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THE PULL OF THE MAINSTREAM

*Martti Koskenniemi**

HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW. By *Theodor Meron.* Oxford: Clarendon Press. 1989. Pp. xi, 263. $55.

I

Ever since the Grotian tradition became little more than an object of ritualistic invocation in keynote speeches at conferences of learned societies, international lawyers have had difficulty accounting for rules of international law that do not emanate from the consent of the states against which they are applied. In fact, most modern lawyers have assumed that international law is not really binding unless it can be traced to an agreement or some other meeting of wills between two or more sovereign states. Once the idea of a natural law is discarded, it seems difficult to justify an obligation that is not voluntarily assumed.

Simultaneously, however, it has been evident that if international law consisted only of formalized meetings of will called treaties, it would not seem very important. Nor would it then contain many of those norms that most lawyers believe are crucial for the functioning of the present international system (such as sovereignty, nonintervention, etc.). A thoughtful commentator once noted: "[O]ne can have a very fair idea of international law without having read a single treaty: and . . . one cannot gain any very coherent idea of the essence of international law by reading treaties alone."[1]

The matter is particularly important in regard to norms intended to safeguard basic human rights and fundamental freedoms. If the only states bound to respect such rights and freedoms are the states that have formally become parties to the relevant instruments — and even then only within the scope of their often compromised wordings and multiple reservations — then many important political values would seem to lack adequate protection. It is inherently difficult to accept the notion that states are legally bound not to engage in genocide, for example, only if they have ratified and not formally denounced the 1948 Genocide Convention. Some norms seem so basic, so important, that it is more than slightly artificial to argue that states are legally bound to comply with them simply because there exists an

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1. C. PARRY, THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW 35 (1965).

agreement between them to that effect, rather than because, in the words of the International Court of Justice (ICJ), noncompliance would "shock[ ] the conscience of mankind"[2] and be contrary to "elementary considerations of humanity."[3]

Professor Theodor Meron's book, *Human Rights and Humanitarian Norms as Customary Law,* places itself squarely within this problem: To what extent are states bound by humanitarian or human rights norms regardless of treaties, by way of customary law? The subject, an important one, is situated in a theoretical mine field. Although it seems clear that not all international law can be based upon agreement, it seems much less clear what else, then, it may be founded upon. Basic questions arise about the legitimacy of applying norms that are based on something other than voluntarily concluded agreements. A Grotian lawyer would not, of course, perceive a great difficulty. He would simply say that some norms exist by force of natural reason or social necessity. Such an argument, however, is not open to a modern lawyer or court, much less an international court, established for the settlement of disputes between varying cultures, varying traditions, and varying conceptions of reason and justice. Such conceptions seem to be historically and contextually conditioned, so that imposing them on a nonconsenting state seems both political and unjustifiable as such.

It is, I believe, for this reason — the difficulty of justifying conceptions of natural justice in modern society — that lawyers have tended to relegate into "custom" all those important norms that cannot be supported by treaties. In this way, they might avoid arguing from an essentially naturalistic —and thus suspect — position. "Custom" may seem both less difficult to verify and more justifiable to apply than abstract maxims of international justice.

Besides treaty and custom, the Statute of the ICJ in paragraph 1 of article 38 (the provision usually held to contain the authoritative statement of the sources of international law) also lists the "general principles of law recognized by civilized nations" as well as, in a secondary fashion, teachings of publicists and judicial precedent.[4] At first blush,

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2. Reservations to the Convention on the Preservation and Punishment of the Crime of Genocide, 1951 I.C.J. 15, 23 (Advisory Opinion of May 28).

3. Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Apr. 9).

4. Paragraph 1 of article 38 of the Statute of the International Court of Justice states:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
>
> (b) international custom, as evidence of a general practice accepted as law;
>
> (c) the general principles of law recognized by civilized nations;
>
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38, para. 1.

the category of "general principles" would seem a suitable candidate for arguing about human rights or principles of humanitarian law. But the ICJ, for one, seems never to have made express reference to general principles. For most modern lawyers, and the World Court, international law consists, for all practical purposes, of only two sorts of norms: treaty norms and custom. All nonwritten norms — whatever their basis, character, or significance — are routinely treated as customary. As a result, as a judge at the ICJ has noted, much of what we tend to call custom "is not only *not* customary law: it does not even faintly resemble a customary law."[5]

Professor Meron follows this strategy. Although he accepts the category of "general principles" as a valid way to argue about human rights and humanitarian norms, he does not use this argumentative tack. Nor does he examine whether, or to what extent, such norms might be valid as natural law. His reason for so doing is clearly stated: he wishes to "utilize irreproachable legal methods" to enhance "the credibility of the norms" for which he argues (pp. 81, 246). The assumption here is that to argue in terms of general principles or natural justice is to engage in a political debate and to fall victim to bias and subjectivism. Following his rationalistic credo, Meron hopes to base human rights and humanitarian norms on something more tangible, something that jurists can look at through a distinct (objective, scientific) method and thus ground their conclusions in a more acceptable way — a way that would also better justify their application against nonconsenting states.

