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International Human Rights in a Nutshell

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INTERNATIONAL HUMAN RIGHTS
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CHAPTER 1

HISTORICAL ANTECEDENTS OF INTERNATIONAL HUMAN RIGHTS LAW

I. INTRODUCTION

This chapter describes the principal historical antecedents of the modern international law of human rights. As used in this book, the international law of human rights is defined as the law concerned with the protection of individuals and groups against violations of their internationally guaranteed rights, and with the promotion of these rights. This branch of the law is sometimes also referred to as the international protection of human rights or international human rights law. Although scholars might disagree over whether one or the other of these labels is more appropriate, they are used interchangeably in this book.

II. PRE-WORLD WAR II LAW

§ 1-1. Introduction

International human rights law has its historical antecedents in several international legal doctrines and institutions. *See generally* L. Henkin, *The Age of Rights* 13 (1990). The most important of these

are humanitarian intervention, state responsibility for injuries to aliens, protection of minorities, the Mandates and Minorities Systems of the League of Nations, and international humanitarian law. To the extent that these doctrines and institutions survive today, they may be said to form an integral part of contemporary international human rights law. We deal with them in this chapter principally for the purpose of exploring the role they played in the development of that law.

§ 1–2. Human Rights and Traditional International Law

International law was defined traditionally as the law governing relations between nation-states exclusively. This meant that only states were subjects of and had legal rights and duties under international law. The classic definition was expanded somewhat after World War I to include various newly created intergovernmental organizations, which were acknowledged to have some very limited international legal personality. Human beings were not deemed to have international legal rights as such; they were said to be *objects* rather than *subjects* of international law. To the extent that states had any international legal obligations towards individuals, they were deemed to be obligations owed to the states whose nationality the individuals possessed. *See, e.g.*, L. Oppenheim, *International Law: A Treatise*, vol. 1, at 362 (2d ed. 1912).

The traditional theories about the nature of international law compelled the conclusion that the

manner in which a state treated its own nationals was not regulated by international law because it did not affect the rights of other states. The entire subject-matter was deemed to fall within the exclusive domestic jurisdiction of each state, barring other states from interceding or intervening on behalf of the nationals of any state which maltreated them. Yet, there were some exceptions to this rule. They are dealt with in the sections that follow.

§ 1–3. Humanitarian Intervention

The doctrine of humanitarian intervention, as expounded by some early international legal scholars, including Hugo Grotius in the 17th century, recognized as lawful the use of force by one or more states to stop the maltreatment by a state of its own nationals when that conduct was so brutal and large-scale as to shock the conscience of the community of nations. *See* E.C. Stowell, *Intervention in International Law* 53 (1921); L. Sohn & T. Buergenthal, *International Protection of Human Rights* 137 (1973). This doctrine was greatly misused and frequently served as a pretext for the occupation or invasion of weaker countries. Nevertheless, the doctrine of humanitarian intervention was the first to give expression to the proposition that there were some limits to the freedom states enjoyed under international law in the treatment of their own nationals. *See generally* F. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality* (2d ed. 1996); G. P. Fletcher, *Defending Humanity: When Force is Justified and Why* (2008).

Contemporary arguments about the rights of international organizations or groups of states to use force, if necessary, to put an end to massive violations of human rights have been justified at times by reference to this doctrine. *See, e.g.*, N. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (2000); S. Murphy, *Humanitarian Intervention* (1996); T. Franck, *Recourse to Force* (2002). The NATO military action in Kosovo in 1999 revived debates over the legality of unilateral and multilateral humanitarian intervention. *See* J.L. Holzbrefe & R.O. Keohane, eds. *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (2003); M. P. Marchak, *No Easy Fix: Global Responses to Internal Wars and Crimes Against Humanity* (2008). Despite the on-going controversy, state practice in some regions supports the doctrine. For example, the Constitutive Act of the African Union, adopted July 11, 2000 (entry into force May 26, 2001), explicitly recognizes the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of "grave circumstances, namely: war crimes, genocide and crimes against humanity." Constitutive Act of the African Union, art. 4(h).

