

CONFLICTING NORMS OF INTERVENTION: MORE VARIABLES FOR THE EQUATION

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I would like to begin by referring to some of the previous speakers' comments. First, Professor Draper has justifiably asked why human rights instruction should not occur more frequently within the United States and other countries, especially within our educational processes.¹ More specifically, we might ask why should not law students become familiar with the human rights instruments, especially those law students who might become judges in different countries around the world.² One aspect of human rights instruction which deserves more attention is the mutual self-interest or common interest in implementing the conventions,³ and, even more fundamentally, in understanding the terms of the conventions. An awareness of this mutual self-interest might aid in what Professor Solf and Attorney Fruchterman would probably term a functional reciprocity. Certainly the time to promote this added

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¹ For similar points made earlier by Professor Draper, see, e.g., Draper, *The Implementation of the Geneva Conventions of 1949 and the Additional Protocols of 1978*, III 1979 RECUEIL DES COURS 9, 20-23, 29 (1980); Draper, *The Ethical and Juridical Status of Constraints in War*, 55 MIL. L. REV. 169, 183-84 (1972). For similar points made by others concerning instruction regarding humanitarian laws, see, e.g., Levie, 74 AM. SOC. INT'L L. PROC. 148-49 (1980); Parks, *id.* at 149-50; Walker, *id.* at 151.

² See also Wright, *National Courts and Human Rights—the Fujii Case*, 45 AM. J. INT'L L. 62, 81 (1951), reprinted in R. LILlich & F. NEWMAN, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY 96 (1979); Paust, *Response to Terrorism: A Prologue to Decision Concerning Private Measures of Sanction*, 12 STAN. J. INT'L STUD. 79, 94-96 (1977) (extending education programs to lower level educational institutions), reprinted in LEGAL ASPECTS OF INTERNATIONAL TERRORISM 575, 589-90, 606, 633-37, 649-50 (A. Evans & J. Murphy eds. 1978) [hereinafter cited as Paust, *Response to Terrorism*]; Paust, *A Survey of Possible Legal Responses to International Terrorism: Prevention, Punishment, and Cooperative Action*, 5 GA. J. INT'L & COMP. L. 431, 445-48 (1975) [hereinafter cited as Paust, *A Survey of Possible Legal Responses*]; Paust, *An International Structure for Implementation of the 1949 Geneva Conventions: Needs and Function Analysis*, 1 YALE STUD. WORLD PUB. ORD. 148, 149-51, 169, 201-02, 204 (1974) [hereinafter cited as Paust, *An International Structure*].

³ See generally M. McDUGAL, H. LASSWELL & L. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 408-22 (1980); Paust, *A Survey of Possible Legal Responses*, *supra* note 2, at 435-45; Paust, *An International Structure*, *supra* note 2.

attention is during the educational process.

Another useful point made by Professor Draper which I would like to comment on is that human rights law regulates what a government can and cannot do to its own people. This is true,⁴ but human rights law also regulates what a government can or cannot do to other people, especially those who are within its jurisdiction. A good example is the case of aliens. They are not necessarily loyal to the government in whose territory they find themselves, and in fact, may be totally opposed to the governmental structure as such.⁵ In such a situation, human rights law regulates what the government can and cannot do with respect to the aliens.

All of the panelists today have recognized that human rights norms form a fundamental set of normative expectations, a fundamental set of legal principles upon which we must focus our attention. I share in that recognition, and I am in agreement with Professor De Schutter that a general legal inquiry should begin with the United Nations Charter, in particular with the human rights provisions and the principle of self-determination. However, we should also recognize that there is a whole package of humanitarian norms, or norms which serve humanitarian purposes, which is applicable in times of internal armed conflict. John Moore might prefer to phrase it differently and say there are many aspects of this "Rubik's cube" of international law to which one must pay adequate attention when deciding whether a particular law applies, whether its application to protect certain persons is required, and whether the law has been violated.

One norm that has not been mentioned yet, but which would indeed be applicable in time of peace as well as in time of war, is the customary prohibition of genocide⁶ and, more particularly, the Genocide Convention and the criminal sanction provisions recog-

⁴ See, e.g., Paust, *Human Rights: From Jurisprudential Inquiry to Effective Litigation*, 56 N.Y.U. L. REV. 227, 235-38 (1981), and references cited therein [hereinafter cited as Paust, *Human Rights*].

⁵ See, e.g., *supra* note 4; M. McDUGAL, H. LASSWELL & L. CHEN, *supra* note 3, at 737-78 *passim*, and references cited therein.

