

EDITORIAL COMMENT

TOWARDS A HUMANITARIAN DECLARATION ON INTERNAL STRIFE

I. INTRODUCTION

The recent statement by the President of the International Committee of the Red Cross (ICRC) that the ICRC will hold consultations with experts on the elaboration of a new declaration on internal strife¹ will no doubt gratify the entire humanitarian and human rights law community. International attention is thus turning to a major area still outside the effective scope of international humanitarian law (hereinafter humanitarian law) applicable in armed conflicts: internal strife that falls below the thresholds of applicability of common Article 3 of the Geneva Conventions of August 12, 1949 for the Protection of Victims of War² and of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).³ In view of the frequency and cruelty of situations of internal strife, the widespread denial of applicability of humanitarian law, the limited number of ratifications of some of the human rights instruments, the inadequacy of the nonderogable provisions, and the abuse of the right of derogation, the elaboration of such a declaration could fill a dangerous lacuna and bring humanitarian and human rights law closer together.⁴

Although the principal mandate of the ICRC has always been to help victims of armed conflict, the Statutes of the International Red Cross, which were adopted with the participation of state parties to Geneva Convention

¹ Hay, *The ICRC and International Humanitarian Issues*, INT'L REV. RED CROSS, No. 238, Jan.-Feb. 1984, at 3, 9. See also INTERNATIONAL COMMITTEE OF THE RED CROSS, ANNUAL REPORT 1983, at 83 (1984). Such a declaration could be adopted by the 25th International Conference of the Red Cross (Geneva, 1986).

² Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention No. I), Aug. 12, 1949, 6 UST 3114, TIAS No. 3362, 75 UNTS 31; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention No. II), Aug. 12, 1949, 6 UST 3217, TIAS No. 3363, 75 UNTS 85; Geneva Convention relative to the Treatment of Prisoners of War (Geneva Convention No. III), Aug. 12, 1949, 6 UST 3316, TIAS No. 3364, 75 UNTS 135; Convention relative to the Protection of Civilian Persons in Time of War (Geneva Convention No. IV), Aug. 12, 1949, 6 UST 3516, TIAS No. 3365, 75 UNTS 287.

³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, reprinted in 16 ILM 1442 (1977).

⁴ Regarding the need for and the concept of such an instrument, see Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 AJIL 589 (1983). Regarding the value of declarations, see *id.* at 606 n.80.

No. 1,⁵ as well as its own Statutes,⁶ also authorize the ICRC to carry out humanitarian work in situations of "internal strife." Under that authority, the ICRC has already been performing the important task of visiting detainees in situations of internal strife,⁷ and has made some "legislative" efforts⁸ regarding internal strife.

The object of this Comment is to express some reflections and desiderata concerning the scope of applicability and normative content of the declaration. Rather than speculate about the content of particular provisions, we shall discuss some basic concepts of a possible model for such a declaration. Past international efforts to regulate the protection of victims of internal strife have failed because of conflicts with the sovereignty of states. It remains to be seen whether the present efforts will produce a significant instrument. While the eventual content of the declaration will be determined by the reach of political consensus, informed public opinion and scholarly writing may influence both the future and the directions of this important initiative.

II. MATERIAL SCOPE OF APPLICABILITY

Although in theory it is possible to conceive of a core declaration of essential norms to be applied either in all situations or in all situations not covered by the existing humanitarian instruments,⁹ the parameters of our discussion of the scope of applicability of the future declaration are drawn from the statement of the President of the ICRC, as follows:

The situation of the individual caught up in violence in a State, violence that ranges from simple internal tensions to more serious internal

⁵ Statutes of the International Red Cross, Art. VI(5), INTERNATIONAL COMMITTEE OF THE RED CROSS, LEAGUE OF RED CROSS SOCIETIES, INTERNATIONAL RED CROSS HANDBOOK 407 (1983). Statutes of the International Red Cross are adopted by international conferences of the Red Cross, in which each state party to Geneva Convention No. I, each national Red Cross Society, the ICRC, and the League of the Red Cross Societies have the right to one vote, Rules of Procedure of the International Conference of the Red Cross, Arts. 1, 17, *id.* at 414.

