New Challenges to Human Rights

por D. Theodor Meron

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I most honoured and grateful for this invitation to to the University of Deusto, to Forum Deusto and its President Alejandro Martinez Charterina, and to my friend Professor Father Jaime Oraa for inviting me to participate in this series of lectures on Human Rights in a Divided World, in which so many distinguished persons have participated. My thanks go also to Maria Gonzalez for all her help in organizing my visit. I shall speak on New Challenges for Human Rights.

Let me start from some of the achievements. I need not tell you what tremendous success human rights as law, as a living discipline and as a movement, have achieved over the last half century. From the rhetorical and moral, human rights have been transformed into legal entitlements protecting human dignity. We have developed not only a comprehensive corpus of human rights, but systems of mechanisms and procedures designed to ensure respect for those rights, systems based on treaties or drawing on human rights clauses in the UN Charter. And we have done this both on the universal and on the regional planes. The principle of international accountability has been

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broadly accepted. Governments recognize that they must account to the international community and to other governments for the way they treat their own populations. That basic human rights constitute obligations *erga omnes* has been recognized.

Human rights treaties have been widely ratified and customary human rights law has rapidly grown. Through customary law and increasing treaty accession, human rights law has become positive law for the internatioal community. Scholars and institutions have developed several strategies for making human rights binding and respected as law for all states on a universal basis. However, these achievements have been largely limited to civil and political rights. In this field, but not in the economic and social area, human rights have reached maturity.

But what about weaknesses? The achievements I mentioned have been accompanied by weaknesses, the breadth of reservations to human rights treaties, politicization and selectivity in application of treaties, the slow rate of ratifications of some treaties and by some states. New problems have been posed by globalization, privatization and economic deprivation, by the disintegration of states and the collapse of law and order, by impunity for those who commit atrocities, and by the fact that human rights have addressed primarily the obligations of governments and have left largely untouched the responsibility of non-governmental actors. Human rights in situations of endemic violence in some states have remained largely unprotected. Human rights norms are quite ineffective in extending protection to the millions of people in prisons around the world, including in the most developed countries.

I do not intend to cover all of these problem areas. But I would like to touch on problems of economic deprivation, privatization and globalization, problems of endemic violence and disintegration of states, the need for some minimum standards of humanity, and problems of impunity and criminalization. As this is a University of the Society of Jesus, with its well known commitment to social justice, I would like to start with the social justice area. I do not want to encourage hopes, I do not have solutions; I have only problems. But I hope that paying attention and focusing on them, may in itself start a momentum towards seeking solutions.

I shall focus, first, on the problem of economic deprivation. International lawyers have always found it difficult to grapple with economic rights, especially because the International Covenant on

Economic, Social and Cultural Rights provides for progressive realization of rights and acknowledges constrains due to economic resources. The Committee on Economic Rights did a fine job in trying to give some concrete content to economic rights. It articulated the duty of states to take steps towards meeting the obligations of the Covenant, and to avoid retrogressive steps. It stated that there was a minimum core obligation to avoid a situation in which individuals are deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing and of the most basic forms of education.

I admit that economic and social rights have never been my focus. But I cannot but be concerned by a rolling back of economic and social entitlements on a very wide front. Globalization, privatization and conditions of extreme competition for economic survival combine with economic crises and retrenchment to cut back the social and economic safety nets provided by governmental and public programs even in rich and developed states. These cuts have been carried to such an extent that in some cases basic human dignity has suffered and the possibility for enjoyment of civil and political rights has become unreal or immaterial.

In a recent statement, the Committee on Economic Rights warned that recent trends toward globalization and privatization risk downgrading social and economic rights. Specifically, the Committee focused on the risks posed by the increasing reliance on the free market, a significant growth in the influence of international financial markets and institutions in determining the viability of national policy priorities, a diminution in the role of the state and the size of its budget, privatization of various functions previously considered to be the exclusive domain of the state, and the deregulation of a range of a range of activities. Such rights as the right to work, trade union rights, and right to social security may crumble under the pressure of competitiveness. While trends towards globalization and privatization may be both inevitable and beneficial, the state cannot ignore the extreme impact that they may have on the basic needs of large groups of population, on the erosion of human dignity and on the possibility of enjoying civil and political rights.

