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Global Snapshots

This introductory chapter assumes no special knowledge about the foundations or content of international human rights. Rather it is meant to spur thoughts about many issues that the later chapters examine.

The following illustrative excerpts from reports of newspapers and organizations plunge you into the diverse human rights problems that plague the world. When reading these materials, consider some of the following questions:

How do we know when and where human rights violations occur and what precisely happened? Who or what institution 'finds the facts,' and through what methods?

Are intergovernmental and non-governmental organizations hostile towards or cooperative with each other, or sometimes one and sometimes the other?

What is the source of the rules or standards under which officials and non-governmental organizations evaluate and criticize a state?

Do the states being criticized appear to accept the legitimacy of those rules and standards? The legitimacy of being criticized about internal matters by intergovernmental organizations or other states?

What kind of relationships, if any, do you see among the types of violations described or problems raised in these excerpts? For example, the excerpts clearly consider physical abuse to be a violation of human rights. What else?

Are you clear in each story that (if the reported facts are true) there has been a violation of human rights? How would you identify the violation in each story?

Are (international) human rights violations committed only by states, or are non-governmental forces and individuals also accused of such violations? Do all the stories involve governments as the direct violators of rights?

What steps if any seem to be taken to influence or force a state to end violations?

STORIES ABOUT HUMAN RIGHTS

Four Cited for Human Rights Work

United Press International, Dec. 8, 1993

Reebok Corp. Wednesday presented its 1993 Human Rights awards to four people, including a California minister targeted for death by a white supremacist group.

In ceremonies in Boston, the recipients of the sixth annual awards by the sportswear manufacturer received $25,000 each for human rights organizations of their choice.

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Botte was cited for her work to save Asian children from prostitution. Reebok noted she has rescued hundreds of young women from brothels in Thailand.

Mubarak faced numerous personal threats, Reebok said, while documenting human rights violations of citizens detained by Egyptian authorities.

Kashinawa was honored for his work to defend the economic rights and cultural integrity of the indigenous people of the Brazilian rainforest.

U.N. Investigator Tells of 'Heinous' Rights Violations in Iraq

by Barbara Crosette, *New York Times*, Feb. 28, 1995, p. A6

A former Foreign Minister of the Netherlands who has been monitoring human rights in Iraq told a United Nations Commission today that over the last year President Saddam Hussein made an already grave situation 'heinous' for Iraqis through officially sanctioned amputations, maiming and branding of dissidents and military deserters.

'It is simply shocking that near the end of the 20th century, any state should so publicly and unashamedly incorporate heinous practices into its law,' said the former Dutch Foreign Minister, Max van der Stoel. He said that such practices, which threaten many thousands of Iraqis arrested for both petty crimes and political opposition are 'absolutely outlawed' under international conventions. The series of laws mandating physical punishment was enacted in the summer and fall of 1994.

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Mr. van der Stoel has not been permitted to visit Iraq to write his reports, the most recent of which was submitted to the Human Rights Commission less than two weeks ago. He relies on material published in official Iraqi gazettes

and information collected from Iraqis who have fled or who have managed to smuggle out of the country video tapes purporting to document abuses.

One tape pictured an army deserter with his ears cut off and blood still flowing on his face. Others show people whose foreheads had been branded with an X to indicate guilt, most often in cases where other mutilation had been done. Mr. van der Stoel said he believed 'tens of thousands' of military deserters or draft evaders lived in fear of torture and amputation under laws that can be applied retroactively.

He said that doctors who complain about brutality are often persecuted for their outspokenness. Occasionally there are reports of children being maimed along with their parents.

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U.S. Prods Indonesia on Rights

by Thomas Friedman, *New York Times*, Jan. 19, 1994, p. D1

Treasury Secretary Lloyd Bentsen told President Suharto of Indonesia today that while the United States believed his Government was making progress on workers' rights it should do more if it wanted to retain its preferential trade privileges with Washington.

Mr. Bentsen was visiting Indonesia as part of an Asian tour intended to advance the Clinton Administration's efforts to get American businesses to focus more on the rapidly expanding economies of Indonesia, Thailand and China.

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Given Indonesia's key role in the forum, and the fact that its economy is expected to spend more than $100 billion on infrastructure projects by the year 2000, one reason for Mr. Bentsen's visit here is to try to defuse a potential spat between Jakarta and Washington about the possible revocation of American trade benefits because of Indonesian human rights abuses. This is a smaller version of the problem Mr. Bentsen will face when he arrives in China Tuesday, after his stop in Bangkok.

The issue is this: Indonesia is a beneficiary of a trade provision called the Generalized System of Preferences. Under the system, developing countries are allowed to send a variety of goods duty-free to the United States. To maintain the benefits, the law states that a country has to be constantly demonstrating that it is making progress toward widening the rights of its workers.

In June, the Clinton Administration said it was reviewing Indonesia's trade status because of the Indonesian Government's continued failure to permit basic workers' rights, most notably the right to organize. Indonesia permits only one Government-directed union.

The Administration gave Indonesia until Feb. 15 to show more progress on workers' rights, particularly the right to strike, or otherwise face possible revocation of its trade privileges. American officials said the Indonesians had been taking steps to loosen up on workers' rights to organize. In recent months, Indonesia has authorized the formation of 14 new trade unions but has insisted that they remain under the supervision of the state-run labor federation, known by its Indonesian acronym S.P.S.I.

Since Indonesia is now leading the Asia-Pacific Economic Cooperation forum in the Non-Aligned Movement and represents an enormous market with 180 million consumers, the Clinton Administration is loath to impose any trade sanctions on Jakarta.

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A Prophet Tests the Honor of His Own Country

by John Darnton, *New York Times*, March 14, 1995, p. A4

In physical stature Yasar Kemal, Turkey's best known and best-loved novelist, is decidedly Hemingwayesque—a big, barrel-chested man who looks as if he's ready to wrestle with the devil. And that, a lot of people feel, is exactly what he's doing.

Turkey has charged the author under Article 8 of the Anti-Terror Law. That is a catch-all provision about advocating separatism, and it is being applied because of an article he wrote for the Jan. 10 issue of Der Spiegel, the German newsmagazine, describing the oppression of fellow Kurds in his country.

Then when he published the essay in a collection of writings by Turkish authors here, titled 'Freedom of Expression and Turkey,' he was charged again under Article 8, along with the publisher. The book was banned and confiscated.

There was another charge in between—something about causing divisions in society, he said.

The writer faces two to five years in jail on two of the charges, three to six on the third. His trial is to start on May 5. It consumes him and has totally intruded on his writing.

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His appearances for hearings in court so far have tended to put the spotlight on Article 8. The Human Rights Association, a nationwide monitoring group, says 118 people are currently jailed under it. Another 2,139 have been convicted but are appealing their sentences, and 5,600 others have been charged and are awaiting trial.

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The article in Der Spiegel, 'Campaign of Lies,' accused the Government of systematically oppressing Turkey's 10 million to 15 million Kurds, especially in the southeast. In 10 years of insurrection there, human rights groups have documented widespread executions, disappearances in the custody of security forces, torture and the burning of villages.

'A tragedy of the human race is going on,' he said in an interview, and nobody—neither the United States nor Europe—pays attention. It is generally thought that about 14,000 have died in the conflict.

Mr. Kemal says in the article that he does not advocate a separate state for Kurds. But he suggests that he can understand, given their treatment, why some Kurds do. That is close to heresy in Turkey, where the 1923 republic founded by Ataturk was based on the principle that ethnic groups must suppress their identities to build a strong nation based on a common sense of Turkishness.

President Suleyman Demirel, asked about Mr. Kemal in an interview in his palace in Ankara, gave a figurative shrug of helplessness. He said: 'Yasar Kemal is a very famous author. I like him very much. He has done beautiful things. He uses Turkish. But he is coming from a Kurdish family—that's all right.

'But what he did in his article, that's unfortunate. I don't think the whole thing is bad. People in Turkey were divided—many said he shouldn't have done it. He did it. The prosecutor cannot do anything else.'

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Argentine Tells of Dumping 'Dirty War' Captives into Sea

by Calvin Sims, *New York Times*, March 13, 1995, p. A1

Many of the victims were so weak from torture and detention that they had to be helped aboard the plane. Once in flight, they were injected with a sedative by an Argentine Navy doctor before two officers stripped them and shoved them to their deaths.

Now, one of those officers has acknowledged that he pushed 30 prisoners out of planes flying over the Atlantic Ocean during the right-wing military Government's violent crackdown in the 1970's.

The former officer, Adolfo Francisco Scilingo, 48, a retired navy commander, became the first Argentine military man to provide details of how the military dictatorship then in power disposed of hundreds of kidnapping and torture victims of what was known as the dirty war by dumping them, unconscious but alive, into the ocean from planes.

In his account, which was published this month in the Argentine newspaper Página 12, Mr. Scilingo said that he took part in two of the 'death flights' in 1977 and that most other officers at the Navy School of Mechanics in Buenos Aires, where he served, were also involved in such flights. He

estimated that the navy conducted the flights every Wednesday for two years, 1977 and 1978, and that 1,500 to 2,000 people were killed.

'I am responsible for killing 30 people with my own hands,' Mr. Scilingo said in an interview after his account was published.

'But I would be a hypocrite if I said that I am repentant for what I did. I don't repent because I am convinced that I was acting under orders and that we were fighting a war.'

Mr. Scilingo's disclosure has reopened a bitter debate here over the so-called dirty war, in which more than 4,000 people were killed and 10,000 others disappeared during the military juntas from 1976 to 1983, according to an official Government inquiry.

Mr. Scilingo said he was motivated to tell his story because of what he called the navy's indifference to the plight of the rank and file who carried out orders to torture and kill prisoners. He said he was so tormented by the memory of his two death flights that he could not sleep at night without taking sleeping pills or drinking heavily.

'I'm not confessing to clear my conscience,' Mr. Scilingo said. 'I'm talking because I feel like the navy had abandoned us, left us to the wolves, the very ones who were loyal and followed orders.'

He said that after his first flight, in which he slipped and almost fell through the portal from which he was throwing bodies, he became so distraught that he confessed his actions to a military priest, who absolved him, saying the killings 'had to be done to separate the wheat from the chaff.'

'At first it didn't bother me that I was dumping these bodies into the ocean because as far as I was concerned they were war prisoners,' Mr. Scilingo said in the interview.

'There were men and women, and I had no idea who they were or what they had done. I was following orders. I did not get too close to the prisoners, and they had no idea what was going to happen to them.'

But he said he had a slight change of heart during the first mission, after a noncommissioned officer, who had not been informed of what the mission entailed, began to express reservations about dumping people into the ocean.

'I reached over to try to comfort him, and I slipped and nearly fell through the door,' Mr. Scilingo said. 'That's when it first hit me exactly what we were doing. We were killing human beings. But still we continued.'

He went on: 'When we finished dumping the bodies, we closed the door to the plane, it was quiet, and all that was left was the clothing which was taken back and thrown away. I went home that night and had two glasses of whiskey and went to sleep.'

Asked to describe the second mission, in which he said he dumped 17 people into the ocean, Mr. Scilingo said he could no longer discuss the details because he was about to break down.

'I have spent many nights sleeping in the plazas of Buenos Aires with a bottle of wine, trying to forget,' he said. 'I have ruined my life. I have to have the

radio or television on at all times or something to distract me. Sometimes I am afraid to be alone with my thoughts.'

He said senior military officers had told participants in the flights that the church hierarchy sanctioned the missions as 'a Christian form of death.'

Outrage over Mr. Scilingo's disclosures was so strong here that the Roman Catholic Church, which in the past has been reluctant to talk about the dirty war, publicly denounced the torture and killings of that era.

Speaking on the behalf of Catholic bishops, Bishop Emilio Bianchi di Cárcano said no Christian could condone killings committed by Argentina's former military rulers. He denied that the church had ever been consulted over 'death flights.'

Bishop Bianchi di Cárcano said that the bishops had written to the military asking for information about the fate of political prisoners, but that the generals had never offered a clear reply.

President Carlos Saúl Menem, who granted broad pardons to military officers and others accused of human rights abuses, called Mr. Scilingo a 'criminal' and ordered the navy to strip the officer of his rank as a result of a conviction for fraud in a car-theft case in 1991.

Speaking to reporters, Mr. Menem, a former dissident who was imprisoned for five years by the military, defended his decision to issue the pardons, saying it was necessary for the country to move forward and to stop the military discontent that led to three barracks uprisings in the 1980's and in 1990.

But human rights groups and families of victims criticized Mr. Menem, saying that for political reasons the President was belittling the first detailed confirmation of what had long been charged: that the military had disposed of victims at sea and that the Catholic Church had sanctioned its actions.

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Capt. Héctor Césari, a spokesman for the navy, said no interviews would be given about Mr. Scilingo because he was no longer associated with the military after being stripped of his rank.

'We don't know if he is motivated by vengeance or money,' Captain Césari said. 'But that is not our issue because Scilingo's statements are his own responsibility; they are his problem.'

Mr. Scilingo said that he began writing letters to navy officials, urging the military to disclose what happened during the dictatorship, but that their only response was to offer him money to keep silent and then to threaten to take away his military medical and social insurance.

Many Argentines, especially those whose relatives or friends were not killed or tortured during the dictatorship, say it is futile to continue to nurture old hostilities from the dirty war. Indeed, some, like Carmen Herrera, who watched the Mothers of the Plaza de Mayo protest on Thursday, argue that the military crackdown was justified to defeat a leftist guerrilla insurgency.

But others, like Horacio Verbitsky, a reporter for Página 12 to whom Mr. Scilingo gave his account, say that for the country to move ahead, all sectors

of Argentine society, including the military and the church, must acknowledge their role in the crackdown.

'For a wound to heal and scar properly, you first have to clean it thoroughly and not leave infection inside,' Mr. Verbitsky said.

Many in U.S. Back Singapore's Plan to Flog Youth

New York Times, April 5, 1994, p. A6

Spare the rod and spoil the child may no longer be an axiom of American parenting, but many Americans are surprisingly unsympathetic to the plight of an Ohio youth who was convicted of vandalizing cars in Singapore and now faces a flogging in that country.

Michael P. Fay, 18 years old, was sentenced to four months in prison, a $2,215 fine and six lashes on his bare buttocks with a rattan cane by a martial arts expert after pleading guilty last October to vandalizing cars with spray paint and eggs and tearing down traffic signs in Singapore, where he lived with his mother and stepfather.

Mr. Fay and his parents say that he is innocent and that he agreed to a plea bargain because they thought he would be sentenced for a lesser crime than vandalism, which carries a mandatory sentence of flogging.

President Clinton and Representative Tony P. Hall, an Ohio Democrat, have appealed to the Singapore Government, arguing that the flogging, which may cause permanent scars, is excessive punishment for the youth.

A judge turned down Mr. Fay's appeal of his sentence on Thursday. His lawyer, Theodore Simon, and Mr. Fay's family are expected to make a final appeal for clemency to the Singapore President, Ong Teng Cheong. Amnesty International sees the Fay case as one more reason to refocus international attention on the inhumaneness of flogging.

Chin Hock Seng, first secretary at the Singapore Embassy, told The Associated Press that more than 100 letters and 200 phone calls had been received from Americans in recent weeks. 'The vast majority express very strong support for Singapore,' Mr. Chin said.

A spokesman for The Dayton Daily News, Mr. Fay's hometown newspaper, also said its mail was running against the youth.

And on the streets of Washington, there was little compassion for the young man. Women were slightly more sympathetic, worrying about the physical damage done by caning.

'If you've ever had your antenna ripped off your car, you can sympathize with the Government of Singapore,' said Ben Johnson, 26, a media relations director of Ein Communications Inc., a public relations firm. 'Lash him. Vandalism is a cowardly and insubordinate act.'

Margaret Henderson, a retired employee at the Department of Defense, who was window shopping on Connecticut Avenue, thought Mr. Fay deserved punishment, 'but certainly not as severe as that.'

The enthusiasm for such measures reflects American frustration with crime and young miscreants, some experts say.

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It is Singapore's flogging law that disturbs Amnesty International. Estrellita Jones, coordinator of Asian affairs for the United States section of Amnesty International, said that the law, which her organization has protested for years, violates international laws and is 'unusually cruel and degrading' punishment.

'This is not the paddle or the whip that some of us got in public school,' she said. 'They tie you down like an animal. This is a very traumatic experience both mentally and physically.'

Ms. Jones said for 1,218 floggings in Singapore reported to Amnesty International in 1987 and 1988, Singaporeans accounted for 984 and foreigners for 234.

For Many Brides in India, A Dowry Buys Death

by Eduard Gargan *New York Times*, Dec. 30, 1993, p. A4

A few days ago, the police arrested Nagavani's husband. It came none too soon: she's still alive.

'My husband wanted a house in his name,' she began, whispering. 'He wanted a 30,000-rupee scooter,' worth about $1,000. 'He said if I did not give him this, he would take me to the top of a building and push me down.'

'He beat me,' she continued, a quiet matter-of-factness cushioning her words. 'He hit me on the back. He used to poke me with a needle on my back. He kept saying, I am an engineer and we must have lots of things. Last night they arrested my husband for dowry harassment.'

The experience of Miss Nagavani, who has only one name, is increasingly common. Despite a 32-year-old statute banning dowries—the money and gifts given by a bride's parents to the groom—the practice has now spread both among untouchables, who never traditionally gave dowries, and, with a vengeance, among the growing middle classes.

And with the spread of the practice has come a rapid rise in the killing of women for not providing dowries that are opulent enough, that are in the eyes of the husband and his family too meager for their status and needs.

Here in India's Silicon Valley, a growing city of high tech, computer enthusiasts and a newly entrenched middle class, dowry abuse has reached epidemic proportions. In the first two months of 1993, the months for which records are available, 161 cases of dowry abuse, including death, were turned over to the city's detectives.

In 1992, 4,785 women were killed by their husbands for not having provided adequate dowries, according to Government statistics. By the last day of 1992, 146 men were awaiting trial in the Delhi High Court for killing or abusing their wives in dowry-related cases, according to the Indian Department of Justice.

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Mohandas K. Gandhi condemned the giving and receiving of dowries as he led India toward independence. For Gandhi, the quest for political freedom was bound up in what he saw as the need to transform the Indian soul. Part of that struggle in Gandhi's eyes included abolishing the dowry.

'A strong public opinion should be created in condemnation of the degrading practice of dowry, and young men who soil their fingers with such ill-gotten gold should be excommunicated from society,' Gandhi wrote. 'The system has to go. Marriage must cease to be a matter of arrangement made by parents for money.'

After Gandhi's admonitions, the new Indian Government passed the Dowry Prohibition Act, which was intended to do just that but which has been ignored by rich and poor alike, by Government ministers and street sweepers, lawyers and computer engineers. In the marriage pages of The Times of India on Sundays, pages of classified advertisements by families looking for husbands for their daughters or wives for their sons, the code words that indicate the need for a dowry are 'decent marriage.' And most of the advertisements are for a decent marriage.

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'Men feel they have a right to strike women,' Ms. Fernandes said. 'The law hardly works, the police hardly work. In India, I think the kind of inequalities in the relationship between men and women are more visible and more deep than elsewhere. Almost every day a woman is killed.'

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Kenya Crackdown Is Aimed at Opposition and the Press

by Donatella Lorch, *New York Times*, April 3, 1995, p. A3

Recent actions by Kenya's Government have been perceived by Western diplomats as the most serious crackdown on the opposition and the press since multiparty elections in 1992.

In the last month, President Daniel arap Moi has ordered the arrest of anyone who insulted him and he declared that a guerrilla movement was poised to invade from neighboring Uganda. At the same time, the governing party's newspaper has published reports about the February 18th Movement, described as a Communist rebel group led by an exile named John Odongo.

The Government has also accused the opposition of colluding with the rebels.

'Nobody takes it seriously,' one diplomat said about the threat of a guerrilla invasion. 'What does this mean for Kenya? The image is of a Kenya increasingly perceived as politically oppressive. This could be a step back for democracy.'

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Four opposition members of Parliament, among others, have been arrested on charges of maligning the Office of the President, one of them accused of calling the Government satanic.

Other apparent opposition targets have included a legal aid center that was firebombed and a magazine whose office was torched after it published a report implicating a presidential adviser in a murder. The Government has denied involvement in both attacks.

Reasons for the crackdown vary, but it is widely seen as a tactic to divert attention from longstanding problems like unemployment, poverty and corruption. It has also come at a time of tensions in the President's governing party, the Kenya African National Union, with hardliners and moderates at odds over a range of issues like economic policy and political reform.

The Government has also accused Time, Newsweek and The Washington Post of 'outrageous lies and deliberate distortion of events in this country,' after they published reports about the crackdown.

'Any attempts to derail law and order by anyone including the media will not be condoned as the security of this nation is not negotiable,' said the Minister of Information, Johnstone Makau, who demanded an apology and raised the possibility of deporting the publications' correspondents.

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Gap in Wealth in U.S. Called Widest in West

by Keith Bradsher, *New York Times*, April 17, 1995, p. A1

New studies on the growing concentration of American wealth and income challenge a cherished part of the country's self-image: They show that rather than being an egalitarian society, the United States has become the most economically stratified of industrial nations.

Even class societies like Britain, which inherited large differences in income and wealth over centuries going back to their feudal pasts, now have greater economic equality than the United States, according to the latest economic and statistical research, much of which is to be published soon.

Economic inequality has been on the rise in the United States since the 1970's. Since 1992, when Bill Clinton charged that Republican tax cuts in the 1980's had broadened the gap between the rich and the middle class, it has become more sharply focused as a political issue.

Many of the new studies are based on the data available then, but provide new analyses that coincide with a vigorous debate in Congress over provisions in the Republican Contract With America.

Indeed, the drive by Republicans to reduce Federal welfare programs and cut taxes is expected, at least in the short term, to widen disparities between rich and poor.

Federal Reserve figures from 1989, the most recent available, show that the wealthiest 1 percent of American households—with net worth of at least $2.3 million each—owns nearly 40 percent of the nation's wealth. By contrast, the wealthiest 1 percent of the British population owns about 18 percent of the wealth there—down from 59 percent in the early 1920's.

Further down the scale, the top 20 percent of Americans—households worth $180,000 or more—have more than 80 percent of the country's wealth, a figure higher than in other industrial nations.

Income statistics are similarly skewed. At the bottom end of the scale, the lowest-earning 20 percent of Americans earn only 5.7 percent of all the after-tax income paid to individuals in the United States each year.

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Liberal social scientists worry about poor people's shrinking share of the nation's resources, and the consequences in terms of economic performance and social tension.

Margaret Weir, a senior fellow in government studies at the Brookings Institution, called the higher concentration of incomes and wealth 'quite divisive,' especially in a country where the political system requires so much campaign money.

'It tilts the political system toward those who have more resources,' she said, adding that financial extremes also undermined the 'sense of community and commonality of purpose.'

Robert Greenstein, executive director of the Center on Budget and Policy Priorities, a Washington research group, observed, 'When you have a child poverty rate that is four times the average of Western European countries that are our principal industrial competitors, and when those children are a significant part of our future work force, you have to worry about the competitive effects as well as the social-fabric effects.'

Conservatives have tended to pay less attention to rising inequality, and some express skepticism about the statistics or their significance.

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Murray L. Weidenbaum, professor of economics at Washington University in St. Louis and chairman of the Council of Economic Advisers under President Ronald Reagan in 1981–1982, said he thought the measures tended to overstate the gap by overlooking Government programs like food stamps or Medicaid.

Still, he said he was uncomfortable with greater concentration of wealth 'unless there's a rapid turnover' in which 'this year's losers will be next year's winners.'

He noted that many wealthy people have bad years and that a lot of middle-class people, like graduate students, briefly look statistically as if they are starving. The United States does have 'very substantial mobility,' he added.

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Britain Out of Step with E.U. Neighbours

Guardian, Jan. 12, 1994, p. 6

The age of consent for sex between gay men is higher in the UK—21—than anywhere else in the European Union, according to research at the University of Utrecht for the European Commission.

Other member states have ruled that the minimum legal age for homosexual and heterosexual activity should be the same—usually 16, or below.

There are still a few small pockets where homosexuality remains illegal: Bosnia, Serbia, Macedonia, Romania and Bielarus. But the European Court of Human Rights has ruled that such prohibition infringes the right to private life.

Ireland last year abolished gross indecency and buggery and established 17 for homosexual and heterosexual activity. Cyprus has promised to lift its ban. This leaves Britain as the member of the Council of Europe with the most restrictive laws.

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Commission officials said they did not have competence under the EU treaties to combat discrimination. The European Court of Human Rights has outlawed national legislation banning homosexuality but has refused to get involved in ages of consent.

In Denmark same-sex couples can enter 'registered partnerships' which have most of the legal effects of marriage for the purposes of maintenance . . .

Israel Resumes Sealing of Houses as Punishment

by Clyde Haberman, *New York Times*, Dec. 4, 1994, Sec. 1, p. 3

In a courtyard a few hundred yards from El Bireh City Hall, Omar al-Asmar's relatives have lived in tents for more than four years, barely protected from rain and cold now that an early winter slashes at the canvas sheets.

The spare four-room house they rented was sealed shut by the Israeli Army in 1990 after Mr. Asmar was sent to prison for acts that included throwing

gasoline bombs at Israeli soldiers. Shutters were welded and doors boarded up..

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Even after Mr. Asmar, 28, was released from prison in May and started working in a pastry shop around the corner, the army insisted that the house remain shut despite family attempts to reopen it.

'They punished my whole family, not only my son,' said Halima al-Asmar, the mother of three sons and three daughters. 'We have no property here. We had no income after he was arrested. So we had no choice but to move into the tents.'

For years, such cases formed the core of the Israeli policy of demolishing or sealing houses in the West Bank and Gaza Strip to combat Palestinian resistance to Israel's military occupation. Hundreds of homes were shut or destroyed, most in the first four years of the uprising that began in December 1987.

Israel has defended the practice as a deterrent against Arab attacks, calling it legal under emergency regulations imposed in 1945 by the British Mandate of Palestine then in existence.

But Palestinians say, and human-rights groups agree, that the policy violates international law, amounting to collective punishment while doing nothing to stop the uprising. If anything, they say, resentment bred by such practices produces even more rock-throwers and killers.

The debate lost a good deal of steam after Yitzhak Rabin became Prime Minister in July 1992. Under the Rabin Government, house demolitions and sealings slowed to a trickle, and then stopped after September 1993 with the agreement giving Palestinians self-rule in Gaza and the West Bank town of Jericho.

But suddenly the issue is back.

Last week, with the blessing of the Israeli High Court of Justice, the army blew up most of the family home of a West Bank Palestinian who carried out the suicide bombing on a Tel Aviv bus that killed 22 passengers and himself in October.

This week, the authorities sealed shut the Jerusalem houses of three men involved in the kidnapping and killing of an Israeli soldier, Nahshon Waxman, also in October. Two of the three were themselves killed in a failed army rescue mission.

After a recent spurt of suicide attacks by Islamic fundamentalists, Israel decided that it had to revive the policy. Government lawyers argued, and the court agreed, that the only thing that might stop a suicide bomber was the knowledge that his family would suffer for his actions.

'This is one of the few weapons of deterrence that we have to deal with a situation that's becoming intolerable,' an army official said.

As in the past, Israeli and Palestinian human rights groups challenged the deterrence claim, and denounced the practice as punishing the wrong people

because most of the culprits in these cases were dead. Besides, they noted, Israel had not touched the Qiryat Arba apartment of Dr. Baruch Goldstein, the Israeli settler who machine-gunned 29 Palestinians to death in Hebron in February and was himself killed.

