The Reality of Private Rights, Duties, and Participation in the International Legal Process

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THE REALITY OF PRIVATE RIGHTS, DUTIES, AND PARTICIPATION IN THE INTERNATIONAL LEGAL PROCESS

Jordan J. Paust*

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INTRODUCTION

In a realistic and descriptive sense, international law is a complex and dynamic legal process profoundly interconnected with regional and domestic legal processes throughout the globe. There are no single sources or evidences of international law; no single set of participants; and no single arenas or institutional arrangements for the creation, invocation, application, change or termination of such law. Like all human law, it is full of human choice and rich in individual and group participation and interaffectation.

Awareness of this reality can have significant consequences with respect to identification of international legal norms, realistic meaning or content, remedies, and possible sanction strategies. The reality of international law might function in ways opposed to certain theoretic constructs, limiting preferences or biases, and individual psychic needs. Realism more generally is especially opposed to a rigid state-oriented positivism and its favored, even dangerous, consequences. Indeed, realist orientations to international law might be threatening to those with a pretense of power, to those who prefer some unobtainable stability (or

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perhaps merely their own specially favored value positions), and to do-
mestic governmental elites (and those eager to serve them) who are
anxious to argue that they should control both the content and applica-
tion of law. Awareness of international law as a process involving
numerous participants can also help one to avoid limitations inherent in
simple “horizontal” or “vertical” theoretic models; can enhance recogni-
tion of various overlapping and interstimulating normative and sanction
processes; and can enhance recognition of and actual and potential pat-
terns of participation by international and regional institutional, state,
nation, corporate, private individual, and other actors.

I. CERTAIN FALSE MYTHS CONCERNING ROLES
AND DUTIES OF PRIVATE ACTORS

Adequate attention to prior and potential roles of private actors in the
international legal process and in various domestic legal processes ad-
dressing international law is sometimes inhibited by imagined theoretic
distinctions between public and private competencies and responsibili-
ties. For example, the brochure prepared to advertise this symposium
repeated claims of a few that the “traditional status” of the international
legal “system” had been “the exclusive realm of states” and that “the
traditional view of international law” had considered international law
“as purely interaction of sovereign states.” Neither claim is correct. For
at least the last 250 years, such concepts were never traditional and were
always unreal. Moreover, repetition of these and similar false myths can
produce consequences far more serious than inadequate attention and
confusion.

In 1984, a lawsuit alleging state and non-state actor responsibility
for terrorism was dismissed partly because judges had been misled or
were not fully informed about the reach of international law to private
actors.1 Judge Edwards in Tel-Oren v. Libyan Arab Republic,2 had cor-
correctly noted that “[t]hrough the 18th century and into the 19th, writers
and jurists believed that rules of international law bound individuals as
well as states,”3 but was in serious error when he claimed that by the

1. See, e.g., JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES
2. 726 F.2d 774 (D.C. Cir. 1984) (per curiam).
3. Id. at 794 (Edwards, J., concurring). Concerning the many early subjects of interna-
tional law and its early reach, including international crimes and human rights, see PAUST,
LAW OF THE UNITED STATES supra note 1, at 7–8, 11–12, 59–61, 193–210, 287–89 n.481,
421–22, 434–35; JORDAN J. PAUST ET AL., INTERNATIONAL LAW AND LITIGATION IN THE U.S.
15–17, 23–24, 95, 120–34, 146, 448 (2000) [hereinafter PAUST, INTERNATIONAL LAW AND
LITIGATION]; infra notes 15, 29–42. The first treaty of major concern to the Founders and
twentieth century a view shared by a few state-oriented positivists had “become firmly entrenched” that “states alone were subjects of international law, and they alone were able to assert rights and be held to duties devolved from the law of nations.” Judge Edwards added, “it follows logically that the law of nations provides no substantive right to be free from private acts of individuals, and persons harmed by such acts have no right, under the law of nations, to assert in federal courts.” Unfortunately, Judge Bork used a similar erroneous myth in his separate opinion supporting dismissal.

Some British positivists in the early 1900s had preferred a “states alone” view, but such a conception was radically opposed to traditional eighteenth and nineteenth century Western—and American—views and was also seriously and widely opposed even at the start of the twentieth century. A study of the rich use of human right precepts from the 1700s

Framers assured protection of rights of British creditors. See Ware v. Hylton, 3 U.S. (3 Dall.) 199, 205 (1796) (addressing the 1783 Treaty of Peace with Great Britain which, in Article VII, defined peace “between the subjects of the one and the citizens of the other” and revived the debts owed British creditors).


5. 726 F.2d at 780 n.4.

6. See id. at 805-06, 817(Bork, J., concurring). With respect to the reach of international law to private acts of terrorism, see infra notes 49-51, 76. Judge Bork’s opinion also contained several other errors, including: (1) an ahistorical statement that “in 1789 there was no concept of international human rights,” 726 F.2d at 813; (2) a claim that the Alien Tort Claims Act (ATCA) does not provide a cause of action or right to a remedy, see id. at 798-801, 820; and (3) an assertion that “international law does not ... recognize the capacity of private plaintiffs to litigate its rules in municipal courts” or provide a cause of action, see id. at 822. Concerning the first additional error, see, for example, PAUST, LAW OF THE UNITED STATES, supra note 1, at 195-202, 208-09, 236; infra notes 61-62. Concerning the second additional error, see, for example, Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996); Iwanova v. Ford Motor Co., 67 F. Supp. 2d 424, 442 n.20 (D.N.J. 1999); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1539 (N.D. Cal. 1987) [hereinafter Forti I]; PAUST, LAW OF THE UNITED STATES, supra note 1, at 14-15, 65 n.134, 233-36, 391-92 n.101 (noting that the ATCA executes and incorporates by reference any partly or fully non-self-executing treaties); infra notes 13, 15. Concerning the third additional error and human rights to an effective remedy in domestic courts, see, for example, PAUST, LAW OF THE UNITED STATES, supra note 1, at 224-29, 235, 314-16, 391-92.