Human dignity involves not only freedom from torture, the rights of free expression, the right to vote and to participatory democracy but also freedom from starvation and the elementary right to health.

The 1998 Human Development Report just issued by the United Nations Development Program listed troubling facts. Despite the world-

wide growth in consumption, the average African household today consumes 20 percent less than it did 20 years ago. The poorest 20 percent of the world's population has been left out of the consumption explosion. Nearly three-fifths of people in developing countries lack basic sanitation; almost a third have no access to clean water.

Figures for rich, industrial countries are also worrying.100 million people in such countries suffer from deprivation and under consumption; more than 100 million are homeless; 37 million are without jobs. My own country, the United States, with the highest average income of the countries ranked by the Report, has the highest population share experiencing human poverty. In this troubling context, ensuring that doctrine does not block practical solutions is particularly vital.

I turn to the challenge of non-governmental actors. Accepted human rights doctrine states that obligations ordinarily run from governments to the governed. In reality, however, non-governmental actors have an increasing impact on human rights. We must therefore consider a human rights agenda that promotes solutions allowing us to address the challenge of non-state actors meaningfully, even at the cost of theoretical purity. The collapse of security structures in some states, along with trends towards privatization of various types of governmental functions, including law enforcement and correctional institutions, makes our discussion today particularly timely.

These developments have an impact on the fabric and structure of norms and institutions. What does this mean for the responsibility of states, for accountability, for the sources of international law, for participation in the creation of customary law, and perhaps even for subjects of international law?

Formally, both human rights and humanitarian law have at least some language that addresses such issues. In the case of human rights, Article 2(1) of the International Covenant on Civil and Political Rights requires states not only to respect rights but also to ensure that rights are respected by others outside the government. Some other conventions have similar provisions. The Geneva Conventions' common Article 1 commit governments to respect and to ensure respect for the conventions in all circumstances.

These are important tools for promoting respect for human rights and humanitarian norms through governmental action and due diligence duties. So far, however, they failed to ensure accountability and effective implementation.

For example, the various treaty provisions emphasizing that treatment of insurgent movements according to obligations under international law will not prejudice their political or legal status, such as common Article 3, have failed to reassure governments.

We have also failed to develop a set of legal norms or political incentives directed at insurgents and aimed at promoting their compliance with international norms. For the most part, we have preferred not to confront the hard questions.

Private actors now play a general role in the international arena, a role that is extraordinarily important both for good and for bad.

The fact that Somalia and Liberia, as well as Afghanistan, represent societies where it is impossible to enforce respect for rights and accountability is obvious. But what about a world power, such as Russia? Can it enforce its human rights obligations in Chechnya? What then are the Chechens' obligations under human rights and humanitarian norms?

We should remember that Additional Protocol II to the Geneva Conventions —in contrast to common Article 3— does not even speak to the obligations of the rebel party, perhaps to avoid offending state sovereignty.

Although we have a large body of norms on mercenaries, private international security companies continue to grow. The deterioration of the security situation in Africa, with cross-border military interventions and the mushrooming of insurgencies, makes these problems acute.

How to deal with human rights and terrorism? The Human Rights Commission adopts resolutions on HR and Terrorism with a very large number of abstentions, reflecting the conviction of some governments that only governments can be accountable for violations of human rights.

A provision in a recent resolution on Human Rights and Terrorism that described acts of terrorism as acts of aggression raised particular concerns in the UN Human Rights Commission. The reference to acts of aggression may have been rhetorical, but the still unanswered question is what arsenal of norms international law has available to address the possibility of real cross-border aggression by non-state actors. This possibility is no longer just an hypothese d'ecole.

What does the 1951 Refugee Convention legally require when a person flees the persecution or violence from non-governmental actors?

Several questions arise for a future research and action agenda: what kind of accountability or representativity should we design for non-state actors in such matters as compliance with human rights and humanitarian norms and individual criminal responsibility for violations?

