The Concept of Human Rights in International Law*

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In the past ten years, the concept of human rights has become a permanent part of the way we think about relations between nations. International human rights are now a legislative condition of foreign aid,¹ have been institutionalized in bureaucratic structures,² and, perhaps most importantly, have been stamped indelibly in the minds of the public as one of the most important standards by which we measure other countries.

Human rights is not just a political and moral concept; it is a legal one as well. Not surprisingly, human rights has been the subject of a burgeoning jurisprudential literature. Since the signing of the United Nations Charter the virtual equivalent of a new academic discipline has emerged to champion the idea that international law gives individuals rights against the state.³ To prove their claim, these scholars can point to a plethora of international treaties, conventions, and United Nations resolutions guaranteeing individuals all sorts of different “rights.”

It was inevitable that these advances would be challenged. In the political sphere, the human rights policies of Jimmy Carter have given way to the realpolitik of the Reagan administration. In the legal sphere, the proponents of international human rights jurisprudence have come under the vigorous attack of such younger scholars as Professors J.S. Watson and Mark Lane. In various journals and symposia,⁴ Watson and Lane have accused their older

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1. E.g., 22 U.S.C. § 2151n(a) (1976), which bars United States economic assistance “to the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights . . . unless such assistance will directly benefit the needy people in such country.” See also id. § 2304(a)(2), which bars security assistance to such countries.

2. E.g., id. § 2384(f), which establishes the position of “Assistant Secretary of State for Human Rights and Humanitarian Affairs.” The Assistant Secretary’s functions include the “gathering [of] detailed information regarding humanitarian affairs and the observance of and respect for internationally recognized human rights.”


colleagues of seriously overstating the international legal status of human rights. The "old school," they charge, has confused a vision of what international law ought to be with an examination of what it actually is. In concentrating on multilateral treaties and United Nations Resolutions the old school has neglected actual state practice; in laboring to codify the varieties of human rights they have ignored the fact that the current international order contains no means of punishing state violators of such rights. Watson and Lane relentlessly recount the mass atrocities of recent years in Uganda, Burundi, Nigeria, and Cambodia. They marshal Amnesty International reports on shock treatment in Brazil and beatings in Iran. In light of such degradations, they ask, how can anyone realistically claim that there is an international law of human rights?

Watson and Lane's contentions have set off a lively debate. Many of their specific points have been countered. Yet these thrusts and counter-thrusts have been vaguely unsatisfying. The discomfiture of the "younger scholars" (and of the Reagan administration) with the notion that international law extends to the rights of citizens against their own governments cannot easily be brushed aside—especially by academicians' reiterations of previously stated positions. Watson and Lane's attacks are sophisticated symptoms of the unease that the layman must feel when he hears of various governmental practices assailed as violations of international law. Can a realistic system of international law—one that takes full account of the dominance of the "Westphalian . . . legal order"—effectively comprehend such practices? More importantly, can international law provide an effective remedy for these practices when they turn out to be, in fact, violations of internationally recognized human rights? Professor Watson's forthright response to these questions is a negative one: "What human rights advocates are seeking," he writes, "is a supranational legal order of the hierarchical, coercive type prevalent in domestic systems to act as a check on governmental malfeasance. But international law is not such a system and it cannot be turned into one no matter how desirable that may be from a humanistic standpoint."

This Article will attempt to defend the opposite conclusion: that the concept of human rights can, and does, play a role in international law. To

5. Lane, Mass Killing by Governments, supra note 4, at 279-80; Watson, Legal Theory, supra note 4, at 611-12.
6. Watson, Legal Theory, supra note 4, at 634-35.
7. Id. at 634.
11. Watson, Legal Theory, supra note 4, at 609.
meet Watson and Lane's theoretical objections head-on—that is, to answer their call for a theory which heeds the realistic necessity of "implementation and compliance"—I will have to go back to some fundamental notions about international law. In the first part of this Article, I will discuss the all-important "compliance" issue, and will attempt to demonstrate that a substantive human rights law is capable of fitting comfortably into the existing system of international legal enforcement. This argument does not need to posit the existence of these rights; it merely serves to demonstrate that the "current legal order" can accommodate the idea that nations have a legal stake in human rights violations by other nations, and that a flexible system exists for enforcing that stake. The second part of the Article will attempt to fill this vessel: I will argue that an international law of human rights actually exists, and that it is derived from such ostensibly particularistic sources as the Genocide and Slavery Conventions. To do this, however, involves an extended discussion of the theory of customary international law, confronting in particular the ideas of several distinguished scholars who have argued that treaties are incapable of evolving on their own into rules of customary international law. My argument will be that such treaties can and do generate new legal rules. Of course, without a system of "implementation and compliance" these rules are meaningless. So it is to the question of the place of human rights in the existing structure of international law that I turn first.

I. THE PLACE OF HUMAN RIGHTS IN INTERNATIONAL LAW: SEVEN PROPOSITIONS

In this first section, I will try to show how the concept of a human rights law relates to the existing structure of international legal relations. Specifically, I will describe that structure in a way that should illuminate its capacity for correcting illegal deviations from its systemic stability. My model of the international legal order is not idealized or forward-looking. My aim is simply to describe what already exists from a fresh perspective that should portray the international legal enforcement of human rights norms.

My argument reduces to several distinct propositions about international law: that a nation is defined by its interests and its entitlements; that all nations have the same set of entitlements; that each entitlement has equal legal standing vis-a-vis other entitlements; that international law strives to preserve the equilibrium that equal entitlements create by permitting retaliation by nations whose entitlements have been violated; and that if human rights norms are part of international law, they take the form of universally-held entitlements.

12. Lane, Demanding Human Rights, supra note 4, at 615.
15. In particular, see sections E-G, infra notes 39-65 and accompanying text.
A. A "Nation" Is a Collection of Interests and Entitlements

The term "international law" suggests a law of, by, and for nations; they are the "creator-subjects" of international law.16 Although nations as a whole have the power to shape international law any way they collectively desire,17 that law itself nevertheless defines what a "nation" is. From the point of view of a given individual nation, whether or not it is a "nation" internationally depends not on what it desires but on whether the "constitutive" rules of international law define it as a "nation." An individual nation in this manner is no different from the "sovereign" described by Professor H.L.A. Hart.18 A sovereign may be able to make or annul the laws in his own territory, but he cannot regulate the laws that define who the sovereign is or who will succeed to the sovereignty upon his demise.19 For these "constitutive" laws are the conditions of his own sovereign power. He may influence them, for example, by appeals to the citizenry or by displays of force, but somehow the constitutive laws are larger than the sovereign. The international situation is an a fortiori case. An individual aggregation of people in a territory may try to influence outside groups to label it as a "nation,"20 but this labeling will or will not occur depending upon the international rules of recognition of nations and whether it comes within those rules.

Thus, at its moment of creation, a "nation" is faced with external rules that have defined it as a "nation." It is already plugged into an international system of rules—by definition. And it finds, upon investigation, that there are many other rules that define nationhood and the nation's standing vis-a-vis other nations—rules that it cannot unilaterally change although it has an equal influence in working with other nations to bring about systemic change acceptable to all.

Our hypothetical new nation might not want to accept any of these rules as obligatory upon itself. For this reason, I will avoid the usual phraseology of "rights" and "obligations" under international law, and instead employ the more objective term of "legal entitlements," or simply entitlements.21 Thus, although our new nation may want to deny that it has any "obligations" under international law—even if the other nations have chosen to recognize it as a "nation"—it cannot deny that other nations claim for themselves certain entitlements. Indeed, our new nation will want to discover what these entitlements are so that it may be more fully aware of its international environment.

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17. There is no international law external to the international collectivity; but any individual nation may only influence the collective consensus as to what the law is. If a single nation could determine what the law is, there would be no possibility of a violation of international law.
19. Id. at 74–76.
20. The Palestinian Arabs on the West Bank are a good example.
for the expectations of its neighbors will be of great practical importance to it in its relations with them.

Upon investigation, it will find a rather awesome and fully developed set of entitlements. We are familiar with these as the usual rules of customary international law. For example, it will find that other nations claim exclusive sovereignty over their airspaces, that they do not claim exclusive sovereignty over the high seas, that they claim that their boundaries are fixed and not subject to forcible change by the military aggression of others, and that treaty entitlements survive changes of government. They also claim, among many other things, that their own nationals traveling in foreign countries must be accorded a minimal standard of international protection against the governmental or police action of those countries. Our new nation, looking at this list, will probably conclude that these entitlements are not on the whole a bad lot. Although they serve to restrict the activities of our new nation (for instance, it will not be able to have free use of the world’s airspace for its new commercial airline but will rather have to engage in negotiations and reciprocal contracts for international flight), they also present it with an important set of entitlements. If our new nation wants to assert these entitlements, it will derive international legal protection for its own boundaries, its own airspace, its own citizens traveling abroad, and so forth. But the crucial point is that even if it does not want to assert these entitlements, it nevertheless will be looking outward at all the other nations that have been asserting and continue to assert these entitlements against it. Our new nation is faced with the fact that other nations have claimed and are claiming these entitlements as a matter of right and expect to continue to claim them, even against our new nation, even if it does not like any or all of them.

In addition to, and conceptually distinct from, entitlements, our new nation and every nation has its own particular “interests.” These are the things that the nation wants, and can include wants that are quite illegal—for instance, rapid territorial expansion at the expense of its neighbors. The set of interests may overlap with the set of entitlements. For example, our new nation may have a very deep interest in something that has not attained the status of an entitlement (and might never attain that status). For instance, the safety of its diplomatic personnel abroad. On the other hand, our new nation, may have a very deep interest in something that has not attained the status of an entitlement (and might never attain that status). For instance, the United States might have a deep interest in breaking up international oil cartels. In its domestic law, the United States has such antitrust power. But internationally, an oil cartel is not as of the present writing a violation of any American international entitlement. The American interest in breaking up an

international oil cartel might be many orders of magnitude greater than the American interest in some of its international entitlements, but to confuse the magnitude of a nation's interests with international entitlements, as these examples suggest, makes no sense.25 The reverse is also true: a nation may have an entitlement but absolutely no interest in it. Switzerland has an entitlement to jurisdiction over its territorial sea. Lacking a territorial sea and any near-term prospects of obtaining one, Switzerland may be assumed to have a near-zero interest in this particular entitlement. Nevertheless, as a nation, it still “has” the entitlement. A nation may unilaterally control its own interests; it has no unilateral control over its (and every other nation’s) entitlements.

Thus, when Professor Watson, at a crucial point in his argument, asserts that “it is an inescapable fact that one state’s treatment of its citizens is of little interest to other states,”26 it is clear that he is not making a legal argument, for he is speaking only of interests, not entitlements. And he may be quite wrong even as to interests: consider Israel’s interest in the treatment of Soviet Jews, or the interest of African nations in the treatment of South African blacks. Nevertheless, the degree of interest that a nation has in the affairs of another nation has no direct connection to its legal entitlements.27 Of course, if every state had no interest whatsoever in what other states do to their own citizens, then it would be unlikely that there would have arisen an entitlement to protect oppressed citizens in other states. I say “unlikely” because international law, after all, reflects the aggregate interests of states over time. But there is no theoretical, or necessary, linkage between no-interest and no-entitlement. And certainly, as my previous examples have suggested, if Watson is roughly correct that one state’s treatment of its citizens is of “little” interest to other states, that fact certainly would neither prevent an entitlement from arising nor defeat one that had already arisen.

B. All Nations Have the Same Set of Entitlements

In sharp contrast to interests that, as we have seen, can vary greatly, each nation’s set of entitlements is the same as every other nation’s. Occasionally, some writers such as DeVisscher, Kaplan, Katzenbach, and McDougal have made highly curious assertions to the contrary.28 But those arguments have

25. For a critique of the “interests approach” of Kaplan and Katzenbach, see D’Amato, supra note 16, at 145–47.
27. States’ interests in such questions, after all, may change over time. Different states may have different degrees of interest (consider, for example, a majority in one state having ethnic or religious ties to a persecuted minority in another state). Indeed, there are signs that people are becoming more empathetic to the plight of other human beings even absent the “old” sorts of ties of religious or ethnic similarity. Evidence for this increasing “interest” is the greater acceptance of nondiscrimination within nations and Professor Schachter’s observation that there is a greater world awareness of human-rights violations. See Schachter, supra note 9, at 264–65. Surely this media awareness reflects people’s increasing “interest” in this topic, an interest that has been reflected in the actions of government in the human rights area.
28. See C. DeVisscher, Theory and Reality in Public International Law 149 (Corbett trans. 1957); M. Kaplan & N. Katzenbach, supra note 23; M. McDougal et al., Studies in World Public Order 773–843 (1960). I have previously commented upon these assertions that some states are
not been taken seriously. Law, in fact, has an internal dynamism that promotes, if not requires, equality; its prescriptions, in nearly every legal system including the international, apply to all its addressees equally.\textsuperscript{29} It is indeed hard to imagine rules and norms of general application that do not apply equally to their addressees. To be sure, within organizations entitlements sometimes are different. In the United Nations, for example, the permanent members of the Security Council have more entitlements regarding the practices of the United Nations than have the other members of the Council, and the Council members as a whole have more entitlements than do the members of the United Nations who are not seated on the Security Council. In any treaty regime, the contracting parties may have differentiable entitlements vis-à-vis each other or as against noncontracting parties (e.g. exclusive trade arrangements). But general customary international law, including the entitlements regarding the entering into and validity of treaties, knows no such differentiations.

C. Each Entitlement Has Equal Standing

Each separate entitlement in a national set of entitlements is legally the equivalent of every other entitlement. None has more legal weight or standing than any other. An entitlement either exists or does not exist, but once it exists, it is the equivalent of any other entitlement. This point is by no means obvious, since normally we think of some entitlements as more important than others—for example, the inviolability of national boundaries seems much more important than equal access to the mineral wealth of the ocean floor. But this “importance” is upon analysis simply a matter of what I have defined as national “interests.” To an expansionist nation, for example, the inviolability of national boundaries might be an impediment; such a nation would have a very low interest in maintaining that entitlement. Stripped of its “interest” dimension, the system of entitlements appears as an unidimensional set of legal norms legally indistinguishable from each other. Entitlements are like Ronald Dworkin’s rules—you have one or you don’t, one applies or it doesn’t.\textsuperscript{30} Even international rules of \textit{jus cogens}, or peremptory norms,\textsuperscript{31} are no more important than other rules, for these are simply rules

\textsuperscript{29} See L. Fuller, \textit{The Morality of Law} 46–49 (rev. ed. 1969); see also A. Gewirth, \textit{Reason and Morality} 129–89 (1978) (incoherent to assert rights yet deny similar assertions by others).

\textsuperscript{30} See R. Dworkin, \textit{Taking Rights Seriously} 26 (1977). Dworkin contrasts “rules” with “principles,” the latter having weight that helps impel a decision a certain way without requiring such a decision.

\textsuperscript{31} See D’Amato, supra note 16, at 132 n.73 (claim oriented perspective on peremptory norms).
that deny the validity of certain substantive provisions that might be included in treaties. As such they are not on a higher plane than, for example, the customary rule of *pacta sunt servanda*; in fact, they may be thought of as conditional specifications of the rule of *pacta sunt servanda*.

