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Workshop

Standard-setting: Lessons Learned for the Future

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TURKU/ÅBO DECLARATION OF MINIMUM HUMANITARIAN STANDARDS (1990)

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BACKGROUND TO THE INSTRUMENT

1. The origins to the Turku Declaration can be traced back to the results of the Diplomatic Conference that by 1977 drafted the two Protocols to the Geneva Conventions of 1949. The adoption of Protocol II, seeking to address non-international armed conflicts, coincided with the entry into force of the International Covenant on Civil and Political Rights in 1976. A comparison of the resulting frameworks of international humanitarian law and human rights law led many observers to the conclusion that there was a protection gap in respect of situations that did not amount to an armed conflict in the meaning of the 1949 Geneva Conventions, or of Protocol II of 1977, but nevertheless allowed states to declare a state of emergency and to resort to the derogation clauses in the ICCPR and certain other human rights treaties.

2. The issues were during the 1980s addressed in several, partly parallel and overlapping processes, mainly representing the work of academic or other experts. Reference can be made to the 1982 Questiaux study for the Sub-Commission,[1] the ICJ Study of 1983,[2] the 1984 Paris Minimum Standards by the ILA,[3] the Siracusa Principles of 1985[4] and, perhaps as the most important initiative, the outspoken voice of Professor Theodor Meron in promoting and drafting a new

[1] Study of 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.
[2] International Commission of Jurists, States of Emergency: Their Impact on Human Rights, 1983.
[3] Reprinted and accompanied by comments by Professor Richard Lillich in 79 American Journal of International Law (1985) at 1072.
[4] Reproduced in 7 Human Rights Quarterly (1985) 3.

instrument.[5] A somewhat different "Code of Conduct" approach was represented by work done within the ICRC.[6]

3. Upon the publication of the Turku Declaration, soon after its adoption, in the American Journal of International Law, two of the principal authors of the Declaration addressed the issue of protection gaps as follows:

4. "The readers of this Journal are familiar with the difficulties experienced in protecting human dignity in situations of internal violence that fall below the thresholds of applicability of international humanitarian instruments but within the margin of public emergency; … These difficulties are compounded by the inadequacy of the non-derogable provisions of human rights instruments, the weakness of international monitoring and control procedures, and the need to define the character of the conflict situations…"[7]

DESCRIPTION OF THE PROCESS AND ITS FORM AND NATURE

5. As a drafting process of a declaration adopted by an expert meeting the path to the Turku Declaration was relatively rapid. In June 1987 the Norwegian Institute of Human Rights[8]and its then director Asbjørn Eide convened an expert meeting that adopted the Oslo Statement on Norms and Procedures in Time of Public Emergency or Internal Violence.[9] Three and a half years later, in December 1990, another expert meeting was held at the Åbo Akademi University Institute for Human Rights, headed by Professor Allan Rosas. Basing itself on preparatory work by Rosas, Eide and Meron, the meeting adopted what is now known as the Turku Declaration of Minimum Humanitarian Standards.[10] The preamble of the instrument was drafted in anticipation of its subsequent adoption by the United Nations.

6. Since the adoption of the Turku Declaration by a group of experts in December 1990 the process can be said to have suffered stagnation. However, this is true only if the process is categorised as one of standard *setting*, and with a specific meaning of that term in mind. It is certainly true that some of the original actors intended the Turku Declaration to be elevated to an instrument adopted by the United Nations. Nevertheless, this was never the sole purpose of the exercise and the Turku Declaration came to play a meaningful role in many other processes that in a broader meaning could be said to fall under the notion of "standard-setting".

7. On the more narrowly understood path of work towards formal adoption by an intergovernmental organisation, the Nordic governments tabled the Turku Declaration before the Sub-Commission from where it later on was elevated to the Commission. While Commission resolutions adopted since 1995 have kept the issue alive and under discussion, they do not - so far - represent a decided approach of moving towards a declaration or another instrument formally adopted by the United Nations.[11]

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[5] Meron, On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument, 77 AJIL (1983) 589; Towards a Humanitarian Declaration on Internal Strife, 78 AJIL (1984) 859; Draft Model Declaration on Internal Strife, International Review of the Red Cross Jan-Feb 1988 at 59.

[6] Gasser, A Measure of Humanity in Internal Disturbances and Tensions: Proposal for a Code of Conduct, International Review of the Red Cross, Jan-Feb 1988 at 38.

