INTERNATIONAL HUMAN RIGHTS

THE SUCCESSOR TO INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS AND MORALS

Text and Materials

PHILIP ALSTON
John Norton Pomeroy Professor of Law at New York University School of Law

RYAN GOODMAN
Anne and Joel Ehrenkranz Professor of Law at New York University School of Law
Professor of Politics and Professor of Sociology at New York University

The authors are co-directors of the
Center for Human Rights and Global Justice at New York University School of Law

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2

The Human Rights Regime: Background and Birth

COMMENT ON INTERNATIONAL DIMENSION OF HUMAN RIGHTS REGIME

In its discussion of the legality of the death penalty and related issues, Chapter 1(B) concentrated on the law — often the constitutional law — of different states. The selected opinions of state courts devoted most of their analysis to their own and to foreign legal systems. International law figured through relevant treaty provisions, but in a subsidiary way. It was not at centre stage.

Chapters 2 to 4, on the other hand, concentrate on the international law aspects of the human rights regime. Why has this path been followed? After all, it is 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 the internal law of states as well as foreign and comparative law. It would engage in a contextual and comparative analysis of bodies of domestic law, perhaps devoting its full attention to states like China, Saudi Arabia, Italy, the United States or Guatemala. It could stress the recent trend in many states toward (at least as a formal matter) liberal constitutionalism. For such a study of human rights, international law could play a peripheral role, relevant only when it exerted some clear influence on the national scene or had a place in the basic logic of a judicial decision.

The attractiveness of such an approach becomes more apparent when one contrasts with international human rights many other international subjects where international law occupies, indeed *must* occupy, a central position. Imagine, for example, that this course book's interest was not human rights but the humanitarian law of war as applied to interstate conflicts, 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 profitably examine any one of them without examining international custom and treaties, international institutions and processes.

Violations of human rights are different. Not only are they generally rooted within states rather than in interstate engagements, but they need not on their

surface involve any international consequences whatsoever. (Of course, systemic and severe human rights violations that appear to be 'internal' matters — for example, recurrent violence against an ethnic minority — could well have international consequences, perhaps by leading to refugee flows abroad or by angering other states whose populations are related by ethnicity to the oppressed minority.) In typical instances of violations, the police of state X torture defendants to extract confessions; the government of X shuts the opposition press as elections approach; prisoners are raped by their guards; courts decide cases according to executive command; women or a minority group are barred from education or certain work. 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 concentrate on the internal legal–political system, including that system's provision for civil liberties and human rights.

Nonetheless, since the Second World War it would be inadequate or even misleading to develop a framework for the study of human rights in many countries without including as a major ingredient the international legal and political aspects of the field: laws, processes and institutions. In today's world, human rights is characteristically imagined as a movement involving international law and institutions, as well as a movement involving the spread of liberal constitutions among states. Internal developments in many states have been much influenced by international law and institutions, as well as by pressures from other states trying to enforce international law.

Internal or comparative approaches to human rights law and the truly international aspects of human rights are now broadly recognized to be complexly intertwined and reciprocally influential with respect to the growth of human rights norms, the causes and effects of their violations, 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 regime without a basic knowledge about international law and its contributions to it. The regime's aspirations 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 course book frequently examines but does not concentrate on the internal law and politics of states. It relates throughout this 'horizontal' strand of the human rights movement, as constitutionalism spreads among states, to the 'vertical' strand of the new international law that is meant to bind states and that is implemented by the new international institutions. Both the horizontal and vertical dimensions are vital to an understanding of the human rights regime. But the truly novel developments of the last half-century have involved primarily this second dimension.

Chapter 2 has several functions. It sketches the doctrines and principles in an older international law that served as background to and precedents for the human rights regime that took root and developed immediately after the Second World War. It then examines the early instruments — particularly the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights — that

(together with the later-described International Covenant on Economic, Social and Cultural Rights) form the substantive core of the regime, an International Bill of Rights. The chapter uses national and international decisions of courts and other tribunals not only to present basic doctrines and principles, but also to convey an understanding of international law: its so-called 'sources', its processes of growth, particularly with respect to customary and treaty law. The two tasks are interrelated. By what means or methods have the international rules and standards of the human rights regime developed? By what processes are international legal rules made, elaborated, applied and changed?

