Notes

Chapter 1

1. Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge: Cambridge University Press, 2004), 51.
2. Nicholas Greenwood Onuf, "The Constitution of International Society" *European Journal of International Law* 5 (1999): 1–19.
3. H. L. A. Hart, *The Concept of Law* 2nd ed. (Oxford: Oxford University Press, 1961 [1997]), 79–99.
4. "Secondary rules are all concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined." Hart (1961), 94.
5. Both "Positivism" and "Voluntarism" are terribly vexed terms; as they will figure prominently throughout, some preliminary clarification is in order. As it will be used here, Positivism refers generally to its usage in legal theory; in that context, it denotes laws that have been set out—posited—by human lawmakers, rather than being intrinsic to the natural order (Natural Law) or ordained by god (Divine Law). Having been posited, there will always be some form or another of evidence of the law and its content. Positivism also tends toward a separation of law and ethics—again in distinction from naturalism. "Voluntarism," as it is used in international law, is related doctrinally to Positivism; it holds that legal obligation over an agent can only be created by the consent of that agent, that is, for a state to be legally bound it must have consented (willed) to be bound. On the term's usage in ethics, see J. B. Schneewind, *The Invention of Autonomy* (Cambridge: Cambridge University Press, 1998), 8–9, 21–36, 95–100; Knud Haakonssen, *Natural Law and Moral Philosophy* (Cambridge: Cambridge University Press, 1996), 19–23, 45–51, 66–71.

6. Höffe uses the term "categorical principle" in a slightly different context. Ottfried Höffe, *Categorical Principles of Law*, trans. Mark Migotti (University Park: Penn State Press, 2002).
7. Immanuel Kant, *Groundwork for the Metaphysics of Morals* (1785), 4: 414–421.
8. *Vienna Convention on the Law of Treaties* 1155 U.N.T.S. 331, UN Doc. A/CONF.39/27 (1969).
9. This understanding comports up to a point with Kelsen's idea of the *Grundnorm.* He does not attribute peremptory status to the *Grundnorm,* but assigns it a more narrow functional role. Hans Kelsen, *Pure Theory of Law* 2nd ed. (Clark: The Lawbook Exchange, Ltd., 2005 [1967]), 8, 193–195.
10. On the circumstances precluding wrongfulness for violating an international obligation see the *Articles on the Responsibility of States for Internationally Wrongful Acts* (2001), Articles 20–26; Lauri Hannikainen, *Peremptory Norms in International Law* (Helsinki: Finnish Lawyers' Publishing Company, 1988), 249–257.
11. Richard Rorty, *Contingency, Irony and Solidarity* (Cambridge: Cambridge University Press, 1989), 73.
12. The imposition of indemnities—particular upon the state or states losing a war—remained a punitive practice into the twentieth century, but one lacking the normative basis of traditional international punishment.
13. The term "personate" comes from Hobbes. See Chapter 6.
14. There is a strand of contemporary international punishment that does involve the punitive use of force; the matter is expertly discussed in Anthony F. Lang, *Punishment, Justice and International Relations: Ethics and Order After the Cold War* (London: Routledge, 2008).

Chapter 2

1. See *inter alia* F. H. Hinsley, *Sovereignty* 2nd ed. (Cambridge: Cambridge University Press, 1986); Nicholas Greenwood Onuf, "Sovereignty, Outline of a Conceptual History," *Alternatives* 16 (1991): 425–446 (reprinted in expanded version in Onuf, *The Republican Legacy in International Thought* (Cambridge: Cambridge University Press, 1998), 113–138; Jens Bartelson, *A Genealogy of Sovereignty* (Cambridge: Cambridge University Press, 1995); Hideaki Shinoda, *Re-Examining Sovereignty: From Classical Theory to the Global Age* (New York: St. Martin's Press, 2000); R. B. J. Walker, *Inside/Outside: International Relations*

as Political Theory (Cambridge: Cambridge University Press, 1993), 153–183; Thomas J. Biersteker and Cynthia Weber, *State Sovereignty as Social Construct* (Cambridge: Cambridge University Press, 1996); Richard Ashley, "Untying the Sovereign State: A Double Reading of the Anarchy Problematique," *Millennium* 17 (1988): 227–262; Daniel Philpott, *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations* (Princeton: Princeton University Press, 2001); Hendryk Spruyt, *The Sovereign State and its Competitors: An Analysis of Systems Change* (Princeton: Princeton University Press, 1994): 151–180; Michael Ross Fowler and Julie Marie Bunck, *Law Power and the Sovereign State: The Evolution and Application of the Concept of Sovereignty* (University Park: The Pennsylvania State University Press, 1996); Alan James, *Sovereign Statehood: The Basis of International Society* (London: Allen and Unwin, 1986); John Hoffman, *Sovereignty* (Minneapolis: University of Minnesota Press, 1998); Wouter G. Werner and Jaap H. de Wilde, "The Endurance of Sovereignty," *European Journal of International Relations* 7 (2001): 283–313; Andreas Osiander, "Sovereignty, International Relations and the Westphalian Myth," *International Organization* 55 (2001): 251–287.

2. Cynthia Weber, *Simulating Sovereignty* (Cambridge: Cambridge University Press, 1995), 11–29.
3. Hugo Grotius, *De Jure Belli ac Pacis*. II.I.II. Emphasis added.
4. Benjamin Straumann, " 'Ancient Caesarian Lawyers' in a State of Nature: Roman Tradition and Natural Rights in Hugo Grotius' *De Jure Praedae*," *Political Theory* 34/3 (2006b), 328–350; Benjamin Straumann, "Is Modern Liberty Ancient? Roman Remedies and Natural Rights in Hugo Grotius' Early Works on Natural Law," *International Law and Justice Working Papers* 2006/11 (2006c), 1–35. Hoag demonstrates similarly the way in which Grotius relied heavily on Augustine—not noting the latter's reliance on Roman jurisprudence. Robert Hoag, "The Recourse to War as Punishment: A Historical Theme in Just War Theory," *Studies in the History of Ethics* 2 (2006): 5–8.
5. When discussing Grotius, I use "nation" rather than "state" for a number of reasons: it is not clear that the Latin terms he used carried the full signification of our modern term. Writing in Latin, he used *civitas* and its cognates, *communis* and its cognates, *respublica* and its cognates, and *gentium.* Translations of Grotius do not agree with each other, and are internally inconsistent in the translation of these terms; sometimes a term is rendered "state," sometimes "nation," at other times "country,"

and even occasionally "commonwealth." Some of the problem lies in Grotius's text itself; it is not always clear contextually whether he sought to signify different things with the differing Latin terms, or if he was using them simply as synonyms. Although Goebel presents an impressive argument in favor of Grotius having a full-fledged conception of the sovereign state—or at least of such an idea being available to him in legal and diplomatic practice, if not doctrine—there remains little evidence for such in the text itself. Finally, as Goebel notes, in cases in which Grotius is referring to their relations with one another, instead of a term like *civitas,* he prefers *gentium*—a word well established as equivalent to nation—*princeps,* referring to the sovereign of the state, or *populus,* indicating the people. We will see a similar problem with the concept of "sovereignty" in Grotius *infra*. Goebel, "The Equality of States part 3," *Columbia Law Review* 23 (1923): 266–271.

6. *De Jure Belli ac Pacis*. II.XX.XL.1. Quoted also in Tuck, 102–103.
7. Grotius, however, did allow that ignorance might mitigate and *possibly* even exculpate guilt. The range of those to whom he might have extended this consideration was presumably extraordinarily narrow. *De Jure Belli ac Pacis*. II.XX.XLIII.2.
8. Hoag, 15.
9. *De Jure Praedae Commentarius,* XII. 274.
10. Tuck, 86, quoting Grotius, *De Jure Praedae Commentarius,* I, 21.
11. *De Jure Belli ac Pacis,* II.XX.VII.5; II.XX.IX.1–2; II.XX.XII.1. Tuck, 82 also quotes from Grotius's *De Jure Praede:*

> Is not the power to punish essentially a power that pertains to the state? Not at all! On the contrary, just as every right of the magistrate comes to him from the state, so has the same right come to the state from private individuals . . . since no one is able to transfer a thing that he never possessed, it is evident that the right of chastisement was held by private persons before it was held by the state.

Grotius, *De Jure Praede,* 91–92.

12. Straumann, "The Right to Punish as a Just Cause of War in Hugo Grotius' Natural Law," *Studies in the History of Ethics* 2 (2006a): 7.
13. Straumann (2006a), 5.
14. *Digest,* 50.17.54, quoted in Straumann (2006a), 6. On page 8, Straumann notes that the right to punish has not passed from the individual's hands completely; it is retained residually in situations in which there is no government present. This is noted as well by

Brown. Chris Brown, *Sovereignty, Rights and Justice: International Political Theory Today* (Cambridge: Polity Press, 2002), 30–31.

15. On reprisal see *De Jure Belli ac Pacis,* III.II *passim*.
16. Tuck, 88; Straumann (2006a), 8, 12–14.
17. Straumann (2006a), 10.
18. *De Jure Belli ac Pacis,* II.XX.XL.3.
19. *De Jure Belli ac Pacis,* II.XX.XLIV, II.XX.XLVIII, and II.XX.XLVII.4, respectively.
20. In this Grotius also broke with some of his more recent predecessors such as Suarez. John Finnis, "The Ethics of War and Peace in the Catholic Natural Law Tradition," in Terry Nardin, ed., *The Ethics of War and Peace: Secular and Religious Perspectives* (Princeton: Princeton University Press, 1996), 21.
21. *De Jure Belli ac Pacis,* III.VIII, III.XV (subsidiary discussions at III.IV, III.V, III.VI, III.XI–XIII.
22. *De Jure Praedae,* XII. 271.
23. *De Jure Belli ac Pacis,* II.XXI.I–II.
24. *De Jure Praedae,* XII. 272–273.
25. Maritain captures the matter nicely:

> Just as the words *poliz* or *civitas* are often translated by "state" (though the most appropriate name is "commonwealth" or "body politic," not "state"), so the words *principatus* and *suprema potestas* are often translated by "sovereignty" and the words *kurioz* or *princeps* ("ruler") by "sovereign." This is a misleading translation, which muddles the issue from the start. *Principatus* ("principality") and *suprema potestas* ("supreme power") simply mean "highest ruling authority," not sovereignty.

Maritain, "The Concept of Sovereignty," *American Political Science Review* 44 (1950): 344.