That entitlements are mutually equivalent in terms of importance or weight is not a necessary feature of international law. Rather, it reflects the current international legal system. Nations might have evolved a different kind of system. But at least so far they have not. Indeed, it is the present deep divergence in interests among nations that accounts for the equal standing of entitlements. For while nations have been able to agree to a common set of entitlements, their differential interests with respect to any particular entitlement almost ensures the lack of any communal consensus as to relative importance among entitlements. (Of course, some entitlements are trivial—for example, the finer points of diplomatic protocol—and these surely are not equivalent to general norms of customary international law. But among the latter material norms, there is no consensus as to relative importance.)

D. The Legal System Will Strive to Preserve Entitlement Equilibrium

Given a common set of entitlements of equal weight, which as a whole defines the international legal system, the legal system itself will act to preserve the equilibrium engendered by that set. This equilibrium or stable balance of legal entitlements is, after all, the result of centuries of international interaction and expresses principles by which nations on the whole have consented to accommodate each other. A disruption in the set may be viewed as a tendency toward imbalance, toward disequilibrium. The legal system may be expected to respond homeostatically—to restore the balance by exacting a legal penalty upon the entitlement violator. The entitlements as a set, worked out by nations over the centuries, represent a coherent system such that the violation of any one of them gives rise on the international level to what Festinger has called “cognitive dissonance” on the level of personal psychology. Other nations will react to remove this dissonance by taking legal action against the violator (which, as we shall see, involves retaliatory entitlement-violation). Additionally, the violating nation itself, having introduced disso-


33. The entitlements as a whole contain primary rules regarding the conduct of states, and secondary rules that “specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.” H. Hart, supra note 18, at 92. See D’Amato, supra note 16, at 41-44; D’Amato, The Neo-Positivist Concept of International Law, 59 Am. J. Int’l L. 321 (1965).

34. See L. Jaffe, Judicial Aspects of Foreign Relations 90 (1933).

35. See L. Festinger, A Theory of Cognitive Dissonance (1957); cf. D’Amato, Psychological Constructs in Foreign Policy Prediction, 11 J. Conf’l Res. 294, 306-09 (1967) (proposing that an individual reacts to the foreign policy environment according to certain behavioral structures and that these “constructs” can be used to predict an individual policy-maker’s decision in a given foreign policy situation).
nance into the system, will expect retaliation, but will not know what kind of entitlement will be involved in the retaliation. Its inability to predict the retaliation serves to dissuade it from committing the initial entitlement violation (the delict); thus the system as a whole tends toward self-preservation of its set of entitlements. This systemic homeostatic mechanism is enhanced by the nature of rule-formation in the international legal system. General rules of international law now are changeable only by the process of custom or consensus. The latter by definition raises no disruptive problem; nations simply agree as a whole to a new rule. But customary law formation, except when accomplished by the effect of treaties upon nonparties, can be disruptive indeed. Like the Hegelian-Marxist struggle of thesis and antithesis, an entitlement (thesis) is met with a violation (antithesis), which violation, if it "catches hold," may give rise to a new rule (synthesis). The violation of the entitlement may thus contain the seeds of a new rule, but the critical question is what the other nations will do about it. If they accept the violation, a new customary rule is on its way toward being formed. But if they isolate the violation, label it a violation, and punish the transgressor, then instead of the seed of a new rule taking hold, the seed is trampled upon and the original customary rule is reinforced. What might have been an impediment to the formation of a customary rule instead becomes another instance of its confirmation.

Unless the international legal system is psychologically ready for a new rule (in which case there is already an implicit consensus), it will react to the violation of a customary rule with all the means at its disposal to ensure that the violation does not replace the old rule with its opposite. These means, as we shall see in the discussion of the next principle, are all that the legal system qua legal system can do—namely, to treat the violator as an "outlaw" for the purpose of its transgression, and to respond by a retaliatory deprivation of one or more of the violator's entitlements.

E. A Nation that Violates Another Nation's Entitlement May Expect Retaliation that Preserves Entitlement Equilibrium

The entitlements that define any legal system require a mechanism for self-protection. This is simply a consequence of the nature of systems that have survived and become stable. Domestic legal systems have such mechanisms in legislatures, in courts of comprehensive jurisdiction, and in police enforcement. If A steals B's car, the state recognizes that B retains ownership of the car even though it is now in A's possession, and furthermore will prosecute A criminally, repossess the car, and deliver it over to B. Thus B's property entitlement in the car is preserved and vindicated. There is no

37. See D'Amato, supra note 16, at 103–66.
38. Of course, this puts the matter broadly. For a specification, see D'Amato, supra note 16, at 91–98.
suggestion that the entitlement itself is in jeopardy of being changed by A's action. In other words, there is no process of customary law formation in this example or in domestic examples similar to it. In contrast, if customary international law were involved in such an example, A's theft from B would contain the seeds of a new customary rule (for example, that anyone who forcibly takes possession of another person's property becomes the legitimate owner of such property). 40 Depending on how many previous cases there were of the old rule (protecting ownership in private property against forcible takeover), on subsequent reaction to the A-B case, and possibly on cases subsequent to the A-B case, a new rule of custom may have been presumptively formed, initiated, or defeated. 41 To be sure, in the earliest days of the domestic legal system, before courts knew very much of what was expected of them and before legislatures or monarchs realized that they could create new laws out of thin air, there was a process of customary-law formation akin to that of the international legal system today. 42 But in any modern municipal-law system, the existence of legislatures, which can change any rule the public wants changed, and courts, which preserve existing rules, is sufficient to give the system of entitlements stability through time.

Of course, the international legal system is not devoid of courts, although the courts as a whole certainly do not enjoy comprehensive jurisdiction over all international legal transactions. The present International Court of Justice at the Hague has very limited, consensual jurisdiction, and it has not acted resolutely in recent cases even where jurisdiction was arguably established. 43 The Security Council of the United Nations in principle has central enforcement power to protect against threats to or breaches of the peace, but due to dissension on the Council, it has not yet mobilized an army. There are many regional organizations, arbitral tribunals, bilateral commissions, and so forth in the international legal panoply, but Professor Watson is correct in arguing that there is a "lack of enforcement mechanisms of the hierarchical type." 44 What Watson fails to see, however, is that the international legal system protects its entitlements by processes different from the domestic model.

41. See D'Amato, supra note 16, at 91–102.
43. To take a speculative example parallel to that given in the text, suppose that in the early days of a legal system A stole B's money, purchased some goods from C, and then left the country. B applies to a court to get his stolen money back from C. The notion of theft and of stolen property might very well have given B a prima facie claim to his money. However, the usefulness of money as a mechanism for exchange would be compromised by allowing persons to trace stolen money. By not allowing B's claim, the early court would be developing the law in a fashion analogous to custom in international law. (A later court would then hold, as we know, that if B could prove that C was not a holder in due course B could get the money back.)
45. Watson, A Realistic Jurisprudence of International Law, 1980 Y.B. World Affairs 265, 267. Even so, there are many kinds of "sanctions" other than force, and the more attenuated the
The way the international legal system protects its entitlements is in effect to declare the nation that violates an entitlement a temporary outlaw and to allow the nation or nations whose entitlements were violated, or even third parties, to retaliate against the outlaw by in turn disregarding one or more of the outlaw nation’s entitlements. The criteria as to which entitlements may be violated in retaliation are, in the present stage of international law, quite controversial. There is a strong consensus that the same entitlement may be violated, at the very least. For instance, when the Iranian militants held American embassy personnel hostage, there was some talk in the United States of retaliating by arresting Iranian diplomats, consular officials, and students in this country.\textsuperscript{45} However, this was widely perceived to be ineffective; the new Iranian revolutionary government might not care about Iranians in the United States who might very well be sympathizers with the old regime of the Shah. Indeed, it is often the case that when state $A$ violates state $B$’s entitlement, state $A$ has already calculated that retaliation in kind would not be too costly to it. Of course, when it is perceived that retaliation in kind would be too costly, the initial violation is probably deterred—and this may be true of the vast majority of cases that never move beyond the planning stage.

As to retaliation by violating a different entitlement, there is a sense in which the retaliation chosen must not be out of proportion to the initial violation.\textsuperscript{46} It would not do to punish the Iranians for taking the American hostages by dropping a nuclear bomb on an Iranian city. However, less drastic, but still forceful, military measures were indeed contemplated by the United States during the period the hostages were held captive.\textsuperscript{47} A further restriction on the choice of a different entitlement for retaliatory purposes might be some sense that the method of retaliation should be related to the initial delict in time, place, or subject matter. However, all of the foregoing are extremely vague restrictions under present international law. Indeed, it is difficult to imagine how rules could be formulated that deal specifically and usefully with questions of proportionality and relatedness when there is such an enormous variety of possible thrusts and counterthrusts in international relations.

The difficulty, or indeed near-impossibility, of formulating rules constraining the choice of retaliations is itself a deterrent to the initial delict. If nation $A$ decides to violate an entitlement of nation $B$, it risks retaliation along a fairly wide and rather undefined front. The risk is, in most cases, not

\textsuperscript{45} See Appendix, infra notes 138–84 and accompanying text.

\textsuperscript{46} See R. Fisher, International Conflict for Beginners 148–49 (1969). Professor Fisher does not purport to be discussing international law in this book, but rather is addressing the broader issue of international conflict resolution. To the extent that he is not talking about “law” itself, he may be correct that it is better strategically to retaliate in proportion, time, place, and manner, to the original delict. But cf. J. Gaddis, Strategies of Containment (1982) (discussion of usefulness of “asymmetric containment” in United States foreign policy); discussion in Appendix, infra notes 145–49 and accompanying text. See also R. Fisher, Improving Compliance with International Law 72 (1981) (credibility of sanction a function of relation to the offense) [hereinafter cited as R. Risher, Improving Compliance].

\textsuperscript{47} See Appendix, infra notes 150–53 and accompanying text.
worth taking. The result is a general condition of systemic stability in which, to use a phrase of Professor Henkin, "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." 48

In the Appendix, I try to present some examples of the contemplation or use of retaliation against entitlements as illustrative of the "enforcement and compliance" mechanism in international law. The mechanism may appear less mysterious if we note here that international law explicitly provides for the kind of entitlement retaliation I have described in the area of breach of treaty. If nations \( X \) and \( Y \) have entered into a treaty, then no matter how long the treaty is and how many articles it contains, if \( X \) commits a material breach of the treaty then \( Y \) may legally retaliate by disregarding any or all of its treaty obligations to \( X \). 49 Another way of putting this is that a treaty sets up contractual entitlements between the parties. If \( X \) violates one of \( Y \)'s treaty entitlements, \( Y \) may legally retaliate by disregarding any or all of its obligations to \( X \) in the particular treaty that was violated by \( X \). As in international customary law, there is no differentiation among entitlements in a treaty as to their relative importance or weight. The only restriction upon \( Y \)'s power of retaliation is that \( X \) must have committed a breach of a material entitlement. In the analogous customary-law situation, the violating nation must have committed a breach of a nontrivial customary-law entitlement.

International law is replete with examples of reprisals, retortions, and other forms of self-help, and the (sometimes) accompanying rules of relatedness and proportionality. 50 Only some of these situations have involved entitlement retaliation (which is not circumscribed by rules of relatedness and proportionality). There have been two recent events, however, that provide an outstanding example of the entitlement-retaliation system: the Iranian hostage crisis and Iraqi war, and the Namibian independence movement. The relevance of both of these is explored in depth in the Appendix to this Article. 51

Retaliation for entitlement violation is a constant possibility in the international legal system, and this fact helps ensure the stability of the entire set of

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49. See Vienna Convention on the Law of Treaties, supra note 32, art. 60(3). The retaliatory mechanism I have discussed in the text applies to the international legal system as a system in any given time period. I have attempted to describe the structure of entitlement retaliation as a mechanism for preserving entitlements. Of course, at any given historical time there may be rules that disallow certain kinds of retaliation. At present, article 2(4) of the United Nations Charter seems to preclude the use of military force in retaliation for anything except armed attack (article 51). But in the systemic terms I have attempted to describe, article 2(4) is simply a very important entitlement that nations invoke to protect themselves. Conceivably that entitlement might be violated, however, if a nation commits an egregious act that falls short of armed attack upon another nation. For example, if a white minority government began systematically to kill its black nationals, I think that such a blatant example of genocide would trigger military invasion by other nations upon the genocidal state's territory, and article 2(4) would be viewed as simply having been overridden. In sum, I suggest that the entitlement-retaliatory mechanism I have described, while primitive, is the ultimate sanction in international law, more basic even than article 2(4).
51. See infra notes 138–84 and accompanying text.
entitlements. However, like the old notion of a "just war" in retaliation for what in those days were considered grave entitlement violations, the entitlement-retaliation system I have described could erupt in runaway escalation, given the vagueness of the previously mentioned "restrictions" of relatedness and proportionality. Its escalatory potential constitutes an ever-present threat to world peace. Clearly entitlement retaliation is not the most desirable form of "compliance and implementation," and fortunately it is not the only one. The international legal system contains many of the sanctions that are more typically used in domestic legal systems to secure compliance with norms. For example, when the International Court of Justice has compulsory jurisdiction, its judgments may be implemented by the United Nations under article 94. In addition, the machinery of the United Nations itself, especially the peace-keeping provisions of the Security Council, which have yet to be implemented, allows for international sanctions against lawbreakers. Many treaties set up treaty mechanisms for enforcement. Also there are regional courts, such as the European Court of Human Rights, which have certain powers of enforcement. Finally, international legal questions arise very often in municipal courts, and depending on the kind of case, enforcement can at times be extremely effective. All of these procedures offer traditional "sanctions"—namely, direct punishment of the lawbreaker that is designed to deter similar instances of such conduct. This traditional type of "sanction" is conceptually distinct from the system of retaliation by entitlement violation that I have described in this Article.

However, although the traditional sanctions systems works for many cases, at the present stage of international legal development it falls significantly short of universality. The international system has no pervasive judicial jurisdiction over all cases that may arise, and the United Nations is hobbled by its discretionary veto system.

As a result, the system of retaliatory entitlement violation that I have described is the only truly universal mechanism allowed by the international legal system to secure implementation and compliance in the real sense required by Professors Lane and Watson. Realistically, we have to acknowledge it as such, even as we recognize its potential for runaway destructive escalation and even as we work to expand the traditional sanctions system.

55. If the permanent members of the Security Council were only able to cast vetoes in certain legally prescribed instances, we might have a universal system of law enforcement; however, the totally discretionary veto has ensured so far in United Nations history that no principled system of universal sanctions could come into existence.
F. If Human-Rights Norms Are Part of International Law, They Are Entitlements

The preceding analysis of entitlement suggests that the international legal system does allow for sanctions for noncompliance with its norms, the sanctions being the threat or actuality of reciprocal entitlement violation that is generally understood and accepted as restorative of entitlement equilibrium. But now the questions arise: when a nation violates an individual’s human rights, has that nation violated an entitlement? If so, is that entitlement a part of the international-law set of entitlements? I want to reserve this last question for the second part of this Article, and deal here only with the structural contention that a nation that violates a human-rights norm can violate what we have defined as an entitlement. While reserving the question of whether or not human rights entitlements actually do exist, this section will deal with the more fundamental question of whether or not they can exist—that is, whether or not they can fit into the international system of legal entitlements.