Should we distinguish between non-state actors that fall into different categories, and if so, what categories should be devised? What is and should be the influence of non-governmental actors on customary international law, standard setting, enforcing respect for human rights, and in shaping foreign policy? Finally, can these questions be addressed meaningfully by states anxious to maintain a monopoly on sovereignty?

I would like to say a few more words about privatization. In some countries, including the United States, we have seen substantial privatization of law enforcement and correctional facilities. Private security companies supervise communities or parts of communities. In several states of the US, private contractors operate prisons.

Have we thought sufficiently about the practical implications of these developments for the observance of international rules and accountability regarding, for example, the prohibition of discrimination and the excessive use of force? Are we comfortable about being stopped and searched by private uniformed, armed guards?

I would like to return to the challenge to human rights presented by the phenomenon of disintegrating states. How can we deal with the protection of human rights in disintegrating states? Because human rights treaties impose obligations on states, they cannot be effective where there are no functioning state organs. Can customary law may be more useful? Turning from human rights to international humanitarian law, common Article 3 imposes obligations on rebel parties, not only on governments, and is increasingly interpreted as applicable also to armed conflict between competing non-governmental groups within the state. But Article 3 cannot be helpful in situations of anarchy and fighting between groups lacking minimum organizational structures and capacity to ensure compliance with minimum humanitarian standards. Protocol II is even less useful, as it applies only to conflicts involving a government on the one hand and imposes rather demanding requirements of organization on the rebel party. Neither common Article 3 nor Protocol II are helpful in situations of endemic violence which has not reached the thresholds of applicability of international humanitarian law, such as internal disturbances and tensions, like riots, or isolated and sporadic acts of violence.

I turn to the problem of impunity and criminalization. In disintegrating states, where rights are ineffective, an approach focused on individual criminal responsibility may be somewhat more promising. Assuming that the judicial and prosecutorial system of the state has collapsed, persons committing atrocities could be prosecuted in third countries under such conventions as the UN 1984 convention against torture or, with respect to grave breaches, under the Geneva Conventions of 12 August 1949 or otherwise under the principle of universality of jurisdiction.

Important possibilities for international prosecutions directly under international law have been created by the recently adopted Rome Statute for the establishment of an international criminal court. Serious violations of common Article 3 have been criminalized and fall within the jurisdiction of the ICC. And the violations of several important rules on the conduct of hostilities (Hague law) have been criminalized in cases of protracted armed conflict not only for armed conflicts between governments and organized armed groups, but also for armed conflicts between such groups even absent governmental involvement.

Particularly important in this context is the possibility of prosecutions for crimes against humanity. Although such crimes require multiple commission of offenses and an element of intentionality, the Statute recognizes that they can be committed not only by governments but also by non-governmental organizations in pursuance of a policy to commit such crimes. Crimes against humanity as articulated in the Statute do not require a war nexus and therefore can be committed even in peacetime. Crimes against humanity under the Rome Statute, violations of common Article 3, and some of the other crimes overlap with, and are indistinguishable from some violations of fundamental human rights which will thus become criminalized under this multilateral treaty. Among the offenses listed in the Statute as crimes against humanity are forcible transfers of population and deportations; imprisonment and other severe deprivations of personal liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any form of sexual violence of comparable gravity; enforced disappearance of persons; and apartheid.

The criminalization of individual conduct in violation of basic human rights norms is thus an important strategy, and a major challenge which we must continue to address.

I would like to say something about treatment of people in prisons. The problem is world wide, but I shall focus, however, on the United

States, drawing on the 1998 Human Rights World Report. By the end of 1996, the number of prisoners and jail inmates reached 1.7 million, including 75000 women, representing a doubling of the incarcerated population since 1985. Overcrowding in prisons contributes to violence and abuse among inmates and between guards and inmates, as well as degrading access to to adequate medical and mental health care. Several states have resorted to shackling of prisoners confined to work squads, and, in some cases, to prison chain gangs, in one state even for women. In difficult cases, prison officials resort to solitary confinement and excessive isolation, controls and restrictions which may amount to inhumane treatment or even torture. Widespread sexual abuse, including rape of women prisoners, have continued.

