PANEL ONE: GENERAL DISCUSSION

John Norton Moore

I would like to make some very brief comments on each of the presentations. Ambassador Pezzullo has reminded us that the legal issues are not the only relevant considerations in determining the propriety of intervention, and I think that this is a crucial point. We have to take into account the character of the governments assisted and the character of the groups opposed. The effects of intervention on national security, world order, and strategic stability, the effects on self determination and human rights, the possibility that other countries will provide assistance, the desirability of using military assistance to gain leverage on human rights issues, the character of the assistance, and the ability to effectively carry out policy in terms of both the military reality and the domestic political and legal reality are all vital considerations.

Coming to Mike Matheson's excellent presentation, I agree very strongly with his crisp characterization of the Afghanistan and El Salvador issues. It is indeed far better than my own. I agree completely that it is always illegal to assist insurgents without Security Council authorization. But I have slightly overstated the case on the illegality of assistance to recognized governments, and I think he has properly called me to task for that. The reality is that the issue is somewhat faded in international law today. My own feeling is that despite the fact that the issue is still unsettled, a government would be ill-advised to assist a recognized government in any setting that does not fit under the two basic categories that I have talked about. In the other cases, there will be widespread allegations of illegality even though it is possible to argue that there is not yet a consensus on the issue. Therefore, I would suggest that the parameters of my own recommendations should be observed, and any intervention in settings which are outside those parameters could be dangerous. I do not think that the El Salvador example cited by Mr. Matheson is a very good counter-example to the standards I have given, because Ambassador White, in requesting assistance at the time of the January offensive, indicated that his request was based on the fact that foreign assistance was being supplied to the insurgents; he made that point very clearly.

I would now like to shift to Roger Clark. First, he attacks the

practice of humanitarian intervention. I would like to point out that none of my statements regarding El Salvador, or intervention in general, were based on humanitarian intervention. I basically did not discuss that issue other than to say that I personally would take a stand in defense of it. He made the case effectively, it seems to me, for the opposition to it. Incidentally, Professor Farer, whom Roger Clark cites, has changed his position on humanitarian intervention and now supports it. There is a clear split among scholars on the issue. The excellent debate between Ian Brownlie and Richard Lillich in *Law and Civil War in the Modern World* summarizes both sides very effectively. To cite the Vietnamese action in Cambodia as a humanitarian intervention simply because the Pol Pot regime was engaged in genocide seems to be a rather substantial distortion. Under no circumstance could one declare the Vietnamese effort at maintaining hegemony in Cambodia a humanitarian intervention. As to the assertion that under article 51 of the Charter there may not be counter-intervention or assistance to a widely recognized government when there is assistance given to the other side, I think it is clearly wrong. A substantial level of covert assistance to insurgent groups in violation of the United Nations Charter can definitely amount to an armed attack, thereby giving rise under the Charter to a right to assist the widely recognized government. By far the majority of international law scholars clearly support the right of counter-intervention in such a setting.

The Tom Farer rule of no participation in tactical operations is both too broad and too narrow. On the one side, do we really want to legitimate in international law any kind of military assistance, economic assistance, or propaganda on behalf of insurgents against governments all over the world? On the other side, do we really want to say that when there is a fundamental covert attack on a government by an insurgent movement against self-determination which is receiving outside assistance, it is impermissible under international law to give whatever effective assistance is necessary to put down the insurgency, including tactical operations on behalf of the widely recognized government? The answer for me in both cases is absolutely no, and I do not believe the Farer standard is going to be accepted as part of international law.

Professor Maier does us a service by pointing out the ambiguities with respect to the right of the United States to intervene to protect the canal under the Panama Canal Treaties. It seems absolutely clear that we had two important interests at stake in the negotiations. The first was clear transit rights through the canal,

and the second was the right to defend the canal in the event of an attack, whether external or internal. I agree with him that the resolution of these problems in the Treaty is replete with ambiguity. Nonetheless, I would differ with him as to its illegality, if that is what he is asserting. My own feeling is that we have retained, though very poorly, the legal rights to protect the canal against either an external third party threat or an internal situation, if the intervention is limited purely to protection of the canal and is not used to alter the government. I refer you to the testimony before the Senate Foreign Relations Committee on precisely this point at the time the Treaty was being considered.

