanitarian law,58 the International Court of Justice Advisory Opinion on the Legality of the Wall in the Palestinian Occupied Territories,59 and the judgments in the cases on Armed Activities in the Congo60 and the Genocide case,61 the adoption of General Comment 31 on Article 2 of the ICCPR62 and General Comment 29 on Article 4 of the ICCPR,63 the adoption of the ILC Draft Articles on State Responsibility,64 the adoption of the Enforced Disappearances Convention,65 and the on-going ‘case law’ of the ICTY, ICTR and Special Court for Sierra Leone. Indeed, all of these developments and events have meaningfully contributed to better understanding the scope of concepts such as

58 ICRC: CIHL STUDY, supra note 7.

59 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ Rep. 136 (July 9), [the Advisory Opinion on the Wall].


65 International Convention for the Protection of All Persons from Enforced Disappearance, adopted by the UN General Assembly by GA Res. 61/117 (Dec. 20, 2006), Art. 2. The treaty will enter into force 30 days after 20 states have ratified it in accordance with Art. 39.
genocide\textsuperscript{66} and crimes against humanity,\textsuperscript{67} the interplay between IHL and international human rights law,\textsuperscript{68} and the extent to which rules applicable in international armed conflict are applicable in non-international armed conflicts.\textsuperscript{69}

IV. QUESTIONING THE NEED FOR A DECLARATION

As long as the Secretary-General is tasked with “the fulfilment of his activities, in accordance with all previous decisions adopted by the Commission on Human Rights and to update the relevant reports and studies”,\textsuperscript{70} there will always be additional cases, reports, treaties, declarations, and general comments that will continue to shed light on what constitutes the scope of fundamental standards of humanity. That is to say, international law is always developing and changing, and new events will occur to enhance the understanding and application of the relevant law. It seems reasonable to posit whether this seemingly endless analysis should be brought to a conclusion, via the drafting and adoption of a declaration on fundamental standards of humanity, or else acknowledge that such an endeavour is an on-going process, and thus no attempt to develop a written instrument should be made. Indeed, a recurring comment in the various Secretary-General’s Reports has been that “there [is] no apparent need to develop new standards”.\textsuperscript{71} So, is an instrument necessary at all?

\textsuperscript{66} ICTY, Prosecutor v. Milomir Stakic, Appeal Judgment, No. IT-97-24-A (22 March, 2006) [Stakić]; ICJ in the Genocide Case, supra note 61.

\textsuperscript{67} ICTY, Stakić, id.

\textsuperscript{68} ICJ, Advisory Opinion on the Wall, supra note 61; and Armed Activities Case, supra note 59.

\textsuperscript{69} ICRC CIHL STUDY, supra note 7.

\textsuperscript{70} Report of the Secretary-General on Fundamental Standards of Humanity, UNHRC, Res. A/HRC/8/14, supra note 57 at 2.

\textsuperscript{71} Id., at 14.
Criticism of a Declaration on Fundamental Standards of Humanity  Throughout the history of the declaration, in its various incarnations, opinion has been divided as to the utility of such a document. Those who reject the necessity for drafting a new document come from various differing positions. For states, a legitimate concern has been what is perceived as the continued encroachment of international law on issues considered to be within the sovereign domain of the State – that of internal conflicts and disturbances. For example, in comments submitted to the Commission on Human Rights in response to Resolution 1995/26, Cuba was adamant that any declaration on minimum humanitarian standards be formulated in strict awareness of the principles of non-intervention and territorial sovereignty of states:

The study of the resolution and the Declaration of Minimum Humanitarian Standards has to continue by means of a detailed analysis designed to achieve the proposed objectives. The measures under consideration must, in any event, be based on the principles embodied in the Charter of the United Nations, particularly those relating to sovereign equality and non-interference in the internal affairs of States, which are particularly relevant. To this end, the material scope of the provisions of international humanitarian law and of human rights themselves has to be properly monitored to prevent the superposition of concepts and notions which might lead to the formulation of policies contrary to the content of the above-mentioned principles…. Respect for the principles of international law, such as non-interference in internal affairs, sovereign equality, the independence and sovereignty of States and the right to self-determination of
peoples, is as important as the adoption of minimum humanitarian standards in avoiding human suffering in such circumstances.\textsuperscript{72}