Several of the opinions and scholarly writings in the chapter draw on Article 38 of the Statute of the International Court of Justice (ICJ), the judicial organ of the United Nations that was created by the UN Charter of 1945.[1] That article has long served as a traditional point of departure for examining questions about the 'sources' of international law. It repeats (largely in identical language) the similar provisions of the 1921 Statute of its predecessor court, the Permanent Court of International Justice that was linked to the League of Nations and effectively died during the Second World War. It reads:

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.

Although Article 38 formally instructs this particular Court about the method of applying international law to resolve disputes, its influence has extended to other international tribunals, to national courts, and indeed generally to argument based on international law that is made in settings other than courts.

The Article takes a positivist perspective. It defines the task of the Court in terms of its *application* of an identifiable body of international law that in one or another sense, has been consented to ('expressly recognized', 'accepted as law', 'recognized') directly or indirectly by states. Its skeletal list expresses a formal conception of the judicial function that is radically different from that of, say, a legal realist. Consider the following comments on Article 38 by José Alvarez, *International Organizations as Law Makers*, at 46 (2005):

> Public international lawyers, through at least the greater part of the 20th century, have sought to define their field as relatively autonomous from either politics or

[1] The Court can only hear cases to which states are parties: Article 34 of the Statute. A state's consent is necessary for the Court to exercise jurisdiction over it. That consent generally refers to the Court's adjudicating all 'legal disputes' concerning the 'interpretation of a treaty', a 'question of international law', the existence of a fact which, if established 'would constitute a breach of an international obligation' and the reparation to be made for breach of an international obligation: Article 36. Statute of the International Court of Justice, T.S. No. 993 (at p. 25) (U.S.).

morality. Their endeavor turned many, particularly in Europe and North America, towards legal positivism....

...

Nothing embodies these central positivist tenets in international law as much as the doctrine of sources. For most international lawyers trained in the West, article 38 of the Statute of the International Court of Justice remains the "constitution" of the international community. Its enumerated sources of international law — treaties, custom, and general principles of law — remain, for most, the exclusive means for generating legal obligations on states. Through the doctrine of sources, international lawyers define (and defend) their field as characteristically legal. Thanks to sources doctrine, international lawyers argue that international law, like domestic law, also has a circumscribed set of sources and rules for interpreting them; thanks to article 38, international law is distinguished from morality or politics. Thanks to sources, international rules have a distinctive either/or quality, essential to distinguish mere wishful thinking (*lex ferenda*) from black letter obligation (*lex lata*): something either is or is not within one of the recognized sources of international law and someone with the requisite skill, like a judge, can do so....

... The doctrine of sources then, has a dual agenda: it tells the lawyer where to find the law in an objective fashion because it is ostensibly based in the concrete practice of states but it also seeks to provide a normatively constraining code for states....

NOTE

The chapter has the following organization: Section A examines customary law, and illustrates its theme through a national court decision in a field now known as 'the law of armed conflict'. Section B examines aspects of general principles of law and natural law, in the context of an arbitral decision on the law of state responsibility for injury to aliens. Section C examines treaty law by drawing on a decision of the Permanent Court of International Justice on the minorities regime in Europe between the two world wars. Section D looks at the judgment at Nuremberg after the Second World War, at the very threshold of the human rights movement. Section E carries the historical narrative into the formation of the movement, stressing the Universal Declaration of Human Rights.

A. THE LAW OF ARMED CONFLICT AND CUSTOMARY INTERNATIONAL LAW

NOTE

The following decision in *The Paquete Habana* deals with an earlier period in the development of the law of armed conflict (also called international humanitarian

law or 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 law of armed conflict, this case involves *jus in bello*, the ways in which war ought to be waged, the rules of war itself, 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, conditions in which (under contemporary international law) going to war is legal.

In its analysis of the question before it, the US Supreme Court here illustrates a classical understanding of customary international law — an understanding that, we shall see, is today open to substantial challenge and reformation. In reading the opinion, keep in mind two questions. What method does the majority opinion employ to conclude that a relevant, indeed decisive, rule of customary international law has developed? Does the dissent differ as to the method itself or as to its application in this case?

THE PAQUETE HABANA

Supreme Court of the United States, 175 U.S. 677 (1900)

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 Privé 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'.

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 MEKENNA, 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 LAW OF ARMED CONFLICT

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 14 years distant from the savagery of the First World War, let alone that war's successors during the last century with their massive civilian casualties, atrocities and wanton destruction in engagements of close to total war by one or both sides.