The starting point — hoping to argue nontreaty-based human rights and humanitarian norms as custom — however, does not fare too well in Professor Meron's careful analysis of pertinent case law and juristic opinion. He accepts the orthodox "two-element theory" of custom (*i.e.,* for custom to exist, there must be both material practice to that effect and the practice must have been motivated by a belief that it is required by law (p. 3)), yet case law contains little to actually support such a theory, although passages paying lip service to it are abundant. Thus, his analysis of the judgement by the ICJ in the *Nicaragua* case,[6] in which the Court inquired, *inter alia,* whether articles 1 and 3 common to all four of the Geneva Conventions of 1949 had "crystallized into" custom, concludes by noting the Court's "complete failure to inquire whether *opinio juris* and practice support the crystallization of articles 1 and 3 into customary law" (p. 36).

Meron's unwillingness to inquire into a nonwritten law which might not be "custom" in the sense of the two-element theory is sur-

5. Jennings, *The Identification of International Law,* in INTERNATIONAL LAW, TEACHING AND PRACTICE 3, 5 (B. Cheng ed. 1982).

6. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

prising. The results of his analysis of the pertinent ICJ practice would seem to compel him to abandon or at least completely revise the traditional view of custom. Should "custom" perhaps be thought of in terms of some deeper historical necessity, for example, as many nineteenth-century international jurists argued?[7] But no such radical revision is proposed. Meron's analysis complies with the orthodox approach — however much Meron is led to conclude that legal practice does not support it.

It often seems that Meron's analysis and criticism of the ICJ's method for "finding" customary law leaves little ground for Meron himself to stand on. Sometimes Meron notes that his own "preferred indicators" for determining when a human rights norm is to be valid as custom would be whether it is repeated in instruments and confirmed in national practice (in particular, in national laws) (pp. 93-94). Yet, there is no study of national laws in the book. In another place, Professor Meron stresses that "*Opinio Juris* is thus critical for the transformation of treaties into general law" (p. 53; footnote omitted), although he does not explain how courts might ascertain the presence of this "subjective element" without making presumptions on the basis of material practice. Yet, he also holds that the ICJ has made "only perfunctory and conclusory references to the practice of states" (p. 42) and he argues that only "limited significance" is given to the two elements and that the burden of proof for establishing custom in the human rights field is lighter than usual (p. 113). Sometimes he throws the orthodox theory completely overboard by concluding that, for important human rights norms, "[t]he 'ought' merges with the 'is' " (p. 42); that the "derivation of specific rules from general principles . . . is an important process in the development of customary humanitarian law" (p. 68); and that "the central source for the rules [for internal armed conflicts] will be the principles of humanity" (p. 74).

These results are clearly correct. And yet, they are also threatening by focusing attention away from "rigorous" tests of pedigree to uncertain and controversial moral principles. It is somewhat disappointing that so much analysis seemed necessary when the conclusion would have been available from a number of important studies on the practice of the ICJ and its predecessor.[8] It appears to be the case that the Court has "instituted a system of decision-making in which the legal conclusion reached is determined by the application of rules of

7. *See, e.g.*, Vinogradoff, *Historical Types of International Law*, in 1 BIBLIOTHECA VISSERIANA 1 (1923).

8. *See, e.g.*, C. JENKS, THE PROSPECTS OF INTERNATIONAL ADJUDICATION 264 (1964); M. SØRENSEN, LES SOURCES DU DROIT INTERNATIONAL 108-11 (1946); Haggenmacher, *La doctrine des deux éléments du droit coutumier dans la pratique de la cour internationale*, 90 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 5 (1986); Virally, *The Sources of International Law*, in MANUAL OF PUBLIC INTERNATIONAL LAW 116, 133-35 (M. Sørensen ed. 1968).

law largely treated as self-evident."[9] Meron's book would have been a more important contribution to human rights law if, instead of arriving where most thoughtful scholars have arrived on the subject for the past forty years, it had attempted an analysis of what makes a norm binding even absent a basis in treaty, if not the practice and the *opinio.* But there is no analysis of the political right in the book, no "derivations" from general principles or from principles of humanity, and no attempt to take the Court's departures from orthodox custom seriously.