26. Goebels goes on to claim that Grotius "had a clear notion of the state as the possessor of sovereignty," but his invocation of the passage cited immediately *supra* is hardly as definitive as he supposes. Goebels, 270. Tuck asserts of a strong notion of sovereignty in Grotius as well. Tuck, 82, 96.
27. Tuck, 158.
28. Tuck, 159.
29. Tuck, 161.
30. Tuck, 171–180; cf. Farr, "Locke, Natural Law, and New World Slavery," *Political Theory* 36 (2008): 500–504.
31. John Locke, *Second Treatise of Government,* §7. Also quoted in part in Tuck, 170–171 and in Straumann (2006a): 13.

32. *Second Treatise,* §8.
33. Alex Tuckness, "Punishment, Property and the Limits of Altruism: Locke's International Asymmetry," *American Political Science Review* 102 (2008): 477.
34. Torbjørn Knutsen, *A History of International Relations Theory* 2nd ed. (Manchester: Manchester University Press. 1997), 90–92.
35. *Majestas,* or its English rendering, "majesty," plays an important role in Onuf's account of the conceptual history of sovereignty. Onuf (1998), 119, 126–130.
36. Gottfried Willhelm Leibniz, *Caeserinus Fürstenerius,* in Patrick Riley, ed., *Leibniz: Political Writings* (Cambridge: Cambridge University Press 1988), 113.
37. Riley, "Introduction" (quoting Leibniz, *Entrétiens de Philarete et d'Eugène,* F de C VI, p. 347), 27.
38. "Thus it can happen that another in our territory has the right of hunting, the right of mining, of hiring, of taxes; perhaps even the right of supreme jurisdiction or the right of judging capital crimes and exacting the penalty from condemned men, or even what is called the right of last instance, or the right to be appealed to over him who has territorial hegemony." Leibniz, *Caeserinus Fürstenerius,* in Riley, ed., 116.
39. Leibniz, *Caeserinus Fürstenerius,* in Riley, ed., 114.
40. Leibniz, *Caeserinus Fürstenerius,* in Riley, ed., 116.
41. Knutsen, 91.
42. Riley, ed., 27.
43.
    > In addition to internal power and freedom, the possession of . . . sovereignty required sufficient consequence and influence to participate in European affairs . . . such a sovereignty would be in respect to other legal subjects on a basis of parity in the enjoyment of rights, irrespective of the size of its territory . . . the possession of external sovereignty itself established equal legal capacity. Goebel, 275–276.

44. Christian Wolff, *Jus Gentium Methodo Scientificum Pertractum* (1749), *Prolegomena* §§4–6.
45. Wolff (1749), §§22–25.
46. Wolff (1749), §§2.
47. Wolff (1749), §§7–15.
48. Wolff (1749), §§16–18.
49. Wolff (1749), §§13, 15.
50. Tuck, 191, citing Wolff (1749), §258.
51. Tuck, 190.

52. Tuck, 192, citing Emer Vattel, *Le Droit des Gens, ou Principes de la Loi Naturelle, Appliqués à la Conduite et aux Affaires des Nations et des Souverains* (1758). 9a. Onuf (1998), 77–81.
53. Tuck, 194, citing Vattel, 131 (II.IV. §54). See also Vattel, Introduction, §18.
54. Vattel, II.VII.73.
55. Vattel, Introduction, §§24–27.
56. Simpson (2004), 62–131.
57. Thomas Hobbes, *Leviathan* (1651), I.XVI. Samuel Pufendorf, *De Jure Naturae et Gentium Libro Octo* (1672). I.1.12. Vattel, Introduction, §§2, 4, 15, 16, 18–20; I.I.§1, 4; II.III. §35, 36.
58. Vattel, Introduction, §§18–20; II.IV. §54, 55; an even more rigid line is taken by Hegel in *Elements of the Philosophy of Right* (1821).
59. Distillation from Baker, "The Doctrine of Legal Equality of States," *British Yearbook of International Law* 4 (1923): 11.
60. Lassa Oppenheim, *International Law* 2nd ed. Volume 1 (New York: Longmans 1912), 169. Quoted in Baker, 12.
61. Simpson (2004), 28.
62. Hans Kelsen, "The Principle of Sovereign Equality of States as a Basis for International Organization," *Yale Law Journal* 53 (1944): 209. Simpson calls this the "principle of consent." Simpson (2004), 28.
63. There are holes in this, obviously, such as the principle that new states are "born" fully encumbered by existing customary legal obligations to which they never had the opportunity to consent or object. Michael Byers, *Custom, Power and the Power of Rules* (Cambridge: Cambridge University Press 1999), 77–78; Sir Humphrey Waldock, "General Course on Public International Law," *Recueil des Cours* 106 (1962) 49–53.
64. Simpson, 48, 51.
65. Vattel, Introduction, §§16, 20, 21.
66. G. W. F. Hegel, *Philosophy of Right,* §§333–334.
67. Baker, 6.
68. Kelsen (1944), 208.
69. John Westlake, *International Law Part 1: Peace* 1st ed. (Buffalo: W. S. Hein, 1910 (2000), 308). Quoted in Baker, p. 4. Fowler and Bunck reach much the same conclusion: "Thus sovereignty came to denote the independence of a state interacting in a system of states." Fowler and Bunck, 5.
70. Yoram Dinstein, "Par in Parem non Habet Imperium" *Israel Law Review* 1 (1966): 408.

71. Ernst H. Kantorowicz, *The Kings Two Bodies: A Study in Medieval Political Theology* (Princeton: Princeton University Press 1957), 452, n. 4.
72. Dinstein, 409.
73. Goebel, "The Equality of States, part 2," 129–130. The concept of the "political body" will be extensively analyzed in Chapter 6.
74. Goebel, "The Equality of States, part 2," 140.
75. Goebel, "The Equality of States, part 2," 140–141.
76. Dinstein, 413. A note of caution is warranted with this definition's importation of elements of the concept *potestas* to the definition of *imperium;* the former originally (despite the literal meaning of "power") connoting something closer to authority, and the latter, carrying from its military origins, the power to command and coerce. Hans Julius Wolff, *Roman Law* (Norman: University of Oklahoma Press, 1982), 27–29. We will return to this topic in the next chapter.
77. Robert Phillimore, *Commentaries Upon International Law* vol. 3. (Littleon: Fred B. Rothman and Co., 1857 (1985)), IX.II.VIII.
78. Westlake, 434. Quoted in Arnold D. McNair, "The Legal Meaning of War and the Relation of War to Reprisals," *Transactions of the Grotius Society* 11 (1925): 36.
79. Derek Bowett, "Reprisals Involving Recourse to Armed Force," *American Journal of International Law* 66 (1972): 3. Nearly identical descriptions are given in Tucker and Taulbee and Anderson. Robert W. Tucker, "Reprisals and Self-Defense: The Customary Law," *American Journal of International Law* 66 (1972): 589; James Larry Taulbee and John Anderson, "Reprisal *Redux,*" *Case Western Journal of International Law* 16 (1984): 312.
80. Further confusion is engendered by the multiple uses of the term "reprisal"; broadly speaking they might first be divided into "forcible" reprisals and "belligerent" reprisals. Forcible reprisal is the retaliatory / punitive use of force by one state against another for a violation of an international obligation that has not been redressed, and is thus subsumed under the *jus ad bellum*. Belligerent reprisals are a part of the *jus in bello*. They deal with reprisals by one belligerent against parties from their adversary (historically civilians or prisoners of war) for antecedent violations of the laws of armed conflict. Although not banned outright, the scope of belligerent reprisal has been greatly narrowed in the last century by a succession of treaties: Article 50 of the 1907 *Annex to Hague Convention IV Respecting the Laws and Customs of War on Land;* the 1929 *Geneva Convention Relative to the Treatment of Prisoners*

of War; Articles 16, 47, 13; and 33, respectively, of the four 1949 *Geneva Conventions*. Henry Wager Halleck, "Retaliation in War," *American Journal of International Law* 6 (1912): 107–118; Françoise J. Hampson, "Belligerent Reprisals and the 1977 Protocols to the Geneva Conventions of 1949," *International and Comparative Law Quarterly* 37 (1988): 818–843; Ingrid Detter, *The Laws of War* (Cambridge: Cambridge University Press 2000), 299–303; Philip Sutter, "The Continuing Role for Belligerent Reprisals," *Journal of Conflict and Security Law* 13 (2008): 93–122; Robert Kolb and Richard Hyde, *An Introduction to the Law of Armed Conflict* (Oxford: Hart Publishing 2008), 173–177.

81. Vattel, II.IV.51–52; he revisits the matter in nearly identical terms at II.IV.65–69.
82. List distilled from Lang (2008), 11–19.
83. This is the essence of belligerent reprisals.
84. But see Vattel, II.IV.51–52; II.IV.55; III.III.41 on reprisals.
85. Theodore D.Woolsey, *Introduction to the Study of International Law* 4th (Littleton: Fred B. Rothman and Co., 1871 (1999), 174. Emphasis in original. Kelly, 4–5 quotes some of this passage from a different edition of Woolsey.
86. Wilhelm G. Grewe, *The Epochs of International Law,* Michael Byers, trans. (New York: de Gruyter 2000), 201.
87. It is noteworthy that Wolff held the right to engage in reprisal to be limited strictly to nations. Wolff (1749), §589.
88. Grover Clark, "The English Practice with Regard to Reprisals by Private Persons," *American Journal of International Law* 27 (1933): 694–723. Indeed, domestically reprisal could be carried out at the level of towns: "As late as the quarter of the 13th century, it was legal, in England, for the authorities of one town, on behalf of the private citizens of the town, to take reprisals on the citizens of another . . . It will be observed, however, that the reprisals were not taken by the private persons who had suffered, but by the authorities of the towns on behalf of those persons." Clark, 704–705.
89. Michael J. Kelly, "Time Warp to 1945—Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law," *Journal of Transnational Law and Policy* 13 (2003): 4.
90. Kelly, 4.
91. Wolff treats the capture of individuals as part of reprisal under the heading of "androlepsy." While he does not allow captives of this sort to be killed if compensation is not forthcoming, he does permit their being "kept in prison forever as captives,

or where slavery is practiced, to become slaves." Wolff (1749), §§ 592–595.

92. Clark, 698.
93. Clark, 700–701.
94. Clark, 695–698; 720. As Woolsey presents the matter at p. 195:

> Every authority in those times could make war, could grant letters of reprisals. But when power began to be more centralized, the sovereign gave to magistrates, governors of provinces and courts the right of issuing them, until at length this right was reserved for the central government alone.

