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everyone is committed to independence. The South Africans, I think, really do want to get out. Of course, they want to do so under circumstances favorable to them. All the other parties are also committed to the independence process. So I hope that nothing will be done to inflame passions, and that all will assist in the peaceful devolution of this very complicated and very long process.

DANIEL L. MAGEL*
Reporter

STATE RESPONSIBILITY FOR VIOLATIONS OF HUMAN RIGHTS

The seminar was convened by Theodor Meron,** at 10:30 a.m., April 7, 1989.

REMARKS BY THEODOR MERON

International lawyers have traditionally discussed human rights in terms of implementation, rather than trying to relate human rights to the general law of state responsibility. In this seminar, I shall consider the relationship of human rights to the law of state responsibility. Let me start with a brief introduction to the subject. Next, I shall mention some other problems of state responsibility of particular relevance to human rights. The questions on which we shall focus are attribution or imputability and exhaustion of local remedies. Finally, we shall turn to a consideration of the 1988 judgment of the Inter-American Court of Human Rights in the case of *Velásquez Rodríguez.*

Students of international human rights and students of state responsibility can find a veritable treasure of important material concerning the law of state responsibility in the decisions of human rights judicial organs, quasi-judicial organs, or other bodies involved in the supervision and implementation of international human rights, such as the Human Rights Committee established under article 28 of the International Covenant on Civil and Political Rights. This material is critical for a proper understanding, as well as for the development, of the law of state responsibility. The relationship of state responsibility to human rights is even more important for the law of human rights. Unfortunately, the principles of state responsibility have often remained terra incognita for human rights lawyers. This is a situation that must not be allowed to continue. By coupling human rights with the corpus of law governing state responsibility, the latter is mobilized to serve the former and to advance its effectiveness.

We shall see that there has been considerable cross-fertilization between these two fields of international law. For both practical and theoretical reasons, their relationship merits close attention by students of international law. Each of these bodies of law has deeply affected the other. This trend will, of course, continue. States can and should take advantage of the already existing institutions and of the emerging principles of state responsibility to take up complaints of breaches of human rights and humanitarian norms through diplomatic channels or before international judicial and quasi-judicial bodies.

The principles are already in place or are in an advanced stage of crystallization. Both the norms and such institutions as have already been created have suffered from underutilization. What has largely been missing is the willingness of states to recognize that compliance with the norms serves their own interests as well as the common

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good, and to be ready, therefore, to pay the political price consequent on raising such claims. Informed public opinion, including that generated by students of international law, may yet move states in this direction. Only when rights are not only rhetorically asserted but are pressed seriously as legal entitlements, will human rights law become truly an effective system for the protection of human dignity. The object of this seminar is to help us move in that direction.

Let me now list some of the issues that are of considerable importance to human rights and state responsibility:

(1) Obligations *erga omnes*. What is the current status of this concept enunciated by the International Court of Justice (ICJ) in the *Barcelona Traction* case of 1970? To what rights does it apply? What are its implications for standing and for remedies?

(2) Judicial remedies. Is damage a condition for state responsibility for violations of human rights? What can we learn from the practice of international judicial, quasi-judicial, and supervisory bodies as to what may be appropriate remedies? What is the significance and effectiveness in this field of monetary compensation, of injunctive relief, of declaratory judgments? What is the relationship of particular remedies or categories of remedies to particular violations?

(3) State responsibility for violations of human rights in a state of necessity or emergency. We all know that, outside of peremptory norms, *jus cogens*, customary international law rules providing exceptions to the normally applicable obligations of states, such as those based on the concepts of *force majeure*, state of necessity, and self-defense, may preclude the wrongfulness of an act which otherwise does not conform to a state's international obligations. The question of derogations on grounds of necessity is sometimes, but not always, governed by explicit treaty provisions (for instance article 4 of the International Covenant on Civil and Political Rights). We also know that states invoke states of necessity or *force majeure* in order to justify deviations or derogations from the conduct required by human rights law. Because of the frequent invocation of these exceptions by states, the applicability of the customary law exceptions requires close scrutiny. What, then, is the continuing relevance and the scope of applicability of customary law exceptions, such as state of necessity and of *force majeure*? Do such exceptions apply to conventions concerning international humanitarian law, for instance, the Geneva Conventions? Do they apply to human rights treaties that are silent as regards states of emergency? An example would be the African Charter on Peoples and Human Rights, which does not contain provisions relating to derogations. Can an African state invoke these customary law exceptions to justify derogations of the norms stated in that Charter?