Since the end of the Cold War, the United Nations Security Council has increasingly taken action to respond to large-scale violations of human rights by authorizing enforcement measures pursuant to its powers under Chapter VII of the UN Charter. This chapter applies to situations involving a "threat to the peace, breach of the peace, or act of

aggression." *UN Charter*, art. 39. The Security Council adopted decisions relating to the Kurds and other civilians in Iraq, the former Yugoslavia, Haiti, Sierra Leone, East Timor, and the Darfur region of the Sudan. Because the resolutions authorizing these measures are ambiguous in terms of the legal norms and factual considerations giving rise to them, it may be premature to assert that the Security Council has adopted a modern version of the doctrine of collective humanitarian intervention. Considering, however, that its recent decisions contain important characteristics traditionally associated with this doctrine, it appears that the Council has moved in that direction. *See* Brown, "Humanitarian Intervention at a Crossroads," 41 Wm. & Mary L. Rev. 1683 (2000); Delbrück, "A More Effective International Law or a New World Law?—Some Aspects of the Development of International Law in a Changing International System," 68 Ind. L. J. 705, 707 (1993). *See also* Hutchinson, "Restoring Hope: U.N. Security Council Resolutions for Somalia and an Expanded Doctrine of Humanitarian Intervention," 34 Harv. Int'l L.J. 624 (1993). *But see* R. Higgins, *Problems and Progress: International Law and How We Use it* 245–48 (1996); C.C. Joyner, *"The Responsibility to Protect": Humanitarian Concern and the Lawfulness of Armed Intervention*, 47 Va. J. Int'l L. 693 (2007); Levitt, "Pro-Democratic Intervention in Africa," 24 Wis. Int'l L.J. 785 (2006); Young Sok Kim, "Responsibility to Protect, Humanitarian Intervention and North Korea," 5 J. Int'l Bus. & L. 74 (2006).

The establishment by the Security Council of various ad hoc international tribunals, including the International Tribunals for the Former Yugoslavia and for Rwanda and the mixed war crimes tribunals for Sierra Leone and Cambodia, to punish those responsible for crimes against humanity, genocide and war crimes committed in those regions may also be seen as a modern form of collective humanitarian intervention in response to massive human rights violations. *See* Buergenthal, "The Evolving International Human Rights System," 100 Am. J. Int'l L. (2006); Meron, "International Criminalization of Internal Atrocities," 89 Am. J. Int'l L. 554 (1995); and the discussion infra at § 6–8. On this subject, *see also* Article 41 of the International Law Commission's articles on state responsibility, adopted in 2001. Report of the International Law Commission, GAOR, Supp. No. 10 (A/56/10) at 277–94.

§ 1–4. Early Human Rights Treaties

It is a well-established principle of international law that a state may limit its sovereignty by treaty and thus internationalize a subject that would otherwise not be regulated by international law. For example, if one state concludes a treaty with another state in which they agree to treat their nationals in a humane manner and to accord them certain human rights, they have, to the extent of the agreement, internationalized that particular subject. *See* Henkin, "Human Rights and 'Domestic Jurisdic-

tion'," *in* T. Buergenthal (ed.), *Human Rights, International Law and the Helsinki Accord* 21 (1977). Neither of the two states can henceforth lawfully assert that the treatment of its own nationals is a subject exclusively within its domestic jurisdiction. Advisory Opinion on Nationality Decrees Issued in Tunis and Morocco, P.C.I.J., Ser. B, No. 4 (1923).

This principle has been extremely important in the development of international human rights law and the gradual internationalization of human rights. Buergenthal, "Domestic Jurisdiction, Intervention and Human Rights," *in* P. Brown & D. MacLean (eds.), *Human Rights and U.S. Foreign Policy* 111 (1979). Although the internationalization process continues to this day every time a human rights treaty enters into force, it began in the 19th century with the conclusion of treaties to ban the slave trade and international agreements to protect Christian minorities in the Ottoman (Turkish) Empire. *See, e.g.,* Treaty of Paris of 30 March 1856; Treaty of Berlin of 13 July 1878. These treaties were relied upon by the states comprising the Concert of Europe to intercede diplomatically and at times even to intervene militarily on behalf of the Christian populations in the Turkish Empire. *See* Sohn & Buergenthal, *supra*, at 143–92. The Treaty of Berlin of 1878 is of particular interest because of the special legal status it accorded to some religious groups; it also served as a model for the Minorities System that was subsequently established within the framework of the League of Nations.

