Introductory Note

The views on various aspects of human rights taken by legal scholars have sharply changed over the last century. This transition can be seen clearly by comparing the attitudes of leading lawyers of their day on two main questions: First, do individuals and protection of their rights have any standing under international law? Second, can intervention be justified on humanitarian grounds against dictatorships oppressing their own people or mistreating racial, ethnic, or religious groups?

On the first issue, L. Oppenheim, a leading authority on international law, wrote in his classic book on the subject in 1912, "The Law of Nations is a law between States only and exclusively." In 1955, however, H. Lauterpacht, a British law professor, in updating Oppenheim's book, saw the situation quite differently. His changes and additions are italicized in the selection that follows.

As for the issue of intervention, British legal expert E. C. Hall, although sympathetic to the idea, saw little ground for such action in international law. "States so intervening," he wrote in 1895, "are going beyond their legal powers. Their excuse or their justification can only be a moral one." Yet by 1921, E. C. Stowell, a prestigious specialist in international law, found real legal justifications for states to seek to protect human rights abroad.

L. Oppenheim

International Law: A Treatise (1912)

Section 188. The importance of individuals to the Law of Nations is just as great as that of territory, for individuals are the personal basis of every State. Just as a State cannot exist without a territory, so it cannot exist without a multitude of individuals who are its subjects and who, as a body, form the people or the nation. The individuals belonging to a State can and do come in various ways in contact with foreign States in time of peace as well as of war. The Law of Nations is therefore compelled to provide certain rules regarding individuals.
Section 289. Now, what is the position of individuals in International Law according to these rules? Since the Law of Nations is a law between States only and exclusively, States only and exclusively are subjects of the Law of Nations. How is it, then, that, although individuals are not subjects of the Law of Nations, they have certain rights and duties in conformity with or according to International Law? Have not monarchs and other heads of States, diplomatic envoys, and even simple citizens certain rights according to the Law of Nations whilst on foreign territory? If we look more closely into these rights, it becomes quite obvious that they are not given to the favoured individual by the Law of Nations directly. For how could International Law, which is a law between States, give rights to individuals concerning their relations to a State? What the Law of Nations really does concerning individuals, is to impose the duty upon all the members of the Family of Nations to grant certain privileges to such foreign heads of States and diplomatic envoys, and certain rights to such foreign citizens as are on their territory. And, corresponding to this duty, every State has by the Law of Nations a right to demand that its head, its diplomatic envoys, and its simple citizens be granted certain rights by foreign States when on their territory. Foreign States granting these rights to foreign individuals do this by their Municipal Laws, and these rights are, therefore, not international rights, but rights derived from Municipal Laws. International Law is indeed the background of these rights in so far as the duty to grant them is imposed upon the single States by International Law. It is therefore quite correct to say that the individuals have these rights in conformity with or according to International Law, if it is only remembered that these rights would not exist had the single States not created them by their Municipal Law.

And the same is valid as regards special rights of individuals in foreign countries according to special international treaties between two or more Powers. Although such treaties mostly speak of rights which individuals shall have as derived from the treaties themselves, this is nothing more than an inaccuracy of language. In fact, such treaties do not create these rights, but they impose the duty upon the contracting States of calling these rights into existence by their Municipal Laws.

Again, in those rare cases in which States stipulate by international treaties certain favours for individuals other than their own subjects, these individuals do not acquire any international rights under these treaties. The latter impose the duty only upon the State whose subjects these individuals are of calling those favours into existence by its Municipal Law. Thus, for example, when articles 5, 25, 33, and 44 of the Treaty of Berlin, 1878, made it a condition of the recognition of

Bulgaria, Montenegro, Servia, and Roumania, that these States should not impose any religious disability upon their subjects, the latter did not thereby acquire any international rights. . . .

Now it is maintained that, although individuals cannot be subjects of International Law, they can nevertheless acquire rights and duties from International Law. But it is impossible to find a basis for the existence of such rights and duties. International rights and duties they cannot be, for international rights and duties can only exist between States. Likewise they cannot be municipal rights, for municipal rights and duties can only be created by Municipal Law. The opponents answer that such rights and duties nevertheless exist, and quote for example articles 4 and 5 of Convention XII (concerning the establishment of an International Prize Court) of the second Hague Peace Conference, according to which individuals have a right to bring an appeal before the International Prize Court. But is this a real right? Is it not more correct to say that the home States of the individuals concerned have a right to demand that these individuals can bring the appeal before the Court? Wherever International Law creates an independent organisation, such as the International Prize Court at the Hague or the European Danube Commission and the like, certain powers and claims must be given to the Courts and Commissions and the individuals concerned, but these powers and claims, and the obligations deriving therefrom, are neither international nor municipal rights and duties: they are powers, claims, and obligations existing only within the organisations concerned. To call them rights and duties—as indeed the respective treaties frequently do—is a laxity of language which is quite tolerable as long as one remembers that they neither comprise any relations between States nor any claims and obligations within the province of Municipal Law.