⁶ Statutes of the International Committee of the Red Cross, Art. 4(1)(d), *id.* at 421.

⁷ Meron, *supra* note 4, at 606.

⁸ For such earlier efforts, see J. MOREILLON, LE COMITÉ INTERNATIONAL DE LA CROIX-ROUGE ET LA PROTECTION DES DÉTENUÉS POLITIQUES 243-55 (1973). The ICRC proposed a text of a short Declaration of Fundamental Rights of the Individual in Time of Internal Disturbances or Public Emergency to the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Conf. Doc. CE/5b, at 85 (1971). See also M. VEUTHEY, GUÉRILLA ET DROIT HUMANITAIRE 373-78 (1983); Meron, *supra* note 4, at 603 n.75. See generally J. BOND, THE RULES OF RIOT: INTERNAL CONFLICT AND THE LAW OF WAR (1974).

⁹ Meron, *supra* note 4, at 604-05. Disputes on characterization of conflicts have plagued the implementation of humanitarian law. The applicability of certain norms depends on such a characterization. *Id.* at 603. It is of interest, therefore, that in its draft of Rules Applicable in Guerrilla Warfare, which the ICRC submitted in 1971 to the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, it was stated that the "standard minimum rules . . . would be applicable in all conflicts not corresponding entirely to the conventional definition envisaged in Articles 2 and 3 of the Geneva Conventions and . . . would in no way influence the designation of the conflict." Conf. Doc. CE/6b, at 50 (1971).

disturbance, is a cause of deep concern to the ICRC. A suggestion was made recently to draft a declaration of basic and inalienable¹⁰ rights applicable to cases of collective violence within States, in situations that would not already be covered by humanitarian law. The ICRC considers this idea worth pursuing and intends to examine it during its consultations with experts.¹¹

The declaration should therefore be based on the following principles: (1) it should concern internal, not international strife; (2) it should cover situations involving collective violence, including low-intensity violence, ranging "from simple internal tensions to more serious internal disturbance";¹² (3) it should cover situations not already covered by humanitarian law; and (4) it should be nonderogable and not subject to any limitations or restrictions for any reason whatsoever.¹³

Collective violence would be required for the declaration to apply. Nonviolent situations would be governed by "normal" or "peacetime" human rights instruments. For the purposes of this Comment, "internal strife" should therefore be understood as violent internal strife.¹⁴ It is essential that the provisions on the scope of applicability be formulated so as to avoid the weakness of common Article 3 of the Geneva Conventions, which frequently allows the states concerned to argue that the level of the internal conflict in their territories has not reached the threshold required for the application of that article.¹⁵ The formulation must not permit states to evade the norms stated in the declaration by claiming, for example, that the violence accompanying the civil strife in question is not of a collective character or is not significant enough. Obviously, this is one of the most difficult problems and it will have to be handled with the utmost care in the actual drafting. Since the bona fides of states cannot be taken for granted, one should anticipate evasions and make them as difficult to achieve as possible. Ideally, all situations of

¹⁰ The original French text of President Hay's statement used the word "*non-dérogeables*," which should have been translated into "nonderogable," rather than "inalienable."

¹¹ Hay, *supra* note 1.

¹² *Id.*

¹³ For a recent example of a declaration containing an explicit prohibition of derogations, see Principle 6 of the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 37/194, 37 UN GAOR Supp. (No. 51) at 211, UN Doc. A/37/51 (1982).

¹⁴ The draft declaration proposed by the ICRC in 1971 was to apply to "public emergency or internal disturbances [which] prove to be serious or protracted and involves acts of violence." ICRC, Declaration of Fundamental Rights, *supra* note 8, at 86; J. MOREILLON, *supra* note 8, at 183-84.