95. Kelly, 5.
96. Clark, 711.
97. Phillimore, IX.II.X.
98. Henry Wheaton, *Elements of International Law* (1866), IV.I.291. Also cited in Kelly, 5. Of reprisals of this type, an author only recorded as B. F. stated, "A commission of general reprisals is stronger than even a declaration of war, authorizing the seizure of the goods of the foreign subjects everywhere and immediately." B. F., "The International Law of Embargo and Reprisal," *Law Magazine or Quarterly Review of Jurisprudence* 24 (1840): 74.
99. Grewe, 369, 525.
100. Grewe, 203. Privateering (and its relation to piracy) will be discussed in more detail in Chapter 5.
101. Janice E. Thomson, *Mercenaries, Pirates and Sovereigns: State-Building and Extraterritorial Violence in Early-Modern Europe* (Princeton: Princeton University Press, 1994), 22–26.
102. Clark, 702. Emphasis in original.
103. Bowett analyzes a series of 20 reprisals involving Israel and its neighbors spanning the years 1953–1970, as well as a British action against Yemen, and Portuguese reprisals against Zambia, Senegal, and Guinea. Kelly looks more narrowly at the British Yemen reprisal, Israel's 1972 reprisals against Lebanon, its 1985 raid on Tunis, the 1986 U.S. action against Libya, and its 1988 reprisal against Iranian oil platforms. Bowett, 4–17, 33–36; Kelly, 14–19.
104. Falk offers a significantly more detailed list consisting of 12 items. Richard Falk, "The Beirut Raid and the International Law of Retaliation," *American Journal of International Law* 63 (1969): 441–442.
105. Tucker, 592; Taulbee and Anderson, 312.
106. Tucker, 593.

107. Tucker, 591–592; McDougal and Feliciano are noteworthy for holding the latter view, Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order* (New Haven: New Haven Press 1961), 682.
108. Taulbee and Anderson, 314.
109. Falk, 429; Bowett, 1–2; Tucker, 586–587; Taulbee and Anderson, 309–310; Jeffrey Allen McCredie, "The April 14, 1986 Bombing of Libya: Act of Self-Defense or Reprisal?," *Case Western Journal of International Law* 19 (1987): 237; Detter, 87–88; Kelly, 12–13.
110. Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Oxford University Press 1963), 281. Quoted in Falk, 428.
111. *Legality of the Threat of Use of Nuclear Weapons,* Advisory Opinion of 8 July 1996, ¶ 46.
112. For an extended analysis of the raid on Libya as a reprisal, see McCredie, *passim*.
113. Although in his denunciation of sovereignty both "as a word and as a concept" Maritain puts this forward as a logical conclusion of the meaning of sovereignty in its international context, it is not a position he held. Maritain, 343, 355–356.
114. Wheaton, IV.I.290.
115. *Leviathan.* I.XVIII.7; John Austin, *The Province of Jurisprudence Determined* (New York: The Lawbook Exchange 1832 (1999)), 5–11.
116. Austin, 110–111; 132.
117. Hans Kelsen, "The Essence of International Law," in Leo Gross, Karl Deutsch & Stanley Hoffmann, eds., *The Relevance of International Law* (Cambridge, MA: Schenkman Publishing 1968), 85–89; see also Hans Kelsen, *Principles of International Law* (Clark, NJ: The Lawbook Exchange. 1952 (2003)), 19–25; Hans Kelsen, *Law and Peace in International Relations* (Buffalo: William S. Hein and Co. 1942 (1997)), 31–34; Simpson (2004), 64.
118. Kelsen (1968), 85–86.

Chapter 3

1. R. St. J. MacDonald, "Fundamental Norms in Contemporary International Law," *Canadian Yearbook of International Law* 25 (1987): 134.
2. Prosper Weil, "Towards Relative Normativity in International Law," *American Journal of International Law* 77 (1983). Weil's skepticism regarding hierarchies of norms—inspired in part by the

development of the concept of *jus cogens*—has led to a number of responses: Ulrich Fastenrath, "Relative Normativity in International Law," *European Journal of International Law* 4 (1993): 305–340; J. H. H Weiler and Andreas L. Paulus, "The Structure of Change in International Law or Is There is Hierarchy of Norms in International Law?" *European Journal of International Law* 8 (1997): 545–565; Martti Koskenniemi, "Hierarchy in International Law: A Sketch," *European Journal of International Law* 8 (1997): 566–582; Juan Antonio Carrillo Salcedo, "Reflections on the Existence of a Hierarchy of Norms in International Law," *European Journal of International Law* 8 (1997): 583–595; Jason Beckett, "Behind Relative Normativity: Rules and Process as Prerequisites of Law," *European Journal of International Law* 12 (2001): 627–650; Dinah Shelton, "Normative Hierarchy in International Law," *American Journal of International Law* 100 (2006): 291–323. The phrases "more binding" and "more imperative" are used in a different but related context in Grigory I. Tunkin, "*Jus Cogens* in Contemporary International Law," *University of Toledo Law Review* 3 (1971): 116.

3. "State practice cited in support of overriding norms of *jus cogens* seems suspect and fragmented." Gordon A. Christenson, "*Jus Cogens:* Guarding Interests Fundamental to International Society," *Virginia Journal of International Law* 28 (1988): 587.
4. Except where otherwise noted, the lexical and etymological information in this section comes from either the *Oxford English Dictionary* or the *Oxford Latin Dictionary*.
5. One also occasionally finds "compulsory" and "mandatory."
6. Gaius, *Institutes* IV.120–121.
7. Wolff (1982), 28. Emphasis added.
8. Nicholas Greenwood Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (Columbia: University of South Carolina Press, 1989), 87, 93, 211–212. In a later work, Onuf uses the verb "demand" as exemplary. Nicholas Greenwood Onuf, "Constructivism: A User's Manual," in Vendulka Kubálková et al., eds, *International Relations in a Constructed World* (Armonk: M.E. Sharpe, 1998), 66.
9. Kant, 4:416.
10. "Peremptory norms are not just binding but operate in an absolute and unconditional way." Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2006), 67.
11. "Anything that is granted to someone without legal compulsion counts as a gift." *Digest* 39.5.29. The translation is from *The*

Digest of Justinian, trans. Watson (College Station: University of Pennsylvania Press, 1998). Suy hastens to note that "this passage has nothing to do with the traditional notion of jus cogens" of international law. Erik Suy, "The Concept of Jus Cogens in Public International Law" in the Lagonissi Conference on International Law Papers and Proceedings II: The Concept of Jus Cogens in International Law (Geneva: Carnegie Endowment for International Peace (European Centre), 1967), 18.

12. "Public law cannot be discharged [changed] by private pacts." (Papinian) *Digest* 2.14.38; cited in Suy, 18 and Vladimir Paul, "Legal Consequences of Conflict Between a Treaty and an Imperative Norm of General International Law," *Österreichische Zeitschrift für Öffentliches Recht* 21 (1974): 20. Translation from Watson; the bracketed emendation is mine. Cf. *Digest* 50.17.45, *privatorum conventio juri publico non derogat; the agreement of private individuals does not derogate from public law*. Cited in Georg Schwarzenberger, "International Jus Cogens?" *Texas Law Review* 43 (1965): 456, n. 5; translation from Watson. Gaius asserted that since the Law of Solon (sixth century B.C.), anything that citizens "agree by themselves will be valid unless forbidden by public statutes." *Digest,* 47.22.4; cited in Suy, 19; translation from Watson.
13. Christenson, (1988), 631, 633.
14. Egon Schwelb, "Some Aspects of International *Jus Cogens* as formulated by the International Law Commission," *American Journal of International Law* 61 (1967): 948; Suy, p. 19; Levan Alexidze, "The Legal Nature of *Jus Cogens* in Contemporary International Law," *Recueil des Cours* 172 (1981): 233. Alexidze includes Savigny, Pukhta, Windcheid and Baron among the Pandectists. Alexidze, 234, 266, n. 23.
15. Schwarzenberger, 456–457; Schwelb, 948–949; Suy, 18–22; Paul, pp. 44–46; Christos L. Rozakis, *The Concept of Jus Cogens in the Law of Treaties* (New York: North-Holland Publishing Co., 1976), 1–2, n. 1; Alexidze, 233–242; Milenko Kreça, "Some General Reflections on Main Features of *Jus Cogens* as Notion of International Law" [*sic*] in Gutiérrez, et. al., *New Directions in International Law* (Frankfurt: Campus Verlag, 1982), 27; Christenson (1988): 597–602 (Christenson is deeply skeptical of the analogy); A. Mark Weisburd, "The Emptiness of the Category of *Jus Cogens,* as Illustrated by the War in Bosnia-Herzegovina," *Michigan Journal of International Law* 17 (1995): 25–27 (Weisburd is also strongly critical of the analogy); Alfred P. Rubin, "*Actio Popularis, Jus Cogens,* and Offenses *Erga Omnes?*" *New England Law Review* 35 (2001): 272–273; Orakhelashvili, 11–26.

16. Paul, 20; Karen Parker and Lyn Beth Neylon, "*Jus Cogens:* Compelling the Law of Human Rights," *Hastings International and Comparative Law Review* 12 (1989): 419–422.
17. Wolff, *Jus Gentium, Prolegomena,* §§4–6. Emphasis added.
18. Vattel, *Le Droit des Gens,* Introduction, §§7–9.
19. Christenson (1988): 612; Michael Byers "Conceptualizing the Relationship between *Jus Cogens* and *Erga Omnes* Rules," *Nordic Journal of International Law* 66 (1997): 224.
20. Alfred von Verdross, "Forbidden Treaties in International Law," *American Journal of International Law* 31 (1937): 571–577. Both Schwelb and MacDonald, however, credit the ILC's second Rapporteur at the Vienna Convention, Lauterpacht's 1953 "Report on the Law of Treaties" to the International Law Commission for the "doctrine's reappearance." Schwelb, 949; MacDonald, 29. As a *concept*, but without express invocation of the name, *jus cogens* was discussed by both Bluntschli and Hall in the nineteenth century. Paul, 20, n. 3, 4. Their formulations, especially Hall's, were clear precursors to Verdross's.
21. Verdross, 571–572. Rozakis's much later assessment of the orthodox doctrine is more blunt still: "States were unconditionally free to conclude agreements of whatever content, even if contrary to already general rules of law." Rozakis, 3. Janis shares their assessment. Mark W. Janis, "The Nature of *Jus Cogens,*" *Connecticut Journal of International Law* 3 (1988): 362; Rafael Nieto-Navia, "International Peremptory Norms (*Jus Cogens*) and International Humanitarian Law" www.iccnow.org/documents/WritingColumbiaeng.pdf 4.
22. The "General principles" formulation is from Article 38 (1)(c) of the *Statute of the International Court of Justice,* which corresponds to Article 38 (3) of the *Statute of the Permanent Court of International Justice,* Verdross's point of reference.
23. Verdross (1937): 574. Emphasis in original. His emphasis later changed; he subsequently came to include "all rules of general international law created for humanitarian purposes." Alfred Verdross, "*Jus Dispositivum* and *Jus Cogens* in International Law," *American Journal of International Law* 60 (1966): 59–60.
24. Verdross (1937): 574. Although the third and fourth functions have individuals as their objects, they do not entail restrictions on how a state may treat its own nationals.
25. Under the rules of the *Vienna Convention* (Art. 44, ¶5), however, the treaty in its entirety would be void.
26. Verdross (1937): 577.

27. Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties* 2nd ed. (Manchester: Manchester University Press, 1984), 224, cited in Christenson (1988): 591.
28. "Some states or writers maintain that it has been imposed on states as a consequence of natural law, having its source in human nature or emanating from a divine source and so being independent of the will of states." Paul, 29. Danilenko cites the statements of several of the states' representatives to the Vienna Conference that "stressed the fact that *jus cogens* derived its origin from concepts of natural law." Danilenko, 44, n. 7, 8.

    Although many representatives to the Vienna Conference may have been thinking of *jus cogens* in naturalist terms, it is clear from the report of the fourth Special Rapporteur Waldock that the International Law Commission "based its approach to the question of *jus cogens* on positive law much more than on natural law" when drafting the preliminary versions of what became Articles 53 and 64. Danilenko, 45, quoting Waldock from the proceedings of the Vienna Conference, volume I, p. 327. See also Lisa Yarwood, "*Jus Cogens:* Useful Tool or Passing Fancy? A Modest Attempt at Definition," *Bracton Law Journal* 38 (2006): 23–24.
29. Andrea Bianchi, "Human Rights and the Magic of *Jus Cogens,*" *European Journal of International Law* 19 (2008): 492.
30. Orakhelashvili details and dismisses the arguments of a number of dissenters from the general view. Orakhelashvili, 207–208. Tunkin concludes that the rule of Article 53 applies to customary rules as well as treaties. Tunkin, 117; Rozakis, 22.
31. Hannikainen, 6, 201. Emphasis in original.

    "If an international *jus cogens* exists it must, indeed, make necessarily null and void any of those legal acts and actions of States whose object is unlawful . . . Any legal act of whatever nature . . . is unlawful in so far as it infringes a rule of the *jus cogens* . . . one does not see why something which is intolerable as far as international treaties are concerned would not be so in respect of any other legal act." Suy, 75.

    "By its very nature, the notion of *jus cogens* goes beyond the law of treaties and makes itself relevant to the whole structure of international law." Ogawa, "International *Jus Cogens* Revisited," *Kwansei Gakuin Law Review* 12 (1986): 21. Cited in Hannikainen, 201.
32. ILC Report 1966, UN Doc A/6309/Rev. 1, p. 89; cited in Hannikainen, 7. Emphasis added. The ILC has maintained this position in its work on codifying the rules applicable to unilateral acts. Orakhelashvili, 208.

33. *Juridical Condition and Rights of Undocumented Migrants* (Advisory Opinion), ¶99, cited in Orakhelashvili, 207.
34. Orakhelashvili, 206.
35. Christenson (1988): 595, n. 35. The fact that he does not take note of the ILC's commentary must surely undermine his principal claim. Paulus also notes the primary rule character of the ILC's formulation. Andreas L. Paulus, "*Jus Cogens* in a Time of Hegemony and Fragmentation," *Nordic Journal of International Law* 74 (2005): 305. Kawasaki is more skeptical yet. Kyoji Kawasaki, "A Brief Note on the Legal Effects of *Jus Cogens* in International Law," *Hitotsubashi Journal of Law and Politics* 34 (2006): 31–35; Ulf Linderfalk, "The Effects of *Jus Cogens* Norms," *European Journal of International Law* 18 (2008): 856.
36. *United States Diplomatic and Consular Staff in Tehran* (U.S. v Iran), 1979. ¶88. As discussed, "imperative" may not be an exact synonym for "peremptory," but again, in the French text of the *Vienna Convention*, "imperative" is used in place of "peremptory," which adds weight to the conclusion that the Court in *Hostages* was treating the rules regarding the status of diplomatic persons and premises as *jus cogens*. Hannikainen, 192–193.
37. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v U.S.), 1986; Gordon A. Christenson, "The World Court and Jus Cogens," *American Journal of International Law* 81 (1987): 93–101; Christenson (1988): 607, 621, n. 152; Hannikainen, 5, 14, 192–194; Alexidze, 228; Giorgio Gaja, "Jus Cogens Beyond the Vienna Convention," *Recueil des Cours* 173 (1981): 285–286. Kadelbach offers a detailed list. Stefan Kadelbach, "Jus Cogens, Obligations Erga Omnes, and Other Rules—The Identification of Fundamental Norms" in Christian Tomuschat and Jean-Marc Thouvenin, eds, *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Leiden: Martinus Nijhoff Publishers, 2006), 32, n. 45.
38. *Armed Activities on the Territory of the Congo* (DRC v Rwanda) (New Application), 2002, ¶64; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Macedonia), 2007, ¶161.
39. *Prosecutor v Furundzija,* ¶114; also note the discussion at ¶153–156.
40. *Resolution 3/87, Case 9647,* ¶56. Cited in Christenson (1988): 608, 621–623.
41. Hannikainen, 3, 6.
42. Hannikainen, 207.

43. de Hoogh brazenly asserts, "To state that a norm is peremptory means that it is binding on all States alike, whether they are opposed to it or not." A. J. J. de Hoogh, "The Relationship Between *Jus Cogens,* Obligations *Erga Omnes* and International Crimes: Peremptory Norms in Perspective," *Austrian Journal of Public International Law* 42 (1991): 186.
44. In its preparatory work on international crimes and delicts for the *Articles on State Responsibility* (see Chapter 6), the ILC revisited the question of the meaning of "international community as a whole" stating, " 'It certainly does not mean the requirement of unanimous recognition by all members' of the international community; this would give each State a right of veto, which would be unthinkable." Hannikainen, 211; Orakhelashvili, 104–108.
45. Gaja, 283.
46. MacDonald, 130–131. This applies to *jus cogens per se,* not to the individual norms.
47. MacDonald, 136; de Hoogh, 86–187; Byers (1997): 217, 222, 227–228. The persistent objector rule is part of customary international law that holds that a state that objects consistently to a rule of customary law from the very time of its development will not become bound by that rule, whereas states that actively participate in the creation of the rule or states that remain passive in the face of the developing rule will be subject to that rule. On the persistent objector rule, see the *Asylum Case* (Colombia v Peru) ICJ 1957; Michael Akehurst, "Custom as a Source of International Law," *British Yearbook of International Law* 47 (1976): 23–27; Ted L. Stein, "The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law," *Harvard International Law Journal* 26 (1985): 457–482; Jonathan I. Charney, "The Persistent Objector Rule and the Development of Customary International Law," *British Yearbook of International Law* 56 (1985): 1–24; David A. Colson, "How Persistent Must the Persistent Objector Be?" *Washington Law Review* 61 (1986): 957–970; Karol Wolfke, *Custom in Present International Law* 2nd ed. (Dordrecht: Martinus Nijhoff Publishers, 1993), 66–67; Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press, 1999), 180–183.
48. Kreça, 34. Turpel and Sands, conversely, explicitly invoke Rousseau's "general will," but reach the opposite conclusion: "The requirement of acceptance by the international community . . . obviously implies *consent* for peremptory norms." Mary Ellen

Turpel and Phillipe Sands, "Peremptory International Law and Sovereignty: Some Questions," *Connecticut Journal of International Law* 3 (1988): 365, 367; Jean Jacques Rousseau, *Discourse on Political Economy*. ¶12, 15, 16, 23, 58; *Social Contract* II.4.1, 5; IV.1.1. Rousseau, of course, denied that there was or could be a general will encompassing all of humanity. *Geneva Manuscript* I.2.8. A more direct parallel might be found in the work of Heinrich Triepel, who articulated a "doctrine of the common will of States as the basis of international law. The essence of this doctrine was that the will of individual states could not be the source of international law." Grewe, 505.

49. Danilenko, 50.
50. Hannikainen, 12; Linderfalk, 862.
51. Alexidze, 258. MacDonald provides a similar formulation. MacDonald, 130; Hannikainen, 4. Danilenko offers a caveat, however: "Dissenting states cannot succeed in preventing the formation of a rule of *jus cogens*. However, this does not necessarily imply the view that such rules will be opposable to them in cases when they persistently objected to the rules." Danilenko, 54.
52. Paulus offers some tentative answers. Paulus, 303.
53. Kreça's talk of "objective orders" comes close to naturalism. Kreça, 29.
54. Danilenko, 53; Nieto-Navia, 9.
55. Hannikainen, 208.
56. Nicholas Greenwood Onuf and Richard K. Birney, "Peremptory Norms of International Law: Their Source, Function and Future," *Denver Journal of International Law and Policy* 4 (1974): 190, n. 9.
57. In the preparatory work for the *Vienna Convention,* the ILC's Drafting Committee clearly indicated its sense that "general" indeed should be taken to mean "universal." Hannikainen, 209. "Universal" appears only in the Preamble with reference to "the principles of free consent and of good faith and the *pacta sunt servanda* rule" and to "respect for human rights and fundamental freedom for all," so Hannikainen's recourse to the Preamble seems inapposite.
58. Rozakis, 55.
59. Alexidze, 246.
60. Alexidze, 247.
61. Rorty (1989), 73.

    I cannot agree with the assertion that the properties Rorty identifies in the second part of this quote are general properties of deontic language; to accept that position would mean that no

"ought" statement can be justified noncircularly, and that there is no "distance" between the set of moral assertions that comprises our ethics and the primitives of our final vocabulary. For most of the statements to which we ascribe normativity, we do so not by direct reference to our moral simples, but we predicate them upon complex congeries of other interlocking norms. In practice, we defend the normativity of a practice, belief, or claim by reference to an antecedent, higher-order norm. Defending any deontic statement might yield a *regress* that would ultimately lead to the primitives of the final vocabulary, but that is not the same thing as saying that all deontic language and hence all "ought" statements are "as far as we can go with language."

62. Verdross (1966), 58.
63. Mexican representative to the Vienna Convention, quoted in Yarwood, 28.
64. Kreça, 31.
65. Rorty does not believe that "searches for a final vocabulary are destined to converge," but simply because they are not so destined does not mean that on some points they will not converge, or that it would be inappropriate to speak of suitably thin shared final vocabulary. Rorty (1989), 76.