8. See, e.g., PAUST, LAW OF THE UNITED STATES, supra note 1, at 227, 235-36, 318-20 n.603-05. Even Oppenheim knew that his theory was opposed by other Europeans. See Oppenheim, supra note 7, at 367 (citing “several writers,” including Bonfils, Bluntschli, Fiore, Martens). Moreover, it was widely known that a “nation” could have treaty relations and responsibilities even though it was not a “state.” See, e.g., Jones v. Meehan, 175 U.S. 1, 4, 32 (1899) (treaty also granting rights to certain lands to Chief Moose Dung and other named persons); Mitchell v. United States, 34 U.S. (9 Pet.) 711, 724-25, 746, 749, 755 (1835) (Great Britain-Indian treaty and rights thereunder remained in force when the U.S. acquired the Floridas); 14 Op. Att’y Gen. 249 (1873) (regarding convictions of certain Modoc Indians for
through the early 1900s and into the 1980s demonstrates that this view was also unrealistic. More generally, within the United States there had also been a rich history of claims brought by private individuals or companies against other individuals or companies for several other types of violations of international law, and civil or criminal sanctions for private violations of international law were often interchangeable depending on who was seeking enforcement: an individual, the government, or both.

Some had also assumed that an earlier rarity of direct individual participation in sanction institutions at the international level meant that individuals had no rights or duties under international law. This form of error misses the fact that even in the early twentieth century some individuals and companies had recognizable rights and duties at the international level and that individual rights were most often implemented, as they are today, in domestic legal processes. The very purpose of the Alien Tort Claims Act (ATCA), first adopted in 1789, was to assure that aliens had a right of access to federal courts for their claims concerning violations of customary international law or treaties of the

violations of the laws of war); J.L. Brierly, The Law of Nations 118–19 (5th ed. 1955); Paust, International Law and Litigation, supra note 3, at 7; H. Wheaton, Elements of International Law 27 (2d ed. 1880). See also Siegfried Wiessner, Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis, 12 Harv. Hum. Rts. J. 57 (1999). Similarly, “belligerents” in a civil war were not the equivalent of “states”; and Great Britain, other European states, and the United States had recognized the Confederate States of America, not as a state, but as a “belligerent” for purposes of trade, laws of neutrality, or the laws of war. See, e.g., The Prize Cases, 67 U.S. (2 Black) 635, 666, 669 (1862).

11. See, e.g., Paust, Law of the United States, supra note 1, at 227, 298 n.505.
12. See, e.g., id. at 231, 236, 303 n.541.
13. See, e.g., id. at 319–20 n.604 (citing varied references including statements of the Permanent Court of International Justice in 1927 and 1928). In 1907, an Opinion of the U.S. Attorney General recognizing that a private U.S. dredging company violated a treaty by dredging activities diverting the Rio Grande, noted that an International Water Boundary Commission “found . . . that the . . . Company . . . violated the stipulations of that treaty,” and recognized that injuries included “damage to property,” including injury to “riparian rights,” and “[a]s to indemnity for injuries which may have been caused to citizens of Mexico, I am of the opinion that existing statutes provide a right of action and a forum . . . . The statutes [including the Alien Tort Claims Act (ATCA)] provide a forum and a right of action.” 26 Op. Att’y Gen. 250, 251–53 (1907). In this general period, the U.S. Supreme Court recognized that even though claims before a U.S.-Mexican Commission were those of governments, a private company had a claim of right under a “treaty and the award of the Commission,” and such right is undoubtedly “susceptible of judicial determination” in domestic courts. La Abra Silver Mining Co. v. United States, 175 U.S. 423, 458, 461 (1899).
Further, it was widely known that "nations" and "belligerents" are different actors than states and that nations were also capable of creating treaty-based international law. "Self-determination" is also a right of participation of "peoples," not states, thereby demonstrating the existence of additional non-state actors.

The false myth that international legal "norms bind only states and persons acting under color of a state's law, not private individuals," was reiterated a decade after Tel-Oren by Radovan Karadzic in a civil proceeding addressing his involvement in war crimes, genocide, other crimes against humanity, torture, and other human rights violations. In contrast to errors in Tel-Oren, Judge Newman rightly rejected the claim "that the law of nations, as understood in the modern era, confines its reach to state action" and recognized that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals." However, even Judge Newman's more thorough inquiry into evidence of the existence of private rights and duties under international law proved to be insufficient when he was faced with the question whether private individuals can commit impermissible acts of torture under human rights law. With respect to torture, he did not consider express and implied private duties identifiable in various general human rights instruments, but focused on a limiting definition contained in two instruments addressing torture.

15. Concerning early use of the ATCA, see, for example, PAUST, LAW OF THE UNITED STATES, supra note 1, at 14, 63 n.127, 233–34, 286–88, 312, 314, 391–92; Jordan J. Paust, The History, Nature, and Reach of the Alien Tort Claims Act, 16 FLA. J. INT'L L. 249 (2004) [hereinafter Paust, Alien Tort Claims Act]. The ATCA requires that a plaintiff be an alien, but cases and opinions of the Attorneys General demonstrate that a defendant can be a U.S. or foreign perpetrator of a private (individual, group, or corporate) or public character. See PAUST, LAW OF THE UNITED STATES, supra note 1, at 14, 63–64 nn.128–131; Paust, Private Corporations, supra note 10, at 820–22. Moreover, by enacting the ATCA as a means of determining what claims are cognizable before the courts, Congress chose to exercise its constitutional power to incorporate international law by reference, which Supreme Court cases have recognized is a congressional prerogative not to be second-guessed by the judiciary. See, e.g., PAUST, LAW OF THE UNITED STATES, supra note 1, at 13–14, 64–65 n.133, 391 n.101. Concerning Supreme Court recognition of congressional choice to incorporate by reference, see, for example, In re Yamashita, 327 U.S. 1, 7–8 (1946); Ex parte Quirin, 317 U.S. 27–30 (1942); United States v. Smith, 18 U.S. (5 Wheat.) 153, 158–62 (1820). Furthermore, when incorporated by reference or otherwise utilized by federal courts, customary international legal norms need only be "sufficiently determinable." See, e.g., Paust, Alien Tort Claims Act, supra, at 258–59 n.25.