Section 290. But what is the real position of individuals in International Law, if they are not subjects thereof? The answer can only be that they are objects of the Law of Nations. They appear as such from many different points of view. When, for instance, the Law of Nations recognises the personal supremacy of every State over its subjects at home and abroad, these individuals appear just as much objects of the Law of Nations as the territory of the States does in consequence of the recognised territorial supremacy of the States. When, secondly, the recognised territorial supremacy of every State comprises certain powers over foreign subjects within its boundaries without their home State's having a right to interfere, these individuals appear again as objects of the Law of Nations. And, thirdly, when according to the Law of Nations any State may seize and punish foreign pirates on the Open Sea, or when belligerents may seize and punish neutral blockade-runners and carriers of contraband on the Open Sea without their
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home State's having a right to interfere, individuals appear here too as objects of the Law of Nations.

Section 291. If, as stated, individuals are never subjects but always objects of the Law of Nations, then nationality is the link between this law and individuals. It is through the medium of their nationality only that individuals can enjoy benefits from the existence of the Law of Nations. This is a fact which has its consequences over the whole area of International Law. Such individuals as do not possess any nationality enjoy no protection whatever, and if they are aggrieved by a State they have no way of redress, there being no State which would be competent to take their case in hand. As far as the Law of Nations is concerned, apart from morality, there is no restriction whatever to cause a State to abstain from maltreating to any extent such stateless individuals. On the other hand, if individuals who possess nationality are wronged abroad, it is their home State only and exclusively who has a right to ask for redress, and these individuals themselves have no such right. It is for this reason that the question of nationality is a very important one for the Law of Nations, and that individuals enjoy benefits from this law not as human beings but as subjects of such States as are members of the Family of Nations.

Section 292. Several writers maintain that the Law of Nations guarantees to every individual at home and abroad the so-called rights of mankind, without regarding whether an individual be stateless or not, or whether he be a subject of a member-State of the Family of Nations or not. Such rights are said to comprise the right of existence, the right to protection of honour, life, health, liberty, and property, the right of practising any religion one likes, the right of emigration, and the like. But such rights do not in fact enjoy any guarantee whatever from the Law of Nations, and they cannot enjoy such guarantee, since the Law of Nations is a law between States, and since individuals cannot be subjects of this law. But there are certain facts which cannot be denied at the background of this erroneous opinion. The Law of Nations is a product of Christian civilisation and represents a legal order which binds States, chiefly Christian, into a community. It is therefore no wonder that ethical ideas which are some of them the basis of, others a development from, Christian morals, have a tendency to require the help of International Law for their realisation. When the Powers stipulated at the Berlin Congress of 1878 that the Balkan States should be recognised only under the condition that they did not impose any religious disabilities on their subjects, they lent their arm to the realisation of such an idea. Again, when the Powers after the beginning of the nineteenth century agreed to several international arrangements in the interest of the abolition of the slave trade, they fostered the realisation of another of these ideas. And the innumerable treaties between

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the different States as regards extradition of criminals, commerce, navigation, copyright, and the like, are inspired by the idea of affording ample protection to life, health, and property of individuals. Lastly, there is no doubt that, should a State venture to treat its own subjects or a part thereof with such cruelty as would stagger humanity, public opinion of the rest of the world would call upon the Powers to exercise intervention for the purpose of compelling such State to establish a legal order of things within its boundaries sufficient to guarantee to its citizens an existence more adequate to the ideas of modern civilisation. However, a guarantee of the so-called rights of mankind cannot be found in all these and other facts. Nor do the actual conditions of life to which certain classes of subjects are forcibly submitted within certain States show that the Law of Nations really comprises such guarantee.

H. Lauterpacht

Revision of Oppenheim (1955)

Section 288. The individuals belonging to a State can, and do, come in various ways in contact with foreign States in time of peace as well as war. Moreover, apart from being nationals of their States, individuals are the ultimate objects of International Law—as they are, indeed, of all law. These are the reasons why the individual is often the object of international regulation and protection.

Section 289. Since the Law of Nations is primarily a law between States, States are, to that extent, the only subjects of the Law of Nations. How is it, then, that, although individuals are not normally subjects of the Law of Nations, they have certain rights and duties in conformity with, or according to, International Law? Have not monarchs and other Heads of States, diplomatic envoys, and even private citizens, certain rights according to the Law of Nations whilst on foreign territory? The answer to these questions is that, as a rule, what the Law of Nations really does concerning individuals is to impose upon all States the duty to grant certain privileges to such foreign Heads of States and diplomatic envoys, and certain rights to such foreign citizens, as are on their territory. And, as corresponding to this duty, every State has by the Law of Nations a right to demand that its Head, its diplomatic envoys, and its citizens be granted certain rights by

Lauterpacht's changes and additions are italicized.