⁶ Today, this prohibition is considered to be customary. See, e.g., M. McDUGAL, H. LASSWELL & L. CHEN, *supra* note 3, at 355-56; Henkin, *Restatement of the Foreign Relations Law of the United States (Revised)*, Tentative Draft No. 3, 76 AM. J. INT'L L. 653, 655 (1982), citing RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (Rev. Tent. Draft No. 3, 1982); Paust & Blaustein, *War Crimes Jurisdiction and Due Process: The Bangladesh Experience*, 11 VAND. J. TRANSNAT'L L. 1, 6, 22 (1978) and references cited.

nized therein.⁷ The general norms of self-determination are also applicable in times of peace as well as in times of war.⁸ The 1970 Declaration on Principles of International Law⁹ recognizes not only the right of a people to self-determination, but also what Professor Blaustein and I termed in a Bangladesh context, the right to self-determination assistance.¹⁰ Quite specifically, the 1970 Declaration recognizes that in actions against, and resistance to, forcible actions which deprive a people of their right to self-determination, "such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter." I suspect that John Moore would underline the last portion of that sentence: "in accordance with the purposes and principles of the Charter." Nevertheless, there is an express recognition of the right to self-determination and to self-determination assistance.

Another norm in the package of humanitarian norms which has to be considered is the principle of intervention. In cases where the right to self-determination assistance is recognized, intervention would certainly be one form of assistance. I remember that it was John Moore who taught us well at Virginia that "intervention" is a term with many meanings,¹¹ and that the United States, for example, might be considered to "intervene" in a situation by simply

⁷ Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951). See *supra* note 6.

⁸ See, e.g., Paust & Blaustein, *supra* note 6, at 11-12 n. 39, 18-19, 30-31; Paust, *A Survey of Possible Legal Responses*, *supra* note 2, at 460-62; L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 496-99, 535-36, 733-34, *passim* (1973); B. WESTON, R. FALK & A. D'AMATO, INTERNATIONAL LAW AND WORLD ORDER 321-22, 537-41, 555-62, 594-95 (1980); M. McDUGAL, H. LASSWELL & L. CHEN, *supra* note 3, at 346, 349; SELF-DETERMINATION: NATIONAL, REGIONAL, AND GLOBAL DIMENSIONS (Y. Alexander & R. Friedlander eds. 1980) [hereinafter cited as SELF-DETERMINATION: NATIONAL, REGIONAL, AND GLOBAL DIMENSIONS]; Richardson, *Self-Determination, International Law and the South African Bantustan Policy*, 17 COLUM. J. TRANSNAT'L L. 185 (1978); Suzuki, *Extraconstitutional Change and World Public Order: A Prologue to Decision-making*, 15 HOUS. L. REV. 23 (1977); Chen, *Self-Determination as a Human Right*, in TOWARD WORLD ORDER AND HUMAN DIGNITY 198 (1976); Suzuki, *Self-Determination and World Public Order: Community Response to Territorial Separation*, 16 VA. J. INT'L L. 779 (1976); Friedlander, *Self-Determination: A Legal-Political Inquiry*, 1975 DET. C. L. REV. 71.

⁹ 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970) (unanimous vote).

¹⁰ See Paust & Blaustein, *supra* note 6, at 11-12 n. 39, 38. See also Paust, *Self-Determination: A Definitional Focus*, in SELF-DETERMINATION: NATIONAL, REGIONAL, AND GLOBAL DIMENSIONS, *supra* note 8, at 7 [hereinafter cited as Paust, *Self-Determination*].

¹¹ See, e.g., Moore, *Intervention: A Monochromatic Term for a Polychromatic Reality*, in 2 THE VIETNAM WAR AND INTERNATIONAL LAW 1061 (R. Falk ed. 1969); see also LAW & CIVIL WAR IN THE MODERN WORLD (J. Moore ed. 1974).

doing nothing. As one of the most powerful, influential and integrated of nation-states in an increasingly interdependent world, our actions and inactions can produce significant social consequences abroad. Thus, the realistic question might not be whether to intervene, but how to intervene and why. In terms of intervention for the promotion of self-determination, I see no reason why, for example, the Central Intelligence Agency could not engage in otherwise permissible activities that aid self-determination processes throughout the globe. Of course, other interrelated norms applicable to human rights would have to be considered.¹²

Among the general norms to be considered are those which address the general legitimacy of governments and the type of governmental entity that can engage in legitimate activities, whether these activities are otherwise lawful strategies of armed coercion, or permissible derogations from certain human rights in times of actual necessity. The precept of authority contained in article 21, paragraph 3 of the Universal Declaration of Human Rights¹³ really cements into human rights law the notion that no government is authoritative unless it represents the will of the people.¹⁴ It also recognizes the need for democratic elections, which is consistent with the right of all persons to participate in a relevant social and political process, a right included in the general norms of human rights.¹⁵ Furthermore, the general precept of authority recognized in the Universal Declaration is a key to a more policy-serving treatment of the question of political oppression through strategies of armed violence, "martial law," or "national security" crackdowns.¹⁶