¹⁵ Common Article 3 does not define what constitutes an "armed conflict not of an international character." However, the authoritative ICRC commentary suggests a high threshold of violence, "a genuine armed conflict." COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 50 (J. Pictet ed. 1952). The conflict would be one that in many respects is similar to an international war, but that takes place within the confines of a single country. COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 36 (O. Uhler & H. Coursier eds. 1958).

internal strife involving violence should be covered, whether originating in the government or in the opposition, even when the violent acts are of low intensity. The provision defining the material scope of applicability of the declaration should not be all-inclusive or exhaustive and should lend itself to a broad interpretation.¹⁶

The declaration should apply to all cases of violent internal strife that are not covered by the Geneva Conventions or by the Additional Protocols. Thus, states would not be allowed to select the least onerous instrument. No gap between the field of applicability of common Article 3 and the declaration must be permitted. A situation of violent domestic strife not covered by Protocol II¹⁷ or common Article 3 must be covered by the declaration.

III. PERSONAL SCOPE OF APPLICABILITY

Geneva Convention No. IV, Protocol I¹⁸ and Protocol II contain some provisions that are applicable to the entire civilian population.¹⁹ Other provisions, however, are applicable only to persons falling into certain categories, inter alios, "protected persons,"²⁰ "persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1,"²¹ combatants and prisoners of war,²² persons, "[i]n so far as they are affected by a situation referred to in Article 1 of this Protocol . . . 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,"²³ "persons affected by an armed conflict as defined in Article 1,"²⁴ "persons who do not take a direct part or who have ceased to take part in hostilities,"²⁵ and "persons who have been deprived of their liberty . . . for reasons related to such conflict."²⁶

What should the personal scope of the declaration be? Should it apply only to persons specifically affected by the internal strife or to everyone without distinction? On the one hand, the object of the declaration is not to revise the existing human rights instruments but to focus on the special concerns of humanitarian law. On the other hand, in a low-intensity conflict, the traditional

¹⁶ It is of interest to compare a formula similar to that found in Article 1(2) of Protocol II, but in the positive sense, to that proposed by the ICRC in 1971, note 14 *supra*.

¹⁷ Regarding the field of applicability of Protocol II, see Meron, *supra* note 4, at 599-600.

¹⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, *reprinted in* 16 ILM 1391 (1977).

¹⁹ See generally Meron, *supra* note 4, at 595-97; Protocol I, pt. IV, sec. I; Protocol II, pt. IV.

²⁰ Geneva Convention No. IV, Art. 4.

²¹ Protocol I, Art. 11(1).

²² *Id.*, pt. III, sec. II.

²³ *Id.*, Art. 75(1). For a comparison of the personal scope of protection provided by this article with that provided by Article 4 of Geneva Convention No. IV, see M. BOTHE, K. PARTSCH & W. SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 457-60 (1982).

²⁴ Protocol II, Art. 2(1).

²⁵ *Id.*, Art. 4(1).

²⁶ *Id.*, Art. 2(2).

distinctions, such as between combatants and civilians, participants and innocent bystanders, persons affected or not affected by the situation of civil strife, may not be meaningful and, moreover, may be abused by governments so as to circumvent the objects and purposes of the declaration.

Another argument in favor of broad applicability of the declaration may be adduced from the nonderogable provisions of the human rights instruments. Those very nonderogable provisions apply to the population as a whole, without any distinction, and should form part of the core of the declaration.²⁷ It would thus be inconceivable that all persons could benefit from such nonderogable provisions under applicable human rights instruments, but not under the declaration. Moreover, certain additional provisions of the declaration, while derived from humanitarian instruments, may have the character of a most fundamental protection, e.g., the prohibition of deportations, which would justify their application to the population as a whole. Finally, the inadequacy of the nonderogable provisions for protecting the denizens of a country involved in internal strife²⁸ suggests that there is a need to apply the declaration to the population as a whole.