However, state resistance to international regulation of internal affairs is nothing new.\textsuperscript{73} Perhaps a more surprising source of criticism of the declaration has come from some humanitarian law and human rights law advocates and practitioners. Concerns have been voiced about using one instrument to fill purported gaps in two distinct areas of international law – human rights law and humanitarian law. The two fields of law, it is argued, while both intended to alleviate the suffering of human beings and protect their rights,\textsuperscript{74} are too different in some basic philosophical approaches:

by... mixing humanitarian rules intended merely to alleviate the suffering of the human person with human rights law based on the respect for his or her inherent rights, there is clearly a significant risk that the legal protection of individuals will be diminished rather than strengthened in situations of internal turmoil.\textsuperscript{75}

Criticism has also been levelled at the wisdom (or lack thereof) of introducing another document regarding the protection of the individual in times of internal crisis and conflict, while failing to address a pivotal and widely acknowledged short-coming of the current law as it stands – the inability to effectively enforce and apply the relevant rules regarding internal conflict and crisis. Indeed, some have questioned the utility of


\textsuperscript{73} See COMMENTARY TO THE ADDITIONAL PROTOCOLS, supra note 4 at 1331-1332, paras 4293-4398; and 1335, paras 4412-4415 regarding state reluctance to accept a broadly applicable draft Protocol II.


\textsuperscript{75} Id., at 21.
introducing a non-binding instrument that merely restates the current applicable law without establishing any effective enforcement or implementation systems:

without being legally binding and accompanied by efficient monitoring mechanisms, the usefulness of the declaration would be of doubtful value. The time, energy, expertise and money that would be required in order to elaborate such minimum standards would no doubt be better invested in seeing to it that already existing norms be more efficiently complied with. In any event, there is no sign that the world governments would be any more inclined to abide by new minimum humanitarian standards in this field than they are to comply with their already existing legal obligations.76

Indeed, this sentiment was voiced during the Cape Town workshop by Zdzisław Kedzia, representative of the United Nations High Commissioner for Human Rights, conveying a message from the High Commissioner:

Like all new legislative proposals, the idea of minimum humanitarian standards could be responded to with the argument - and the widely shared opinion - that, after a period of standard-setting, the international community should focus on implementation. The World Conference on Human Rights attached great importance to this subject, including by setting the goal of universal ratification of the basic human rights treaties. So, although nobody denied that, if necessary, new standards should be elaborated, the preference for implementation prevailed… [m]aintaining the high level of existing human rights standards should be the preoccupation of the international community. Situations should be avoided which

76 Id., at 18-19.
could allow an opportunity to misinterpret or lower existing human rights standards or obligations deriving from them.\textsuperscript{77}

On perhaps a more fundamental level, the entire basis for the document itself has been questioned. When Theodor Meron first proposed the idea of a declaration on minimum humanitarian standards, he pointed out the potential international legal gap between IHL and international human rights law in times of internal disturbances or low-intensity conflicts:

scholars have assumed that in conflict situations as least, either ‘human rights’ or ‘humanitarian rights’ will apply, not that neither will apply…unfortunately, this is not always the case in reality. In many cases of armed conflict, states derogate from peacetime human rights through a number of techniques without recognising the applicability not only of humanitarian law as a whole, but even of common Article 3… the prospects for the application of Protocol II are even worse.\textsuperscript{78}

Meron also argued that the derogation provisions of the ICCPR and other human rights documents were cause for concern:

How far can states go in derogating, on grounds of public emergency, from international human rights? As regards parties to the Political Covenant [ICCPR], the list of nonderogable rights is clearly stated in Article 4 of that Covenant. But any scrutiny of that list must reveal its inadequacy. For instance, there is no prohibition of arbitrary deportations, even on a massive scale (such measure are prohibited by Article 49 of Geneva Convention IV)… [it is] distressing to note that

\textsuperscript{77} Comments by Zdzislaw Kedzia, the representative of the United Nations High Commissioner for Human Rights, in a message from the High Commissioner, Report on the Cape Town Workshop, supra note 55 at paras 40-41.

\textsuperscript{78} Meron, supra note 5 at 602.
the list of nonderogable rights under the Political Covenant is quite limited and appears to be inadequate to encompass all of the provisions that should be regarded as belonging to an irreducible core of human rights that must be applied at a minimum at all times.\textsuperscript{79}

However, the contention that there is a ‘gap’ in the law has been queried; such an appraisal of the law seems to underestimate both the scope of IHL (especially common Article 3) while concurrently over-estimating the degree to which international human rights law can be derogated from, or that those States which do derogate from the law actually justify such acts as a derogation at all.\textsuperscript{80}

\textit{A Defence of a Declaration of Fundamental Standards of Humanity} It would be easy to dismiss the last twenty years of work on this issue if it were not for the fact that for twenty years numerous academics, practitioners and advocates for international humanitarian law and international human rights law have supported the adoption of such a declaration. More tellingly, perhaps, is that the declaration has been long supported by the ICRC – the organisation who most often deal with the practicalities of armed conflict.