Although Meron does not analyze the various general theories of international custom (and no such analysis is really needed), he does review the arguments used by lawyers seeking to make treaty-based human rights norms binding on nonparties. The four principal argumentative strategies claim that a norm is binding for nonparties if (1) it can be deduced from the provisions — in particular articles 55 and 56 — of the United Nations Charter; (2) it is supported by a general (even if perhaps not unanimous) consensus; (3) it has become a "general principle of law" in the sense of article 38 of the Statute of the ICJ; or (4) it has been tacitly accepted by nonparties as well (pp. 81-106). Of these, Meron concentrates on the last two, which he thinks are the most likely to succeed.

The category of "general principles," it must be noted at the outset, does not signify for Professor Meron what is signified to the drafters of the ICJ Statute — particularly Baron Descamps.[10] General principles are not natural or even quasi-natural principles but generalizations from municipal jurisprudence (pp. 88-89). But one wonders whether this is really the secret of their apparent relevance. Given that it is practically impossible to collect representative data of such jurisprudence, and given that only a minority of countries apply a *stare decisis* system, the usefulness of this approach seems doubtful. For a continental lawyer — such as this author — using basically American and British cases to argue for general principles is a questionable strategy. It is true that analyzing American cases — as Meron has done — is a useful tool for illustrating the structure of typical argumentation in human rights as in other cases. But I would be very hesitant to imply that the arguments by U.S. courts in, for instance, the much-debated *Filartiga v. Peña-Irala*[11] and *Tel-Oren v. Libyan Arab Republic*[12] cases possess any formal authority in determining the obligations of other states. Perhaps this is not what Meron

9. Kearney, *Sources of Law and the International Court of Justice,* in 2 THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE 610, 653 (L. Gross ed. 1976).

10. *See* ADVISORY COMMITTEE OF JURISTS, PROCÈS-VERBAUX OF THE PROCEEDINGS OF THE COMMITTEE 293 (1920).

11. 630 F.2d 876 (2d Cir. 1980).

12. 726 F.2d 774 (D.C. Cir. 1984).

implies. Maybe he merely intends to show the typical (natural!) way in which the relevant norms (prohibition of torture and terrorism) are applicable. But, in that case, he should have considered those arguments on their merits, not merely described their use in U.S. courts. Yet the book contains no such discussion. One is left with the feeling that Meron's very discussion — informative though it is — is more intended to show American lawyers how to plead when pressing a human rights case in American courts than to reveal much about international law.

The other strategy recommended by Meron as an "effective means for expanding the universality of international human rights" (p. 89) — arguing on the basis of tacit acceptance ("acquiescence") — is a strategy much used in international litigation.[13] Using it for the purposes he intends, however, meets with the difficulties any consensualism is bound to confront. First, it contains the unpleasant implication that people have human rights only so far as actually accepted by states. It thus leaves the door open for a state to come up with evidence actually denying its intent to be bound by others' treaties. Second, and relating to the first point, it meets with difficulties of proof. If a state denies that it has consented to a human rights norm embedded in a treaty to which it has refrained from being a party, how can we justifiably claim to know which norms that state has consented to *better* than the state itself does? The very assumption that we could seems odd. It provides a justification for overruling a state's express report about its will — in this sense it is a Hobbesian argument which posits the arguer in the place of Leviathan. It also destroys the liberal justification for relying on consent — and the justification for basing social order on a popular vote — in the first place: Why do this if someone else (we) can know better?

In fact, arguing from tacit consent tends to be a camouflage for arguing from a conception of justice, most frequently from the principle that legitimate expectations should not be ignored. It is not really — despite appearances — a consensual argument at all.[14] This is the lesson of the judgment by the ICJ in the *Nuclear Tests* cases,[15] in which the court held France bound by certain statements made by its president and foreign minister despite other evidence that France never intended to assume a legally enforceable obligation. This result, however, is not a conclusion about someone's consent, but an extrapolation of what seems just or, as the Court here put it, in accordance

13. *Cf.* M. KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 284-341 (1989).

14. *Cf.* C. PATEMAN, THE PROBLEM OF POLITICAL OBLIGATION: A CRITIQUE OF LIBERAL THEORY 15-17, 81-98 (2d ed. 1985).

15. Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457 (Dec. 20); Nuclear Tests (Aus. v. Fr.), 1974 I.C.J. 253 (Dec. 20).

with the good faith principle.[16] Therefore, it is hardly consistent with the orthodox theory of customary law, nor, for that matter, with the assumptions of legal objectivity behind liberal legal theory.

Throughout the book one has the impression that whenever Meron states that some humanitarian or human rights principle is a part of customary law, the conclusion does not really follow from the arguments, but instead existed in Meron's head even as the arguments were chosen. This feeling is in no way diminished by the fact that he continually changes the types of arguments he puts forward to support his conclusions. Sometimes he relies quite openly on a shared intuition between the reader and himself. The feeling is, in other words, that Professor Meron has quite strong opinions about which norms should be included among those that are binding even beyond specific treaties,[17] and that he uses whichever arguments are available to support them.