As a matter of general policy, the declaration should therefore be made applicable to the entire population.²⁹ However, certain protections would have to be limited to particular categories of persons. Thus, due process guarantees, which are recognized in humanitarian instruments with regard to particular categories of beneficiaries and which under the International Covenant on Civil and Political Rights³⁰ (Political Covenant) are subject to derogations, might have to be limited to persons prosecuted for offenses related to the internal strife. The same might be true of the ICRC's role regarding visits to detainees: in principle, the ICRC would offer its services to visit only those deprived of their liberty for reasons related to the internal strife. But all exceptions from the principle of general applicability to all persons should only be made for good cause and should be explicitly stated.

IV. NORMATIVE CONTENT

The declaration should contain normative provisions broad enough to provide essential protections to denizens of states involved in internal strife, but not so broad as to make the attainment of an international consensus improbable. Reports and studies presented to the UN Commission on Human Rights reveal a striking pattern of frequent and brutal violations of fundamental human and humanitarian rights in countries engaged in civil strife. Because the applicability of humanitarian law is often denied, and the nonderogable

²⁷ See section IV *infra*.

²⁸ Meron, *supra* note 4, at 601–02.

²⁹ It may be recalled that the draft declaration proposed by the ICRC in 1971 was also to be applied “without any discrimination.” ICRC, Declaration of Fundamental Rights, *supra* note 8, at 86.

³⁰ GA Res. 2200, 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966).

human rights protections are inadequate and frequently ignored, there is a dire scarcity of governing norms. The declaration, though brief, should therefore be comprehensive and self-contained. It should represent to denizens of a country suffering internal strife what the Universal Declaration of Human Rights³¹ represents to persons living in conditions of tranquility. To increase the likelihood that states will respect the new instrument, and taking into account its form (a declaration rather than a treaty), it should contain as far as possible relatively "hard" norms. Soft norms³² should be avoided. In principle, the declaration should embody norms that no self-respecting state would deny without risking condemnation by international public opinion.

The declaration should contain a provision stating that its application shall not affect the legal status of authorities or persons involved in the situation of internal strife. Such a provision is necessary to encourage governments to respect the declaration without fear that its application might amount to recognition of, or grant of political status to, dissidents or other oppositional elements.

The careful selection and formulation of the essential rights is crucial. The two principal sources should be the nonderogable provisions of human rights instruments and humanitarian instruments, especially the latter.

A starting point could be to review the lists of nonderogable rights in the Political Covenant, the European Convention for the Protection of Human Rights and Fundamental Freedoms³³ (European Convention), and the American Convention on Human Rights³⁴ (American Convention). Since important groups of states acting severally have already accepted the principle of nonderogability of the rights on one or two of the lists (parties to the Political Covenant and one of the regional conventions), there should be some hope for joint acceptance of a broader list based on the existing ones.

If a particular nonderogable right is not truly essential to the protection of people involved in internal strife,³⁵ it should not be included. Certain rights enumerated in the nonderogable provisions of human rights instruments may not be suitable for inclusion in a humanitarian instrument, e.g., the political right to participate in government.³⁶ On the other hand, some protections that are recognized, or partly recognized, in the nonderogable provisions may

³¹ GA Res. 217A, UN Doc. A/810, at 71 (1948).

³² E.g., Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva in 1955, and approved by the Economic and Social Council by its Resolutions 663C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977.

³³ 213 UNTS 221.

³⁴ For the official text, see ORGANIZATION OF AMERICAN STATES, HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 29, OEA/Ser.L/V/II.60, doc. 28, rev.1 (1983).

³⁵ To illustrate: the prohibition of imprisonment merely on the ground of inability to fulfill a contractual obligation, stated in Article 11 of the Political Covenant, is not of particular relevance in times of emergency.

³⁶ See, e.g., American Convention, Arts. 23, 27.

have to be strengthened.³⁷ Other rights that are not currently enumerated among the nonderogable rights³⁸ may have to be added.

The main source of rights, however, should be humanitarian instruments, preferably the Geneva Conventions themselves, because of their universal acceptance by states and their special relevance to situations of strife. Many of the relevant provisions may have to be "borrowed" from Protocol II, often with important modifications, and, in a number of cases, from Protocol I. Although, as of April 10, 1984, only 34 states had ratified Protocol II, it contains significant provisions that are crucial to the drafting of the declaration (e.g., Article 4, "Fundamental guarantees"). The selection of the provisions should be guided by the principle of economy, balanced against the need to state all of the truly essential protections.

