

PANEL TWO: GENERAL DISCUSSION

Frank Newman

I would like to talk about the overlap between humanitarian law and human rights law. Almost all of the speakers on this panel talked about that overlap, but I think only one of them carefully distinguished human rights law from humanitarian law. The overlap, if correctly handled, will help to resolve the ironies that were put to us by Mr. Ball. Human rights law affects both the substantive and procedural aspects of the norms we are discussing. In this comment I will discuss only substance.

First, we must keep in mind that the basic thrust of the norms we are discussing here leads us to the conclusion that we must apply the law that is better suited to the particular situation—humanitarian law or human rights law. When I mean better, I do not mean better for governments, although this has historically been the case. Rather, we should apply the law which is better from the non-government perspective. Next, it is quite acceptable that humanitarian lawyers talk about the human rights documents as having become part of customary law. Nuremberg and other tribunals helped to extend the impact of humanitarian law beyond the treaty stage. My own view is that the human rights documents, specifically the Universal Declaration and the Covenants, but also many of the others, get their main strength not from article 38 of the Statute of the International Court, but from the fact that they are authoritative and perhaps even authentic interpretations of the United Nations Charter.

Without going into great detail, it is clear that the Charter is a treaty, and the more than 150 nations that have ratified it have agreed that it is the super treaty. All other treaties are expressly declared to be subordinate if the provisions of the Charter are in conflict. It can no longer be disputed that the human rights clauses are an important part of the Charter. We have learned that they can be interpreted, and they have to be interpreted. More than a hundred nations want them to be interpreted, and they so express themselves in United Nations organs and agencies.

Where do we look for the best interpretations of the Charter? Unfortunately, we do not have enough opinions from the International Court of Justice, and unfortunately the Legal Adviser's Of-

fice of the United Nations is not as authoritative as it needs to be. Therefore, we must look first to the Universal Declaration. Perhaps when the Universal Declaration was first approved it was not an authoritative interpretation of the Charter, but in the intervening years it has been cited again and again by almost every government as the interpretation of the human rights provisions of the Charter. The same can be done with the Covenants and with other treaties. In the Namibia opinion we do have an authoritative decision by the International Court of Justice interpreting the Racial Discrimination Treaty. This opinion showed the permissibility of looking at the provisions of a treaty which is almost universally accepted, even though it involved a nation that had not ratified the treaty. That is all I want to say about authoritative interpretation of the Charter as compared with customary law.

In regard to specific provisions, the main weakness of the discussion today was illustrated by the treatment of article 4 of the Covenant, which was referred to by at least four or five speakers as the public emergency exception. "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties may take measures derogating from their obligations under the present Covenant . . . provided that such measures are not inconsistent with their other obligations under international law" There was also reference to article 3 of the Geneva Treaties, but here is the proviso in that article that was not mentioned: "Such measures may not involve discrimination solely on the ground of race, color, sex, language, religion, or social origin." This is a tremendously important provision from which there may be no derogation. There is another provision providing that they may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation. I want to call your attention to that clause specifically. We were on an amnesty mission in Chile in the fall of 1973, five or six weeks after the coup. The Foreign Ministry of Chile had a legal adviser who did not know much about the Covenant, although the Foreign Ministry itself knew a lot about it. They had signed it, but had not yet ratified it. They could not possibly argue, and finally did not even try, nor did the military try to say that torture was strictly required by the exigencies of the situation. We were benefitted by a struggle that was going on between the Foreign Ministry and the military as to whether torture was desirable, but not a single person with any

juridical background argued with us that torture was strictly required by the exigencies of the situation.

There was a reference to the fact that certain articles in the Covenant may not be derogated from, and Mr. DeSchutter pointed out that one of the articles absolutely prohibits torture. Much more important is the provision of that same article, article 7, that no one shall be subjected to cruel, inhuman or degrading treatment or punishment. The phrase "cruel, inhuman or degrading treatment" is potentially one of the most powerful clauses in the history of civil rights and civil liberties in the world, and we have to start building on it. There may be no derogation from that clause.

I will conclude with a statement of the derogation provision, because a lot of nations are parties to the Covenant. "Any State Party . . . availing itself of the right of derogation shall immediately inform the other States Parties . . . of the provisions from which it has derogated and of the reasons by which it was actuated." This reporting requirement is very useful, and we should push for ratification of the Covenant so the requirement becomes legally binding. If we are going to put humanitarian law and human rights law together, we really have to read these paragraphs from beginning to end because they are very powerful. In many respects they are much more powerful in the human rights instruments than they are in the humanitarian law instruments.

John Norton Moore

I have just a brief comment. I enjoyed very much the discussion of the panelists on the applicability of both the Hague and Geneva rules, the combat rules and the protection of victims of armed conflict. But historically there has been a third element, which is sometimes overlooked because it does not fit as neatly under the humanitarian laws of war. It is the law of neutrality. If we are looking at the entire question of how, in a post-Charter world, we apply the norms of the Charter and the laws of war to internal conflict settings, we also have to consider the extent to which the principles underlying the laws of neutrality are applicable. We must further consider how to develop a set of norms for applying the law of neutrality to internal conflicts, and a procedural structure for implementing those norms. It seems that the principal underlying policy is to try to confine the focus of conflict and prevent its spread to third countries. To my knowledge, the only convention that seeks to raise this question is the 1973 United States Draft Convention on Terrorism. This Convention was drafted in the af-

termath of the Munich Crisis, which caused enormous outrage here and abroad, but since it had terrorism in the title it could not fare very well in the United Nations System. However, if the Convention were to be renamed "A Convention to Prevent the Spread of Civil Conflict," it could precisely implement the basic notion of the laws of neutrality in the setting of insurgent and terrorist activities in civil strife situations. I would be grateful for any members of the panel who would care to comment on this suggestion or any other ways in which they believe the laws of neutrality could be made relevant to the question of civil conflict and insurgency.