§ 1–5. The League of Nations

The Covenant of the League of Nations, the treaty that in 1920 established the League and served as its constitution, contained no general provisions dealing with human rights. The notion that human rights should be internationally protected had not yet gained acceptance by the community of nations, nor was it seriously contemplated by those who drafted that treaty, despite efforts by Japan to have the principle of equality and non-discrimination included in the text. The Covenant did, however, contain two provisions (Articles 22 and 23) that bear on the development of international human rights law. The League also played an important role in helping with the implementation of post-World War I treaties for the protection of minorities.

1. The Mandates System

Article 22 of the Covenant established the Mandates System of the League. This provision applied only to the former colonies of the states that had lost the First World War. It transformed these colonies into League Mandates to be administered by the victorious powers. The latter agreed with the League to administer the territories pursuant to "the principle that the well-being and development of [the native] peoples form a sacred trust of civilization.... " The Mandatory Powers also undertook to provide the League with annual reports bearing on the discharge of their responsibilities. These

reports were reviewed by the Mandates Commission of the League.

The Mandates Commission gradually acquired more power in supervising the administration of the Mandates and the manner in which the native populations were treated. *See generally,* Sohn & Buergenthal, *supra,* at 337–73. The dissolution of the League ended this development. In its stead, the United Nations established the UN Trusteeship System, which was entrusted with supervisory power over the remaining eleven Mandates and other non-self-governing territories. Among the last of these territories to gain independence (in 1990) was Namibia. It had been administered by South Africa under the South–West Africa Mandate. South Africa had for many years refused to comply with U.N. General Assembly and Security Council resolutions calling on it to relinquish control over Namibia. The bitter dispute between the U.N. and South Africa concerning Namibia generated considerable litigation before the International Court of Justice. *See* Advisory Opinion on the International Status of South–West Africa, 1950 I.C.J. Rep. 128; Advisory Opinion on Voting Procedure, 1955 I.C.J. Rep. 67; Advisory Opinion on Hearings of Petitioners, 1956 I.C.J. Rep. 23; Ethiopia and Liberia v. South Africa (Preliminary Objections), 1962 I.C.J. Rep. 319; Ethiopia and Liberia v. South Africa (Judgment), 1966 I.C.J. Rep. 6; Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia, 1971 I.C.J. Rep. 16. For an analysis of these cases and the relevant resolu-

tion, *see* L. Sohn, *Rights in Conflict: The United Nations and South Africa* 24–31 and 148–49 (1994). *See also* Schwelb, "The International Court of Justice and the Human Rights Clauses of the Charter," 66 Am. J. Int'l L. 337 (1972).

By 1994, all Trust Territories had attained self-government status or independence, either as separate States or by joining neighboring independent countries.

2. International Labor Standards

Article 23 of the League of Nations Covenant concerned human rights in that it dealt, *inter alia*, with questions relating to the "fair and humane conditions of labour for men, women, and children." It also envisaged the establishment of an international organization to promote this objective. That function was assumed by the International Labor Organization, which came into being at about the same time as the League. The ILO survived the League and is now one of the Specialized Agencies of the United Nations. *See* § 2–25, *infra*. The legislative activities and the supervisory machinery established by the ILO to promote and monitor compliance with international labor standards have over the years made important contributions to the improvement of the conditions of work and the development of international human rights law. *See* C.W. Jenks, *Human Rights and International Labour Standards* (1960); V. Leary, *International Labour Conventions and National Law* (1981); H. J. Bartolomei de la Cruz et al., *The International*

Labour Organization: The International Standards System & Basic Human Rights (1996); Ho, "The International Labour Organization's Role in Nationalizing the International Movement to Abolish Child Labor," 7 Chi. J. Int'l L. 337 (2006); L. R. Helfer, *Understanding Change in International Organizations: Globalization and Innovation in the ILO* (2006).