I always learn greatly from Professor Louis Sohn, and today is no exception. However, I would not support the suggestion that participation in tactical operations in a counter-intervention setting is not permissible. We have already discussed this question under the Farer Proposal. I find nothing whatsoever in the United Nations Charter that draws a line at tactical, as opposed to non-tactical, assistance nor in my judgment should it. Finally, I am not sure that his definition of permissible intervention aids us enormously in clarifying the interventionary issues because it seems to strongly suggest that assistance to a widely recognized government is going to be allowable when you consider the emergency setting from the auto-interpretation standpoint. The claim of emergency will always be made, and if it is made by any of the permanent members of the Security Council, there will be no United Nations action prohibiting the intervention. Therefore, I have a little trouble with this definition as a single standard, though I welcome the specific effort to get something in front of us.

Jordan Paust

I would like to direct a question to Professor Moore. You have recognized that the legitimacy of a regime is at least one of those factors on the Rubik's cube that must somehow be considered. In focusing on the legitimacy of a regime, let us look at aid by a state to a regime (for example, aid by the Soviet Union to a widely recognized puppet regime) that is subject to covert and overt armed attack under the guise of self-determination and opening up the political process in that particular regime. Is Soviet aid to the puppet regime fully permissible under these circumstances? I think you stated that it is fully permissible for an outside government to aid such a particularly widely recognized government that is subject to attack. Is that always the case if we add to the factor of the

legitimacy of that government the factors of self-determination, the human right to a government that represents the will of the people, the notion of authority under article 21 of the Universal Declaration, etc.? There are so many squares in that Rubik's cube that I would like to just shift the cube around a bit in posing that question.

John Norton Moore

That is fair enough. I think that we could develop an endless variety of contextual principles if we wanted to, and if we are going to be fully policy responsive, as the legal realists have taught us, we would have to do that for every particular case. It seems to me, though, that the task of international lawyers in this area is to provide some contextual rules within which we can reasonably operate in a policy responsive manner; these rules cannot have an endless kind of texture, an open-ended texture. In the setting that you pose, I am quite willing to live by the rule that if the United States or some other government were to provide major external assistance to insurgent movements in Poland or Czechoslovakia, for example, which states I regard quite frankly as clear puppet regimes denying self-determination to their people, the Soviet Union would have a right to provide assistance to the widely recognized governments in those countries, which, after all, are admitted to the United Nations. I would not like it, but I would be willing to accept that degree of reciprocity under that rule. I reach this conclusion because I think it is absolutely wrong to aid insurgent movements. The risk to world order is simply too high.

Bart De Schutter

I would like to carry this a little bit further. What if the first intervention goes through the government, whether a popular government or a puppet government? Can you not say that in a situation like Poland there could be a right to counter-intervention running to the insurgents? That is one step further than the answer you have given now.

John Norton Moore

The answer I arrive at is absolutely no. There is no right of counter-intervention on behalf of insurgency. There is a flat rule, which I think is part of international law, and which is also what I would recommend, that it is illegal in all circumstances to provide aid to insurgent movements. One can make a case for the sugges-

tion you have presented. The case would be that if there is already some kind of massive assistance to a widely recognized government, why not open up assistance to insurgents? The problem is that even though it might serve the cause of self-determination, the consequences to world order are simply devastating. Both sides could reciprocally assert that the other side was being aided, and aid to either side would justify aid to the other. Furthermore, once military assistance programs that are perfectly lawful under international law are started, aid to insurgents would always be permitted, unless a threshold were established. For me the answer is very clearly no; one cannot have a counter-intervention exception for insurgents.