[7] Meron and Rosas, A Declaration of Minimum Humanitarian Standards, 85 AJIL (1991) 375.

[8] Now Norwegian Centre for Human Rights.

[9] For the text, see UN Doc. E/CN.4/Sub.2/1987/31. The Oslo Statement drew upon previous work by Professor Theodor Meron.

[10] Turku is the Finnish name of the city that in Swedish carries the name Åbo and where Åbo Akademi is the Swedish-language university, hosting the Institute for Human Rights.

[11] In resolution 1995/29 the Commission recognized the need to address principles applicable to situations of internal and related violence, disturbance, tension and public emergency (OP1). This can be contrasted with the

8. In 1994, at an international expert meeting convened at the Norwegian Institute of Human Rights, certain needs to modify the text of the Turku Declaration were discussed on the basis of expressed criticism and changes in the nature of conflicts in the 1990s. A revised version of the Turku Declaration was submitted to the Commission on Human Rights by Norway and Finland.[12]

ACTORS OF THE PROCESS

9. Academic and other independent experts played a major role in the process leading to the adoption of the Turku Declaration in 1990. Particular mention can be made of the Nordic human rights institutes/centres and of Professor Theodor Meron. NGOs with pertinent expertise, such as Amnesty International or the ICRC were involved, but often with a critical perspective into the project. The criticism may have resulted either from a fear of existing standards being watered down (Amnesty) or from potential conflicts between mandates based on humanitarian law vs. human rights law (ICRC).

10. The Nordic governments were active in promoting the adoption of an international instrument, perhaps even more so than the original initiators who saw independent merit in the process itself, namely as a visible opportunity to address and discuss existing protection gaps and to seek solutions to them in various fora. The Nordic governments, supported by others, took the issue to the CSCE/OSCE where several documents make implicit or explicit reference to the Turku Declaration. Of these, the perhaps most important is the Document of the 1991 Moscow CSCE Meeting on the Human Dimension where the participating states committed themselves to more extensive protection of fundamental rights during states of emergency than what can be inferred from a strictly textual reading of the derogation clauses in human rights treaties.

OTHER INFLUENCES

11. The stagnation in respect of the role of the Turku Declaration as a standard-setting process in the narrow meaning of the term, i.e. in respect of its formal adoption by the United Nations, is related to the general reluctance of governments to adopt new human rights instruments in issues that are considered sensitive – even when the instrument in question would rather represent an effort to identify and codify existing binding norms, than a real "law-making" process towards the adoption of new substantive norms.

12. At the same time, such stagnation serves as evidence that there is no in-built progressive or even neutral rationale in formal standard-setting processes in the field of human rights. Even in areas where a proposed new instrument would represent an effort to codify a set of already binding fundamental norms, some governments (or other actors) may misuse the process for the purpose of questioning or watering down those existing standards.

Sub-commission resolution 1994/26 where the text of the Turku Declaration had been forwarded to the Commission "with a view to its further elaboration and eventual adoption". In a later Commission resolution 1997/21 the Secretary-General was requested to prepare an analytical report "on the issue of fundamental standards of humanity… identifying, *inter alia*, common rules of human rights law and international law that are applicable in all circumstances". At this stage the notion of minimum humanitarian standards was replaced with "fundamental standards of humanity", in order to avoid confusion with humanitarian law and in order to avoid any message of watering down existing standards of protection.

[12] UN doc. E/CN.4/1995/116. Article 8 (3) was modified to avoid the impression that capital punishment was mandatory in some circumstances. The prohibition against using the Turku Declaration for lowering the protection afforded by other instruments was emphasised by moving it from art. 18 (2) to art. 1. Art. 7 on displacement was strengthened by adding the right to remain. The changing nature of conflicts was taken into account by adding references to "ethnic, religious and national conflicts" in all pertinent paragraphs.