16. See supra note 7.


18. See Kadic v. Karadzic, 70 F.3d at 239.

19. Id.

20. See infra Part III.

21. Kadic v. Karadzic, 70 F.3d at 243–44. Judge Newman cited the definition of torture in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or
This focus led to an erroneous conclusion that torture, outside "the course of genocide or war crimes," is proscribed "only when committed by state officials or under color of law." The phrase "color of law" is not a phrase that is found in international law. It is a construct that was seemingly borrowed from U.S. domestic limitations of responsibility and used to argue improperly that similar limitations exist on individual duties with respect to the proscription of torture under international law.

The error and unreality of myths that international law had been or is merely state-to-state and that there had been or are no private duties can also be demonstrated by more detailed attention to the reach of international criminal law and human rights law to private actors, the focus of the next two Parts. These two Parts additionally demonstrate that duties and rights under international law are often addressed domestically as well as at the international level and provide a glimpse at complex interconnections among norms, arenas, and sanctions.

II. THE REACH OF INTERNATIONAL CRIMINAL LAW

The reality of the reach of international law to individual actors was stressed by the International Military Tribunal at Nuremberg in opposition to defense claims "that international law is concerned [merely] with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible. . . . That international law imposes duties and liabilities upon individuals as well as States," the Tribunal affirmed, "has long been recognized."

Punishment, Dec. 10, 1984, art. 1, S. Treaty Doc. No. 100-20, at 19 (1988), 55-56, 1465 U.N.T.S. 85, 113-14, which states, "[f]or the purposes of this Convention, the term 'torture' means, [inter alia] any act . . . inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." However, even with such a limited definition it is not clear that a private perpetrator of torture is acting under "color of law" in every case in which a public actor merely acquiesces. The tests for "color of law" adopted in Kadic were broad enough to find responsibility when a private actor acts "together with" or "in concert with" a state or "with significant state aid," 70 F.3d at 245, but mere "acquiescence" can be broader. A similar test for "color" in Iwanowa included the phrases "in close cooperation with" and "worked closely with." Iwanowa v. Ford Motor Co., 67 F. Supp. 2d. at 445, 446 n.27. Further, general human rights instruments contain no such limiting phrases with respect to the prohibition of torture. See, e.g., ICCPR, supra note 17, art. 7, at 175.

23. International Military Tribunal (Nuremberg): Judgment and Sentences, reprinted in 41 AM. J. INT'L L. 172, 220 (1947). This rationale can be used by analogy to recognize that states carrying out the plan or actions of an international organization (e.g., the United Nations or NATO) are still responsible even if the organization also has responsibility.
Rejecting the false myth that international law is simply state-to-state, the Tribunal also recognized: "Crimes against international law are committed by men, not by abstract entities . . . . [and] individuals have international duties which transcend the national obligations of obedience imposed by the individual state. . . ." The same can be said of violations of human rights law, although certainly many violators are official elites who also claim to represent states or other abstract entities. Furthermore, like international crimes, most human rights violations occur in the territory of a single state, although such actions are essentially of international concern. Clearly also, most of the victims are private individuals. It is not difficult to understand, then, that patterns of practice involving violations of international criminal law and human rights more generally are not merely patterns involving interactions among states or state actors.

The International Military Tribunal at Nuremberg offered another important recognition relevant to individual responsibility under customary international law and notions of state authority or "sovereignty." When faced with a claim that those acting on behalf of or with the approval of the state are immune from the reach of international law, the Tribunal rightly declared:

The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position . . . . He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law.

As the Tribunal affirmed, acts taken in violation of international law are beyond the lawful authority of any state, are ultra vires, and cannot be covered by immunity. Indeed, "sovereignty" is conditioned

24. Id. at 221.
25. Id.
on obedience to international law, the law upon which sovereignty rests. Many U.S. courts have applied the *ultra vires* rationale with respect to violations of international law as well as violations of foreign domestic law to find acts by heads of state and other officials to be not lawful “public” or “sovereign” acts, therefore not protected by sovereign immunity. 

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Nonimmunity for human rights violations has also been mandated in treaties. See, e.g., ICCPR, *supra* note 17, art. 2, ¶ (3)(a), at 174 (duty of states “[t]o ensure that any person whose... are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”); American Convention on Human Rights, Nov. 22, 1969, art. 25(1), 1144 U.N.T.S. 123, 151; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 21, arts. 1(1), 14(1) (duty to ensure redress and fair and adequate compensation); General Comment 20, art. 7, U.N. Human Rights Comm., 44th Sess., at 29, ¶ 2, U.N. Doc HRI/GEN/1 (1992) *available at* http://www1.umn.edu/humanrts/gencomm/hrcomms.htm (“whether inflicted by people acting in their official capacity, outside their capacity or...”); *id.* at 32, ¶ 13 (“whether committed by public officials or other persons acting on behalf of the State...those who violate...must be responsible”); moreover, every modern international criminal law instrument applies to any person or everyone who commits a relevant crime, thus reaching any official as well as any private perpetrator. *See also* Rome Statute of the International Criminal Court, July 17, 1998, art. 27(1), adopted by the U.N. Diplomatic Conference, July 17, 1998, *reprinted in* JORDAN J. PAUST, ET. AL., INTERNATIONAL CRIMINAL LAW DOCUMENTS SUPPLEMENT 206, 219 (2000) [hereinafter DOCUMENTS SUPPLEMENT].