    This "we" is a very malleable referent that, in principle, extends from the individual to the whole of the international society. Although universally agreed upon norms are vanishingly rare, *jus cogens* has been defined in such a way as to negotiate this *aporia,* and as reference to the debates surrounding the inclusion of peremptory norms in the Vienna Convention indicates, support was nearly universal, and representative of all cultural, political, economic, and religious groupings.

    On the breadth of support for the inclusion of such norms, see Hannikainen, 145–180. MacDonald highlights the "insistent support of the Asian, African and Latin American States," which were "primarily concerned with the values the international order embraced; in particular they wanted to use the doctrine as a tool to achieve economic and political equality with the West." MacDonald, 129–130; Alexidze, 230. Tunkin emphasizes the support from both sides of the Cold War ideological divide. Tunkin, 110.
66. Kreça, 28.
67. Myres McDougal and Michael Reisman, "The Prescribing Function in the World Constitutive Process: How International Law is

Made," in Myres McDougal and Associates, eds, *International Law Essays* (New York: The Foundation Press, 1981), 373.

68. Onuf and Birney, 196–197.
69. Richard Rorty, *Philosophy and Social Hope* (New York: Penguin Books, 1999), 83; Ludwig Wittgenstein, *Philosophical Investigations* 3rd ed. (1958), ¶217. "If I have exhausted the justifications I have reached bedrock, and my spade is turned. Then I am inclined to say: 'This is simply what I do.' "
70. Rorty (1989), 80.
71. This usage of "thin" comes from Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (Notre Dame: University of Notre Dame Press, 1994), 1–19, 61–84. On the "Cosmopolitan—Communitarian Debate" see Chris Brown, *International Relations Theory: New Normative Approaches* (New York: Columbia University Press, 1992) 23–77; Charles Jones, *Global Justice: Defending Cosmopolitanism* (Oxford: Oxford University Press, 1999); Molly Cochran, *Normative Theory in International Relations: A Pragmatic Approach* (Cambridge: Cambridge University Press, 1999) 21–77.
72. See *inter alia,* Karl Llewellyn, "A Realistic Jurisprudence—The Next Step," *Columbia Law Review* 30 (1930): 431–465; Karl Llewellyn, "Some Realism about Realism," *Harvard Law Review* 44 (1931): 1222–1264; Hessel Yntema, "American Legal Realism in Retrospect," *Vanderbilt Law Review* 14 (1960): 317–330; William Fisher III et al., eds., *American Legal Realism* (Oxford: Oxford University Press, 1993); Harry D. Gould and Nicholas Greenwood Onuf, "Pragmatism, Legal Realism and Constructivism," in Harry Bauer and Elisabetta Brighi, eds., *Pragmatism in International Relations* (London: Routledge, 2009), 32–38.
73. By contrast, Schwarzenberger sees *jus cogens* as nothing but morality clad in the language of law, "the alleged incompatibility of any particular treaty with international *jus cogens* provides splendid opportunities for the expression of moral indignation by third parties in a semi-legal jargon on matters which, otherwise, would clearly not be their business." Schwarzenberger, 477.
74. "Rules may be stated in very general terms, in which case we might call it a principle." Onuf (1998), 67.
75. Richard Rorty, "Human Rights, Rationality and Sentiment," in Richard Rorty, ed., *Truth and Progress: Philosophical Papers* vol. 3 (Cambridge: Cambridge University Press, 1998), 177.
76. Rorty (1998), 177–178.

Chapter 4

1. Michael Byers, "Conceptualizing the Relationship Between *Jus Cogens* and *Erga Omnes* Rules," *Nordic Journal of International Law* 66 (1997): 238.
2. Christian Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: Cambridge University Press, 2005), 158.
3. Karl Zemanek, "New Trends in the Enforcement of *Erga Omnes* Obligations," *Max Planck Yearbook of United Nations Law* (2000): 8.
4. René Lefeber, "Cum Grano Salis," *Leiden Journal of International Law* 11 (1998): 5.
5. A. J. J. de Hoogh, *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (Leiden: Martinus Nijhoff, 1996), 54.
6. Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford: Oxford University Press (Clarendon Press), 1997); see also Kriangsak Kittichaisaree, *International Criminal Law* (Oxford University Press, 2001), 11–13; R. St. J. MacDonald, "Fundamental Norms in Contemporary International Law," *Canadian Yearbook of International Law* 25 (1987): 136–139; Olivia Lopez Pegna, "Counter-claims and Obligations Erga Omnes before the International Court of Justice," *European Journal of International Law* 9/4 (1998): 724–736; de Hoogh (1991).
7. Stefan Kadelbach "Jus Cogens, Obligations Erga Omnes, and Other Rules—The Identification of Fundamental Norms" in Christian Tomuschat and Jean-Marc Thouvenin, eds, *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Leiden: Martinus Nijhoff Publishers, 2006), 26; Christian Hillgruber, "The Right of Third States to Take Countermeasures" in Thomuschat and Thouvenin, eds, 265–294, *passim;* Tams, 198–249, *passim*.
8. M. Sherif Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice," *Virginia Journal of International Law* 42 (2001): 88; see also William J. Aceves, "*Actio Popularis?* The Class Action in International Law," *University of Chicago Legal Forum* (2003): 398. On the Roman law roots of the concept, see J. A. van der Vyver, "*Actiones Populares* and the Problem of Standing in Roman, Roman-Dutch, South

African and American Law," *Acta Juridica* (1978): 191–193; Alfred P. Rubin, "*Actio Popularis*, *Jus Cogens,* and Offenses *Erga Omnes?*" *New England Law Review* 35 (2001): 268.

9. van der Vyver, 194–201.
10. van der Vyver, 191–192, n. 2, 3.
11. van der Vyver, 192.
12. Egon Schwelb, "The *Actio Popularis* and International Law," *Israel Yearbook on Human Rights* 2 (1972): 47, n. 6; van der Vyver, 192. Rubin's brusque dismissal of the *actio popularis* by associating it with slavery *simpliciter* is wholly unwarranted and indeed irresponsible. Rubin (2001), 268.
13. Aceves, 398.
14. Byers (1997), 238.
15. Tams discusses a number of subsidiary cases that will not be addressed here. Tams, 187–192.
16. Terry Gill, ed. *Rosenne's The World Court* 6th ed. (Leiden: Martinus Nijhoff Publishers, 2003), 138.
17. *South-West Africa (Liberia v. South Africa Ethiopia v. South Africa)* Application ¶4–8. ICJ 1966; Tams, 64; Schwelb, (1972): 47–49; Aceves, 356–357; Gill, ed. 137–142.
18. The relevant provision of the Mandate Agreement, Article 7(2), states: "The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation."
19. *South-West Africa* Preliminary Objections, 452. Note President Winiarski's incorrect attribution of the *actio popularis* to penal law rather than the law of obligations.
20. *South-West Africa* Preliminary Objections, 425. Also quoted in Tams, 51.
21. de Hoogh (1991), 194–195.
22. *South-West Africa* Judgment, ¶88, at 47.
23. *South-West Africa* Judgment, ¶88, at 47. Gill, ed. 140; Aceves, 356–367.
24. Schwelb rightly notes Justice Jessup's dissent that set the stage for later developments. Schwelb, 48, citing Jessup's separate opinion in the preliminary phase (1962) and his dissent in the Decision. de Hoogh asserts, however, that there was no basis in the text of the Mandate Agreement for Liberia and Ethiopia to make such a claim. de Hoogh (1991), 197.
25. Schwelb, 49–55.

26. Tams, 68.
27. *Case Concerning Barcelona Light, Power and Traction ltd. (Belgium v. Spain)* ICJ 1970, Summary of Judgment, 1.
28. *Case Concerning Barcelona Light, Power and Traction ltd. (Belgium v. Spain)* ICJ 1970, Second Phase ¶33. Emphasis added. Gill, ed. 158–160; Aceves, 357; Kadelbach, 27. de Hoogh (1991), however, did not find any support in the Court's dictum for any assertion of an *actio popularis*.
29. *Barcelona Traction* Second Phase ¶35.
30. Hillgruber, 267, n.8; de Hoogh (1991), 192.
31. Tams, 162. He goes on to note, however, that Judge Ammoun did explicitly reach this conclusion in his concurring separate opinion. Tams, 164.
32. Tams, 49–50.
33. Tams, 103–115. Other uses he identifies are precluding the territorial restriction of the application of a treaty, and "in a descriptive way, as a substitute for 'all States.' "
34. *Case Concerning East Timor (Portugal v. Australia)* ICJ 1995.
35. Christine Chinkin, "East Timor Moves into the World Court," *European Journal of International Law* 4 (1993): 211.
36. Vaughan Lowe, "The International Court in a Timorous Mood," *Cambridge Law Journal* 54 (1995): 484.
37. Christine Chinkin, "The East Timor Case (*Portugal v. Australia*)," *International and Comparative Law Quarterly* 45 (1996): 717.
38. *East Timor,* ¶23, 24.
39. *East Timor,* ¶26, 28; Gill, ed. 192–193; Lefeber, 4.
40. *Case Concerning East Timor* ¶29. Emphasis added.
41. Iain G.M. Scobbie and Catriona Drew, "Self-Determination Undermined: The Case of East Timor," *Leiden Journal of International Law* 9 (1996): 190.
42. Tams, 185.
43. Lowe, 484–486; Richard Burchill, "The ICJ Decision in the Case Concerning East Timor: The Illegal Use of Force Validated?" *Journal of Armed Conflict Law* 2 (1997): 1–16; Scobbie and Drew, 190–211.
44. *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom and United States)*, ICJ, 1953; Lowe, 485; Gill, ed. 147–148.
45. Lowe, 485.
46. Chinkin (1996), 721–722.
47. Ragazzi, 212.
48. Hillgruber, 271–272.

49. Nigel White and Ademola Abass, "Countermeasures and Sanctions," in Malcolm Evans, ed., *International Law* 2nd ed. (Oxford: Oxford University Press, 2006), 514.
50. White and Abass are much less sanguine on this account. White and Abass, 517–521.
51. Tams, 210–225.
52. Tams, 225–227.
53. Tams, 230–231.
54. Hillgruber, 283; White and Abass, 520.
55. Christian Tomuschat, "Reconceptualizing the Debate on *Jus Cogens* and Obligations *Erga Omnes*—Concluding Observations," in Tomuschat and Thouvenin, eds. 429.
56. Gaja, 280–281; MacDonald, 137. Byers responds: "Although some of the rules which the Court identified as being *erga omnes* rules may also be considered *jus cogens* rules, the Court in this passage [the passage quoted above] was clearly referring to a characteristic distinct form that of non-derogability" Byers (1997), 230.
57. Hannikainen, 207; M. Sherif Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes,*" *Law and Contemporary Problems* 59 (1996): 63, 65–66; Kadelbach, pp. 25–28.
58. Byers (1997): 230.
59. Byers (1997): 233.
60. Byers (1997): 212. Ragazzi provides a potential counterexample to Byers' first assertion in his postulate of regional *jus cogens,* but is unable to muster empirical support for such an entity. Ragazzi, 194–199.
61. Byers (1997): 236, 212–213; Tomushcat reaches the same conclusion at page 429.