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'What's unfair is that the doctor who killed people, this Jewish criminal, did not also have his house sealed,' said Taysir al-Natshe, whose son, Hassan, was one of the slain Waxman kidnappers. Mr. Natshe, who owns a clothing store in Jerusalem's Old City, watched as windows and doors were welded shut at his home this week.

'This is my house that they've sealed,' he said. 'What's my crime? I did nothing wrong.'

I Have No Words

Ottawa Citizen, Feb. 4, 1993, p. B1

They sat in a row, eyes down, four survivors of Serb-run concentration camps waiting to be questioned about the nightmare they endured.

Of the 24 Bosnian Muslims who arrived in Ottawa last week, the three men and one woman were the only ones who felt up to talking about their eight-month ordeal.

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Faudin revealed a hell on earth. Like the other prisoners, he spent his days with his head down, hands behind his back. A sideways glance was enough to bring a beating. So was not eating a meal in the allotted 45 seconds. He was forced to drink five litres of motor oil, destroying his intestines. He lost 85 pounds.

The prisoners were made to watch all manner of cruelty: fathers forced to have oral sex with their sons, women raped in front of husbands and sons, people quartered after their limbs were tied to cars that drove off in different directions.

Many had their fourth and fifth fingers cut off at the knuckles, leaving the other fingers fixed in the two-fingered salute to Serbian nationalism.

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'One man had to bite off his brother's testicles and then beat him up,' recalled Faudin, head down, arms crossed. 'In Manjaca camp, 100 people died daily. Those shot with bullets were the lucky ones.'

'I have no words to describe the methods the Serbian villains used to humiliate us,' said Avdo Nalic, formerly of Sanski Most. 'All the scenes of horror of the Second World War were used on us. They are destroying the Muslim people.'

The eight refugee families in Ottawa are among 5,000 prisoners released from Serb camps since the United Nations High Commissioner for Refugees and the International Red Cross appealed to the Bosnian Serb forces in November. They were let go on the condition they not return to Bosnia. Canada has accepted 500 of them.

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The refugees have mixed feeling about being in Canada. They are grateful for the haven, but fear the international community is unintentionally helping achieve the Serbian goal of ethnic cleansing by agreeing to the no-return condition.

Mobutu Says Amnesty Aims to Destabilize Zaire

Reuter Library Report, Sept. 17, 1993

Zaire's President Mobutu Sese Seko has accused Amnesty International of trying to destabilise his country with a report accusing security forces of appalling human rights abuses.

A statement from the presidency read on state-run television on Thursday night also said an Amnesty International report accusing Zaire of killing hundreds and even thousands of civilians could wreck talks between the government and the opposition.

'Was it the best moment for Amnesty International to pour oil onto the flames by publishing a report which makes allegations which are clearly tendentious, and which aim only at sabotaging the ongoing political consultations and at influencing certain international circles with the aim of destabilising the Republic of Zaire?' the statement said.

'The Presidency of the Republic would like to remind those who dream of a "Somalicisation" of Zaire that they would do better to look elsewhere,' said the statement, monitored by the British Broadcasting Corporation.

'Indeed, the important thing for now is to do everything to ensure the success of the current negotiations in order to secure the foundations of the irreversible option of pluralist democracy, of the respect of human rights, of equality and transparency in the management of public affairs.'

The London-based human rights group said government security forces had killed thousands of civilians and members of the political opposition since 1990 and urged the international community to intervene.

'Zaire is sliding inexorably towards a total breakdown of law and order and the government is using the country's worsening political and economic situation as an excuse for appalling human rights violations,' the report released on Thursday said.

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U.S. State Department, Country Reports on Human Rights Practices for 1994

1995, p. 934

Russia

The Russian Constitution establishes democratic governance through three branches of power with checks and balances: the Presidency and the Government, headed by the Prime Minister, a bicameral legislature, or Federal Assembly, consisting of the State Duma and Federation Council; and the courts. The Constitution also lays a comprehensive groundwork for observance and enforcement of human rights set forth in the Universal Declaration of Human Rights.

The constitutional referendum of December 1993, which was concurrent with parliamentary elections, strengthened President Boris Yeltsin's position vis-a-vis the legislature. He continued to proclaim his commitment to political reform and the transition to a modern market economy. Nevertheless, the process of institutionalizing democracy and a modern market economy lagged due, in part, to the slow enactment of laws and development of regulatory institutions, widespread unfamiliarity with democratic and market principles, and a reaction against 'democrats' and free market advocates because of social dislocation.

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The overall human rights record in Russia in 1994 remained uneven. The concept of the rule of law has yet to be institutionalized and implemented. In his desire to combat rapidly increasing crime, President Yeltsin signed two decrees in June which contradict constitutional rights to protection against arbitrary arrest and illegal search, seizure, and detention. The Constitutional Court, the only body having the authority to settle constitutional disputes, remained inoperative because of governmental inability to fill vacancies. Courts of general jurisdiction, with several notable exceptions, remained timid in asserting their authority. Moreover, judges generally feel uncomfortable with the idea of having the duty and responsibility to declare actions taken by the executive branch and regional authorities as unconstitutional.

In August Sergey Kovalev, the Human Rights Commissioner, (a position provided for in the Constitution), published a highly critical report on the human rights situation in 1993, noting that law enforcement officials reportedly beat and physically abused detainees; military officers failed to discipline those who engaged in 'dedovshchina,' the violent hazing of conscripts, which led to numerous deaths and injuries; and prison officials appeared unable to correct life-threatening situations in pretrial detention centers.

Claiming the need to prevent Chechnya's secession from Russia, Russian troops crossed into the Russian Federation's Republic of Chechnya on December 11. Beginning in late December following major Chechen

resistance, there was massive aerial and artillery bombardment of Chechnya's capital, Groznyy, resulting in a heavy loss of civilian life and hundreds of thousands of internally displaced persons. These actions were in conflict with a number of Russia's international obligations, including those concerning the protection of civilian noncombatants and notification of troop movements. In late December, Human Rights Commissioner Kovalev accused Russian troops of violating human rights on a 'massive scale' in Chechnya. The international community and human rights nongovernmental organizations (NGO's) called upon both parties to respect international humanitarian law and the human rights of noncombatant civilians.

Although freedom of speech and press is widely respected, there were physical attacks on journalists by unknown persons and at least one killing. Journalists reporting on the conflict in Chechnya were harassed and threatened. Other human rights abuses include official and societal discrimination against people from the Caucasus, some continuing societal discrimination against Jews, violence against women, lack of attention to the welfare of children and the handicapped, and bureaucratic obstacles to the development of independent labor unions.

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Soldiers Kill Thousands in Rwanda Camp

Boston Globe, April 23, 1995, p. 2

Government soldiers yesterday killed thousands of people who were trying to flee Rwanda's largest refugee camp, relief workers and military officials said.

UN troops found more than 4,000 people, most of them members of Rwanda's Hutu majority, dead and 650 wounded in Kibeho camp in southwest Rwanda in a search of only half the site, Reuters reported early this morning.

Maj. Mark Mackay, spokesman for the Integrated Operations Center, a UN-affiliated organization, said reports from the Kibeho camp indicated that the victims had been killed by soldiers or died in stampedes. 'There were bodies all over the place,' Mackay said.

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The killings occurred on the fifth day of a campaign by Rwanda's Tutsi-led army to close the camp at Kibeho, 80 miles southwest of Kigali, and force its residents to return to their homes. Kibeho is one of nine camps inside Rwanda that hold a total of 250,000 people.

'What happened today was pure stupidity on the part of the soldiers,' a relief worker said.

The afternoon's shootings began after a group of camp residents tried to break away from the cordon of soldiers around the area, prompting hundreds

of others to try to flee. 'The floodgates opened,' said Shaharyar Khan, special representative of the UN secretary general in Kigali.

Witnesses said shooting lasted two hours, as soldiers reportedly sprayed crowds with automatic-weapons fire and launched at least one rocket-propelled grenade into the camp.

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Most of the camps' residents are Hutus who fled their homes in fear of revenge killings by the Tutsi minority, an estimated 500,000 of whom were massacred by Hutu extremists last spring.

The Tutsi-led Rwandan Patriotic Front ousted the hard-line Hutu regime that fostered the massacres, and Rwanda's new government has been attempting to close the camps for months, saying the areas have become hiding places for Hutus who took part in last year's genocide. Soldiers encircled Kibeho to screen its inhabitants before sending them out of the camp.

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PART B

HISTORICAL DEVELOPMENT AND NORMATIVE FRAMEWORK OF INTERNATIONAL HUMAN RIGHTS

It would be possible to study human rights issues not at the international level but in the detailed contexts of different states' histories, socio-economic and political structures, legal systems, religions, cultures and so on. With respect to its legal dimension, a human rights course that was so organized would stress foreign and comparative law, in the sense of a contextual and comparative analysis of law and practice in selected foreign states. It could devote its full attention to the analysis of states like Zaire, China, Saudi Arabia, Italy, the United States, or Guatemala. It could stress different internal traditions and distinctive internal problems, the trend in many states toward (at least as a formal matter) liberal constitutionalism, and so on. International law could play a peripheral role, relevant only when it exerted some clear influence on the national scene.

Contrast many other subjects where international law necessarily occupies a central position. Imagine, for example, that our interest were not human rights but the humanitarian law of war (rules for the conduct of war), or the regulation of fisheries, or immunities of diplomats from arrest, or the regulation of trade barriers like tariffs. Each of those fields is inherently, intrinsically, *international* in character. Each involves relations *between* states or between citizens of one state and other states. We could not meaningfully examine any one of them without examining international custom and treaties, international institutions and processes.

Violations of human rights are different. They are rooted within states, and need not on their surface involve any international consequences whatsoever. Police torture defendants to extract confessions; the attorney general shuts the opposition press as elections approach; prisoners are raped; courts decide cases according to executive command; women are barred from education. Each of these events could profitably be studied entirely within a state's (or region's, culture's) internal framework, just as law students in many countries traditionally devote most of their energy to studying their internal legal–political system, including that system's provision for civil liberties and human rights. All these considerations point toward the foreign–comparative law approach to the study of human rights.

Nonetheless, it would be profoundly misleading to develop a framework for the study of human rights without including as a major ingredient the international legal and political aspects of the field: laws, processes, and institutions. We have stressed that human rights is in vital respects a distinctive field of international law. But it is characteristically imagined in the modern world as an international movement whose study necessarily involves international law and institutions, as well as a movement within and among states. Internal developments in many states have been too influenced by that law and those institutions, as well as by pressures from other states trying to enforce international law, for students to ignore the international dimensions. These inter-

nal and international aspects of human rights are now rarely 'split,' but rather complexly intertwined and reciprocally influential with respect to the causes and effects of violations of human rights, the reactions and sanctions of intergovernmental bodies or other states, the transformations of internal orders, and so on.

From another perspective as well it would be impossible to grasp the character of the human rights movement without a basic knowledge about international law and its contributions to the human rights movement. The aspirations of that movement to universal validity are necessarily rooted in that body of law. Many of the distinctive organizations intended to help to realize those aspirations are creations of international law.

For such reasons, this coursebook does not concentrate on the internal law and politics of one or a few states. It does however draw on internal matters in a large number of states from all regions for brief illustrative examples of one or another problem, or for lengthier case studies. Throughout it emphasizes the international law aspect of the human rights movement, the distinctive development of the last half century, particularly the growth of customary law and treaties on human rights and the creation of organizations, both intergovernmental and non-governmental, involved with human rights issues.

2

International Law Concepts and Doctrinal Background Relevant to the Human Rights Movement

This chapter gives the student some familiarity with the traditional conceptions and processes of international law. That familiarity must include an understanding of the modes of argument or argumentative strategies about international law, of custom or treaties or general principles, of ways of dealing with the tension between national sovereignty and international regulation, and so on. International human rights is only one branch of international law. Nonetheless, the arguments of advocates, diplomats, and legal or other scholars and activists about that body of law necessarily have the same general structure and invoke the same phenomena as arguments relevant to other fields of international law.

Section A provides readings about international law: processes, sources, some basic political and jurisprudential assumptions. It is brief and selective in providing background for later portions of the book that develop its themes. These readings serve as review for students with an academic background in international law, and as introduction to fundamental conceptions for those first entering the field. Section B illustrates and probes the processes and concepts introduced in Section A through examination of decisions of tribunals during the first half of the twentieth century that involve international law doctrines forming an important part of the background to the contemporary human rights movement.

A. BASIC CONCEPTIONS AND PROCESSES

How, by what means or methods, have the international aspects of the human rights movement developed? By what processes are international legal rules made or elaborated or applied, and international institutions created and administered? Section A introduces these issues through brief and general observations about international law that should be sufficient for grasping the international law aspects of the human rights materials that follow. The read-

ings are compact and abstract, and shy on illustrations. The case studies in Section B offer those illustrations and will strengthen your grasp of the present materials.

Article 38 of the Statute of the International Court of Justice, the judicial organ of the United Nations that is provided for in the UN Charter, now constitutes a traditional point of departure for examining such issues. The question to which that article responds is put from a court's perspective: to what 'sources'—or, some would say, 'evidence'—of law does an international court look, to what 'processes' of lawmaking should it be attentive, if its mission is to decide disputes submitted to it—in the words of Article 38—'in accordance with international law'? One might ask why the perspective of a court should be relevant to a field like international human rights where courts have not played a vital role in the development of the universal human rights system. It is relevant for our purposes because an international court's perspective provides a useful point of departure for examining basic characteristics of international law, whatever the institutions or processes through which that law develops.

Article 38 answers the question noted above in a formal and positivist manner. It defines the task of the court in terms of the court's *application* of an identifiable body of international law. Its skeletal list, one that omits important contemporary processes of international lawmaking, expresses a conception of the judicial function that is radically different from that of, say, a legal realist. Article 38(1) provides:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59 [stating that decisions of the Court have no binding force except between the parties to the case], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

COMMENT ON THE ROLE OF CUSTOM

We start the inquiry with custom, which has been referred to as the oldest and original source of international law. Customary law remains indispensable to an adequate understanding of human rights law. It figures in many fora, from the broad debates about human rights within the United Nations to the arguments of counsel before an international or national tribunal.

By customary law, we refer to conduct, or the conscious abstention from certain conduct, of states that becomes in some measure a part of international legal order. By virtue of a developing custom, particular conduct may be considered to be permitted or obligatory in legal terms, or abstention from particular conduct may come to be considered a legal duty.

Consider the 1950 statement of a noted scholar describing the character of the state practice that can build a customary rule of international law: (1) 'concordant practice' by a number of states relating to a particular situation; (2) continuation of that practice 'over a considerable period of time'; (3) a conception that the practice is required by or consistent with international law; and (4) general acquiescence in that practice by other states.[1] Other scholars have contested some of these observations, and today many authorities would contend that custom has long been a less rigid, more flexible and dynamic force in lawmaking.

Clause (b) of Article 38(1) states that the I.C.J. shall apply 'international custom, as evidence of a general practice accepted as law.' Contemporary formulations of custom have overcome some of the difficulties in understanding this terse and confusing phrase, but three of the terms there used remain contested and vexing: 'general,' 'practice,' and 'accepted as law.'

Section 102 of the *Restatement (Third), Foreign Relations Law of the United States*, presents a contemporary and clearer formulation of customary law that draws broadly on scholarly, judicial, and diplomatic sources. Many authorities on international law, surely in the developed world and to varying degrees in the states of the Third World, could accept that formulation as an accurate description and guide. After including custom as one of the sources of international law, it provides in clause (2): 'Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.'

Each of these terms—'general,' 'consistent,' 'practice,' 'followed,' and 'sense of legal obligation'—is defined in a particular way. For example, the *Restatement*'s comments on Section 102 say: state practice includes diplomatic acts and instructions, public measures, and official statements, whether unilateral or in combination with other states in international organizations; inaction may constitute state practice as when a state acquiesces in another state's conduct that affects its legal rights; the state practice necessary may be of 'comparatively short duration.' a practice can be general even if not universally followed; there is no 'precise formula to indicate how widespread a practice must be, but it should reflect wide acceptance among the states particularly involved in the relevant activity.'

Other *Restatement* comments address the question of the sense of legal obligation, or *opinio juris* in the conventional Latin phrase. For example, to form a customary rule, 'it must appear that the states follow the practice from a sense of legal obligation (*opinio juris sive necessitatis*); hence a practice gen-

[1] M. Hudson, Working Paper on Article 24 of the Statute of the International Law Commission, UN Doc. A/CN.4/16, March 3, 1950, p. 5.

erally followed 'but which states feel legally free to disregard' cannot form such a rule; *opinio juris* need not be verbal or in some other way explicit, but may be inferred from acts or omissions. The comments also note that a state that is created after a practice has ripened into a rule of international law 'is bound by that rule.'

The *Restatement* (in the Reporter's Notes to Section 102) notes some of the perplexities in the concept of customary law:

> Each element in attempted definitions has raised difficulties. There have been philosophical debates about the very basis of the definition: how can practice build law? Most troublesome conceptually has been the circularity in the suggestion that law is built by practice based on a sense of legal obligation: how, it is asked, can there be a sense of legal obligation before the law from which the legal obligation derives has matured? Such conceptual difficulties, however, have not prevented acceptance of customary law essentially as here defined.

The following discussion, and later readings in Chapter 2, address a few dilemmas of customary law that are particularly relevant to understanding its role in human rights law.

Consider the need to evaluate state practice with respect to (1) *opinio juris* and (2) the reaction of other states to a given state's conduct. Suppose that a state's 'abstention' is primarily at issue—for example, state X neither arrests nor asserts judicial jurisdiction over a foreign ambassador, which is one aspect of the law of diplomatic immunities that developed as customary law long before it was subjected to treaty regulation. During the period when this customary law was being developed, it would have been relevant to inquire why states generally did not arrest or prosecute foreign ambassadors. For example, assume that X asserted that it was not legally barred from such conduct but merely exercised its discretion, as a matter of expediency, not to arrest or prosecute. Abstention by X coupled with such an explanation would not as readily have contributed to the formation of a customary legal rule. On the other hand, assume that a decision by the executive or courts of X not to arrest or assert judicial jurisdiction over the ambassador rested explicitly on the belief that international law required such abstention. Such practice of X would then constitute classic evidence of *opinio juris*.

Consider a polar illustration, where X acts in a way that immediately and adversely affects the interests of other states rather than abstains from conduct. Suppose that X imprisons without trial the ambassador from state Y, or imprisons many local residents who are citizens of Y. Surely it has not acted out of a sense of an international law *duty*. If it considered international law to be relevant at all, it may have concluded that its conduct was not prohibited by customary law. Or it may have decided that even if imprisonment was prohibited, it would nonetheless violate international law.

In this type of situation, the conception of *opinio juris* is less relevant, indeed irrelevant to the state's conduct. What does appear central to a determination

of the legality of X's conduct is the *reaction* of other states—in this instance, particularly Y. That reaction of Y might be one of tacit acquiescence, thus tending to support the legality of X's conduct, or, more likely on the facts here given, Y might make a diplomatic protest (perhaps accompanied by economic pressures) that would criticize X's action as a violation of international law. Action and reaction, acts by a state perhaps accompanied by claims of the act's legality, followed by reaction-responses by other states affected by those acts, here constitute the critical components of the growth of a customary rule.

These simplified illustrations suggest some of the typical dynamics of traditional customary international law. What is common to both illustrations—abstention from arrest, and arrest—is that the interests of at least two states were directly involved. Of course states other than Y may well have taken an interest in X's action; after all, those states also have ambassadors and citizens in foreign countries. All of these possibilities are relevant to understanding *The Paquete Habana*, p. 60, *infra*.

COMMENT ON TREATIES

In Article 38(1) of the Statute of the International Court of Justice, the Court is instructed to apply 'a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states.' Treaties, that is, appear first on the list. They have become the primary expression of international law and, particularly when multilateral, the most effective if not the only path toward international regulation of many contemporary problems. Treaties, for example, have been the principal means for development of the human rights movement. Only treaties, not custom or general principles, can create international institutions in which state parties participate and to which they may owe duties.

The terminology for this voluminous and diverse body of international law varies. International agreements are referred to as pacts, protocols (generally supplemental to another agreement), covenants, conventions, charters, exchanges of notes and concordats (agreements between a nation and the Holy See), as well as treaties—terms that are more or less interchangeable in legal significance. Within the internal law of some countries such as the United States, the term 'treaty' (as contrasted, say, with international executive agreement) has a particular constitutional significance. See p. 742, *infra*.

Consider the different purposes which treaties serve. Some reaching critical national interests have a basic political character: alliances, peace settlements, atom bomb test ban. Others, while less politically charged, also involve relationships between governments or government agencies and affect private parties only indirectly: agreements on foreign aid, cooperation in the provision of governmental services such as weather forecasting and the mails. But treaties often have a direct and specific impact upon private parties. Tariff accords, income tax conventions, and treaties of friendship, commerce and navigation

have for many decades determined some of the conditions under which the nationals or residents of one signatory can export to, or engage in business activities within, the other signatory's territory. Most significant for this book's purposes, human rights conventions have sought to extend protection to all persons against governmental abuse.

Domestic analogies to the treaty help to portray its distinctive character. Some treaties settling particular disputes resemble a private accord and satisfaction: an agreement over boundaries, an agreement to pay a stated sum as compensation for injury to the receiving nation or its nationals. Others are closer in character to private contracts of continuing significance or to domestic legislation, for they regulate recurrent problems by defining rights and obligations of the parties and their nationals: agreements over rules of navigation, income taxation, or the enforcement of foreign-country judgments. Indeed, the term 'international legislation' has gained some currency, particularly with respect to multilateral treaties such as those on human rights that impose rules on states intended to regulate their conduct.

Nonetheless, domestic legislation differs in several critical respects from the characteristic treaty. A statute is generally enacted by the majority of a legislature and binds all members of the relevant society. Even changes in a constitution, which usually require approval by the legislature and other institutions or groups, can be accomplished over substantial dissent. The ordinary treaty, on the other hand, is a consensual arrangement. With few exceptions, such as Article 2(6) of the UN Charter, it purports to bind or benefit only parties. Alteration of its terms by one party generally requires the consent of all.

The other principal domestic analogy is the contract. Like the treaty, a contract can be said to make or create law between the parties –for within the facilitative framework of governing law but subject to that law's mandatory norms and constraints, courts recognize and enforce contract-created duties. The treaty shares a contract's consensual basis, but treaty law lacks the breadth and relative inclusiveness of a national body of contract law. It has preserved a certain Roman law flavor ('*pacta sunt servanda*', '*rebus sic stantibus*') acquired during the long period from the Renaissance to the nineteenth century, when continental European scholars dominated the field. But treaty law often reflects the diversity of approaches to contract law that lawyers in different countries bring to the topic, a diversity that is particularly striking on issues of treaty interpretation.

Duties Imposed by Treaty Law

Whatever its purpose or character, the international agreement is generally recognized from the perspective of international law as an authoritative starting point for legal reasoning about any dispute to which it is relevant. The maxim *pacta sunt servanda* is at the core of treaty law. It embodies a

widespread recognition that commitments publicly, formally and (more or less) voluntarily made by a nation should be honored. As stated in Article 26 of the Vienna Convention on the Law of Treaties, referred to below: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'

Whatever the jurisprudential or philosophical bases for this norm, one can readily perceive the practical reasons for and the national interests served by adherence to the principle that *pacta sunt servanda*. The treaty represents one of the most effective means for bringing some order to relationships among states or their nationals, and for the systematic development of new principles responsive to the changing needs of the international community. It is the prime legal form through which that community can realize some degree of stability and predictability, and seek to institutionalize ideals like peaceful settlement of disputes and protection of human rights.

Acceptance of the primary role of the treaty does not, however, mean that a problem between two countries is adequately solved from the perspective of legal ordering simply by execution of a treaty with satisfactory provisions. A body of law has necessarily developed to deal with questions analogous to those addressed by domestic contract law—for example, formation of a treaty, its interpretation and performance, remedies for breach, and amendment or termination. But that body of law is often fragmentary and vague, reflecting the scarcity of decisions of international tribunals and the political tensions of some aspects of treaty law.

There have been recurrent efforts to remedy this situation through more or less creative codification of the law of treaties. The contemporary authoritative text grows out of a United Nations Conference on the Law of Treaties that adopted in 1969 the Vienna Convention on the Law of Treaties, UN Doc, A/Conf., 39/27, 63 A.J.I.L. 875 (1969). That Convention became effective in 1980 and (as of 1993) had been ratified by about 90 states from all regions of the world. For reasons stemming largely from tensions between the Executive and the Congress over authority over different types of international agreements, the United States has not ratified the Vienna Convention. Nonetheless, in its provisions on international agreements the *Restatement (Third), Foreign Relations Law of the United States* (1987) 'accepts the Vienna Convention as, in general, constituting a codification of the customary international law governing international agreements, and therefore as foreign relations law of the United States. . . .' Vol. I, p. 145.

Treaty Formation

A treaty is formed by the express consent of its parties. Although there are no precise requirements for execution or form, certain procedures have become standard. By choice of the parties, or in order to comply with the internal rules of a signatory country that are considered at pp. 726–50 *infra*, it may be nec-

essary to postpone the effectiveness of the agreement until a national legislative body has approved it and national executive authorities have ratified it. Instruments of ratification for bilateral agreements are then exchanged. In the case of multilateral treaties, such instruments are deposited with the national government or international organization that has been designated as the custodian of the authentic text and of all other instruments relating to the treaty, including subsequent adhesions by nations that were not among the original signatories. Thereafter a treaty will generally be proclaimed or promulgated by the executive in each country.

Consent

Given the established principle that treaties are consensual, what rules prevail as to the character of that consent? Do domestic-law contract principles about the effect of duress carry over to the international field? A leader came to power in Germany with a platform stressing the proposition that the Versailles Treaty was dictated by force and therefore was not binding. The newly emergent countries have made claims that treaties under which the colonial powers withdrew were imposed upon them by the threat of force or as a condition to withdrawal, and therefore are not valid. Sometimes analogous claims are made by states of the Third World when they are accused of violating human rights conventions to which they are parties.

In a domestic legal system, a party cannot enforce a contract which was signed by a defendant at gunpoint. One could argue that victorious nations cannot assert rights under a peace treaty obtained by a whole army. It is not surprising that the large powers are reluctant to recognize that such forms of duress can invalidate a treaty. If duress were a defense, it would be critical to define its contours, for many treaties result from various forms of military, political or economic pressure. The paucity of and doubts about international institutions with authority to develop answers to such questions underscore the reluctance to open treaties to challenge on these grounds.

The different approaches of the victorious Western powers towards the defeated nations in World War I and World War II reflect the growing awareness that treaties, whatever their 'legal' character, will survive only insofar as they bring satisfactory solutions to developing political, economic, and social problems. Even from a legal perspective, the advent of the UN Charter after World War II, with its explicit rejection of war as a permitted instrument of national policy, may herald some evolution of legal doctrine in this field. Article 52 of the Vienna Convention states: 'A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.' Attempts at Vienna to broaden the scope of coercion to include economic duress failed, although they resulted in a declaration condemning the use of such practices.