Of course, we cannot expect prisoners to enjoy either the full range of constitutional rights, nor the full range of human rights. But as Article 10 of the International Covenant on Civil and Political Rights provides, all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. We must dedicate ourselves to ensuring that this fundamental obligation is observed in all the countries of the world.

Finally, I turn to discuss the protection of human rights in situations of endemic violence, a topic often discussed in the context of the quest for a new declaration of minimum standards of humanity or humanitarian standards.

We no longer live in a world where international wars are the principal threats to human lives and dignity. Ours is a universe of states torn by internal strife; collective violence of varying intensity; ethnic, religious and national conflicts; disturbances, tensions, public emergency, bloodshed; collapse of civil order and institutions, including courts and administration of justice.

It is true that the Geneva Conventions for the protection of war victims and their additional protocols, various law of war treaties and international customary law provide a considerable measure of protection for victims of international wars, and some protection for internal wars. It is also clear that human rights treaties, declarations and mechanisms serve to protect the individual from abuses by governments in time of peace. However, we no longer live in a society where situations can be so neatly characterized as war or peace.

More and more we find ourselves in a twilight situation, in a grey zone between peace and war. We have a gap here, a lacuna, or a deficiency in the protective systems.

In situations which fall short of an armed conflict, humanitarian law might not apply, but internal violence might lead a state to declare a public emergency and suspend many essential protections. Among the essential rights often regarded as derogable, are guarantees of due process, personal liberty including imprisonment and detention, and freedom of movement. Of course, the list of non-derogable rights is not the only guide to parameters of derogations. Human rights bodies have made important efforts to prevent an abusive invocation by states of the derogation clauses. All states must also respect the very important procedural safeguards such as proportionality («to the extent strictly required»), and non-discrimination, as stated, for example in article 4(1) of the Covenant on Civil and Political Rights.

As conflict situations deteriorate toward more intense violence, the gaps in the law become more pronounced: Common Article 3 does not contain any Hague rules concerning conduct of hostilities. Even Protocol II contains very few such rules. This situation has been remedied somewhat by the Rome Statute of the International Criminal Court, which listed a number of Hague type norms for non-international armed conflicts. However, the Statute made it clear that its war crimes provisions will not apply to disturbances and tensions and such sporadic violence as riots, which do not rise to the level of armed conflicts.

An empirical, rather than a strictly legal examination supports the conclusion that gaps in protection exist and that the need for corrective action is great. A careful consideration of past experience demonstrates that governments typically contest that the situations of collective violence in which they are involved reach the thresholds of applicability of humanitarian treaties. In reality, the protective provisions of these conventions are prevented from helping those who need protection: victims of collective violence. In such situations, the law either does not apply or its applicability is contested.

Problems encountered in the recent and tragic conflicts that proliferate on every continent demonstrate that a new humanitarian approach is needed.

Of course there are many existing treaties and identifiable standards. Significant problems remain, however, in four areas:

(1) where the threshold of applicability of international humanitarian law is not reached, or is disputed;
(2) where the state in question is not a party to the relevant treaty or instrument;

(3) where derogation from the specified standards is invoked; and
(4) where the actor is not a government, but some other group.

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.

Experience indicates that in situations of internal violence, normal constitutional and other legal checks and balances are singularly ineffective. Situations of internal conflict or civil strife represent the most difficult context for the protection of the human person and cause serious and increasing instability and great suffering in all parts of the world.

Instead of focusing on protection, we typically argue about legal and political definitions of conflict situations. Governments and authorities assert that the situations of collective violence in which they are involved are *sui generis*, and not subject to the pertinent humanitarian treaties.

Such stalemates underline the need to articulate a strategy for dealing with such problems. As there is no realistic possibility to resort to a binding treaty on this subject, a soft-law approach might be the only option. It is therefore important to promote the adoption of a declaration of minimum humanitarian standards from which there can be no derogation and the applicability of which does not depend on the characterization of the situation.

The observance of a set of minimum humanitarian standards which are politically and legally neutral and carry no presumption about the particular status of any of the parties involved in the conflict, could save lives.