Imagine that a soapbox orator begins to make a political speech in state $X$. Among the small group of people listening to him are $A$, a national of $X$, and $B$, who was born in $X$ but became a naturalized citizen of $Y$ and is now on a vacation in $X$. The $X$ police suddenly descend upon the scene, and arrest the orator and the twenty or so persons who had gathered around to listen. $A$ and $B$ are jailed without any formal arraignment processes; they are subjected to inhuman and degrading treatment and finally are tortured for supporting (by virtue of their listening to) the subversive orator. Let us further stipulate that both $A$ and $B$ were simply passers-by, and neither was connected in any way with any anti-government political activities in $X$.

On these facts, Lane and Watson would have no difficulty in concluding that nation $X$ has incurred international responsibility to nation $Y$ for its maltreatment of $B$.\(^{56}\) That maltreatment fell below the international minimal standard for a state's responsibility to aliens, and thus clearly violated $Y$'s entitlement that its nationals traveling abroad should not be subjected to such maltreatment by the officials of $X$.\(^{57}\) There is no difficulty with this conclusion in present-day international law or even in the international law of the nineteenth century. A classicist might say that state $Y$ is itself "harmed" by virtue of the harm to one of its nationals, and is thus entitled to redress from state $X$.\(^{58}\) Since state $Y$ is injured, $Y$ might want to engage in a reciprocal violation of one of $X$'s entitlements in the event that $X$ does not compensate $Y$ for the injury.

But what is it, if anything, that sets $B$ apart from $A$? Is it the fact that $B$ is holding a passport from state $Y$? $B$ may not have the passport (he may have lost it), or it may be outdated or invalid for some other reason. Without the passport or some other set of papers, $B$ is, in appearance, the same as $A$. Both are, say, men in their forties, apolitical, perhaps of the same religious and

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56. See, e.g., Watson, Legal Theory, supra note 4, at 620.
ethnic group, and were even born in the same town in $X$. Why should Watson and Lane have no difficulty with $B$'s case, which they acknowledge is part of international law in the realistic sense of compliance and sanctions,\(^{59}\) and yet have enormous difficulty with $A$'s case, which they say is outside the realm of international law? Why do they feel that what state $X$ does to its own citizen, $A$, within its own borders, is purely a matter of $X$'s "domestic jurisdiction" protected as such by article 2(7) of the United Nations Charter?\(^{60}\) A possible answer is that $B$ is a "national" of $Y$, and that fact "internationalizes" his situation, whereas $A$ is a national of $X$, and thus the $A$-$X$ relation is one of domestic law only. Yet, this begs the question. "Nationality" is only an artificial relationship pertaining to international law. It is merely another way of stating that state $Y$ has an entitlement in $B$'s protection from $X$. For if $Y$ were the only state in the world, there would not have arisen a concept of nationality. (There might have arisen a concept of citizenship, which has to do with voting or other kinds of political eligibility, but not "nationality."\(^{59}\)) It is the existence of other states in the world that has given rise to a special relationship between $Y$ and certain of "its" people, including those who become its people through naturalization, namely, the relationship of nationality. This special relationship would not have arisen had not other states recognized it (and they recognized it, perhaps, because they saw in it reciprocal advantages to themselves in claims of their own "nationality").\(^{61}\) Once recognized and accepted, it became an entitlement.

Thus, Watson and Lane's theses come down to this: they agree that what $X$ does to $B$ is a matter of international law in the fullest sense of the word—namely, that $X$'s duties toward $B$ are subject to implementation and compliance to the extent that international law can and does ensure such compliance with its norms. And they also agree that what $X$ does to $A$ is a matter of domestic jurisdiction wholly outside the realm of international law. Thus Lane and Watson (and their followers in the Reagan administration) are not saying that individuals cannot be the subject of international law, or that international law does not exist, or that international law is ineffective, or any of the other discredited positions that from time to time have been asserted by self-styled "realists." Rather, they are saying only that international law obtains in the case of $B$, because $B$ is a national of $Y$, and does not obtain in the case of $A$, because $A$ is not an alien within $X$ but rather a national of $X$ who is stuck with whatever maltreatment his own country metes out to him within its boundaries. Finally, as we have seen, the only thing that differentiates $A$ and $B$ is the intangible and indeed question-begging concept of "nationality."

\(^{59}\) Watson indeed criticizes Lauterpacht and McDougal for their "lack of understanding as to why there is such a difference in the legal status of aliens and citizens." Watson, Legal Theory, supra note 4, at 620.

\(^{60}\) Watson is more strident on this point than Lane. See Watson, Autointerpretation, supra note 4. Lane, Mass Killing by Governments, supra note 4, focuses more upon the failure to enforce human rights.

\(^{61}\) International law might have developed quite differently—perhaps that anyone physically within a state is totally subject to that state's laws and that there is no concept of an alien, a non-national, or a stateless person.
G. If Human Rights Norms Are Entitlements, Then They Are Universal Entitlements

Our next step is therefore apparent. We must try to discover whether $Y$ has an entitlement to protect $A$ along with its acknowledged entitlement to protect $B$. We have to decide, in other words, whether there is a "human rights" entitlement in $Y$ that enables $Y$ legally to violate one or more of $X$'s international-law entitlements if $X$ maltreats $A$, its own national, in the same sense that $Y$ has a "nationality" entitlement that enables $Y$ legally to violate one or more of $X$'s international-law entitlements if $X$ maltreats $B$, $Y$'s national. Or, to coin a phrase, we must find $A$ to be an "international" of state $Y$ just as $B$ is a "national" of state $Y$.

To writers such as Lane and Watson, what state $X$ does to its own national, $A$, within its own borders seems quintessentially a matter of $X$'s domestic jurisdiction. Yet, as Professor Henkin has demonstrated, a matter is exclusively within $X$'s domestic jurisdiction only when it is not a matter of international law.62 Domestic jurisdiction is a residual concept; it is simply another way of saying that international law does not apply. To be sure, how state $X$ treats individuals within its borders seems to be something within state $X$'s exclusive province. Yet we only have to recall our previous hypothetical example to dispel this illusion. State $X$ maltreats $A$ and $B$, who are individuals within its borders. $B$, we assume, carries no papers or other identification, and appears to be no different from $A$. Yet $B$ is a national of state $Y$. Every international lawyer believes that what state $X$ does to $B$ is not within $X$'s domestic jurisdiction. The reason given for singling out $B$ is that there is some international law link between $B$ and another state, a link defined and approved by international law and labeled "nationality." Appearances do not tell us about this; rather, the link is entirely a juridical construct. In short, Henkin and before him Kelsen must be correct in arguing that characterizing a matter as one within $X$'s domestic jurisdiction is simply another way of saying that the matter is not cognizable under international law, and no more than that.63

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There are, however, two alternative views of "domestic jurisdiction," both suggested by Professor Oscar Schachter, that should be noted. See Schachter, Book Review, 17 Colum. J. Transnat'l L. 531 (1978) (reviewing Human Rights, International Law and the Helsinki Accord (T. Buergenthal ed. 1977)). The first might view the concept as something of a shield or barrier to international cognizance of minor international law violations that occur within a state's territory. For example, the issue of preferential admissions to blacks in American professional schools, if argued to be racial discrimination against whites, may be too minor an issue to rise to the level of international human-rights concern. Perhaps international law should concern itself only with "consistent patterns or gross abuses," id. at 534. Schachter makes the interesting suggestion that over time the concept of "domestic jurisdiction" might aid the development of standards for determining the nature or frequency of violations that do rise to the international level, which may be preferable to "leaving the drawing of a line entirely to the political judgment of interested States." Id. (Of course, it might be pointed out, the existence of a domestic-jurisdiction line does not mean that its violation will automatically be sanctioned; the political judgment of interested states will still have an impact.) A second possibility is that the concept of domestic jurisdiction
So let us now focus upon $X$'s maltreatment of its own national $A$. Is $X$'s action cognizable under international law? A more precise way of asking this question is to ask if one or more other states can have an entitlement that $A$ not be tortured by $X$? If so, which other states? I would suggest that the other states that may claim such an entitlement are all the other states, a notion which after all is suggested by the very term "human rights."

The human rights violator is, like the pirate, *hostis humani generis*, an enemy of all mankind, and jurisdiction to punish his violations is universal. In years past, although pirates were theoretically subject to the criminal jurisdiction of any state that captured them, many nations “‘winked’ at the practice so long as the pirates were known to carry out their depredations against other states. For instance, pirate vessels known to focus their attentions upon Spanish galleons might have been allowed a certain freedom of action by England, even though England theoretically had jurisdiction. The state immediately affected, Spain, certainly had every incentive to combat piracy, but other nations often did nothing about it even though they were entitled to act. Similarly, with human rights most nations might not care whether state $X$ tortures its own national. Perhaps a particular nation might feel specially affected—for instance, if $A$’s religious or ethnic background is the same as that of a majority of the citizens of $Y$, $Y$ might feel some special calling to complain about $X$’s treatment of $A$. Certainly many nations in Africa having black majorities feel a special interest in the plight of blacks in South Africa. But like piracy, human rights may allow for a “universal” entitlement without necessarily guaranteeing that any one nation or group of nations will feel motivated, or have the interest, to do something about it.

For Lane and Watson to contend that the often appalling statistics of human-rights violations by governments vis-a-vis their own nationals are evidence that what those governments are doing is legal under international law would be very much like a seventeenth-century legal scholar stating that piracy must be legal because it is flourishing. Rather, the critical legal question for the seventeenth-century scholar was not whether nations in fact combatted piracy but whether they were legally entitled to do so if they chose. Similarly, if $X$’s maltreatment of $A$ is a violation of $Y$'s entitlement, what is important is $Y$'s potential enforceability (through reciprocal entitlement-violation) of its entitlement.\(^65\)

\(^{65}\) can act as a sort of “exhaustion of local remedies” requirement, so that if a state recognizes a domestic human-rights violation and takes steps to remedy it, the international community would not have jurisdiction unless there is a failure to remedy that amounts to a denial of justice.

\(^{64}\) Cf. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (discussion of the torturer as *hostis humani generis*).

\(^{65}\) Before proceeding to an argument that other nations do have an international law entitlement against certain forms of maltreatment by any one nation of its own nationals, I might mention a much more “radical” view of the human rights issue that I have chosen not to deal with in the present essay. This more radical theory is that individual human beings are in a sense more important than, or legally higher than, nations; therefore it is relatively unimportant whether other nations feel that they have an entitlement to protect individuals against the depredations of their own governments. Indeed, under this theory, to look at the matter from the viewpoint of nations’ entitlements is somehow to cheapen the issue, for $A$’s rights do not exist because nations $Y$ and $Z$ have an entitlement with respect to $A$ but simply because $A$’s rights are primary to those
This first section has described the international legal system from a perspective that allows for a substantive international law of human rights. Nations may have an interest in protecting human rights in other countries; what counts, however, is that they have a realistic entitlement to do so. None of the foregoing arguments, of course, establishes the existence of these rights. It is now necessary to explore the means by which legally binding human rights may be derived to fit our framework.

II. TREATIES INTO CUSTOM: DERIVING AN INTERNATIONAL LAW OF HUMAN RIGHTS

The second half of this Article is concerned with the actual process by which various human rights become law. As will be seen below, treaties play a crucial role in the creation of these laws—but not just through the usual method of creating strictly defined obligations that restrict the ratifying parties. More importantly, treaties containing generalizable principles of international law generate rules of customary international law that bind even non-signatories.

A. SOME HUMAN RIGHTS ARE PROTECTED BY TREATIES

The most obvious way for nations to secure human-rights norms among themselves is to conclude a treaty to that effect. The earliest forms of treaties—treaties providing for the safety of emissaries and messengers—had individuals as their subject matter. The treaties involved in the Iranian example discussed in the Appendix focused upon the safety of diplomatic and embassy personnel abroad. Of course, these and countless other “classic” treaties were concerned with the rights of nationals in foreign countries. Persons lacking a nationality, refugees, and “stateless” persons were accorded rights by states adhering to the 1951 Convention Relating to the Status of Refugees. Lane and Watson, however, are concerned with a government’s treatment of its own nationals within its own territory. As to this class of persons, states adhering to the Genocide Convention that came into force in 1961 have agreed inter se that certain enumerated acts by a government

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of all governments including X, Y, and Z. Whether this theory can be given operational substance, or whether it is merely rhetoric, is not an issue that needs to be addressed here. Compare Henkin, supra note 8, at 257–80, with M. McDougal, H. Lasswell, and L. Chen, Human Rights and World Public Order 161–85 (1980).

My purpose is simply to take Lane and Watson (and their sympathizers in government) at face value. To them, the question is whether international law applies to A in the same way that they concede that it applies to B. Given that concession on their part, I see no need to change the theory so that some entirely different view of human rights can be propounded. Indeed, part of their legitimate frustration, expressed in their articles, is that writers have not come to grips with the precise question that they raise. Since their question is, I believe, answerable on its own terms, I eschew any circuitous paths, however tempting they may be.

66. See infra notes 78–96 and accompanying text.
68. See infra notes 139–78 and accompanying text.
against a group of its own citizens are crimes under international law that all
the signatories "undertake to prevent and to punish."70 The broadest treaty
on human rights, the International Covenant on Civil and Political Rights,71 is
explicitly aimed at all individuals within the territory and jurisdiction of the
signatory state.

The United Nations Charter, as a treaty, contains a pledge in article 56
that members will take action to achieve the purposes set forth in article 55,
including "universal respect for, and observance of, human rights." The
many resolutions of the General Assembly adopted over the years may be
claimed to constitute an implementation of these treaty provisions and hence
are binding upon the member states. Of course, many would argue that the
resolutions are merely recommendations without legal force.72

B. Some Human Rights Have Become Part of Customary International Law

1. Which Rights. Apart from treaty entitlements among parties to treat-
ties, we must inquire whether there are any "human rights" that are generally
binding upon all states by virtue of such rights having become entitlements of
customary international law. Such an inquiry must be highly particular about
which human rights, if any, are at issue. Many "rights" have been asserted in
print, ranging from the fundamental to the vague, from the consistent to the
incoherent. Three examples of fundamental, consistent assertions of human
rights that come readily to mind are the entitlement of any one nation that no
other nation may commit an act of genocide against a group of persons,
including its nationals, within its territory;73 the entitlement of any one nation
that no other nation may torture any human being;74 and the entitlement of

70. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948,
art. 1, 78 U.N.T.S. 277 [hereinafter cited without cross references as Genocide Convention].

71. International Covenant on Civil and Political Rights, opened for signature Dec. 19,
1966, art. 2, 6 I.L.M. 368, 369, [hereinafter cited without cross references as International
Covenant on Civil and Political Rights]. The fact that the United States, as of this writing, has
ratified neither this Convention nor the Genocide Convention may cause some policy makers in
the Reagan administration to think that the human rights of foreigners in their own countries are
of no legal concern to the United States, but if so this attitude is rarely made explicit—perhaps
because of a sense of shame that the treaties are still unratified. In any event, the attitude has little
to recommend it from a legal standpoint, since the failure of the United States to ratify these
treaties can hardly make a difference to the many states who are parties. As to the latter, they
have achieved by their own adherence to those treaties a legal entitlement in the human rights of
persons who are nationals of the other contracting parties.

72. See, e.g., Panel Discussion, Contemporary Views on the Sources of International Law:
Professor Sohn has forcefully stated the case for treating General Assembly resolutions as
important components of international law. See Sohn, The Universal Declaration of Human
Rights, 8 J. Int'l Comm. Jurists 17 (1967); L. Sohn & T. Buergenthal, supra note 57, at 518-22,
551-56.