Reservations

Problems of consent that have no precise parallel in national contract law arise in connection with reservations to treaties, i.e., unilateral statements made by a state accepting a treaty 'whereby it purports to exclude, or vary the legal effect of certain provisions of the treaty in their application to a state.' (Article 2(1)(d) of the Vienna Convention). With bilateral treaties, no conceptual difficulties arise: ratification with reservations amounts to a counteroffer; the other state may explicitly accept (or reject) that ratification or may be held to have tacitly accepted it by proceeding with its ratification process or with compliance with the treaty. With multilateral treaties the problems may be quite complex. The traditional rule said that acceptance by all parties was required. The expanding number of states has required more flexibility.[2]

A treaty's text may explicitly permit some reservations, thus deliberately sacrificing uniformity of obligation for the sake of more widespread adherence. Such a listing of permissible reservations may by implication prohibit others or there may be explicit limitations. When neither such circumstance applies, Article 19 of the Vienna Convention provides that a state can formulate a reservation unless it is 'incompatible with the object and purpose of the treaty.' A state faced with unpalatable reservations by another state must, under the Vienna Convention, make its objection formally known if it is to prevent the reservation from becoming effective as to it. A series of reservations and objections can produce a complex set of relations among different states.

Given the increased number of reservations, some of great significance, that many states are attaching to their ratifications of basic human rights treaties, questions about those reservations' validity under general treaty law or under the terms of a specific treaty have become matters of high concern within the human rights movement. See pp. 756–58 and 767–76, *infra*.

Violations of and Changes in Treaties

Violation of a treaty may lead to diplomatic protests and a claim before an international tribunal. But primarily because of the limited and qualified consents of nations to the jurisdiction of international tribunals, the offended party will usually resort to other measures. In a national system of contract law, well developed rules govern such measures. They may distinguish between a minor breach not authorizing the injured party to terminate its own performance, and a material breach providing justification for such a move. Article 60 of the Vienna Convention provides that a material breach (as defined) of

[2] This is particularly true with such agreements as human rights conventions where widespread adherence is thought to be more important in advancing the rights of individuals than is exact correspondence among the commitments of the consenting states. See Advisory Opinion on Reservations to the Genocide Convention, [1951] I.C.J.Rep. 15, p. 757, *infra*.

a bilateral treaty entitles the other party to terminate the treaty or suspend its performance thereunder. These rules necessarily grow more complex for multilateral treaties. For reasons that Chapters 2 and 3 describe, they may have little relevance for the ways that states respond to violations of human rights treaty norms by other states.

Amendments raise additional problems. The treaty's contractual aspect suggests that the consent of all parties is necessary. Parties may however agree in advance (see Article 108 of the UN Charter) to be bound with respect to certain matters by the vote of a specified number. Such provisions in a multilateral treaty bring it closer in character to national legislation. They may be limited to changes which do not impose new obligations upon a dissenting party, although a state antagonistic to an amendment could of course withdraw. Absent some such provisions, a treaty may aggravate rather than resolve a fundamental problem of international law, how to achieve in a peaceful manner the changes in existing arrangements that are needed to adapt them to developing political, social or economic conditions.

One of the most contentious issues in treaty law is whether the emergence of conditions that were unforeseeable or unforeseen at the time of the treaty's conclusion terminates or modifies a party's obligation to perform. This problem borders the subject of treaty interpretation, considered below, since it is often described as a question whether an implied condition or an escape clause, called the *clausula rebus sic stantibus*, should be read into a treaty. Mature municipal legal systems have developed rules for handling situations wherein the performance of one party is rendered impossible or useless by intervening conditions. 'Impossibility,' 'frustration,' 'force majeure' and 'implied conditions' are the concepts used in Anglo-American law.

At the international level, possibilities of changes in conditions that upset assumptions underlying an agreement are enhanced by the long duration of many treaties, the difficulty in amending them and the rapid political, economic and social vicissitudes in the twentieth century. Thus nations, including the United States, have occasionally used *rebus sic stantibus* as the basis for declaring treaties no longer effective. International tribunals have shed no illumination on the field. Article 62 of the Vienna Convention states that a 'fundamental change of circumstances' which was not foreseen by the parties may not be invoked as a ground for terminating a treaty unless '(a) the existence of those circumstances constituted an essential basis of the consent of the parties . . . and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.'

Treaty Interpretation

There is no shortcut to a reliable sense of how a given treaty will be construed. Even immersion in a mass of diplomatic correspondence and cases would not develop such a skill. In view of the variety of treaties and of approaches to

their interpretation, such learning would more likely shed light on the possibilities than provide a certain answer to any given question.

One obstacle to helpful generalization about treaty interpretation is the variety of purposes which treaties serve. Different approaches are advisable for treaties that lay down rules for a long or indefinite period, in contrast with those settling past disputes. The long-term treaty must benefit from a certain flexibility and room for development if it is to survive changes in circumstances and relations between the parties. Changes in conditions like those that make *rebus sic stantibus* an attractive doctrine may lead a court or executive official to interpret a treaty liberally so as to give it a sensible application to new circumstances.

The very style of a treaty will influence the approach of an official charged with interpreting it. Certain categories, such as income tax conventions, lend themselves to a detailed draftsmanship that will often be impractical and undesirable in a constitutional document such as the UN Charter. Conventions such as those relating to human rights necessarily use broad and abstract terms and standards like fairness or *ordre public*.

In a national legal system, lawyers and courts can seek to give specific content to general statutory standards by resort to a common-law background or to a constitutional tradition, indeed by reference to the entire legal culture and society within which these standards become operative. Interpretation can reach towards generally understood practices, customs or purposes—even if the lawyer or judge may encounter choice and contradiction in practices and purposes rather than consensus. It may be far more difficult to interpret treaty standards of comparable generality embracing an international community with diverse national traditions. The problem becomes acute in multilateral treaties among nations from different regions, for one method of securing agreement to a treaty in the first instance may be to conceal rather than resolve differences through resort to general standards. In addition, the difficulty in achieving agreement over amendments to long-continuing multilateral treaties may encourage their draftsmen to express a 'consensus' through norms of a general character, which have a better chance of surviving and carrying their broad purposes through changed conditions among the signatories.[3]

Maxims similar to those found in domestic fields exist for treaties as well. The Vienna Convention contains several. Article 31 provides that a 'treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' Article 32 goes on to add that recourse may be had to supplementary

[3] The distinction suggested between interpretation of certain categories of international agreements and of domestic instruments becomes less tenable when one considers the range of domestic law expressed in open-textured norms of an abstract and general character. This is most evident in constitutional litigation. Decisions of the United States Supreme Court under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution offer apt illustrations. Consider also the critical and often fresh or innovative terms in regulatory legislation such as antitrust or civil rights statutes that raise just as vexing and contested issues of interpretation.

means if interpretation pursuant to Article 31 produces a meaning that is 'ambiguous or obscure' or an outcome 'manifestly absurd or unreasonable.'

One way to build a framework for construing treaties is to consider the continuum which lies between 'strict' interpretation according to the 'plain meaning' of the treaty, and interpretation according to the interpreter's view of the best means of implementing the purposes or realizing the principles expressed by the treaty. Of course both extremes of the spectrum are untenanted. One cannot wholly ignore the treaty's words, nor can one always find an unambiguous and relevant text that resolves the immediate issue.

Part of the difficulty is that treaties may be drafted in several languages. If domestic courts deem it unwise to 'make a fortress out of the dictionary,' it would seem particularly unwise when dictionaries in several languages (and in different legal systems according different meanings to linguistically similar terms) must be resorted to. Sometimes corresponding words in the different versions may shed more light on the intended meaning; at other times, they are plainly inconsistent.

Reliance upon literal construction or 'strict' interpretation, may however be an attractive method or technique to an international tribunal that is sensitive to its weak political foundation. It may be tempted to take refuge in the position that its decision is the ineluctable outcome of the drafter's intention expressed in clear text, and not a choice arrived at on the basis of the tribunal's understanding of policy considerations or relevant principles that may resolve a dispute over interpretation. Reliance on legislative history or *travaux préparatoires* can achieve the same result of placing responsibility on the drafters. The charge of 'judicial legislation' evokes strong reactions in the United States; it inevitably influences judges of international tribunals and heightens the temptation to take refuge in the dictionary.

Relationships between Treaties and Custom

Thus far we have considered custom and treaties in separate compartments, although as later materials show these two 'sources' or law-making processes of international law are complexly interrelated. For example, the question often arises of the extent to which a treaty should be read in the light of pre-existing custom. A treaty norm of great generality may naturally be interpreted against the background of relevant state practice or policies. In such contexts, the question whether the treaty is intended to be 'declaratory' of pre-existing customary law or to change that law may become relevant.

Moreover, treaties may give birth to rules of customary law. Assume a succession of bilateral treaties among many states, each containing a provision giving indigent aliens who are citizens of the other state party the right to counsel at the government's expense in a criminal prosecution. The question may arise whether these bilateral treaties create a custom that would bind a state not party to any of them. Polar arguments will likely be developed by

parties to such a dispute, for example: (1) The non-party state cannot be bound by those treaties since it has not consented. The series of bilateral treaties simply constitutes special exceptions to the traditional customary law that leaves the state's discretion unimpaired on this matter. Indeed, the necessity that many states saw for treaties underscores that no obligation existed under customary law. (2) A solution worked out among many states should be considered relevant or persuasive for the development of a customary law setting standards for all countries. Similarly, the network of treaties may have become dense enough and state practice consistent with the treaty may have become general enough to build a customary norm binding all states. Article 38 of the Vienna Convention signals rather than resolves this issue by stating that nothing in its prior articles providing generally that a treaty does not create obligations for a third state precludes a rule set forth in a treaty from becoming binding on a third State 'as a customary rule of international law, recognized as such.'

In contemporary international law, broadly ratified multilateral treaties are more likely than a series of bilateral treaties to generate the argument that treaty rules have become customary law binding non-parties. Some of the principal human rights treaties, for example, have about 120 state parties from all parts of the world. Of course, one must distinguish between substantive norms in multilateral treaties that are alleged to constitute custom binding non-parties, and institutional arrangements created by the treaties in which parties have agreed, for example, to submit reports or disputes to a treaty organ.

Treaties and International Organizations

In addition to setting forth specific rules which are to govern the conduct of the parties, a treaty may establish machinery for the development of further norms. This applies particularly to multilateral agreements, which may be specialized or general in subject matter, regional or worldwide in scope. At its simplest, such a treaty may provide for periodic meetings at which the signatories' representatives will exchange views. From such discussions the representatives may go on to negotiate new agreements, for the presence of delegates from several countries makes possible the adjustment at one time of interlocking problems that affect each of them. At the next level, the treaty may authorize the parties' delegates to pass advisory or recommendatory resolutions. Such meetings can produce draft conventions which will be submitted to the members for consideration and possible ratification.

In more advanced arrangements the structure created by treaty will include organs or agencies exercising stated powers. Sometimes they are authorized to mediate or put pressure on disputants to arbitrate. Sometimes their authority extends to issuing non-binding declarations on relevant issues and recommendatory resolutions. Such powers can go further and include competence

to issue binding interpretations of the treaty as well as regulations, directives or resolutions binding upon the parties (a limited legislative function) or to apply the treaty to specific situations in an authoritative way (a limited judicial function). Finally, the treaty may give a stated majority of the members the power to amend the agreement with respect to some or all provisions so as to bind all parties.

At some point in this progression we find that the treaty has created an international 'organization'. The growth of a permanent staff maintaining a continuous interim activity and the acquisition of a budget and buildings signal the emergence of a distinct entity with some life of its own. The members may endow this entity with a juridical personality and empower it to make contracts or treaties with private parties or governments and be a party to lawsuits. They may also confer upon the organization and its officials various immunities.

Such international organizations' concerns and functions now include diverse fields like peacekeeping, trade and monetary matters, fisheries and other regimes of the high seas, environmental protection, the regulation of basic commodities, and protection of human rights. In all such cases, the issues to be addressed do not lend themselves to adequate resolution through the development of customary rules, through a network of bilateral treaties, or through multilateral treaties that contain only substantive rules without institutional mechanisms for their promotion, implementation or enforcement. Such organizations may be universal or regional. Issues of human rights, for example, figure pervasively in the work of the United Nations and fully occupy some organs within the UN such as the Commission on Human Rights (Chapters 3, 5). There are also regional human rights organizations in Europe, the Americas and Africa (Chapter 10).

NOTE

The following three readings introduce debates about international law—concerning state sovereignty, the foundations and justifications for international law, and the structure of international legal argument—that figure throughout this coursebook. The three authors-scholars differ widely in their method and approach toward the subject, as evidenced even in the slender excerpts that follow. Those differences inform later materials and debates about human rights law itself.

The excerpts from Brownlie's treatise expand and probe the notions of custom set forth in the earlier Comment. Those from Schachter's book explore fundamental questions about the nature of international law, such as its relation to power, realist and positivist perspectives on international law, the relation of custom or general principles to state sovereignty, and so on. The article by Koskenniemi (a condensed version of his 1989 book, *From Apology to Utopia*) asks different questions in its examination of dilemmas and

contradictions built into the structure of and argument developing international law.

For the novice, the readings will be difficult to grasp fully at this stage. Bear in mind that the balance of Chapter 2 as well as Chapters 3–5 refer on several occasions to the ideas in these readings, drawing on and illustrating them.

IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW

(4th ed. 1990), at 3.

[These excerpts start with the author's comments on Article 38 of the Statute of the International Court of Justice.]

These provisions are expressed in terms of the function of the Court, but they represent the previous practice of arbitral tribunals, and Article 38 is generally regarded as a complete statement of the sources of international law. Yet the article itself does not refer to 'sources' and, if looked at closely, cannot be regarded as a straightforward enumeration of the sources. The first question which arises is whether paragraph 1 creates a hierarchy of sources. They are not stated to represent a hierarchy, but the draftsmen intended to give an order and in one draft the word 'successively' appeared. In practice the Court may be expected to observe the order in which they appear: (a) and (b) are obviously the important sources, and the priority of (a) is explicable by the fact that this refers to a source of mutual obligations of the parties. . . .

. . . Moreover, it is probably unwise to think in terms of hierarchy dictated by the order (a) to (d) in all cases. Source (a) relates to *obligations* in any case; and presumably a treaty contrary to a custom or to a general principle part of the *jus cogens* would be void or voidable. Again, the interpretation of a treaty may involve resort to general principles of law or of international law. A treaty may be displaced or amended by a subsequent custom, where such effects are recognized by the subsequent conduct of the parties.

. . .

[The following observations are taken from a section entitled 'International Custom'.]

Evidence. The material sources of custom are very numerous and include the following: diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, e.g. manuals of military law, executive decisions and practices, orders to naval forces etc., comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of

treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly. Obviously the value of these sources varies and much depends on the circumstances.

The elements of custom

(a) Duration. Provided the consistency and generality of a practice are proved, no particular duration is required: the passage of time will of course be a part of the evidence of generality and consistency. A long (and, much less, an immemorial) practice is not necessary, and rules relating to airspace and the continental shelf have emerged from fairly quick maturing of practice. The International Court does not emphasize the time element as such in its practice.

(b) Uniformity, consistency of the practice. This is very much a matter of appreciation and a tribunal will have considerable freedom of determination in many cases. Complete uniformity is not required, but substantial uniformity is . . .

. . .

(c) Generality of the practice. This is an aspect which complements that of consistency. Certainly universality is not required, but the real problem is to determine the value of abstention from protest by a substantial number of states in face of a practice followed by some others. Silence may denote either tacit agreement or a simple lack of interest in the issue. . . .

(d) Opinio juris et necessitatis. The Statute of the International Court refers to 'a general practice *accepted as law*'. Brierly speaks of recognition by states of a certain practice 'as obligatory', and Hudson requires a 'conception that the practice is required by, or consistent with, prevailing international law'. Some writers do not consider this psychological element to be a requirement for the formation of custom, but it is in fact a necessary ingredient. The sense of legal obligation, as opposed to motives of courtesy, fairness, or morality, is real enough, and the practice of states recognizes a distinction between obligation and usage. The essential problem is surely one of proof, and especially the incidence of the burden of proof.

In terms of the practice of the International Court of Justice—which provides a general guide to the nature of the problem—there are two methods of approach. In many cases the Court is willing to assume the existence of an *opinio juris* on the basis of evidence of a general practice, or a consensus in the literature, or the previous determinations of the Court or other international tribunals. However, in a significant minority of cases the Court has adopted a more rigorous approach and has called for more positive evidence of the recognition of the validity of the rules in question in the practice of states. The choice of approach appears to depend upon the nature of the issues (that is, the state of the law may be a primary point in contention), and the discretion of the Court.

. . .

The persistent objector. The way in which, as a matter of practice, custom resolves itself into a question of special relations is illustrated further by the rule that a state may contract out of a custom in the process of formation. Evidence of objection must be clear and there is probably a presumption of acceptance which is to be rebutted. Whatever the theoretical underpinnings of the principle, it is well recognized by international tribunals, and in the practice of states. Given the majoritarian tendency of international relations the principle is likely to have increased prominence.

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OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE

(1991), at 5.

Ch. 1. The Nature and Reality of International Law

. . .

The Uses of Law and the Role of Power

In discussing the complexity of international law and its relative autonomy, we have more or less assumed its 'reality'. We did so while recognizing that it is a product of political and social forces, that it is dependent on behaviour and that it is an instrument to meet changing ends and values. All these aspects give rise to questions as to the reality of international law. These questions are epitomized in the not uncommon view that we cannot have genuine and effective law in a society of sovereign States dominated by power and self-interest. . . .

One way of approaching the issues is to consider the views of the sceptics of international law—those who doubt, for one reason or another, that international law can contribute significantly to international order. Four kinds of sceptical positions merit our attention. The first emphasizes the dominance of power over law. The second asserts the dependence of international law on the will of national States. A third position points to the deep divisions of belief, aims and culture in international society and questions whether a common authoritative legal system is realizable. The fourth sceptical position lays stress on the fragility of a legal system that lacks centralized institutions to determine authoritatively what the law is and to enforce it. I will discuss the reasoning behind these positions and comment on their validity.

The thesis that law is subordinate to power is commonly referred to as a 'realist' (or 'realpolitik') point of view. Power, in this context, refers to the ability of a State to impose its will on others or, more broadly, to control outcomes contested by others. The components of power are military, economic, political and psychological; international society exhibits, in striking degree,

an unequal distribution of these components of power. The unequal distribution of power is a pervasive and dominating element in the relations of States. States strive to augment their power, perceiving power sometimes as an end in itself and more commonly as a means to attain more freedom of action and other objectives. For the realist, the crucial importance of power and the pursuit of self-interest by States make it virtually inevitable that the law—both in its creation and application—should yield to those determinants. Law may play a subordinate role as an aid to stability, a 'gentle civilizer of events' but it cannot be relied on 'to suppress the chaotic and dangerous aspirations of governments'. Political theorists reach similar conclusions in their analysis of the State system. From a 'structural' standpoint (as they sometimes put it), a system based on the sovereignty of States is a system of 'co-ordinate relations', in which formal authority is decentralized. While this fundamental condition does not rule out the use of a legal system to provide a required degree of order and predictability, the individual States in the last analysis are not subordinated to any superior authority. Hence the effective limits on their action derive from their own perception of national interest and the countervailing power of others. In consequence, as Raymond Aron has put it, international society is 'an anarchical order of power in which might makes right'.

These general theoretical conclusions accord with the widespread popular belief that in international relations power rather than law governs. . . . The fact that legal arguments are almost always made by the alleged violators only tends to add to the cynicism about law since such self-serving legal arguments are not submitted to adjudication or other third-party determinations. The absence of compulsory or generally accepted judicial settlement of international disputes is taken as compelling evidence that the law is not taken seriously and hence that 'power politics' prevails.

Since we cannot deny the crucial role of power in the relations of States, we should seek to understand its specific impact on the international legal system. Plainly, international law is not an ideal construct, created and given effect solely in terms of its internal logic. Nor can it be understood only as an instrument to serve human needs and aims (though it is that too). International law must also be seen as the product of historical experience in which power and the 'relation of forces' are determinants. Those States with power (i.e., the ability to control the outcomes contested by others) will have a disproportionate and often decisive influence in determining the content of rules and their application in practice. Because this is the case, international law, in a broad sense, both reflects and sustains the existing political order and distribution of power.

. . . A popular view, probably prevalent all over the world, is that powerful States, like powerful individuals in many countries, can often flout the law and get away with it. . . .

We need to consider not only that States break the rules but also that they generally conform to them even against their immediate interest. Nobody denies that States, powerful and not so powerful, observe international law

most of the time. There are various reasons why they do so. Much compliance can be attributed to institutionalized habit; officials follow the rules as a matter of practice, and in countless decisions they look to treaty obligations, to precedents that evidence custom and to general principles of law expounded in treatises and manuals. Many of the decisions involve no apparent clash of law and self-interest but numerous cases arise in which a government refrains from action (or non-action) that it would otherwise take if there were no legal grounds limiting its discretion. This is most evident when specific treaties apply—say, of commerce, navigation, reciprocal exchanges—but it is also true of the many cases covered by the unwritten customary rules applicable to many areas of inter-State relations. We must remember that the law is not applied as if it were governed by a computer programmed to respond to every contingency. In actuality, a good part of law observance takes place because the officials concerned do not even consider the option of violation; they have, so to speak, 'internalized' the rules so that possibilities of action contrary to the law do not even rise to conscious decision-making. It would, for example, be virtually certain today that a State would not consider sending its troops in to another country to collect revenues to pay a debt (as the United States once did in Haiti). Nor would it consider asserting jurisdiction over foreign flag vessels on the high seas. We often tend to forget how much of the basic law of nations is so thoroughly embedded in the minds and habits of officials that it is given effect without conscious decision making.

It is of course also true that cases arise in which officials do have to consider whether the law should be applied when it appears to be in the immediate interest of the government not to do so. The responses to such situations depend on a variety of considerations. Most obviously, governments will weigh a possible breach by them against their interest in reciprocal observance by the other party. They will also consider the likelihood of retaliation and other self-help measures by that party. Nor would they ignore the negative consequences of a reputation for repudiating their obligations. In many countries, officials would be sensitive to anticipated criticism by influential domestic leaders or groups who place high value on the country's reputation for legality generally or on observance of the particular obligations involved. The possibility of judicial enforcement in domestic tribunals may in some cases serve as a deterrent to non-compliance. Remedies by the aggrieved State may also be available under some circumstances in international mechanisms, perhaps through arbitral or judicial means or through loss of benefits under treaty régimes. . . . Violations, in short, are rarely cost-free even to powerful States.

. . .

The Dependency of International Law on the Will of States

. . . If States have no superior authority and their relations are 'co-ordinate', rather than hierarchical, does it not follow that a State is bound only by the legal rules to which it agrees to submit? . . .

These questions are as old as international law itself and have given rise to considerable theoretical writing. The idea that the will of States is the basis of international law and hence that the law is dependent on the consent of States is referred to in international law theory as 'voluntarism' or 'consensualism'. Voluntarism is not only a theory held by academic scholars. It is also an expression of the strongly held conception of State sovereignty dominant in most governments. . . .

The general idea that international law rests on the will of the States has been applied in various ways, with quite different significance. It has been applied to international law as a whole (particularly customary law) and to particular rules of international law. In regard to the latter, the requirement of consent has been directed both to the creation of new rules of law and to their use in particular cases. We will sort out the questions raised in each category by considering the following five propositions:

(1) international law as a general system is accepted by all States and hence is an expression of their will;

. . .

(3) the creation of a new rule or repeal of an old rule of customary law requires the consent of States;
(4) a State which has not consented to a customary law rule is free at any time to reject its application to that State;
(5) any State is free to exercise its sovereign right to reject the application of a customary law rule on the ground that it is not in accordance with that State's will.

(I should note that the term customary law rule as used above is intended to refer not only to rules in the narrow sense of that term but also to principles, standards, practices, concepts and procedures that are considered as legal grounds for asserting rights and obligations.)

(1) The first proposition asserts an empirical fact amply supported by practice. A possible objection is that the acceptance of international law cannot be attributed to the 'will' of the States since they have no choice in the matter. The very claim to be a State with authority over a given territory and population involves recognition of the basic international law rules. We shall consider this further in regard to the second proposition. However, even if it is true that 'membership' in any society presupposes adherence to its basic rules (*ubi societas, ibi ius*), it is not inconsistent with the fact that States accept the particular system of international law now in force. At least in that sense, the system rests on their consent just as a domestic law system may be said to rest basically on the consent of the people. Without their general consent, there could be no durable operative system of law. Although voluntarism in this form may seem to be a 'weak' version, it is important to recognize that the system of law has in general been accepted by the community of States.

Acceptance of the system is in itself a plausible basis for the obligation to abide by the particular rules valid in that system.

. . .

(3) The third proposition is that the creation of a new rule or repeal of an existing rule requires the consent of States. Inasmuch as customary law arises through uniformities of State conduct accompanied by the belief of States that they are conforming to what amounts to a legal obligation, the States that participated in such conduct and recognize the obligation created by it can reasonably be considered to have consented to the rule thus established. . . .

How many States are required to establish 'general' practice and how frequent, numerous and consistent the practice must be are questions which cannot be answered in categorical propositions. Generality, frequency, density, consistency, duration are in principle required but whether they are met in regard to a specific rule depends on the circumstances of the case. This seems to leave the emergence of customary law rather mysterious. It is not easy to generalize about the factors that should help in deciding how many States are enough, how 'dense' the practice need be, how long in time and so on. . . . For our present purpose, it is enough to note the broad agreement among authorities that general custom does not require universal consent of all States. . . .

(4) The most significant test of voluntarist-consensualist theory is raised by the fourth proposition—namely that a State is not bound by a rule to which it has not consented. The proposition requires critical analysis. Non-consenting States divide into two categories: (1) States that have manifested neither acceptance nor objection; (2) States which have openly objected to the rule in general or to its specific application to the objecting State. If we accept the principle that general custom does not require universal consent it follows that the assent of a particular State is not necessary for a general rule to come into being and to bind all States. . . .

A special problem is presented by the second category of non-consenting States—those that have openly manifested their dissent to a customary rule. One might ask why a dissenting State should be able to avoid a general customary rule if universal consent is not considered necessary and non-assenting States are considered bound. . . . Even if this is accepted as law, it is subject to some limitations. . . .

. . . [I]t may be questioned whether the exception for a dissenting State would apply to a new principle of customary law regarded as fundamental or of major importance. . . . If . . . principles are regarded as fundamental and of major importance to the generality of States with respect to an area beyond any State's jurisdiction, a good case can be made for denying the dissenting State the right to avoid the obligations that all other States incur as a consequence of the acceptance of the new principles. The issue cannot reasonably be decided solely by reference to voluntarist theory. It would be germane to consider a variety of factors including the circumstances of adoption of the

new principle, the reasons for its importance to the generality of States, the grounds for dissent, and the relevant position of the dissenting States. . . .

(5) The fifth proposition constitutes the 'strongest' use of voluntarist theory. It would allow a State to reject the application of a customary rule to it simply on the ground that it was contrary to the State's present will. No State, to my knowledge, has openly espoused that position. It would amount to a denial of customary law and it is most unlikely that any State would be prepared to take that position. However, a State may seek to avoid submitting to a rule by adopting a more moderate form of consensualism. . . . A strong preference in favour of State sovereignty and voluntarism on the part of members of a tribunal (or other decision-makers) will tend to raise the threshold of practice and *opinio juris* considered necessary to establish a universal rule.