This is intended less as a criticism than a point of reflection. Might it not be that the certainty we have of the illegality of genocide, or of torture, or of depriving ethnic wholes the right of self-determination, is *by itself sufficient reason* to include those norms in international law? What does it add to such certainty if we find, or do not find, a precedent, a state, or the United Nations General Assembly, saying the same? Very little, I feel.

My point is as follows: In his wish to look for "irreproachable legal methods" to argue for the validity of nontreaty norms, Professor Meron has tried to rely on the traditional two-element theory of custom — the material practice and the *opinio juris.* His hope was that these would provide a noncontroversial litmus test that would finally convince everyone of the certainty of his conclusions. As Meron himself shows, however, this test is in fact relatively useless. It is useless, first, because the interpretation of "state behavior" or "state will" is not an automatic operation but involves the choice and use of conceptual matrices that are controversial and that usually allow one to argue either way. But it is also, and more fundamentally, useless because we do not wish to condone anything that states may do or say, and because it is really our certainty that genocide or torture is illegal that allows us to understand state behavior and to accept or reject its legal message, not state behavior itself that allows us to understand that these practices are prohibited by law. It seems to me that if we are uncertain of the latter fact, then there is really little in this world we can feel confident about.

16. Nuclear Tests (Aus. v. Fr.), 1974 I.C.J. at 268.

17. Meron's list includes the prohibition of torture and racial discrimination, and the minimum guarantees for humane treatment found in article 3 of the Geneva Conventions. *See* pp. 46-47 (his list of customary standards in Geneva Convention No. IV); pp. 94-98 (his list of general human rights norms).

In other words, finding juristic evidence (a precedent, a habitual behavior, a legal doctrine) to support such a conclusion adds little or nothing to our reasons for adopting it. To the contrary, it contains the harmful implication that it is *only* because this evidence is available that we can justifiably reach our conclusion. It opens the door for disputing the conclusion by disputing the presence of the evidence, or for requiring the same evidence in support of some other equally compelling conclusion, when that evidence might not be so readily available.

It is, of course, true that people are uncertain about right and wrong. The past two hundred years since the Enlightenment and the victory of the principle of arbitrary value have done nothing to teach us about how to know these things or how to cope with our strong moral intuitions.[18] But one should not pretend that this uncertainty will vanish if only one is methodologically "rigorous." If the development of the human sciences has taught us anything during its short history, it is that the effort to replace our loss of faith in theories about the right and the good with an absolute faith in our ability to understand human life as a matter of social "facts" has been a failure. We remain just as unable to derive norms from the facts of state behavior as Hume was. And we are just as compelled to admit that everything we know about norms which are embedded in such behavior is conditioned by an anterior — though at least in some respects largely shared — criterion of what is right and good for human life.

II

There is little else to be said about Professor Meron's discussion in Parts I and II of the book dealing with the customary law character of humanitarian and human rights norms. The discussion is balanced and the conclusions are usually intuitively acceptable. They are not so, however, because Meron succeeds in showing how well they correspond to state practice, but because they, for the most part, appear reasonable and coincide with our moral imagination. For example, he discusses at length whether a provision in a treaty allowing reservations — or not allowing them — is relevant in determining the customary character of that provision. Meron concludes, correctly, that these facts may have some probative value although they remain unreliable as rules for determining whether the respective provision might be valid as custom (p. 24). The point I want to make here is that the contextual assessment that ascertains the customary character of a provision cannot be fitted within any rigid "method" for finding custom in every case. It is a practical matter (in the sense of being related to normative *praxis*) that requires making contested, political evalua-

18. *Cf.* A. MACINTYRE, AFTER VIRTUE: A STUDY OF MORAL THEORY (2d ed. 1984).

tions. It is not a rule-determined activity but one which gives meaning to rules (namely rules concerning reservations, consent, and *jus cogens*) and which therefore remains external to them.

Meron also discusses the transformation of treaties into custom with particular reference to norms enshrined in the 1949 Geneva Conventions and the 1977 Additional Protocols. He considers, for example, whether practice by treaty parties constitutes relevant "practice," the effect of occasional deviations and possible reactions to them, and the scope of the relevant practice by nonparties. But his framing of the problem is notoriously problematic. A treaty may be evidence of custom (in the sense that it shows the importance of a norm to its parties) or evidence of the absence of custom (otherwise we must remain puzzled about the need to conclude the treaty in the first place).[19] Professor Meron is aware of these — and other — paradoxes, but his discussion does little more than lay them in the open. At a significant place in his argument, he contends that "[b]oth scholarly and judicial sources have shown reluctance to reject conventional norms whose content merits customary law status as candidates for that status . . . " (p. 57). This, he adds, "may reflect the strength of moral claims" for their application (p. 57). Again, this seems quite correct but is simultaneously puzzling if one remembers Meron's insistence on the "two-element" method. Again, one seems drawn into a contextual assessment of the political significance of the treaty.