Furthermore, it should be noted that while the Geneva Conventions are uniformly ratified, the international human rights documents are not; neither are the Additional Protocols. A document which brings together, in one place, those principles of international humanitarian law and human rights law which have customary status and are thus applicable in all situations and circumstances, must be considered of some value. One need only look back at the Bush administration, in their dealings with Guantánamo Bay detainees, and the attempts to deny all manner of international legal protections to

\textsuperscript{79} \textit{Id.}, at 601, 604.

\textsuperscript{80} Svensson-McCarthy, supra note 74 at 4.
the detainees, to see that a definitive statement on what basic rules to apply to all people in all circumstances of violence and strife, can only ever more, rather than less, useful.

Indeed, this very point was noted during the Cape Town meeting; Francis Deng, representative of the Secretary-General on internally displaced persons, noted that restating the law with reforms, as needed, would have the effect of bringing into focus and consolidating standards that were otherwise dispersed and diffused into a multiplicity of instruments; the result could also have an educational value, and the overall effect would be improved protection and assistance.  

Indeed, the utility of a declaration on fundamental standards of humanity should not be underestimated, especially when considering those particular events at which the initial declaration was aimed – internal tensions, disturbances and low-intensity conflict situations. In the last twenty years, there has been a remarkable growth in humanitarian ‘special agreements’ drafted between rebel groups and states regarding conduct in internal conflicts. These documents, often termed ‘Ground Rules’, ‘Memorandum of Understanding’, ‘Codes of Conduct’ and so on, have been adopted in numerous instances of internal conflict in countries such as the Philippines, Sudan, Colombia and El

81 Comments by Francis Deng, representative of the Secretary-General on internally displaced persons, Report on the Cape Town Workshop, supra note 55 at para 43.


The ongoing work of the non-governmental organisation Geneva Call is also worth mentioning here; Geneva Call is a neutral humanitarian organisation whose aim is to foster compliance with humanitarian and human rights norms amongst nonstate armed groups. Their most significant work has been in the creation of the “Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action” - a document which allows nonstate actors to publicly pledge their commitment to cease using anti-personnel mines. As of April 2010, thirty-nine nonstate groups have signed the document.

What is noteworthy about all these special agreements is that they often incorporate human rights obligations as well as humanitarian law obligations. For instance, in the Philippines, the parties to the Comprehensive Agreement note specifically that “respect for human rights and international humanitarian law is of crucial importance and urgent necessity in laying the ground for a just and lasting peace” and that “the

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85 Special Agreement between the Frente Farabundo Marti Para La Liberacion Nacional (FMLN) and the Government of El Salvador (Jul. 26, 1990), cited in ICRC, INCREASING RESPECT FOR INTERNATIONAL HUMANITARIAN LAW IN NON-INTERNATIONAL ARMED CONFLICTS, Id. See also the Transitional Justice Institute/International Conflict Research Institute Peace Agreements Database at <http://www.peaceagreements.ulster.ac.uk/cgi-bin/Agreements/agree.pl?list=all> (visited Apr. 12, 2010) for a comprehensive listing of numerous agreements concluded between parties to internal armed conflicts regarding implementation of human rights and humanitarian law norms.


88 Available at <http://www.genevacall.org/resources/list-of-signatories/list-of-signatories.htm>.
prolonged armed conflict in the Philippines necessitates the application of the principles of human rights and the principles of international humanitarian law.”

The idea of humanitarian agreements involving nonstate actors is a concept included in Common Article 3 of the Geneva Conventions, which provides that parties to the conflict “should … endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.” However, the Conventions do not proscribe the type or form of such special agreements, leaving it to the parties to decide the composition of the document. A template instrument – such as a declaration on fundamental standards of humanity – could serve as a useful starting point for those participants in internal armed conflicts who wish to agree to the application of fundamental humanitarian rules.

Finally, one of the declaration’s perceived weaknesses – its non-binding character and lack of enforcement mechanisms – may, conversely, improve the document’s chances of acceptance on the international plane. The history of humanitarian law as well as human rights law is replete with examples of States resisting, if not outright actively opposing, the introduction of new binding norms to temper State conduct towards its citizens and those within its borders. However, it is often the case that States will gradually come to accept guidelines regarding certain types of conduct when such guidelines are positioned as useful albeit non-binding recommendations. An example of this can be seen with the Standard Minimum Rules for the Treatment of

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89 Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law Between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines, supra note 82, preamble.