Chapter 5

1. American Law Institute, *Restatement 3rd of the Foreign Relations Law of the United States* (1987), §404 and §404, Comment A.
2. Edward M. Wise, "Extradition: The Hypothesis of a *Civitas Maxima* and the Maxim *Aut Dedere Aut Judicare*," *Revue Internationale de Droit Penal*/International Review of Penal Law 62 (New Series) (1991): 109–133; Colleen Enache-Brown and Ari Fried, "Universal Crime, Jurisdiction and Duty: The Obligation of *Aut Dedere Aut Judicare* in International Law," McGill Law Journal/*Revue de Droit de McGill* 43 (1998): 613–633; M. Cherif Bassiouni, *Introduction to International Criminal Law* (Ardsley: Transnational Publishers, 2003), 334–346.

3. Jordan J. Paust et al., *International Criminal Law: Cases and Materials* 3rd (Durham: Carolina Academic Press, 2007), 155.
4. On the definition of the principle generally, see *inter alia Restatement* 3rd, §404; Thomas H. Sponsler, "The Universality Principle and the Threatened Trials of American Airmen," *Loyola Law Review* 15 (1968): 43–44; Kenneth C. Randall, "Universal Jurisdiction Under International Law," *Texas Law Review* 66 (1988): 788; Jon B. Jordan, "Universal Jurisdiction in a Dangerous World," *MSU-DCL Journal of International Law* 9 (2000): 3–5; Amnesty International, *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation* (2001), Introduction, p. 1; chapter 1, 2, 11; Leila Nadya Sadat, "Redefining Universal Jurisdiction," *New England Law Review* 35 (2001): 246; Bartram S. Brown, "The Evolving Concept of Universal Jurisdiction," *New England Law Review* 35 (2001): 383–384; Luc Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford: Oxford University Press, 2003); Bruce Broomhall, *International Justice and the International Criminal Court* (Oxford: Oxford University Press, 2003), 106; Stephen Macedo, ed. *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (Philadelphia: University of Pennsylvania Press, 2004), 21 (Principle 1 of the Princeton Principles on Universal Jurisdiction); Yana Shy Kraytman, "Universal Jurisdiction—Historical Roots and Modern Implications," *BSIS Journal of International Studies* 2 (2005): 94–95; Beth van Schaack and Ronald C. Slye, *International Criminal Law and Its Enforcement: Cases and Materials* (New York: Foundation Press, 2007), 100; Alexander Zahar and Göran Sluiter, *International Criminal Law* (Oxford: Oxford University Press, 2008), 496; Florian Jessberger, "Universal Jurisdiction," in Antonio Cassese, ed., *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009), 555–558.
5. M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* 2nd (Dordrecht: Kluwer Law International, 1999), 229.
6. Lowe (2006), 351–352; Wade Estey, "The Five Bases of Extraterritorial Jurisdiction and the Failure of the Presumption Against Extraterritoriality," *Hastings International and Comparative Law Review* 21 (1997–1998): 204.
7. Henry J. Steiner, "Three Cheers for Universal Jurisdiction—Or Is It Only Two?" *Theoretical Inquiries in Law* 5 (2004): 204.

8. M. Cherif Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice," *Virginia Journal of International Law* 42 (2001): 88; 96. Sadat uses the phrase "humanity's agents." Sadat, 244. See also Schwelb, 46–56; Christopher C. Joyner, "Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability," *Law and Contemporary Problems* 59 (1997): 169.
9. Rubin is strikingly deflationary in his assessment of the role that the idea of *actio popularis* played in the formulation of the UP. Rubin, 268; Andreas Zimmermann, "Violations of Fundamental Norms of International Law and the Exercise of Universal Jurisdiction in Criminal Matters," in Tomuschat and Thouvenin, eds. 337–339.
10. Gerhard Werle, *Principles of International Criminal Law* (Cambridge T.M.C. Asser Press, 2005), 58–59.
11. William Blackstone, *Commentaries on the Laws of England* v. 4 1769. p. 71. Quoted in Amnesty International (2001), chapter 2, 8–9, n. 26.
12. Amnesty International (2001), chapter 2, 1. They refer to heading C.3.15.1, *Ubi de criminibus agi oportet* (Where crimes should be tried), which states:

    > It is well known that investigations of crimes, which are punished by the laws, or under the ordinary procedure, should be finished where the crimes have been committed or (the trial is) commenced, or where the persons who are said to be guilty are found.

    From the Fred Blume translation found at uwacadweb.uwyo.edu/blume&justinian. Blume's exegetical note to this heading strongly undermines any link to the modern practice of universal jurisdiction. One obvious reason not to equate this with modern ideas of universality is that this was a domestic law, operative within a single, albeit imperial jurisdiction.
13. Willard B. Cowles, "Universality of Jurisdiction over War Crimes," *California Law Review* 33 (1945): 188–194; Sponsler, 44–45; Randall, 791–798; Estey, 195–196; Bassiouni (1999): 229; Jordan, 5; 10–12; Bassiouni (2001): 108–112; Amnesty International (2001), chapter 2, 3–9; Sadat, 244; Madeline H. Morris, "Universal Jurisdiction in a Divided World," *New England Law Review* 35 (2001): 339–340; Michael P. Scharf, "Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States," *New England Law Review* 35 (2001): 369–370; Brown,

p. 384; Bruce Broomhall, "Toward the Development of an Effective System of Universal Jurisdiction for Crimes under International Law," *New England Law Review* 35 (2001): 402; Antonio Cassese, "Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction," *Journal of International Criminal Justice* 1 (2003): 284; Kraytman, 97–98.

The aptness of the canon's approach is certainly not without its detractors. Alfred P. Rubin, *The Law of Piracy* (Annapolis: Naval War College Press, 1988), 292–298; Alfred P. Rubin, *Ethics and Authority in International Law* (Cambridge: Cambridge University Press, 1997), 84–97; Rubin (2001): 267; Kraytman, 98–99; Eugene Kontorovich, "The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation," *Harvard International Law Journal* 45 (2004): 183–237, *passim;* Gerry Simpson, "Piracy and the Origins of Enmity" in Matthew Craven, Malagosia Fitzmaurice and Maria Vogiatzi, eds. *Time, History and International Law* (Leiden: Martinus Nijhoff, 2007), 219–230.

14. This phrase can be traced back at least as far as Cicero's *De Officiis,* III.107.
15. Rubin (1988), citing Gentili, *Hispanicis Advocationis* (1613), I.IV.15.
16. Bassiouni (2001) and Simpson (2007) both note, however, that this was not the case in the ancient Greek and Roman worlds. Bassiouni (2001): 108; Simpson (2007), 228–229.

    Rubin, however, suggests that the communities to which Bassiouni and Simpson refer did not fit our modern definition of pirates, and that lexical and orthographic similarities notwithstanding, the Greek and Latin words from which our term derives (*peirato* and its cognates and *pirata,* respectively) did not mean anything like what "pirate" today connotes. Rubin (1988), 3–13. He goes on to demonstrate that the passages from Classical Greek literature upon which they rely do not even use *peirato* or any of its cognates (although that is how the Greek terms have been translated).
17. *U.S. v. Smith* (1820) quoted in Scharf, 369. Spelling modernized.
18. *United States vs Brig Malek Adhel,* 43 U.S. (2 How.) 210, 232. 1844. Quoted in Randall, 794. Full text of quotation restored.
19. Bassiouni (1999): 229 and Randall, 791 both quote Oppenheim: "before International Law in the modern sense of the term was in existence, a pirate was already considered and outlaw, a '*hostis humani generis.*' " Lassa Oppenheim, *International Law: A Treatise* (8th ed. vol. 1, Hersch Lauterpacht, ed.) (New York: Longman,

Green, 1955), 609. Brierly goes so far as to label the practice "ancient." J.L. Brierly, *The Law of Nations* 6th ed. (Sir Humphrey Waldock, ed.) (Oxford: Oxford University Press, 1963), 311. As was the case with the purported acceptance of piracy in the ancient Greek world, Rubin likewise casts serious doubt on the original significance of this Ciceronian formulation. Rubin (1988), 10–12.

20. Randall, 791.
21. Thomson, 50–54; 107–118.
22. *Article 100—Duty to Cooperate in the Repression of Piracy* "All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State."
23. Kraytman, 97–98; Randall, 794–795; Georges Abi-Saab, "The Proper Role of Universals Jurisdiction," *Journal of International Criminal Justice* 1 (2003): 599.
24. Amnesty International (2001), chapters 2, 9; Abi-Saab demonstrates some affinity for this view.
25. Kontorovich makes a similar point. Kontorovich, 190.
    There is a related, but long-discredited view that by virtue of their activities, pirates were stateless persons aboard stateless ships, articulated *inter alia* in *U.S. v Klintock* (U.S. Supreme Court 1820). Cited in Scharf, 369. This would render Territorial and National jurisdiction inapplicable (although it would not bear on Passive Personality jurisdiction). This view is easily set aside because as a basic matter of the rules of nationality engaging in piracy cannot strip an individual's (or ship's) state of its jurisdiction over them. Randall, 794. This is reaffirmed in Article 104 of *UNCLOS*.
26. Scharf, 369; Joyner, 165, n. 48.
27. "Gravest crimes" formulation from Amnesty International, "Universal Jurisdiction: Questions and Answers" (2001a), 2; "shock the conscience" formulation from *The State of Israel v. Eichmann,* 1961, 45 P.M. 3, part II, paragraph 12; "sicken the conscience" and "universally abhorrent" formulations from Joyner, 153, 165.
28. Sadat, 244. "Crimes subject to the UP are so threatening to the international community or so heinous in scope and degree that they offend the interest of all humanity . . . ;" Scharf, 368. The *Restatement* (3rd) uses the rather less colorful phrase "recognized . . . as of universal concern." *Restatement* (3rd) §404.
29. Kontorovich, 185.
30. Quoted in Sponsler, 50.
31. 630 F.2d 876 (2nd Circuit 1980) 890.

