

CHAPTER SIXTEEN: THE NORMATIVE DIMENSION

Pages 351-354

A. Peace

Introduction. The brutality and suffering of war renders it, in the view of many observers, the antithesis of being human. Many believe that international law is the law of peace. Although there are laws regulating the conduct of warfare, their existence does not mean that war is acceptable behavior. The opening words of the Preamble to the Charter of the United Nations are: "We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind..."

Yet do we believe in peace at any price? What if the price of peace is enslavement? Thought control? Pervasive injustice? We dealt with some of these questions in considering humanitarian intervention, in the Chapter on Human Rights. The present Chapter carries the dialogue further.

Reading Assignment: *International Law Anthology*, pp. 347-50.

NOTES AND QUESTIONS FOR CLASSROOM DISCUSSION

1. According to Immanuel Kant, what are the first steps that governments must take to end the natural state of war?
2. What does Kant mean by republican states?
3. What is the difference between statism and realism?
4. What empirical reasons does Kant give in support of his contention that the internal structure of a state can secure peace in the international community? Do you find these reasons persuasive?
5. Kant argued philosophically that perpetual peace might be achieved if every state in the world became a republican state. What is the conclusion of recent empirical research by political scientists on this question? Does it support Kant's contention?
6. How does Fernando Teson reconcile Kant's respect for human rights with the principle of non-intervention? Is there any inconsistency between Teson's enthusiasm for Kant's general position, and Teson's own arguments regarding humanitarian intervention that you have previously read on pp. 225 and 258-60 of the Anthology?
7. If you found any degree of inconsistency on the part of Teson in your answer to the previous question, do you find a similar inconsistency wholly within Kant's own theory?

B. Justice

Introduction. What is law about, if it isn't about justice? Neither domestic law nor international law can change human nature or the physical world that supports life on this small planet, but they can provide a structure for the resolution of conflicts. If the law is just and is justly administered, then conflicts will be resolved according to principles of justice. If the law is unjust (think of the Nazi laws against Jews, or the laws of the Confederacy specifying one person's "property rights" in another human being and his wife and children), then the resolution of conflicts can be unjust. The author of this Coursebook believes that the unjust resolution of conflicts is *destabilizing*, that somehow the human condition over time reaches equilibrium if the legal system delivers substantive justice. He further believes that the most fundamental duty of every lawyer is to add to the quantum of justice in the world--that's what makes law a profession.¹

To what extent is international law influenced by justice? To what extent is its content determined by justice? To what extent should international law be neutral--serving neither justice nor injustice? Think about these questions as you read the selections in the *Anthology*.

Reading Assignment: *International Law Anthology*, pp. 351-66.

Charter of the United Nations Article 2

(4) All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

NOTES AND QUESTIONS
FOR CLASSROOM DISCUSSION

1. How do political realism and cosmopolitanism differ in their ethical foundations? In what important ways are they similar?
2. What is the difference between the instrumental and the formal perspective on the authority of rules? Which view does Terry Nardin adopt? Is his argument persuasive?
3. According to Nardin, where does the rule of law come from in the domestic sphere? Where does it come from in the international sphere? How is each "binding"?
4. According to Nardin, how do the cosmopolitan and realism perspectives "miss the point" with regard to international law? Do you agree?
5. What is John Rawls' "difference principle"? Are you in favor of a "transfer tax" that might be imposed upon nations to reduce disparities of wealth between nations? Why? Why not?
6. Do you agree with Anthony D'Amato's argument that distinguishes between types of "richness"?
7. What is John Rawls' "original position" assumption? Can it possibly undermine his own argument when his argument is applied to international law?
8. What solutions does D'Amato offer to overcome the problem of free riders?
9. What problems arise from the concept of morally equal states?
10. What are the two standards of justice from which an alien can benefit?
11. What is the "international minimum standard"? What principle was it derived from? The footnotes on pp. 358-60 in the *Anthology* summarize a large chapter in the history of international law dealing with state responsibility. What trend is exemplified by the cases summarized in those footnotes? What are their relevance to the present day?
12. What is the "national treatment standard"? How does it differ from the "international minimum standard"? *When* might one standard apply when the other one doesn't?
13. Are aliens' rights better protected than nationals' rights? If so, why?
14. Do Anthony D'Amato and Kirsten Engel convince you that there should be an international obligation *not to harm* nationals of another nation? Or is their thesis too "far out"?
15. Would you go farther than D'Amato and Engel and contend that there should be an international duty to *help* nationals of another state?
16. What tension in John Rawls' theory do D'Amato and Engel find? How does Charles Beitz reformulate Rawls' position to include transboundary relations in certain circumstances? Is his reformulation persuasive?
17. What gives rise to a transboundary obligation of compensatory justice? Should it give rise to a greater obligation?
18. Do you agree with Louis Henkin that peace and sovereignty are more important than human rights? Or do you agree with Anthony D'Amato that humanitarian intervention--concededly a disruption of peace--is at least as important in some situations?
19. Louis Henkin and Anthony D'Amato interpret Article 2(4) of the UN Charter quite differently. Whose interpretation is more persuasive as a matter of textual construction? As a matter of the purposes of the Charter? As a matter of the purposes of international law?