Consider, for example Professor Meron's account of how the United States determined which of the rules in Protocol I to the Geneva Convention (which the United States has not ratified) had customary law character. The determination, it seems, was "guided both by considerations of [the United States'] own military interests and by policy and value judgments" (p. 68). Meron should take this as an affirmation that such factors do indeed play a role in this determination, yet he does not. At least he should list this finding among the state practices he uses to draw consequences from.

III

Lawyers — and international lawyers are no exception — often assume that the core of law consists of norms enforced by sanctions. There may even be some doubt about whether norms alone, without some regime for enforcing them, can properly be called legal norms at all. As is well known, this point is frequently asserted to deny the

19. Thus, in Libyan Am. Oil Co. v. Government of the Libyan Arab Republic, 20 INTL. LEGAL MATERIALS 1, 72-73 (1981), the Arbitrator regarded lump sum agreements whereby less than full compensation was paid as evidence of custom which did not provide for full compensation in nationalization cases. However, lump sum agreements were treated as conscious *departures from* a customary standard of full compensation by the Iran-United States Claims Tribunal in Sedco, Inc. v. National Iranian Oil Co., 25 INTL. LEGAL MATERIALS 629, 633 (1986).

"legal" character of intersovereign law.[20]

If international lawyers have had some trouble convincing critics about the legal character of their law in the absence of effective sanctions, they have experienced even more difficulty when arguing for the "hard law" character of international human rights norms. Therefore, the third, and longest, part of Professor Meron's book — discussing the international responsibility of states for violations of human rights standards — seems of paramount importance for human rights lawyers (pp. 136-245). If human rights are really connected with a regime of international accountability, then they might emerge from their association with "soft" ethico-political principles onto the level of hard law.

This part of Meron's book is divided into eleven sections, which deal with most of what are usually thought of as central issues in the international law of responsibility. Professor Meron discusses, *inter alia,* problems relating to attribution of responsibility (private acts/state responsibility), the application of the domestic remedies rule with respect to citizens and foreigners, the relevance of the problematic distinction between obligations of conduct and of result, the usefulness of the notion of obligations *erga omnes,* the distinction between international crimes and delicts, exceptions to the responsibility rule (state of necessity), and modalities for realizing responsibility (national vs. international enforcement).

Here, too, the discussion is balanced and methodologically "rigorous" and one finds little substantive disagreement with Meron's conclusions. He argues that international human rights norms are hard law, just as any other international norms, being connected with an identical accountability regime. The main problem here relates to Meron's admission that "[d]ue to the scarcity of practice . . . our discussion will frequently be largely theoretical" (p. 137). This admission detracts somewhat from Meron's wish to show that human rights norms are "hard law," enforceable — and actually enforced — by national and international courts and mechanisms. To speak of a regime may even seem somewhat grandiose in view of the virtual absence of relevant practice outside of specific treaties, such as the European Convention on Human Rights (1950) and its American counterpart (1970) as well as the International Covenant on Civil and Political Rights (1966). As Meron notes, a general regime exists nowhere apart from the drafts and reports of the International Law Commission, the United Nation's main body for the codification and progressive development of international law. These drafts and reports are not classifiable as custom by any classical test, yet, according to Meron, they still "give a useful indication of customary law" (p. 137). For all practical

20. *See, e.g.,* F. HAYEK, THE ROAD TO SERFDOM 173 (1950).

purposes, his discussion uses those materials as if they contained an authoritative statement of custom.

The International Law Commission (ILC) has discussed international responsibility for most of its forty-three-year existence. Its current project, begun in 1969, contains a repository of valuable materials on the matter. These materials can — and should — be used in any discussion concerning the law of responsibility. But the fact that the materials are only drafts and reports, that the project itself is far from finished, and that it is the subject of much academic as well as diplomatic controversy shows that one is moving here among a host of uncertainties.

This may explain why much, if not most, of Meron's discussion not dealing with the views of the ILC on particular matters concentrates on the application of human rights treaties by organs established in them. The lengthy, handbook-like section on "mapping recourse options" for addressing breaches (pp. 136-54) is almost exhaustively concerned with treaty-based remedies. These remedies are, of course, generally inapplicable to breaches of customary norms (unless the customary norm is included or interpreted into the respective instrument). In any case, the jurisdiction of the treaty bodies is based on the acceptance of their jurisdiction by the parties. Nevertheless, and despite any doctrinal problems this may involve, the practice of these bodies does have relevance for the interpretation and application of general human rights norms as well. To this extent, Professor Meron's approach seems justified. One would, perhaps, have only hoped for a discussion of the basis on which such generalizations are made — particularly in view of the recognized under-utilization of the treaty mechanisms for state complaints, which seems to indicate that pleading human rights cases is not "business as usual" among states.