The intricate body of international humanitarian law considered by the Supreme Court grew out of centuries of primarily customary law, although custom was supplemented, informed and indeed developed centuries ago by selective bilateral treaties. To this day, custom remains essential to argument about the law of armed conflict, including to the norms considered by international criminal tribunals examined in Chapter 14 and potentially to assessments of military conflict following 11 September examined in Chapter 5. Like many other areas of international law, this field is increasingly dominated by multilateral instruments that have both codified customary standards and rules and developed new ones. 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 the Second World War on matters like bans on particular weapons and protection of cultural property.

In Chapter 5, we introduce the law of armed conflict in greater depth. For now, it is important to know that the basic Geneva Conventions (which have now obtained universal ratification) and the two Protocols (Protocol I, 171 parties; Protocol II, 166 parties) cover a vast range of problems stemming from land, air and naval warfare, including the protection of wounded combatants, prisoners of war, civilian populations and civilian objects, and medical and religious personnel and buildings. As suggested by this list, the provisions of the four Conventions and the two Protocols constitute the principal contemporary regulation of *jus in bello*, that is, how war ought to be waged.

This entire corpus of custom and treaties has as its broad purpose, 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. 120, *infra*, and today governed by the UN Charter), a war fought in compliance with the standards and rules of the laws of war permits — one might say authorizes or legitimates — massive intentional killing or wounding and massive other destruction that, absent a war, would violate the most fundamental human rights norms.

Hence all these standards and rules stand at some perilous and problematic divide between brutality and destruction (1) that is permitted or privileged and (2) that is illegal and subject to sanction. Broad standards like 'proportionality' in choosing military means or like the avoidance of 'unnecessary suffering' are employed to help to draw the line. The powerful ideal of reducing human suffering that animates international humanitarian law 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 the Second World War through the Geneva Conventions of 1949 and the Protocols of 1977. Consider Article 48 of Protocol I to the Geneva Conventions. Article 48 enjoins the parties to a conflict to 'distinguish between the civilian population and combatants and between civilian objects and military objectives'. Military attacks 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; today's total of almost 200 states offers a striking contrast. Consider 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.

COMMENT ON THE ROLE OF CUSTOM

The Supreme Court decision in *The Paquete Habana* raises basic questions about 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 scholarship about the content of human rights law, to the broad debates about human rights within the United Nations, to the arguments of counsel before an international or national tribunal. As this chapter later indicates, the character of such argument today differs in significant respects from the character a century ago at the time of this decision.

Customary law refers 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.[2] Other scholars have contested some of these observations, and today many authorities contend that custom has long been a less rigid, more flexible and dynamic force in law-making.

Clause (b) of Article 38(1) of the Statute of the ICJ states that the Court shall apply 'international custom, as evidence of a general practice accepted as law'. The phrase is as confusing as it is terse. Contemporary formulations of custom have overcome some difficulties in understanding it, 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 clearer formulation of customary law that draws broadly on scholarly, judicial and diplomatic sources. Many authorities on international law, certainly in the developed world and to varying degrees in the developing states as well, could accept that formulation as an accurate description and guide. After including custom as one of the sources of international law, the *Restatement* provides in clause

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

(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'.

The *Restatement* also addresses 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 generally 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.

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 what is at issue in a case is a state's 'abstention' — 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 or courtesy, 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, that customary law was here permissive. 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. The state did not act out of duty. 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 or criticize X's action in other ways 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 adversely 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: at least the acting state X, and state Y. 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*.

Relationships between Treaties and Custom

Thus far we have considered custom independently of treaties (whose elements are described at p. 113, *infra*). But 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 nonparty 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 on the Law of Treaties 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 nonparties. Some of the principal human rights treaties, for example, have from around 150 to 190 states parties from all parts of the world. Of course, one must distinguish between substantive norms in multilateral treaties that are alleged to constitute customary law that binds nonparties, and institutional arrangements created by the treaties in which parties have agreed, for example, to submit reports or disputes to a treaty organ.

AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW

Peter Malanczuk (7th edn. 1997), at 39

[The following excerpts develop some themes about custom in the preceding Comment.]

...