Because of the scarcity of appropriate nonderogable provisions, it may well be that the bulk of the declaration will be inspired by provisions found in humanitarian instruments. In some cases, a nonderogable provision of a human rights instrument and a provision of a humanitarian instrument overlap (e.g., on torture). In such cases, the drafters of the declaration will have the advantage of being able to choose the more appropriate provision. Humanitarian instruments, it may be recalled here, are never subject to derogations on such

³⁷ Article 4(2) of the Political Covenant mentions the right to life (Art. 6) among the nonderogable provisions, but not due process guarantees (Art. 14). As the right to life under Article 6 is not absolute, the effect of this omission is, arguably, that in time of emergency, death sentences can be imposed following summary procedures, provided that the more limited guarantees stated in Article 6 are observed. A different interpretation, however, based on the prohibition of arbitrary deprivation of life, is possible. S. Wako, Report on Summary or Arbitrary Executions, UN Doc. E/CN.4/1983/16, at 13-14. Regarding Article 4(2) of the Political Covenant, see Lillich, *Civil Rights*, in 1 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 115, 121-22 (T. Meron ed. 1984); Dinstein, *The Right to Life, Physical Integrity, and Liberty*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 114, 116 (L. Henkin ed. 1981). See also Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Advisory Opinion No. OC-3/83 (Inter-Am. Ct. Human Rights, Sept. 8, 1983).

Regarding Protocol No. 6 to the European Convention, see Meron, *supra* note 4, at 605 n.79. It may be noted that the UN General Assembly requested that the Commission on Human Rights consider elaborating a draft of a second optional protocol to the Political Covenant, aiming at the abolition of the death penalty. GA Res. 37/192, 37 UN GAOR Supp. (No. 51) at 209, UN Doc. A/37/51 (1982). The Commission on Human Rights recently referred the matter to the Sub-Commission on Prevention of Discrimination and Protection of Minorities. Res. 1984/19, UN Doc. E/1984/14, E/CN.4/1984/77, at 53.

A better formulation than in the Political Covenant is contained in Article 27(2) of the American Convention which prohibits suspension of judicial guarantees essential to the protection of nonderogable rights and in common Article 3(1)(d) of the Geneva Conventions which prohibits "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."

³⁸ The Political Covenant does not contain a clear and nonderogable prohibition of deportations, even on a massive scale. Experience indicates the necessity that such a provision be included in the declaration. The essential principle of prohibition of deportations is well established in humanitarian instruments (Geneva Convention No. IV, Art. 49; Protocol II, Art. 17) which would provide the source for the declaration.

grounds as public emergency since they were adopted to govern situations of armed conflict.³⁹

Among the specific provisions that would have to be "borrowed" from humanitarian instruments would be the important guarantees of due process and of humane treatment of detainees and internees, because of their mostly derogable character in human rights instruments.⁴⁰ Other provisions to be selected from humanitarian instruments should include those dealing with deportations,⁴¹ forced movements of the population, collective punishments and protection of children and families.

In situations of internal strife, excessive force is often used, e.g., to suppress riots or enforce curfews. The declaration should therefore curtail the use of force by law enforcement officials.⁴² The pertinent provisions should prohibit the use of force unless it is absolutely required. They should be based on the principle of proportionality between the objective to be attained and the degree of force used.⁴³ The use of weapons in violation of the laws of war or other rules of international law applicable to the state concerned should be prohibited.⁴⁴ The declaration should reflect the concept that the use of firearms constitutes an extreme measure that is not to be allowed in certain egregious cases, e.g., against peaceful demonstrators or children. Such provisions would adapt to the circumstances of internal strife certain concepts of the "Hague law" establishing restraints on the use of weapons.⁴⁵

³⁹ See Meron, *supra* note 4, at 598, 605–06; Dinstein, *Human Rights in Armed Conflict: International Humanitarian Law*, in 2 HUMAN RIGHTS IN INTERNATIONAL LAW, *supra* note 37, at 345, 350–54.