(4) Settlement of disputes procedures and remedies. What is the relationship between remedies in human rights treaties and other remedies? For example, representatives of East European states have asserted in the past that the procedures for settlement of disputes and the remedies established under human rights treaties constitute a comprehensive and exclusive system for redressing human rights violations which excludes *inter partes* resort to systems of settlement and remedies available under other treaties or under customary law. These states have normally made reservations from provisions in human rights treaties conferring on the ICJ jurisdiction over disputes concerning the interpretation and application of these conventions. The U.S.S.R. has recently withdrawn reservations with regard to a number of human rights treaties.

What is the soundness of the theory asserting that the remedies and the settlement of disputes procedures stated in treaties constitute "a self-contained regime"? The ICJ made a reference to this term in the *Iranian Hos-*

tages case, in the context of the law of diplomatic relations and diplomatic immunities. Here we have a very serious issue touching the heart of effectiveness of human rights. Because procedures for the settlement of disputes and remedies recognized by human rights treaties are often weak and because they are often based on infrequent optional acts of acceptance, to accept the theory that we are limited by the remedies stated in particular human rights treaties and may not turn to general international law, would mean that we would intensify the fragility and the ineffectiveness of human rights. The new *Restatement of the Foreign Relations Law of the United States* deals with this question in an effective way by suggesting that in addition to remedies and settlement of dispute procedures explicitly stated in a human rights treaty, and unless the treaty otherwise provides or implies, resort may be had to remedies under general international law. This is very important in order to enhance the effectiveness of international human rights.

(5) Countermeasures or nonjudicial remedies. In practice, as you all know, in vindicating human rights states rely more frequently on nonjudicial remedies or countermeasures than on judicial remedies. Many questions merit inquiry here. Does every state, and not only the state directly affected by the breach, have the right to resort to countermeasures in response to another state's breach of international human rights? What is the relevance to this question of the concept of *erga omnes* which was enunciated by the ICJ in the *Barcelona Traction* case of 1970?

Suspension of customary law obligations as countermeasure to a state's breach of international law, including human rights norms, is recognized in draft article 30 (part one of the draft articles on state responsibility) which was adopted by the International Law Commission (ILC). But, what about the suspension of treaties in response to a state's breach of international law? This question is not addressed by the ILC in article 30.

There are obviously compelling reasons for excluding human rights from obligations, whether conventional or customary, that may be suspended in response to a state's breach of international law. This question involves interlocking issues of the law of treaties, the law of state responsibility, and human rights law. Article 60(5) of the Vienna Convention on the Law of Treaties, which was viewed by the ICJ as a codification of existing customary law in many respects, provides significant guidance in analyzing this issue.

The goal of increasing the effectiveness of international human rights and humanitarian norms would be advanced if the victim could, in response to a breach of a human rights treaty or a humanitarian treaty, suspend the operation of a treaty or of a provision of a treaty which does not concern the protection of the human person. This would be in accordance with both the spirit and the language of article 60(5) of the Vienna Convention on the Law of Treaties. However, in so doing, we must also balance the effectiveness of human rights with other important goals of international law: securing the stability of international agreements and the principle of *pacta sunt servanda*. Moreover, this goal must be reconciled with the Vienna Convention. Article 42(2) of that Convention provides that the termination of a treaty, its denunciation or the withdrawal of a party, or the suspension of the operation of a treaty, may take place only in accordance with or only as a result of the application of the provisions of the treaty or of the Vienna Convention itself. The question is whether article 42(2) was meant to create an entirely comprehensive self-contained system, excluding resort to customary law countermeasures involving treaties.

Another question concerns the language of article 60(1) of the Vienna Convention which pertains to material breaches of conventions. This language suggests that a

state may not terminate treaty A on the ground that a material breach of treaty B was committed. I believe that the object of article 60 was not to enumerate exhaustively all the cases in which suspension or termination of a treaty is lawful, but only to consider the effect of the breach of a treaty on the existence and operation of that treaty, as a matter of treaty law. Such a construction enhances the effectiveness of international human rights because it enables state A to resort to countermeasures involving the suspension of another treaty in response to a breach of international human rights obligations by state B. For example, the U.S. Government has suspended the operation of agreements with the U.S.S.R. and Poland in cases where it felt that these countries had committed gross violations of international human rights. This practice has important implications because it shows that the concept of *erga omnes* involves not only judicial remedies and proceedings before judicial tribunals and quasi-judicial institutions; it is also relevant to the area of nonjudicial remedies involving countermeasures.