73. Genocide Convention, supra note 70.

74. International Covenant on Civil and Political Rights, supra note 71, art. 7. In Filartiga v.
Pena-Irala, 630 F.2d 876 (2d Cir. 1980), the court held that torture committed against a citizen of
Paraguay by a Paraguayan official within Paraguay violated international law and thus jurisdiction
was conferred upon United States district courts under 28 U.S.C. § 1350 (1976) (allowing
original jurisdiction where an alien sues for a tort "committed in violation of the law of nations").
any one nation that no other nation may enslave human beings or traffic in human slavery.\footnote{75}

"Vague" rights tend to be those that are asserted against an entire social system such as apartheid or communism. The ambiguity arises when one considers the results of immediate dismantling of those systems: would other human rights be jeopardized? To make the blanket assertion, for example, that apartheid is a violation of human rights fails to take account of the foreseeable consequences to whites in South Africa if the social system were suddenly dismantled. Finally, there are "incoherent" assertions of human rights. The so-called rights to the necessities of life—minimal food, shelter, and clothing—may reflect what Lon Fuller would call an "aspirational morality."\footnote{76} But they are inconsistent if viewed as legally enforceable rights since they may involve redistribution of privately held resources.\footnote{77} Much more specification is needed before we can ascribe a clear meaning, much less make out an international entitlement, to such "rights."

In this section I will focus upon the three relatively uncontroversial prohibitions previously given: genocide, torture, and slavery. My purpose is simply to challenge the theses of Watson and Lane that there are \textit{no} universal or general rights. Although I acknowledge the necessity of particularizing any discussion of human rights, these three, or any one of them, are sufficient to my present purpose. I suggest that these three prohibitions are entitlements of general customary international law and thus binding upon all states. Other rights as well may come under my analysis, but they may be left to further research and particularization.

2. \textit{The Effect of Treaties Upon Custom.} My argument is simply that the multilateral conventions containing prohibitions against genocide, torture, and slavery\footnote{78} constitute evidence of customary law binding upon all states and not just the parties thereto. I do not claim that this evidence can be found subsequent to, or apart from, the conventions, but rather that the conventions themselves constitute or generate customary rules of law. To prove this argument it will be necessary to depart from our concentration on human rights—since the argument relates to all generalizable treaty provisions, including human rights provisions—and discuss in detail the theory of customary law formation. The present section will describe my argument. The next section

\footnote{75. International Covenant on Civil and Political Rights, supra note 71, art. 8; Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, T.S. No. 778, 60 L.N.T.S. 253.}

\footnote{76. L. Fuller, supra note 29, at 5-32.}

\footnote{77. While the argument I have given in the text criticizes economic and social rights from the perspective of requiring others (including the government) to provide them, the rights may be viewed coherently from the standpoint of prohibiting certain kinds of acts. As Professor Schachter has called to my attention, former Secretary of State Cyrus Vance argued that economic rights can be violated by a government "through corrupt official processes which divert resources to an elite at the expense of the needy." Vance, Human Rights and Foreign Policy, 76 Dep't St. Bull. 505-06 (1977), quoted in Schachter, International Law Implications of U.S. Human Rights Policies, 24 N.Y.L. Sch. L. Rev. 63, 77 (1978).}

\footnote{78. See supra notes 70, 71 & 75.}
will deal with specific criticisms of my theory that have been made by Dr. Michael Akehurst. 79

Customary international law is a set of entitlements that have developed through centuries of the “practice” of states. By “practice” I mean not what states do in isolation, but how states interact with each other on any issue: absent all interactions, a state is simply acting domestically. 80 Some customary entitlements owe their origin to the following model: state X acts, state Y reacts, and either X’s action or Y’s reaction or some other resolution of the issue is accepted or becomes operative between X and Y. For example, a courier of state X delivers an unwelcome message to the king of state Y. The king imprisons the messenger. State X responds by sending another courier (obviously a reluctant one) who delivers the message that unless Y returns the first courier safe and sound X will sack and destroy the towns of Y. If Y releases the first courier with an apology and perhaps a payment of gold, a resolution of the issue in this manner will lead to a rule that official couriers are entitled to immunity against imprisonment. However, if Y were to imprison the second messenger as well, and X was unable for any reason to do anything about it or get Y to change its mind, a different rule would arise to the effect that official couriers have no immunity. We cannot say a priori which of these two results must occur; all we have is the history of state behavior to tell us which rules of international law have become manifest in their customary interactions. In fact, we know that, due either to the perceived need to communicate, or the injustice of ill-treatment of couriers, an early rule of diplomatic immunity became well established as an entitlement of any nation against all other nations. This is the classic kind of example of a practice ripening into a rule of law. But many rules of international law—the vast majority of them, in fact—did not originate along the lines of this model. Rather, most rules began as provisions in treaties. State X and Y agreed in writing to honor the personal safety of their respective diplomats, either because of an earlier incident between them involving the ill-treatment of a messenger, or because they perceived the need to coexist peacefully and avoid problems arising out of the exchange of message-bearing personnel. Early treaties and agreements of friendship, commerce, and/or navigation typically provided for the immunity of diplomatic personnel, a rule that became part of customary law. The treaty in effect replaced the model I suggested in the

80. In II T v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975), Judge Friendly noted that the fact that every nation’s municipal law might prohibit theft does not incorporate into international law the Eighth Commandment’s prohibition against stealing. As Judge Kaufman wrote in Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980), “It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the [Allen Tort Statute, 28 U.S.C. 1350 (1976)].” In other words, if two or more nations commit themselves in a treaty not to allow certain domestic acts—for example, torture, or even in Judge Friendly’s hypothetical, theft—that treaty provision internationalizes the issue and takes it out of the pure domestic realm of a state’s acts. See D’Amato, supra note 16, at 79–80 (1971) (Genocide Convention moves domestic genocide into the domain of international relations).
previous paragraph. Instead of imprisoning a courier and then letting him go to establish a customary rule, the two affected nations committed themselves to that rule in advance by virtue of a binding instrument. (The binding nature of a "treaty" had itself already been established by virtue of customary law.\textsuperscript{81})

Some years ago when I read the classic works of the "positivist" writers of international law, such as Zouche, Wolff, Moser, Vattel, and especially Bynkershoek, I was struck by the fact that nearly everything they claimed to be a rule of international law was in fact a provision of a treaty. The earlier "naturalist" writers, such as Grotius, Suarez, and Gentili, had unabashedly included treaty provisions as sources of customary law. The "positivists" were more of a surprise; though they claimed that international law was based upon consent, they were able to find such consent generally in the system on the basis of treaty provisions concluded by only a subset of the nations in the system. In my book, \textit{The Concept of Custom in International Law},\textsuperscript{82} I tried to give a detailed account of the rules we now accept as part of customary law that originated in treaties. My impression is that if we were to remove all the rules of international law that originated as provisions in treaties, we would be left with very few rules indeed—the rare rules that were actually the result of clashing acts and claims and the resolutions of these controversies.

To say this is not to assert that all provisions in treaties become part of the general customary international law. Many treaty provisions are simply not generalizable into rules of law without destroying their content—they are not "norm-creating" treaties. For instance, a "most-favored-nation" clause loses its meaning if it is generalized to give most-favored-nation treatment to everyone without exception.\textsuperscript{83} The classic writers on international law, including those previously mentioned, were well aware of these limitations, and regarded the sorting out and identification of generalizable provisions in treaties as their scholarly mission.\textsuperscript{84}

\textsuperscript{81} Interestingly, the rule that treaties are binding might itself have resulted from provisions in early treaties containing solemn vows that the treaties were binding.\textsuperscript{82} A. D'Amato, supra note 16.

\textsuperscript{83} Additionally, there are many treaties that effect a barter or exchange (e.g., the "destroyers-for-bases" deal between England and the United States prior to World War II), and these too cannot be generalized. Moreover, many treaties and treaty provisions refer to particular places or organizations and thus cannot state a general rule: for example, treaties affecting the title or rights of passage of particular lands or waterways, demilitarization treaties for particular territories, mandates and trusteeships, boundaries, treaties setting up international organizations, and so forth. See generally the list of categories provided by Waldock in 2 Y.B. Int'l L. Comm'n 27, U.N. Doc. A/ CN.4/SER. A/1964/Add. 1. Finally, if some treaties state one rule and other treaties state the opposite rule, the clash between the two, just like a clash of customary practice, cannot give rise to any one customary rule.

\textsuperscript{84} The classic writers' approach to international law was no different from Lord Mansfield's approach to developing the "law merchant" rules of the common law in England at roughly the same time. Lord Mansfield found many provisions in contracts which were generalizable, and he applied them to other unrelated contracts when the latter lacked specificity. He had no difficulty accepting as the "practices" of the mercantile class the written agreements concluded among merchants. See generally B. Shientag, Moulders of Legal Thought 108-11, 123-50 (1943).
At about the turn of the twentieth century, however, several English publicists, including Oppenheim and Hall, 85 put forth the view that treaties simply laid down contractual obligations for the parties and could have no legal effect outside the parties. This view was repeated as dicta by Lord Alverstone in the much-cited case of West Rand Central Gold Mining Co. v. The King, 86 a case now, however, generally acknowledged to have been wrongly decided. 87 I have not been able to find any support for the Oppenheim position apart from the assertion by Oppenheim and Hall that provisions in treaties can either be declaratory or in derogation of the underlying customary law, but do not affect the underlying law. 88 This is more a statement of a conclusion than a reason, a conclusion that follows from equating treaties with contracts and then taking a restrictive view of contracts. Yet, a long line of British and American authors, from Oppenheim to my former teacher, the late Professor (and Judge) Richard R. Baxter, have reiterated this “restrictive-contract” view of treaties. 89

Several arguments can be made against the restrictive-contract view. First, as Lord McNair and Professor Sohn, among others, have persuasively demonstrated, treaties differ in many fundamental respects from domestic contracts. 90 Second, and much more significantly, the writers who have asserted, with Oppenheim, that provisions in treaties do not affect the underlying customary law have uniformly failed to adduce a single instance of a generalizable treaty provision that has not been transmuted into customary law. Third, even these writers accept that provisions in treaties may eventually “pass” into customary international law or “harden” into law. But they have never indicated how or when this “passage” or “hardening” takes place, and they have failed to indicate what evidence we might look for to ascertain that a treaty provision has undergone the rites of passage into customary law. Their inability to give theoretical or practical support to the notions they have invented of “passing” or “hardening,” after all these years, suggests that perhaps something is wrong with their initial premise.

86. [1905] 2 K.B. 391, 398.
87. See, e.g., E. Feilichenfeld, Public Debts and State Succession 380–96 (1931) (eventual diplomatic settlement by England more liberal than the theories advanced in the case would indicate); 1 D. O’Connell, State Succession in Municipal Law and International Law 244, 321, 378 (1967).
88. W. Hall, supra note 87, at 7–8; 1 L. Oppenheim, supra note 87, at 27.

In contrast, many continental authors have retained the classical view that generalizable provisions in treaties constitute evidence of customary international law. See references in D’Amaoto, supra note 16, at 138–40. 90

An example from Oppenheim's own text indicates the level of unreality to which insistence upon a theory of "hardening" can lead. As late as the final edition of Lauterpacht's Oppenheim, published in 1955, the author still found it "difficult to say" whether a customary international law contains a prohibition against the international traffic in slaves.91 The author cited numerous international treaties condemning slave traffic, but because of the commitment to the theory that treaty provisions can either be in derogation of or declaratory of customary law, no conclusion as to the latter could be reached. But not long thereafter, the International Law Commission, commenting upon the *jus cogens* provision of the new Vienna Convention on Treaties, found not only that customary international law prohibited international slave trade but that this prohibition was "one of the most obvious and best settled rules of *jus cogens*" in that even new treaties could not derogate from it.92 Unlike Lauterpacht's Oppenheim, the I.L.C. did not miss the forest for the trees.

If we press this example a bit further, we might inquire what evidence Oppenheim or Lauterpacht would desire in order to substantiate a customary international law rule prohibiting traffic in slaves. Certainly one more or a dozen more treaties would not do the trick, because Lauterpacht already cited numerous international treaties prohibiting slave traffic. Thus his prescription in practical terms might be inferred to be as follows: let one nation that is not a party to any conventions on slavery actually encourage the taking of a group of humans as slaves, allow or require one of its vessels to transport these slaves to another nation, hope that other nations will intercede forcibly to halt the transportation, and then have the first nation "back down" and agree to free the slaves and punish the ship's captain. This procedure, or something like it, would then substantiate the prior treaty provisions outlawing the international slave traffic, and presumably would allow Lauterpacht in the next edition to write that, finally, the treaty law has indeed "hardened" into customary law. Similarly, if a writer were to contend that "it is difficult to say" whether the Genocide Convention has passed into customary international law, presumably a nation would actually have to engage in genocide and then desist after a few hundred or a few thousand people have been massacred in order to substantiate the antigenocide rule. If Oppenheim's "theory" is accepted, it would appear that nations would have to engage in such post-treaty "practice" in the slavery and genocide cases—as well as in all other human-rights cases—in order to test whether the treaty rule has hardened into customary law. My position, on the other hand, is that nations have not painted themselves into any such theoretical corner, but rather have manifested by virtue of their behavior over the centuries that generalizable provisions in treaties become part of customary law directly without need for such subsequent "practice."

91. 1 L. Oppenheim, supra note 87, at 733–34.
Finally, the incoherence of the "hardening" theory can be demonstrated theoretically even if we accept the previously described gruesome example of deliberately enslaving human beings as necessary to test whether the treaty rule has become a customary rule. Suppose nation \( X \) (not a party to any antislavery treaty) enslaves some people and transports them on one of its ships, and nations \( Y \) and \( Z \) notify \( X \) that \( X \) should cease and desist immediately. By what law do nations \( Y \) and \( Z \) object to \( X \)'s acts? The only prior law on the subject, by definition, is the law in the treaties. Yet, if it is by this law that \( Y \) and \( Z \) object to \( X \)'s acts, then the law, for international law purposes, is already established prior to \( X \)'s compliance. In this event, the Oppenheim thesis is redundant. Or to put the point differently, there is no coherent means to establish "hardening" of the sort envisaged by Oppenheim, since its very proof involves invocation of the theory that Oppenheim attacks, namely the theory that provisions in treaties generate customary law immediately and without any such process of "hardening."

To be sure, the subsequent evidence needed to substantiate the "passage" of a treaty provision into customary law might be something other than the action-reaction-resolution model I suggested at the outset. But what might this something else be? The late Professor Baxter in a carefully reasoned lecture argued that this subsequent element must be acquiescence in the rule by the nonparty states.\(^93\) Baxter gave no suggestion, however, as to how this acquiescence might be manifested or proved. And he himself recognized a logical paradox implicit in the idea of acquiescence: the more states that sign a multilateral convention, the fewer nonparties remain and hence the more difficult it becomes to find a consistent attitude of these nonparties to the rule in the treaty.\(^94\) Indeed, suppose all the states in the world that are at all interested in the subject matter of the treaty sign it; we might wait in vain for the nonsignatories to express any attitude toward the rules of the treaty.

Nevertheless, a critic may attempt to support the Oppenheim approach by the argument that since the parties to a treaty intend that the treaty shall be binding only upon themselves—which is, after all, why they enter into the treaty—the provisions cannot therefore have any third-party effect. This argument in a sense restates the restrictive-contract notion of treaties. But it is also answerable on its own terms. In the first place, we cannot be sure that the parties to a treaty intend exclusivity of its provisions. Of course, a treaty involving commercial trade or one delimiting boundaries would seem to be of particular and even exclusive interest to the parties, but I have previously ruled

\(^93\) Baxter, Treaties and Custom, supra note 89, at 71–73.