C. Democracy

Introduction. Around the time of the American Revolution, the prevailing view about war among political philosophers was that kings entered into wars for their own private gain, and that ordinary people would not choose to go to war if the choice was theirs to make. Looking back at the Convention that drafted the Constitution, President Lincoln said:

Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This our Convention understood to be the most oppressive of all Kingly oppressions; and they resolved to so frame the Constitution that *no one man* should hold the power of bringing this oppression upon us.

If democratic states do not go to war against each other--as recent political science studies seem to demonstrate (*Anthology* pp. 348-49)--and if peace is the foremost goal of international law, would it not follow logically that international law should attempt to *impose* democracy upon states?

Reading Assignment: *International Law Anthology*, pp. 367-80.

NOTES AND QUESTIONS
FOR CLASSROOM DISCUSSION

1. What are the building blocks for constructing a normative entitlement to democracy? Which is the core of the democratic entitlement?
2. According to Thomas Franck, are self-determination and democracy the same thing? If not, what difference exists between them?
3. What effect did the Second World War and the United Nations Charter have on the evolution of self-determination?
4. What is the international basis for the right to free political expression? Is it universally binding?
5. What evidence does Thomas Franck give to support the assertion that a right to participate in elections is becoming a norm in customary law and thus binding on all states?
6. What is the relation of the human rights movement toward the democratic entitlement that Franck postulates?
7. Should there be a general international monitoring of elections in sovereign states? What legitimate fears are aroused by this proposal?
8. Does Franck's insistence on collateral action deal with the problem of differing definitions of democracy raised by Louis Henkin in Chapter 14 of the Anthology?
9. How in fact does democracy promote peace?
10. Does Franck support the idea of armed intervention in order to impose democracy upon recalcitrant states?
11. Does Babacar Ndiaye support the idea of armed intervention in order to impose democracy upon recalcitrant states?
12. According to Babacar Ndiaye, what are the two essential elements in the Western liberal view of democracy? Should "economic and social rights" be an integral part of democracy? What nations might adopt that view?
13. How do process-based and rights-based democracy differ? According to Anthony D'Amato, which type of democracy does the U.S. have?
14. Does the situation in Algeria convince you that rights-based democracy affords greater protection to citizens than process-based democracy?
15. What is Jean-Jacques Rousseau's "general will" theory? How does it differ from the "will of all"? How does Rousseau protect the general will from contamination by dissenters?
16. What is Rousseau's theory of civil religion? Does it help with the problem of dissenters? Do you accept Rousseau's version of democracy?
17. Is a tyranny of the majority better than a tyranny of one person?
18. Do you think we should be exporting democracy? Would that do more harm than good?

D. The Future of International Law

Reading Assignment: *International Law Anthology*, pp. 411-19.

NOTES AND QUESTIONS
FOR CLASSROOM DISCUSSION

1. What do Lung-Chu Chen, Barbara Stark, Philip Allott, and Richard Falk each think is the most important problem that international law will face in the twenty-first century? Do they think the problem is intractable?
2. Earlier in this Coursebook it was suggested that the problem of "group rights" may become the most important and most intractable problem for international law in the twenty-first century. Do you agree? Do Chen, Stark, Allott, or Falk agree?
3. Anthony Lake, Adviser to President Clinton on National Security matters, has written in *Foreign Affairs* that the biggest problem in foreign policy is that of what he calls the "backlash states," which he names as Cuba, Iran, Iraq, Libya, and North Korea. Do you agree? Would Chen, Stark, Allott, or Falk agree?
4. If the backlash states were to acquire nuclear weapons, would that make them the world's biggest problem in the near future?
5. Can all of these guesses about the future go horribly wrong if a world epidemic of a deadly communicable disease breaks out? Or if the ozone layer reaches a critical mass of chemical contamination and goes into irreversible

depletion?

6. If international law seems feeble in the face of some possible threats to human survival, would we be better off with less international law? Or would we be better off with more improved and more pervasive international law?

FOOTNOTE Chapter 16

1 See ANTHONY D'AMATO & ARTHUR JACOBSON, JUSTICE AND THE LEGAL SYSTEM: A COURSEBOOK (1992).