Where to Look for Evidence of Customary Law

The main evidence of customary law is to be found in the actual practice of states, and a rough idea of a state's practice can be gathered from published material — from newspaper reports of actions taken by states, and from statements made by government spokesmen to Parliament, to the press, at international conferences and at meetings of international organizations; and also from a state's laws and judicial decisions, because the legislature and the judiciary form part of a state just as much as the executive does. At times the Foreign Ministry of a state may publish extracts from its archives; for instance, when a state goes to war or becomes

involved in a particular bitter dispute, it may publish documents to justify itself in the eyes of the world. But the vast majority of the material which would tend to throw light on a state's practice concerning questions of international law — correspondence with other states, and the advice which each state receives from its own legal advisers — is normally not published; or, to be more precise, it is only recently that efforts have been made to publish digests of the practice followed by different states....

...

The Problem of Repetition

It has sometimes been suggested that a single precedent is not enough to establish a customary rule, and that there must be a degree of repetition over a period of time....

In the *Nicaragua* case [*Nicaragua v. US (Merits)*, ICJ Rep. 1986, para. 186] the ICJ held:

> It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.

In sum, *major* inconsistencies in the practice (that is, a large amount of practice which goes against the 'rule' in question) prevent the creation of a customary rule

...

There remains the question of what constitutes 'general' practice. This much depends on the circumstances of the case and on the rule at issue. 'General' practice is a relative concept and cannot be determined in the abstract. It should include the conduct of all states, which can participate in the formulation of the rule or the interests of which are specially affected. 'A practice can be general even if it is not universally accepted; 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'....

What is certain is that general practice does not require the unanimous practice of all states or other international subjects. This means that a state can be bound by the general practice of other states even against its wishes if it does not protest against the emergence of the rule and continues persistently to do so (persistent objector). Such instances are not frequent and the rule also requires that states are sufficiently aware of the emergence of the new practice and law....

...

The Psychological Element in the Formation of Customary Law (opinio iuris)

...

There is clearly something artificial about trying to analyse the psychology of collective entities such as states. Indeed, the modern tendency is not to look for direct evidence of a state's psychological convictions, but to infer *opinio iuris* indirectly from the actual behaviour of states. Thus, official statements are not required; *opinio iuris* may be gathered from acts or omissions....

...

Customary law has a built-in mechanism of change. If states are agreed that a rule should be changed, a new rule of customary international law based on the new practice of states can emerge very quickly; thus the law on outer space developed very quickly after the first artificial satellite was launched....

...

Universality and the Consensual Theory of International Law

...Can the opposition of a single state prevent the creation of a customary rule? If so, there would be very few rules, because state practice differs from state to state on many topics. On the other hand, to allow the majority to create a rule against the wishes of the minority would lead to insuperable difficulties. How large must the majority be? In counting the majority, must equal weight be given to the practice of Guatemala and that of the United States? If, on the other hand, some states are to be regarded as more important than others, on what criteria is importance to be based? Population? Area? Wealth? Military power?...

...

...The International Court of Justice has emphasized that a claimant state which seeks to rely on a customary rule must prove that the rule has become binding on the defendant state. The obvious way of doing this is to show that the defendant state has recognized the rule in its own state practice (although recognition for this purpose may amount to no more than failure to protest when other states have applied the rule in cases affecting the defendant's interests). But it may not be possible to find any evidence of the defendant's attitude towards the rule, and so there is a second — and more frequently used — way of proving that the rule is binding on the defendant: by showing that the rule is accepted by other states. In these circumstances the rule in question is binding on the defendant state, unless the defendant state can show that it has expressly and consistently rejected the rule since the earliest days of the rule's existence; dissent expressed after the rule has become well established is too late to prevent the rule binding the dissenting state....

The problem of the 'persistent objector', however, has recently attracted more attention in the literature. Can a disagreeing state ultimately and indefinitely remain outside of new law accepted by the large majority of states? Do emerging rules of *ius cogens* require criteria different to norms of lesser significance? Such questions are far from settled at this point in time....

...

Ius cogens [or Jus cogens]

Some of the early writers on international law said that a treaty would be void if it was contrary to morality or to certain (unspecified) basic principles of international law. The logical basis for this rule was that a treaty could not override natural law. With the decline of the theory of natural law, the rule was largely forgotten, although some writers continued to pay lip-service to it.

Recently there has been a tendency to revive the rule, although it is no longer based on natural law.... The technical name now given to the basic principles of international law, which states are not allowed to contract out of, is 'peremptory norms of general international law', otherwise known as *ius cogens*.