\(^94\) Id. at 64. Professor Baxter based much of his reasoning upon the decision of the International Court of Justice in the North Sea Continental Shelf Cases (W. Ger. v. Den., W. Ger. v. Neth.), 1969 I.C.J. 3 (Judgment of Feb. 20). For reasons that I give in the next section of the present essay, see infra notes 97–113 and accompanying text, the Continental Shelf Cases are better construed as delineating the requirements of "special custom" and not "general custom." Under this approach, reliance on that decision is misplaced. But even if the reader does not want to accept my analysis of the Continental Shelf Cases as turning on the requirements of special custom, one looks in vain at the opinion of the court to find what the court itself would accept as evidence of "acquiescence" under Baxter's theory.
out such treaties as norm-creating because they are not generalizable. But taking those provisions that are generalizable, it is not clear that the parties intend them to be exclusive to themselves. Indeed, a generalizable provision would almost by its very nature be one to which the parties would welcome adherence on the part of other states. Moreover, multilateral conventions, which these days are becoming especially numerous and prominent, nearly always contain provisions to which the parties would want other states to subscribe. Multilateral conventions open to all nations seem to manifest an intent to universal inclusivity. At the very least, we might conclude that parties to treaties do not necessarily intend generalizable treaty provisions to be limited to the signatories.

Second, and more importantly, I would argue that whether the parties’ intent is resolved on the side of exclusivity or inclusivity, intent is ultimately irrelevant. What the parties to a treaty intend its effect to be has nothing to do with the use to which the international community of states may desire to put the treaty. Take as an analogy a case in domestic law. The judicial system will give the case precedential effect irrespective of the intent of the parties. Indeed, if both plaintiff and defendant were to stipulate that the decision in their case be confined to themselves, I believe that any court would disregard their wishes and reply simply that the use to which the judicial system wants to put the decision in this particular case has nothing to do with the desire or intent of the parties but rather is a question of the jurisprudence of the legal system. In international law, nations have through history incorporated the provisions of treaties into customary law without regard to the intent of the parties—even if such an intent could be determined, and even if it were determined to express a desire for exclusivity.

3. Dr. Akehurst’s Critique. In a leading article devoted largely to a criticism of my book on the concept of customary international law, Dr. Michael Akehurst contends that I was wrong in asserting that treaties may generate customary law. It will be instructive to see how he goes about attempting to prove this proposition.

95. See supra text accompanying note 82.
96. See D’Amato, Manifest Intent and the Generation of Treaties of Customary International Law, 64 Am. J. Int’l L. 892 (1970). In a paper that I wrote for a seminar given by Professor Baxter in 1961, published the following year, I argued that parties to a treaty usually hope that “the general rules they adopt in treaties” are “extended to all nations; a rule is essentially a reciprocal accommodation.” D’Amato, Treaties as a Source of General Rules of International Law, Harv. Int’l L. Club Bull., Apr. 1962, at 1, 29.
97. Akehurst, supra note 79.
98. Akehurst’s criticism is ironic, since he also disputes my position that claims are less important than treaties in generating custom. In the book, I asserted that a claim is only the first step toward a unit of “custom.” To complete the unit, what is needed is a reaction by one or more other states and a resolution of the issue. On the other hand, if custom can be generated by a claim only, as Akehurst argues, then all kinds of unilateral desires by nations would become law. For instance, a claim made by one nation that the Soviet Union violates international law by not having more than one political party to give the voters a meaningful choice at election time would, according to Akehurst’s reasoning, be evidence of a rule of international customary law of which the Soviet Union’s one-party system is in violation. Or, a claim by one or more nations that apartheid violates international law would be evidence of a customary rule to that effect binding upon South Africa. A claim by Switzerland that it owns Antarctica, or by Sweden that it owns the
Since Akehurst recognizes that so many rules of customary law owe their origin to provisions in treaties, and since (with some misgivings) he accepts the cases I cited to prove this proposition, he must find various mechanisms to

moon, or by Saudi Arabia that it owns the mineral wealth under all the oceans would also be constitutive of custom (for Akehurst indeed cites cases involving claims to specific real estate in support of what I would have thought would be the rather different proposition that claims generate general customary law). Akehurst, supra note 79, at 2. In domestic law, if one were to argue that any claim made by any private person or by any lawyer constitutes evidence of what the law is, the argument would be thrown out of court. For clearly there is no conceivable restraint upon what any person—or any nation—might claim. And just as clearly, for every claim there is a potential counterclaim. For these reasons, I find Akehurst's position that a mere claim is enough to constitute evidence of customary law to be quite unconvincing.

In turn, Akehurst calls my position on claims “very restrictive.” Id. at 1. He makes one argument that on its face has merit: that claims of states regarding the width of the territorial sea or of exclusive fishery zones are regarded as in themselves capable of creating customary law. Id. at 2. While Akehurst does not specify this argument any further, let us suppose that all the nations in the world are requested by the Secretary-General of the United Nations to state their claim for the width of the territorial sea (or, interchangeably, their claim for the width of exclusive fishery zones) in a letter to the Secretary. Suppose all nations respond, and the claims range from 25 miles to 500 miles. On these supposed facts, I would have no difficulty finding a rule of international law to the effect that a 25-mile territorial sea has been established, and that anything beyond 25 miles is still subject to dispute and resolution. But as I made clear in my book, D’Amato, supra note 16, at 33–34, and in a simultaneously published article on consensus, D’Amato, On Consensus, 8 Can. Y.B. Int’l L. 104 (1970), cited in Akehurst, supra note 79, at 7, a minimal consensus reached by all states (for instance, 25 miles) becomes part of general international law not by the process of “custom” but simply because international law itself is no more and no less than what the nations of the world think it is. If all the nations in the world think that, at the very least, the territorial sea is 25 miles wide, then that ipso facto is what international law holds. If a label had to be given to this process of law creation, I would call it “consensus.” But in any event it is not custom. For if it were custom, then logically any claim is capable of generating custom. If one or two states in the letter to the Secretary-General claimed a 500-mile territorial sea, Akehurst would have to give that claim weight as part of “customary” law as much as he gives weight to all the other claims. He would then be caught in a welter of conflicting claims (after all, a nation that claims a 25-mile territorial sea is implicitly stating that it will not recognize a claim that exceeds 25 miles). Thus, my conclusion on this particular issue of claims to the width of territorial seas coincides with Akehurst’s conclusion only to the limited extent that I would accept a consensus position as to the minimal claim. But I would not accept it as custom, as he does, for all the reasons previously given.

But if all the reasons I have given fail to convince the reader, and if instead Akehurst’s position that claims generate customary law is preferred, then it would appear to be quite easy to reach the conclusion that treaties generate customary law as well as claims, for treaties incorporate the claims made by all the parties thereto and go a step farther and resolve those claims. Surely if a bare claim is enough to generate custom, then the frozen evidence of resolved claims in a treaty is an a fortiori case. Yet strangely enough, Akehurst does not take this step that his own logic would seem to impel him to take. Instead, he puts the matter in reverse. He asks: “What logical justification is there for regarding treaties as State practice, while denying that status to other statements (such as claims) made by States?” Akehurst, supra note 79, at 3. My position, which he is criticizing by his rhetorical question, is precisely that treaties are a record of state agreements that legally bind them to act in a certain way, whereas a statement (such as a claim) is merely a negotiating position to which we should not attach much credibility or conviction. But surely if Akehurst wants to attach that much credibility to a mere statement by a state, then what logical justification is there for questioning the position that treaties generate custom?

99. Akehurst, supra note 79, at 42–43. One of his “contrary” cases is West Rand Central Gold Mining Co. v. The King, see supra text accompanying note 86. Akehurst takes issue with me on the matter of treaties articulating a rule of custom (the articulation being what I have claimed as the objective evidence of opinio juris in D’Amato, supra note 16, at 160–62). Akehurst writes in a footnote that the “fatal flaw” in my reasoning “is that treaties do not, in most cases, articulate the norm as one of customary law (unless one assumes that laying down a rule in a treaty automatically means articulating the rule as a norm of customary law—but that is to assume
account for this international practice. One important mechanism builds upon the early Oppenheim view, as significantly modified by Baxter. Oppenheim, it will be recalled, said that treaties are either declaratory or in derogation of the underlying common law, and hence are irrelevant to it.\textsuperscript{100} Many years later Baxter argued that those treaties that are declaratory of customary law, but not those in derogation of it, can be cited as evidence of that customary law.\textsuperscript{101} I entered the argument at this point and objected that if we are able to determine whether or not a treaty is declaratory of the underlying customary law, as Baxter suggests, then if our answer is positive we would have no need to cite the treaty as evidence at all, for we will have determined independently of the treaty what the customary law on the point in fact is.\textsuperscript{102} Before my book was published, I had communicated my objection on this point to Professor Baxter, and he modified his view in his Hague Lectures in 1970, agreeing that the proof of customary law is not "facilitated" by the method of determining what the customary law is dehors the treaty.\textsuperscript{103} However, Baxter retained his previous position that treaties that are declaratory of customary international law may be cited as evidence of that custom. After abandoning the idea that proof of whether the treaty is declaratory requires separate research into the custom, Baxter argued that there are two other methods of determining whether a treaty is declaratory of customary law. The first would be "appropriate language in the preamble or elsewhere" that the treaty "incorporates nothing but customary international law."\textsuperscript{104} And the second is research into the \textit{travaux préparatoires} to see whether the treaty was intended to be declaratory of international law.\textsuperscript{105}

My reply to these latter two methods must now be summarized to set the stage for Akehurst's rejoinder. I argued that the first method—looking for language in the treaty that incorporates customary law—simply would put a high premium upon treaty draftsmanship.\textsuperscript{106} And with respect to the \textit{travaux préparatoires}, I argued that any good negotiator on either side would invariably contend that the language that he or she champions is a mere restatement of the customary rule in the absence of a treaty. The reason for so contending would be to convince the other side that the language in question adds nothing

\textsuperscript{100} See supra note 88 and accompanying text.
\textsuperscript{102} D'Amato, supra note 16, at 115, 153.
\textsuperscript{103} Baxter, Treaties and Custom, supra note 89, at 42, 75 n.1.
\textsuperscript{104} Id. at 42.
\textsuperscript{105} Id. at 42–46; Baxter, supra note 101, at 291–93.
\textsuperscript{106} D'Amato, supra note 16, at 157–58.
to existing law and therefore no "bargaining chips" must be paid in order for the other side to accept the language. One may dip at random into the travaux préparatoires of any multilateral draft convention and find any number of instances of experienced negotiators resting their case for the adoption of their own drafts on no argument other than the fact that their own draft accurately reflects existing law on the subject in question.

Upon this dialogue, Akehurst builds his exception to his criticism of my theory that treaties generate custom. He takes Baxter's position one step further by arguing that, irrespective of the real intent of the drafters of the treaty, it is possible for us to conclude that a treaty is declaratory of the underlying customary law if we merely find statements to that effect in the treaty or in the travaux. Nor is this method defeated, Akehurst adds, if we were to find that the states making those statements (that the treaty is declaratory of customary law) knew them to be untrue. Thus, Akehurst has objectified Baxter's method of proving subjective intent.

Yet it seems to me that the exception that Akehurst thus carves out of his proposition that treaties do not generate custom is large enough to swallow the entire thesis. There will not be many instances, including human-rights conferences, of travaux that manifest any intent other than to declare existing customary law. Nor will there be many instances of preambles in treaties stating any intention other than to codify existing law, even if those treaties are the result of conferences originally called into being to engage in the "progressive development" of international law. The more important the treaty, the more likely we are to have language expressly declaring the treaty to be a codification of existing law. An example is the Genocide Convention of 1948 which, in its first article (an article given added significance by virtue of the omission of any preamble), states that "[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." While I have given my reasons for disagreeing with the entire investigation into whether a treaty is declaratory of customary law, if Akehurst's objective approach leads him to admitting that, say, ninety percent of all multilateral conventions and many bilateral treaties (those containing generalizable provisions) will constitute customary law by virtue of statements that we are sure to find in the travaux or in the treaties themselves, I would not object to the practical result that he reaches.

A second important mechanism suggested by Akehurst to show that the provisions in a treaty have become part of customary international law is a subsequent statement made by a state that the provision or the rule it describes has become part of customary law. We might label this mechanism an

107. Akehurst, supra note 79, at 45–48. I had previously suggested the importance of objectifying all the constituent elements of custom; see D'Amato, supra note 16, at 33–41, 74–87.
108. Akehurst, supra note 79, at 47.
109. Convention on the Prevention and Punishment of the Crime of Genocide, supra note 70, art.1. By "confirming" the crime of genocide, rather than recognizing its novelty, the parties obviously used draftsmanship to help ensure the status of genocide as a universal prohibition.
110. Akehurst, supra note 79, at 49.
objective restatement of the old "hardening into law" position. I have previously indicated that no writer has come forth with any mechanism for a treaty provision's "hardening" or "passing" into customary law.111 But now Akehurst appears to have provided such a mechanism. It occurs, according to Akehurst, when states subsequently make a statement or claim that the legal norm in question has become part of customary law.

Yet if we look more closely at Akehurst's article, we find that he has given no example of this mechanism. Thus we might dismiss this effort by Akehurst with the observation that he is only trying to salvage the old "hardening" test by indicating what would be an objective example of "hardening" even though the real world has apparently failed to provide a single illustration of that objective example. And we might conclude that with Akehurst's prior concession regarding the ease with which we may find that a treaty is intended to be declaratory of customary law, all or nearly all treaties are subsumed within that exception, thus making Akehurst de facto a supporter of the theory that treaties generate custom, despite his insistence that, but for these exceptions, they do not.

Yet we cannot dismiss this latter theory too quickly because of the support Akehurst claims for it from the Vienna Convention on the Law of Treaties112 and the North Sea Continental Shelf Cases.113 Neither of these eminent sources provides an illustration of a "subsequent statement" of the sort envisaged by Akehurst, although on their surface they seem to support his theoretical position.

Article 38 of the Vienna Convention provides that "nothing in Articles 34 to 37 [relating to the effect of treaties on third states] precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of law, recognized as such." Akehurst contends that the phrase "recognized as such" indicates an intention on the part of the framers that something must happen subsequent to a treaty in order to warrant the conclusion that a rule in the treaty has become binding as a customary rule of law.114 An examination of the travaux préparatoires, however, indicates no such singleminded intent and no common understanding of what the phrase "recognized as such" means.115 To the Soviet delegation and its ideological adherents, "recognized as such" apparently did indicate the need for subsequent consent to the rule, but we must bear in mind that the Soviet position (at least as it was at the time of the travaux) was that customary law itself is only binding upon states that have consented to it.116 Given that restrictive, antihistorical, and theoretically unsound117 view of general customary law, it is no surprise that the adherents.

111. D'Amato, supra note 16, at 139-40.
114. Akehurst, supra note 79, at 49.
to the Soviet position would not want to recognize in treaties any mechanism for general generation of customary law; they would not even recognize in custom itself any such mechanism. It is improbable that Akehurst would want to endorse the Soviet position if that were the cost of substantiating his argument, for that would leave him with a restrictive view of custom that would render otiose his entire preceding argument that treaties found through their travaux to be declaratory of customary law have that effect upon non-parties.