Voluntarism in a somewhat different guise can also be found when a State objects to a rule on the ground that it is incompatible with a vital interest of the State. In such case, the recalcitrant State rests not simply on its will per se but on a superior norm of self-interest that is said to prevail over law. . . .

Significantly, no State appears to claim a right of this kind although some have interpreted self-defence broadly (as we shall see) or have turned to general notions of sovereignty and independence to justify departing from rules that are deemed against their vital interest.

. . .

Ch. IV. General Principles and Equity

. . .

The Broad Expanse of General Principles of Law

We can distinguish five categories of general principles that have been invoked and applied in international law discourse and cases. Each has a different basis for its authority and validity as law. They are

(1) The principles of municipal law 'recognized by civilized nations'.
(2) General principles of law 'derived from the specific nature of the international community'.
(3) Principles 'intrinsic to the idea of law and basic to all legal systems'
(4) Principles 'valid through all kinds of societies in relationships of hierarchy and co-ordination'.
(5) Principles of justice founded on 'the very nature of man as a rational and social being'.

Although these five categories are analytically distinct, it is not unusual for a particular general principle to fall into more than one of the categories. For example, the principle that no one shall be a judge in his own cause or that a victim of a legal wrong is entitled to reparation are considered part of most if not all, systems of municipal law and as intrinsic to the basic idea of law.

Our first category, general principles of municipal law, has given rise to a considerable body of writing and much controversy. Article 38 (1) *(c)* of the Statute of the Court does not expressly refer to principles of national law but rather general principles 'recognized by civilized nations'. . . . Elihu Root, the American member of the drafting committee, prepared the text finally adopted and it seemed clear that his amendment was intended to refer to principles 'actually recognized and applied in national legal systems'. The fact that the subparagraph was distinct from those on treaty and custom indicated an intent to treat general principles as an independent source of law, and not as a subsidiary source. As an independent source, it did not appear to require any separate proof that such principles of national law had been 'received' into international law.

However, a significant minority of jurists holds that national law principles, even if generally found in most legal systems, cannot *ipso facto* be international law. One view is that they must receive the *imprimatur* of State consent through custom or treaty in order to become international law. The strict positivist school adheres to that view. A somewhat modified version is adopted by others to the effect that rules of municipal law cannot be considered as recognized by civilized nations unless there is evidence of the concurrence of States on their status as international law. Such concurrence may occur through treaty, custom or other evidence of recognition. This would allow for some principles, such as *res judicata*, which are not customary law but are generally accepted in international law. . . .

. . .

. . . The most important limitation on the use of municipal law principles arises from the requirement that the principle be appropriate for application on the international level. Thus, the universally accepted common crimes—murder, theft, assault, incest—that apply to individuals are not crimes under international law by virtue of their ubiquity. . . .

At the same time, I would suggest a somewhat more positive approach for the emergent international law concerned with the individual, business companies, environmental dangers and shared resources. Inasmuch as these areas have become the concern of international law, national law principles will often be suitable for international application. This does not mean importing municipal rules 'lock, stock and barrel', but it suggests that domestic law rules applicable to such matters as individual rights, contractual remedies, liability for extra-hazardous activities, or restraints on use of common property, have now become pertinent for recruitment into international law. In these areas, we may look to representative legal systems not only for the highly abstract principles of the kind referred to earlier but to more specific rules that are sufficiently widespread as to be considered 'recognized by civilized nations'. . . .

The second category of general principles included in our list comprises principles derived from the specific character of the international community. The most obvious candidates for this category of principles are . . . the necessary

principles of co-existence. They include the principles of *pacta sunt servanda*, non-intervention, territorial integrity, self-defence and the legal equality of States. Some of these principles are in the United Nations Charter and therefore part of treaty law, but others might appropriately be treated as principles required by the specific character of a society of sovereign independent members.

. . .

The foregoing comments are also pertinent to the next two categories of general principles. The idea of principles '*jus rationale*' 'valid through all kinds of human societies'. . . is associated with traditional natural law doctrine. At the present time its theological links are mainly historical as far as international law is concerned, but its principal justification does not depart too far from the classic natural law emphasis on the nature of 'man', that is, on the human person as a rational and social creature.

The universalist implication of this theory—the idea of the unity of the human species—has had a powerful impetus in the present era. This is evidenced in at least three significant political and legal developments. The first is the global movements against discrimination on grounds of race, colour and sex. The second is the move toward general acceptance of human rights. The third is the increased fear of nuclear annihilation. These three developments strongly reinforce the universalistic values inherent in natural law doctrine. They have found expression in numerous international and constitutional law instruments as well as in popular movements throughout the world directed to humanitarian ends. Clearly, they are a 'material source' of much of the new international law manifested in treaties and customary rules.

In so far as they are recognized as general principles of law, many tend to fall within our fifth category—the principles of natural justice. This concept is well known in many municipal law systems (although identified in diverse ways). 'Natural justice' in its international legal manifestation has two aspects. One refers to the minimal standards of decency and respect for the individual human being that are largely spelled out in the human rights instruments. We can say that in this aspect, 'natural justice' has been largely subsumed as a source of general principles by the human rights instruments . . .

. . .

NOTE

Compare with Schachter's views about the relationship between law and force the following observations of Stanley Hoffmann, in *The Study of International Law and the Theory of International Relations*, 1963 Proc. Am. Soc. Int. L. 26:

> It is however essential for the social scientist to understand that law is not merely a policy among others in the hands of statesmen, but that it is a

tool with very special characteristics and roles. . . . Most important is the fact that law has a distinct solemnity of effects: it is a normative instrument that creates rights and duties. Consequently it has a function that is both symbolic and conservative; it enshrines, elevates, consecrates the interests or ideas it embodies. We understand, thus, why law is an important stake in the contests of nations. What makes international law so special a tool for states is this solemnity of effects, rather than the fact that its norms express common interests; for this is far too simple: some legal instruments such as peace treaties reflect merely the temporary, forced convergence of deeply antagonistic policies. A situation of dependence or of superiority that is just a fact of life can be reversed through political action; but once it is solemnly cast in legal form, the risks of action designed to change the situation are much higher: law is a form of policy that changes the stakes, and often 'escalates' the intensity, of political contests; it is a constraint comparable to force in its effects.

MARTTI KOSKENNIEMI, THE POLITICS OF INTERNATIONAL LAW

1 Eur. J. Int. L. 4 (1990), at 6

[This theoretical essay examines the character and politics of international law and the structure of international legal argument. It both develops earlier readings' conceptions of international law and custom, and provides an illuminating framework for understanding the particular character and effects of the human rights movement within the larger field of international law. The excerpts below stress the author's discussion of (i) the conceptions of apology and utopia that are central to his theory; (ii) dilemmas of state sovereignty and of consensual and justice-oriented theories of obligation in international law; and (iii) complexities in argument based on customary international law.]

The vision of a Rule of Law between states . . . is yet another reformulation of the liberal impulse to escape politics. . . .

In this article . . . I shall attempt to show that our inherited ideal of a World Order based on the Rule of Law thinly hides from sight the fact that social conflict must still be solved by political means and that even though there may exist a common legal rhetoric among international lawyers, that rhetoric must, *for reasons internal to the ideal itself*, rely on essentially contested—political—principles to justify outcomes to international disputes.

II. The Content of the Rule of Law: Concreteness and Normativity

Organizing society through legal rules is premised on the assumption that these rules are objective in some sense that political ideas, views, or preferences are not. To show that international law is objective—that is, independent from international politics—the legal mind fights a battle on two fronts.

On the one hand, it aims to ensure the *concreteness* of the law by distancing it from theories of natural justice. On the other hand, it aims to guarantee the *normativity* of the law by creating distance between it and actual state behaviour, will, or interest. Law enjoys independence from politics only if both of these conditions are simultaneously present.

. . . To avoid political subjectivism and illegitimate constraint, we must base law on something concrete—on the actual (verifiable) behaviour, will and interest of the members of society-states. The modern view is a *social conception of law*. For it, law is not a natural but an artificial creation, a reflexion of social circumstances.

According to the requirement of normativity, law should be applied regardless of the political preferences of legal subjects. In particular, it should be applicable even against a state which opposes its application to itself. As international lawyers have had the occasion to point out, legal rules whose content or application depends on the will of the legal subject for whom they are valid are not proper legal rules at all but apologies for the legal subject's political interest.

. . .

This argumentative structure, however, which forces jurists to prove that their law is valid because concrete and normative in the above sense, both creates and destroys itself. For it is impossible to prove that a rule, principle or doctrine (in short, an argument) is both concrete and normative simultaneously. The two requirements *cancel each other*. An argument about concreteness is an argument about the closeness of a particular rule, principle or doctrine to state practice. But the closer to state practice an argument is, the less normative and the more political it seems. The more it seems just another apology for existing power. An argument about normativity, on the other hand, is an argument which intends to demonstrate the rule's distance from state will and practice. The more normative a rule, the more political it seems because the less it is possible to argue it by reference to social context. It seems utopian and—like theories of natural justice—manipulable at will.

The dynamics of international legal argument are provided by the constant effort of lawyers to show that their law is either concrete or normative and their becoming thus vulnerable to the charge that such law is in fact political because apologist or utopian. Different doctrinal and practical controversies turn on transformations of this dilemma. It lies behind such dichotomies as 'positivism'/'naturalism', 'consent'/'justice', 'autonomy'/'community', process'/ 'rule', etc., and explains why these and other oppositions keep recurring and do not seem soluble in a permanent way. They recur because it seems possible to defend one's legal argument only by showing either its closeness to, or its distance from, state practice. They seem insoluble because both argumentative strategies are vulnerable to what appear like valid criticisms, compelled by the system itself.

This provides an argumentative structure which is capable of providing a valid criticism of each substantive position but which itself cannot justify any.

The fact that positions are constantly taken and solutions justified by lawyers, demonstrates that the structure does not possess the kind of distance from politics for which the Rule of Law once seemed necessary. It seems possible to adopt a position only by a political choice: a choice which must ultimately defend itself in terms of a conception of justice.

III. Doctrinal Structures

Two criticisms are often advanced against international law. One group of critics has accused international law of being too political in the sense of being too dependent on states' political power. Another group has argued that the law is too political because founded on speculative utopias. The standard point about the non-existence of legislative machineries, compulsory adjudication and enforcement procedures captures both criticisms. From one perspective, this criticism highlights the infinite flexibility of international law, its character as a manipulable facade for power politics. From another perspective, the criticism stresses the moralistic character of international law, its distance from the realities of power politics. According to the former criticism, international law is too *apologetic* to be taken seriously in the construction of international order. According to the latter, it is too *utopian* to the identical effect.

International lawyers have had difficulty answering these criticisms. The more reconstructive doctrines have attempted to prove the normativity of the law, its autonomy from politics, the more they have become vulnerable to the charge of utopianism. The more they have insisted on the close connexion between international law and state behaviour, the less normative their doctrines have appeared. Let me outline the four positions which modern international lawyers have taken to prove the relevance of their norms and doctrines. These are mutually exclusive and logically exhaustive positions and account for a full explanation of the possibilities of doctrinal argument.

Many of the doctrines which emerged from the ashes of legal scholarship at the close of the First World War explained the failure of pre-war international doctrines by reference to their apologist character. Particular objects of criticism were 'absolutist' doctrines of sovereignty, expressed in particular in . . . doctrines stressing the legal significance of the balance of power or delimiting the legal functions to matters which were unrelated to questions of 'honour' or 'vital interest.' . . . By associating the failure of those doctrines with their excessive closeness to state policy and national interest and by advocating the autonomy of international legal rules, these jurists led the way to the establishment of what could be called a *rule approach* to international law, stressing the law's normativity, its capacity to oppose state policy as the key to its constraining relevance.

This approach insists on an objective, format test of pedigree (sources) which will tell which standards qualify as legal rules and which do not. If a rule meets this test, then it is binding. Though there is disagreement between rule approach lawyers over what constitutes the proper test, there is no dispute about its importance. . . .

The second major position in contemporary scholarship uses these criticisms to establish itself. A major continental interpretation of the mistakes of 19th-century lawyers and diplomats explains them as a result of naive utopianism: an unwarranted belief in the viability of the [1815 Congress of Vienna system], with its ideas of legality and collective intervention. It failed because it had not been able to keep up with the politics of emergent nationalism and the increasing pace of social and technological change. Lawyers such as Nicolas Politis or Georges Scelle stressed the need to link international law much more closely to the social—even biological—necessities of international life. Roscoe Pound's programmatic writings laid the basis for the contemporary formulation of this approach by criticizing the attempt to think of international law in terms of abstract rules. It was, rather, to be thought of "in terms of social ends."

According to this approach—the *policy approach*—international law can only be relevant if it is firmly based in the social context of international policy. Rules are only trends of past decision which may or may not correspond to social necessities. 'Binding force' is a juristic illusion. Standards are, in fact more or less effective and it is their effectiveness—their capacity to further social goals—which is the relevant question, not their formal 'validity.'

But this approach is just as vulnerable to well-founded criticisms as the rule approach. By emphasizing the law's concreteness, it will ultimately do away with its constraining force altogether. If law is only what is effective, then by definition, it becomes an apology for the interests of the powerful. If, as Myres McDougal does, this consequence is avoided by postulating some 'goal values' whose legal importance is independent of considerations of effectiveness, then the (reformed) policy approach becomes vulnerable to criticisms which it originally voiced against the rule approach. In particular, it appears to assume an illegitimate naturalism which . . . is in constant danger of becoming just an apology of some states' policies.

The rule and the policy approaches are two contrasting ways of trying to establish the relevance of international law in the face of what appear as well-founded criticisms. The former does this by stressing the law's normativity, but fails to be convincing because it lacks concreteness. The latter builds upon the concreteness of international law, but loses the normativity, the binding force of its law. It is hardly surprising, then, that some lawyers have occupied the two remaining positions: they have either assumed that international law can neither be seen as normatively controlling nor widely applied in practice (the sceptical position), or have continued writing as if both the law's binding force as well as its correspondence with developments in international practice were a matter of course (idealist position). The former ends in cynicism, the latter in contradiction.

. . .

. . . On the one hand, the 'idealist' illusion is preserved that law can and does play a role in the organization of social life among states. On the other,

the 'realist' criticisms have been accepted and the law is seen as distinctly secondary to power and politics. Modern doctrine, as Philip Allott has shown, uses a mixture of positivistic and naturalistic, consensualistic and non-consensualistic, teleological, practical, political, logical and factual arguments in happy confusion, unaware of its internal contradictions. . . .

. . .

[The following excerpts, about consensualism and justice-based explanations of international law and their relevance to argument about customary international law, appear in a section entitled 'Sources'.]

Though there is no major disagreement among international lawyers about the correct enumeration of sources (treaties, custom, general principles), the rhetorical force of sources ('binding force') is explained from contrasting perspectives. Their importance is sometimes linked with their capacity to reflect state will (consensualism). At other times, such binding force is linked with the relationship of sources arguments with what is 'just', 'reasonable', 'in accordance with good faith', or some other non-consensual metaphor.

Standard disputes about the content or application of international legal norms use the contradiction between consent and justice based explanations. One party argues in terms of consent, the other in terms of what is just (reasonable, etc.). But neither argument is fully justifiable alone. A purely consensual argument cannot ultimately justify the application of a norm against non-consenting states (apologism). An argument relying only on a notion of justice violates the principle of the subjectivity of value (utopianism). Therefore, they must rely on each other. Arguments about consent must explain the relevance and content of consent in terms of what seems just. Arguments about justice must demonstrate their correctness by reference to what states have consented to. Because these movements (consent to justice; justice to consent) make the originally opposing positions look the same, no solution can be made by simply choosing one. A solution now seems possible only by either deciding what is it that states 'really' will or what the content of justice 'really' is. Neither question, however, is answerable on the premises of the Rule of Law.

For the modern lawyer, it is very difficult to envisage, let alone to justify, a law which would divorce itself from what states think or will to be the law. The apparent necessity of consensualism seems grounded in the very criticism of natural norms as superstition. Yet, the criticisms against full consensualism—its logical circularity, its distance from experience, its inherent apologism—are well-known. Consensualism cannot justify the application of a norm against a state which opposes such application unless it creates distance between the norm and the relevant state's momentary will. It has been explained, for example, that though law emerges from consent, it does not need every state's consent all the time, that a general agreement . . . is sufficient to apply the norm.

But these explanations violate the principle of sovereign equality—they fail to explain why a state should be bound by what another state wills. This can, of course, be explained from some concept of social necessity. But in such case we have already moved away from pure consensualism and face the difficulty of explaining the legal status of the assumed necessity and why it should support one norm instead of another.

A more common strategy is to explain that the state has originally consented (by means of recognition, acquiescence, by not protesting or by 'tacitly' agreeing) although it now denies it has. Such an argument is extremely important in liberal legitimation discourse. It allows defending social constraint in a consensual fashion while allowing the application of constraint against a state which denies it consent. But even this argument fails to be convincing because it must ultimately explain itself either in a fully consensual or fully non-consensual way and thereby become vulnerable to the objections about apologism or utopianism.

Why should a state be bound by an argument according to which it has consented, albeit 'tacitly'? If the reason is stated in terms of respecting its own consent, then we have to explain why we can know better than the state itself what it has consented to. Even consensualists usually concede that such knowledge is not open to external observers . . .

Tacit consent theorists usually explain that the question is not of 'real' but of 'presumed' will. But what then allows the application of the presumption against a state denying that it had ever consented to anything like it? At this point the tacit consent lawyer must move from consensualism to non-consensualism. Tacit consent— or the presumption of consent—binds because it is 'just' or in accordance with reasonableness or good faith, or it protects legitimate expectations or the like. . . .

. . .

The structure, importance and weaknesses of tacit consent is nowhere more visible that in the orthodox argument about customary international law.

According to this argument, binding custom exists if there is a material practice of states to that effect and that practice is motivated by the belief that it is obligatory. . . .

. . .

Modern lawyers have rejected fully materialistic explanations of custom as apologist, incapable of distinguishing between factual constraint and law. If the possibility is excluded that this distinction can be made by the justice of the relevant behaviour, then it can only be made by reference to the psychological element, the *opinio juris*. But, as many students of the [International Court of Justice] jurisprudence have shown, there are no independently applicable criteria for ascertaining the presence of the *opinio juris*. The ICJ has

simply i[illegible]rred its presence or absence from the extent and intensity of the materi[illegible] it has studied. . .

. . .

Customary law doctrine remains indeterminate because it is circular. It assumes behaviour to be evidence of states' intentions (*opinio juris*) and the latter to be evidence of what behaviour is relevant as custom. To avoid apologism (relying on the state's present will), it looks at the psychological element from the perspective of the material: to avoid utopianism (making the distinction between binding and non-binding usages by reference to what is just), it looks at the material element from the perspective of the psychological. It can occupy neither position in a permanent way without becoming vulnerable to criticism compelled by the other. . . .

. . .

Many have been dissatisfied with the modern strategy of arguing every imaginable non-written standard as 'custom.' Sir Robert Jennings, among others, has noted that what we tend to call custom: 'is not only not customary law: it does not even faintly resemble a customary law.' But if a non-written standard is not arguable in terms of material practices or beliefs relating to such practices then it can only exist as natural law—being defensible only by reference to the political importance of its content. . . .

. . .

Conclusion

Theorists of the present often explain our post-modern condition as a result of a tragedy of losses. For international lawyers, the Enlightenment signified loss of faith in a natural order among peoples, nations and sovereigns. To contain political subjectivism, 19th and 20th-century jurists put their faith variably on logic and texts, history and power to find a secure, objective foothold. Each attempt led to disappointment. One's use of logic depended on what political axioms were inserted as the premises. Texts, facts and history were capable of being interpreted in the most varied ways. In making his interpretations the jurist was always forced to rely on conceptual matrices which could no longer be defended by the texts, facts or histories to which they provided meaning. They were—and are—arenas of political struggle.

. . .

Social theorists have documented a recent modern turn in national societies away from the *Rechtstaat* [Rule of Law state] into a society in which social conflict is increasingly met with flexible, contextually determined standards and compromises. The turn away from general principles and formal rules into contextually determined equity may reflect a similar turn in the develop-

ment of international legal thought and practice. There is every reason to take this turn seriously—though this may mean that lawyers have to re-think their professional self-image. For issues of contextual justice cannot be solved by the application of ready-made rules or principles. Their solution requires venturing into fields such as politics, social and economic casuistry which were formally delimited beyond the point at which legal argument was supposed to stop in order to remain 'legal.' To be sure, we shall remain uncertain. Resolutions based on political acceptability cannot be made with the kind of certainty post-Enlightenment lawyers once hoped to attain. And yet, it is only by their remaining so which will prevent their use as apologies for tyranny.

NOTE

The ideas developed by Koskenniemi provide useful insights into the dilemmas of contemporary argument about international human rights. A fundamental theme is the relation between 'law' and 'politics' in argument about international law, and between the notion of an international order based on the Rule of Law or based on political views and preferences (including theories of justice or social utility). The questions below explore these themes.

QUESTIONS

1. The two columns below composed of terms used in the preceding excerpts attempt to organize some of Koskenniemi's themes. In his discussion of international-law norms and argument, Koskenniemi employs sets of terms expressed as dichotomies or oppositions (or at least expressed as alternative methods or approaches toward understanding international law). These sets are set forth on the same lines in the two columns below—i.e., concrete is paired with normative, autonomy is paired with community, and so on. Koskenniemi also suggests relationships within each column—i.e., relationships in the first column among concrete, apology and consent, relationships in the second column among normative, utopia and justice.

concrete	normative
close to state practice	distant from state practice
apology	utopia
positivism	naturalism
consent	justice
autonomy	community
policy	rule

a. Can you describe the relationships that the author suggests both (i) between the paired terms (like apology and utopia) and (ii) among the terms in each column (like concrete, apology, and consent)?

b. Suppose that the rule that a state cannot arrest another state's ambassador were expressed only in the form of customary international law—that is, it is not expressed in a treaty. State X arrests the ambassador to it from state Y, which protests the arrest. Develop two arguments for Y to the effect that the arrest violates international law. The first argument could be based on the terms in the first column, the second argument on the terms in the second column.

c. Suppose that state X tortures its political prisoners to extract information. Other states criticize X, arguing that its conduct violates customary international law. Try to construct the two types of arguments sketched in paragraph (b). Are the arguments different in structure from those developed for paragraph (b)?

d. Koskenniemi contends that whichever argument you make in either case, it would contain elements of the other column's structure of argument. Does this appear to be the case?

2. Compare Schachter's use of the terms 'realism' and 'voluntarism'. Do either or both of these terms, as defined by Schachter, fit comfortably within Koskenniemi's scheme?

3. Compare the views of Schachter and Koskenniemi about the role of consent in the formation and application of customary international law. What are the differences?

ADDITIONAL READING

Note: Sections entitled 'Additional Reading' appear throughout the book. Readers should be aware of the general list of books concerned with human rights that appears in the Annex on Bibliography.

Contemporary scholarship on international law in general includes the following books and treatises, all of which have sections on human rights: Rudolph Bernhardt (ed.), *Encyclopedia of Public International Law*, 1981– , vols. 1–12. Ian Brownlie, *Principles of Public International Law* (4th ed. 1990); Martti Koskenniemi, *Apology and Utopia* (1989); Louis Henkin, *International Law: Politics, Values and Functions*, 216 Collected Courses of the Hague Academy of International Law 13 (Vol. IV, 1989); Robert Jennings and Arthur Watts, *Oppenheim's International Law* (9th ed. 1992); Oscar Schachter, *International Law in Theory and Practice* (1991).

B. HISTORICAL ANTECEDENTS TO CONTEMPORARY HUMAN RIGHTS

Section B serves two functions simultaneously. Through decisions of courts and other types of tribunals, it illustrates problems in applying the ideas about international law—sources, evidence, processes, structure of argument—that were discussed in the readings of Section A. It renders those readings more concrete by examining, for example, how jurists grasp and apply ideas about customary or treaty law, how they conceive of international law or international legal argument in general, and how such conceptions influence their decisions.

This section uses as illustrations four opinions of tribunals dating from the start of the twentieth century to the eve of the development of the human rights movement at the end of World War II. The four tribunals have radically different characters. In sequence, the opinions are those of the United States Supreme Court (sitting as a court of prize), of an international arbitral tribunal formed under a U.S.–Mexican convention, of the Permanent Court of International Justice formed under the League of Nations (the predecessor to the present International Court of Justice formed under the United Nations Charter), and of the International Military Tribunal formed by the allied powers after World War II for the Nuremberg trials of war criminals.

The second function of Section B is to describe some vital antecedents to the growth of the human rights movement. Each opinion involves a different field of international law that formed part of the relevant background to, and nourished, that movement—in the same sequence, the laws of (the conduct of) war, the protection of aliens under the international law of state responsibility, the regimes protecting minorities that were established by treaty in some European states after World War I, and the imposition of personal criminal responsibility for war crimes and crimes against humanity in the Nuremberg trials of Nazi leaders.

These four topics, while central to an understanding of the antecedents to the contemporary human rights movement, do not exhaust those antecedents. Other developments from the early part of the nineteenth century are sketched in the concluding reading of this chapter.

The selection of four tribunals' opinions to present some background to the human rights movement might suggest to the reader that tribunals have played a major role in resolving disputes over international human rights and in simultaneously developing that body of law. An analogous suggestion with respect to the role and contribution of courts in a domestic legal system like that of the United States would be accurate. But that observation would be seriously misleading in an international context, at least outside the distinctive regional arrangement of the European human rights system in which a court does play a major role.

For the most part, courts and other tribunals have played peripheral roles in the development of what we now term universal human rights law. In the following chapters, their opinions figure only rarely in discussions that concentrate on different institutions and processes. Nonetheless, the four opinions provide excellent points of departure for exploring the questions now before us. They provide much information about the conceptions of international law and the substantive doctrines of earlier periods, as well as about matters such as the processes by which international law develops, the relation between international law and state sovereignty, and the relevance of international law to individual rights.

NOTE

The following decision in *The Paquete Habana* deals with an earlier period in the development of the laws of war, here naval warfare, and with a theme that became central in the later treaty development of this field—the protection of noncombatant civilians and their property (here, civilian fishing vessels) against the ravages of war. Within the framework of the laws of war, this case involves *jus in bello*, the ways in which war ought to be waged, rather than the related but distinct *jus ad bellum*, the determination of those conditions (if any) in which a *just* or justified war can be waged, in which war is legal.

In its analysis of the question before it, the U.S. Supreme Court here illustrates a classical understanding of international customary law, thus advancing our inquiry into custom that began with the readings in Section A.

THE PAQUETE HABANA

Supreme Court of the United States, 1900.
175 U.S. 677, 20 S.Ct. 290.

Mr. Justice Gray delivered the opinion of the court:

These are two appeals from decrees of the district court of the United States for the southern district of Florida condemning two fishing vessels and their cargoes as prize of war.

Each vessel was a fishing smack, running in and out of Havana, and regularly engaged in fishing on the coast of Cuba; sailed under the Spanish flag; was owned by a Spanish subject of Cuban birth, living in the city of Havana; was commanded by a subject of Spain also residing in Havana; and her master and crew had no interest in the vessel, but were entitled to shares, amounting in all to two thirds, of her catch, the other third belonging to her owner. Her cargo consisted of fresh fish, caught by her crew from the sea, put on board as they were caught, and kept and sold alive. Until stopped by the blockading squadron she had no knowledge of the existence of the war or of

any blockade. She had no arms or ammunition on board, and made no attempt to run the blockade after she knew of its existence, nor any resistance at the time of the capture.