I would like to turn now to the question of attribution or imputability. The basic customary law principle attributing to the state responsibility for acts of its officials or organs that have been neither authorized nor legal under the law of the state is of great importance in all fields of international law. This principle is known as the principle of responsibility of states for *ultra vires* conduct of their officials and organs. This principle of customary international law acquires particular vitality in the field of international human rights because in the vast majority of cases, acts comprising the most egregious violations of human rights, such as torture, murder, or causing the disappearance of individuals, would also breach the internal law of the state or, at least formally, the policy or the instructions issued by senior governmental officials of states where they were committed.

There is considerable case law of the European Court and Commission of Human Rights, and, most recently, of the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case on this question and there are some references to it in our case law.

The question of imputability has also come up before various U.N. bodies. Professor Felix Ermacora, a U.N. Human Rights Commission expert on the question of the fate of missing and disappeared persons in Chile, has established that certain disappearances were imputable to the Government of Chile, even though, he suggests, they may not have been authorized by certain levels of the Chilean Government (U.N. Doc. A/34/583/Add.1 at 87–92 (1979)). This question of establishing that states are responsible under customary law for *ultra vires* acts of their officials and organs or for unlawful acts of officials and organs is absolutely critical if we are going to have an effective law of state responsibility and an effective law of international human rights. It is critical because in practice states that commit grave breaches of international human rights either deny outright the fact that violations have been committed, or they describe the violations as being contrary to the law of the land or to the policy of the government.

Under the principle attributing to the state the unauthorized acts of its organs, expressed in the ILC's article 10, a defense of *ultra vires* would not exonerate the state from international responsibility for the violation. Article 10 describes certain principles that would guide us in defining what is an act of the state.

Doubts have been expressed, however, regarding whether this principle of customary law, which is rooted in the law governing the responsibility of states for injuries to aliens, applies to customary law violations of obligations by a state towards its own citizens. Such doubts have been expressed by an authoritative statement of interna-

tional law, namely, the *Restatement (Third) of the Foreign Relations Law of the United States*. While recognizing that a plea of *ultra vires* provides no defense for breaches of norms governing the responsibility of states for injuries to aliens, including the violation of their human rights, the *Restatement* takes the position that the principle excluding the defense of *ultra vires* does not apply to the violations by a state of the customary human rights of its own nationals.

The *Restatement* accepts, however, that a state is responsible for *ultra vires* breaches of treaty human rights. This position, accepting responsibility for *ultra vires* violations of treaty obligations, is in accord with the approach adopted by the European Commission of Human Rights in *Ireland v. United Kingdom*. I do not agree, however, with the position taken by the *Restatement* as regards nonresponsibility for *ultra vires* breaches of customary human rights of the citizens of the state by the officials of that state, which appears to be in conflict with the ILC's rules of attribution. These rules were intended to apply across the board to all fields of international law, including both customary and conventional human rights law. This does not mean that we cannot have in some fields of international law a different *lex specialis*. For instance in the Fourth Hague Convention we do have a rule of *lex specialis* in article 3, pertaining to the responsibility of states for acts of members of its armed forces. But, in the absence of *lex specialis*, these general rules of attribution do and must apply across the board to all fields of international law.

The ILC has thus decided that the rule attributing such unauthorized conduct to the state must apply "even in the case of manifest incompetence of the organ perpetrating the conduct complained of, and even if other organs of the State have disowned the conduct of the offending organ."[1] In adopting this position, the ILC grounded its rationale both in existing case law and in the principle of effectiveness. Emphasizing that in the majority of cases "the fact of knowing that the organ engaging in unlawful conduct is either exceeding its competence, or contravening its instructions, will not enable the victim of such conduct to escape its harmful consequences,"[2] the Commission refused to provide the state "with an easy loophole in particularly serious cases where its international responsibility ought to be affirmed."[3]

This approach gains important support in the *Velásquez Rodríguez* case, where the Inter-American Court of Human Rights stated that according to article 1 of the American Convention on Human Rights, any exercise of public power that violates the rights stated in the Convention is illegal. The Court appeared to suggest that this principle reflected not only a conventional rule, but a general principle of international law. The Court explained that its conclusion was independent of whether the organ or official contravenes the internal law or acts *ultra vires*, because it is a principle of international law that the state is responsible for the acts and omissions of its agents in their official capacity, even if committed outside of the sphere of their authority or in violation of internal law.