But there are at least two other meanings that can be attributed to the phrase "recognized as such" that either were expressed during the treaty negotiations or might conceivably have been considered as a meaning by the states that ultimately ratified the convention. For instance, the phrase might mean "understood as such"; it would thus imply that the process of treaty formation of customary rules of law must be understood to create custom and not a treaty obligation upon third states. Along this line, the delegate from El Salvador acutely observed that it was not the rules of a treaty that could have the effect of becoming binding via custom on third states, but the content of the treaty provisions. Or, "recognized as such" might refer to recognition within the treaty or in its travaux (Akehurst's first objective mechanism, but not the mechanism of subsequent statements for which he cited article 38). Clearly, article 38 contains great ambiguity in the phrase "recognized as such," which should not obscure the central fact that the article expressly recognizes the process of customary law creation by treaty that I have been describing in the present section of this essay.

More significant than the Vienna Convention for Akehurst's purposes is his invocation of the judgment of the International Court of Justice in the North Sea Continental Shelf Cases of 1969. He contends that the need for opinio juris—that is, in his view, the need for statements in the treaty, in the travaux, or in subsequent remarks by states accepting the treaty provisions that those provisions are declaratory of international law—"is clearly stated in the North Sea Continental Shelf Cases." The court, commenting upon the contention of Denmark and the Netherlands that a customary rule corresponding to article 6 of the Geneva Convention on the Continental Shelf had "come into being since the Convention, partly because of its [the conven-

119. Akehurst, supra note 79, at 44.
1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.
2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle
tion's] own impact, partly on the basis of subsequent State practice," said that there must be some showing of *opinio juris* to demonstrate this subsequent behavior that made the Convention's article 6 into a norm of customary law.\(^{121}\) The court's precise language on this point, which explicitly recognizes the norm-creating process that I have been describing in the present essay, is as follows:

In so far as this contention is based on the view that Article 6 of the Convention has had the influence, and has produced the effect, described, it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained.\(^{122}\)

The court then found that as far as article 6 itself was concerned, there was a need to show subsequent acceptance of its rule by other states (for example, by demonstrating *opinio juris*—although the court fails to indicate how *opinio juris* could be shown), and that the contending parties failed to offer such proof of subsequent acceptance.

The court is saying two things. First, there is no doubt that treaty provisions may generate customary rules. Second, article 6 of the Geneva Convention did not do so. At this point in the court's opinion we are left unsure whether the reason given by the court for why this particular provision did not generate the customary rule desired by Denmark and the Netherlands—that there was no subsequent *opinio juris* indicating acceptance of the treaty rule—applies generally to all treaty provisions that generate customary rules, or only to article 6. If it is the former, then the thesis I have been contending for in this Article becomes unnecessary, since any subsequent showing of *opinio juris* should be enough to demonstrate a rule of customary law quite apart from the prior treaty. Thus we are left with the question whether the court is positing the first of these propositions or the second.

Fortunately, we are not remitted to metaphysical speculation for our decision. The court's opinion as a whole makes it abundantly clear that the rule of article 6 was itself inapplicable to the facts of the case and could not

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3. In delimiting the boundaries of the continental shelf, any lines which are drawn in accordance with the principles set out in paragraphs 1 and 2 of this article should be defined with reference to charts and geographical features as they exist at a particular date, and reference should be made to fixed permanent identifiable points on the land.


122. Id.
have generated a rule binding upon the Federal Republic of Germany with regard to its continental shelf. By omitting the facts of the case, the contentions of the parties, and the court's decisive reasoning in that regard, Akehurst creates the impression that the court was speaking ex cathedra about custom formation. Unfortunately, Akehurst is not alone in dealing with the Continental Shelf opinion as if it were cut loose from the moorings of its own pleadings, facts, and judicial holding.\footnote{123} Hence we must examine the case itself with some care.

Denmark and the Netherlands contended that the North Sea continental shelf delimitation line between themselves and the Federal Republic of Germany should be decided upon the basis of the equidistance method as specified in article 6 of the Geneva Convention. Germany countered that the continental shelf should be delimited according to the principle that each coastal state is entitled to a just and equitable share. The court, however, held that neither contention was correct under international law. Instead, it found that a nation's continental shelf is as much its territory as is its land above sea level, and that fairness, equity, or equidistance has nothing to do with the matter. To summarize the court's reasoning in this regard, let us imagine two nations, \(X\) and \(Y\), facing each other across a 500-mile wide sea. Suppose that nation \(X\) has a continental shelf appertaining to its land territory, and that the shelf extends across the sea for a distance of 450 miles. At that point, the shelf drops down to the ocean floor depth, and then rises precipitously to form the land mass of nation \(Y\). In other words, \(X\) "has" a continental shelf and \(Y\) does not "have" one. In this situation, the equidistance principle might draw the line of delimitation at 250 miles from \(X\)'s coast, giving the remaining 200 miles of continental shelf over to \(Y\). A fair or equitable principle might draw the line in roughly the same place. But according to the court, what is involved in the matter of the continental shelf is not fairness or equidistance, but title to territory. "What confers the ipso jure title which international law attributes to the coastal State in respect of its continental shelf," the court held, "is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion—in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea."\footnote{124} Thus, under the court's reasoning, \(X\) is entitled to the entire continental shelf of 450 miles.

This, then, is the bedrock upon which the court constructed its judgment in the case. But there are two remaining contentions that Denmark and the

\footnote{123. A leading casebook on international law suggests that excerpts from the \textit{North Sea Continental Shelf Cases} will "provide the answers to, or at least throw further light on," numerous questions posed by the authors regarding the impact of treaties upon custom. L. Henkin, R. Pugh, O. Schachter, & H. Smit, \textit{International Law Cases and Materials} 38 (1980). The lengthy excerpts from the \textit{North Sea Continental Shelf Cases} that follow, id. at 59–65, 84–85, 366–67, do not indicate the territorial basis upon which the court based its result in the cases or the consequence that the territorial basis entails stricter proof of special custom. These qualifications are also not mentioned in the references to the \textit{North Sea Continental Shelf Cases} in Restatement (Revised) of the Law: Foreign Relations Law of the United States 31–34 (Tent. Draft No. 1, 1980).}

\footnote{124. 1969 I.C.J. at 32.}
Netherlands offered. First, they argued that the equidistance principle of article 6 of the Geneva Convention changed matters, so that, whatever title to the continental shelf Germany might have had prior to that Convention, it now only had so much of the North Sea continental shelf as the equidistance principle would allow (a principle that, as we might expect, sharply reduced the total area of the continental shelf that would be allocated to Germany).

The answer to this first contention might best be illustrated by a hypothetical example. Suppose most of the nations in the world conclude a multilateral treaty on the subjects of international law, and that one of the provisions of this supposed treaty contains the following language:

A “nation” consists of reasonably contiguous territory. No nation may claim as any of its territory land that is separated from the bulk of its territory by more than 1000 miles of ocean.

Suppose further that the United States signs this treaty, but fails to ratify it because it realizes that ratification would mean that its fiftieth state would be forfeited. Is there any process known to international law whereby other states, by entering into a treaty, may deprive the United States of Hawaii? To be sure, the treaty provision I have invented looks generalizable—as does article 6 of the Geneva Convention regarding the equidistance principle. But the fact that the provision appears to be generalizable into a norm of customary law does not make it in fact so generalizable, because the effect of this particular provision would be to change the title to specific territory. To be sure, the situation would be different if Hawaii were *res nullius* or the continental shelf were *res nullius*. But as I pointed out above, the court explicitly held that the continental shelf was as much part of the territory of a nation as its land above sea level. Thus, no matter how many nations ratified the hypothetical treaty I have suggested, the United States could not be bound thereby unless the United States itself ratified the treaty. A nation cannot be deprived of a portion of its territory (such as its continental shelf) except by its own consent. No matter how innocuous a treaty provision might seem to be, if its effect is to change title to specific territory, it cannot have that effect without the consent of the owner.

Second, Denmark and the Netherlands argued that, although Germany did not ratify the Geneva Convention, international conduct subsequent to the Convention had nevertheless elevated the equidistance principle to a rule of customary law. But now we can see that, given the court’s primary holding that title to specific territory is involved in this case, the only way that such title may be transferred other than through the process of explicit consent (and there was no showing at all that Germany consented) would be through the

125. Convention on the Continental Shelf, supra note 120, art. 6 (continental shelf between adjacent or opposite states to use the equidistant median line from baselines, in absence of agreement or special circumstances).

126. Present customary international law requires this result. Of course, international law could change. A new norm could come into being, through multilateral conventions that allowed for loss of national territory without the consent of the national owner.
process of special custom, which is indeed a form of implied consent. The concept of a special custom may apply to settle specific questions regarding territory, such as whether "an alleged regional or local custom" settled a question of territorial asylum in the Asylum Case,\(^{127}\) whether specific territorial capitulatory rights existed in Morocco in the Nationals in Morocco Case,\(^{128}\) or whether Portugal had a right of passage or easement over specific Indian territory in the Right of Passage Case.\(^{129}\) In all these cases, specific opinio juris on the part of the defendant against whom the rights were asserted had to be proved as part of the plaintiff's (complainant's) case. A proof of such specific opinio juris would satisfy Blackstone's original distinction between general and special custom in giving the latter the required element of consent.\(^{130}\) Hence, the idea of subsequent opinio juris in the North Sea Continental Shelf Cases was required by the court before it would divest Germany of title to any portion of its continental shelf territory. In a previous article, I attempted to spell out the requirements of special custom at some length, with more detailed references to the preceding cases as well as to the Anglo-Norwegian Fisheries Case.\(^{131}\) The main point of that article bears summarization here: that general custom is entirely distinct from special custom, and that the stringent requirements of proof of the latter (such as a showing of opinio juris) should in no way be confused with proof of the former.

Therefore, given its judgment (which I believe was entirely correct) that the continental shelf question was one of title to territory and not fairness of apportionment, the court turned to article 6 as a possible contention—not stated in so many words—that proof of special custom was needed before any change of title could be assumed. (We would expect and insist on the same result in the hypothetical case I gave of Hawaii.) Inasmuch as the court explicitly acknowledged the process of custom generation by treaty, it held only that article 6 was not an example of the generation of general custom. Given the facts of the case and the court's disposition of the matter of title to the continental shelf, the court's remarks on the need for opinio juris subsequent to the adoption of the Geneva Convention apply only to this or similar cases of special custom. The use to which Akehurst puts the court's remarks on article 6 is wholly unwarranted.\(^{132}\)

\(^{127}\) Asylum (Colom. v. Peru), 1950 I.C.J. 265 (Judgment of Nov. 20).

\(^{128}\) Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), 1952 I.C.J. 176 (Judgment of Aug. 27).

\(^{129}\) Right of Passage over Indian Territory (Port. v. India), 1960 I.C.J. 4 (Judgment of Apr. 12).

\(^{130}\) See 1 W. Blackstone, Commentaries *74–75, *78.


\(^{132}\) To be sure, Akehurst prefaced his remarks about the Continental Shelf Cases with the qualification, "Despite some ambiguities, the judgment in the North Sea Continental Shelf cases supports this [Akehurst's own] view." Akehurst, supra note 79, at 50. But since he leaves the term "ambiguities" undefined, there is only the slightest hint that he may have misconstrued the cases. More significant is Akehurst's own shifting throughout his article between a view of opinio juris as an element in the establishment of custom quite apart from any use the customary rule is put to against a third state, and opinio juris as a showing by the specific third state against which a rule is being asserted; the latter is what I have argued is only an element of special custom. If it were the
4. Treaties Into Custom? It seems to me that the theory that treaties
generate customary law stands, at the present writing, upon the following
considerations. First, any student of international law reading the literature of
the subject, particularly historical texts or the successive editions of a text-
book, should conclude that a great many of the rules we now call customary
law had their origin as provisions in treaties. Second, as to human rights in
particular, treaty law today is clearly the major repository of the rules that we
regard as the rules of customary international law of human rights. The
most prominent example is perhaps the prohibition against human slavery, as
I have already tried to show in this Article; the more recent prohibitions
against genocide and torture are also generally regarded as part of customary
law. Of course, Lane and Watson seem to regard these latter two, at least, as
outside the realm of customary international law binding upon all nations
generally. But their position, it would appear, would logically require them to
discard all the rules of customary law that have had their origin in treaties,
and that would mean nearly all the rules.

Yet, doubts remain that treaties do not of themselves generate custom.
Akehurst’s position, which I have criticized in the preceding section, probably
represents what many, if not most, American and English scholars believe to
be the case. The persons sharing Akehurst’s stance feel that generalizable
provisions in treaties do not give rise instantly, or ipso facto, to customary law
binding upon nonparties. I think they feel this way largely because of the
“contract” view of treaties that I have previously described, and perhaps in
lesser part because they may feel it is unfair in some sense to visit new rules
upon states who have not joined (for whatever reason) in the treaty that
supposedly creates those new rules. Thus, they might feel that one must view
“with caution” the proposition that treaties generate custom, even though
they might acknowledge that the process undoubtedly takes place “from time
to time.”

As much as I acknowledge the reality of these psychological perceptions,
the arguments that I have made in the last two decades and continue to make

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133. In any litigated case, counsel will of course cite any and all other possible “sources” of
international law in addition to treaties. In Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980),
for example, the court stated that torture was a violation of international law and cited as support
the writings of legal scholars, resolutions of the United Nations General Assembly, the prohibi-
tions against torture contained in the constitutions of various countries, and also, of course,
international treaties. But not all of these “sources” are equally persuasive. In particular,
resolutions of the General Assembly might on occasion represent political desiderata of a majority
of nations but not amount to a statement of “law.” See, e.g., Discussion, Contemporary Views
on the Sources of International Law: The Effect of U.N. Resolutions on Emerging Legal Norms,
73 Proc. Am. Soc’y Int’l L. 327 (1979). Some writers feel that international law can be shown by
an international “consensus.” See, e.g., Farer, International Law and Political Behavior: Toward
a Conceptual Liaison, 25 World Pol. 430, 446 (1973). The problem consists, however, in estab-
lishing that the “consensus” exists. Professors Lane and Watson are properly cynical in saying that a
consensus on human rights can easily be formed by authors citing each other until something that
looks like a consensus emerges. For a restrictive, and perhaps similarly cynical, view of consensus,
see D’Amato, supra note 36.
in the present Article stem solely from a conviction that the cautious view in this case is a chimera. No process of treaties "hardening" or "passing" into custom has even been described, much less recorded. Akehurst's attempt to objectify the hardening process (requiring states subsequently to make a statement that they believe a treaty rule has passed into custom—whether or not, Akehurst adds, they actually believe it) again has no real-world exemplar.

Where, then, do we stand? If I am correct in arguing that nothing subsequent to the treaty can be found, or needs to be found, to prove that its generalizable provisions have passed into custom, and if the reader concurs that treaties have furnished us with many if not nearly all the rules of customary law that we now recognize as such, then we are left with two possibilities. The first is that generalizable treaty provisions ipso facto and instantly give us evidence of custom in the same sense that the classic act-conflict-resolution pattern gives us evidence of custom. The second is that such treaty provisions have this effect, but not immediately; some passage of time is required. But how much time? A day, a month, a century? Are there different time requirements for different rules, and if so, how can we discover what they are? These difficulties seem to me to be insuperable, for absent any material thing or process that we can point to subsequent to a treaty that indicates when the treaty rule becomes customary, the time question becomes arbitrary. A "reasonable" time period, however, should perhaps be required so that if two or more states do not like a rule in a treaty signed by other states they may have a reasonable time to enter into a contrary treaty among themselves. Thus, for example, five nations enter into a human-rights treaty that contains a generalizable, yet controversial, provision. Nations $V$, $W$, and $X$ do not like this provision and enter into a treaty among themselves that contains the opposite of that provision (i.e., its contradiction). Perhaps we should give $V$, $W$, and $X$ time to do this—a reasonable amount of time. If they do not act, then we might say that the first treaty gives rise to customary law.