Outside the practice of the European Convention, there are no cases in which a state has filed a complaint within a supervisory body under the relevant provisions of the political covenant, the racial discrimination convention (1966), or the torture convention (1984). The complete nonuse of the state complaint procedure in these treaties, and the virtually complete absence of practice concerning international accountability for human rights violations does make it problematic to argue that such accountability exists as matter of customary law — unless, of course, "custom" is understood as a modern code word for something politically compelling.

Meron's discussion of imputability follows closely the work of the ILC in this field. He accepts the Commission's conclusion that both authorized as well as unauthorized acts by state organs create responsibility (pp. 156-59). Though this is clearly correct as a matter of policy (it being otherwise virtually impossible to establish responsibility), it is doubtful whether many states will accept this conclusion — par-

ticularly because he also concludes that states are directly responsible for acts of even minor officials (pp. 158-60). The latter point is affirmed by a large jurisprudence concerning acquiescence or estoppel, for instance, in which the acts, statements, or silence by minor officials have sufficed to bind the state.[21] Indeed, were this otherwise, many of those whose rights are constantly violated by officials in the regular police force, for instance, would have no remedy. The combined conclusion — that states are responsible even for nonauthorized acts of minor officials — though evidently tempered by the exhaustion-of-local-remedies rule is perhaps inevitable if one wishes to have an effective accountability system for violations of human rights. Still, one wonders whether such a principle can in any near future become anything close to effective reality.

Meron shares the classical view that responsibility in relation to acts of private persons is connected to the state's duty of care (due diligence) (p. 171). Responsibility is triggered if the state failed to take preventive measures. What such measures might be is determined by a "reasonable person" standard and necessarily varies from case to case and probably also from country to country.[22] That there is something of a double standard favoring economically worse-off countries seems today quite clear.[23] The broad standard set down by the Inter-American Court of Human Rights in the *Velásquez-Rodríguez* case[24] is probably close to the customary one, as noted by Meron. However, it is uncertain to what extent the jurisprudence of the European Court can be argued to support a customary standard. Here the European Court has repeatedly noted that states that are parties to the European Convention must legislate to give effect to its provisions. It does not seem possible to draw the analogy that states should also legislate to give effect to the uncertain and varying customary standard of due diligence.

One might be prompted to ask, however, whether "due diligence" is a proper concept within which to grasp the evolving law of state responsibility at all. It bears a relationship to fault liability which is today widely criticized. The construction of the due care standard may often take place with little or no concern to whether state organs actually knew about a violation or had any chance of preventing it.

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21. *See, e.g.*, Temple of Preah Vihear (Cambodia v. Thailand), 1962 I.C.J. 6, 25 (June 15); Cahier, *Le comportement des états comme source de droits et d'obligations*, in RECUEIL D'ÉTUDES DE DROIT INTERNATIONAL EN HOMMAGE À PAUL GUGGENHEIM 237 (1968).

22. *Cf. Affaire des biens Britanniques au Maroc Espagnol*, (U.K. v. Spain), 2 R. Intl. Arb. Awards 615, 644 (1925).

23. *See, e.g.*, Fitzmaurice, *The Future of Public International Law and of the International Legal System in the Circumstances of Today* in LIVRE DU CENTENAIRE 1873-1973: EVOLUTION ET PERSPECTIVES DU DROIT INTERNATIONAL 198, 232 (1973); G. DE LACHARRIÈRE, LA POLITIQUE JURIDIQUE EXTÉRIEURE 63 (1983).

24. Velásquez Rodríguez Case, 28 INTL. LEGAL MATERIALS 291 (Inter-American Court of Human Rights, July 29, 1988) (1989).

The presumption of knowledge, based on territorial control — as constructed by the ICJ in the *Corfu Channel* case,[25] for example — comes very close to an objective responsibility which is triggered by many considerations, among which subjective "fault" in some agent may be only a minor concern. As is clear to anyone having read the statements by state representatives at the Sixth Committee of the UN General Assembly when it undertakes its annual discussion of the ILC topic "Liability for Injurious Consequences of Acts not Prohibited by International Law" — a topic introduced in 1980 and discussed each autumn since — no-fault liability (notwithstanding terminology and the somewhat painful attempts to distinguish between "liability" and "responsibility" in international law) has never come close to receiving the consent of states. But consent, too, may be a relatively minor matter here.