As Professor Draper and others have mentioned, the general norm of nondiscrimination is also relevant to situations of armed

¹² See, e.g., Paust, *Is the President Bound by the Supreme Law of the Land?—Foreign Affairs and National Security Reexamined*, 9 HASTINGS CONST. L.Q. 719, 758-65 (1982) [hereinafter cited as Paust, *Is the President Bound?*].

¹³ Universal Declaration of Human Rights, art. 21, para. 3, G.A. Res. 217 A, U.N. Doc. A/810, at 71 (1948).

¹⁴ For further exposition, see, e.g., Paust, *International Law and Control of the Media: Terror, Repression and the Alternative*, 53 IND. L. J. 621, 627-29 *passim* (1978) [hereinafter cited as Paust, *Control of the Media*]; Paust, *Self-Determination*, *supra* note 10; Paust, *Human Rights*, *supra* note 4, at 248-49, and references cited therein.

¹⁵ See Universal Declaration of Human Rights, art. 21, paras. 1-3, G.A. Res. 217 A, U.N. Doc. A/810, at 71 (1948). See also *id.* arts. 1, 2, 4, 6-7, 19-20, 28-30.

¹⁶ See, e.g., Paust, *Control of the Media*, *supra* note 14; see also M. McDUGAL, H. LASSWELL & L. CHEN, *supra* note 3, at 690-712, *passim*; Paust, *Is the President Bound?*, *supra* note 12.

conflict.¹⁷ One finds a cross reference to the norm of nondiscrimination, for example, in Protocol II to the Geneva Conventions.¹⁸ This norm prohibits distinctions per se on the basis of race, color, national or social origin, sex, and importantly, political or other opinion.¹⁹ General human rights, as well as the more specific human rights and humanitarian provisions contained within the laws of armed conflict, are applicable to all persons without distinction per se on the basis of ideologic or political belief, or on the basis of the other forms of impermissible distinction.

Articles 55 and 56 of the United Nations Charter impose an obligation on each state to take joint and separate action to achieve "universal respect for, and observance of human rights." The Charter also contains a fundamental prohibition of the threat or use of force by a state, not only against the territorial integrity or political independence of another nation-state, but in any manner inconsistent with the purposes of the United Nations Charter.²⁰ Since the purposes of the Charter expressly include norms of self-determination and human rights,²¹ it is certainly arguable that the use of force by a state in a manner inconsistent with the norm of self-determination is itself violative of the article 2(4) prohibition of the use of force.²² The Declaration on Principles of International Law also recognizes, twice in the same instrument, that every state "has the duty to refrain from any forcible action which deprives" a relevant people of their right to self-determination.

On the counterside of the equation, or the Rubik's cube of international law, are the norms generalized as the prohibition of intervention. Article 2, paragraph 7 of the Charter is one basis for these norms. We see further recognition of this particular prohibition in Protocol II to the Geneva Conventions. Article 3, paragraph 2 declares: "nothing in this Protocol shall be invoked as a justification for intervening directly or indirectly . . . in [an] armed conflict or

¹⁷ On the general norm of nondiscrimination, see, e.g., M. McDUGAL, H. LASSWELL & L. CHEN, *supra* note 3, at 449-796, 909, 916-18, *passim*.

¹⁸ See Protocol II to the Geneva Conventions, *adopted* June 8, 1977, art. 2, para. 1, *reprinted in* 17 I.L.M. 1442, 1443 (1977).

¹⁹ See, e.g., Universal Declaration of Human Rights, art. 2, G.A. Res. 217 A, U.N. Doc. A/810, at 71 (1948).

²⁰ U.N. CHARTER art. 2, para. 4. See also *id.* preamble, art. 1, para. 1; *cf. id.* arts. 51-52 (art. 51 reserves to Member States the right to individual or collective self-defense; art. 52 provides for actions by regional organizations for settlement of disputes).

²¹ See, e.g., *id.* preamble, art. 1, paras. 2-3.