27. *See, e.g.,* In re Estate of Ferdinand Marcos, Human Rights Litigation, 25 F.3d 1467, 1470-71 (9th Cir. 1994), cert. denied, 513 U.S. 1126 (1995); Doe v. Unocal Corp., 963 F. Supp. 880, 892-95, 898-99 (C.D. Cal. 1997); Xuncax v. Gramajo, 886 F. Supp. 162, 175-76 (D. Mass. 1995); Letelier v. Republic of Chile, 488 F. Supp. 665, 673 (D.D.C. 1980) (“[T]here is no discretion to commit, or to have one’s officers or agents commit, an illegal act...no ‘discretion’ to perpetuate conduct designed to result in...assassination...action that is clearly contrary to the precepts of humanity, as recognized in both national and international law.”); PAUST, INTERNATIONAL LAW
In the United States, there had been early attention to a significant number of international crimes that can be committed by private perpetrators and provide universal jurisdiction for criminal or civil sanctions, including piracy.\textsuperscript{28} War and litigation, supra note 3, at 25, 303–04, 313–14, 322–25, 592–93, 651–53, 676–77, 709–11; Paust, Law of the United States, supra note 1, at 306–07, 312–14, 421–22, 438–39 n.72. See also Johnson v. Eisentrager, 339 U.S. 763, 765, 789 (1950) (discussing that no public official immunity exists for war crimes); The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 252–53 (1822) (If a sovereign "comes personally within our limits, although he generally enjoy a personal immunity, he may become liable to judicial process in the same way, and under the same circumstances, as the public ships of the nations," which were subject to jurisdiction in our courts with respect to violations of the law of nations (the law of neutrality)); Hudson v. Guestier, 8 U.S. (4 Cranch) 293, 294 (1808) (foreign public acts violative of the law of nations are beyond foreign "jurisdiction" and are not entitled to recognition as lawful public acts); *In re Doe* v. United States, 860 F.2d 40, 45 (2d Cir. 1988) ("there is respectable authority for denying head-of-state immunity to a former head-of-state for private or criminal acts in violation of American law," citing *The Schooner Exchange v. McMadden*, 11 U.S. (7 Cranch) 116, 135, 144 (1812)); *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 425 (2d Cir. 1987) ("sovereigns are not immune from suit for their violations of international law"). *rev’d on other grounds*, 488 U.S. 428 (1989); *West v. Multibanco Comermex*, S.A., 807 F.2d 820, 826 (9th Cir. 1987) ("violations of international law are not ‘sovereign’ acts"); *cert. denied*, 482 U.S. 906 (1987); United States v. La Jeune Eugenie, 26 F. Cas. 832, 847 (C.C.D. Mass. 1821) (No. 15,551) ("no nation can rightfully permit its subjects to carry . . . on [a violation of international law, “an offence against the universal law of society”], or exempt them . . . [and] no nation can privilege itself to commit a crime against the law of nations"); *Daiberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 52–54 (D.D.C. 2000) ("nations that operate in a manner inconsistent with international norms should not expect to be granted the privilege of immunity from suit"); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1197–98 (S.D.N.Y. 1996) (acts of torture are "acts which exceed the lawful boundaries of a defendant’s authority" and are therefore nonimmune); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993) (acts alleged in violation of international law "hardly qualify as official public acts"); *Kalmich v. Bruno*, 450 F. Supp. 227, 229 n.2 (N.D. Ill. 1978) (act of state doctrine does not apply to acts in violation of international law); 9 Op. Att’y Gen. 356, 362–63 (1859) ("A sovereign who tramples upon the public law of the world cannot excuse himself by pointing to a provision of his own municipal code."). For cases recognizing nonimmunity for violations of international law despite commissions from any foreign prince or state, see, for example, *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 201–02 (1820); *The Estrella*, 17 U.S. (4 Wheat.) 298, 299–301, 304, 307–09 (1819); *L’Invincible*, 14 U.S. (1 Wheat.) 238, 257–58 (1816). *But see* *Plaintiffs A. v. Zemin*, 282 F. Supp. 2d 875 (N.D. Ill. 2003); *Abiola v. Abubakar*, 267 F. Supp. 2d 907 (N.D. Ill. 2003); *Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (S.D.N.Y. 2001); *Lafontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994) (addressing so-called law of state immunity, apparently unaware of international laws and other cases addressed herein).

28. *See*, e.g., *United States v. The Cargo of the Brig Malek Adhel*, 43 U.S. (2 How.) 210, 232, 235 (1844); *United States v. Furlong*, 18 U.S. (5 Wheat.) at 197 (stating that piracy "is against all, and punished by all . . . within this universal jurisdiction"); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161, 163 (1820); *United States v. Klintock*, 18 U.S. (5 Wheat.) 144, 147–48, 152 (1820) (explaining that piracy "is punishable in the Courts of all . . . [and] Courts of this country are authorized and bound to punish"); *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 159 (1795) (Iredell, J., concurring) ("[A] ll piracies and trespasses committed against the general law of nations, are inquirable, and may be proceeded against, in any nation. . . ."); *Davison v. Seal Skins*, 7 F. Cas. 192, 194 (C.C.D. Conn. 1835) (No. 3,661) (private recovery of property taken by non-state actor pirates); 4 William Blackstone, Commentaries on the Laws of England 68 (1765). Concerning additional early and continued recognition of universal jurisdiction over violations of customary international law, see, for example, *The Prosecutor v. Tadic*, supra note 26, at ¶ 71 ("[A] ll States have the right to punish . . . violators" of common Article 3 of the Geneva Conventions); 1 Op. Att’y Gen. 68, 69 (1797) ("[as] an offence against the law of nations . . . it is the interest as well as the
crimes;\textsuperscript{29} breaches of neutrality, territorial infractions, "aggression," and other crimes against peace;\textsuperscript{30} unlawful capture of vessels;\textsuperscript{31} the slave trade;\textsuperscript{32} violence against foreign ministers and other officials;\textsuperscript{33} poisoners, assassins, and incendiaries;\textsuperscript{34} counterfeaters of foreign currency;\textsuperscript{35} banditti and brigands;\textsuperscript{36} terroristic publications;\textsuperscript{37} violation of passports;\textsuperscript{38} violation of safe-conducts;\textsuperscript{39} and more generally "all . . .

duty of every government to punish . . . all the individuals" who commit violations of territorial rights); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987); PAUST, LAW OF THE UNITED STATES, supra note 1, at 420–23, 432–41.