Joseph Rohlik

I have a question for Professor Moore. Governments today have very sophisticated arms and armies. If the government does not use the arms, as was the case with the Shah of Iran, then of course you can help insurgents; but if the government does use arms to fight insurgents, how do you not eliminate the possibility of insurgency if aid to insurgents is impermissible?

John Norton Moore

There is one unfortunate truth in revolution theory, which in itself is a rather interesting body of literature. The literature seems to be rather unanimous that if there is a repressive regime to the left or to the right, you will not have a revolution. In fact, there has not been a successful revolution in a communist regime anywhere in the world. It is precisely at the moment when a repressive regime is liberalizing that there is the greatest risk of revolution. We see this in Poland, for example, where there is a movement toward liberalization. I am obviously not recommending totalitarian regimes, but merely suggesting that there is the unfortunate fact that if regimes are totalitarian, there simply are no insurgent movements. It does seem to me that the world order principle, that you cannot start a war in order to change the status quo, suggests that you cannot aid insurgents. Do we really want to foster a principle which says that because we object strongly to Soviet activities in Eastern Europe or in the Soviet Union in terms of the type of government, it is perfectly permissible for the United States to foster insurgent movements in those countries? I do not believe such a principle exists under the Charter, nor is it one by which we can live.

If in the Afghanistan setting we have a classic violation of article 2(4) of the Charter, as Mike Matheson has very ably demonstrated, then article 51 allows other nations of the world to go to the assistance of the Afghan people. In the real world I do not expect that the United States or any other country would become involved in a major effort to roll back the Soviet undertaking. But providing assistance to insurgent groups in opposition to the Soviet undertaking is of course completely consistent with the Charter in my judgment.

Gabriel Wilner

Of course, there is one great problem. Suppose we arm fifty or one hundred or one thousand Poles and then say it is an insurgent movement. Then the Russians send in the Warsaw Pact. In this case we may certainly continue to give whatever assistance we can to the Poles. Perhaps it is a question of reality, and I think that Professor Moore is a great advocate of the realistic view of world politics and international law.

Covey Oliver

I do not denigrate from the quality of coverage of the panel we have heard this morning when I suggest that we keep in mind two other aspects of the major topic, aspects that did not come up at this session but that we ought to reach as our work continues.

The first is that even when we deal with the rules—the norms—we must not forget questions of *fact*. This morning we have talked mainly about the law, or the lack of it. But, as we all know, in international affairs and international law—as in domestic affairs and law—outcomes often turn on factual and inferential variables, such as preponderance of evidence, motive, intent, degree, and intensity of action or response. The linkages between law and fact sometimes bring the effectiveness of the rule into question, especially as to its scope; attention to the modalities available or chosen for crucial factual determinations is always required.

The second matter I wish to bring up is the problem of non-military intervention, both in international politics and in international law. Recalling Professor Sohn's useful commentary, below his lowest gradation there is the matter of non-military pressure, of external political and economic activities and attitudes designed and intended to curb, canalize, or dissuade a state from an intended (or seen from abroad as intended) course of conduct. The problem is complicated by the state-of-seige mentality that grips

beleaguered rulers when a particularly effective single state engages in unilateral "denials policies." Such individual sanctions or inducements, it seems to me, tend to fall below Professor Sohn's lowest gradation, and thus, outside the field of military and paramilitary intervention. Nonetheless, the perception of intervention—of the violation of national privacy and free will—has expanded to include non-military conduct of other states. This is a matter of observable fact and should not be disregarded as a result of a first emphasis on military conduct.