32. Tellingly, Lowe, in disaggregating crimes of universal jurisdiction into "heinous crimes" and "crimes that are serious and which might otherwise go unpunished," puts piracy in the latter category. Lowe (2006), p. 348.
33. Thomson, 69–76.
34. It became clear that this is still a live issue with the proposal of H.R. 3216, *The Marque and Reprisal Act of 2007,* which sought to issue letters of Marque to private actors in furtherance of U.S. aims in the War on Terror.
35. Recall the qualification in Justice Story's definition of piracy: "without any . . . pretense of public authority."
36. *Leviathan,* II.XXIX.6–8.
37. Kontorovich, 210–217.
38. Kontorovich, 223–226; Rubin (1988), 122–275, *passim*.
39. Kontorovich, 92.
40. Byers (1999), 131; Jörg Kammerhofer, "Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems," *European Journal of International Law* 15 (2003): 534–535; Ian Brownlie, "Methodological Problems in International Law and Development," *Journal of African Law* 26 (1982): 10.
41. Rubin (1997), 98, 108–124.
42. Amnesty International (2001), chapter 2, 10. Randall invokes the language of "heinousness." Randall, 800.
43. Kontorovich, however, reads the language of this treaty as using piracy merely "colloquially as a term of opprobrium for crime," but offers neither a historical nor a lexical basis for this assertion. Kontorovich, 193, n. 59; Randall, 800, n. 88; Bassiouni (2001): 112–113.
44. *Vienna Convention on the Law of Treaties* (1969), Art. 34; Anthony Aust, *Modern Treaty Law and Practice* 2nd (Cambridge: Cambridge University Press, 2000), 256–261; *Digest,* XLV.I.83.
45. He continues: "Contemporary lawyers would clearly have regarded such jurisdictional treaties as an acknowledgment of the absence of universal jurisdiction over slave trading." Kontorovich, 193–194.
46. Randall reads a form of universal jurisdiction in this regime inasmuch as there need be no link between the state exercising jurisdiction and the vessel and its crew engaging in the slave trade. Randall, 800. This stretches "universal" to the breaking point.

Paust captures the matter well in asserting that "universal jurisdiction" by treaty "is actually a form of consensual jurisdiction among the signatories." Paust, 155. Picking up the thread, Broomhall insists that, "this form of jurisdiction is not truly 'universal', but is a regime of rights and obligations arising among a closed set of parties." Broomhall (2003), 107. Jurisdiction *inter partes* can only be universal if membership is as well.

47. Bassiouni is simply materially incorrect in his assertion "A trial would . . . be held in the country which seized the vessel." Bassiouni, "Enslavement as an International Crime," *New York University Journal of International Law and Politics* 23 (1991): 461.

    If the language of Article VII left any ambiguity (it did not: "be taken into a port belonging to the nation of the *detained* vessel, to be there proceeded against"), Art. X surely clarified it in stating that the ship and crew were to be taken "before the competent Tribunals of the country to which she belongs." Were any uncertainty to linger, Annex B, in listing where ships of each nationality were to be brought for trial surely put an end to it, in each instance specifying *by name* French ports for French ships, British ports for British ships, et cetera.
48. Bassiouni (1991): 461.
49. Fischer, "The Suppression of Slavery in International Law (1)," *International Law Quarterly* 3 (1950): 45.
50. Hume, *A Treatise of Human Nature* III.I.I.27.
51. Kontorovich, 194.
52. Bassiouni (1990–1991): 445; Bassiouni (2001): 112; Kraytman, 100.
53. The body of §404 asserts that the slave trade is a universal jurisdiction crime; *Comment A* clarifies: "These offenses are subject to universal jurisdiction as a matter of customary law."
54. It must be noted that Higgins's assertion was not made in the course of a legal decision, but before joining the Court. It can be held neither to represent the sentiment of the Court, nor her position on the bench. Dame Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1994), 58.
55. Bassiouni (1990–1991): 445–449; Jordan, 12.
56. Randall, 799, fn. 79. Emphasis added.
57. For detailed discussions of the drafting, scope, and effect of the entire body of post – World War Two treaties purported to give rise to universal jurisdiction, see Randall, 816–829; 834–839;

Amnesty International (2001), chs. 3, 5, 7, 9, 11–13; Bassiouni (2001): 115–139; Bassiouni (2004): 52–61.

58. Bass (2000) discusses previous, frustrated twentieth-century attempts to bring war criminals and perpetrators of crimes against humanity to justice. Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000), 58–146, *passim*. For a defendant-by-defendant account of the proceedings at Nuremberg see Eugene Davidson, *The Trial of the Germans: An Account of the Twenty-Two Defendants before the International Military Tribunal at Nuremberg* (New York: Macmillan, 1966).
59. *Judgment of the International Military Tribunal for the Trial of German Major War Criminals:* The Law of the Charter, ¶3. Emphasis added.

    King makes a great deal of scattered universal-sounding remarks in Justice Jackson's opening statement before the Tribunal, but we cannot make serious inference about the basis of the Tribunal's jurisdictional base from the oratory of the Prosecution. It must also be noted that reference to piracy at paragraph notwithstanding (and this in relation to *individual* rather than *universal* jurisdiction), Jackson does plainly root the Court's jurisdiction in the Charter, and the Charter's in the specific *inter partes* treaty obligations the accused were alleged to have violated. Henry T. King Jr., "Universal Jurisdiction: Myths, Realities, Prospects, War Crimes and Crimes Against Humanity: The Nuremberg Precedent," *New England Law Review* 35 (2001): 281–282.
60. Amnesty International (2001), chapter 2, 25–26.
61. *Judgment of the IMT:* The Law of the Charter, ¶1, 2.
62. Randall, 805.
63. Sponsler, 51; Randall, 805–806; Bassiouni (2001): 91, 118;
64. Randall, 808; Bassiouni (1999): 236; Amnesty International (2001), chapter 2, 27; King, 284.
65. Randall, 808; Bassiouni (1999): 236; Amnesty International (2001), chapter 2, 28. In this case, however, the British additionally had passive personality jurisdiction as the victims were British nationals.
66. Randall, 808–809; Amnesty International (2001), chapter 2, 28–29.
67. Randall, 809; Amnesty International (2001), chapter 2, 27–28.
68. Randall, 809–810; Bassiouni (1999): 236–237; Amnesty International (2001), chapter 2, 28.

69. Morris, 342. Like the British in *Almelo,* the French had passive personality jurisdiction in this case.
70. The story of Eichmann's crimes, his capture and trial are well documented; see *inter alia* Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Viking Press, 1964); Gideon Hausner, *Justice in Jerusalem* (New York: Harper & Row, 1966); Lord Russell of Liverpool, *The Record: The Trial of Adolf Eichmann for his Crimes against the Jewish People and against Humanity* (New York: Alfred P. Knopf, 1963).
71. *Attorney General of Israel v. Eichmann,* District Court of Jerusalem, Criminal Case No. 40/61, December 11, 1961.
72. *Attorney General of Israel v. Eichmann,* Supreme Court of Israel, Criminal Appeal No. 336/61, May 29, 1962.
73. *Nazis and Nazi Collaborators (Punishment) Law*—5710/1950 §1(a).
74. *Judgment* §§11–12.
75. *Appeal* §10; §11(b).
76. Randall, p. 811.
77. *Judgment* § 26; *Appeal* §10. Bass (2004) shares this conclusion, arguing that there is no significance to the "Crimes Against the Jewish People" / "Crimes Against Humanity" dichotomy. Gary Bass, "The Adolf Eichmann Case: Universal and National Jurisdiction," in Macedo, ed. 84–86.
78. Kontorovich, 96–197.
79. Former premier Hideki Tojo, prosecuted and convicted by the International Military Tribunal for the Far East after World War Two, was head of government; the Emperor of Japan was head of state. There is, as we shall see *infra* some dispute about the scope immunity *ratione personae* of a head of government who is not also a head of state; it was the position of Lord Millett in *Pinochet III* that it extended only to heads of state, but the majority in *Congo v Belgium* held that it extends to all ministers of government. In the case of Tojo, the matter was obviated by express provision of jurisdiction in Article 6 of the IMTFE's Charter.
80. *Regina v. Bartle et al. ex parte Pinochet,* Judgment of 25 November 1998 (*Pinochet I*); *in re Pinochet,* Judgment of 17 December 1998 (*Pinochet II*); *Regina v. Bartle, et al. ex parte Pinochet,* Judgment of 24 March 1999 (*Pinochet III*).
81. Chile, the United Kingdom and Spain are all parties to the 1984 *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*.

82. Neil Boister and Richard Burchill, "The *Pinochet* Precedent: Don't Leave Home Without It," *Criminal Law Forum* 10 (1999): 412–413.
83. Lord Steyn, *Pinochet I*.
84. Henley, "Sovereignty, Augusto Pinochet, and Legal Positivism," *Human Rights Review* 8 (2006): 72–74.
85. Lord Nicholls, *Pinochet I*.
86. Lord Browne-Wilkinson, *Pinochet III*. Lord Hope of Craighead formulated his conclusion similarly: "[acts of torture] cannot be regarded as functions of a head of state under international law when international law expressly prohibits torture . . . in any circumstances whatsoever and had made it an international crime." Lord Hope of Craighead, *Pinochet III*.
87. Lord Millett, *Pinochet III*.
88. Lord Millett made the most expansive claims:
    In my opinion, crimes prohibited by international law attract universal jurisdiction under customary law if two criteria are satisfied. First, they must be contrary to a peremptory norm of international law so as to infringe a *jus cogens*. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international order . . . Every state has jurisdiction under customary law to exercise extra-territorial jurisdiction in respect of crimes which satisfy the relevant criteria . . . the systematic use of torture . . . [has] joined piracy, war crimes and crimes against peace as an international crime of universal jurisdiction.

    He elaborated further in Lord Millett, "The *Pinochet* Case—Some Personal Reflections," in Malcolm Evans, ed., *International Law* 2nd ed. (Oxford: Oxford University Press, 2006), 9.
89. Naomi Roht-Arriaza, "The Pinochet Precedent and Universal Jurisdiction," *New England Law Review* 35 (2001): 313.
90. Amnesty International, *The Pinochet Case—Universal Jurisdiction and Absence of Immunity for Crimes Against Humanity* (1999), 10–12, 21–25. Familiarly, we find piracy analogy at work in the construction of their argument.
91. *Law of 16 June 1993 Relative to the Repression of Grave Violations of the Geneva Conventions and their First and Second Protocols*. This was amended in 1999 to include genocide and crimes against humanity in the *Law Relative to the Repression of Grave Violation of International Humanitarian Law*. The phrase is Cassese's. Antonio Cassese, "When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v. Belgium* Case," *European Journal of International Law* 13 (2002): 856.