29. See, e.g., Brown v. United States, 12 U.S. (8 Cranch) 110 (1814); Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 39 (1801); Bas v. Tingy, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J.); Jordan J. Paust, My Lai and Vietnam: Norms, Myths and Leader Responsibility, 57 MIL. L. REV. 99, 112–15, 129–30 (1972) [hereinafter Paust, Vietnam]. See also Ex parte Quirin, 317 U.S. 1, 27–28 (1942) ("From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes . . . the status, rights and duties of enemy nations as well as enemy individuals.").

30. See, e.g., United States v. Smith, 27 F. Cas. 1192 (C.C.N.Y. 1806) (No. 16,342) (Patterson, J., on circuit) (private war, breach of neutrality); Henfield's Case, 24 F Cas. 252 (C.C.D. Pa. 1806) (private war, breach of neutrality); Henfield's Case, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J.); Jordan J. Paust, My Lai and Vietnam: Norms, Myths and Leader Responsibility, 57 MIL. L. REV. 99, 112–15, 129–30 (1972) [hereinafter Paust, Vietnam]. See also Ex parte Quirin, 317 U.S. 1, 27–28 (1942) ("From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes . . . the status, rights and duties of enemy nations as well as enemy individuals.").


33. See, e.g., United States v. Ortega, 24 U.S. (11 Wheat.) 467 (1826) (violation against charge d'affaires); Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 116–17 (1814) (assault on foreign consul); United States v. Liddle, 26 F. Cas. 936 (C.C.D. Pa. 1808) (No. 15,598) (assault on a foreign minister); United States v. Hand, 26 F. Cas. 103 (C.C.D. Pa. 1810) (No. 15,297) (assault on charge d'affaires); Res of 1781, supra note 30, at 1136–37. See also 4 Blackstone, supra note 28, at 70–71; 1 Kent, supra note 32, at 44.


35. See, e.g., United States v. Arjona, 120 U.S. 479 (1887).


38. See, e.g., Res of 1781, supra note 30; 1 Kent, supra note 32, at 171.

39. See, e.g., Res of 1781, supra note 30; 4 Blackstone, supra note 28, at 68.
trespasses committed against the general law of nations" and the treaties of the United States.\textsuperscript{40}

Today, the number of specific international crimes that can be committed by private individuals has increased from earlier categories to include, among others, the following: genocide;\textsuperscript{41} other crimes against humanity;\textsuperscript{42} apartheid;\textsuperscript{43} race discrimination;\textsuperscript{44} hostage-taking;\textsuperscript{45} torture;\textsuperscript{46} forced disappearance of persons;\textsuperscript{47}

\begin{itemize}
\item \textsuperscript{40} Talbot v. Janson, 3 U.S. (3 Dall.) at 159–61. See also Res. of 1781, supra note 30 (concluding that "[i]f the preceding being only those offences against the law of nations which are most obvious.").
\item \textsuperscript{41} See, e.g., Res. of 1781, supra note 30 ("infractions of treaties and conventions to which the United States are a party").
\item \textsuperscript{43} See, e.g., PAUST, INTERNATIONAL CRIMINAL LAW, supra note 26, at 855–916. Concerning civil sanctions, see, for example, Kadic v. Karadzic, 70 F.3d at 236; Mehinovic v. Vuckovic, 198 F. Supp. 2d at 1322, 1328–29, 1344, 1352–56; Estate of Cabello v. Fernando-Larios, 157 F. Supp. 2d at 1350–51, 1360–61, 1366.
\item \textsuperscript{47} See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, supra note 21; Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, 18 U.S.C. § 2340A, 25 I.L.M. 519. Concerning civil sanctions, see, for example, Wiwa, 2002 U.S. Dist. Lexis 3293 passim; Presbyterian Church of the Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 passim; Doe v. Unocal, 963 F. Supp. 880 passim.
terrorism;\textsuperscript{49} terrorist bombings;\textsuperscript{50} financing of terrorism;\textsuperscript{51} aircraft hijacking;\textsuperscript{52} aircraft sabotage and certain other acts against civil aviation;\textsuperscript{53} certain acts against the safety of maritime navigation, including boatjacking;\textsuperscript{54} murder, kidnapping, or other attacks on the person or liberty of internationally protected persons;\textsuperscript{55} trafficking in certain drugs;\textsuperscript{56} slavery;\textsuperscript{57} and mercenarism.\textsuperscript{58}


From the above, it is evident that it cannot be realistic to claim that tradition during the last 250 years had been that international law was merely state-to-state or that individuals did not have duties. Such unreality is also evident in the next Part with respect to the reach of human rights law. It is also useful to note that the primary arena for enforcement of international criminal law had been and still is within the state, despite the growing number of international fora for prosecution. With respect to "fragmentation" of an international legal "system," it is interesting that the new International Criminal Court, despite its limited jurisdiction, is a modern advance toward defragmentation of what has always been a relatively "fragmented" but complex international legal sanctions process. Therefore, opposition to jurisdiction of the International Criminal Court tends to support fragmentation.

