ASIL INTERNATIONAL LAW WEEKEND: PANEL ON INTERNAL CONFLICTS

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As John Crook has pointed out, most of the armed conflicts of recent years have been internal rather than international, and most of the suffering of the civilian population has occurred in these internal conflicts. The United States and other western governments have been trying for a number of years to improve both the legal standards applicable in internal conflicts and the means for their enforcement. This morning, I would like to survey the various contexts in which this question has arisen and to describe what the United States has attempted to do in each case.

John has already referred to the basic texts that apply rules of international humanitarian law to internal conflicts—namely, common article 3 to the 1949 Geneva Conventions and the 1977 Additional Protocol II to those Conventions. During the Geneva Diplomatic Conference which adopted the Additional Protocols, the western group fought a hard and largely unsuccessful battle to bring the substance of provisions applicable in internal conflicts closer to those applicable in international conflicts, particularly with respect to protection of the civilian population.

There were two primary obstacles. First, the nonaligned and Soviet blocs expressed the concern that any strengthening of the obligations applicable in internal conflicts would give enhanced political and legal status to insurgent groups, and would lead to greater international intrusion into their internal affairs. This was a particular concern of the many nonaligned states that did not have a strong history of national unity, and that lived in fear of secessionist ethnic, tribal and religious movements within their societies. It was also a concern of governments that had been the object of international criticism for domestic abuses, and that were not inclined to give new grounds and new opportunities for such criticism or intervention.

Second, there were concerns that the standards and procedures of international humanitarian law, which had been developed to regulate the conduct of states and regular armed forces, could not sensibly be applied to internal conflicts where the insurgent groups often had little internal discipline and fewer incentives to comply with international standards they

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had no hand in negotiating and may never have accepted. A frequent objection was that these governments could not be expected to require their military forces to obey restrictions which their insurgent opponents had not accepted and might not have the ability to comply with if they wanted to do so.

As a result, Additional Protocol II is not as comprehensive as western delegations had wanted, either with respect to its substance or its scope of application. With respect to substance, the Protocol was an important improvement in some areas, but its protections for the civilian population, for detained persons and for those engaged in humanitarian work were in many ways only a pale copy of the rules for international armed conflict.

With respect to its scope of application, the Protocol excludes conflicts with insurgent armed groups which are not under *responsible command* or which do not exercise such control over a sufficient part of national territory *as to enable them to carry out sustained and concerted military operations*. Unfortunately, these provisions would exclude many guerrilla wars fought by irregulars. They have also provided a convenient basis for governments that do not wish to apply the Protocol to decline to do so.

The view of the United States is that the rules of Additional Protocol II should apply to all internal armed conflicts, and in submitting the Protocol to the Senate the Executive Branch proposed that United States ratification be subject to a formal Declaration that it would so apply the Protocol and would encourage all other states to do likewise. We hope that the Senate can be persuaded to give its advice and consent to the Protocol with this Declaration at an early date.

Since 1977, the United States has attempted in various contexts to expand the application of international humanitarian protections to internal conflicts. For example, during the drafting of the Statute of the International War Crimes Tribunal for the former Yugoslavia, we took the position that the Tribunal should have jurisdiction over war crimes, crimes against humanity and genocide in internal as well as international armed conflicts.

The Statute that was drafted by the United Nations Secretariat and adopted without change by the Security Council in 1993 included four jurisdictional articles. The article on crimes against humanity expressly stated that the Tribunal had jurisdiction over such crimes *when committed in armed conflict, whether international or internal in character*. . . . The articles on grave breaches of the 1949 Geneva Conventions, other violations of the law and customs of war, and genocide did not expressly state whether they applied in internal conflicts. In her explanation of vote

in the Security Council in favor of the Statute, Ambassador Albright stated for the record that the United States interpreted the jurisdiction of the Tribunal to apply in all respects to internal as well as international conflicts, including violations of the provisions on internal armed conflicts in common article 3 of the 1949 Conventions and Additional Protocol II.

When these issues came before the Appeals Chamber of the War Crimes Tribunal in the course of ruling on various appeals by the first war crimes defendant (Dusko Tadic), we argued that the conflict in the former Yugoslavia was in fact an international conflict, but that in any event each of the jurisdictional provisions of the Tribunal's Statute applied in both international and internal conflicts. The Appeals Chamber disagreed with our argument that the entire conflict was international in character, and disagreed with our argument that the grave breaches provisions of the 1949 Geneva Conventions applied in both types of conflicts. However, the Chamber agreed that the other jurisdictional provisions applied in internal as well as international conflicts, relying heavily on the United States statement during the deliberations of the Security Council. Therefore, although we did not agree with the reasoning of the Appeals Chamber on all points, it did sustain our basic argument that the Tribunal's jurisdiction did apply to violations of genocide, war crimes, and crimes against humanity committed during internal armed conflict.