. . .

Both the fishing vessels were brought by their captors into Key West. A libel for the condemnation of each vessel and her cargo as prize of war was there filed on April 27, 1898; a claim was interposed by her master on behalf of himself and the other members of the crew, and of her owner; evidence was taken, showing the facts above stated; and on May 30, 1898, a final decree of condemnation and sale was entered, 'the court not being satisfied that as a matter of law, without any ordinance, treaty, or proclamation, fishing vessels of this class are exempt from seizure'.

Each vessel was thereupon sold by auction; the Paquete Habana for the sum of $490; and the Lola for the sum of $800. There was no other evidence in the record of the value of either vessel or of her cargo. . . .

. . .

We are then brought to the consideration of the question whether, upon the facts appearing in these records, the fishing smacks were subject to capture by the armed vessels of the United States during the recent war with Spain.

By an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war.

This doctrine, however, has been earnestly contested at the bar; and no complete collection of the instances illustrating it is to be found, so far as we are aware, in a single published work, although many are referred to and discussed by the writers on international law, notable in 2 Ortolan, Règles Internationales et Diplomatie de la Mer (4th ed.) lib. 3, chap. 2, pp. 51–56; in 4 Calvo, Droit International (5th ed.) §§ 2367–2373; in De Boeck, Propriété Privée Ennemie sous Pavillon Ennemie, §§ 191–196; and in Hall, International Law (4th ed.) § 148. It is therefore worth the while to trace the history of the rule, from the earliest accessible sources, through the increasing recognition of it with occasional setbacks, to what we may now justly consider as its final establishment in our own country and generally throughout the civilized world.

The earliest acts of any government on the subject, mentioned in the books, either emanated from, or were approved by, a King of England.

In 1403 and 1406 Henry IV issued orders to his admirals and other officers, entitled 'Concerning Safety for Fishermen—*De Securitate pro Piscatoribus.*' By an order of October 26, 1403, reciting that it was made pursuant to a treaty between himself and the King of France; and for the greater safety of the fishermen of either country, and so that they could be, and carry on their

industry, the more safely on the sea, and deal with each other in peace; and that the French King had consented that English fishermen should be treated likewise,—it was ordained that French fishermen might, during the then pending season for the herring fishery, safely fish for herrings and all other fish, from the harbor of Gravelines and the island of Thanet to the mouth of the Seine and the harbor of Hautoune. . . .

. . .

The same custom would seem to have prevailed in France until towards the end of the seventeenth century. For example, in 1675, Louis XIV. and the States General of Holland by mutual agreement granted to Dutch and French fishermen the liberty, undisturbed by their vessels of war, of fishing along the coasts of France, Holland, and England. . . .

The doctrine which exempts coast fishermen, with their vessels and cargoes, from capture as prize of war, has been familiar to the United States from the time of the War of Independence.

. . .

In the treaty of 1785 between the United States and Prussia, article 23 . . . provided that, if war should arise between the contracting parties, 'all women and children, scholars of every faculty, cultivators of the earth, artisans, manufacturers, and fishermen, unarmed and inhabiting unfortified towns, villages, or places, and in general all others whose occupations are for the common subsistence and benefit of mankind, shall be allowed to continue their respective employments, and shall not be molested in their persons, nor shall their houses or goods be burnt or otherwise destroyed, nor their fields wasted by the armed force of the enemy, into whose power, by the events of war, they may happen to fall; but if anything is necessary to be taken from them for the use of such armed force, the same shall be paid for at a reasonable price.' . . .

Since the United States became a nation, the only serious interruptions, so far as we are informed, of the general recognition of the exemption of coast fishing vessels from hostile capture, arose out of the mutual suspicions and recriminations of England and France during the wars of the French Revolution.

. . .

On January 24, 1798, the English government by express order instructed the commanders of its ships to seize French and Dutch fishermen with their boats. . . . After the promulgation of that order, Lord Stowell (then Sir William Scott) in the High Court of Admiralty of England condemned small Dutch fishing vessels as prize of war. In one case the capture was in April, 1798, and the decree was made November 13, 1798. *The Young Jacob and Johanna*, 1 C.Rob. 20. . . .

. . .

On March 16, 1801, the Addington Ministry, having come into power in England, revoked the orders of its predecessors against the French fishermen; maintaining, however, that 'the freedom of fishing was nowise founded upon an agreement, but upon a simple concession;' that 'this concession would be always subordinate to the convenience of the moment,' and that 'it was never extended to the great fishery, or to commerce in oysters or in fish.' And the freedom of the coast fisheries was again allowed on both sides. . . .

Lord Stowell's judgment in *The Young Jacob and Johanna*, 1 C.Rob. 20, above cited, was much relied on by the counsel for the United States, and deserves careful consideration.

The vessel there condemned is described in the report as 'a small Dutch fishing vessel taken April, 1798, on her return from the Dogger bank to Holland;' and Lord Stowell, in delivering judgment, said: 'In former wars it has not been usual to make captures of these small fishing vessels; but this rule was a rule of comity only, and not of legal decision; it has prevailed from views of mutual accommodation between neighbouring countries, and from tenderness to a poor and industrious order of people. In the present war there has, I presume, been sufficient reason for changing this mode of treatment; and as they are brought before me for my judgment they must be referred to the general principles of this court; they fall under the character and description of the last class of cases; that is, of ships constantly and exclusively employed in the enemy's trade.' And he added: 'it is a further satisfaction to me, in giving this judgment, to observe that the facts also bear strong marks of a false and fraudulent transaction.'

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Both the capture and the condemnation were within a year after the order of the English government of January 24, 1798, instructing the commanders of its ships to seize French and Dutch fishing vessels, and before any revocation of that order. Lord Stowell's judgment shows that his decision was based upon the order of 1798, as well as upon strong evidence of fraud. Nothing more was adjudged in the case.

But some expressions in his opinion have been given so much weight by English writers that it may be well to examine them particularly. The opinion begins by admitting the known custom in former wars not to capture such vessels; adding, however, 'but this was a rule of comity only, and not of legal decision.' Assuming the phrase 'legal decision' to have been there used, in the sense in which courts are accustomed to use it, as equivalent to 'judicial decision,' it is true that so far as appears, there had been no such decision on the point in England. The word 'comity' was apparently used by Lord Stowell as synonymous with courtesy or goodwill. But the period of a hundred years which has since elapsed is amply sufficient to have enabled what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of civilized nations, into a settled rule of international law. . . .

The French prize tribunals, both before and after Lord Stowell's decision, took a wholly different view of the general question. . . .

The English government [by orders in council of 1806 and 1810] unqualifiedly prohibited the molestation of fishing vessels employed in catching and bringing to market fresh fish. . . .

Wheaton, in his Digest of the Law of Maritime Captures and Prizes, published in 1815, wrote: 'It has been usual in maritime wars to exempt from capture fishing boats and their cargoes, both from views of mutual accommodation between neighboring countries, and from tenderness to a poor and industrious order of people. This custom, so honorable to the humanity of civilized nations, has fallen into disuse; and it is remarkable that both France and England mutually reproach each other with that breach of good faith which has finally abolished it.' Wheaton, Captures, chap. 2, § 18.

This statement clearly exhibits Wheaton's opinion that the custom had been a general one, as well as that it ought to remain so. His assumption that it had been abolished by the differences between France and England at the close of the last century was hardly justified by the state of things when he wrote, and has not since been borne out.

. . .

In the war with Mexico, in 1846, the United States recognized the exemption of coast fishing boats from capture. . . .

. . .

In the treaty of peace between the United States and Mexico, in 1848, were inserted the very words of the earlier treaties with Prussia, already quoted, forbidding the hostile molestation or seizure in time of war of the persons, occupations, houses, or goods of fishermen. 9 Stat. at L. 939, 940.

. . .

France in the Crimean war in 1854, and in her wars with Italy in 1859 and with Germany in 1870, by general orders, forbade her cruisers to trouble the coast fisheries, or to seize any vessel or boat engaged therein, unless naval or military operations should make it necessary.

. . .

Since the English orders in council of 1806 and 1810 . . . in favor of fishing vessels employed in catching and bringing to market fresh fish, no instance has been found in which the exemption from capture of private coast fishing vessels honestly pursuing their peaceful industry has been denied by England or by any other nation. And the Empire of Japan (the last state admitted into the rank of civilized nations), by an ordinance promulgated at the beginning of its war with China in August, 1894, established prize courts, and ordained

that 'the following enemy's vessels are exempt from detention,' including in the exemption 'boats engaged in coast fisheries,' as well as 'ships engaged exclusively on a voyage of scientific discovery, philanthrophy, or religious mission.' Takahashi, International Law, 11, 178.

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. Hilton v. Guyot, 159 U.S. 113, 163, 164, 214, 215, 40 L.Ed. 95, 108, 125, 126, 16 Sup.Ct.Rep. 139.

. . .

Chancellor Kent says: 'In the absence of higher and more authoritative sanctions, the ordinances of foreign states, the opinions of eminent statesmen, and the writings of distinguished jurists, are regarded as of great consideration on questions not settled by conventional law. In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their maxims; and no civilized nation that does not arrogantly set all ordinary law and justice at defiance will venture to disregard the uniform sense of the established writers on international law.' 1 Kent, Com. 18.

It will be convenient, in the first place, to refer to some leading French treatises on international law, which deal with the question now before us, not as one of the law of France only, but as one determined by the general consent of civilized nations. . . . [Discussion of French treatises omitted.]

. . .

No international jurist of the present day has a wider or more deserved reputation than Calvo, who, though writing in French, is a citizen of the Argentine Republic, employed in its diplomatic service abroad. In the fifth edition of his great work on international law, published in 1896, he observes, in § 2366, that the international authority of decisions in particular cases by the prize courts of France, of England, and of the United States is lessened by the fact that the principles on which they are based are largely derived from the internal legislation of each country; and yet the peculiar character of maritime wars, with other considerations, gives to prize jurisprudence a force and importance reaching beyond the limits of the country in which it has prevailed. He therefore proposes here to group together a number of particular cases proper to serve as precedents for the solution of grave questions of maritime

law in regard to the capture of private property as prize of war. Immediately, in § 2367, he goes on to say: 'Notwithstanding the hardships to which maritime wars subject private property, notwithstanding the extent of the recognized rights of belligerents, there are generally exempted, from seizure and capture, fishing vessels.' . . .

The modern German books on international law, cited by the counsel for the appellants, treat the custom by which the vessels and implements of coast fishermen are exempt from seizure and capture as well established by the practice of nations. Heffter, § 137; 2 Kalterborn, § 237, p. 480; Bluntschli, § 667; Perels, § 37, p. 217.

. . .

Two recent English text-writers cited at the bar (influenced by what Lord Stowell said a century since) hesitate to recognize that the exemption of coast fishing vessels from capture has now become a settled rule of international law. Yet they both admit that there is little real difference in the views, or in the practice, of England and of other maritime nations; and that no civilized nation at the present day would molest coast fishing vessels so long as they were peaceably pursuing their calling and there was no danger that they or their crews might be of military use to the enemy. . . .

But there are writers of various maritime countries, not yet cited, too important to be passed by without notice. . . .

[The opinion quotes from writing from the Netherlands, Spain, Austria, Portugal and Italy.]

This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent states, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.

. . .

This rule of international law is one which prize courts administering the law of nations are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.

. . .

To this subject in more than one aspect are singularly applicable the words uttered by Mr. Justice Strong, speaking for this court: 'Undoubtedly no single nation can change the law of the sea. The law is of universal obligation and

no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation, or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world. . . . [Of these facts] we may take judicial notice. Foreign municipal laws must indeed be proved as facts, but it is not so with the law of nations.' The Scotia, 14 Wall. 170, 187, 188, sub nom. Sears v. The Scotia, 20 L.Ed. 822, 825, 826.

The position taken by the United States during the recent war with Spain was quite in accord with the rule of international law, now generally recognized by civilized nations, in regard to coast fishing vessels.

On April 21, 1898, the Secretary of the Navy gave instructions to Admiral Sampson, commanding the North Atlantic Squadron, to 'immediately institute a blockade of the north coast of Cuba, extending from Cardenas on the east to Bahia Honda on the west.' Bureau of Navigation Report of 1898, appx. 175. The blockade was immediately instituted accordingly. On April 22 the President issued a proclamation declaring that the United States had instituted and would maintain that blockade, 'in pursuance of the laws of the United States, and the law of nations applicable to such cases.' 30 Stat. at L. 1769. And by the act of Congress of April 25, 1898, chap. 189, it was declared that the war between the United States and Spain existed on that day, and had existed since and including April 21. 30 Stat. at L. 364.

On April 26, 1898, the President issued another proclamation which, after reciting the existence of the war as declared by Congress, contained this further recital: 'It being desirable that such war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice.' This recital was followed by specific declarations of certain rules for the conduct of the war by sea, making no mention of fishing vessels. 30 Stat. at L. 1770. But the proclamation clearly manifests the general policy of the government to conduct the war in accordance with the principles of international law sanctioned by the recent practice of nations.

. . .

Upon the facts proved in either case, it is the duty of this court, sitting as the highest prize court of the United States, and administering the law of nations, to declare and adjudge that the capture was unlawful and without probable cause; and it is therefore, in each case,—

Ordered, that the decree of the District Court be reversed, and the proceeds of the sale of the vessel, together with the proceeds of any sale of her cargo, be restored to the claimant, with damages and costs.

Mr. Chief Justice Fuller, with whom concurred *Mr. Justice Harlan* and *Mr. Justice Mckenna*, dissenting:

The district court held these vessels and their cargoes liable because not 'satisfied that as a matter of law, without any ordinance, treaty, or proclamation, fishing vessels of this class are exempt from seizure.'

This court holds otherwise, not because such exemption is to be found in any treaty, legislation, proclamation, or instruction granting it, but on the ground that the vessels were exempt by reason of an established rule of international law applicable to them, which it is the duty of the court to enforce.

I am unable to conclude that there is any such established international rule, or that this court can properly revise action which must be treated as having been taken in the ordinary exercise of discretion in the conduct of war.

. . .

This case involves the capture of enemy's property on the sea, and executive action, and if the position that the alleged rule *proprio vigore* limits the sovereign power in war be rejected, then I understand the contention to be that, by reason of the existence of the rule, the proclamation of April 26 must be read as if it contained the exemption in terms, or the exemption must be allowed because the capture of fishing vessels of this class was not specifically authorized.

The preamble to the proclamation stated, it is true, that it was desirable that the war 'should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice,' but the reference was to the intention of the government 'not to resort to privateering, but to adhere to the rules of the Declaration of Paris;' and the proclamation spoke for itself. The language of the preamble did not carry the exemption in terms, and the real question is whether it must be allowed because not affirmatively withheld, or, in other words, because such captures were not in terms directed.

. . .

It is impossible to concede that the Admiral ratified these captures in disregard of established international law and the proclamation, or that the President, if he had been of opinion that there was any infraction of law or proclamation, would not have intervened prior to condemnation.

. . .

In truth, the exemption of fishing craft is essentially an act of grace, and not a matter of right, and it is extended or denied as the exigency is believed to demand.

It is, said Sir William Scott, 'a rule of comity only, and not of legal decision.'

. . .

It is difficult to conceive of a law of the sea of universal obligation to which Great Britain has not acceded. And I am not aware of adequate foundation for imputing to this country the adoption of any other than the English rule.

. . .

It is needless to review the speculations and repetitions of the writers on international law. Ortolan, De Boeck, and others admit that the custom relied on as consecrating the immunity is not so general as to create an absolute international rule; Heffter, Calvo, and others are to the contrary. Their lucubrations may be persuasive, but not authoritative.

In my judgment, the rule is that exemption from the rigors of war is in the control of the Executive. He is bound by no immutable rule on the subject. It is for him to apply, or to modify, or to deny altogether such immunity as may have been usually extended.

. . .

COMMENT ON THE HUMANITARIAN LAW OF WAR

The opinion in *The Paquete Habana* has the aura of a humane world in which, if war occurs, the fighting should be as compassionate in spirit as possible. It rests the rule of exemption of coastal fishing vessels 'on considerations of humanity to a poor and industrious order of men, and [on] the mutual convenience of fishing vessels.' The opinion seems more than a mere fourteen years distant from the savagery of World War I, and remote from that war's successors during this century with their massive atrocities and civilian casualties in engagements of close to total war by one or both sides.

The intricate body of international law considered by the Supreme Court grew out of centuries of primarily customary law, although custom was supplemented and informed centuries ago by selective bilateral treaties. Custom remains essential to argument about the laws of war to this day, indeed to the jurisdictional provisions of the International Criminal Tribunal for the Former Yugoslavia discussed in Ch. 15. But this field is increasingly dominated by multilateral treaties that have both codified customary standards and rules and developed new ones in numerous international conferences. Multilateral declarations and treaties started to achieve prominence in the second half of the nineteenth century. The treaties now include the Hague Conventions concluded around the turn of the century, the four Geneva Conventions of 1949 (as well as two significant Protocols of 1977 to those conventions), and several discrete treaties since World War II on matters like bans on particular weapons and cultural property.

The basic Geneva Conventions (185 statesparties as of January 1995) and the two Protocols (Protocol No. 1, 136 parties; Protocol No. 2, 126 parties) cover a vast range of problems stemming from land, air or naval warfare, including the protection of wounded combatants and prisoners of war, of

civilian populations and civilian objects affected by military operations or present in occupied territories, and of medical and religious personnel and buildings. As suggested by this list, the provisions of the four Conventions and two Protocols constitute the principal regulation of *jus in bello*.

This entire corpus of custom and treaties has come to be know as the 'international humanitarian law of war,' the broad purpose being—in the words of the landmark St. Petersburg Declaration of 1868—'alleviating as much as possible the calamities of war.' Here lies the tension, even contradiction, within this body of law. Putting aside the question of a war's legality (an issue central to the Judgment of the International Military Tribunal at Nuremberg, p. 102, *infra*, and today governed by the UN Charter), a war fought in compliance with the standards and rules of the laws of war permits massive intentional killing or wounding and massive other destruction that, absent a war, would violate fundamental human rights norms.

Hence all these standards and rules stand at some perilous and problematic divide between brutality and destruction (i) that is permitted or privileged and (ii) that is illegal and subject to sanction. Principles like 'proportionality' in choosing military means or like the avoidance of 'unnecessary suffering' to the civilian population are employed to help to draw the line. The powerful ideal of reducing human suffering that animates this humanitarian law of war thus is countered by the goal of state parties to a war—indeed, in the eyes of states, the paramount goal—of gaining military objectives and victory while reducing as much as possible the losses to one's own armed forces.

The generous mood of *The Paquete Habana* toward the civilian population and its food-gathering needs was reflected in the various Hague Conventions regulating land and naval warfare that were adopted during the ensuing decade. Note Article 3 of the Hague Convention of 1907 on Certain Restrictions with Regard to the Exercise of the Right to Capture in Naval War, 36 Stat. 2396, T.S. No. 544, which proclaimed in 1910: 'Vessels used exclusively for fishing along the coast . . . are exempt from capture . . . .'

The efforts to protect civilian populations and their property took on renewed vigor after World War II through the Geneva Conventions of 1949. Consider Protocol No. 1 to the Geneva Conventions, adopted in 1977 and ratified (as of January 1995) by 136 states. Article 48 enjoins the parties to a conflict to 'distinguish between the civilian population and combatants and between civilian objects and military objectives.' Their operations are to be directed 'only against military objectives.' Article 52 defines military objectives to be 'objects which, by their nature, location, purposes or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.' Article 54 is entitled, 'Protection of Objects Indispensable to the Survival of the Civilian Population.' It states that '[s]tarvation of civilians as a method of warfare is prohibited.' Specifically, parties are prohibited from attacking or removing 'objects indispensable to the survival of the civilian population, such as foodstuffs . . ., for the specific purpose of denying

them for their sustenance value to the civilian population or to the adverse Party. . . .' An exception is made for objects used by an adverse party as sustenance 'solely' for its armed forces or 'in direct support of military action.'

Consider some special characteristics of *The Paquete Habana*. (1) Note the emphasis on the fact that the Supreme Court here sat as a *prize court* administering the law of nations, and note its references to the international character of the law maritime. Indeed, the Court almost assumed the role of an international tribunal, a consideration stressed in the excerpts from the scholar Calvo. Nonetheless, the Court's statement that 'international law is part of our law' and must be 'ascertained and administered by courts of justice' as often as 'questions of right' depending on it are presented for determination, has been drawn on in many later judicial decisions in the United States involving unrelated international-law issues.

(2) An antiquarian aspect of the decision and period is that the naval personnel who captured the fishing vessels participated in the judicial proceedings, for at the time of the war captors were entitled to share in the proceeds of the sale of lawful prizes. That practice has ended and proceeds are now paid into the Treasury. 70A Stat. 475 (1956), 10 U.S.C.A. §§7651–81.

(3) The Court looked to a relatively small number of countries for evidence of state practice, dominantly in Western Europe. It referred to Japan as 'the last state admitted into the rank of civilized nations.' Even at the start of the twentieth century, the world community creating international law was a small and relatively cohesive one. Contrast the multinational and multicultural character of an assembly of states today drafting a convention on the laws of war or a human rights convention, and imagine the range of states to which references might be made in a contemporary judicial opinion considering the customary law of international human rights.

QUESTIONS

1. Suppose that an international tribunal rather than U.S. courts had heard this controversy, and had sought to decide it within the framework of Article 38 of the Statute of the International Court of Justice. Assuming that this tribunal came to the same conclusion, would any observations in the Supreme Court's opinion be likely to have been omitted or changed by such an international tribunal? Which observations? Suppose, for example, that the historical record was identical with that reported by the Supreme Court except for the fact that the United States had consistently objected to this rule of exemption and had often refused to follow it.

2. Does the method of the Court in 'ascertaining' the customary rule appear consistent with some of the observations about the nature of custom and the processes for its development in the readings in Section A? Consider, for example, how the Supreme Court directly or implicitly deals with (i) the issue of *opinio juris*, (ii) the relevance of treaties, and (iii) the departure from the rule of exemption during the Napoleonic wars. With which of these aspects of the opinion does the dissenting opinion differ?

COMMENT ON THE LAW OF STATE RESPONSIBILITY AND THE *CHATTIN* CASE

The *Chattin* case that follows was decided under a 1923 General Claims Convention between the United States and Mexico, 43 Stat. 1730, T.S. No. 678. That treaty provided that designated claims against Mexico of U.S. citizens (and vice versa) for losses or damages suffered by persons or by their properties that (in the case of the U.S. citizens) had been presented to the U.S. government for interposition with Mexico and that had remained unsettled 'shall be submitted to a Commission consisting of three members for decision in accordance with the principles of international law, justice and equity.' Each state was to appoint one member, and the presiding third commissioner was to be selected by mutual agreement (and by stipulated procedures failing agreement).

These arbitrations grew out of and further developed the law of state responsibility for injuries to aliens, a branch of international law that was among the important predecessors to contemporary human rights law. That body of law addressed only certain kinds of conflicts—not including, for example, conflicts originating in the first instance in a dispute between a claimant state (X) and a respondent state (Y). Thus it did not cover a dispute, say, based on a claim by X that Y had violated international law by its invasion of X's territory or by its imprisonment of X's ambassador.

Rather, the claims between states that were addressed by the law of state responsibility for injuries to aliens grew out of disputes arising in the first instance between a citizen-national of X and the government of Y. For example, respondent state Y allegedly imprisoned a citizen of claimant state X without hearing or trial, or seized property belonging to citizens of X—allegations which, if true, could show violations of international law. Note that these illustrations involve action leading to injury of X's citizens by governmental officials or organs (executive, legislative, judicial) of Y. The law of state responsibility required that the conduct complained of be that of the state or, in less clear and more complex situations, be ultimately attributable to the state.

In the normal case, the citizen of X would seek a remedy within Y, probably through its judiciary—release from jail, return of the seized property or compensation for it. Indeed, before invoking the aid of his own government, the citizen of X would generally be required under the relevant treaty to pursue such a path, to 'exhaust local remedies.' But that path may prove to be fruitless, because of lack of recourse to Y's judiciary, because that judiciary is corrupt, or because of Y's law adverse to the citizen of X that would be applied by its judiciary. In such circumstances, the injured person may turn to his own government X for diplomatic protection.

The 1924 decision of the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions (Jurisdiction)* case, P.C.I.J., Ser. A, No. 2,

gave classic expression to such diplomatic protection. It pointed out that when a state took up the cause of one of its subjects (citizens-nationals) in a dispute originating between that subject and respondent state, the dispute

> entered upon a new phase; it entered the domain of international law, and became a dispute between two States . . . . It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.

Precisely what action to take, what form of diplomatic protection to extend, lay within the discretion of the claimant state. If it decided to intervene and thereby make the claim its own, it might espouse the claim through informal discussions with the respondent state, or make a formal diplomatic protest, or exert various economic and political pressures to encourage a settlement (extending at times to military intervention), or, if these strategies failed, have recourse to international tribunals. Such recourse was infrequent. International tribunals to whose jurisdiction states had consented for the resolution of disputes between them were rare. Moreover, states were reluctant to raise controversies between their citizens and foreign states to the level of interstate conflict before an international tribunal except where a clear national interest gave reason to do so.

An arbitral tribunal to which the claimant state turned may have been created by agreement between the disputing states to submit to it designated types of disputes. That agreement may have been part of a general arbitration treaty (which after World War II found scant use) covering a broad range of potential disputes between the two parties. Or it may have been a so-called compromissory clause (*compromis*) in a treaty dealing with a specific subject that bound the parties to submit to arbitration disputes that might arise under that treaty. Of course, two states could always agree to submit specified disputes to arbitration, as in the 1923 General Claims Convention between the United States and Mexico under which *Chattin* was decided.

In 1921, *ad hoc* arbitral tribunals were first supplemented by an international court, the Permanent Court of International Justice provided for in the Covenant of the League of Nations. Again, problems of states' consent to jurisdiction and states' reluctance to start interstate litigation limited the role of that court (and indeed the role of its successor, the International Court of Justice created under the Charter of the United Nations) in developing the law of state responsibility (or, today, in developing the international law of human rights).

The growth in the nineteenth and twentieth centuries of the law of state responsibility for injury to aliens was the product of and evidenced by a range of state interactions— diplomatic protests and responses, negotiated settlements, arbitral decisions—and the writings of scholars. Before World War II, there was little attempt at formal codification or creative development of this body of law through treaties—that is, treaties spelling out the content of what international law required of a state in its treatment of aliens.

As it developed, the international law of state responsibility reflected the more intense identification of the individual with his state (or later, the identification of the corporation with the state of its incorporation, or of most of its shareholders) that accompanied the nationalistic trends of that era. This body of law would not have developed so vigorously but for Western colonialism and economic imperialism that reached their zenith during this period. Transnational business operations centered in Europe, and later in the United States as well, penetrated those regions now known as the Third World or developing countries.

In such circumstances, given the obvious links between the success and wealth of corporations in their foreign ventures and national wealth and power, the security of the person and property of a national or corporation operating in a foreign part of the world became a concern of his or its government. That concern manifested itself in the vigorous assertion of diplomatic protection and in the enhanced activity of arbitral tribunals. In the late nineteenth and early twentieth centuries, some such arbitrations occurred under the pressure of actual or threatened military force by the claimant states, particularly against Latin American governments.