Article 53 of the Convention on the Law of Treaties provides as follows:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

What is said about treaties being void would also probably apply equally to local custom....

Although cautiously expressed to apply only 'for the purposes of the present Convention', the definition of a 'peremptory norm' is probably valid for all purposes. The definition is more skilful than appears at first sight. A rule cannot become a peremptory norm unless it is 'accepted and recognized [as such] by the international community of states *as a whole*'.... It must find acceptance and recognition by the international community at large and cannot be imposed upon a significant minority of states. Thus, an overwhelming majority of states is required, cutting across cultural and ideological differences.

At present very few rules pass this test. Many rules have been suggested as candidates. Some writers suggest that there is considerable agreement on the prohibition of the use of force, of genocide, slavery, of gross violations of the right of people to self-determination, and of racial discrimination. Others would include the prohibition on torture....

MARTTI KOSKENNIEMI, THE PULL OF THE MAINSTREAM

88 Mich. L. Rev. 1946 (1990)

... [I]nternational lawyers have had difficulty accounting for rules of international law that do not emanate from the consent of the states against which they are applied. In fact, most modern lawyers have assumed that international law is not really binding unless it can be traced to an agreement or some other meeting of wills between two or more sovereign states. Once the idea of a natural law is discarded, it seems difficult to justify an obligation that is not voluntarily assumed.

...

The matter is particularly important in regard to norms intended to safeguard basic human rights and fundamental freedoms. If the only states bound to respect such rights and freedoms are the states that have formally become parties to the relevant instruments ... then many important political values would seem to lack adequate protection. It is inherently difficult to accept the notion that states are legally bound not to engage in genocide, for example, only if they have ratified and not formally denounced the 1948 Genocide Convention. Some norms seem so basic, so important, that it is more than slightly artificial to argue that states are legally bound to comply with them simply because there exists an agreement between them to that effect, rather than because, in the words of the International Court of Justice (ICJ), noncompliance would 'shock[] the conscience of mankind' and be contrary to 'elementary considerations of humanity'.

...

... Although it seems clear that not all international law can be based upon agreement, it seems much less clear what else, then, it may be founded upon.... A Grotian lawyer would not, of course, perceive a great difficulty. He would simply say that some norms exist by force of natural reason or social necessity. Such an argument, however, is not open to a modern lawyer or court, much less an international court, established for the settlement of disputes between varying cultures, varying traditions, and varying conceptions of reason and justice. Such conceptions seem to be historically and contextually conditioned, so that imposing them on a nonconsenting state seems both political and unjustifiable as such.

It is, I believe, for this reason — the difficulty of justifying conceptions of natural justice in modern society — that lawyers have tended to relegate into 'custom' all those important norms that cannot be supported by treaties. In this way, they might avoid arguing from an essentially naturalistic — and thus suspect — position. 'Custom' may seem both less difficult to verify and more justifiable to apply than abstract maxims of international justice.

...

Professor Meron [an authority on humanitarian law whose book is here under review by Koskenniemi] follows this strategy. Although he accepts the category of 'general principles' as a valid way to argue about human rights and humanitarian norms, he does not use this argumentative tack. Nor does he examine whether, or to what extent, such norms might be valid as natural law. His reason for so doing is clearly stated: he wishes to 'utilize irreproachable legal methods' to enhance 'the credibility of the norms' for which he argues. The assumption here is that to argue in terms of general principles or natural justice is to engage in a political debate and to fall victim to bias and subjectivism. Following his rationalistic credo, Meron hopes to base human rights and humanitarian norms on something more tangible, something that jurists can look at through a distinct (objective, scientific) method and thus ground their conclusions in a more acceptable way — a way that would also better justify their application against nonconsenting states.

The starting point — hoping to argue nontreaty-based human rights and humanitarian norms as custom — however, does not fare too well in Professor Meron's careful analysis of pertinent case law and juristic opinion. He accepts the orthodox 'two-element theory' of custom (*i.e.*, for custom to exist, there must be both material practice to that effect and the practice must have been motivated by a

belief that it is required by law (p. 3)), yet case law contains little to actually support such a theory, although passages paying lip service to it are abundant....

...

... [The rest of material practice and the *opinio juris*] is useless, first, because the interpretation of 'state behavior' or 'state will' is not an automatic operation but involves the choice and use of conceptual matrices that are controversial and that usually allow one to argue either way. But it is also, and more fundamentally, useless because ... it is really our certainty that genocide or torture is illegal that allows us to understand state behavior and to accept or reject its legal message, not state behavior itself that allows us to understand that these practices are prohibited by law. It seems to me that if we are uncertain of the latter fact, then there is really little in this world we can feel confident about.