III. THE REACH OF HUMAN RIGHTS LAW

A. Early and Continuing Attention to Human Rights

As documented in a detailed study of the recognition and use of human rights and related precepts prior to and throughout the history of the United States, there had been an early and rich interrelationship between human rights and individual rights and duties prior to the creation of the post-World War II international human rights instruments. Further study would be useful, but there had also been an early use of human rights precepts and claims in Europe, Latin America, and other areas outside the United States. Moreover, what has been

59. For identification of prior and current international criminal tribunals, their limited jurisdiction and certain primacies over domestic jurisdiction, including the International Criminal Tribunal for Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), and International Criminal Court (ICC), see, e.g., PAUST, INTERNATIONAL CRIMINAL LAW, supra note 26, at 621–716.

60. See United States v. Haun, 26 F. Cas. 227 (C.C.S.D. Ala. 1860); PAUST, LAW OF THE UNITED STATES, supra note 1, at 195–224; In Haun, Justice Campbell emphasized President Jefferson's far earlier recognition of "violations of human rights" by private "citizens of the United States" in other countries. Haun, 26 F. Cas. at 231. President Jefferson had made such remarks in his Sixth Annual Message to Congress in 1806 concerning private human rights duties to not engage in the slave trade. See PAUST, LAW OF THE UNITED STATES, supra note 1, at 202.

61. PAUST, LAW OF THE UNITED STATES, supra note 1, at 195–96, 199–200, 200 n.111, 205–07, 236 nn. 603–04; Burns H. Weston, Human Rights, in ENCYCLOPEDIA BRITANNICA, reprinted in ANTHONY D'AMATO, INTERNATIONAL LAW ANTHOLOGY 21–24 (1994); MYRES S. MCDouGAL, ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER 3–6, passim (1980) [hereinafter MCDouGAL, HUMAN RIGHTS]. For a few more recent foreign decisions recognizing private duties, see, for example, Paust, Private Corporations, supra note 10, at 809–10 (Canada, Germany, Israel, Japan, United Kingdom). For recognition by European international institutions of private duties under human rights law, see, for example, Case 43/75, Defrenne
documented is sufficient to demonstrate that the traditional reach of human rights involved private rights and duties long before the misrepresentations of a few British theorists in the early twentieth century and the current adherents of a "states alone" viewpoint. This study also provides evidence of early and continued refutation of a theory of absolute "state" sovereignty offered by some "states alone" and refutation of the association of raw power, even state power, adherents with authority, a theoretic association convenient for those alleging the permissibility of early British oppression of other peoples, or communist and other forms of internal and external oppression.

B. Human Rights Instruments Often Reach Private Perpetrators

As documented in a study of human rights duties of private corporations, most modern human rights instruments create private duties


See generally Herbert Marcuse, Soviet Marxism—A Critical Analysis 188-93, 198-99, 225-26, 245 (1961); Grigori I. Tunkin, Theory of International Law 82-83, 137, 431, 435-36, 438 (William E. Butler trans., 1974). C.f. id. at 382 ("The subjects of international legal responsibility are the subjects of international law; consequently, they are above all, and primarily, states. . . . In isolated instances there occurs responsibility of physical persons."); A. P. Movchan, The Human Rights Problem in Present-Day International Law, in Contemporary International Law 233, 239 (Grigory Tunkin ed. 1969) ("Oppenheim wrote that 'although such treaties generally speak of rights which individuals shall have . . ., this is, as a rule, nothing more than an inaccuracy of language. . . . The Soviet science of international law is unequivocal in its claim that the 'legal position of individuals is determined by national and not international law.'"); G.I. Tunkin, Peaceful Coexistence and International Law, in id. 5, 32 ("international law as an expression of state will"); N.A. Ushakov, International Law and Sovereignty, in id. 97, 99-102 ("The supremacy of the state means subordination to it of all persons and organisations within the bounds of state territory. The state has supreme power. . . . All these organisations and persons are bound to submit to it. . . . Only the will of the sovereign state, expressed in state power, becomes a law. . . . The very concept of state supremacy negates the possibility of formally restricting state power. State power operates on the basis of the law and order it itself creates.") (emphasis in original).

See, e.g., Lon Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 Harv. L. Rev. 630, 658-59 (1958) (stating that positivist-trained German lawyers in the 1930s were so "prepared to accept as 'law' anything that called itself by that name, was printed at government expense and seemed to come 'von oben herab'" that they were the first to fall in line and to support the evil Hitlerian regime); Jordan J. Paust, The Concept of Norm: Toward a Better Understanding of Content, Authority, and Choice, 53 Temp. L.Q. 226, 268, 270-72, 274-77 (1980) [hereinafter Paust, Norms].
expressly or by implication. Several instruments recognize or create private duties in preambular provisions and in particular articles, and in many articles duties and prohibitions are not limited to particular types of actors. Many human rights instruments expressly deny the right of any group or person to engage in conduct aimed at the destruction of rights of others or at their limitation, thereby necessarily recognizing duties of all groups or persons.

C. Multiple Instruments and Institutions

Given the multiplicity of human rights instruments and institutions some might wonder whether the existence of the United Nations and other international and regional human rights bodies, each with their own jurisdictional competence over certain violations of human rights law, poses serious problems of "fragmentation" among international institutions or for the global community. In general, institutional fragmentation among human rights bodies is not a serious problem and the major problem for humankind is not that various international institutions can address a particular human rights violation, but that many do so indirectly or relatively ineffectively. More generally, justice abhors a vacuum and tolerates varied attempts toward realization of its achievement.