G.I.A.D. Draper

In answer to Professor Moore's interesting suggestion, may I add a fourth suggestion, which we have also overlooked. That is the law of pacific relations between belligerents, a subject which is rarely discussed, but about which there is a great deal of law. Because we do not have peace treaties today, this subject includes the whole method whereby wars end, namely general armistices. Peace treaties seem to have gone out with the laundry. With regard to neutrality in relation to internal armed conflicts, I see a difficulty. When a third state claims to be neutral in regard to an internal armed conflict, the government of the state in which the conflict is taking place may well allege that its sovereignty is being violated.

Waldemar Solf

I want to thank Judge Newman for pointing out that the human rights instruments are even more applicable in time of armed conflict than we had otherwise indicated. I think Colonel Draper has fully pointed out that the threshold of common article 3 is not defined, and the reason it was not defined is because they could never arrive at an agreement on what it meant. In the long run I think this has been very worthwhile. Some states take the position that the recognition of belligerency is almost necessary before common article 3 is applicable, which is of course an absurd conclusion in view of the very basic substantive provisions of that article. There certainly is no point in saying that the threshold for article 3 is the situation where one would expect states with a spark of humanity to apply a major portion of the international law of armed conflicts, including prisoner of war treatment.

Without any definition of the threshold, the International Committee of the Red Cross has been relatively successful in being admitted into situations of civil war or non-international armed con-

flict. The monthly bulletin of the International Committee of the Red Cross indicates what they have been doing during the month. They do not tell you what they have seen, they do not point the finger of guilt at anyone, but you can see that they have been around. I made a short list of what appeared in the very latest one. They visited prisoners of war, gave nutritional or medical relief, and implemented their tracing service to let relatives know the status of missing persons. They did this in the Golan Heights. These activities are covered by the Geneva Conventions under article 4 because this is occupied territory, notwithstanding the fact that one of the occupying powers has decided to apply its own law. They visited the captives of the Polisario in Western Sahara. They visited East Timor. When we have been engaged in armed conflict with a communist power, namely in Korea and Vietnam, the International Committee of the Red Cross was never able to get into the country. We thought that maybe it was a phenomenon common to all communist countries, that they absolutely would not let anyone come in and take a look at their gulag. As it turns out, the first time that the International Committee of the Red Cross was ever able to visit captives in what was certainly not considered to be an armed conflict, international or otherwise, was in 1919 in Hungary. Béla Kun was running the country and had all of the former Hungarian elite more or less locked up. So the very first visit to political offenders or political detainees was in a communist country. I noticed in the last month that they also were able to get into Poland. They were never able to get into Kampuchea, Vietnam, or Laos. They got into Angola and Chad last month. There has been a big civil war going on in Chad and both sides have apparently treated their opponents as prisoners of war, and both sides have permitted the International Committee of the Red Cross to enter. They were in the Cape Verde Islands and Gambia. They had been in Uganda for two years, and the Ugandan government of Milton Obote has told them to get out. But at least they have been there, and also Mozambique. They manage to get in where there is not any legal obligation whatsoever, except possibly the Statute of the International Red Cross. Their success rate begins to diminish when they are in a position to assert that the rebels have reached a certain threshold, and consequently some norm or another applies. That is when governments begin to turn off.

In the realm of criminal mechanisms, compliance could be promoted by abolishing the entire notion of political crime. If extradition is attempted against someone because he was involved as an

insurgent in an internal conflict situation, the sentimental rule that a political criminal should not be extradited must be applied. I think we should do away with that. The notion of political crime should be replaced by a notion of non-discriminatory treatment, and I think it would be a step forward to try to combine the common elements of all of these anti-terrorist treaties. The obligation to either extradite or prosecute should be combined with the possibility of refusing extradition for, among other reasons, political beliefs, political conviction, and ideological conviction. The extraditing state could refuse extradition if it felt that the person would receive discriminatory treatment violative of fundamental human rights. I think it would be another small step forward in the issues of enforcement and compliance.

Again, one of my beliefs in this area is that a lot of information, a lot of coordination, and a lot of publicity on what the rules of the game should be are very important. Then, if we could transplant some areas from the soft core to the hard core international law area in a step by step process, we would have the possibility of achieving what we have been pursuing for so many years.

Jordan Paust

In terms of remedies, I think it is also useful to remember that when we speak of violations of human rights law and the sovereignty question, it is precisely at the point where international law has been violated by a government that there is no entitlement to sovereign immunity against private suits. This is true under the norm of non-immunity that is recognized, for example, in section 1604 of our Foreign Sovereignty Immunities Act. This is termed the international agreements exception to violations of international law or international agreements. If we were to apply this remedy to the humanitarian law area, it might provide a useful stimulation, in addition to public opinion, for governmental compliance with humanitarian and human rights law. I see no reason why private suits could not presently be maintained for violations of human rights, just as there is no reason why criminal prosecutions could not exist for violations of fundamental human rights.

PANEL III

**THE ROLE OF
INTERNATIONAL AND
REGIONAL
ORGANIZATIONS IN
INTERNAL CONFLICTS**