For a discussion of the increasing relevance of international labor standards for contemporary trade agreements, including the North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO), *see* Summers, "The Battle in Seattle: Free Trade, Labor Rights, and Societal Values," 22 U. Pa. J. Int'l Econ. L. 61 (Spring 2001); Mansoor, "Laughter and Tears of Developing Countries: The WTO and the Protection of International Labor Standards," 14–SUM Currents: Int'l Trade L.J 60 (2004); Manley, "International Labor Standards in Free Trade Agreements of the Americas," 18 Emory Int'l L. Rev. 85 (2004).

3. The Minorities System

The League of Nations also played a very important role in developing an international system for the protection of minorities. *See generally,* Sohn & Buergenthal, *supra,* at 213. This subject was not regulated by the Covenant. Instead, the League derived its powers in this field from a series of treaties concluded after World War I. One consequence of that war was a substantial redrawing of the political map of Europe and the Middle East. A

number of new states came into being and others regained their independence. Some of these countries, notably Poland, Czechoslovakia, Hungary, Yugoslavia, Bulgaria, Albania and Romania, included pockets of ethnic, linguistic and religious minorities. These minorities had good historical reasons for fearing that the new political order would threaten their cultural survival. The governments of the victor nations—the so-called Principal Allied and Associated Powers—insisted therefore that the new states conclude special treaties for the protection of their ethnic, linguistic and religious minorities. *See generally* H. Hannum, *Autonomy, Sovereignty and Self-Determination* 51 (1990).

The first treaty to establish this protective regime was the Treaty between the Principal Allied and Associated Powers and Poland, signed at Versailles on June 29, 1919. It served as a model for the other treaties. In them, the states to which the minorities system applied undertook not to discriminate against members of the protected minorities and to grant them special rights necessary for the preservation of their ethnic, religious or linguistic integrity, including the right to the official use of their languages, the right to maintain their schools, and the right to practice their religions. To ensure compliance, the treaties contained provisions similar to Article 12 of the Polish treaty, which declared that "Poland agrees that the stipulations in the foregoing Articles, so far as they affect persons belonging to racial, religious or linguistic minorities, constitute obligations of international concern and shall

be placed under the guarantee of the League of Nations."

The League of Nations agreed to serve as guarantor of the obligations the parties assumed in these treaties. It exercised that function by developing a system for dealing with petitions by minorities charging violations of their rights. That system was relatively effective and quite advanced for its time. The petitions were reviewed by a Committee of Three of the League Council, the states concerned were given an opportunity to present their views and, when appropriate, the Permanent Court of International Justice was asked to render advisory opinions on disputed questions of law. *See generally* J. Stone, *International Guarantees of Minority Rights* (1934). *See also* Advisory Opinion on Minority Schools in Albania, P.C.I.J., Ser. A/B, No. 64 (1935); Advisory Opinion on Access to German Minority Schools in Upper Silesia, P.C.I.J., Ser. A/B, No. 40 (1931); Advisory Opinion on Greco–Bulgarian "Communities," P.C.I.J., Ser. B, No. 17 (1930). In addition, the League served as guarantor for certain special political arrangements that also provided for the protection of the rights of minorities. *See, e.g.,* Advisory Opinion on the Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, P.C.I.J., Ser. A/B, No. 65 (1935), a fascinating case that examines the meaning of "law" in the context of the Nazi takeover of Danzig.

Although some isolated minorities arrangements of the League era survive to this day, the League's

minorities system as such died with it. *See generally* T. Modeen, *The International Protection of National Minorities in Europe* (1969); I.L. Claude, *National Minorities: An International Problem* (1955). It is important to recognize nevertheless that some modern international human rights institutions bear considerable resemblance to the institutions that were first developed by the League for the administration of the minorities system.

For many years after their establishment, the United Nations and other international organizations showed very little interest in the protection of minorities, focusing instead on individual rights, non-discrimination and equal protection. With the end of the Cold War and the rise of nationalism in various parts of the world, the international community began again to focus on the development of international norms and institutions designed to protect the rights of minorities. Efforts to lay the normative foundation for a system that would accomplish this objective were initiated in the United Nations with the adoption by the General Assembly of the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. *See generally* Thornberry, "The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis and Observations," *in* A. Phillips & A. Rosas (eds.), *The UN Minority Rights Declaration* 11 (1993).