That the principle of effectiveness instructs the rule stating that the state is responsible for *ultra vires* acts of state organs and officials violating human rights, appears clearly from this judgment. The Court declared that if acts of public power that are either *ultra vires* or violate the internal law could not be considered breaches of that state's obligations under the Convention, the system of protection which it provides

[1] [1975] 2 Y.B. INT'L L. COMM'N 61.
[2] *Id.* at 69 (footnote omitted).
[3] *Id.*

would be illusory. The Court concluded that such acts are, in principle, imputable to the state.

If we want international human rights law to become an authentic branch of international law, equal to all other branches of international law, we must create a conceptual structure in which we can invoke the same principles of state responsibility as in other fields of international law. The basic requirement here is that we should be able to invoke the same principles of attribution.

Let me turn to the principle of exhaustion of local remedies. I draw your attention to the important jurisprudence of the Human Rights Committee established under article 28 of the Political Covenant, the European Court and Commission of Human Rights, and the Inter-American Court of Human Rights.

In applying the rule of exhaustion of local remedies in the field of human rights, the interests of state sovereignty must of course be balanced with those of the effective protection of human dignity. The scope of the requirement and the conditions for its application must therefore be delineated in a manner that does not impair the effective protection of human rights.

This leads to another issue, the significance and impact of the characterization by human rights treaties of exhaustion as a general principle of international law. Because the requirement of exhaustion of local remedies is based in customary law, international forums must apply this rule in a manner consistent with customary law, so that these forums will not be prevented from considering human rights violations.

Which rules of customary international law demonstrate the limits of the requirement of exhaustion? The basic principle demands that local remedies be both available and effective.

In the *Velásquez Rodríguez* case, the Inter-American Court of Human Rights stated that the "generally recognized principles of international law" (article 46(1)(a) of the American Convention on Human Rights) refer not only to the formal existence, but also to the adequacy and effectiveness of such remedies. The Court decided that a remedy that is not adequate in a specific case, need not be exhausted. It concluded that remedies available in Honduras during the relevant period were entirely ineffective.

The practice of the European Commission and Court of Human Rights in applying the rule of exhaustion of local remedies stated in article 26 of the European Convention reveals that the general international law foundations of treaty requirements of exhaustion provided the rationale for conforming the application of the requirement of exhaustion in the field of human rights to the principles of international customary law governing injuries to aliens. Because article 26 characterizes this rule as confirming customary law, the significance of the Strasbourg jurisprudence under this article extends well beyond the application of the European Convention.

In the *De Wilde, Ooms & Versyp* cases, the European Court of Human Rights stated:

> The rule of exhaustion of domestic remedies, which dispenses States from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system, is also one of the generally recognized principles of international law to which Article 26 makes specific reference.[4]

[4]12 Eur. Ct. H.R. (ser. A) 29 (1971).

The basic principle that the European Court of Human Rights enunciates is that of effectiveness, i.e., international law, to which article 26 explicitly refers, only requires the exhaustion of remedies "which are not only available to the persons concerned but are also sufficient, that is to say capable of redressing their complaints." The jurisprudence of the Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights, has similarly established that exhaustion of local remedies is required only to the extent that local remedies are both effective and available.

Of particular interest is the question of whether article 26 of the European Convention extends to interstate applications. The meaning of those provisions in human rights treaties that subject applications by states to the requirement of exhaustion is not always clear. However, a careful consideration of the texts of the European Convention and other human rights treaties suggests that the requirement of exhaustion applies to state complaints involving individual victims of violations, but not to state complaints alleging widespread violations. This conclusion is supported by the practice of international human rights organs.

The limits on the application of the exhaustion requirement articulated by the European Court and Commission of Human Rights will have a significant impact on the development of customary human rights law.

The European Court has clearly explained that, although exhaustion under article 26 is required both with regard to individual (article 25) and interstate (article 24) applications, the relevance of article 26 to the latter is limited to cases "when the applicant State does no more than denounce a violation or violations allegedly suffered by 'individuals' whose place, as it were, is taken by the State."[5] We have here some kind of analogy to the concept of espousal of an individual claim in the traditional law of state responsibility. But when a state complains not of a single violation, but of a pattern or a practice of violations, or when it invokes violations suffered by individuals, but mentions them not in order to obtain reparation for the victims, but simply in order to establish a pattern, in those latter cases the state would not have to exhaust local remedies. You will find interesting material on the application of this theory in the cases of *Austria v. Italy* and *Ireland v. United Kingdom*. In principle the requirement of exhaustion does not apply where the applicant state complains of a practice as such, with the aim of preventing its continuation or recurrence, but does not ask the Commission or the Court to pronounce on each of the cases put forward as proof or illustrations of that practice.