ASSESSMENT OF THE OUTCOME

13. The fact that the Turku Declaration was drafted with a view to its formal adoption by the United Nations may have resulted in the formulation of a fairly careful, rather than progressive or expansive approach to the catalogue of fundamental rights that are applicable in respect of all actors in all circumstances. At the same time this modest approach may also explain why the Turku Declaration – or the lines of thought reflected in it – have been fairly successful what comes to their later inclusion in related processes of "standard-setting", here referring to the broad meaning of the term. Particular mention of processes that are relevant is this context should be made of the following four:

    i. The reference to the Turku Declaration by the International Criminal Tribunal for former Yugoslavia in the *Tadic* case.[13]

    ii. The subsequent contribution made by the 1998 Rome Statute of the International Criminal Court in bridging the gap between humanitarian and human rights law, *inter alia*, in defining the Court's jurisdiction in respect of crimes against humanity. The issue of non-state actors being bound by a set of fundamental standards of humanity is regulated by the ICC Statute as far as breaches against those standards constitute international crimes that fall within the jurisdiction of the ICC.

    iii. The (ongoing) work by the ICRC towards the codification of customary norms of international humanitarian law which will shed more light on the substance and scope of fundamental standards of humanity applicable in non-international armed conflicts and in respect of non-state actors or states that have not ratified Protocol II to the Geneva Conventions.

    iv. The adoption, in July 2001, of General Comment No. 29 by the Human Rights Committee on states of emergency, departing from a narrow textual reading of the list of non-derogable rights in the ICCPR, partly through reasoning that reflects the idea of fundamental standards of humanity, and with an explicit reference to the Turku Declaration.[14]

IMPLEMENTATION PHASE

14. One potential use of the Turku Declaration is to serve as a pedagogical tool, as a short guide to fundamental standards of humanity, capable of crystallising in a brief format the essence of core norms of humanitarian and human rights law.

[13] *Prosecutor v. Tadic*, Decision of 2 October 1995, Case No. IT-94-1-AR-72.

[14] UN Doc. CCPR/C/21/Rev.1/Add.11. In paragraph 10 of the General Comment, the Human Rights Committee points out that the power of states to derogate from the ICCPR during a state of emergency is restricted not only by the list of non-derogable rights in article 4, paragraph 2, but also by the reference in paragraph 1 of the same article to "other obligations under international law". Thereafter, the Committee continues: "In this respect, States parties should duly take into account the developments within international law as to human rights standards applicable in emergency situations." The accompanying footnote No. 6 lists a number of international instruments, including the Turku Declaration that represent such "developments". Furthermore, the formulation of subsequent paragraphs where the Committee identifies non-derogable elements in such provisions of the ICCPR that are not listed in article 4, paragraph 2, as non-derogable *in toto*, may have been influenced, *inter alia*, by the Turku Declaration.

15. Notice can also be made of the fact that certain resolutions by the Commission on Human Rights that refer to the Turku Declaration, explicitly invite states to review their national legislation.[15] This can be seen to reflect a form of domestic implementation of the Declaration.

16. In recent years, discussion on the Turku Declaration has more than before focused on the issue of using the Declaration – or a new international instrument reflecting the same concerns – as a pedagogical tool in respect of armed groups and other non-state actors. In contrast to the original prospect of working towards the formal adoption of the Declaration by the United Nations as an intergovernmental forum this discussion has emphasised the need to address and involve non-state actors in the process.[16] Consequently, proposals have been made to the effect that if a new international instrument will one day be adopted, this should perhaps take place at a forum which is *not* intergovernmental in nature.[17] The underlying challenge can be said to relate to three dimensions:

    i. Legality: What is the authority of states to use the medium of international treaties or other instruments adopted by themselves to impose obligations on other actors?

    ii. Legitimacy: Will the exercise of such presumed authority be capable of meeting the acceptance of actors that do not consider themselves involved in the process?

    iii. Efficiency: Will a state-centred process towards the adoption of new normative standards lead to actual compliance?

17. While these questions are of particular relevance in respect of a set of standards that explicitly proclaim their binding nature also in respect of other actors than states, they may have even general resonance in the field of human rights standard-setting.

18. At the same time, there has been a movement towards emphasising that the Turku Declaration should perhaps not be seen as a process of "setting" new standards but, rather, as a combination of identifying, codifying, reaffirming and implementing existing legally binding standards. Largely due to the recent positive developments listed above in section V, the remaining protection gaps no longer pertain so much to substantive standards but, rather, to the effective implementation of existing standards in respect of state and non-state actors.

[15] E.g., resolution 1997/21.

[16] See, the report "Ends and Means: human rights approaches to armed groups" (2000) by the ICHRP, in particular the emphasis given to the approach of "working with armed groups".

[17] Scheinin, Background Paper to an international expert meeting on fundamental standards of humanity, Stockholm 22-24 February 2000.