In other words, finding juristic evidence (a precedent, a habitual behaviour, a legal doctrine) to support such a conclusion adds little or nothing to our reasons for adopting it. To the contrary, it contains the harmful implication that it is *only* because this evidence is available that we can justifiably reach our conclusion. It opens the door for disputing the conclusion by disputing the presence of the evidence, or for requiring the same evidence in support of some other equally compelling conclusion, when that evidence might not be so readily available.

It is, of course, true that people are uncertain about right and wrong. The past two hundred years since the Enlightenment and the victory of the principle of arbitrary value have done nothing to teach us about how to know these things or how to cope with our strong moral intuitions. But one should not pretend that this uncertainty will vanish if only one is methodologically 'rigorous'. If the development of the human sciences has taught us anything during its short history, it is that the effort to replace our loss of faith in theories about the right and the good with an absolute faith in our ability to understand human life as a matter of social 'facts' has been a failure. We remain just as unable to derive norms from the facts of state behavior as Hume was. And we are just as compelled to admit that everything we know about norms which are embedded in such behavior is conditioned by an anterior — though at least in some respects largely shared — criterion of what is right and good for human life.

...

QUESTIONS

1. Suppose that an international tribunal rather than US courts had heard the controversy in *The Paquete Habana*, 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, are any observations in the Supreme Court's opinion 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 preceding readings? Consider, for example, how the Supreme Court deals with:

(a) the issue of *opinio juris*, and its relation to comity, grace, concession or discretion;

(b) the relevance of treaties, as expressing a customary norm or as special rules (*lex specialis*) negating the existence of a custom; and

(c) the departure from the rule of exemption during the Napoleonic wars, as a temporary interruption of or as aborting an emerging custom.

About which of these three aspects of the opinion does the dissenting opinion differ? How would you have argued against the Court's resolution of these three aspects?

3. How do you assess Koskenniemi's argument about customary law and natural law? How would you make the argument that the decision in *The Paquete Habana* in fact supports Koskenniemi's view of what underlies argument about customary law and what indeed should be brought to the forefront of argument?

4. Advocates acting on behalf of prisoners sentenced to death have argued in a number of countries that the death penalty is now barred by customary international law. Based on the materials in Chapter 1(B), and in light of the preceding discussions of custom, how would you develop the argument that customary international law bars capital punishment? How would you make the opposing argument? In developing your arguments, take account of the evidence of state practice and of *opinio juris*, and of the major difference between (a) ascertaining customary law through interaction between two states or between citizens of one state and the government of another state in a case like *The Paquete Habana*, and (b) ascertaining customary international law in a death penalty case.

COMMENT ON THE CHANGING CHARACTER OF CUSTOMARY INTERNATIONAL LAW AND OF 'SOFT LAW'

A remarkable, almost anachronistic, feature of *The Paquete Habana* is the reliance on bilateral agreements rather than multilateral agreements and multilateral intergovernmental organizations (IGOs). Since the Second World War, the international legal arena has experienced an extraordinary growth of multilateral instruments, many of them creating IGOs. So many fields of international law — human rights, peacekeeping, the use of force, monetary and trade agreements, environmental treaties, criminal law — contributed to this significant trend from bilateral to multilateral agreements and institutions as the preferred means by which to address some of the problems of the day. Inevitably these treaties and organizations so changed the international law context and the relationships between states and international law as well as between each other as to influence

some basic concepts and doctrines, including doctrinal understanding of the sources of international law.

As we will see in the following chapters, the Universal Declaration of Human Rights (UDHR) and the major human rights treaties suggest the importance of this phenomenon for the evolution of the human rights regime. Not only do the basic duties of the state run towards its internal social and political order and population, but other states — independently or as members of various international human rights organizations — become involved in the process of attempting to assure the observance by delinquent states of those duties. IGOs become to one or another degree independent actors working toward treaties' goals. Or at least the scheme so suggests, for this book's later materials explore how far shy of that 'assurance' the system has in fact progressed.