Thomas McCarthy

In its development of international law relating to intervention in internal conflicts, the United Nations has taken a very specific approach to the issue of intervention in wars of national liberation. Such wars may be described as the armed struggle by a people through its national liberation movement against an established colonialist, racist, or alien government for the purpose of achieving self-determination. A study of the relevant basic documents—the Charter, the Declaration on the Granting of Independence to Colonial Countries and Peoples, the International Covenants on Human Rights, the Declaration on Friendly Relations Among States, the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States, and the resolutions of the General Assembly relating to national liberation movements in specific countries or territories (territories under Portuguese administration, Southern Rhodesia (Zimbabwe), South Africa and Namibia)—leads to the following points: the right to self-determination of peoples is a right recognized by international law and thus questions relating to it fall outside the exclusive domestic jurisdiction of states; colonial peoples have a right of self-defense or forcible resistance against foreign, alien, or racist domination; the use of force against colonial peoples in order to prevent the exercise of the right to self-determination is illicit in international law; assistance by third countries to help regimes fight against the exercise of the right to self-determination of peoples is also illicit in international law; colonial peoples have a right to seek and receive support in their struggle for self-determination; the provision of certain types of assistance by third states to national liberation movements is not illicit under international law either as intervention in internal affairs or as aggression. The licit nature of humanitarian aid may be taken as clearly established. The issues become less clear and need more careful consideration when the aid is mili-

tary in nature, particularly direct military intervention, or when it involves the provision of sanctuaries.

Martin Feinrider

I have some questions directed to Professor Moore. With regard to your two exceptions to the rule of non-intervention, which I am afraid may re-create the Maginot Line for the status quo, you say that pre-insurgency levels of assistance should be frozen, but that it should be permissible to maintain pre-insurgency levels of assistance. When does an insurgency begin, when does a group of thugs become a revolutionary army, and to what extent does the attitude of the government against whom the insurgents direct their attention dictate that determination? It strikes me that the second exception, that external aid to insurgents makes aid to the government permissible, presupposes that the insurgents exist before the external aid is provided. I wonder if it is possible today for an insurgency to exist when the insurgents cannot obtain arms. In most third world nations there is no production of arms; they are obtained either from the East or the West. Given this situation, does your second exception fail to leave room for reality?

John Norton Moore

I am delighted that you asked those questions. I did not have time in my initial presentation to discuss the criteria for establishing the initial threshold. However, I believe that in the attempt to clarify the neutral non-intervention standard with the two exceptions, the first exception is too often neglected. Its application has a fairly high threshold for all of the reasons that Mike Matheson presented. Because military assistance programs are so prevalent around the world, a rather clear showing of an internal conflict is required before the freeze rule comes into effect. I have set forth three criteria for invoking the exception. First, the internal conflict must be authority oriented, that is, aimed at governmental structures. Second, the recognized government is obliged to make continuing use of most of its regular military forces against the insurgency unless a substantial portion of its regular military forces has ceased to accept orders. Finally, the insurgents must effectively prevent the recognized government from exercising government authority over a significant percentage of the population. This is, of course, only one effort to develop such criteria. Incidentally, the International Committee for the Red Cross has considered some of these same problems in the past when trying to develop a thresh-

old for the application of the law of war. As for your implication that counter-intervention is the exception that swallows the rule, there is no question that one pays the price for permitting lawful assistance to either side in an insurgent setting. It seems to me wholly unrealistic, in a world which does not have the effective centralized peace-keeping machinery that we would like, to permit assistance to be given to insurgents so that they will be able to respond in an insurgency setting. I think it is entirely possible to have revolutions and internal changes of government without the involvement of substantial external assistance. It is only in those cases where external intervention is targeted for the purpose of altering the authority structures that the right to provide counter-intervention exists.

I have a question for Mr. McCarthy. Has the Human Rights Commission condemned the Soviet Union for its actions in Poland, which it seems to me would fit rather squarely within the definition that you enunciated? Have they called for assistance to insurgent movements in Poland? It seems to me that if we have a rule, it should work both ways. I ask this question and seek to get the reciprocity point out on the table because it seems to me that generally we should not permit authorization of assistance to insurgent movements by the General Assembly or anything below the Security Council. I once took the position that General Assembly authorization should be sufficient, and I was taken roundly to task by Professor Higgins of Great Britain. Upon reflection, I think that she was absolutely right. I think there should not be any authorization of assistance that would not otherwise be justified unless the authorization comes from the Security Council of the United Nations.