²² See, e.g., Paust & Blaustein, *supra* note 6, at 11 n.39; Paust, *A Survey of Possible Legal Responses*, *supra* note 2, at 460-62.

in [any] internal or external affairs of [a] High Contracting Party" Thus, the question is presented: What are the internal or external affairs "of" a particular country as opposed to international affairs or matters of international concern? When does the affair "of" a particular country become the affair also of others and, thus, a matter of international concern? And when is there an impermissible outside "intervention" into the affair "of" a particular nation-state as opposed to a normal day to day interrelationship or interdependency of states and peoples? I would suggest, like several commentators today, that article 2, paragraph 7 of the United Nations Charter and article 3 of the 1977 Geneva Protocol II do not prohibit intervention by the international community into international affairs. At a minimum, they do not prohibit the concern, investigations, and actions taken by the community in response to violations of human rights or basic denials of self-determination.²³

I would now like to turn to article 29 of the Universal Declaration of Human Rights and the question of permissible derogations from human rights norms. Yes, human rights norms generally are applicable in times of peace and in times of armed conflict. Yes, there can also be permissible derogations from human rights norms in times of crisis, but the test is rather strict. The test of paragraph 2 of article 29 is necessity within democratic limits.²⁴ The test requires necessity under the circumstances, but also contains the significant conditioning phrase: "democratic society." This phrase is neither ideologically neutral nor irrelevant to self-determination or the precept of authority that is also contained in the Universal Declaration.²⁵

If we look at the specific parts of the necessity test for permissible human rights derogations, we find that permissible measures of derogation must be "determined by law" (*i.e.*, that extralegal measures, perhaps even martial law decrees, are impermissible means for derogating from human rights). Secondly, these derogations must be engaged in "solely for the purpose of": (1) implementing

²³ See, *e.g.*, Paust, *Transnational Freedom of Speech: Legal Aspects of the Helsinki Final Act*, 45 LAW & CONTEMP. PROBS. 53, 66 (1982), and references cited therein; Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity of Foreign State Violators of International Law Under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L. L. 191, 221-25 (1983), and references cited.

²⁴ For further exposition, see Paust, *Control of the Media*, *supra* note 14, at 626-29, 664, *passim*.

²⁵ See *supra* note 14.

the relative rights and freedoms of other individuals, groups or the society as a whole, and (2) meeting the just requirements of morality, public order and welfare. The words "solely," "and," and "requirements" are significant conditioning words. They condition not only the types of purposes that are permissible, but also the degree of necessity that must exist (*i.e.*, "solely for the purpose . . . of meeting . . . just requirements").²⁶ Thus, the "just requirements" phrase provides the requirement of necessity that we see generally in humanitarian law which prohibits unnecessary suffering and military measures that are not reasonably necessary under the circumstances.²⁷

Third, the human rights derogation provision contains a limitation that relates to a politico-ideologic process termed a "democratic" society. There is an express recognition that permissible derogations can take place only within a democratic society.²⁸ In the 1966 International Covenant on Civil and Political Rights,²⁹ one does not see this same "democratic society" limitation directly, but there is an express reference to the need to serve self-determination.³⁰ If I had more time, I would demonstrate further how self-determination, the right of participation, norms of nondiscrimination, and the precept of authority contained in article 21 of the Universal Declaration of Human Rights are necessarily interrelated, and why they should also condition the derogation provision found in article 29 of the Universal Declaration.³¹ To return to John Moore's Rubik's cube example, all of these norms are necessarily interrelated, and adequate attention to each of these must

²⁶ *Id.*

²⁷ For exposition of the necessity test under the law of war, see, e.g., Paust, *Weapons Regulation, Military Necessity and Legal Standards: Are Contemporary Department of Defense "Practices" Inconsistent with Legal Norms?*, 4 DEN. J. INT'L L. & POL. 229 (1974); Paust, *Does Your Police Force Use Illegal Weapons?—A Configurative Approach to Decision Integrating International and Domestic Law*, 18 HARV. INT'L L.J. 19, 29-37 (1977).

²⁸ See *supra* note 14.

²⁹ International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1967), reprinted in 6 I.L.M. 368 (1967).

³⁰ See *id.* art. 1; see also Paust, *Control of the Media*, *supra* note 14, at 627 n. 29.

³¹ For now, see Paust, *Control of the Media*, *supra* note 14, at 626-29, *passim*. It should also be noted that these concerns are also relevant to an adequate interpretation of the "by all legitimate means" phrase in article 3, paragraph 1 of Protocol II. Legitimacy must certainly be tested with reference to the U.N. Charter and the Universal Declaration of Human Rights if only because the Charter must prevail in the case of any inconsistency, and the Universal Declaration provides authoritative content with regard to the human rights provisions of the Charter. See U.N. CHARTER art. 103. Furthermore, the preamble to Protocol II refers expressly to human rights instruments and, thus necessarily, to the Universal Declaration.

occur if we are more usefully to serve not only humanitarian law but also other forms of international law in times of armed conflict.