Finally, let us consider the applicability of exhaustion to human rights claims governed by customary law rather than by treaties. Exhaustion clearly applies to a claim by an alien that a host country has violated his or her international human rights. However, does the requirement of exhaustion apply "also to determination[s] of the fulfillment or breach of international obligations concerning [citizens]"?[6] In his sixth report, Special Rapporteur Ago clearly suggests that customary law generally requires exhaustion even by nationals of the implicated state. He observes that "it would be injudicious to tamper with the existing general scope of the principle in the name of an alleged progressive development."[7] He argues forcefully that the draft article on local remedies should address the need for all individuals, not only aliens, to exhaust local remedies.

[5] Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) 64 (1978).
[6] [1977] 2 Y.B. INT'L L. COMM'N (pt. 2) 42.
[7] [1977] 2 Y.B. INT'L L. COMM'N (pt. 1) 43, U.N. Doc. A/CN.4/SER.A/1977/Add.1 (Part 1) (1978).

The majority of the Commission preferred, however, not to refer to individuals in general, but only to aliens.[8] The articulation of the requirement of exhaustion in every human rights treaty demonstrates that the framers considered this rule appropriate for the field of human rights, and may also offer some evidence that it was believed to embody customary law. Although the ILC left open the question of the applicability under customary law of the requirement of exhaustion to human rights obligations (the customary law requirement of exhaustion could apply also to the breach of human rights obligations contained in a treaty that is silent on the question of exhaustion), this requirement has either already matured into a norm of customary human rights law or, at the very least, is rapidly crystallizing as such a norm. Because the ICJ is both responsive to concerns of state sovereignty and familiar with the rationale for, and deep roots of, the requirement of exhaustion in international law, it would probably decide that exhaustion reaches violations by a state of the customary human rights of its citizens.

An attendee asked what the obligation under international human rights treaties was in the prosecution of a criminal case where human rights violations have occurred. Could a state waive its obligations with local amnesty laws? This was an important problem in South America currently. In the *Velásquez Rodríguez* case, the Court stated in its decision that states must prevent, investigate, and punish any violation of human rights. The Court recognized this duty, in fact. However, in its decisions, it did not call upon the state of Honduras to punish the military officials involved in these violations.

Professor MERON: The duty to prevent human rights violations and the duty to punish are very critical issues. The *Velásquez Rodríguez* case gave us a lot of good law on these duties by interpreting the provisions of article 1 of the American Convention. It stated that the state has the obligation to prevent and the obligation to punish. The obligation to punish would apply to the individuals involved in the violations addressed in the judgment. If that statement of principle had appeared not only in the part of the decision dealing with the interpretation in the abstract of article 1 of the American Convention, but also in the dispositive, operative part of the decision, it would have created a legal obligation binding on the Government of Honduras. If the Government of Honduras had not respected that decision either by not instituting proceedings against the persons guilty of causing disappearances or by some pardon or amnesty, the government would have been in breach of that provision of the American Convention which states that every state must abide by the judgments of the Court. Unfortunately, the Court did not go that far. However, I think the Court's decision is one step forward. In that part of the judgment that deals with interim measures, the Court is more explicit with regard to the duty of punishment.

I think that this decision of the Court in principle will no doubt affect the interpretation of similar provisions which are stated in the International Covenant on Civil and Political Rights and in the European Convention on Human Rights. The language of article 1 of the American Convention is very similar to the language of article 1 of the European Convention on Human Rights and article 2 of the Political Covenant. The issue of amnesty, apart from the immediate context of the *Velásquez Rodríguez* case, is something that must be carefully considered. Some Latin American and Central American countries have resorted to amnesties for persons involved in the perpetration of gross violations of human rights. Amnesties may fall into different categories. The worst type of amnesty could be categorized as self-amnesties. This is

[8][1977] 1 Y.B. INT'L L. COMM'N 278, 281, U.N. Doc. A/CN.4/SER.A/1977 (1978).

not the case of the Argentine regime where the regime seeks to maintain a measure of social peace and is willing to grant amnesty to some of the perpetrators of human rights violations committed under the previous regimes. Some amnesties were clearly declared by persons interested in saving or protecting their own skins. Such self-amnesties ought to require particularly close scrutiny. They must be regarded as suspect.