With respect to hierarchic norms and concurrent enforcement competencies, the U.N. Charter will generally prevail in case of an unavoidable clash with another international agreement. One might also assume that its human rights bodies would have primacy, but the Charter invites concurrent human rights enforcement effort by expressing a duty of states to take "joint and separate action" to achieve "universal respect for, and observance of, human rights. Regional human rights bodies also consider decisions of other human rights bodies, which leads

65. For a detailed discussion the reach of Human Rights Instruments, see Paust, Private Corporations, supra note 10, at 810–15.
66. See id. at 811–15.
67. See id. at 812–15.
70. See U.N. Charter art. 103. However, jus cogens norms prevail over treaties. See, e.g., Paust, International Law and Litigation, supra note 3, at 49–51.
71. U.N. Charter art. 56; Henry J. Steiner & Philip Alston, International Human Rights in Context 783 (2d ed. 2000) (Inis Claude claiming that an original purpose might have been to have regional bodies subject to U.N. control).
72. U.N. Charter art. 55(c).
to normative integration or interstimulation with respect to normative content. The African Charter on Human and Peoples' Rights and the American Convention on Human Rights contemplate such a process as well as consideration of the effects of other human rights treaties,\(^73\) and no significant problems are evident. Cross-identification of rights is also contemplated, for example, in the European Convention\(^74\) and the ICCPR,\(^75\) both of which declare a primacy for certain human rights contained in other international agreements and assure their consideration in connection with interpretive tasks.\(^76\) Some human rights treaties require a primacy for provisions in other treaties or customary international law only if they are "more conducive" to effectuation of specific rights at

73. See, e.g., "Other Treaties" Subject to the Advisory Jurisdiction of the Court, Inter-Am. Ct. H.R., Advisory Opinion OC-1/82 of Sept. 24, 1982, Ser. A., No. 1, at 25, 42 (1982) (Article 64 covers "any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever be the principal purpose of such a treaty. . . "); African Charter on Human and People's Rights, June 21, 1981, pmbl., arts. 60-61, O.A.U. Doc. CAB/LEG/67/3/Rev.5 (1981), reprinted in, 21 I.L.M. 58 (1982) (the African "Commission shall draw inspiration from" and the African "Commission shall also take into consideration") [hereinafter African Charter]; American Convention on Human Rights, supra note 26, pmbl. ("Considering . . . principles . . . set forth [inter alia] . . . in the Universal Declaration of Human Rights, and that they have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope"), arts. 29 ("No provision of this Convention shall be interpreted as . . . (d) [e]xcluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have"), 64 (the Inter-American Court of Human Rights can entertain questions raised by member states "regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. . . "). See also Gabriel M. Wilner, Reflections on Regional Human Rights Law, 25 GA. J. INT'L & COMP. L. 407, 408-09, 411-12 (1995-96).

74. See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, pmbl. 213 U.N.T.S. 221, 224 ("for the collective enforcement of certain of the Rights stated in the Universal Declaration") [hereinafter European Convention]. See also Wilner, supra note 73, at 408, 410-11. Professor Wilner also notes that expectations exist that the Universal Declaration is meant to provide a set of minimum or core-value guarantees. See id. at 409, 420-26. See also Mcdougal, Human Rights, supra note 61, at 90, 274, 302, 321-22, 325-27 (the Universal Declaration clarifies basic human rights guaranteed in the U.N. Charter and is a primary part of the International Bill of Human Rights, which includes further clarification of primary rights in the International Covenants).

75. ICCPR, supra note 17, pmbl., at 173 (addressing the Universal Declaration of Human Rights and the United Nations Charter).

76. See ICCPR, supra note 17, art. 5(2), at 174 ("There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them at a lesser extent."); European Convention, supra note 74, art. 60, at 250 ("Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured . . . under any other agreement" of a signatory).
stake, which seems to assure that the rights contained in the specific instrument provide a minimum set of guarantees that can be supplemented. This last approach seems preferable to one declaring a primacy for any human rights contained in other instruments, as in the case of the European Convention, or any "fundamental" human rights, as in the case of the ICCPR, since in a given case the full effectuation of a right contained in another instrument might lessen the full effectuation of rights contained in the European Convention or the ICCPR. This is particularly strange with respect to the ICCPR, since it is a major human rights treaty that is meant to provide universal minimum standards in supplementation of the Universal Declaration of Human Rights within a process that tolerates regional expansion, particulars, or experimentation as long as regional relativism or the regional practices do not result in violations of the core of minimum human rights guarantees. In any event, as noted, the U.N. Charter has primacy over other treaties and jus cogens norms will prevail over contrary norms contained in any treaty.

IV. THE ROLE OF INDIVIDUALS IN NORMATIVE FORMATION, MODIFICATION, AND SANCTIONS

In another study, the author has identified the realistic role and forms of participation of individuals in the formation and modification of customary international law. Such forms of participation are no less real with respect to international agreements. Knowledge of the reality of
individual participation in normative formation and modification allows one to avoid myths that individuals are mere objects of international law or that international law is made merely by state elite practice and expectations.\textsuperscript{82} In contrast, a tunnel-vision focus on merely formalistic international law-making and law-applying institutions and certain formally recognized roles of groups and individuals will inhibit more comprehensive awareness of the varied roles and actual patterns of non-state actor participation in normative formation and sanction processes. Moreover, state elite and state and international institutional decisions are subject to a "process of review" that allows participation of individuals and groups in a dynamic review of decisions and acceptance, modification, or termination of the efficacy of decisions and underlying norms.\textsuperscript{83} Awareness of actual patterns of participation also allows recognition of the fact that the international legal process is not purely vertical or horizontal and that it is not significantly fragmented.\textsuperscript{84}

Individuals can also play effective roles in various political, diplomatic, economic, juridic, and power-coercive sanction processes. Comprehensive awareness of individual participation in various sanction processes allows one to recognize not merely past forms of participation, but also potential future roles and varied types of strategies that might be usefully employed.\textsuperscript{85}

More generally, the efficacy, predictability and stability of international law ultimately rest upon real processes of power and authority in which all participate, however indirectly. When all the various voices are heard or represented, it is more likely that law will be effective, predictable and more stable.

\textbf{V. THE ROLE OF INDIVIDUALS IN SANCTION PROCESSES}

Attempts to restrict every form of participation by non-state actors would be futile, perhaps like attempts to command every molecule in an ocean's waves to refrain from trespassing on some king's supposed beachhead. Since broad participation is also democratizing with respect

\textsuperscript{82} See Paust, Evidences of Customary Human Rights, supra note 80, at 156–58.
\textsuperscript{83} See, e.g., id. at 157.
\textsuperscript{84} See id. at 158.
\textsuperscript{85} See id. at 160–61.
to both the evolving content and continued application of international law, attempts at control also seem less than preferable.