Within Europe, the Organization on Security and Cooperation in Europe pioneered in taking meas-

ures to protect minorities with the 1990 Copenhagen Concluding Document and a number of later OSCE instruments on the subject, culminating in 1992 with the establishment of the office of the OSCE High Commissioner for National Minorities. *See* Foundation on Inter-Ethnic Relations, *The Role of the High Commissioner on National Minorities in OSCE Conflict Prevention* (1997). The Council of Europe followed with the adoption in 1994 of the Framework Convention for the Protection of National Minorities. *See* Klebes, "The Council of Europe's Framework Convention for the Protection of Minorities," 16 Hum. Rts. L.J. 92 (1995). Some of the actions taken in this regard within the framework of the United Nations, the Council of Europe, and the OSCE are discussed in § 3–31, *infra*.

§ 1–6. State Responsibility for Injury to Aliens

Traditional international law recognized very early that states had an obligation to treat foreign nationals in a manner that conformed to certain minimum standards of civilization or justice. This obligation was deemed to be owed to the state of the individual's nationality because human beings as such did not have rights under international law. Hence, when individuals were subjected by a foreign government to treatment that violated international law, the state of their nationality was considered to have a cause of action under international law against the offending state. Mavrommatis Palestine Concessions (Jurisdiction), P.C.I.J., Ser. A, No. 2

(1934). When damages were awarded, however, the successful state usually compensated its nationals for the damages they had sustained, although international law did not require such payment.

Disputes involving claims under the law of state responsibility for injuries to aliens were commonly resolved through diplomatic negotiations between the governments concerned. Sometimes the failure of the offending state to comply with demands for satisfaction, usually the payment of compensation, led to the use of force. For some of these cases, *see* Sohn & Buergenthal, *supra,* at 40. More often than not, however, the disputes were resolved by diplomatic means, international arbitration or adjudication. For the relevant legal doctrines, *see* E.M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (1915); C.F. Amerasinghe, *State Responsibility for Injuries to Aliens* (1967); R.M. Lillich, *International Law of State Responsibility for Injuries to Aliens* (1983).

The legal fiction that the injury suffered by the alien abroad was an injury to the state of the alien's nationality preserved the notion that only states were subjects of international law. It also had the negative consequence of leaving stateless persons and those who possessed the nationality of the offending state without protection. No state had standing to espouse their claims because no state could validly claim that its rights were affected when these human beings were injured.

The substantive law applicable to claims by states on behalf of their nationals was derived for the most part from so-called "general principles of law recognized by civilized nations." *See* I.C.J. Statute, art. 38 (1)(c). These principles had their source in natural law and various domestic legal doctrines applicable to the treatment of individuals. International arbitrators and tribunals drew on this body of law and doctrine to give substance to concepts such as "denial of justice," "minimum standards of justice," etc. When modern international law came to recognize that individuals, irrespective of their nationality, should enjoy certain basic human rights, the substantive principles of the law of state responsibility provided a reservoir of norms that could be drawn upon in codifying international human rights law. Today, because of the dramatic evolution and extensive codification of human rights law, human rights law nourishes the law of state responsibility.

Here it is important to remember, as the *Restatement of the Foreign Relations Law of the United States (Third)* (1987) [hereinafter cited as *Restatement (Third)*] aptly notes, that "the difference in history and in jurisprudential origins between the older law of responsibility for injury to aliens and the newer law of human rights should not conceal their essential affinity and their convergence." Introductory Note to Part VII, *id.*, vol. 2, at 145. The *Restatement* goes on to point out that "as the law of human rights developed, the law of responsibility for injury to aliens, as applied to natural persons,

began to refer to violations of their 'fundamental human rights,' and states began to invoke contemporary norms of human rights as the basis for claims for injury to their nationals." *Id.,* at 1058. *See generally* F.V. Garcia–Amador, L. Sohn & R. Baxter, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (1974).