However, while it is quite clear that those amnesties contradict the whole spirit of effectiveness of international human rights, the question we ought to address is whether we can identify specific rules of international law that would make these amnesties strictly illegal. In a recent colloquium convened on this question by the Aspen Institute, a wide spectrum of views was expressed. I have argued that while we do not have many international law norms already in place, we do have some, suggesting that an across-the-board amnesty, distinguished from an individual pardon, may be against the language and certainly against the spirit of some provisions. If we read closely the U.N. Convention Against Torture, we find that it is not difficult to formulate or assert a rule that an across-the-board amnesty would be in conflict with the obligations by states to criminalize and to punish violations of that Convention. Perhaps we can distinguish between the classical sovereign right of the government, unless prevented under international treaties, to grant an amnesty or pardon to a particular individual and the more questionable grant of an across-the-board amnesty to perpetrators at large of human rights violations.

We actually have more advanced law on this in international humanitarian law than in human rights law. Thus, the four Geneva Conventions for the Protection of Victims of War establish, not for all breaches, but for those defined as grave breaches, the obligation of the state to prosecute or to extradite the persons responsible. This obligation is very clear. Again, if a state tried by an across-the-board general amnesty to avoid its obligations under the Geneva Conventions, that would be, I believe, a breach of the obligations to prosecute or to extradite.

The problem, however, is this: the situations on which we are focusing, those that have occurred in Latin America and Central America (except for the conflict between Argentina and the United Kingdom with regard to the Malvinas-Falklands), cannot be characterized as international wars. One great weakness of the Geneva Conventions of 1949 is that the famous common article 3 of those Conventions, which deals with noninternational armed conflicts, makes it very clear, when read in conjunction with the definitions of grave breaches, that violations of common article 3 are not regarded as grave breaches. This is one kind of gap existing in international law of which we ought to be aware and try to reduce somehow. We must be aware that many egregious violations of human rights occur in situations that do not meet the threshold of international wars, but are, in fact, either internal wars or even situations of internal strife—situations that do not reach the threshold of common article 3.

An attendee asked whether there were state responsibilities or obligations to act against other states that were violators of human rights, and if so, what were those rights and responsibilities, and under what circumstances would the state be entitled to act.

Professor MERON: This is a complex issue. I will suggest some possible directions or a framework for discussion of these questions. One possibility, which in theory is an easy one, but in practice is a difficult one, because of the way the Security Council of the United Nations functions, is to start from the law of the United Nations. Suppose that there is a state that commits atrocities. In cases where Chapter VII of the U.N. Charter can be invoked, the Security Council, acting under that Chapter may

impose on member states in general the obligation to resort to coercive measures against the violating state. If such a resolution were adopted, I believe it would provide member states with sufficient authority and indeed with a duty to act in accordance with article 25 of the Charter.

Whether the principle of *erga omnes* stated in the *Barcelona Traction* case, which is relevant also to countermeasures and not only to judicial remedies, extends to the duty, as distinguished from the right, of protection is an open question. The general view is, perhaps, that while the concept of *erga omnes* allows certain actions taken by third states, i.e., states whose interests are not directly involved, in response to violations of human rights by another state, that concept involves a right rather than an obligation. There are some qualifications to this statement as is illustrated by common article 1 of the Geneva Convention of 1949, which can be seen as a conceptual precursor of the concept of *erga omnes*. That article provides that states shall respect the provisions of the Convention and "shall ensure" respect for the provisions of those Conventions. There has been considerable literature discussing the meaning of this latter provision. That the states must respect their conventional obligations goes without saying. That provision may have historically had some significance in attempting to ensure that states issue instructions to their armed forces to observe the provisions of the Geneva Conventions. But basically these words state something that is obvious and clear in the current state of international law. However, the provisions requiring that states must ensure the observance of conventions is much more interesting.

In *Nicaragua v. United States*, the ICJ alluded to article 1 of the Geneva Convention as customary international law. The interpretation of that article contained in the Commentary on the Fourth Geneva Convention, prepared by the International Committee of the Red Cross and published in 1958, is very broad. It surely justifies, and even, in legal terms, obligates states to make representations to the violating state asking it to refrain from violations. Whether this obligation goes further and how much further is, however, not clear.

An attendee noted that in the attribution paragraph, number 172, of the *Velásquez Rodríguez* case, there is a provision that places a duty on the states to avoid violations of human rights, and also a continuing duty to follow up, seek out, and respond to such violations. According to paragraph 172, "the lack of due diligence to prevent the violations or to respond to it as required by the convention [can lead to international responsibility of the state]." The speaker agreed that the Convention must be read against the backdrop of general international law like any municipal law, fundamental law, or constitutional law. However, as to the situation in Argentina, understanding the political forces that were present at the time, the Argentine Government said that this is not international law, but rather, our own municipal law that we are applying. How do they go about trying to fulfill their responsibility in a manner that is not at all acceptable under international law? Can such devices which mitigate the legal requirements, be cited as fulfilling states' responsibility?