It should be noted that if $V$, $W$ and $X$ enter into such a treaty, not only will they carve out a rule for themselves, but their treaty too will generate customary law—a custom that is directly contrary to the custom generated by the first treaty. This is the same process that would occur if some state practices resolved a dispute one way and others, another way; it is like conflicting precedents in domestic law. What an international court might do if faced with conflicting treaties that are argued to generate customary law for a state that is not a party to any of them is a complex question, one that I have previously tried to answer, though the lack of case law on this particular subject makes such enterprises extremely speculative.\textsuperscript{134}

Should this "reasonable time" provision be read into the treaty-into-custom process? Perhaps some such provision is all that many scholars would need to secure their concurrence to the proposition that human-rights treaties (among others) by now have generated customary international law binding

\textsuperscript{134} See D'Amato, supra note 16, at 92-98. See also Onuf, Global Law-Making and Legal Thought, in N. Onuf, supra note 44, at 21, 28-29 (critique of D'Amato's theory); D'Amato, What "Counts" as Law?, in id. at 79-100 (reply to Onuf).
on all the states. If that is so, my thesis is for the purpose of the present Article complete. There is no doubt that by now nations have had ample opportunity to enter into treaties providing that slavery, genocide, or torture are legal (and perhaps, although one would have to argue each case separately, treaties contradicting other human rights as well). Since no nations have entered into any such treaties, we might conclude that the prohibitions against slavery, genocide, and torture have “passed” into customary international law. This conclusion of course follows a fortiori if no time is needed for such “passage.” Because of the indeterminateness of what would constitute a “reasonable time,” and because traditional customary law has no such requirement (the act-conflict-resolution scenario generates custom right away, though of course subsequent contrary practice would modify or change that custom), my own preference would be to acknowledge that generalizable provisions in treaties (especially multilateral treaties) ipso facto generate customary rules. But happily for the purpose of the present essay, this “stronger” version of the thesis is not required.

III. Conclusion

I have tried to show that, through the time-honored process of the generation of customary law by generalizable treaty provisions, international entitlements have arisen that prohibit any nation from engaging in acts of genocide against its own population, or torturing or enslaving any human being. These “human rights,” as well as others, may be found in multilateral conventions, but their effect spreads to nonparty states through the customary process of treaty generation of international law. In the second part of this Article, I attempted to defend the thesis of treaty generation of customary law against various contrary contentions that have recently been advanced.

Thus, in the example I gave in the first part of this Article, if A, a national of state X, is tortured by state X, state Y has an international-law entitlement against X that X cease and desist the torture and pay damages to A (the damages may be paid to Y, which in turn pays them to A, following the procedure in the Lotus Case135). A, as it turns out, is an “international” of state Y just as he is a “national” of state X. If international law provides for “implementation and compliance” for A as X’s national, it provides, the same sanctions for A as Y’s “international” in those areas secured by the customary law of human rights. As a national of X, A has certain rights when he is visiting in states other than X. As an “international” of Y, he has a different set of rights against all states including state X when he is back home. These latter rights are precisely those that have been articulated and

135. S.S. “Lotus” (Fr. v. Turk.), 1927 P.C.I.J., ser. A, No. 9, at 4 (Judgment of Sept. 7). Although France was the complaining state, and although under traditional theory France was itself complaining of an injury (which might or might not be measured in terms of the damage to its injured citizen), the question posed to the court by the parties indicated that if the court found against Turkey, the citizen, a Lieutenant Demons, would be paid (either directly by Turkey or through the good offices of France); the question was “what pecuniary reparation is due to M. Demons?” Thus, as early as 1927, the real party in interest was the injured person, M. Demons.
protected in the generalizable provisions of treaties, particularly multilateral conventions, dealing with various aspects of human rights. To be sure, these international human rights are defeasible if other conventions are entered into that deny such rights. As of the present writing, I know of no international conventions that contradict the various "human rights" conventions, but we must recognize the possibility that, as far as international entitlements are concerned, those entitlements may be destroyed by conventions just as they have been created. As in all other arguments in this article, I think we must above all recognize that as far as the states of the world are concerned, what they do—and not what we want them to do—constitutes international law. On this point I agree with Lane and Watson, whose theses I have otherwise devoted this article to refuting.

We must also recognize that many powerful sources—particularly the present administration—oppose the concept of a human rights law. The United States lives under a regime of dedication to law and the Constitution. If what nation $X$ is doing to its own citizens in $X$ is contrary to international law, American policy makers (or some of them) will feel a pressure to denounce $X$ or to cut off military or economic aid to $X$. The President, however, generally likes to have wide discretion to decide politically whether or not to give aid to any foreign nation such as $X$ and thus is likely to be predisposed against any legal argument that such aid must be curtailed. Naturally, any President will tend to oppose a policy that weakens his personal power and discretion, and thus we may expect resistance from the executive branch to the universality of human rights entitlements. On the other hand, this may be an area where, in the United States at least, international law is ahead of national interests. If the President has an international legal right to complain about what nation $X$ does to its citizens, a new area for the legitimate exercise of presidential power has opened up and perhaps it will be filled someday. If and when that happens, commentators will undoubtedly say that we are expressing our national interest in how nation $X$ treats its own citizens.

But if it is any small comfort to the admirers of executive discretion, I would also reiterate that entitlements and interests are not the same thing. Although we may be entitled to complain about what nation $X$ does to its own citizens in $X$, we may, for other overriding political reasons, not want to show our "interest" in the matter. From a purely personal point of view, with the luxury of not being saddled with foreign-policy-making responsibility, I would consider it a matter of morality that we should protest vigorously against any denial of human rights in any foreign country and take all steps necessary to

influence that country to abandon its illegal practices. But my concern in the present essay is, I hope, a more objective one: to indicate that even if, for political reasons, we do not protest against some violations of human rights in some foreign countries, that does not give any favorable coloring of legality to those foreign practices. Rather, the entitlement remains the same even if the interest is not manifested.

At the present level of academic dialogue on the matter of human rights, it is essential to make sure that despair over the wretched state of human rights around the world does not lead to abandonment of the concept of human rights law. I have tried to demonstrate that the concept remains vital, and that no special change in the relationship of states to one another is needed to implement it. It is true that we cannot legally require the executive to combat human-rights violations in foreign countries. Yet that is only a legal concession—and a relatively small one at that. The most difficult issues in the enforcement of human rights are not issues of law, but of politics—and ultimately, of morality.

APPENDIX: THE ENTITLEMENT-RETALIATION SYSTEM AT WORK

A. The Iranian Example

The events surrounding the taking of hostages at the United States Embassy in Teheran in 1979 offer several illustrations of different aspects of the workings of entitlement-retaliation in international law. Although multilateral and bilateral treaties signed by Iran and the United States required Iran to protect American diplomatic and consular personnel against such an attack, and although a similar requirement could be made out under general international law, the Iranian government did nothing by way of protection or intervention.139 Thus an American entitlement against Iran, requiring the latter to protect American Embassy personnel in Iran, was violated. A second American entitlement was violated when Iran officially endorsed the action of the militants, enabling them to hold the hostages for more than a year.140

Were Iran's actions a retaliation for a previous entitlement violation by the United States? Iran took such a position in communications to the International Court of Justice. In a letter of March 16, 1980, the Iranian Minister for Foreign Affairs referred to "more than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms."141 As far as the court itself was concerned, these vague charges were not specified because Iran refused to participate in the proceedings.142 The court, as one might have expected, viewed Iran's allegations as part of the "political

139. See United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 6-7, 13-14 (Judgment of May 24) [hereinafter cited as Tehran Hostages Case].
140. See id. at 33-34.
141. Id. at 8.
142. Id. at 20.
context" in which the specific dispute (namely, the taking of American hostages) arose.\textsuperscript{143} For our own analytical purposes, the labeling of something as "political" is another way of saying that it has not attained the status of a legal entitlement.

This conclusion would follow, under present international law, even if we were to assume that the Iranian charges could be fully specified and proved. The fact is that the customary international law of human rights has not yet reached the level of implicating foreign governments in such situations. Every government's foreign affairs business consists of encouraging or discouraging the actions of other governments, and it is far too soon in the evolution of international law to expect legal responsibility to attach to any such actions of encouragement or discouragement. However, we should not too readily dismiss the Iranian claim. Perhaps Iran has articulated\textsuperscript{144} a norm that now needs, for customary corroboration, supporting instances of international behavior that would generate a new customary rule of international law, to the effect that if a government aids and abets another government that is engaged in human-rights violations, the first government has violated an international norm. However, it is clear that although Iran may have articulated such a norm, the articulation has fallen upon deaf ears. The argument made no impression upon the court or the dissenting Soviet judge.\textsuperscript{145} At the present time, the proposed Iranian entitlement is clearly rejected by the world community; hence the international legal system, acting to preserve its present set of entitlements, has responded almost uniformly with outrage at the Iranian endorsement of the militants' seizure of American embassy personnel. This seizure was therefore seen to be not in retaliation for a previous entitlement violation, but rather itself an illegal violation of an American entitlement.

Given Iran's violation of the American entitlement of the safety and protection of its diplomatic personnel abroad, let us now consider the posture of the American responses to the Iranian action. Perhaps the most obvious reciprocal entitlement-violation would have been for the United States to seize and hold hostage the approximately 220 Iranian embassy personnel within the United States. Such a move would have satisfied Professor Fisher's criterion of relatedness—the seizure would have been similar in time, place, and manner to the original delict.\textsuperscript{146} However, the United States rejected this possibility, reportedly on the ground that it did not want to be accused of following

\textsuperscript{143} Id.
\textsuperscript{146} See R. Fisher, supra note 46, at 148–50.
Iran’s lead. Instead, the State Department gave Iran five days to reduce the diplomatic staff from about sixty to fifteen and the consulate staffs from a total of 160 to twenty. In light of other alternatives for the United States, to be discussed below, it is interesting to speculate further on why the United States did not do the “obvious” thing and hold Iranian embassy personnel hostage in retaliation for the actions in Teheran. Such an action, I submit, might not be as effective in upholding the entire set of international entitlements as would selecting a different entitlement violation. Instead, what it might do is simply help erode the particular entitlement at issue. The international legal system might lose one of its entitlements instead of protecting it. Crucially, the entitlement would not have been lost through the process of custom, since a change in custom requires both an initial deviating act and an acceptance of that deviation by the affected state. But a “spreading” entitlement violation of the sort I have just described, though it would lead to a loss of the general rule of diplomatic immunity, would not have been effected by acquiescence on the part of the affected states but rather by their attempt—futile in the premises—to secure the original norm. Hence, there is some theoretical support for taking a position contrary to the strategic suggestion of Professor Fisher—namely, for the international system to secure its entitlements by allowing the affected nation to retaliate against a different entitlement.

Accordingly, the United States considered several other violations of Iran’s entitlements when it became clear that the government of Iran was not immediately going to return the hostages. The options considered ranged from a naval blockade of the Kharg Islands to precision strikes against other oil installations. Although the threats certainly served a purpose, helping to ensure the safety of the hostages, the United States made it clear on numerous occasions that military action would be taken if the hostages were harmed. Anyone reading the media accounts cannot fail to be impressed with the fact that practically no objection was raised to the legality of such possible actions. The discussion instead focused upon possible Iranian retaliation against the hostages and the possible adverse reaction of public opinion in

147. “From the start of the crisis, American officials had considered various ways of retaliating against Iranian diplomats. The possibility of holding them hostage was rejected. The United States did not want to be accused of following Iran’s lead.” N.Y. Times, Dec. 13, 1979, at A1, col. 5.
148. Id.
149. See A. D’Amato, supra note 16, at 87–98.
150. The slow refinement of customary laws through the centuries indicates that the international system protects its customary entitlements, allowing them to change by custom (since that is the process by which they were created) but is careful lest they change by the destructive process of spreading entitlement violations. For a discussion of the factors supporting and reinforcing custom, see id. at 169–229.
153. Id. at A10, col. 5.
other Middle Eastern nations. Although not strong evidence, it is at least some evidence of an underlying acceptance of the international systemic mechanism I have described that would allow an entitlement violation (i.e., attacking the territory of Iran) in retaliation for an initial entitlement violation (the taking of the hostages).

Better evidence in support of that mechanism can be found in the reaction to the American military initiative that was taken—the aborted rescue mission of April 24–25, 1980. Iran appears not to have asked for an American apology for the violation of its airspace and territory, and certainly the United States tendered no apology. International reaction in general focused upon criticism of strategy and tactics and seemed to say little if anything about legality. The International Court of Justice stated in its judgment that it “cannot fail to express its concern in regard to the United States’ incursion into Iran.” However, the court then made it clear that its concern was that the incursion could “undermine respect for the judicial process,” since it took place while the court was deliberating and writing its judgment in the case. Other than that, the court pointed out that the question of the legality of the incursion was not before it, and that in any event the operation of April 24th could have “no bearing on the evaluation of the conduct of the Iranian Government over six months earlier.”

Here, as is often true of legal analysis, it is more important to consider what the court did rather than what it said. For the court held not only that Iran violated the American diplomatic and consular entitlements, but also that Iran must make reparation to the United States (the form and amount of such reparation to be settled by the court in a future proceeding). Surely the American incursion was relevant to the question of reparation. And the court had direct notice of its relevance, because the Soviet judge, in dissent, made the precise point. Judge Morozov, referring to economic actions by the United States against Iran that “culminated in a military attack on the territory” of Iran, argued that the United States “has forfeited the legal right as well as the moral right to expect the Court to uphold any claim for reparation.” Under article 53 of the Statute of the International Court of Justice, the court is required to satisfy itself that an uncontested claim “is well founded in fact and law.” Hence there is no doubt that the military incursion was part of the case.

155. There was, of course, loose discussion in the media about article 51 of the United Nations Charter, but it is farfetched to say that an armed attack occurred against the United States within the meaning of that article.
157. Tehran Hostages Case, supra note 139, at 43.
158. Id.
159. Id. at 43–44.
160. The vote on reparations was 12 to 3, and the vote deciding that the form and amount of reparation shall be settled in the future by the court was 14 to 1. Id. at 45.
161. Id. at 54 (Morozov J., dissenting).
162. Id. at 53.
163. Statute of the International Court of Justice, June 26, 1945, art. 53, 59 Stat. 1055, 1062, T.S. No. 993 at 32, 1976 U.N.Y.B. 1052, 1066. In a recent article, Professor Stein contends that
Thus we have an apparent contradiction. The court in its judgment said that the question of the legality of the incursion was not before it. Yet, as we have seen, the incursion’s legality was implicated in the court’s holding. We can only conclude, given the court’s holding that reparations were owing, that the court necessarily had to find as a logical condition to its holding that the American incursion was legal. In other words, the American incursion was a retaliatory entitlement violation permitted by the international legal system in the face of Iran’s initial clear violation of the American diplomatic and consular entitlements.