90 Geneva Conventions I-IV, supra note 15, Art.3.
Prisoners,\textsuperscript{91} which, while not binding of themselves, do reflect recognized binding customary obligations under international law, such as the prohibition on cruel, inhuman, or degrading punishment. These rules are accepted by the UN as

a body of doctrine representing as a whole, the minimum conditions which are accepted as suitable by the United Nations in the management, custody and treatment of offenders, and explicitly called upon the world’s governments to give favourable consideration to the adoption of the Rules and their application in the administration of penal institutions.\textsuperscript{92}

The ninety-four rules cover what have come to be considered the basic minimum requirements for persons in detention.\textsuperscript{93} Given their general acceptance, the rules can be used as an interpretative aid in determining whether detention conditions are deemed to violate the prohibition on cruel, inhuman or degrading treatment or punishment.\textsuperscript{94} Indeed, this approach can be seen in the jurisprudence of the European Commission on Human Rights (ECiHR).\textsuperscript{95}

\textsuperscript{91} Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Aug. 30, 1955); approved by ECOSOC in Res. 663 C (XXIV) (July 31, 1957) and affirmed in Res. 2076 (LXII) (May 13, 1977); adopted by the General Assembly in GA Res. 2858 (XXVI) (Dec. 20, 1971); the Rules called upon Member States to implement the Rules in the administration of their domestic penal and correctional institutions and that consideration should be given to incorporating the Rules into domestic legislation. In 1973, the General Assembly recommended that Member States make all efforts to implement the Rules in both the administration of facilities and the creation of domestic legislation (GA Res. 3144 (XXVIII) (Dec. 14, 1973).


\textsuperscript{93} \textit{Id.}, 455.

\textsuperscript{94} See NIGEL RODLEY, \textit{THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW} 281 (2nd edn, 1999): “serious non-compliance with some rules or widespread non-compliance with some other may well result in a level of ill-treatment sufficient to constitute violation of the general rule [against cruel, inhuman or degrading treatment and punishment]”.

\textsuperscript{95} The ECiHR made considerable use of the Standard Minimum Rules in their determination in the \textit{Greek case}, which "constituted the first systematic application of the international standard to conditions of detention." RODLEY, supra note 94 at 282. \textit{See also The Greek Case}, 12 YB EURO CONV H RTS 468 (1969).
In addition, the Fourth United Nations Crimes Congress, held in 1970, examined nation-by-nation implementation of the Standard Minimum Rules for the Treatment of Prisoners. A survey of member states found the rules had contributed to advancing basic human rights for millions of prisoners, with fifteen of the forty-three responding States claiming that the Rules had played an influential role in the drafting of national legislation.\textsuperscript{96} At the Ninth Congress, held in 1995, it was found that the majority of Member States implemented or applied the Standard Minimum Rules to ‘a large extent’.\textsuperscript{97} If declaration on fundamental standards of humanity could achieve similar success, it could hardly be considered as entirely without merit.\textsuperscript{98}

V. PROPOSALS FOR THE FUTURE – AN ALTERNATE PATH?

If one accepts that a declaration on fundamental standards of humanity is indeed useful, it should be queried whether the United Nations is any closer to drafting and adopting such a document. The history of the declaration through the UN would seem to suggest not; thus, it might be useful to examine whether an alternate forum might have been and may yet be a better venue for the declaration to come to fruition.

In this respect, it is useful to draw an analogy between other significant documents in international humanitarian law that have not been adopted in the form of a


\textsuperscript{98} Svensson-McCarthy, supra note 74 at 18 – she questions the “alleged usefulness” of a declaration on minimum humanitarian standards and suggests that moves towards adopting such a document demonstrate a “lack of logic”.
treaty, not transmitted for ‘formal’ attention to the UN, but that nonetheless retain a significant measure of importance and resonance – for example, the San Remo Manual on the Law of Armed Conflict at Sea.

The San Remo Manual was drafted over a period of seven years and adopted in June 1994. The panel that drafted and adopted the manual comprised forty-five experts, from twenty-four countries, including government personnel and academics. The process was initiated with the first meeting convened at the San Remo International Institute of International Law, in cooperation the ICRC, a number of National Red Cross societies, and other institutions such as the Universities of Pisa and Syracuse.