Professor MERON: Unfortunately, the Inter-American Court in the *Velásquez Rodríguez* case refrained from stating the principle of punishment in the dispositive and operative part of the decision. I think that our discussion can provide some kind of frame of reference in order to challenge the practice of exonerating the perpetrators of the violations.

The judgment of the *Velásquez Rodríguez* case is also important in the broader context of the notion of due diligence to prevent violations by private persons and, thus, of the effective reach of international law. Generally speaking, duties and obligations under international law pertain to acts of governmental organs and officials. Do

they in some respect also implicate acts of individuals? There is growing literature in this area of international law, including in particular, an article by M. Forde in volume 56 of the *British Yearbook of International Law* ("Non-Governmental Interferences with Human Rights"). The doctrine that the duties and obligations may relate to the prevention of acts of individuals by governments is greatly supported by the *Velásquez Rodríguez* case.

Under article 1 of the American Convention, as interpreted by the Inter-American Court, states have certain obligations not only to control the conduct of their own officials and organs, but also to prevent certain types of breaches by individuals. I discuss these issues in some detail in my forthcoming book *Human Rights and Humanitarian Norms as Customary Law* (1989).

CLAUDIO GROSSMAN:* I think the problem in legal policy of who has standing to allege state violations of human rights is very important. Giving power to the states is a problem, as states will often act for reasons based on considerations other than humanitarian ones. Therefore, other alternatives should be developed. For example, we could give direct representation to individuals in international judicial proceedings, and create and strengthen the review powers of international courts.

Professor MERON: The point raised is a very interesting one. If we examine, for instance, the practice of the European Commission and the European Court of Human Rights we see that over the years, despite the authority that states have under the Convention to submit complaints to the Commission against breaches of human rights by another state, there have been only about 20 or so interstate complaints in contrast to thousands of individual complaints. This shows, as Professor Grossman suggests, that states are reluctant to pay the political price involved in utilizing the existing complaint procedures against other states.

Actually, if we examine those 20-odd cases of complaints submitted by states for breaches by other states of international human rights in the context of the European Convention, we see that many of those complaints involved special ethnic or religious links existing between a community that suffered violations of human rights and the complaining state. Those 20 cases of interstate complaints submitted to the Strasbourg organs would have been more significant had they always been based on disinterested, altruistic considerations. Nevertheless, it should be realized in this context that when the notion of *erga omnes* was first advanced, fear was expressed in various quarters that this notion was going to be abused and that some states, for political reasons, would rush to invoke this concept against other states. It is, of course, true that states often invoke complaints of human rights breaches against states that they dislike. But the fear that states will grossly abuse the concept of *erga omnes* has not been supported by actual practice.

Given the fact that states will seldom present formal complaints of violations, I agree with Professor Grossman that human rights law could be made more effective by emulating provisions of the American Convention that enable individuals to submit complaints to international bodies. Victims of violations will be guided by considerations different from those of governments; they will seek vindication of their own rights and protection of their own dignity, without worrying about the economic or political relations between governments. The policy should be to expand, to follow, to emulate, this model and, through enlightened interpretation, to encourage the various bodies that already have the necessary competence to interpret their constitutive docu-

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ments in a way designed to enhance the effectiveness of the protection of human rights of individuals.

One attendee was under the impression that the only international convention affecting human rights was the Convention Against Torture, but two other conventions regarding rights of women and one regarding racial discrimination had been mentioned.

Professor MERON: The Convention Against Torture is one of the most recent additions to the corpus of international conventions dealing with human rights. Although the United States has acceded to very few of the international human rights conventions, the number of those conventions is quite large. A recent U.N. compilation of only those conventions that have been adopted either by the United Nations or specialized agents such as UNESCO and ILO comprises about 400 pages.

Another attendee asked what constituted the type of injury that justified a response in the human rights area?

Professor MERON: There is considerable literature now on this question. Professor Schachter in his Hague Academy lectures deals with this question in considerable detail. Basically, the notion that is increasingly accepted is that a legal injury justifying an appropriate response is involved in the very violation of a norm of international law, e.g., concerning the protection of human rights. In other words, the violation of the norm in itself, whether or not accompanied by material damage, may be relevant and sufficient. As regards the rights of a state that does not have a direct interest of its own, views differ as to whether it is enough if the violation is sporadic or individual, or whether the violations must be massive and systematic, representing a gross pattern of violations. I believe that the insistence on a gross pattern of violations is not justified.