Thomas McCarthy

The Commission seems to have a very progressive approach in the language it uses with regard to South Africa and Namibia. It is very clear on what it wishes; it wishes the guns to go to the insurgents. In the occupied territories there is a little more nuance. Afghanistan and Kampuchea are both treated by the Commission in a very similar way; foreign occupation is said to be the principal and most serious violation of human rights. In neither of these countries has the Commission yet requested assistance to the liberation movements, but it has called for the withdrawal of the occupying forces. In Poland, the question is not one of the physical movement of people or forces. Therefore, the Commission has in

its most recent session, and in agreement with the Economic and Social Council, expressed concern about the situation and asked that a special study be made for the next session. This is the first step that the Commission uses when it deals with such a problem, and we do not know what the next step will be.

G.I.A.D. Draper

I would like to put this to Professor Moore, if I may. Would he be prepared to accept that St. Augustine cannot really claim the benefit of being the author of the "just war" doctrine, because it started with the Roman Priest Law of the kings, and it was already a thousand years old by the time he wrote his letter against Faustus, the Manichaean heretic? My second question is whether he would be willing to consider that, for the purposes of giving content to the level of intensity where one begins to talk about intervention in an internal armed conflict, one might find some value in looking at article 1 of Protocol 2, additional to the Geneva Conventions of 1949, which, although an instrument ratified by only seventeen states so far, at least secured the consensus of quite a large number of states (about 120, up to the signing point), and which does provide a formula that was thrashed about in a diplomatic forum in which about 120 states participated?

John Norton Moore

I always learn more from Professor Draper than I can possibly impart, and this is yet another example. I certainly would not cite St. Augustine as the enunciator of the "just war" doctrine, but rather as one whose name is closely identified with the "just war" doctrine. Incidentally, theological doctrine today unfortunately continues to be rather caught on "just war" thinking as opposed to the far more focused framework of the United Nations Charter. Quite frankly, I am not particularly enamored of the criteria set out in article 1 of Protocol 2. First, I think it is blatantly political. Secondly, I think it is altogether more appropriate (if it is even appropriate there) in the setting of the law of war issue, which is a somewhat different issue than the functional issue of when assistance is permissible in the first place. I have great difficulty with the rhetoric of colonialism and racist regimes.

G.I.A.D. Draper

That is Protocol 1. I am talking of Protocol 2, Professor Moore. Protocol 2 deals with internal armed conflicts, conflicts which take

place in the territory of a high contracting party between its armed forces and dissidents, dissident armed forces, or other organized armed groups, which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations, thereby implementing this Protocol. In the very next article you find this statement about non-intervention in those types of conflicts: "Nothing in this Protocol should be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflcit or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs." And that is, as it were, the maximum level reached by a consensus of states at a diplomatic conference on that issue.

John Norton Moore

Once again I have learned from Professor Draper. I stand corrected, and I now have in front of me the two protocols that I had misinterpreted. Your statement is referring to part one, paragraph four of Protocol 1.

G.I.A.D. Draper

That is rhetoric, because Protocol 1 is, as you know, what I might call a rhetorical exercise in racism. Article 1 of Protocol 2 is totally different. And that is why my country, when it made its understanding, used article 2 as the minimum standard for which article 1, paragraph 4, to which you so valiantly take great exception, should be applicable. It was quite a nice diplomatic exercise.

John Norton Moore

I am delighted to see that you and I agree completely on article 1, paragraph 4 of Protocol 1. To answer the first part of your question, yes, I do think that the standard established there would perhaps be a better starting point in view of the number of countries involved in its negotiation. My own criteria were developed prior to the negotiation of this Protocol, but I shall have another look at it for this additional point.

PANEL II

APPLICABILITY OF HUMANITARIAN LAW IN INTERNAL CONFLICTS