The law of state responsibility for injuries to aliens continues to play an important role in contemporary diplomatic relations. In 2001, the International Law Commission adopted a set of articles on the Responsibility of States for Internationally Wrongful Acts. The UN General Assembly took note of the articles and commended them to the attention of governments. G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Dec. 12, 2001). The ILC also adopted draft articles on diplomatic protection in 2006. Report of the International Commission, GAOR, Supp. No. 10 (A/61/10) at 16 (2006).

States still espouse the claims of their nationals, be they natural persons or corporations, in some instances bringing claims to the International Court of Justice. The Case Concerning Ahmadou Sadio Diallo (Rep. of Guinea v. DRC), 2007 I.C.J. Rep. (May 24) (Preliminary Objections) is based on customary international norms of state responsibility. In contrast, the case of Georgia v. Russia, application filed August 12, 2008, alleges that Russian discrimination against Georgian citizens constitutes a breach of the treaty obligations contained in the Convention on the Elimination of All Forms of Racial Discrimination. Other cases of diplomatic

protection have been filed with human rights bodies. *See* Nicaragua v. Costa Rica, Rep. No. 11/07, Interstate Case 01/06, Inter-Am. Comm. H.R., March 8, 2006.

Many state responsibility and diplomatic protection claims are based in the growing number of bilateral and multilateral investment treaties and in so-called treaties of friendship, commerce and navigation. These treaties frequently confer jurisdiction on existing or *ad hoc* international tribunals to resolve disputes relating to the application or interpretation of these agreements and thus provide an international remedy which may in some cases be more effective than available human rights procedures. *See generally*, D. Shelton, *Remedies in International Human Rights Law* 93–133 (1999). For a modern case involving a bilateral treaty between the United States and Italy, *see* Case Concerning Elettronica Sicula S.p.A. (Elsi), 1989 I.C.J. Rep. 15. Sometimes special *ad hoc* tribunals are created to deal with a host of similar disputes. One notable example is the Iran–United States Claims Tribunal, which was established in 1981. *See generally,* G. Aldrich, *The Jurisprudence of the Iran–United States Claims Tribunal* (1996); C. Brower & J. Brueschke, *The Iran–United States Claims Tribunal* (1998); R. Lillich & D. Magraw (eds.), *The Iran–United States Claims Tribunal: Its Contribution to the Law of State Responsibility* (1998). Following the Iraqi invasion of Kuwait in 1991, the United Nations Security Council established the United Nations Compensation Commission to deal with individual and corporate claims against Iraq arising

from its invasion. *See* R. Lillich (ed.), *The United Nations Compensation Commission* (1995); Bederman, "The United Nations Compensation Commission and the Tradition of International Claims Settlement," 27 N.Y.U. J. Int'l L. & Pol. 1 (1994).

§ 1–7. Responsibility of Individuals and Other Private Entities

In the past, international efforts to protect human rights have tended to focus on holding only governments internationally responsible for violations. The gradual recognition that some governments are simply not able to protect those within their territory from violations of human rights committed by powerful private actors has motivated the international community to find ways of holding individual violators responsible. *See* Buergenthal, "The Evolving International Human Rights System," 100 Am. J. Int'l L. 783 (2006); A. Clapham, *Human Rights Obligations of Non–State Actors* (2006); Knox, "Horizontal Human Rights Law," 102 Am. J. Int'l L. 1 (2008).

Initial efforts sought accountability of terrorist groups, criminal organizations and in certain countries, paramilitary groups. Individuals belonging to these groups have often been able to engage in large-scale violations of human rights while enjoying *de facto* immunity (impunity) from prosecution for what in theory at least are criminal acts under the law of the state where these acts take place. *See* N. Roht–Arriaza (ed.), *Impunity and Human Rights in International Law and Practice* (1997). While

various principles of international criminal law permitted the imposition of individual responsibility for international crimes, no international tribunals with jurisdiction to apply that law existed following the dissolution of the Nuremberg and Tokyo War Crimes Tribunals. For a compilation of applicable international norms, see A. Cassese, *International Criminal Law* (2d ed. 2008); I. Bantekas & S. Nash, *International Criminal Law* (2007).