⁴⁰ Articles 5–6 of Protocol II are particularly suitable as sources. See also note 37 *supra*. Neil MacDermot has observed that studies conducted by the International Commission of Jurists "had shown that although, pursuant to article 4 . . . [of the Political Covenant], there could be no derogation of certain rights, all the procedural and other safeguards which would reduce the risk of violations of those rights could themselves be derogated and in practice were usually suspended." UN Doc. E/CN.4/1984/SR.20, at 4–5 (Feb. 20). See generally INTERNATIONAL COMMISSION OF JURISTS: STATES OF EMERGENCY: THEIR IMPACT ON HUMAN RIGHTS (1984); Meron, *supra* note 4, at 600–02; Sub-Comm'n on Prevention of Discrimination and Protection of Minorities Res. 1983/30, UN Doc. E/CN.4/1984/3, E/CN.4/Sub.2/1983/43, at 96.

⁴¹ See note 38 *supra*.

⁴² See generally Code of Conduct for Law Enforcement Officials, GA Res. 34/169, 34 UN GAOR Supp. (No. 46) at 185, UN Doc. A/34/46 (1979); European Convention, Art. 2. The Political Covenant does not contain a provision similar to Article 2 of the European Convention. But in the context of the right to life (Political Covenant, Art. 6), the UN Human Rights Committee has raised questions concerning the rules governing the use of arms by security forces in disturbances and, particularly, in political riots. Report of the Human Rights Committee, 33 UN GAOR Supp. (No. 40) at 49, UN Doc. A/33/40 (1978).

⁴³ For a recent formulation of the principle of proportionality, see Protocol I, Arts. 51(5)(b), 57(2)(a)(iii).

⁴⁴ Cf. Protocol I, Art. 36.

⁴⁵ For a useful discussion of "Hague law" and "Geneva law," see Aldrich, *New Life for the Laws of War*, 75 AJIL 764 (1981). The Sub-Commission on Prevention of Discrimination and Protection of Minorities recently expressed its concern at "the numerous occurrences in many countries of excessive and/or completely unwarranted use of force by law enforcement officials and military personnel during public gatherings, resulting in civilian loss of life or injury." Res. 1983/24, UN Doc. E/CN.4/1984/3, E/CN.4/Sub.2/1983/43, at 91. The Sub-Commission asked the Commission on Human Rights to invite the Committee on Crime Prevention and Control to consider this question. *Id.* See also Report on Restraints in the Use of Force prepared

In situations of internal strife, pernicious phenomena such as “disappearances” and the operations of so-called death squads are frequent, and the drafters should take them into account in preparing the declaration. Provisions should be included that prohibit acts or threats of violence whose purpose or effect is to spread terror among the population. Although various rights that are violated through the causing of “disappearances” are stated in international human rights treaties, an explicit prohibition of “disappearances” does not as yet appear in any such treaty. The draft of the new *Restatement of the Foreign Relations Law of the United States*⁴⁶ correctly lists the causing of the disappearance of individuals among the violations of customary international law. Considering the acceptance of the prohibition of disappearances into the corpus of customary international law and the frequency with which disappearances occur in many countries, especially in situations of internal strife, the declaration should not only incorporate this concept, but go a step further in trying to provide a sound definition of the prohibition of disappearances.⁴⁷

Finally, the declaration should include provisions dealing with the activities of the ICRC and other humanitarian bodies, and with protection and care of the sick and wounded.⁴⁸ The declaration as a whole should be humanistic in style to the extent possible, but precise in its normative formulations. Clear terminology would aid in its dissemination and in the creation of the requisite public opinion, the most effective means of encouraging respect for humanitarian law.