The text of such a declaration of minimum humanitarian standards was drafted by a group of individual experts in humanitarian and human rights law and draws on both of these protective systems. It is often referred to as the Turku text, for the place where the experts met in 1991.

This declaration, now for a number of years before the UN Human Rights Commission has been gaining increasing recognition by governments, organizations and experts, including the UN sub-commission on prevention of discrimination and protection of minorities. The Budapest review conference of the OSCE in 1994

emphasized the significance of the declaration and the willingness of the participating states to promote it in the United Nations. The appeals chamber of the international criminal tribunal for former Yugoslavia in the 1995 Tadic decision, UNHCR and a considerable number of governments have also cited the declaration. The International Workshop on Minimum Humanitarian Standards convened by the government of South Africa in Cape Town in 1996 gave the idea of promoting the declaration further momentum. Finally, the analytical report of the UN Secretary General in 1998 gave the matter further constructive and thoughtful direction.

These developments demonstrate that the concept of minimum humanitarian standards has already entered the mainstream of governmental and UN attention and is here to stay.

Care has been taken to ensure that the declaration could not encroach on the Geneva Conventions, Protocols, or human rights treaties. Several provisions of the declaration make this absolutely clear. One provision is designed to ensure that the declaration will not affect the status of any authorities, groups or persons.

I shall briefly explain the content of the declaration.

The declaration reaffirms an irreducible core of humanitarian norms and human rights which must be respected in all situations and at all times, a safety net independent of any assertions that a particular conflict is below the threshold of applicability of international humanitarian law and is not addressed by existing international law.

Following the tradition of humanitarian law treaties, derogations are prohibited, but the importance of the declaration goes far beyond the technical problem of states of emergency and derogations. The declaration also addresses the need to respect fundamental principles of international humanitarian law in all circumstances. It is designed to avoid the pitfalls of the never ending debates on thresholds of applicability and complex legal characterizations of different types of conflicts.

The declaration provides a basis for observing minimum humanitarian standards in *all* conflict situations. This is particularly pertinent to situations of internal violence, and to the gray zone between war and peace.

With a focus on the nature of contemporary conflicts, which so often concern groups not recognized as governments, the text of the

declaration provides that «(t)hese standards shall be respected by, and applied to all persons, groups and authorities, irrespective of their legal status and without any adverse discrimination.» The prospects for humanizing internal violence are greatly improved by urging all sides, including non-governmental actors, to abide by essential humanitarian principles.

The declaration draws on major norms of both humanitarian and human rights instruments. It is based on the fundamental principle of humanity which underlies all such instruments. Many of its provisions codify minimum standards already recognized by extant human rights or humanitarian law and are declaratory of customary law.

Among the standards incorporated in the declaration are core judicial or due process guarantees, limitations on excessive use of force and on means and methods of combat, the prohibition of deportations, rules pertaining to administrative or preventive detentions, humane treatment and guarantees of humanitarian assistance.

The declaration contemplates a decentralized promotion of compliance with its standards by everybody who can help and who is involved in monitoring, reporting, peace-keeping *etc*. This includes, of course, governments, intergovernmental and non-governmental organizations, as well as thematic groups and rapporteurs and special country rapporteurs appointed by the United Nations. All UN organs, OSCE, OAS, OAU, could do their best to ensure that all persons, groups and authorities, including those under their own authority, fully respect the declaration's standards in all circumstances.

All these organs, and the media as well, should refer to the declaration as a statement of accepted normative standards. Governments, authorities, groups and individuals should be urged to comply with these standards.

While the declaration might face problems of compliance similar to those encountered by other international instruments, the simplified normative scheme should make evasion more difficult. Additionally, because of its essential simplicity, the declaration could become a useful source of indicators to guide governmental and non-governmental organizations in giving early warnings of mass violations. The declaration can and should become an important tool for education, dissemination, monitoring, implementation and enforcement.

The simplicity, clarity, and elementary humane character of its provisions; the fact that it draws on humanitarian and human rights instruments, on customary law and on standards of humanity; and the fact that it avoids legalistic and political problems of definition of conflicts and recognition of authorities, combine to make the declaration easier to respect.