This situation began changing in 1993 and 1994, with the establishment by the United Nations Security Council of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, with jurisdiction over crimes against humanity, genocide, and war crimes committed in those territories. See J. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* (2d. ed. 2000); T. Meron, *War Crimes Law Comes of Age* 210 (1998). In 1998, a diplomatic conference convened by the United Nations adopted the Statute of the permanent International Criminal Court. *See generally*, R. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (1999); M.C. Bassiouni (ed.), *The Statute of the International Criminal Court: A Documentary History* (1998). The Statute entered into force July 1, 2002 and the prosecutor's office began investigating allegations of international criminal conduct in Uganda, the Democratic Republic of the Congo, the Central African Republic and Sudan. The first three situations were referred by the governments themselves, while the U.N. Security Council asked the office to investigate

the situation in the Sudan. Some dozen indictments resulted, including one against the sitting Sudanese head of state. *See* Warrant of Arrest for Omar Hassan Ahmad Al Bashir, No. ICC–020–5–01/09 (Mar. 4, 2009). *See generally,* Jorda, "Reflections on the First Years of the International Criminal Court," 36 Hofstra L. Rev. 239, 239 (2007).

The question of human rights obligations of other non-state actors, especially intergovernmental organizations and business entities, has emerged in recent years as these actors have become more active and powerful. *See* Kinley & Chambers, "The UN Human Rights Norms for Corporations: The Private Implications of Public International Law," 6 Hum. Rts. L. Rev. 477 (2006) While only states are party to human rights treaties, the obligations contained in these agreements usually require the parties to act with due diligence to protect human rights not only against state action, but also against private conduct that violates the guaranteed rights. Velasquez Rodriguez v. Honduras, 4 Inter–Am.Ct. Hum.Rts. (Ser. C)(1988). Various efforts to go further and directly to impose international obligations on multinational business enterprises or intergovernmental organizations have thus far resulted mainly in voluntary codes of conduct and non-binding guidelines.

§ 1–8. Humanitarian Law

This branch of international law can be defined as the human rights component of the law of armed conflict. Humanitarian law is much older, however,

than international human rights law. Its modern development is usually traced to a series of initiatives undertaken in the 19th century by a number of Swiss individuals, who advocated the conclusion of international agreements making certain humanitarian rules applicable in the conduct of war. *See* P. Boissier, *History of the International Committee of the Red Cross: From Solferino to Tsushima* (1985). These initiatives produced the Geneva Convention of 1864, which was designed to protect medical personnel and hospital installations. It also provided that "wounded or sick combatants, to whatever nation they may belong, shall be collected and cared for." (Article 6(1).) For the text of this and other relevant instruments, see *International Red Cross Handbook*, published and periodically updated by the International Committee of the Red Cross. The Geneva Convention of 1864 was followed by the Hague Convention No. III of 1899, which established comparable humanitarian rules applicable to naval warfare. Several provisions in these treaties reflect State practice as it existed before and after their adoption. *See* Meron, "Francis Lieber's Code and Principles of Humanity," 36 Colum. J. Transnat'l L. 269 (1997).

These treaties have been revised, amplified and modernized from time to time and now comprise a vast body of law dealing with almost all aspects of modern armed conflict. Much of that law is today codified in the four Geneva Conventions of 1949 and the two 1977 Protocols Additional to these Conventions. *See generally*, F. Kalshoven & L.

Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (2001); T. Meron, *War Crimes Law Comes of Age* (1998); M. Bothe, K.J. Partsch & W. Solf, *New Rules for Victims of Armed Conflicts: A Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (1982); Bassiouni, "The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors," 98 J. Crim. L. & Criminology 711 (2008); Hosni, "The ABCs of the Geneva Conventions and their Applicability to Modern Warfare," 14 New Eng. J. Int'l & Comp. L. 135 (2007).