A further indication that this is what the court actually had in mind is its disposition of the issue whether the United States could rely on its Treaty of Amity, Economic Relations, and Consular Rights of 1955 with Iran. Judge Morozov, dissenting, said that the United States could not rely on this treaty because it had engaged in “military invasion of the territory of Iran, a series of economic sanctions and other coercive measures which are, to say the least, incompatible with notions such as amity.” But in the court’s opinion:

However, all the measures in question were taken by the United States after the seizure of its Embassy by an armed group and subsequent detention of its diplomatic and consular staff as hostages. They were measures taken in response to what the United States believed to be grave and manifest violations of international law by Iran, including violations of the 1955 Treaty itself.

Thus the court explicitly acknowledged what I have called retaliatory entitlement violation. Its use of the word “including” in the last sentence above quoted indicates that apart from the 1955 treaty the actions by the United States were justifiable. And, interestingly, even with respect to the treaty itself the United States was not limited to the remedy of being able in turn to disobey its provisions (referred to loosely by Judge Morozov as “amity”), but could continue to invoke the treaty against Iran even in the face of such departures from the treaty. Thus the measures taken by the United States must be interpreted as supporting the treaty and enforcing Iran’s obligations under the treaty, rather than simply rendering the treaty void. In effect the court has treated the Treaty of Amity as an entitlement of the United States, which the

the only analytical issue in the case regarding the incursion was not whether it was lawful but whether it amounted to a type of contempt of court. Stein, Contempt, Crisis, and the Court: The World Court and the Hostage Rescue Attempt, 76 Am. J. Int’l L. 499 (1982). However, he seems to conclude both that there was and was not contempt of court. The court, he writes, gave a “sharp rebuke” to the United States but did not penalize it, which according to Stein “seems a proper exercise of discretion.” Id. at 530. In any event, contrary to Stein’s argument, the damage inflicted by the United States was not only upon the court and the integrity of its proceedings, but also upon the territory of Iran. The court, in awarding reparations to the United States, could easily have provided for a set-off in favor of Iran for the actual dollar amount of the damages sustained by Iran as a result of the unlawful incursion. That the court did not do so indicates that it implicitly held the rescue attempt to be lawful.

165. Tehran Hostages Case, supra note 139, at 52 (Morozov, J., dissenting).
166. Id. at 28.
latter may uphold by retaliatory entitlement violations against Iran's entitlements under the same treaty.

Most prominent of all the American responses to the hostage crisis was, of course, the freezing of approximately $13 billion of Iranian assets in American banks, American corporations, and American-controlled bank deposits abroad.167 Whether the freeze was in violation of Iran's international entitlement to use of its own property abroad, and hence an entitlement violation by retaliation in the sense I have been describing, or whether the freeze was legal, remains a difficult question. I will argue that the freeze's legality is a mixed question, and hence to the extent that it was illegal, it was a partial entitlement retaliation.

The legal position of the United States in regard to the freeze was stated by Roberts B. Owen, Legal Adviser to the Department of State, in oral argument to the International Court of Justice on March 20, 1980, in direct response to a question posed by Judge Morozov requesting explanation of the freeze.168 First, Mr. Owen argued that the freeze was a direct response to the Iranian threat suddenly to withdraw all Iranian funds from United States banks. The threat "constituted nothing less than an attack on the stability of the world economy and the international monetary system."169 Legally, this is perhaps an explanation, but hardly a justification. It constitutes a political statement designed to elicit sympathy for the United States in international banking circles, but clearly if Iran had a right to withdraw its money the consequences to the stability of the international monetary system would simply be a price that system would have to pay for allowing Iran to build up such significant reserve assets. Second, Mr. Owen referred to the Iranian threat to repudiate obligations owed to the United States and its nationals:

In response to Iran's efforts to harm the U.S. economy and the dollar, and having in mind Iran's unlawful detention of American hostages, the President of the United States simply froze all Iranian assets in U.S. control for the time being, in part simply to make it possible for U.S. claimants to be made whole if the Government of Iran carried through with its threats to repudiate all of its obligations to such claimants.170

The freezing of assets to guard against repudiation of obligations by Iran is akin to an attachment proceeding in a judicial action, and thus if we regard the entire Iranian situation as a "case," perhaps the United States acted legally to secure its legitimate expectations. Even if one were to object that the totality of claims that could be asserted against Iran would fall short of $13 billion—and thus the United States blocked more than was necessary—a

167. Although the exact figure has been disputed, the $13 billion amount is generally used as a rough measure. See Nickel, Battling for Iran's Frozen Billions, Fortune, Dec. 15, 1980, at 117.
169. Id.
170. Id.
rejoinder to that contention could be made to the effect that the hostages themselves might have significant claims for false imprisonment and even maltreatment if that were later revealed. But even with Mr. Owen's argument, as augmented, we still find his phrase "having in mind Iran's unlawful detention of American hostages," which indicates a retaliatory motivation for the freeze. Additionally, nothing was mentioned about interest on the $13 billion that was frozen. Since the money was blocked for more than a year and prevailing interest rates were approximately fifteen percent, there is perhaps as much as $2 billion of interest unaccounted for in the legal arguments before the court. Was the United States threatening to confiscate the "interest" on the frozen assets? If so, that would amount to a violation of an Iranian entitlement. (What happened in the end was that, with the return of the hostages, the United States remitted to Iran, as part of the agreed settlement, an initial interest payment of $800 million. 171 But this was clearly ex post the legal question.)

As matters turned out, the United States "unfroze" the assets in return for the safe delivery of the hostages. The judicial question of whether the freezing of the assets was in whole or in part a violation of an Iranian entitlement thus became moot. Nevertheless, to the extent that my claim that the freeze was a partial violation of an Iranian entitlement is convincing, the fact that it occasioned such little comment from the rest of the world or the International Court of Justice tends to support the legitimacy of the concept of entitlement retaliation.

A much more dramatic, but equally more controversial, entitlement violation that may have been causally connected with the initial Iranian delict was Iraq's military invasion of Iran in early September 1980. In the first place, and relevant though not critical for my present analysis, the Iraqi invasion in fact helped wind up the hostage problem. According to Lloyd N. Cutler, who was a participant at the highest level in the ultimate negotiations for the release of the hostages, "[i]t took the Iraqi invasion to sharpen Iran's need for arms, spare parts, and money." 172 This linkage between the invasion and Iran's need for the return of its $13 billion in banks controlled by the United States may be taken as a response by two members of the international community (the United States and Iraq, acting of course separately) which had the effect of upholding the international norm of diplomatic and consular inviolability. For the effect of their separate efforts was to secure the release of the hostages, quite apart from any motivation on the part of Iraq to help the United States in this particular way. Indeed, any such motive was probably farthest from the minds of the Iraqi leaders, as far as we can know such things. But the international legal system is not explainable on the basis of crude psychological guesses about the motivation of national leaders; objective reality is the only criterion for law-determination. 173 Putting speculations

about motive aside, the fact remains that the Iraqi invasion contributed to the relief that the United States sought from Iran for Iran's initial delict.

My second point will be far more controversial. I contend that if we can step back and take a broad historical perspective, we might well conclude that the Iraqi invasion of Iran was legally related to the Iranian violation of the American diplomatic and consular entitlement. Indeed, we might conclude that it was an example of retaliatory entitlement violation. If we can sort out large international movements from the small zigs and zags that preoccupy most present observers, I believe we can recognize that the international legal system itself (acting of course through the states) has attempted to preserve entitlement equilibrium and has done so by allowing the Iraqi invasion as an example of retaliatory entitlement violation.

In support of this proposition, I contend that the initial delict by Iran was universally regarded as an outrageous attack upon a key international entitlement. More importantly, Iraq's invasion of Iran for purposes of territorial aggrandizement, flying in the face of every international prohibition from the Kellogg-Briand Pact to article 2(4) of the United Nations Charter, actually seemed acceptable to the world community. In Professor Falk's words:

In September 1980, we witnessed for the first time since World War I an example of one country attacking another—Iraq attacking Iran—while the world looked on with indifference. Both superpowers have suggested that this is a context where noninvolvement is the appropriate response. Nor has a dissident voice of any significance been raised in the United Nations or elsewhere in international society. To me, this represents a monumental, unacknowledged retreat from the post-World War I notion that aggression is the most severe form of disruption of international life . . .

Falk goes on to give some "opportunistic reasons" for the indifference of the world community, but he hardly finds these persuasive. Thus, under Falk's theory, we might have in the Iraq invasion something that is unexplained, unexplainable, totally illegal, and hence a "gap" in the theory of international relations and international law. On the other hand, the theory I have been suggesting in this essay constitutes, I contend, a full explanation. The "wound" inflicted by Iran upon a critical international entitlement was so deep, so much in need of redress, and so shocking—no nation had ever before ratified the imprisonment of foreign diplomats—that the international community mentally branded Iran an "outlaw" and was willing to tolerate a

174. See Dep't St. Bull., May, 1980, at 46. Iran's official endorsement of the seizure of the diplomats, supra note 139, seems to be the first such official endorsement in modern history, an historical factor contributing to the outrage of the international community.
177. Id. at 400-03.
severe violation of one of Iran's basic entitlements in retaliation therefor, no matter who inflicted it. Iran, in the international systemic sense, got what it deserved.

Admittedly, any political realist might object to my theory on the ground that "international law" is not as important as I make it out to be and that certainly Iraq of all countries was not interested in making Iran respect international law. My reply, briefly, is that no one knows exactly how important international law is, but we do know that it has persisted through the centuries and further, that while Iraq may not have had anything in mind about international law and may have attacked Iran simply for territorial expansionist purposes, the important point is the reaction of the world community to that attack. If my theory is correct, Iraq's attack would have been condemned by the world community in no uncertain terms but for Iran's seizure of the hostages. But given that seizure, Iraq's attack was viewed as permissible under international law (just as the possible American military retaliations upon Iranian territory, which I discussed previously, might have been viewed with equal indifference by the world community although they were not carried out by the United States because of its fear for the lives and safety of the hostages).

Even though the reader might find it difficult to accept naked aggression by Iraq as permissible under international law, I would suggest that my theory actually upholds article 2(4) and the general prohibition against aggression, whereas Professor Falk's view would undermine that same prohibition. For those who share Falk's view, Iraq's invasion is a direct violation of an international norm, and the fact that the world community has greeted it with indifference means that the international norm against aggression is on its way to being replaced, via the processes of customary-law formation resulting from state practice accepted by the international community, with a contrary norm—that such aggression is no longer illegal. Indeed, Professor Falk seems to draw such a conclusion and goes on to view the future with great apprehension—and has dire forebodings as well for the role of international law itself.178 Quite to the contrary, I argue that the Iraqi invasion occasions no such violation of the international norm against aggression, but rather is a function of the "implementation and compliance" problem we have been

178. See Falk, The American Society of International Law: 75 Years and Beyond, 1981 Proc. Am. Soc. Int'l L.; D'Amato, Comment on Professor Falk's Remarks, id. at (forthcoming). The argument I give in the text may be supported by the following additional consideration by way of analogy. In the event of a violation of article 2(4), the United Nations, acting through the Security Council, has the right to send in an international army to maintain and restore international peace and security (article 42). Such an action by the United Nations army, of course, would not violate 2(4). I suggest that, in the absence of such Security Council procedure, the world community considered Iraq's military action against Iran as privileged in the same sense that the Security Council's action might be. Naturally, the reader is free to reject this analysis, in which case I rest my argument concerning reciprocal entitlement violation on the other examples given in the present section of the Article.
addressing that the international legal system, in looking out for its own preservation, allows in the name of restoring entitlement equilibrium. Hence, although my theory "justifies" the Iraqi invasion in legal terms (personally I deplore the aggression), the consequence of my theory is to preserve intact the international entitlement of every nation against external military invasion of its territory. If this consequence did not follow, I suggest that the world community would not have been indifferent to the Iraqi invasion.

B. The Namibian Example

Our investigation of the Iranian situation in entitlement terms has revealed several aspects of the entitlement-retaliation system, and there is no need to multiply examples for their own sake. However, the gradual emergence of Namibia toward independent statehood deserves brief comment because, absent the international entitlements system, it would be inexplicable.179

When South West Africa was given over as a class C mandate to South Africa in 1920, South Africa proceeded to administer the territory as a fifth province and practically to ignore the admittedly vague provisions of the mandate.180 The mandate provided only the loosest "internationalization" of South West Africa, a frail juridical link to the international legal system. Nations other than South Africa had an entitlement, through the mandate, only to the effect that South Africa itself was required to act for the best interests of the inhabitants of the territory. After the Second World War, South Africa refused to turn the mandate over to the new trusteeship system of the United Nations, and when the League of Nations was formally dissolved in 1946 the juridical link between South West Africa and the world community became even more attenuated. South Africa, through the Ondoaal Report, began to plan for Bantustans, or homelands, in South West Africa, though the plan upon analysis was sufficiently discriminatory as arguably to violate South Africa's mandatory obligations to the native inhabitants of the territory.181 Other nations, fearful that South Africa would formally annex the territory, kept up the pressure by a series of United Nations General Assembly resolutions, requests to the International Court of Justice for advisory opinions, and in 1966, a compulsory-jurisdiction proceeding in that court (which proceeding, however, ended in a procedural victory for

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179. As of the present writing, Namibia is certainly not independent. But neither is it a mere "fifth province" of South Africa. Apartheid has been legally removed, a multiracial coalition controls the National Assembly, and a one-person/one-vote election process has at least been authorized even though there is no short-term hope of democratic elections (at present the stumbling block is supervision and control over such elections).


South Africa).\(^{182}\) Disappointing as these initiatives were individually, their total effect was to keep underlining the tenuous link between the world community and South West Africa. Perhaps a few hundred years ago such a link would have been ignored by a nation like South Africa for the juridical construct it undoubtedly was, yet such a course of action was not realistically possible for South Africa in recent decades. It was not possible, I contend, because formal incorporation or annexation of the territory by South Africa would have opened up South Africa to retaliatory entitlement violation by other nations.

The entitlement retaliation I have in mind is not the application of "sanctions" against South Africa. For the latter, in the form of economic boycotts, have been in recent years a constant. They would have been applied against South Africa for its apartheid policies whether or not South West Africa was a mandate, or an independent nation, or an integral part of the South African Republic. Despite the occasional talk that the sanctions policy has been the factor in keeping South West Africa independent,\(^{183}\) clearly when it is analyzed as a constant, no such power can be attributed to it.\(^{184}\)

Rather, the gradual emergence of Namibia as an independent state must be attributed to South Africa’s self-perceived stake in the entire set of international entitlements. Without those entitlements that enable it to proclaim sovereignty within its own boundaries, that proclaim it as an equal member among nations with equal claims to territorial integrity and political independence, South Africa would be jeopardizing its very existence. It would be vulnerable to the same sort of international indifference that greeted Iraq’s invasion of Iran. Hence, South Africa has maintained a careful regard for international entitlements, argued its cases thoroughly and well before the International Court of Justice, objected to all U.N. resolutions directed against it (the objections, as I earlier argued, were of crucial importance in defeating a consensus claim\(^{185}\)), and refrained from incorporating South West Africa. Instead, it has let the weak mandate entitlement gradually sever the territory administratively from the Union—an underlying corroboration, I maintain, for the efficacy of international law’s "implementation and compliance" of its set of entitlements.

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185. See D’Amato, supra note 36, at 117–21.