VI. INTERNATIONAL LEGAL STANDARDS OF AUTHORITY AND SELF-DETERMINATION

The role of individuals in association with others is also central to international legal standards of authority and self-determination. Human rights relevant to individual dignity, the process of authoritative government, and the related precept of self-determination of peoples (not states) are enshrined in the U.N. Charter. Additionally, the ICCPR lists political self-determination as a human right and recognizes that "by virtue of that right" all peoples have the right to "freely determine their political status and freely pursue their economic, social and cultural development." To the extent that persons are denied equal participation in their political process, they are denied the sharing of political power or shared participation in a process of political determination by an aggregate "self." In a given case, a denial of self-determination by governmental or private actors operating in their own or in foreign territory can also infringe the human rights of freedom of expression, including the free exchange of ideas nationally and transnationally; the

86. See Paust, Law of the United States, supra note 1, at 4, 20–21 nn.8–10; Chen, supra note 80, at 23.


88. ICCPR, supra note 17, art. 1(1), at 173. See also Declaration on Principles of International Law, supra note 87, ("the right freely to determine ... political status freely determined by a people); African Charter, supra note 73, art. 20; G.A. Res. 107, supra note 78, pml., at 1, ¶ 3(a), at 2; Chen, supra note 80, at 30–33. The Human Rights Committee created by the ICCPR has also recognized that "denying peoples the right to determine their own political status ... would be incompatible with the object and purpose of the Covenant." General Comment No. 24, supra note 79, at ¶ 9. The Committee has also recognized that Article 1 "imposes on all States parties corresponding obligations" and that paragraph 3 "imposes specific obligations ... not only in relation to their own peoples but vis-à-vis all peoples. ... It follows that all States parties to the Covenant should take positive action to facilitate realization of and respect for the right of peoples to self-determination." General Comment No. 12, U.N. GAOR H.R. Comm., 21st Sess., at 10–12, ¶¶ 2, 6, U.N. Doc. CCPR/C/21/Rev.1 (1989).

89. ICCPR, supra note 17, art. 19, at 178.
freedom of assembly;\textsuperscript{90} the ability of citizens to take part in governmental processes directly or through freely chosen representatives;\textsuperscript{91} and the rights of individual dignity and worth,\textsuperscript{92} equality, and freedom from impermissible discrimination on the basis of political or other opinion.\textsuperscript{93} Enjoyment of political self-determination and human rights are thus intertwined.

Such an interconnection is also recognizable in other ways. For example, the only legitimate or authoritative government the Universal Declaration of Human Rights affirms, is one based on the will of the people: "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."\textsuperscript{94} The human right to a government based on the relative free will of the people is necessarily mirrored in the concomitant right of a people "freely to determine ... their political status" recognized in connection with self-determination.\textsuperscript{95}

As the International Court of Justice has recognized, "application of the

\textsuperscript{90} Id. art. 22, at 178.
\textsuperscript{91} Id. art. 25, at 179.
\textsuperscript{92} Id. pmbl, at 173. See also U.N. CHARTER pmbl. ("reaffirm ... the dignity and worth of the human person").
\textsuperscript{93} ICCPR, supra note 17, arts. 2, 26, at 173–74, 179. See also U.N. CHARTER pmbl., arts. 1, § 3, 55(c).

The expectations of the Founders of the United States were that ultimate authority and "sovereignty" remain with the people of the United States and not the government. See, e.g., PAUST, LAW OF THE UNITED STATES, supra note 1, at 197, 201, 220, 328–31, 333–35, 340, 342.

In Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27), the majority opinion of International Court of Justice stated that "adherence by a State to any particular doctrine does not constitute a violation of customary international law," confused "sovereignty" with the "State" or "regime," and assumed nonsensically that a totalitarian dictatorship comports with "freedom of choice." Id. ¶ 263. Such statements are in serious error since the right of self-determination under the U.N. Charter is not that of a "State" or a "regime" but that of a relevant people, and both self-determination and human rights require a domestic political process based on the relative free will of a given people.

\textsuperscript{95} See Declaration on Principles of International Law, supra note 87.
right of self-determination requires a free and genuine expression of the will of the peoples concerned.\textsuperscript{96} Modes of enjoyment of the right of self-determination also recognizably include "[t]he establishment of a sovereign and independent State . . . or the emergence into any other political status freely determined by a people,"\textsuperscript{97} modes that are particularly relevant to the process of self-identification of a given people and their consensual participation in a political process.

CONCLUSION

Private individual, group, and institutional participation in the international legal process is a social, political, and legally-relevant fact. Awareness of these forms of participation can help one to avoid the fallacious myth and to guide realistic inquiry not merely concerning identification and clarification of rights, duties, competencies, and responsibilities under international law, but also with respect to violations of international law and various sanction processes, strategies, and possibilities. Rigid state-oriented constructs, like other theories in a box, are inattentive to such realities and can also inhibit attention to the full value and worth of individual human beings and political self-determination of peoples recognized in human rights law and enshrined in the United Nations Charter. Clearly, international law is not merely the province of the state or even one most powerful state. "On states as well as individuals the duties of humanity are strictly incumbent."\textsuperscript{98}

\textsuperscript{96} Western Sahara, 1975 I.C.J. 12, 32 (Oct. 16).
\textsuperscript{97} Declaration on Principles of International Law, supra note 87. See also CHEN, supra note 80, at 33–34.
\textsuperscript{98} Henfield's Case, 11 F. Cas. at 1107. District Attorney Rawle also noted that "[t]he rights of man are the rights of all men in relation to each other. . . ." Id. at 1118.