Meetings then followed in Madrid, Bochum, Toulon, Bergen, Ottawa, Geneva and, Livorno, during which time plans of action were devised, drafting work undertaken and additional input received from three ICRC convened rapporteur sessions. The final result was a manual comprising one hundred and eighty-three paragraphs, drawn from treaties and customary international law, and further informed by recourse to national military manuals, domestic case law, and reports, papers and opinions of publicists in the area, specially-appointed rapporteurs, as well as the opinions and perspectives offered by naval officers who served on the panel.

The decision was made to keep the manual as a non-binding document, and not transmit the manual to the UN for adoption in treaty form. It was always the intention to

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100 For a complete listing of the participants, see 14 SYRACUSE J. INT’L L. & COM. 565 (1987-1988). The division was approximately one-third academics to two-thirds government personnel.
102 Doswald Beck, supra note 99 at 194.
[adopt] a nonbinding document. In view of the extent of uncertainty in the law, the participants decided that it was premature to thinking terms of a draft treaty, and that a type of successor to the Oxford Manual of 1913 would be more appropriate and should in itself promote comprehension of contemporary law.\textsuperscript{103}

The San Remo Manual is generally considered as “the most comprehensive… enunciation of the international law applicable at sea.”\textsuperscript{104} The manual’s customary status has been affirmed by the ICRC’s study into customary international humanitarian law.\textsuperscript{105} There seems little dispute as to whether the rules outlined in the Manual constitute a sound re-statement of the applicable law, despite the absence of a more modern treaty on naval warfare.

The successful adoption of the San Remo Manual through a non-UN based mechanism provides an interesting counter-point to the less successful path taken by the declaration on fundamental standards of humanity. The San Remo Manual went from theoretical conception, to drafting stage and then adoption of the final instrument in seven years. Contrast this with the nearly twenty years the declaration on fundamental standards of humanity has dwelt in various organs of the UN.

Admittedly, the declaration is dealing with the regulation of state behaviour towards its own individuals – an area often beset by state resistance to the imposition of international rules. States may resist the introduction of another instrument that may be seen as attempting to impose more restrictions on the sovereign independence of the state. However, as with Protocol II and Common Article 3, steps can be taken to

\textsuperscript{103} Id., at 208.

\textsuperscript{104} J Ashley Roach, The Law of Naval Warfare at the Turn of Two Centuries, 94 AJIL 64, 67 (2000).

\textsuperscript{105}
alleviate state concerns regarding the perceived intrusion into state sovereignty – through
the inclusion of articles or provisions emphasising that the instrument does not confer any
sort of international legitimacy on nonstate actors, and that the instrument is essentially a
restatement of the applicable law, rather than an extension or expansion of the rules
currently in place regarding states during times of emergency or low-level conflict.

VI. CONCLUSIONS

Given the number of international instruments already in existence regarding the
protection of human rights in both times of peace and times of armed conflict, it seems
reasonable to question whether the introduction of another document – a non-binding one
at that - would actually achieve anything. Legitimate critiques of the declaration have
quite rightly highlighted the fact that the failings of international human rights and
humanitarian law are in their implementation and enforcement procedures, rather than in
the rules themselves. Until all persons actively involved in armed hostilities obey all of
the rules all the time, additional regulatory instruments will simply be just one more
‘piece of paper’.

However, when it comes to attempting to improve the lot of those who are most
vulnerable when societal structures break down – either due to small scale internal
tensions all the way up to full-blown armed conflict – more, rather than less, effort is to
be encouraged and commended. This is an era where the established rules are being
challenged by situations and individuals that do not easily fit within conventional legal
structures. Terrorists, armed nonstate groups, private military and security contractors
are all part of the international political scene, and if international law is to retain its
currency in this new era, it must adapt to these new situations, to ensure it continues to adequately address these new situations. Therefore, any attempt to remind all the players of the rules of engagement should be encouraged.

Where this leaves the declaration on fundamental standards of humanity is less certain. It has been the contention of this article that the process of adopting a declaration should have been kept out of the UN and the task handed to a suitable NGO or academic organisation. However, the past cannot be changed; the declaration remains firmly enmeshed in the UN Human Rights Council, the successor body to the Human Rights Commission. The question is thus, ‘where to from here?’ Given that the declaration has percolated in the UN for nearly twenty years, without any moves towards bringing all the reports and studies and resolutions together in one instrument, it seems unlikely that the declaration will ever be adopted.