V. RELATIONSHIP TO OTHER INSTRUMENTS

In normative terms there is bound to be a considerable degree of overlap between the declaration and other humanitarian instruments, but there should be no overlap between their fields of application, as the declaration should not apply to situations covered by the Geneva Conventions and the Additional Protocols. But as regards the human rights instruments, an overlap in the scope of application between at least some normative provisions will be inevitable. When a situation of internal strife is covered both by the declaration and by the nonderogable provisions of a particular human rights instrument, the level of protection that each of them offers may be different; that provided by the declaration is likely to be, in some respects, more advantageous to the

by the Secretary-General in accordance with Sub-Commission Resolution 1983/24, UN Doc. E/CN.4/Sub.2/1984/14.

⁴⁶ RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) §702 (Tentative Draft No. 3, 1982).

⁴⁷ See generally Reports of the Working Group on Enforced and Involuntary Disappearances, UN Docs. E/CN.4/1435 and Add.1 (1981); E/CN.4/1492 and Add.1 (1981); E/CN.4/1983/14 (1983); E/CN.4/1984/21 (1984); J. EGELAND, HUMANITARIAN INITIATIVE AGAINST POLITICAL “DISAPPEARANCES” (Henry Dunant Institute, 1982); Berman & Clark, *State Terrorism: Disappearances*, 13 RUTGERS L.J. 531 (1982).

The Sub-Commission on Prevention of Discrimination and Protection of Minorities instructed its Working Group on Detention to prepare a first draft of a “Declaration Against Unacknowledged Detention of Persons, Whatever Their Condition,” Res. 1983/23, UN Doc. E/CN.4/1984/3, E/CN.4/Sub.2/1983/43, at 90, 91.

⁴⁸ *Aiding War Wounded—A Legal Right*, ICRC BULL., No. 99, Apr. 1984, at 4.

individual. Indeed, it has already been observed that the list of nonderogable rights does not encompass all of the protections that should be regarded as belonging to an irreducible core of human rights.⁴⁹ The establishment of a more extensive catalog of elementary protections than that comprised by the nonderogable provisions of human rights instruments is one of the main justifications for the declaration. There is nothing new in the notion that humanitarian instruments recognize rights additional to those provided for in certain human rights instruments.⁵⁰ The relationship between the rights granted under a particular human rights instrument and the probably more extensive rights under the declaration should not be regarded as a conflict:⁵¹ there is no incompatibility if one of the two instruments provides for a higher standard of protection than the other, because implementation of the higher standard necessarily entails implementation of the lower one.⁵²

Finally, the declaration should contain well-drafted and comprehensive saving provisions, which would make it clear that existing humanitarian instruments were fully maintained and that no state could evade its obligations under those instruments on the pretext that it was complying with the declaration.⁵³ The saving provisions would ensure that extant humanitarian rights could not be weakened by the new declaration and that more extensive rights recognized in any country under any law, treaty or custom would not be denied on the ground that the declaration recognized such rights to a lesser extent.⁵⁴

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⁴⁹ See Meron, *supra* note 4, at 604.

⁵⁰ Thus, Article 6(5) of the Political Covenant prohibits the carrying out of a sentence of death on a pregnant woman, but it appears that pregnancy only postpones the implementation of the death penalty until after the woman has given birth. More liberal provisions are contained in humanitarian instruments. Article 76(3) of Protocol I prohibits the execution of the death penalty on pregnant women or mothers of dependent infants, for an offense related to the armed conflict. Article 6(4) of Protocol II prohibits the carrying out of a death sentence on pregnant women or mothers of young children.

⁵¹ See generally Meron, *Norm Making and Supervision in International Human Rights: Reflections on Institutional Order*, 76 AJIL 754 (1982).

⁵² N. VALTICOS, *INTERNATIONAL LABOUR LAW* 73 (1979).

⁵³ Cf. Political Covenant, Art. 46; International Covenant on Economic, Social and Cultural Rights (Economic Covenant), Art. 24, GA Res. 2200, 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966).

⁵⁴ Cf. Political Covenant, Art. 5(2); Economic Covenant, Art. 5(2).