The question was asked whether we could use the analogy of the Geneva Conventions regarding the idea that grave breaches require a consistent violation as applied to the principle of *erga omnes.*

Professor MERON: Grave breaches under the Geneva Convention do not mean that such violations must have been committed with regard to a large number of individuals. It is enough, under the Geneva Conventions, that a grave breach has been committed with regard to a single individual. In my forthcoming book, I address this issue. Violations of human rights are, obviously, violations of international law, and if we are going to take the law of human rights seriously, we must take advantage of general international law concepts that are already in place, including that of *erga omnes.* If there is a proper jurisdictional basis, either under article 36(2) or under article 36(1) of the Statute of the ICJ, any state can legally invoke the concept of *erga omnes* and bring a case to the ICJ. I would think that with the present composition of the Court, it is probable that if the case selected is of sufficient gravity, the Court might accept a third party claim and award appropriate remedy.

Of course, the compensation, if any, would be awarded to the victims, just as in the *Velásquez Rodríguez* case. There the Court required the Inter-American Commission and the Government of Honduras to negotiate the payment of reparation, making it very clear that the award would be transmitted to the next of kin of Velásquez Rodríguez. I think that we already have the basic legal principles. That does not mean that we will have this year or next year or within the next 5 years a state that is going to be ready to pay the political price that such proceedings before the ICJ would entail. But this is the trend of the future.

An attendee suggested that the distinction between a state's obligation to act and to guarantee a certain standard of human rights and a state's obligation to refrain from acting remained unclear.

Professor MERON: The answer would turn on the content of the norm in question, which may involve the obligation to act or the obligation to refrain from acting.

The developments in the European Court suggest an expansion of state's duties. However, I think it is very important in every case to look at the content of the norm that we are talking about. The interesting point about the *Velásquez Rodríguez* case is that the Court discusses failures of the "governmental apparatus" with respect to imputability and responsibility. In other words, if a state fails to organize its governmental machinery in a way that ensures the observance of its conventional human rights obligations, in a case under the American Convention resulting in the violation of human rights of some individuals, the state would be responsible for the breach.

I would like to mention here the question of the burden of proof. In the *Velásquez Rodríguez* case the Court states that:

> [it] is convinced, and has so found, that the disappearance of Manfredo Velásquez was carried out by agents who acted under cover of public authority. However, [and this is the important part], even had that fact not been proven, the failure of the State apparatus to act, which is clearly proven, is a failure on the part of Honduras to fulfill the duties it assumed under Article 1(1) of the Convention, which obligated it to ensure Manfredo Velásquez the free and full exercise of his human rights.[9]

The Court is obviously convinced that the Honduras Government, or the governmental apparatus was involved in the disappearances; nevertheless, the Court considers that even if this could not be established, the failure to provide the necessary governmental apparatus to guarantee the rights under the Convention, which in this case resulted in the disappearance and the killing of Velásquez Rodríguez, would in itself be taken as a breach of obligations owed to Velásquez Rodríguez.

An attendee asked whether there was a hierarchy of human rights, and whether this had an effect on nonjudicial countermeasures, meaning *jus cogens* violated by the first state. In other words, if a state violated human rights, and those rights were not mere human rights, but were peremptory norms, did it mean that the third state was under a greater duty to resort to countermeasures?

Professor MERON: There is a whole range of issues here that we do not have time to explore. In practice, the graver the violation, the greater the interest of other states in trying to ensure a cessation of violations. Governments do not approach this problem, however, from the standpoint that scholars would be tempted to discuss it, such as whether the norm violated is peremptory or not. Governments would look at such questions as: are the violations massive, are the violations egregious? The hierarchy of human rights is something that we like writing about, because it is important and intriguing. Governments are led by different considerations. Supposing that the international community considers taking some action against Romania (e.g., countermeasures) because of its current treatment of the Hungarian minority, would such action be considered in terms of a hierarchy of norms or peremptory norms? I do not think so. States would say that grave or massive violations of human rights are being committed and that these justify, perhaps, the denial of certain trade privileges that states grant Romania, or the resort to other countermeasures against that state.

An attendee asked Professor Meron to comment on the special procedure that the Committee of Human Rights was applying when it heard reports from different countries as to how they complied with their obligations. Did Professor Meron see that as

[9]Velásquez Rodríguez Case, Judgment of July 29, 1988, ser. C: Decisions and Judgments, No. 4, para. 182.