By their very nature these standards of humanity are truly universal. The declaration would thus not give rise to further debates on cultural relativism v. universality of human rights.

In the refugee context, the declaration of minimum humanitarian standards could be particularly useful both in countries of origin to avoid large refugee outflows, and in countries of resettlement or repatriation to create the minimum humanitarian conditions required for durable solutions. There is already a general recognition that human rights and humanitarian law abuses are among the major causes of refugee problems. It may be possible to prevent or reduce future refugee flows if the human rights/humanitarian situations in countries of origin is improved.

The proverb that the best is the enemy of the good has proven true in the case of our declaration also. Those who worry about the declaration's affecting existing legal norms, or about drafting points which can easily be corrected, forget how urgent and paramount is the need to try to humanize conflicts raging in all parts of the world.

Another concern sometimes expressed has been that the declaration as a recommendation, will not be legally binding or otherwise effective. Has the CSCE's Helsinki Final Act not shown the whole world how effective political and moral commitments can be? Until the declaration is adopted by the United Nations, the emphasis should be on increasing the visibility and the international awareness of the declaration. Let us find ways to transform the declaration into a yardstick for humane behaviour of all concerned in conflict situations.

The increasing recognition by some states that the need to establish some obligations for guerillas, and even terrorists, improves the prospects for a sympathetic consideration of the declaration.

The challenges ahead of us are many and they are daunting. We must all work to overcome them, and one day we shall.

Resumen

A pesar de los avances dados en el campo de la protección de los Derechos Humanos, éstos se hallan a menudo en situaciones de conflicto, como cuando se produce violencia endémica, impunidad o criminalidad. En estos casos, y a pesar de que en muchas ocasiones existen herramientas para evitar su violación, se producen ataque continuos a los derechos del hombre y las normas existentes son ineficaces para proteger a millones de personas que sufren violaciones en todo el mundo, incluyendo en los países más desarrollados. Por todo ello, se defiende la necesidad de un mínimo de normas humanitarias.

Es claro que los tratados sobre Derechos Humanos, declaraciones y mecanismos sirven para proteger al individuo de los abusos cometidos por gobiernos en tiempos de paz. Sin embargo, no viviremos por mucho tiempo en una sociedad donde pueda ser claramente definida la guerra o la paz. Nos encontramos cada vez más en momentos donde aparece una zona gris entre paz y guerra, en la que se observa una deficiencia en los sistemas de protección.

Además, los conflictos trágicos ocurridos en la historia reciente demuestran que se necesita una nueva aproximación a la realidad humanitaria. Desde luego, existen muchos tratados y normas identificables, pero los problemas fundamentales siguen existiendo cuando la ley humanitaria internacional no se consigue aplicar, el Estado en cuestión no es partidario de la implementación de un determinado tratado o instrumento, cuando se produce la derogación de normas específicas, o cuando el actor no es un gobierno, sino otro grupo.

Estas dificultades se deben fundamentalmente a la existencia de instrumentos de protección inadecuados, un proceso de control internacional débil y una falta de definición de las características de las situaciones de conflicto. La experiencia indica que en situaciones de conflicto interno o civil es cuando es más difícil la protección de los derechos de la persona humana y, por todo ello, es un firme defensor de la adopción de un declaración de un mínimo de normas humanitarias, que no puedan ser derogadas y cuya aplicación no dependa de una situación determinada. Así, el mantenimiento de unos mínimos básicos que sean política y legalmente neutrales y que no traigan ninguna prevalencia política de alguno de los partidos involucrados en el conflicto, puede salvar vidas.

Esta Declaración reafirma además un código de normas humanitarias y Derechos Humanos que han de ser respetados en todas las situa-

ciones y todos los tiempos. No obstante, hasta que no sea adoptada por las Naciones Unidas, el énfasis debería estar relacionado con la clarificación y atención internacional en torno a la declaración. Se deben, por tanto, encontrar las vías para transformar esta declaración en un termómetro del comportamiento humano en torno a todo lo sucedido en situaciones de conflicto. Los desafíos en este sentido son muchos y peligrosos y todos hemos de trabajar para lograrlo.