Although humanitarian law predates the development of international human rights law and had some influence on it, *see, e.g.,* common Article 3 of the Geneva Conventions of 1949, various provisions of the most recent Protocols mirror the principles underlying modern international human rights instruments. *See generally* T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989). It is also worth noting that the derogation clauses of the principal international human rights treaties incorporate by reference the humanitarian law treaties and obligations of the state parties thereto. *See* International Covenant on Civil and Political Rights, art. 4; European Convention of Human Rights, art. 15; American Convention on Human Rights, art. 27. In addition, the practice of existing international war crime tribunals has had a substantial impact on the development of international humanitarian law. For a more extensive

treatment of this subject, see Chapter 6 (Humanitarian Law), *infra.*

§ 1–9. The Past and Modern International Human Rights Law

Traditional international law developed various doctrines and institutions designed to protect different groups of human beings: slaves, minorities, certain native populations, foreign nationals, victims of massive violations, combatants, etc. That law and practice provided the conceptual and institutional underpinnings for the development of contemporary international human rights law. Moreover, many of the older institutions and doctrines continue to exist side-by-side with, or form an inherent part of, the modern international law of human rights. For certain matters, that law has been profoundly influenced by its antecedents. An awareness of the historical roots of modern international law of human rights will consequently give the reader a deeper understanding of that law. *See, e.g.,* P. G. Lauren, *The Evolution of International Human Rights: Vision Seen* (1998).

As we shall see in the chapters that follow, modern international human rights law differs most significantly from its historical antecedents in today recognizing that individual human beings have internationally guaranteed rights as individuals and not as nationals of a particular state. A growing number of international institutions now have jurisdiction to protect individuals against human rights violations committed by their state of nationality as

well as by any other state. Although the remedies often remain inadequate or ineffective, the vast body of international human rights law now in existence—as well as the mushrooming of international institutions designed to implement that law—have internationalized the subject of human rights beyond all expectations. This development in turn produced a political climate in which the protection of human rights has become one of the most important items on the agenda of the contemporary international political discourse involving governments, inter-governmental organizations, and a vast international network of non-governmental organizations.

Moreover, the end of the Cold War brought widespread international political acceptance of the proposition that democracy is a precondition for the effective protection of human rights. *See* Carothers, "Democracy and Human Rights: Policy Allies or Rivals?" 17 Wash. Q. 109–20 (1994). This development has led, *inter alia*, to the emergence of an "an internationally constituted right to electoral democracy that builds on the human rights canon, but seeks to extend the ambit of protected rights to ensure meaningful participation by the governed in the formal political decisions by which the quality of their lives and societies are shaped." Franck, "Legitimacy and the Democratic Entitlement," *in* G. Fox & B. Roth (eds.), *Democratic Law and International Law* 25, 26 (2000); *see also* Fox, "The Right to Political Participation in International Law," *id.* at 48–90.

In the long run, the most important developments in the international human rights field can be attributed to the fact that human beings around the world have increasingly come to believe that states and the international community have an obligation to protect their human rights, be they civil and political rights or economic, social and cultural rights. The expectations that this phenomenon creates make it politically ever more difficult for states to deny the existence of this obligation. That, in turn, facilitates efforts to promote and protect human rights on the international plane. In other words, what we have been witnessing is a human rights revolution. The gains are many, but they remain to be consolidated. Much of the needed law has been enacted, but, unfortunately, the national and international institutions to enforce the law are still rather weak. *See* Buergenthal, "The Evolving International Human Rights System," 100 Am J. Int'l L. 783 (2006). One major task that remains is to give "teeth" to the law by strengthening international mechanisms, which protect human rights, and to extend their reach to all parts of the world.

It must be kept in mind, however, that progress in the human rights area is greatly hampered in many countries by endemic poverty, illiteracy, corruption and various forms of discrimination that prevent large segments of the population from enjoying their internationally recognized human rights. These scourges cannot be eradicated by law and legal enforcement mechanism alone. They require international cooperation and development

assistance geared to the needs of individual countries, educational programs that focus on the promotion of a culture of human rights, on interpersonal and inter-group tolerance, and on the creation of national and local institutions capable of translating international human rights norms into reality. It is here that international lending and development institutions, such as the World Bank, the International Monetary Fund and regional development banks as well as bilateral governmental assistance agencies and non-governmental aid agencies can play an important role. Some of these agencies have in the past shied away from the adoption of a "human rights policy," fearing that they would be accused of politicizing their mandates. This view changed with the end of the Cold War and the gradual recognition that economic development without democracy and human rights cannot succeed in the long run. As a result, some of these agencies have begun to incorporate human rights objectives into their development programs.