These and other phenomena, ranging from the development of national and international human rights nongovernmental organizations (NGOs) to globalization embracing multiple cultures, have influenced the very paths of 'making' international law. For example, even outside the world of states and IGOs, there are today so many more voices and places contributing statements, resolutions, declarations, draft codes and other types of instruments about the content of international law — what it 'is', what it 'ought to be'. The Universal Declaration of Human Rights, for example, has evolved from its early status as an aspirational statement to a body of norms in which many provisions are widely accepted as authoritative — as, for example, part of customary international law, or as an authoritative interpretation of the Charter's human rights provisions. Which individuals, which groups, which institutions, which states served as agents of this process? Do those who understand the UDHR, or important parts of it, as authoritative international law, as much so as a treaty, rely on the traditional criteria of customary law to support their understanding? Do UN General Assembly resolutions approved with large majorities occupy a special status? Are different criteria for the formation of custom developing, and becoming widely accepted? Such questions, addressed not only to global and regional IGOs but also to human rights NGOs, to international associations of lawyers and judges, and to a broad range of other non-state groups issuing proposals about human rights, have led to the concept of 'soft law', which is now another, often perplexing ingredient in the multi-faceted evolution of international law.

For these reasons, we turn to such questions at this point, for they become immediately relevant to an understanding of the elaboration and evolution of civil-political and economic-social rights. The following two articles develop these themes and questions.

ANTHEA ROBERTS, TRADITIONAL AND MODERN APPROACHES TO CUSTOMARY INTERNATIONAL LAW: A RECONCILIATION

95 Am. J. Int'l. L. 757 (2001)

... [C]ustom has become an increasingly significant source of law in important areas such as human rights obligations. Codification conventions, academic

commentary, and the case law of the International Court of Justice (the Court) have also contributed to a contemporary resurrection of custom. These developments have resulted in two apparently opposing approaches, which I term "traditional custom" and "modern custom." ...

... Custom is generally considered to have two elements: state practice and *opinio juris*.... This distinction is problematic because it is difficult to determine what states believe as opposed to what they say. Whether treaties and declarations constitute state practice or *opinio juris* is also controversial. For the sake of clarity, this article adopts Anthony D'Amato's distinction between action (state practice) and statements (*opinio juris*). Thus, actions can form custom only if accompanied by an articulation of the legality of the action. *Opinio juris* concerns statements of belief rather than actual beliefs. Further, treaties and declarations represent *opinio juris* because they are statements about the legality of action, rather than examples of that action....

What I have termed traditional custom results from general and consistent practice followed by states from a sense of legal obligation. It focuses primarily on state practice in the form of interstate interaction and acquiescence. *Opinio juris* is a secondary consideration invoked to distinguish between legal and nonlegal obligations. Traditional custom is evolutionary and is identified through an *inductive* process in which a general custom is derived from specific instances of state practice....

By contrast, modern custom is derived by a *deductive* process that begins with general statements of rules rather than particular instances of practice. This approach emphasizes *opinio juris* rather than state practice because it relies primarily on statements rather than actions. Modern custom can develop quickly because it is deduced from multilateral treaties and declarations by international fora such as the General Assembly, which can declare existing customs, crystallize emerging customs, and generate new customs.... A good example of the deductive approach is the Merits decision in *Military and Paramilitary Activities in and against Nicaragua* [1986 ICJ Rep. 14]. The Court paid lip service to the traditional test for custom but derived customs of non-use of force and nonintervention from statements such as General Assembly resolutions. The Court did not make a serious inquiry into state practice, holding that it was sufficient for conduct to be generally consistent with statements of rules, provided that instances of inconsistent practice had been treated as breaches of the rule concerned rather than as generating a new rule....

H. L. A. Hart and R. M. Hare distinguish between *descriptive* and *prescriptive* statements and laws. Descriptive laws can be discovered by observation and reasoning because they are statements about what the practice *has been*. By contrast, prescriptive laws are not determined primarily by observations of fact because they state demands about what the practice *should or ought to be*. Legal rules are *always prescriptive* because they make demands about how people and states should behave. However, their prescriptive nature can be justified by what the practice has been and/or what the practice should be. A law is primarily *descriptive* if it conforms to the premise: the *law is* what the practice *has been*. A law is primarily *normative* if it is formulated on the assumption: the *law is* what the practice *ought to be*. What the law *is* (prescription) can be justified by what the practice *has been* (description) or

what the practice *ought to be* (normativity). Thus, we should distinguish between what the practice has been, what the law is, and what the practice ought to be: "has/is/ought" (description/prescription/normativity)....