In fact, Meron comes close to adopting this view in his discussion of the relationship of "obligations of means" and "obligations of result" (pp. 182-88). He concludes that most human rights obligations are, or can be conceived of as, obligations of result (pp. 184, 188). Clearly, for the reality of those obligations, this is the only acceptable conclusion — though many would not accept it.[26] But it also brings in a nonfault-related standard and it renders largely superfluous any inquiry into whether anyone has acted with due diligence. It may be in order not to impose a pure no-fault standard on states that Meron still contends that "[o]bligations of means and obligations of result do not compete with, but complement, one another" (p. 184). Such a "combination" might leave it open to argue in terms of due diligence after all, and thus escape from the consequence, so hard to accept by states, that they might be responsible for some act or event which they had no practical means of preventing.

There is virtually no discussion of the customary status or responsibility attached to economic, social, and cultural rights in the book. While one can appreciate the difficulties that such a discussion would create, reference to the problem might still have been appropriate, at least in the present context. It seems that a state's obligations relating to economic, social, and cultural rights — whatever their basis — cannot easily be construed in terms of obligations of result. As often observed, these rights are "programmatory" in some way that is difficult to define precisely but which clearly implies that the state has an obligation to act, instead of an obligation to achieve a result.

The discussion concerning the highly problematic conceptions of norms *erga omnes* brings in very little that would alleviate the intuitive feeling that what is at issue here is simply a political evaluation of the importance of some norms (or compliance with them) vis-à-vis others.

25. Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 18-22 (Apr. 9).

26. *See, e.g.*, P. REUTER, DROIT INTERNATIONAL PUBLIC 37 (5th ed. 1976).

(The same can be said of any attempt to distinguish between international crimes and other, "ordinary" offenses.) As Meron correctly notes (p. 210), the distinction, as it appears in ILC drafts, is based on the (naturalistic) assumption that such crimes could be distinguished by their content. This leaves us with very little in the event of inevitable disagreement about such content. Making a preference between two assumptions about the intrinsically heinous character of some act is inevitably a political choice. It is uncertain whether the results of that choice, if made, for instance, through a majority decision at the United Nations, would be very appealing to human rights lawyers.

Meron's discussion of *erga omnes* norms takes up the (highly inconclusive) practice of the International Court of Justice in this respect. He notes that the Court's distinction in the *Barcelona Traction* case,[27] between "basic rights of the human person" and "ordinary" human rights norms is both "conceptually difficult" and "politically contentious" (p. 192). Referring to the U.S. *Restatement of Foreign Relations Law*[28] as well as to draft article 5 of the Second Part of the ILC draft on state responsibility (p. 198) (which establishes the law of human rights as an "objective regime," extending the definition of "injured states" in cases of human rights violations to include all states), he concludes that all relevant human rights norms should be seen as norms which are valid *erga omnes* — *i.e.,* owed not to any particular state but to the international community as a whole. As a result, he asserts, such norms should be capable of being invoked by any state regardless of the usual jurisdictional rule that permits only a state against which or against whose national a violation has taken place to appear as plaintiff (pp. 196-99).

It is difficult to imagine another conclusion on this matter that would be more morally compelling and further removed from the realities of international life than this. It is, to say the least, quite impossible to justify such a view by reference to any international custom — if by "custom" one means something even remotely connected with an *opinio juris* plus generally conforming practice. States simply do not, in any manner which could be termed "customary," take up violations of human rights in other countries. Neither has judicial practice in any way formally overturned the dictum of the ICJ in the *South West Africa* cases, according to which *locus standi* is not constituted by the fact that all states have an interest in "humanitarian matters."[29] Though Meron does argue that "international practice" supports his conclusion (p. 199), he does not mention even one incident of state practice to this effect. The only "practice" he cites is the relevant ILC

27. Barcelona Traction (Belg. v. Spain), 1970 I.C.J. 4, 32 (Feb. 5).

28. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 703 (1987).

29. South West Africa Cases (Ethiopia v. South Africa), 1966 I.C.J. 4, 34 (July 18).

draft. Perhaps for this reason, Meron retreats somewhat from his conclusion by noting that "customary law" is "not yet settled" on whether the right to take up violations wherever and against whomever they might take place is restricted only to gross and systematic violations (p. 199). One is left wondering what type of evidence would go to settle the matter. Two facts seem pertinent. On the one hand, states do not grant each other the right to complain to judicial bodies about domestic human rights violations regardless of the nationality of the victims. On the other hand, they do make political protests every now and then, and these are made selectively, based on such factors as political alliances and controversies, inclinations of domestic audiences, and the like.