A statement in an arbitral proceeding in 1924 by Max Huber, a Judge of the Permanent Court of International Justice, cogently expressed some basic principles of that era's consensus (among states of the developed world) about the law of state responsibility:[4]

> . . . It is true that the large majority of writers have a marked tendency to limit the responsibility of the State. But their theories often have political inspiration and represent a natural reaction against unjustified interventions in the affairs of certain nations. . . .
>
> . . . The conflicting interest with respect to the problem of compensation of aliens are, on the one hand, the interest of a State in exercising its public power in its own territory without interference or control of any nature by foreign States and, on the other hand, the interest of the State in seeing the rights of its nationals established in foreign countries respected and well protected.
>
> Three principles are hardly debatable:
>
> . . .

[4] Judge Huber delivered these remarks in his role as a Reporter (in effect, arbitrator) in a dispute between Great Britain and Spain involving claims of British subjects against Spanish authorities for alleged mistreatment. British Claims in the Spanish Zone of Morocco, 2 U.N.R.I.A.A. 615, 639 (1924).

(2) In general, a person established in a foreign country is subject to the territorial legislation for the protection of his person and his property, under the same conditions as nationals of that country.

(3) A State whose national established in another State is deprived of his rights has a right to intervene *if the injury constitutes a violation of international law*. . . .

. . . The territorial character of sovereignty is so essential a trait of contemporary public law that foreign intervention in relationships between a territorial State and individuals subject to its sovereignty can be allowed only in extraordinary cases. . . .

. . . This right of intervention has been claimed by all States; only its limits are under discussion. By denying this right, one would arrive at intolerable results: international law would become helpless in the face of injustices tantamount to the negation of human personality, for that is the subject which every denial of justice touches.

. . . No police or other administration of justice is perfect, and it is doubtless necessary to accept, even in the best administered countries, a considerable margin of tolerance. However, the restrictions thus placed on the right of a State to intervene to protect its nationals assume that the general security in the country of residence does not fall below a certain standard . . . .

How was it determined whether, in Huber's words, an 'injury' to an alien 'constitutes a violation of international law,' or whether the administration of justice in a given country fell below 'a certain standard?' To what materials would, for example, an arbitral tribunal turn for help in defining the content of that standard? What types of argument and justifications would inform the development of this body of international law? Consider these questions as you read the *Chattin* arbitration.

UNITED STATES OF AMERICA (B.E. CHATTIN) v. UNITED MEXICAN STATES

United States-Mexican Claims Commission, 1927.
Opinions of Commissioners under the Convention Concluded September 8, 1923 between the United States and Mexico, 1926–27, at 422.
4 U.N.R.I.A.A. 282.

[Chattin, a United States citizen, was a conductor on a railroad in Mexico from 1908 to 1910, when he was arrested for embezzlement of fares. Chattin's trial was consolidated with those of several other Americans and Mexicans who had been arrested on similar charges. In February 1911 he was convicted and sentenced to two years' imprisonment. His appeal was rejected in July 1911. In the meantime the inhabitants of Mazatlán, during a political uprising, threw open the doors of the jail and Chattin escaped to the United States. In asserting Chattin's claims, the United States argued that the arrest was

illegal, that Chattin was mistreated while in prison, that his trial was unreasonably delayed, and that there were irregularities in the trial. It claimed that Chattin suffered injuries worth $50,000 in compensation.

The Claims Commission had three members, including one from the United States (Nielsen) and from Mexico (MacGregor). The opinion of Van Vollenhoven, the Presiding Commissioner, distinguished between the legal bases for responsibility of a state because of acts or failures to act by its *judicial* and *non-judicial* branches of government. 'Acts of the *judiciary* . . . are not considered insufficient unless the wrong committed amounts to an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiased man.' Acts of the legislative or executive branches were held to this same standard with respect to *indirect* liability (for example, a lack of appropriate action by government in response to conduct of private persons who initially caused the loss to the victim), but in cases of *direct* liability (for example, unwarranted arrest, reckless shooting by police), the standard was more demanding on the state and included forms of negligence. Van Vollenhoven, quoting from precedent, noted that 'as far as acts of the judiciary are involved . . . "it is a matter of the greatest political and international delicacy for one country to disacknowledge the judicial decision of a court of another country."'

The following excerpts from Van Vollenhoven's opinion deal with three of the detailed complaints about the conduct of the trial, a number of other complaints having been rejected as irrelevant or non-prejudicial.]

17. The allegation (e) that the accused has not been duly informed regarding the charge brought against him is proven by the record, and to a painful extent. The real complainant in this case was the railroad company, acting through its general manager; this manager, an American, not only was allowed to make full statements to the Court on August 2, 3, and 26, 1910, without ever being confronted with the accused and his colleagues, but he was even allowed to submit to the Court a series of anonymous written accusations, the anonymity of which reports could not be removed (for reasons which he explained); these documents created the real atmosphere of the trial. Were they made known to the conductors? Were the accused given an opportunity to controvert them? There is no trace of it in the record, nor was it ever alleged by Mexico. . . . The court record only shows that on January 13, and 16, 1911, the conductors and one of their lawyers were aware of the existence, not that they knew the contents, of these documents. . . . It is not shown that the confrontation between Chattin and his accusers amounted to anything like an effort on the Judge's part to find out the truth. Only after November 22, 1910, and only at the request of the Prosecuting Attorney, was Chattin confronted with some of the persons who, between July 13 and 21, inclusive, had testified of his being well acquainted with Ramírez. It is regrettable, on the other hand, that the accused misrepresents the wrong done him in this respect:

He had not been left altogether in the dark. According to a letter signed by himself and two other conductors dated August 31, 1910, he was perfectly aware even of the details of the investigations made against him; so was the American vice-consul on July 26, 1910. . . .

Owing to the strict seclusion to which the conductors contend to have been submitted, it is impossible they could be so well-informed if the charges and the investigations were kept hidden from them.

. . .

19. The allegation (h) that the witnesses were not sworn is irrelevant, as Mexican law does not require an 'oath' (it is satisfied with a solemn promise, *protesta*, to tell the truth), nor do international standards of civilization.

. . .

21. The allegation (j) that the hearings in open court lasted only some five minutes is proven by the record. This trial in open court was held on January 27, 1911. It was a pure formality, in which only confirmations were made of written documents, and in which not even the lawyer of the accused conductors took the trouble to say more than a word or two.

22. The whole of the proceedings discloses a most astonishing lack of seriousness on the part of the Court. There is no trace of an effort to have the two foremost pieces of evidence explained (paragraphs 14 and 17 above). There is no trace of an effort to find one Manuel Virgen, who, according to the investigations of July 21, 1910, might have been mixed in Chattin's dealings, nor to examine one Carl or Carrol Collins, a dismissed clerk of the railroad company concerned, who was repeatedly mentioned as forging tickets and passes and as having been discharged for that very reason. One of the Mexican brakemen, Batriz, stated on August 8, 1910, in court that 'it is true that the American conductors have among themselves schemes to defraud in that manner the company, the deponent not knowing it for sure'; but again no steps were taken to have this statement verified or this brakeman confronted with the accused Americans. . . . No investigation was made as to why Delgado and Sarabia felt quite certain that June 29 was the date of their trip, a date upon the correctness of which the weight of their testimony wholly depended. No search of the houses of these conductors is mentioned. Nothing is revealed as to a search of their persons on the days of their arrest; when the lawyer of the other conductors, Haley and Englehart, insisted upon such an inquiry, a letter was sent to the Judge at Culiacán, but was allowed to remain unanswered. Neither during the investigations nor during the hearings in open court was any such thing as an oral examination or cross-examination of any importance attempted. It seems highly improbable that the accused have been given a real opportunity during the hearings in open court, freely to speak for themselves. It is not for the Commission to endeavor to reach from the record any conviction as to the innocence or guilt of Chattin and his colleagues; but even in case they were guilty, the Commission would render a bad service to

the Government of Mexico if it failed to place the stamp of its disapproval and even indignation on a criminal procedure so far below international standards of civilization as the present one. If the wholesome rule of international law as to respect for the judiciary of another country . . . shall stand, it would seem of the utmost necessity that appellate tribunals when, in exceptional cases, discovering proceedings of this type should take against them the strongest measures possible under constitution and laws, in order to safeguard their country's reputation.

. . .

24. In Mexican law, as in that of other countries, an accused cannot be convicted unless the Judge is convinced of his guilt and has acquired this view from legal evidence. An international tribunal never can replace the important first element, that of the Judge's being convinced of the accused's guilt; it can only in extreme cases, and then with great reserve, look into the second element, the legality and sufficiency of the evidence.

. . .

26. From the record there is not convincing evidence that the proof against Chattin, scanty and weak though it may have been, was not such as to warrant a conviction. Under the article deemed applicable the medium penalty fixed by law was imposed, and deduction made of the seven months Chattin had passed in detention from July, 1910, till February, 1911. It is difficult to understand the sentence unless it be assumed that the Court, for some reason or other, wished to punish him severely. . . . The allegation that the Court in this matter was biased against American citizens would seem to be contradicted by the fact that, together with the four Americans, five Mexicans were indicted as well, four of whom had been caught and have subsequently been convicted—that one of these Mexicans was punished as severely as the Americans were—and that the lower penalties imposed on the three others are explained by motives which, even if not shared, would seem reasonable. . . . If Chattin's guilt was sufficiently proven, the small amount of the embezzlement (four pesos) need not in itself have prevented the Court from imposing a severe penalty.

. . .

29. Bringing the proceedings of Mexican authorities against Chattin to the test of international standards . . . there can be no doubt of their being highly insufficient. Inquiring whether there is convincing evidence of these unjust proceedings . . . the answer must be in the affirmative. Since this is a case of alleged responsibility of Mexico for injustice committed by its judiciary, it is necessary to inquire whether the treatment of Chattin amounts even to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action recognizable by every unbiased man . . . and the answer here

again can only be in the affirmative.

30. An illegal arrest of Chattin is not proven. Irregularity of court proceedings is proven with reference to absence of proper investigations, insufficiency of confrontations, withholding from the accused the opportunity to know all of the charges brought against him, undue delay of the proceedings, making the hearings in open court a mere formality, and a continued absence of seriousness on the part of the Court. Insufficiency of the evidence against Chattin is not convincingly proven; intentional severity of the punishment is proven, without its being shown that the explanation is to be found in unfairmindedness of the Judge. Mistreatment in prison is not proven. Taking into consideration, on the one hand, that this is a case of direct governmental responsibility, and, on the other hand, that Chattin, because of his escape, has stayed in jail for eleven months instead of for two years, it would seem proper to allow in behalf of this claimant damages in the sum of $5,000.00, without interest.

NIELSEN, Commissioner, concurring:

. . .

So far as concerns methods of procedure prescribed by Mexican law, conclusions with respect to their propriety or impropriety may be reached in the light of comparisons with legal systems of other countries. And comparisons pertinent and useful in the instant case must be made with the systems obtaining in countries which like Mexico are governed by the principles of the civil law, since the administration of criminal jurisprudence in those countries differs so very radically from the procedure in criminal cases in countries in which the principles of Anglo-Saxon law obtain. This point is important in considering the arguments of counsel for the United States regarding irrelevant evidence and hearsay evidence appearing in the record of proceedings against the accused. From the standpoint of the rules governing Mexican criminal procedure conclusions respecting objections relative to these matters must be grounded not on the fact that a judge received evidence of this kind but on the use he made of it.

Counsel for Mexico discussed in some detail two periods of the proceedings under Mexican law in a criminal case. The procedure under the Mexican code of criminal procedure apparently is somewhat similar to that employed in the early stages of the Roman law and similar in some respects to the procedure generally obtaining in European countries at the present time. Counsel for Mexico pointed out that during the period of investigation a Mexican judge is at liberty to receive and take cognizance of anything placed before him, even matters that have no relation to the offense with which the accused is tried. The nature of some of the things incorporated into the record, including anonymous accusations against the character of the accused, is shown in the Presiding Commissioner's opinion. Undoubtedly in European countries a similar measure of latitude is permitted to a judge, but there seems to be an essential difference between procedure in those countries and that obtaining in the

Mexican courts, in that after a preliminary examination before a judge of investigation, a case passes on to a judge who conducts a trial. The French system, which was described by counsel for Mexico as being more severe toward the accused than is Mexican procedure, may be mentioned for purposes of comparison. Apparently under French law the preliminary examination does not serve as a foundation for the verdict of the judge who decided as to the guilt of the accused. The examination allows the examining judge to determine whether there is ground for formal charge, and in case there is, to decide upon the jurisdiction. The accused is not immediately brought before the court which is to pass upon his guilt or innocence. His appearance in court is deferred until the accusation rests upon substantial grounds. This trial is before a judge whose functions are of a more judicial character than those of a judge of investigation employing inquisitorial methods in the nature of those used by a prosecutor. When the period of investigation was completed in the cases of Chattin and the others with whom his case was consolidated, the entire proceedings so far as the Government was concerned were substantially finished, and after a hearing lasting perhaps five minutes, the same judge who collected evidence against the accused sentenced them.

. . .

International law requires that in the administration of penal laws an alien must be accorded certain rights. There must be some grounds for his arrest; he is entitled to be informed of the charge against him; and he must be given opportunity to defend himself.

. . .

. . . Positive conclusions as to the existence of some irregularities in a trial of a case obviously do not necessarily justify a pronouncement of a denial of justice. I do not find myself able fully to concur in the general trend of the argument of counsel for the United States that the record of the trial abounds in irregularities which reveal a purpose on the part of the judge at Mazatlán to convict the accused even in the absence of convincing proof of guilt. . . . I am of the opinion that the conclusions of the Commission must be grounded upon the record of the proceedings instituted against the accused. Having in mind the principles asserted by the Commission from time to time as to the necessity for basing pecuniary awards on convincing evidence of a pronounced degree of improper governmental administration, and having further in mind the peculiarly delicate character of an examination of judicial proceedings by an international tribunal, as well as the practical difficulties inherent in such examination, I limit myself to a rigid application of those principles in the instant case by concluding that the Commission should render an award, small in comparison to that claimed, which should be grounded on the mistreatment of the claimant during the period of investigation of his case. While deeply impressed with the importance of a strict application of the principles applic-

able to a case of this character, such application does not, in my opinion, preclude a full appreciation of human rights which it was contended in argument were grossly violated, and which it is clearly shown were in a measure disregarded with resultant injury to a man who languished in prison for seven months and was severely sentenced on scanty evidence for the alleged embezzlement of four pesos.

MacGREGOR, Commissioner, dissenting:

[MacGregor rejected the assertion 'that the accused was ignorant of a single one of the charges made against him, for the simple reason that the records formed in a criminal process are not secret, according to Mexican law, and are, from the time of their commencement at the disposal of the defendants or their counsel . . . .' He continued:]

8. It has been alleged that the trial proper (meaning by trial that part of the proceedings in which the defendants and witnesses as well as the Prosecuting Attorney and counsel appear personally before the Judge for the purpose of discussing the circumstances of the case) lasted five minutes at the most, for which reason it was a mere formality, implying thereby that there was really no trial and that Chattin was convicted without being heard. I believe that this is an erroneous criticism which arises from the difference between Anglo-Saxon procedure and that of other countries. Counsel for Mexico explained during the hearing of this case that Mexican criminal procedure is composed of two parts: Preliminary proceedings (sumario) and plenary proceedings (plenario). In the former all the information and evidence on the case are adduced; the corpus delicti is established; visits are made to the residences of persons concerned; commissions are performed by experts appointed by the Court; testimony is received and the Judge can cross-examine the culprits, counsel for the defense having also the right of cross-examination; public or private documents are received, etc. When the Judge considers that he has sufficient facts on which to establish a case, he declares the instruction closed and places the record in the hands of the parties (the defendant and his counsel on the one side evidence has been received are the parties in the cause requested to and the Prosecuting Attorney on the other [sic]), in order that they may state whether they desire any new evidence filed, and only when such file their respective final pleas. This being done, the public hearing is held, in which the parties very often do not have anything further to allege, because everything concerning their interests has already been done and stated. In such a case, the hearing is limited to the Prosecuting Attorney's ratification of his accusation, previously filed, and the defendants and their counsel also rely on the allegations previously made by them, these two facts being entered in the record, whereupon the Judge declares the case closed and it becomes ready to be decided. This is what happened in the criminal proceedings which have given rise to

this claim, and they show, further, that the defendants, including Chattin, refused to speak at the hearing in question or to adduce any kind of argument or evidence. In view of the foregoing explanation, I believe that it becomes evident that the charge, that there was no trial proper, can not subsist, for, in Mexican procedure, it is not a question of a trial in the sense of Anglo-Saxon law, which requires that the case be always heard in plenary proceedings, before a jury, adducing all the circumstances and evidence of the cause, examining and cross-examining all the witnesses, and allowing the prosecuting attorney and counsel for the defense to make their respective allegations. International law insures that a defendant be judged openly and that he be permitted to defend himself, but in no manner does it oblige these things to be done in any fixed way, as they are matters of internal regulation and belong to the sovereignty of States.

. . .

10. I admit that [other deficiencies] exist and that they show that the Judge could have carried out the investigation in a more efficient manner, but the fact that it was not done does not mean any violation of international law.

. . .

19. I consider that this is one of the most delicate cases that has come before the Commission and that its nature is such that it puts to a test the application of principles of international law. It is hardly of any use to proclaim in theory respect for the judiciary of a nation, if, in practice, it is attempted to call the judiciary to account for its minor acts. It is true that sometimes it is difficult to determine when a judicial act is internationally improper and when it is so from a domestic standpoint only. In my opinion the test which consists in ascertaining if the act implies damage, wilful neglect, or palpable deviation from the established customs becomes clearer by having in mind the damage which the claimant could have suffered. There are certain defects in procedure that can never cause damage which may be estimated separately, and that are blotted out or disappear, to put it thus, if the final decision is just. There are other defects which make it impossible for such decision to be just. The former, as a rule, do not engender international liability; the latter do so, since such liability arises from the decision which is iniquitous because of such defects. To prevent an accused from defending himself, either by refusing to inform him as to the facts imputed to him or by denying him a hearing and the use of remedies; to sentence him without evidence, or to impose on him disproportionate or unusual penalties, to treat him with cruelty and discrimination; are all acts which per se cause damage due to their rendering a just decision impossible. But to delay the proceedings somewhat, to lay aside some evidence, there existing other clear proofs, to fail to comply with the adjective law in its secondary provisions and other deficiencies of this kind, do not cause damage nor violate international law. Counsel for Mexico justly

stated that to submit the decisions of a nation to revision in this respect was tantamount to submitting her to a régime of capitulations. All the criticism which has been made of these proceedings, I regret to say, appears to arise from lack of knowledge of the judicial system and practice of Mexico, and, what is more dangerous, from the application thereto of tests belonging to foreign systems of law. For example, in some of the latter the investigation of a crime is made only by the police magistrates and the trial proper is conducted by the Judge. Hence the reluctance in accepting that one same judge may have the two functions and that, therefore, he may have to receive in the preliminary investigation (instrucción) of the case all kinds of data, with the obligation, of course, of not taking them into account at the time of judgment, if they have no probative weight. It is certain that the secret report, so much discussed in this case, would have been received by the police of the countries which place the investigation exclusively in the hands of such branch. This same police would have been free to follow all the clues or to abandon them at its discretion; but the Judge is criticized here because he did not follow up completely the clue given by Ramirez with respect to Chattin. The same domestic test—to call it such—is used to understand what is a trial or open trial imagining at the same time that it must have the sacred forms of common-law and without remembering that the same goal is reached by many roads. And the same can be said when speaking of the manner of taking testimony of witnesses, of cross-examination, of holding confrontations, etc.

20. In view of the above considerations, I am of the opinion that this claim should be disallowed.

COMMENT ON PROBLEMS IN DEVELOPING AN INTERNATIONAL MINIMUM STANDARD IN CRIMINAL PROCEDURE

As the opinions in *Chattin* indicate, fundamental differences exist between common-law and civil-law criminal procedure. Moreover, there are important differences within each group—for example, between Mexico and France. Consider some aspects of the more-or-less contemporary French judicial process that appear applicable in a case similar to *Chattin*—a case that would likely be regarded as a *délit* (misdemeanor) rather than *crime* (felony) in view of the conduct and small sum involved.

Official proceedings would likely start with a preparatory investigation by the *juge d'instruction* (examining magistrate), who may visit the scene of the crime, conduct searches, call witnesses and experts and so on. Witnesses are heard under oath without the accused being present, and their statements are put in writing. The accused is informed of the charge, and told that he need make no statement and has the right to counsel. Indeed, absent an express waiver, the accused cannot be examined or confronted unless counsel is present. Throughout these pretrial proceedings, the *dossier* (official file) grows.

and counsel may consult it. Counsel may pose questions during proceedings only with the authorization of the examining magistrate.

After the investigation and pre-trial proceedings are completed, the magistrate determines if the evidence is sufficient to justify further proceedings, and if so, determines the appropriate court (in view of the nature of the charge) to which the case should be sent for trial. The *dossier* is transmitted to that court. The magistrate plays no further role. The case in handled (for *délits*) by a three-judge court. Trial hearings are public; there are no formal rules of procedure in the Anglo-American sense. The court's president interrogates the accused and poses questions to witnesses, including as useful the questions proposed by the parties.

Among the stark contrasts between the Mexican or French procedures and criminal trials in the United States is the traditional and constitutional requirement of trial by jury. Another pervasive difference is the significance in the Anglo-American jury trial of what has been loosely termed an accusatorial or prosecutorial rather than an inquisitorial approach. The court in the Anglo-American world is relatively quiescent. Initiative lies generally with the parties, who develop facts and seek evidence through personal or police inquiry, summon witnesses whom they examine, and generally give direction to the legal or factual inquiries pursued during pre-trial proceedings or at trial. The court aids them through the issuance of its official process, as necessary.

A critical ingredient of this approach is the emphasis which Anglo-American legal systems place upon direct confrontation and cross-examination. Compare, for example, the decision in *Pointer* v. *Texas*, 380 U.S. 400 (1965), with the Mexican and French procedures. The Supreme Court there held that the Due Process Clause of the Fourteenth Amendment forbade the prosecutor in a state criminal trial to use a transcript of the witness's testimony which was given at a preliminary hearing at which the defendant, present without counsel, did not cross-examine. The witness himself was absent from the trial. The Court stated that 'the Sixth Amendment's right of an accused to confront the witnesses against him is . . . a fundamental right and is made obligatory on the States by the Fourteenth Amendment. . . . There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.' The transcript, concluded the Court, had not been taken under circumstances giving the defendant 'through counsel an adequate opportunity to cross-examine . . . .'

The *Chattin* opinions underscore the methodological problems in developing a minimum international standard of criminal procedure out of such diverse materials—a diversity there restricted to Europe and Latin America, hence far less perplexing than the worldwide diversity of legal cultures and criminal processes among the states of the contemporary world. A treaty was relevant to *Chattin*, but as indicated above, it addressed the scope and structure of the arbitration between the United States and Mexico rather than the international

norms of criminal procedure to be applied. The only reference of the General Claims Convention to applicable norms was the terse provision in Article 1 that claims should be submitted to the tripartite Commission 'for decision in accordance with the principles of international law, justice and equity.'

Today a dispute like that in *Chattin* could draw on a human rights treaty, the International Covenant on Civil and Political Rights to be discussed in Chapter 3 that (as of September 1995) had 131 states parties. Article 14 of that Covenant dealing with criminal trials provides in relevant part:

> 1. All persons shall be equal before the courts . . . . [E]veryone shall be entitled to a fair and public hearing by [an] impartial tribunal . . . .
>
> 2. Everyone . . . shall have the right to be presumed innocent until proved guilty according to law.
>
> 3. . . . [E]veryone shall be entitled to the following minimum guarantees . . . .
>
> (d) To be tried in his presence and to defend himself in person or through legal assistance of his own choosing . . . ;
>
> (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf . . . .

QUESTIONS

1. How would you identify the most serious issues in the judicial process leading to Chattin's conviction—say, on the basis of a comparison between the Mexican and French systems? Does the challenge to Chattin's conviction implicate the Mexican system of criminal justice structurally—that is, do the two commissioners finding the conviction to violate an international standard indict the structure of the Mexican system of criminal justice in general? Or rather do they find an aberration from that system in this particular case?

2. How do the commissioners approach the task of identifying an 'international standard of civilization' (or, within the terms of the 1923 Convention, the relevant 'international law, justice and equity') against which they test the legality of the conviction and imprisonment of Chattin? Is this decision an illustration of a tribunal's defining and applying customary international law, or is some other 'source' or 'process' of international law also involved? Does any other provision of Article 38(1) of the I.C.J. Statute or does the discussion by Schachter at p. 47, *supra*, illuminate this last question?

3. What threshold problems do you see in the working out—by a tribunal, by a multilateral conference drafting a treaty, by a scholar—of a general international standard governing criminal process?

4. Would the tribunal's task have been much simpler if there had been a treaty between the U.S. and Mexico regulating treatment of aliens that included Article 14 of the ICCPR? Would Article 14 have resolved on its face all the issues?

5. Issues similar to those in *Chattin*, particularly the significance of having the same judge preside over pretrial proceedings and the actual trial, have been the subject of several decisions of the European Court of Human Rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms. Do such issues appear easier to resolve in a regional context like Europe than in the Universal settin gof the ICCPR?

ADDITIONAL READING

Richard Baxter, *Reflections on Codification in Light of the International Law of State Responsibility for Injuries to Aliens*, 16 Syracuse L. Rev. 745 (1965); Richard Lillich, *The Current Status of the Law of State Responsibility*, in Lillich (ed.) *International Law of State Responsibility for Injuries to Aliens* (1983); Guha Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?*, 55 Am. J. Int. L. 863 (1961).

COMMENT ON THE MINORITIES REGIME AFTER WORLD WAR I

The *Minority Schools in Albania* opinion that follows illustrates treaties as a source and major expression of international law, and introduces another field of international law that influenced the growth of the human rights movement. This Comment provides some background to the opinion.

Treaties and other special regimes to protect minorities have a long history in international law dating from the emergence in the seventeenth century of the modern form of the political state, sovereign within its territorial boundaries. Within Europe religious issues became a strong concern since states often included more than one religious denomination, and abuse by a state of a religious minority could lead to intervention by other states where that religion was dominant. Hence peace treaties sometimes included provisions on religious minorities. In later centuries, the precarious situation of Christian minorities within the Ottoman Empire and of religious minorities in newly independent East European or Balkan states led to outbreaks of violence and to sporadic treaty regulation.

World War I ushered in an era of heightened attention to problems of racial, religious or linguistic minorities. The collapse of the great Austro-Hungarian and Ottoman multinational empires, and the chaos as the Russian empire of the Romanoffs was succeeded by the Soviet Union, led to much redrawing of maps and the creation of new states. President Wilson's Fourteen Points, however compromised they became in the Versailles Treaty and later arrangements, nonetheless exerted influence on the postwar settlements. In it

and other messages, Wilson stressed the ideals of the freeing of minorities and the related 'self-determination' of peoples or nationalities. That concept of self-determination, so politically powerful and open to such diverse interpretations, continues to this day to be much disputed and to have profound consequences. It not only appears in the UN Charter but is given a position of high prominence in the two principal human rights covenants. Its current significance is examined in Chapter 4.