When the International War Crimes Tribunal for Rwanda was created by the Security Council in 1994, it was agreed by all concerned that the Rwanda situation was an internal armed conflict, and this time the jurisdictional provisions of the Rwanda Statute were drafted so as expressly to apply to the rules of humanitarian law in internal armed conflict, as well as to genocide and crimes against humanity. Therefore, there should be no question that the applicable rules of common article 3 and Additional Protocol II will apply in the Rwanda war crimes trials.

The question of internal armed conflict was also a critical issue during the negotiations of the past few years to improve the international rules governing the use of conventional weapons—particularly land mines and similar devices, which are governed by the Mines Protocol of the 1980 Convention on Conventional Weapons. Unfortunately, the 1980 Convention clearly applied only to international conflicts, while the great majority of civilian casualties from land mine use in recent conflicts have occurred in internal conflicts, such as those in Angola and Cambodia. It was therefore one of the primary United States objectives in the revision of the Mines Protocol to expand its scope to include all internal conflicts. At first, the nonaligned states opposed such an expansion, for all the same reasons that had caused them to oppose the expansion of the scope and content of Additional Protocol II.

In the end, we and other western delegations were able to convince these states that a revised Mines Protocol would be of little practical value if it did not apply to internal conflicts, and that there was no valid reason for denying the civilian population protection from land mines simply because the conflict in which they found themselves happened to be internal rather than international. To meet their concerns about the legal effects of expanding the scope of the Protocol, we added language specifically disclaiming any effect on the legal status of the conflict or the insurgent groups involved, as well as a provision stating that the obligations of the Protocol would apply equally to all parties to the conflict. These additions seemed to provide the necessary cover to allow them to agree to the expansion of scope.

However, I do not know whether this expansion of the Mines Protocol to internal conflicts suggests that it may now be possible to expand other humanitarian law protections to internal conflicts. In agreeing to the expansion of the scope of the Mines Protocol, one key nonaligned state made clear that it viewed this as an exceptional circumstance that should not be repeated elsewhere, and blocked the proposed expansion of the scope of other parts of the Convention, particularly the new Protocol on Blinding Laser Weapons that was adopted at the same time. Furthermore, we were not able to persuade the nonaligned to accept a western proposal for international fact-finding investigations into alleged violations of the Mines Protocol, and one of the reasons often cited for the nonaligned refusal was that it would never be acceptable to have international investigations into the circumstances of internal conflicts.

In surveying the field on the application of law to the conduct of internal armed conflicts, we should not neglect various provisions of arms control agreements that affect the use of weapons in those conflicts. The best early example of this was the 1925 Geneva Protocol which prohibited the use of chemical and bacteriological weapons. This Protocol is often classified as an arms control agreement, but in fact it states a very important rule of the law of armed conflict. By its terms, the Protocol only applies to the use of these weapons *in war*, which was understood to mean international armed conflict. Over the years, however, more and more states came to accept the position that this prohibition had become a part of customary international law applicable in internal as well as international conflicts. This position was supported by the United States in the aftermath of the use of chemical weapons by Iraqi forces against Kurdish civilians in northern Iraq after the end of the Iran-Iraq War.

Not all states accept this view of customary law. However, two arms control agreements concluded in recent decades would produce much

the same effect. The 1972 Biological Weapons Convention did not expressly deal with the use of such weapons in armed conflict, but did prohibit any acquisition or retention of biological agents of types or in quantities that have no justification for peaceful purposes, or of weapons or means of delivery designed to use such agents for hostile purposes or in armed conflict. The effect of these prohibitions is to make it impossible lawfully to use biological weapons in any form of armed conflict. Likewise, the 1993 Chemical Weapons Convention expressly prohibits the use of chemical weapons, and the use of riot control agents as a method of warfare. This would clearly preclude the lawful use of chemical weapons in either internal or international conflicts.

The United States was a strong supporter of both these conventions, and is of course a party to the Biological Weapons Convention. The Chemical Weapons Convention has been submitted to the Senate, but the Senate has not yet given its consent to ratification. We hope this will occur soon.

Finally, attempts have been made recently by government and non-government experts to identify the rules which may be said to be part of customary international law in international and internal conflicts, or to define sets of principles that should be applied in all circumstances—whether in armed conflict or peacetime. I imagine that Professor Meron, who has been active in these efforts, will describe them in greater detail. The United States is particularly interested in the current project of the International Committee of the Red Cross to conduct a detailed study of the customary rules of international humanitarian law, and hopes to contribute in a concrete way to this useful work.