It would be difficult to accept that states could not criticize or take up in international organs the plight of people struggling against repeated human rights violations, regardless of considerations of nationality or geography. The practice of UN organs, for example, has witnessed a marked reduction in the use of the reservation of matters on "domestic jurisdiction" in article 2(7) of the UN Charter.[30] But it is one thing to note and applaud this development and another to argue that states have generally the *right* to ask for judicial determination of the conformity of a practice in some state with a customary standard of human rights. If there existed consensus about a basic customary standard, this suggestion would perhaps not seem too objectionable. In view of the extreme variations of political culture, and economic and technological capacity, however, as well as the range of plausible interpretations about the content and application of any potential basic standard, my fear is that such *actio popularis* would simply mean an attempt to enforce judicially a set of Western values. I have little doubt that strong ethico-political necessities require international lawyers, and others, to condemn oppressive social practices, wherever they might occur. Such practices should be taken into international fora, discussed there, and hopefully eliminated sooner rather than later. But I would hesitate to affirm a right of *actio popularis,* with all that this implies about the finality and enforcement of the judgment, the creation of a legal culture of pleading human rights in other countries, and other issues. Such an attempt at a shortcut to a world state would too easily become an apology for imperialism.

Similar problems arise in Professor Meron's discussion of the state of necessity and other causes for departing from the assumed customary standard. On the one hand, there exists some practice under the political covenant on this matter, but it is doubtful whether this practice may be generalized as customary. On the other hand, any acceptable conclusion should provide for a set of core rights — however they

30. For a detailed analysis, see M. RAJAN, THE EXPANDING JURISDICTION OF THE UNITED NATIONS (1982); M. RAJAN, UNITED NATIONS AND DOMESTIC JURISDICTION (1958).

are characterized — from which states may not derogate. What these latter norms might be raises the issue of *jus cogens,* a Latin code phrase for making the political distinction between important and less important rights. Meron does not discuss the problem of how (*i.e.,* by what "method") to recognize *jus cogens.* But the expressions he uses ("categorical rules," "decisive importance of certain norms and values" (pp. 221, 222)) are far removed from any assumption that these norms might be recognizable by the orthodox twin criterion of custom. The point is that this is a matter of political value: if you and I believe something is so important that it can in no circumstance be derogated, then surely this conviction *is* deeper and more forceful than any conviction about legal validity created by any formal test, and we will feel fully justified in enforcing it as law (if that is the sensible way to enforce it).

IV

Professor Meron's work is a solid piece of writing within the mainstream of international legal scholarship. He has taken up an issue which has surprisingly long been neglected by publicists, and he arrives at substantively consoling conclusions: Indeed, some human rights and humanitarian norms may be argued as custom; indeed, these norms may be linked with a regime of responsibility for violations of the respective rights. The conclusions in each specific problem area are just as unsurprising in their final vindication of liberal intuitions. Indeed, which rights are customary is less a matter of formal tests of legal validity than a deference to their ethico-political importance; indeed, "elementary considerations of humanity" and "basic rights of the human person" receive legal protection regardless of whether lawyers come up with any number of precedents to support them; indeed, the more shocking the violation, the more open is the law for allowing responsibility to be triggered. Would any other conclusion have been acceptable, or possible?

Throughout the book, Professor Meron stresses the importance of backing his conclusions with "irreproachable legal methods" (p. 81). He stresses the need for "greater analytical rigour on the part of human rights lawyers" (p. 247). His concern is, obviously, the relative exclusion of human rights specialists from the center of international legal debate — an exclusion grounded in what for the mainstream analytical jurists has appeared to be their uncritical enthusiasm over certain ethico-political principles of doubtful juristic value and their sloppiness in the face of orthodox rule-identification criteria.[31]

31. A similar concern has been expressed by some political theorists who have wished to develop a more analytical (*i.e.,* substantively empty) approach to current international human rights discourse. Especially relevant is J. DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE (1989).

Clearly, Meron has succeeded in showing that human rights can be argued just as technically as maritime delimitation. One may ask, however, whether this is not in some way a mixed blessing. For it may be argued that the justifying rhetoric of the mainstream is in disarray: positivism is no longer credible, naturalism has long been a closed option, and the different policy-science approaches have, if taken seriously, failed to demonstrate what is specifically "legal in them," while their popular versions appear to be thinly disguised rhetoric aimed at furthering political interests. By becoming more mainstream, human rights lawyers may gain in academic or diplomatic prestige. But they will also face the danger of losing their critical teeth and finding themselves discussing analytic distinctions whose one social function is the legitimation of oppressive practices through the strategy of the exception: once you define a right, you delimit it. And once you delimit it, you offer a formally valid argument for someone to deny that right.

Here is a final paradox: late-modern legal, social, and linguistic theory has taught us that rules, whether extracted from behavior or texts, are of necessity indeterminate. Thinking of human rights in terms of legal rules will extend indeterminacy into those rights as well. The secularization of human rights rhetoric involved in its becoming mainstream, then, may not be the best way to protect human rights. By remaining in the periphery, in the field of largely subconscious, private, moral-religious experience that defies technical articulation, human rights may be more able to retain their constraining hold on the way most people, and by extension most states, behave.