From concepts like self-determination and out of the legacy of nineteenth century liberal nationalism that saw the development of nation-states like Germany and Italy, the principle of nationalities took on a new force. Here was another ambiguous and disputed concept—the 'nation' or 'nationality' as distinct from the political state, the nation (often identified with a 'people') defined in cultural or historical terms, often defined more concretely in racial, linguistic and religious terms. One goal in displacing the old empires with new or redrawn states was to identify the nation with the state—ideally, to give each 'nation' its own state. Membership in a 'nation' would ideally be equivalent to membership in a 'state' consisting only or principally of that nation.

Within the pure realization of this ideal, all 'Poles,' for example, would be situated in Poland; there would be no 'Polish' minority in other states, and other 'nationalities' would not be resident in Poland. However, even the detaching of Poland after World War I from the empires and states that had absorbed different parts of it failed to acheive a strict congruence between the 'nation' and 'state'. There were polar moves, for example the creation of Yugoslavia as a multiethnic state that after seventy years has had such tragic consequences.

Of course the goal of total identification of state with nation—a goal itself disputed and in contradiction with other conceptions of the political state that did not emphasize cultural homogeneity or ethnic purity—could not be realized. Life and history were and remain too various and complex for such precise correlations. The nineteenth century examples of Germany and Italy, for example, were far from unitary; each had its national, ethnic, linguistic, and religious minorities. National or ethnic homogeneity could be achieved in the vast majority of the world's states only by the compulsory and massive migrations of minority groups, migrations far more systematic and coercive than were some of the population movements and exchanges after World War I. A 'nation' defined, say, in linguistic–religious terms would generally transcend national boundaries and be located in the territories of two or several sovereign states in the new world created by the postwar settlements. A Greek-speaking Christian minority would, for example, be present in the reconfigured Muslim Albania.

Bear in mind another confusing linguistic usage. The term 'national' is generally used in international law to signify the subjects or citizens of a state. Hence members of the 'German' nation (in the sense of a 'people' and 'culture') living in Poland could be Polish 'nationals' in the sense of being citizens of Poland. Or they could possess only German citizenship and be alien residents in Poland. In the *Minority Schools in Albania* case that follows, members of the

Greek-speaking Christian minority (part of a 'nation' in the cultural or ethnic sense) in Muslim Albania were 'nationals' (citizens) of Albania. One can imagine the ambiguity attending the frequent usage of the term 'national minorities,' which could mean at least (1) a group in a state belonging in the cultural or ethnic sense to a 'nation' that constituted a minority in that state, or (2) all minorities in a state who were 'nationals' (citizens) of that state.

After World War I, the victorious powers and the new League of Nations sought to address this situation. They confronted the impossibility, even if it were desirable, of creating ethnically homogeneous states. Hence they had to deal with the continuing presence in states of minorities which had frequently been abused in ways ranging from economic discrimination to pogroms and other violence that could implicate other states, spill across international boundaries and lead to war. The immediate trigger for the outbreak of World War I in the tormented Balkans was fresh in memory.

President Wilson had proposed that the Covenant of the League of Nations include norms governing the protection of minorities that would have embraced all members of the League. The other major powers rejected this approach, preferring discrete international arrangements to handle discrete problems of minorities in particular states of Central-East Europe and the Balkans rather than a universal treaty system. This compromise led to the regime of the so-called Minorities Treaties that were imposed on the new or reconfigured states of Central-East Europe and the Balkans.

For some states like Austria and Hungary, provisions for minority protection were included in the peace treaties. Other states like Poland or Greece signed minority protection treaties with the allied and associated powers. Some states like Albania and Lithuania made minority protection declarations as a condition for their membership in the League of Nations. There were also bilateral treaties protecting minorities such as one between Germany and Poland. Note that one of the features of this new regime was to insulate the victorious powers from international regulation of their treatment of their own citizens belonging to minorities.

Although there were significant variations among these treaties and declarations, many provisions were common. The 1919 Minorities Treaty between the Principal Allied and Associated Powers and Poland served as a model for later treaties and declarations. It provided for protection of life and liberty and religious freedom for all 'inhabitants of Poland.' All Polish nationals (citizens) were guaranteed equality before the law and the right to use their own language in private life and judicial proceedings. Members of racial, religious or linguistic minorities were guaranteed 'the same treatment and security in law and in fact' as other Polish nationals, and the right to establish and control at their expense their own religious, social and educational institutions. In areas of Poland where a 'considerable proportion' of Polish nationals belonged to minorities, an 'equitable share' of public funds would go to such minority groups for educational or religious purposes. In view of the particular history of oppression and violence, there were specific guarantees for Jews.

Like other minority treaties and declarations, the Polish treaty's provisions were placed under the guarantee of the League of Nations to the extent that 'they affect persons belonging to' minority groups. The League developed procedures to implement its duties, including a right of petition to it by beleaguered minorities claiming that a treaty regime or declaration had been violated, and including a minorities committees given the task of seeking negotiated solutions to such disputes. As shown by the *Minority Schools in Albania* case, the Council of the League could invoke in accordance with its usual procedures the advisory opinion jurisdiction of the Permanent Court of International Justice (P.C.I.J.), the first international court (supplementing *ad hoc* arbitral tribunals as in the *Chattin* case). The Court was created by the League in 1921, became dormant in World War II, and was then succeeded by the International Court of Justice created under the UN Charter.

MINORITY SCHOOLS IN ALBANIA

Advisory Opinion, Permanent Court of International Justice, 1935.
Series A/B–No. 64.

[In 1920, the Assembly of the League of Nations adopted a recommendation requesting that if Albania were admitted into the League, it 'should take the necessary measures to enforce the principles of the Minorities Treaties' and to arrange the 'details required to carry this object into effect' with the Council of the League. Albania was admitted to membership a few days later. In 1921 the Council included on its agenda the question of protection of minorities in Albania.

The Greek government, in view of the presence of a substantial Christian minority of Greek origin in (dominantly Muslim) Albania, communicated to the League proposals for provisions going beyond the Minorities Treaties that were related to Christian worship and to education in the Greek language. The Council commissioned a report, and the reporter submitted to it a draft Declaration to be signed by Albania and formally communicated to the Council. The Declaration was signed by Albania and submitted to the Council in 1921, with basic similarities to but some differences from the typical clauses of the Minorities Treaties. The Council decided that the stipulations in the Declaration about minorities should be placed under the guarantee of the League from the date of the Declaration's ratification by Albania, which took place in 1922.

The first paragraph of Article 5 of the Declaration, at the core of the dispute that later developed, provided as follows:

> Albanian nationals who belong to racial, linguistic or religious minorities, will enjoy the same treatment and security in law and in fact as other

> Albanian nationals. In particular, they shall have an equal right to maintain, manage and control at their own expense or to establish in the future, charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein.

Over the years, numerous changes in the laws and practices of the Albanian government led to questions about compliance with the Declaration. In 1933, the Albanian National Assembly modified Articles 206 and 207 of the Constitution, which had provided that 'Albanian subjects may found private schools' subject to government regulation, to state:

> The instruction and education of Albanian subjects are reserved to the State and will be given in State schools. Primary education is compulsory for all Albanian nationals and will be given free of charge. Private schools of all categories at present in operation will be closed.

The new provisions affecting Greek-language and other private schools led to petitions and complaints to the League from groups including the Greek minority in Albania. Acting within its regular powers, the Council requested the Permanent Court of International Justice in 1935 to give an advisory opinion whether, in light of the 1921 Declaration as a whole, Albania was justified in its position that it had acted in conformity with 'the letter and the spirit' of Article 5 because (as Albania argued) its abolition of private schools was a general measure applicable to all Albanian nationals, whether members of an ethnic majority or minority.

There follow excerpts from the opinion for the P.C.I.J. and from a dissenting opinion. For present purposes, the Albanian Declaration can be understood as tantamount to a treaty. The opinions draw no relevant distinction between the two, and refer frequently to the Minorities Treaties to inform their interpretation of the Declaration.]

The contention of the Albanian Government is that the above-mentioned clause imposed no other obligation upon it, in educational matters, than to grant to its nationals belonging to racial, religious, or linguistic minorities a right equal to that possessed by other Albanian nationals. Once the latter have ceased to be entitled to have private schools, the former cannot claim to have them either. This conclusion, which is alleged to follow quite naturally from the wording of paragraph 1 of Article 5, would, it is contended, be in complete conformity with the meaning and spirit of the treaties for the protection of minorities, an essential characteristic of which is the full and complete equality of all nationals of the State, whether belonging to the majority or to the minority. On the other hand, it is argued, any interpretation which would compel Albania to respect the private minority schools would create a privilege in favour of the minority and run counter to the essential idea of the law governing minorities. Moreover, as the minority régime is an extraordinary

régime constituting a derogation from the ordinary law, the text in question should, in case of doubt, be construed in the manner most favourable to the sovereignty of the Albanian State.

According to the explanations furnished to the Court by the Greek Government, the fundamental idea of Article 5 of the Declaration was on the contrary to guarantee freedom of education to the minorities by granting them the right to retain their existing schools and to establish others, if they desired; equality of treatment is, in the Greek Government's opinion, merely an adjunct to that right, and cannot impede the purpose in view, which is to ensure full and effectual liberty in matters of education. Moreover, the application of the same régime to a majority as to a minority, whose needs are quite different, would only create an apparent equality, whereas the Albanian Declaration, consistently with ordinary minority law, was designed to ensure a genuine and effective equality, not merely a formal equality.

. . .

As the Declaration of October 2nd, 1921, was designed to apply to Albania the general principles of the treaties for the protection of minorities, this is the point of view which, in the Court's opinion, must be adopted in construing paragraph I of Article 5 of the said Declaration.

*

The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority, and satisfying the ensuing special needs.

In order to attain this object, two things were regarded as particularly necessary, and have formed the subject of provisions in these treaties.

The first is to ensure that nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State.

The second is to ensure for the minority elements suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics.

These two requirements are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority.

In common with the other treaties for the protection of minorities, and in particular with the Polish Treaty of June 28th, 1919, the text of which it follows, so far as concerns the question before the Court, very closely and almost literally, the Declaration of October 2nd, 1921, begins by laying down that no

person shall be placed, in his relations with the Albanian authorities, in a position of inferiority by reason of his language, race or religion. . . .

. . .

In all these cases, the Declaration provides for a régime of legal equality for all persons mentioned in the clause; in fact no standard of comparison was indicated, and none was necessary, for at the same time that it provides for equality of treatment the Declaration specifies the rights which are to be enjoyed equally by all.

. . .

It has already been remarked that paragraph 1 of Article 5 consists of two sentences, the second of which is linked to the first by the words *in particular*: for a right apprehension of the second part, it is therefore first necessary to determine the meaning and the scope of the first sentence.

This sentence is worded as follows:

> Albanian nationals who belong to racial, linguistic or religious minorities, will enjoy the same treatment and security in law and in fact as other Albanian nationals.

The question that arises is what is meant by the *same treatment and security in law and in fact*.

It must be noted to begin with that the equality of all Albanian nationals before the law has already been stipulated in the widest terms in Article 4. As it is difficult to admit that Article 5 set out to repeat in different words what had already been said in Article 4, one is led to the conclusion that 'the same treatment and security in law and in fact' which is provided for in Article 5 is not the same notion as the equality before the law which is provided for in Article 4.

. . .

This special conception finds expression in the idea of an equality in fact which in Article 5 supplements equality in law. All Albanian nationals enjoy the equality in law stipulated in Article 4; on the other hand, the equality between members of the majority and of the minority must, according to the terms of Article 5, be an equality in law and in fact.

It is perhaps not easy to define the distinction between the notions of equality in fact and equality in law; nevertheless, it may be said that the former notion excludes the idea of a merely formal equality; that is indeed what the Court laid down in its Advisory Opinion of September 10th, 1923, concerning the case of the German settlers in Poland (Opinion No. 6), in which it said that:

> There must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law.

Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations.

It is easy to imagine cases in which equality of treatment of the majority and of the minority, whose situation and requirements are different, would result in inequality in fact; treatment of this description would run counter to the first sentence of paragraph I of Article 5. The equality between members of the majority and of the minority must be an effective, genuine equality; that is the meaning of this provision.

The second sentence of this paragraph provides as follows:

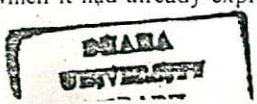
> In particular they shall have an equal right to maintain, manage and control at their own expense or to establish in the future, charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein.

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This sentence of the paragraph being linked to the first by the words 'in particular', it is natural to conclude that it envisages a particularly important illustration of the application of the principle of identical treatment in law and in fact that is stipulated in the first sentence of the paragraph. For the institutions mentioned in the second sentence are indispensable to enable the minority to enjoy the same treatment as the majority, not only in law but also in fact. The abolition of these institutions, which alone can satisfy the special requirements of the minority groups, and their replacement by government institutions, would destroy this equality of treatment, for its effect would be to deprive the minority of the institutions appropriate to its needs, whereas the majority would continue to have them supplied in the institutions created by the State.

Far from creating a privilege in favour of the minority, as the Albanian Government avers, this stipulation ensures that the majority shall not be given a privileged situation as compared with the minority.

It may further be observed that, even disregarding the link between the two parts of paragraph I of Article 5, it seems difficult to maintain that the adjective 'equal', which qualifies the word 'right', has the effect of empowering the State to abolish the right, and thus to render the clause in question illusory; for, if so, the stipulation which confers so important a right on the members of the minority would not only add nothing to what has already been provided in Article 4, but it would become a weapon by which the State could deprive the minority régime of a great part of its practical value. It should be observed that in its Advisory Opinion of September 15th, 1923, concerning the question of the acquisition of Polish nationality (Opinion No. 7), the Court referred to the opinion which it had already expressed in Advisory Opinion



No. 6 to the effect that 'an interpretation which would deprive the Minorities Treaty of a great part of its value is inadmissible'.

. . . The idea embodied in the expression 'equal right' is that the right thus conferred on the members of the minority cannot in any case be inferior to the corresponding right of other Albanian nationals. In other words, the members of the minority must always enjoy the right stipulated in the Declaration, and, in addition, any more extensive rights which the State may accord to other nationals. . . .

The construction which the Court places on paragraph 1 of Article 5 is confirmed by the history of this provision.

[Analysis of the proposals of the Greek Government and replies of the Albanian Government during the period of drafting of the Declaration omitted.]

The Court, having thus established that paragraph 1 of Article 5 of the Declaration, both according to its letter and its spirit, confers on Albanian nationals of racial, religious or linguistic minorities the right that is stipulated in the second sentence of that paragraph, finds it unnecessary to examine the subsidiary argument adduced by the Albanian Government to the effect that the text in question should in case of doubt be interpreted in the sense that is most favourable to the sovereignty of the State.

. . .

For these reasons,

The Court is of opinion,

by eight votes to three,

that the plea of the Albanian Government that, as the abolition of private schools in Albania constitutes a general measure applicable to the majority as well as to the minority, it is in conformity with the letter and spirit of the stipulations laid down in Article 5, first paragraph, of the Declaration of October 2nd, 1921, is not well founded.

. . .

DISSENTING OPINION BY SIR CECIL HURST, COUNT ROSTWOROWSKI AND M. NEGULESCO.

The undermentioned are unable to concur in the opinion rendered by the Court. They can see no adequate reason for holding that the suppression of the private schools effected in Albania in virtue of Articles 206 and 207 of the Constitution of 1933 is not in conformity with the Albanian Declaration of October 2nd, 1921.

. . .

The construction of the paragraph is clear and simple. The first sentence stipulates for the treatment and the security being the same for the members of the minority as for the other Albanian nationals. The second provides that as regards certain specified matters the members of the minority shall have an equal right. The two sentences are linked together by the words 'In particular' (*notamment*). These words show that the second sentence is a particular application of the principle enunciated in the first. If the rights of the two categories under the first sentence are to be the same, the equal right provided for in the second sentence must indicate equality between the same two categories, viz. the members of the minority and the other Albanian nationals. The second sentence is added because the general principle laid down in the first sentence mentions only 'treatment and security in law and in fact'—a phrase so indefinite that without further words of precision it would be doubtful whether it covered the right to establish and maintain charitable, religious and social institutions and schools and other educational establishments, but the particular application of the general principle of identity of treatment and security remains governed by the dominating element of equality as between the two categories.

The word 'equal' implies that the right so enjoyed must be equal in measure to the right enjoyed by somebody else. '*They shall have an equal right*' means that the right to be enjoyed by the people in question is to be equal in measure to that enjoyed by some other group. A right which is unconditional and independent of that enjoyed by other people cannot with accuracy be described as an 'equal right'. 'Equality' necessarily implies the existence of some extraneous criterion by reference to which the content is to be determined.

If the text of the first paragraph of Article 5 is considered alone, it does not seem that there could be any doubt as to its interpretation. It is, however, laid down in the Opinion from which the undersigned dissent that if the general purpose of the minority treaties is borne in mind and also the contents of the Albanian Declaration taken as a whole, it will be found that the 'equal right' provided for in the first paragraph of Article 5 cannot mean a right of which the extent is measured by that enjoyed by other Albanian nationals, and that it must imply an unconditional right, a right of which the members of the minority cannot be deprived.

. . .

As the opinion of the Court is based on the general purpose which the minorities treaties are presumed to have had in view and not on the text of Article 5, paragraph I, of the Albanian Declaration, it involves to some extent a departure from the principles hitherto adopted by this Court in the interpretation of international instruments, that in presence of a clause which is reasonably clear the Court is bound to apply it as it stands without considering whether other provisions might with advantage have been added to it or

substituted for it, and this even if the results following from it may in some particular hypothesis seem unsatisfactory.

. . .

Furthermore, the suppression of the private schools—even if it may prejudice to some appreciable extent the interests of a minority—does not oblige them to abandon an essential part of the characteristic life of a minority. In interpreting Article 5, the question whether the possession of particular institutions may or may not be *important* to the minority cannot constitute the decisive consideration. There is another consideration entitled to equal weight. That is the extent to which the monopoly of education may be of importance to the State. The two considerations cannot be weighed one against the other: Neither of them—in the absence of a clear stipulation to that effect—can provide an objective standard for determining which of them is to prevail.

International justice must proceed upon the footing of applying treaty stipulations impartially to the rights of the State and to the rights of the minority, and the method of doing so is to adhere to the terms of the treaty—as representing the common will of the parties—as closely as possible.

. . .

If the intention of the second sentence: 'In particular they [the minority] shall have an equal right . . .', had been that the right so given should be universal and unconditional, there is no reason why the draftsman should not have dealt with the right to establish institutions and schools in the earlier articles [of the Declaration that set up fixed and universal standards for all Albanians on matters like protection of life and free exercise of religion]. The draftsman should have dealt with the liberty to maintain schools and other institutions on lines similar to those governing the right to the free exercise of religion, which undoubtedly is conferred as a universal and unconditional right. Instead of doing so the right conferred upon the minority is an 'equal' right . . .

. . .

COMMENT ON FURTHER ASPECTS OF THE MINORITY TREATIES

The *Minority Schools in Albania* opinions address many current issues that remain vexing. The discussions about the nature of 'equality' and assurances thereof, in particular about equality 'in law' and 'in fact,' inform contemporary human rights law as well as constitutional and legislative debates in many states with respect to issues like equal protection and affirmative action. The question whether the Declaration and the Court's opinion recognized only the

rights of individual members of a minority, or also the right of the minority itself as a collective or group, remains one that vexes the discussion of minority rights. Protection aiming at the cultural survival of minorities continues to raise the troubling issue of which types of minorities merit such protection, and whether assurance of equal protection (with the majority) is sufficient for the purpose. See Chapter 14.

Although the issues debated within the minorities regime remain vital, the regime itself disappeared. Over the next two decades, its norms were roundly violated. Its international machinery within the League of Nations proved to be ineffectual, partly for the same lack of political will that led to other disastrous events in the interwar period. The failure of the regime was tragic in its consequences. Its noble purposes were distorted or blunted or ignored as Europe of the 1930s moved toward the horrors of World War II, the Holocaust and the brutalization and slaughter of so many other minorities. The settlements, norms and institutions after World War II designed to prevent further savagery against minorities stressed different principles and created radically different institutions, principally within the universal human rights system built in and around the United Nations.

Nonetheless, it is important to recognize the distinctive dilemmas and advances as well as the shortcomings of this minorities regime. Sovereignty in the sense of a state's (absolute) internal control over its own citizens was to some extent eroded. Treaties-declarations subjected aspects of the state's treatment of its own citizens to international law and and processes—that is, citizens who were members of a racial, religious or linguistic minority. Although the norms were expressed in bilateral treaties or declarations, the regime took on a multilateral aspect through its incorporation into the League as well as through the large number of nearly simultaneous treaties and declarations. The whole scheme was informed by multilateral planning, in contrast with the centuries-old examples of sporadic bilateral treaties protecting (usually religious) minorities. Minorities became a matter of formal international concern, the treaties-declarations fragmented the state into different sections of its citizens, and international law reached beyond the law of state responsibility to protect some of a state's own citizens.

The precise issue of the *Minority Schools in Albania* case is now addressed in the 1960 UNESCO Convention against Discrimination in Education. Article 5(1)(c) recognizes the 'right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, the use or the teaching of their own language . . . .' The article subjects this right to several provisos. For example, its exercise should not prevent minorities from understanding the culture and language of the larger community as well, or prejudice national sovereignty.

QUESTIONS

1. The types of protections or assurances given by treaty to a distinctive group within a larger polity can be categorized in various ways, including the following. The assurance can be *absolute* (fixed, unconditional) or *contingent* (dependent on some reference group). For example, treaties of commerce between two states may reciprocally grant to citizens of each state the right to reside (for business purposes) and do business (as aliens) in the other state. Some assurances in such treaties will be absolute—for example, citizens of each state are given the right to buy or lease real property for residential purposes in the other state. Other assurances will be contingent—for example, citizens of each state are given the right to organize a corporation and qualify to do business in the other state on the same terms as citizens of that other state (so called 'national treatment'). Within this framework, how would you characterize the rights given to members of a designated minority by the Declaration? Do the majority and dissenting opinions differ about how to characterize them?

2. If you were a member of the Greek-speaking Christian minority, would you have been content with a Declaration that contained no more than a general equal protection clause? If not, why not? How would you justify your argument for more protection?

3. Why do the opinions refer to this minorities regime as 'extraordinary'? In what respects did it depart from classical conceptions of international law, or differ from the law of state responsibility?

4. Does a treaty necessarily solve the problems of the method to be employed in 'identifying' and 'applying' international law that were present in *The Paquete Habana* and *Chattin*? How would you characterize the methodologies or conceptions of interpretation that the majority and dissenting opinions reveal? How do those approaches to interpretation differ with respect to their basic assumptions about the relation between the minorities regime and general international law?

5. Consider how close to or distant from the minorities regime Article 27 of the International Covenant on Civil and Political Rights—the most invoked and influential human rights treaty today with (as of September 1995) 131 states parties—appears on its face to be. It provides:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

ADDITIONAL READING

Nathaniel Berman, *'But the Alternative is Despair': European Nationalism and the Modernist Renewal of International Law*, 106 Harv. L. Rev. 1792 (1993); Danilo Türk, *Minority Issues in the UN: Norms and Institutions*, in Henry Steiner (ed.), *Ethnic Conflict and the UN Human Rights System* (forthcoming 1995).

COMMENT ON THE NUREMBERG TRIALS

The trial at Nuremberg in 1945–46 of major war criminals among the Axis powers, dominantly Nazi party leaders and military officials, gave the nascent human rights movement a powerful impulse. The UN Charter that became effective in 1945 included a few broad human rights provisions. But they were more programmatic than operational, more a program to be realized by states over time than legal rules to be applied immediately to states. Nuremberg, on the other hand, was concrete and applied: prosecutions, convictions, punishment. The prosecution and the Judgment of the International Military Tribunal were based on concepts and norms, some of which had deep roots in international law and some of which represented a significant development of that law that underlay the later formulation of major human rights norms.

The striking aspect of Nuremberg was that the trial and Judgment applied international law doctrines and concepts to impose criminal punishment on individuals for their commission of any of the three types of crimes under international law that are described below. The notion of crimes against the law of nations for which violators bore an individual criminal responsibility was itself an older one, but it had operated in a restricted field. As customary international law developed from the time of Grotius, certain conduct came to be considered a violation of the law of nations—in effect, a universal crime. Piracy on the high seas was long the classic example of this limited category of crimes. Given the common interest of all nations in protecting navigation against interference on the high seas outside the territory of any state, it was considered appropriate for the state apprehending a pirate to prosecute in its own courts. Since there was no international criminal tribunal, prosecution in a state court was the only means of judicial enforcement. To the extent that the state courts sought to apply the customary international law defining the crime of piracy, either directly or as it had become absorbed into national legislation, the choice of forum became less significant, for state courts everywhere, at least in theory, were applying the same law.

One specialized field, the humanitarian laws of war, had long included rules regulating the conduct of war, the so-called *jus in bello*. This body of law imposed sanctions against combatants who committed serious violations of the restrictive rules. Such application of the laws of war, and its foundation in customary norms and in treaties, figure in the Judgment below. But the concept of individual criminal responsibility was not systematically developed. It achieved

a new prominence and a clearer definition after the Nuremberg Judgment, and the treaties and protocols noted at p. 69 *supra*. Gradually other types of conduct have been added to this small list of crimes under international law—for example, slave trading prior to Nuremberg and genocide thereafter.

As World War II came to an end, the Allied powers held several conferences to determine what policies they should follow towards the Germans responsible for the war and the massive, systematic barbarity and destruction of the period. These conferences culminated in the (U.S., U.S.S.R., Britain, France) London Agreement of August 8, 1945, 59 Stat. 1544, E.A.S. No. 472, in which the parties determined to constitute 'an International Military Tribunal for the trial of war criminals.' The Charter annexed to the Agreement provided for the composition and basic procedures of the Tribunal and stated in its three critical articles:

> *Article 6.*
>
> The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.
>
> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
>
> (a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
>
> (b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
>
> (c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.
>
> Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of

the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Article 7.

The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Article 8.

The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Note the innovative character of these provisions. The Tribunal of four judges (one from each of the major Allied Powers) was international in formation and composition and, although restricted to the four victorious powers creating The Tribunal, was radically different from the national military courts before which the laws of war had to that time generally been enforced. At the core of the Charter lay the concept of international crimes for which there would be 'individual responsibility,' a sharp departure from the then-existing customary law or conventions which gave prominence to the duties of (and sometimes to sanctions against) nations. Moreover, in defining crimes within the Tribunal's jurisdiction, the Charter went beyond the traditional 'war crimes' (paragraph (b) of Article 6) in two ways.

First, the Charter included the war-related 'crimes against peace'—so-called *jus ad bellum*, in contrast with the category of war crimes or *jus in bello*. International law had for a long time been innocent of such a concept. After a slow departure during the post-Reformation period from earlier distinctions of philosophers, theologians, and writers on international law between 'just' and 'unjust' wars, the European nations moved towards a conception of war as an instrument of national policy, much like any other, to be legally regulated only as to the manner of its conduct. The Covenant of the League of Nations did not frontally challenge this principle, although it attempted to control aggression through collective decisions of the League. The interwar period witnessed some fortification of the principles later articulated in the Nuremberg Charter, primarily through the Kellogg-Briand pact of 1927 referred to in the Judgment. Today the United Nations Charter requires members (Article 2(4)) to 'refrain in their international relations from the threat or use of force' against other states, while providing (Article 51) that nothing shall impair 'the inherent right of individual or collective self-defense if an armed attack occurs against a Member . . .' When viewed in conjunction with the Nuremberg Charter, those provisions suggest the contemporary effort to distinguish not between 'just' and 'unjust' wars but between 'self-defense' and 'aggression'—the word used in defining 'crimes against peace' in Article 6(a) of that Charter.