... Moving from *has* to *is* involves some level of law creation because it requires the formulation of an abstract rule from actual practice, despite the existence of silences, ambiguities, and contradictions in that practice. Determining what the law *is* from what the practice *has been* relies heavily on the choice of characteristics under which precedents are classified and the degree of abstraction employed....

...

Traditional custom is closely associated with descriptive accuracy because norms are constructed primarily from state practice — working from practice to theory. Reliance on state practice provides continuity with past actions and reliable predictions of future actions. It results in practical and achievable customs that can actually regulate state conduct. By contrast, modern custom demonstrates a predilection for substantive normativity rather than descriptive accuracy. Modern custom derives norms primarily from abstract statements of *opinio juris* — working from theory to practice. Whereas state practice is clearly descriptive, *opinio juris* is inherently ambiguous in nature because statements can represent *lex lata* (what the law is, a descriptive characteristic) or *lex ferenda* (what the law should be, a normative characteristic). The Court has held that only statements of *lex lata* can contribute to the formation of custom. However, modern custom seems to be based on normative statements of *lex ferenda* cloaked as *lex lata*, for three reasons.

...

[Third], treaties and resolutions often use mandatory language to prescribe a model of conduct and provide a catalyst for the development of modern custom. Treaties and declarations do not merely photograph or declare the current state of practice on moral issues. Rather, they often reflect a deliberate ambiguity between actual and desired practice, designed to develop the law and to stretch the consensus on the text as far as possible. For example, some rights set out in the Universal Declaration of Human Rights of 1948 are expressed in mandatory terms and have achieved customary status even though infringements are 'widespread, often gross and generally tolerated by the international community.' As a result, modern custom often represents progressive development of the law masked as codification by phrasing *lex ferenda* as *lex lata*.

...

The moral content of modern custom explains the strong tendency to discount the importance of contrary state practice in the modern approach. Irregularities in description can undermine a descriptive law, but a normative law may be broken and remain a law because it is not premised on descriptive accuracy. For example, *jus cogens* norms prohibit fundamentally immoral conduct and cannot be undermined by treaty arrangement or inconsistent state practice. Since the subject matter of modern customs is not morally neutral, the international community is not willing to accept any norm established by state practice. Modern custom involves an almost teleological approach, whereby some examples of state practice are used to justify a chosen norm, rather than deriving norms from state practice.... Thus,

the importance of descriptive accuracy varies according to the facilitative or moral content of the rule involved.

...

A critique of modern custom.... Deriving customs primarily from treaties and declarations, rather than state practice, is potentially more democratic because it involves practically all states. Most states can participate in the negotiation and ratification of treaties and declarations of international fora, such as the United Nations General Assembly. The notion of sovereign equality (one state, one vote) helps to level the playing field between developed and developing countries. While formal equality cannot remedy all inequalities in power, international fora provide less powerful states with a cost-efficient means of expressing their views.... [V]otes in the General Assembly usually receive little media scrutiny and are generally not intended to make law. For example, the General Assembly resolution on torture was adopted unanimously, while a much smaller number of states ratified the Convention Against Torture and others entered significant reservations to it.

...

The greatest criticism of modern custom is that it is descriptively inaccurate because it reflects ideal, rather than actual, standards of conduct. The normative nature of modern custom leads to an enormous gap between asserted customs and state practice. For example, customary international law prohibits torture, yet torture is endemic. A similar criticism is made of the 'emptiness' of *jus cogens* norms, which are often flouted in practice. These laws lack efficacy because states have not internalized them as standards of behavior to guide their actions and judge the behavior of others. The regulatory function of modern custom is doubtful because it appears merely to set up aspirational aims rather than realistic requirements about action.... Some theorists characterize modern customs as 'soft laws' or sub-legal obligations that do not amount to law. Indeed, norms that are honored in the breach do not yield reliable predictions of future conduct and are likely to bring themselves, and possibly custom as a whole, into disrepute.

...

DINAH SHELTON, INTRODUCTION: LAW, NON-LAW AND THE PROBLEM OF 'SOFT LAW'

in Dinah Shelton (ed.), Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System (2000), at 1

... The subject of compliance with non-binding norms [is] concerned with why states and other international actors choose to conclude non-binding rather than binding normative instruments and whether or to what extent that choice affects their consequent behavior.

...