Second, Article 6(c) represented an important innovation. There were few precedents for use of the phrase 'crimes against humanity' as part of a description of international law, and its content was correspondingly indeterminate. On its face, paragraph (c) might have been read to include the entire program of the Nazi government to exterminate Jews and other civilian groups, in and outside Germany, whether 'before or during the war,' and thus to include the planning for and early persecution of Jews and other groups preceding the Holocaust as well as the Holocaust itself. Moreover, that paragraph included the persecution or annihilation by Germany of Jews who were German nationals as well as those who were aliens. The advance on the international law of state responsibility to aliens as described in the materials on the *Chattin* case, p. 75, *supra* is evident. Note how the Judgment of the Tribunal interpreted paragraph (c) with respect to these observations.

In other respects as well, the concept of 'crimes against humanity,' even in this early formulation, differed from earlier international law. War crimes were directed to combatants; crimes against humanity could be committed by civilians as well. War crimes could cover discrete as well as systematic action by a combatant—an isolated murder of a civilian by a combatant as well a systematic policy of wanton desruction of towns. Crimes against humanity were directed primarily to planned conduct, to systematic conduct, to massive destruction.

In defining the charges against the major Nazi leaders tried at Nuremberg and its successor tribunals, the Allied powers took care to exclude those types of conduct which had not been understood to violate existing custom or conventions and in which they themselves had engaged—for example, the massive bombing of cities with predictably high tolls of civilians.

JUDGMENT OF NUREMBERG TRIBUNAL

International Military Tribunal (Nuremberg), 1946.
41 Am. J. Int. L. 172 (1947).

. . .

The Law of the Charter

The jurisdiction of the Tribunal is defined in the [London] Agreement and Charter, and the crimes coming within the jurisdiction of the Tribunal, for which there shall be individual responsibility, are set out in Article 6. The law of the Charter is decisive, and binding upon the Tribunal.

The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world. The Charter is not an arbitrary exercise of power on the part of the victorious Nations, but in the view of the Tribunal, as will be shown, it is the expression of international law

existing at the time of its creation; and to that extent is itself a contribution to international law.

. . . With regard to the constitution of the Court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law.

The Charter makes the planning or waging of a war of aggression or a war in violation of international treaties a crime; and it is therefore not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement. But in view of the great importance of the questions of law involved, the Tribunal has heard full argument from the Prosecution and the Defense, and will express its view on the matter.

It was urged on behalf of the defendants that a fundamental principle of all law—international and domestic—is that there can be no punishment of crime without a pre-existing law. '*Nullum crimen sine lege, nulla poena sine lege.*' It was submitted that *ex post facto* punishment is abhorrent to the law of all civilized nations, that no sovereign power had made aggressive war a crime at the time that the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.

In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. . . .

This view is strongly reinforced by a consideration of the state of international law in 1939, so far as aggressive war is concerned. The General Treaty for the Renunciation of War of 27 August 1928, more generally known as the Pact of Paris or the Kellogg–Briand Pact, was binding on 63 nations, including Germany, Italy and Japan at the outbreak of war in 1939. . . .

. . . The nations who signed the Pact or adhered to it unconditionally condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the Pact, any nation resorting to war as an instrument of national policy breaks the Pact. In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the Pact. . . .

. . . The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of true, and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as

offenses against the law of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention. In the opinion of the Tribunal, those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention. . . . The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.

. . .

All these expressions of opinion, and others that could be cited, so solemnly made, reinforce the construction which the Tribunal placed upon the Pact of Paris, that resort to a war of aggression is not merely illegal, but is criminal. The prohibition of aggressive war demanded by the conscience of the world, finds its expression in the series of pacts and treaties to which the Tribunal has just referred.

. . .

. . . That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized. . . . Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.

. . .

. . . The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings. Article 7 of the Charter expressly declares:

> The official position of Defendants, whether as heads of State, or responsible officials in Government departments, shall not be considered as freeing them from responsibility, or mitigating punishment.

On the other hand the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law.

It was also submitted on behalf of most of these defendants that in doing what they did they were acting under the orders of Hitler, and therefore cannot be held responsible for the acts committed by them in carrying out these orders. The Charter specifically provides in Article 8:

> The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment.

The provisions of this article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.

. . .

War Crimes and Crimes against Humanity

. . . War Crimes were committed on a vast scale, never before seen in the history of war. They were perpetrated in all the countries occupied by Germany, and on the High Seas, and were attended by every conceivable circumstance of cruelty and horror. There can be no doubt that the majority of them arose from the Nazi conception of 'total war,' with which the aggressive wars were waged. For in this conception of 'total war,' the moral ideas underlying the conventions which seek to make war more humane are no longer regarded as having force or validity. Everything is made subordinate to the overmastering dictates of war. Rules, regulations, assurances, and treaties all alike are of no moment; and so, freed from the restraining influence of international law, the aggressive war is conducted by the Nazi leaders in the most barbaric way. Accordingly, War Crimes were committed when and wherever the Führer and his close associates thought them to be advantageous. They were for the most part the result of cold and criminal calculation.

. . .

. . . Prisoners of war were ill-treated and tortured and murdered, not only in defiance of the well-established rules of international law, but in complete disregard of the elementary dictates of humanity. Civilian populations in occupied territories suffered the same fate. Whole populations were deported to Germany for the purposes of slave labor upon defense works, armament production, and similar tasks connected with the war effort. Hostages were taken in very large numbers from the civilian populations in all the occupied countries, and were shot as suited the German purposes. Public and private property was systematically plundered and pillaged in order to enlarge the

resources of Germany at the expense of the rest of Europe. Cities and towns and villages were wantonly destroyed without military justification or necessity.

. . .

Murder and Ill-treatment of Civilian Population

Article 6 (b) of the Charter provides that 'ill-treatment . . . of civilian population of or in occupied territory . . . killing of hostages . . . wanton destruction of cities, towns, or villages' shall be a war crime. In the main, these provisions are merely declaratory of the existing laws of war as expressed by the Hague Convention, Article 46. . . .

. . .

One of the most notorious means of terrorizing the people in occupied territories was the use of concentration camps . . . [which] became places of organized and systematic murder, where millions of people were destroyed.

In the administration of the occupied territories the concentration camps were used to destroy all opposition groups. . . .

A certain number of the concentration camps were equipped with gas chambers for the wholesale destruction of the inmates, and with furnaces for the burning of the bodies. Some of them were in fact used for the extermination of Jews as part of the 'final solution' of the Jewish problem. . . .

. . .

Slave Labor Policy

Article 6 (b) of the Charter provides that the 'ill-treatment or deportation to slave labor or for any other purpose, of civilian population of or in occupied territory' shall be a War Crime. The laws relating to forced labor by the inhabitants of occupied territories are found in Article 52 of the Hague Convention. . . . The policy of the German occupation authorities was in flagrant violation of the terms of this convention. . . . [T]he German occupation authorities did succeed in forcing many of the inhabitants of the occupied territories to work for the German war effort, and in deporting at least 5,000,000 persons to Germany to serve German industry and agriculture.

. . .

Persecution of the Jews

The persecution of the Jews at the hands of the Nazi Government has been proved in the greatest detail before the Tribunal. It is a record of consistent and systematic inhumanity on the greatest scale. Ohlendorf, Chief of Amt III in the RSHA from 1939 to 1943, and who was in command of one of the Einsatz groups in the campaign against the Soviet Union testified as to the methods employed in the extermination of the Jews. . . .

When the witness Bach Zelewski was asked how Ohlendorf could admit the murder of 90,000 people, he replied: 'I am of the opinion that when, for years, for decades, the doctrine is preached that the Slav race is an inferior race, and Jews not even human, then such an outcome is inevitable.'

. . .

. . . The Nazi Party preached these doctrines throughout its history, *Der Stürmer* and other publications were allowed to disseminate hatred of the Jews, and in the speeches and public declarations of the Nazi leaders, the Jews were held up to public ridicule and contempt.

. . . By the autumn of 1938, the Nazi policy towards the Jews had reached the stage where it was directed towards the complete exclusion of Jews from German life. Pogroms were organized, which included the burning and demolishing of synagogues, the looting of Jewish businesses, and the arrest of prominent Jewish business men. . . .

It was contended for the Prosecution that certain aspects of this anti-Semitic policy were connected with the plans for aggressive war. The violent measures taken against the Jews in November 1938 were nominally in retaliation for the killing of an official of the German Embassy in Paris. But the decision to seize Austria and Czechoslovakia had been made a year before. The imposition of a fine of one billion marks was made, and the confiscation of the financial holdings of the Jews was decreed, at a time when German armament expenditure had put the German treasury in difficulties, and when the reduction of expenditure on armaments was being considered. . . .

It was further said that the connection of the anti-Semitic policy with aggressive war was not limited to economic matters. . . .

The Nazi persecution of Jews in Germany before the war, severe and repressive as it was, cannot compare, however, with the policy pursued during the war in the occupied territories. . . . In the summer of 1941, however, plans were made for the 'final solution' of the Jewish question in Europe. This 'final solution' meant the extermination of the Jews. . . .

The plan for exterminating the Jews was developed shortly after the attack on the Soviet Union. . . .

. . .

. . . Adolf Eichmann, who had been put in charge of this program by Hitler, has estimated that the policy pursued resulted in the killing of 6 million Jews, of which 4 million were killed in the extermination institutions.

The Law Relating to War Crimes and Crimes against Humanity

. . .

The Tribunal is of course bound by the Charter, in the definition which it gives both of War Crimes and Crimes against Humanity. With respect to War

Crimes, however, as has already been pointed out, the crimes defined by Article 6, Section (b), of the Charter were already recognized as War Crimes under international law. They were covered by Articles 46, 50, 52, and 56 of the Hague Convention of 1907, and Articles 2, 3, 4, 46, and 51 of the Geneva Convention of 1929. That violation of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument.

But it is argued that the Hague Convention does not apply in this case. because of the 'general participation' clause in Article 2 of the Hague Convention of 1907. That clause provided:

> The provisions contained in the regulations (Rules of Land Warfare) referred to in Article 1 as well as in the present Convention do not apply except between contracting powers, and then only if all the belligerents are parties to the Convention.

Several of the belligerents in the recent war were not parties to this Convention.

In the opinion of the Tribunal it is not necessary to decide this question. The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But the convention expressly stated that it was an attempt 'to revise the general laws and customs of war,' which it thus recognized to be then existing, but by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6 (b) of the Charter.

. . .

With regard to Crimes against Humanity there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic. The policy of persecution, repression, and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of Jews during the same period is established beyond all doubt. To constitute Crimes against Humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were Crimes against Humanity within the meaning of the Charter, but from the beginning of the war in 1939 War Crimes were committed on a vast scale, which were also Crimes against Humanity; and insofar as the inhumane acts charged

in the Indictment, and committed after the beginning of the war, did not constitute War Crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted Crimes against Humanity.

[The opinion considered individually each of the 22 defendants at this first trial of alleged war criminals. It found 19 of the defendants guilty of one or more counts of the indictment. It imposed 12 death sentences. Most convictions were for War Crimes and Crimes against Humanity, the majority of those convicted being found guilty of both crimes.]

NOTE

Note the following statement in Ian Brownlie, *Principles of Public International Law* (4th ed. 1990), at 562:

> But whatever the state of the law in 1945, Article 6 of the Nuremberg Charter has since come to represent general international law. The Agreement to which the Charter was annexed was signed by the United States, United Kingdom, France, and USSR, and nineteen other state subsequently adhered to it. In a resolution adopted unanimously on 11 December 1946, the General Assembly affirmed 'the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal'.

There has been considerable expansion in the definitions of two of the crimes defined in Article 6. The field of individual criminal responsibility for war crimes has been both expanded and clarified, through provisions of the Geneva Conventions of 1949 and later instruments. The concept of crimes against humanity has both expanded in coverage and shed some limitations placed on it by the Judgment of the Tribunal. Such developments are described in the materials dealing with the current International Criminal Tribunal for the Former Yugoslavia (and later, for Rwanda as well) in Chapter 15. The notion of 'crimes against peace,' however, has fallen into relative disuse.

Compare with the Nuremberg Judgment the following provisions of the Convention on the Prevention and Punishment of the Crime of Genocide (116 parties as of September 1995) bearing on personal responsibility. The treaty parties 'confirm' in Art. 1 that genocide 'is a crime under international law which they undertake to prevent and to punish.' Persons committing acts of genocide (as defined) 'shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.' (Art. IV). The parties agree (Art. V) to enact the necessary legislation to give effect to the Convention and 'to provide effective penalties for persons guilty of genocide.' Under Art. VI, persons charged with genocide are to be tried by a tribunal 'of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those

Contracting Parties which shall have accepted its jurisdiction.' No international penal tribunal of general jurisdiction has been created.

VIEWS OF COMMENTATORS

There follow a number of authors' observations about the Judgment and the principles underlying the Nuremberg trials.

(1) In a review of a book by Sheldon Glueck entitled *The Nuremberg Trial and Aggressive War* (1946), the reviewer George Finch, 47 Am. J. Int. L. 334 (1947), makes the following arguments:

> As the title indicates, this book deals with the charges at Nuremberg based upon the planning and waging of aggressive war. The author has written it because in his previous volume he expressed the view that he did not think such acts could be regarded as 'international crimes.' He has now changed his mind and believes 'that for the purpose of conceiving aggressive war to be an international crime, the Pact of Paris may, together with other treaties and resolutions, be regarded as evidence of a sufficiently developed *custom* to be accepted as international law' (pp. 4–5). . . .
>
> The reviewer fully agrees with the author in regard to the place of custom in the development of international law. He regards as untenable, however, the argument not only of the author but of the prosecutors and judges at Nuremberg that custom can be judicially established by placing interpretations upon the words of treaties which are refuted by the acts of the signatories in practice, by citing unratified protocols or public and private resolutions of no legal effect, and by ignoring flagrant and repeated violations of non-aggression pacts by one of the prosecuting governments which, if properly weighed in the evidence, would nullify any judicial holding that a custom outlawing aggressive war had been accepted in international law. . . .

(2) In his article *The Nurnberg Trial*, 33 Va. L. Rev. 679 (1947), at 694, Francis Biddle, the American judge on the Tribunal, commented on the definition of 'crimes against humanity' in Article 6(c) of the Charter:

> . . . The authors of the Charter evidently realized that the crimes enumerated were essentially domestic and hardly subject to the incidence of international law, unless partaking of the nature of war crimes. Their purpose was evidently to reach the terrible persecution of the Jews and liberals within Germany before the war. But the Tribunal held that 'revolting and horrible as many of these crimes were,' it had not been established that they were done 'in execution of, or in connection with' any crime within its jurisdiction. After the beginning of the war, however, these inhumane acts were held to have been committed in execution of the war, and were therefore crimes against humanity.
>
> . . .

> Crimes against humanity constitute a somewhat nebulous conception, although the expression is not unknown to the language of international law. . . . With one possible exception . . . crimes against humanity were held [in the Judgment of the Tribunal] to have been committed only where the proof also fully established the commission of war crimes. Mr. Stimson suggested [that the Tribunal eliminate from its jurisdiction matters related to pre-war persecution in Germany], which involved 'a reduction of the meaning of crimes against humanity to a point where they became practically synonymous with war crimes.' I agree. And I believe that this inelastic construction is justified by the language of the Charter and by the consideration that such a rigid interpretation is highly desirable in this stage of the development of international law.

(3) Professor Hans Kelsen, in *Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?*, 1 Int. L. Q. 153 (1947) at 164, was critical of several aspects of the London Agreement and the Judgment. But with respect to the question of retroactivity of criminal punishment, he wrote:

> The objection most frequently put forward—although not the weightiest one—is that the law applied by the judgment of Nuremberg is an ex post facto law. There can be little doubt that the London Agreement provides individual punishment for acts which, at the time they were performed were not punishable, either under international law or under any national law. . . . However, this rule [against retroactive legislation] is not valid at all within international law, and is valid within national law only with important exceptions. [Kelsen notes several exceptions, including the rule's irrelevance to 'customary law and to law created by a precedent, for such law is necessarily retroactive in respect to the first case to which it is applied. . . .']
>
> A retroactive law providing individual punishment for acts which were illegal though not criminal at the time they were committed, seems also to be an exception to the rule against ex post facto laws. The London Agreement is such a law. It is retroactive only in so far as it established individual criminal responsibility for acts which at the time they were committed constituted violations of existing international law, but for which this law has provided only collective responsibility. . . . Since the internationally illegal acts for which the London Agreement established individual criminal responsibility were certainly also morally most objectionable, and the persons who committed these acts were certainly aware of their immoral character, the retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice.

(4) In his biography entitled *Harlan Fiske Stone: Pillar of the Law* (1956), Alpheus Thomas Mason discussed Chief Justice Stone's views about the involvement of Justices of the U.S. Supreme Court in extrajudicial assignments and, in particular, Stone's views about President Truman's appointment of Justice Robert Jackson to be American Prosecutor at the trials. The following excerpts (at p. 715) are all incorporations by Mason in his book of quotations of Chief Justice Stone's remarks.

> So far as the Nuremberg trial is an attempt to justify the application of the power of the victor to the vanquished because the vanquished made aggressive war, . . . I dislike extremely to see it dressed up with a false facade of legality. The best that can be said for it is that it is a political act of the victorious States which may be morally right . . . . It would not disturb me greatly . . . if that power were openly and frankly used to punish the German leaders for being a bad lot, but it disturbs me some to have it dressed up in the habiliments of the common law and the Constitutional safeguards to those charged with crime.
>
> Jackson is away conducting his high-grade lynching party in Nuremberg . . . . I don't mind what he does to the Nazis, but I hate to see the pretense that he is running a court and proceeding according to common law. This is a little too sanctimonious a fraud to meet my old-fashioned ideas.

(5) Professor Herbert Wechsler, in *The Issues of the Nuremberg Trial*, 62 Pol. Sci. Q. 11 (1947), at 23, observed:

> . . . [M]ost of those who mount the attack [on the Judgment on contentions including *ex post facto* law] hasten to assure us that their plea is not one of immunity for the defendants; they argue only that they should have been disposed of politically, that is, dispatched out of hand. This is a curious position indeed. A punitive enterprise launched on the basis of general rules, administered in an adversary proceeding under a separation of prosecutive and adjudicative powers is, in the name of law and justice, asserted to be less desirable than an *ex parte* execution list or a drumhead court-martial constituted in the immediate aftermath of the war. . . . Those who choose to do so may view the Nuremberg proceeding as 'political' rather than 'legal'—a program calling for the judicial application of principles of liability politically defined. They cannot view it as less civilized an institution than a program of organized violence against prisoners, whether directed from the respective capitals or by military commanders in the field.

QUESTIONS

1. Recall clause (c) of Article 38(1) of the Statute of the I.C.J., p. 27, *supra*. Could the Tribunal have relied on that clause to respond to charges of *ex post facto* application of Article 6(c) to individuals who were responsible for the murder of groups of Germans or aliens?

2. Do you agree with the Tribunal's restrictive interpretation of Article 6(c)? Consider the commentary of Francis Biddle.

3. How do you react to the criticism by Finch of the Tribunal's use of treaties in deciding whether customary international law included a given norm? Recall the comments about the growth of customary law by Schachter and Koskenniemi.

ADDITIONAL READING

In addition to the sources cited in the text, see three books of Telford Taylor: *Nuremberg Trials: War Crimes and International Law* (1949); *Nuremberg and Vietnam: An American Tragedy* (1978); and *The Anatomy of the Nuremberg Trials: A Personal Memoir* (1992). See also Memorandum Submitted by the Secretary-General, The Charter and Judgment of the Nürnberg Tribunal: History and Analysis, U.N. Doc. A/CN.4/5 (1949); and Egon Schwelb, *Crimes against Humanity*, 23 Brit. Ybk. Int. L. 178 (1946).

NOTE

The following comments of Louis Henkin review some themes developed in this chapter and describe other antecedents in international law to contemporary human rights.

LOUIS HENKIN, INTERNATIONAL LAW: POLITICS, VALUES AND FUNCTIONS

216 Collected Courses of Hague Academy of International Law 13 (Vol. IV, 1989), at 208.

CHAPTER X

STATE VALUES AND OTHER VALUES: HUMAN RIGHTS

. . .

That until recently international law took no note of individual human beings may be surprising. Both international law and domestic legal norms in the Christian world had roots in an accepted morality and in natural law, and had common intellectual progenitors (including Grotius, Locke, Vattel). But for hundreds of years international law and the law governing individual life did not come together. International law, true to its name, was law only between States, governing only relations between States on the State level. What a State did inside its borders in relation to its own nationals remained its own affair, an element of its autonomy, a matter of its 'domestic jurisdiction'.

Antecedents of the International Law of Human Rights

In fact, neither the international political system nor international law ever closed out totally what went on inside a State and what happened to individuals within a State. Early, international law began to attend to internal matters that held special interest for other States, and those sometimes included concern for individual human beings, or at least redounded to the benefit of

individual human beings. But what was in fact of interest to other States, and what was accepted as being of legitimate interest to other States (and therefore to the system and to law), were limited *a priori* by the character of the State system and its values. Of course, every State was legitimately concerned with what happened to its diplomats, to its diplomatic mission and to its property in the territory of another State. States were concerned, and the system developed norms to assure, that their nationals (and the property of their nationals) in the territory of another State be treated reasonably, 'fairly', and the system and the law early identified an international standard of justice by which a State must abide in its treatment of foreign nationals. States also entered into agreements, usually on a reciprocal basis, promising protection or privilege—freedom to reside, to conduct business, to worship—to persons with whom the other State party to the treaty identified because of common religion or ethnicity.

Concern for individual human welfare seeped into the international system in the eighteenth and nineteenth centuries in other discrete, specific respects. In the nineteenth century, European (and American) States abolished slavery and slave trade. Later, States began to pursue agreements to make war less inhumane, to outlaw some cruel weapons, to safeguard prisoners of war, the wounded, civilian populations. It is noteworthy that, in these instances, even less-than-democratic States began to attend to human values, though humanitarian limitations on the conduct of war may have brought significant cost to the State's military interests.

Following the First World War, concern for individual human beings was reflected in several League of Nations programmes. Building on earlier precedents in the nineteenth century, the dominant States pressed selected other States to adhere to 'minorities treaties' guaranteed by the League, in which States Parties assumed obligations to respect rights of identified ethnic, national or religious minorities among their inhabitants. . . . The years following the First World War also saw a major development in international concern for individual welfare, a development that is often overlooked and commonly underestimated: the International Labour Office (now the International Labour Organisation (ILO) was established and it launched a variety of programmes including a series of conventions setting minimum standards for working conditions and related matters.

In general, the principles of customary international law that developed, and the special agreements that were concluded, addressed only what happened to *some* people inside a State, only in respects with which other States were in fact concerned, and only where such concern was considered their proper business in a system of autonomous States. One can only speculate as to why States accepted these norms and agreements, but it may be reasonable to doubt whether those developments authentically reflected sensitivity to human rights generally. States attended to what occurred inside another State when such happenings impinged on their political-economic interests. States were concerned, and were deemed legitimately concerned, for the freedoms,

privileges, and immunities of their diplomats because an affront to the diplomat affronted his prince (or his State), and because interference with a diplomat interfered with his functions and disturbed orderly, friendly relations. Injury to a foreign national or to his or her property was also an affront to the State of his or her nationality, and powerful States exporting people, goods, and capital to other countries in the age of growing mercantilism insisted on law that would protect the State interests that these represented.

. . .

Humanitarian developments in the law of war reflected some concern by States to reduce the horrors of war for their own people and a willingness in exchange to reduce them for others. Powerful States promoted minorities treaties because mistreatment of minorities with which other States identified threatened international peace. Those treaties were imposed selectively, principally on nations defeated in war and on newly created or enlarged States; they did not establish general norms requiring respect for minorities by the big and the powerful as well; they did not require respect for individuals who were not members of identified minorities, or for members of the majority. . . .

Even the ILO conventions, perhaps, served some less-than-altruistic purposes. Improvement in the conditions of labour was capitalism's defence against the spectre of spreading socialism which had just established itself in the largest country in Europe. States, moreover, had a direct interest in the conditions of labour in countries with which they competed in a common international market: a State impelled to improve labour and social conditions at home could not readily do so unless other States did so, lest the increase in its costs of production render its products non-competitive.

I have stressed the possibly political-economic (rather than humanitarian) motivations for early norms and agreements, identifying a State's concern for the welfare of some of its nationals as an extension of its Statehood and perhaps reflecting principally concern for State interests and values. If some norms and agreements in fact were motivated by concern for a State's own people generally, they did not reflect interest in the welfare of those in other countries, or of human beings generally. State interests rather than individual human interests, or at best the interests of a State's own people rather than general human concerns, also inspired voluntary inter-State co-operation to promote reciprocal economic interests. Occasional assistance to other States, even if for the benefit of the people of that State (as in flood or earthquake relief), was voluntary, out of friendship and generosity (rather than legal obligation), and was provided to the receiving State and penetrated its society only lightly and only with its consent.

I would not underestimate the influence of ideas of rights and constitutionalism in the seventeenth and eighteenth centuries, and of a growing and spreading enlightenment generally: Locke, Montesquieu, other Encyclopedists, Rousseau; the example of the Glorious Revolution in England and the establishment of constitutionalism in the United States; the influence of the

French Declaration of the Rights of Man and of the Citizen. Such ideas and examples have influenced developments inside countries, but they did not easily enter the international political and legal system. Concern by one country for the welfare of individual human beings inside another country met many obstacles, not least the conception and implications of Statehood in a State system. The human condition in other countries and the treatment of individuals by other Governments were not commonly known abroad since they were not included in the information sources of the time. Information (and concern) were filtered through the State system and through diplomatic sources, and human values as such were not the business of diplomacy. For those reasons, and for other reasons flowing from the State system, other States took little note and expressed little concern for what a Government did to its own citizens. In general, the veil of Statehood was impermeable. If occasionally something particularly horrendous happened—a massacre, a pogrom—and was communicated and made known by the available media of communication, it evoked from other States more-or-less polite diplomatic expressions of regret, not on grounds of law but of *noblesse oblige* or of common princely morality wrapped in Christian charity (whose violation gave princes and Christianity a bad name).

Even if the implications of Statehood had not been an obstacle, as regards any but the grossest violations of what we now call human rights, few if any States had moral sensitivity and moral standing to intercede. When a State invoked an international standard of justice on behalf of one of its nationals abroad, it may have been invoking a standard unknown and unheeded at home. Few States had constitutional protections and not many had effective legislative or common-law protections for individual rights. Torture and police brutality, denials of due process, arbitrary detention, perversions of law, were not wildly abnormal. Surely, few States recognized political freedoms—freedom of speech, association and assembly, universal suffrage. Many States denied religious freedom to some, and few States granted complete religious toleration; full equality to members of other than the dominant religion was slow in coming anywhere. Women were subject to rampant and deep-rooted inequalities and domination, often to abuse and oppression. Even today such violations are not the stuff of dramatic television programmes and do not arouse international revulsion and reaction; in earlier times, surely, violations of what are today recognized as civil and political rights caused little stir outside the country. A State's failure to provide for the economic and social welfare of its inhabitants was wholly beyond the ken of other States. There were no alert media of information and few civil rights or other non-governmental organizations to sensitize and activate people and Governments.