92. *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002.
93. For a detailed history of changes to the Belgian legislation, see Luc Reydams, "Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law," *Journal of International Criminal Law* 1 (2003a): 679–689; Steven R. Ratner, "Belgium's War Crimes Statute: A Postmortem," *American Journal of International Law* 97 (2003): 889–892; Tom Ongena and Ignace van Daele, "Universal Jurisdiction for International Core Crimes: Recent Developments in Belgium," *Leiden Journal of International Law* 15 (2002): 696–701. For detailed analysis of the legislation itself see Ongena and van Daele, 688–694; Reydams (2003), 102–109; Luc Reydams, "Universal Criminal Jurisdiction: The Belgian State of Affairs," *Criminal Law Forum* 11 (2000): 186–197. See Malvinia Halberstam, "Belgium's Universal Jurisdictional Law: Vindication of International Justice or Pursuit of Politics?" *Cardozo Law Review* 25 (2003): 247–266 for heated criticism of the Belgian law.
94. Reydams (2003), 106–107. The translation is Reydams'.
95. Ongena and van Daele, 691.
96. *Abbas Hijazi, et al. v Sharon, et al., Cour de Cassation,* decision of 12 February 2003. Reydamns (2003a): 680.
97. Reydams (2003), 107–108.
98. Reydams (2000): 190–191.
99. *Congo v. Belgium,* Judgment, ¶15. The quotation comes from Alexander Orakhelashvili, "Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)," *American Journal of International Law* 96 (2002): 677 (summary of the ICJ's decision).
100. *Congo v. Belgium,* Judgment, ¶1, 11, 12, 17.
101. *Congo v. Belgium,* Judgment, ¶21, 45.
102. *Congo v. Belgium,* Judgment, ¶43, 46.
103. *Congo v. Belgium,* Judgment, ¶54.
104. *Congo v. Belgium,* Judgment, ¶61. Emphasis added.
105. *Congo v. Belgium,* Separate Opinion of President Guillaume, ¶1.
106. *Congo v. Belgium,* Joint Separate Opinion of judges Higgins, Kooijmans, and Buergenthal, ¶3–5.
107. Cassese (2002): 855–856; Jan Wouters, "The Judgment of the International Court of Justice in the *Arrest Warrant* Case: Some Critical Remarks," *Leiden Journal of International Law* (2003): 263–264.

108. Inasmuch as this implies that the immunity (or the rule underlying it) has *jus cogens* status, Stein points to the conclusion that either this is not the case or most of the treaties that form the International Criminal Law regime are void. Torsten Stein, "Limits of International Law Immunities for Senior State Officials in Criminal Procedure" in Christian Tomuschat and Jean-Marc Thouvenin, eds, *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Leiden: Martinus Nijhoff Publishers, 2006), 249.
109. Joint Separate Opinion, ¶81 "We have found no basis for the argument that Ministers of Foreign Affairs are entitled to the same immunities as heads of state"; ¶85 " . . . serious international crimes cannot be regarded as official acts"; *Congo v. Belgium,* Dissenting Opinion of Judge van den Wyngaert, ¶11–23 on immunity *ratione personae;* Cassese (2002): 862–874; Steffen Wirth, "Immunity for Core Crimes? The ICJ's Judgment in the *Congo v. Belgium* Case," *European Journal of International Law* 13 (2002): 883–891; Maria Spinedi, "State Responsibility v. Individual Responsibility for International Crimes: *Tertium non Datur?*" *European Journal of International Law* 13 (2002): 897–899; Wouters, 262–263; Phillipe Sands, "International Law Transformed? From *Pinochet* to *Congo . . .*?" *Leiden Journal of International Law* 16 (2003): 49–53.
110. Wolfke is more cautious. Wolfke, 86–90.
111. Charney, however, in asserting the centrality of custom for the creation of "universal international law," concludes that this principle is not recognized in international law. Jonathan Charney, "Universal International Law," *American Journal of International Law* 87 (1993): 538–541.
112. Byers (1999), 77–78.
113. James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text, and Commentaries* (Cambridge: Cambridge University Press, 2002), 48.
114. *Ethiopia v South Africa; Liberia v South Africa,* 2nd Phase, Judgment, ¶88.
115. *International Covenant on Civil and Political Rights,* Art. 41 (a voluntary procedure dependent upon reciprocity and amenable only to conciliation, not binding, enforceable decision); *European Convention for the Protection of Human Rights and Fundamental Freedoms,* Art. 33; *American Convention on Human Rights,* Art. 45 (procedure of the same character as that of the *ICCPR*),

Art. 62 (a voluntary and reciprocity-dependent procedures which does result in binding, enforceable decisions); *African Charter on Human and Peoples' Rights,* Art. 47 (this procedure does not require consent or reciprocity, but is also conciliatory in character).

116. Randall, 789–790. He does concede, however, that third states are probably not under the formal *obligation* to prosecute or extradite. Randall, 823.
117. Broomhall (2001): 401.

Chapter 6

1. Nicholas Onuf, *World of Our Making* (Columbia: University of South Carolina Press, 1989); Onuf, "Constructivism: A User's Manual," in Vendulka Kubálkova, Nicholas Onuf and Paul Kowert, eds, *International Relations in a Constructed World* (Armonk: M.E. Sharpe, 1998), 58–78.
2. Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999), 193–245; Patrick Thaddeus Jackson, "Is the State a Person? Why Should We Care?" *Review of International Studies* 30 (2004): 255–258; Iver Neumann, "Beware of Organicism: The Narrative Self of the State," *Review of International Studies* 30 (2004): 259–267; Colin Wight, "State Agency: Social Action without Human Activity?" *Review of International Studies* 30 (2004): 269–280; Patrick Thaddeus Jackson, "Hegel's House, or 'People are States Too'," *Review of International Studies* 30 (2004a): 281–287; Alexander Wendt, "The State as Person in International Theory," *Review of International Studies* 30 (2004): 289–316; Peter Lomas, "Anthropomorphism, Personification and Ethics: A Reply to Alexander Wendt," *Review of International Studies* 31/2 (2005): 349–355; Alexander Wendt, "How Not to Argue Against State Personhood: A Reply to Lomas," *Review of International Studies* 31 (2005): 357–360.
3. David Miller has posed complementary questions regarding the responsibility of nations. David Miller, "Holding Nations Responsible," *Ethics*, 114 (2004): 240–268. Toni Erskine, however, has explicitly rejected the inclusion of nations as "moral agents." Toni Erskine, "Assigning Responsibilities to Institutional Moral Agents: The Case of States and Quasi-States," *Ethics and International Affairs*, 15 (2001): 72.
4. As Kelsen has stated the issue; "The question whether a certain behavior, particularly whether a certain act, a certain function is

an act or function of the state, that is, whether it is the state as a person that performs an act or exercises a function, is not a question directed toward the existence of a fact . . . If the question did have this meaning, it could never be answered affirmatively. For in fact it is never the state but always a certain individual who is acting." Kelsen (1967), p. 291.

5. Samuel Pufendorf, *De Jure Naturae et Gentium Libro Octo*, I.1.13; *De Officio Hominis et Civis Libro Duo*, II.6.10. The issue is also treated in David Boucher, "Resurrecting Pufendorf and Capturing the Westphalian Moment," *Review of International Studies*, 27 (2001): 566–567. Jean-Jacques Burlamaqui basically restates the Hobbes—Pufendorf position: *The Principles of Natural and Political Law*, II.6.iv.
6. G.W.F. Hegel, "Philosophy of Right and Law," in Carl J. Friedrich, ed., *The Philosophy of Hegel* (New York: Random House, 1954), 320.
7. *Articles on Responsibility of States for Wrongful Acts*. Arts. 4–11; James Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge: Cambridge University Press, 2002), 91–123; James Crawford and Simon Olleson, "The Nature and Forms of International Responsibility," in Malcolm Evans, ed., *International Law* (Oxford: Oxford University Press, 2006), 454–458; Hans Kelsen, *Pure Theory of Law* 2nd ed. (Clark: The Lawbook Exchange, Ltd., 2005 (1967)), 292; Hans Kelsen, *General Theory of Law and State* (New Brunswick: Transaction Publishers, 1949 (2006)), 106.
8. Nina Jørgensen, *The Responsibility of States for International Crimes* (Oxford: Oxford University Press, 2000), 79, 279–280.
9. In the ICJ's recent *Genocide Case* for example the Court clearly stated that even in the case of Genocide, the responsibility of a state would not be criminal in nature. *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* ¶167.
10. The definitive account is to be found in Marina Spinedi, "International Crimes of State: The Legislative History," in Joseph Weiler, Antonio Cassese and Marina Spinedi, eds, *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (New York: Walter de Gruyter, 1989), 7–138. Crawford (2002), 16–20 provides detailed discussion of the flaws in Article 19's framing that contributed to its exclusion. See also Jørgensen, *The Responsibility of States*, XI-XV, 175–184; and the essays by Abi-Saab, Graefrath, Dupuy, Stein, Cassese, Aldrich,

and Sinclair in Weiler et al. *International Crimes of States*. For a contrasting account, see Luis Molina, "Can States Commit Crimes? The Limits of Formal International Law," in Ross, ed., *Controlling State Crime* (New Brunswick: Transaction Publishers, 2000), 349–388.

11. Georges Abi-Saab, "The Uses of Article 19," *European Journal of International Law* 10 (1999): 345–346. Wyler, however, asserts "According to many commentators, the distinction introduced in Article 19 . . . between 'crimes' and 'delicts' led to a 'criminalization' of responsibility." Eric Wyler, "From 'State Crime' to Responsibility for Serious Breaches of Obligations under Peremptory Norms of General International Law," *European Journal of International Law* 13 (2002): 1148.
12. Alain Pellet, "Can a State Commit a Crime? Definitely, Yes!" *European Journal of International Law* 10 (1999): 432.
13. Giorgio Gaja, "Should all References to International Crimes Disappear from the ILC Draft Articles on State Responsibility?" *European Journal of International Law* 10 (1999), 365.
14. Crawford (2002), 19.
15. Mortimer Sellers, "International Legal Theory," *Jus Gentium* 11 (2005): 67.
16. On the nature of legal fictions, see: Lon L. Fuller, Legal Fictions (Stanford: Stanford University Press, 1967); Sanford Schane, "The Corporation is a Person: The Language of a Legal Fiction," *Tulane Law Review* 61 (1987); Note, "What We Talk About When We Talk About Persons: The Language of A Legal Fiction," *Harvard Law Review* 114 (2001): 1750–1754.
17. P.W. Duff, *Personality in Roman Law* (Cambridge: Cambridge University Press, 1938), 28.
18. Peter French, *Collective and Corporate Persons* (New York: Columbia University Press, 1984), 34; Duff, 21, 35, 50, 72, 223; Andrew Borkowski and Paul du Plessis, *Textbook on Roman Law* 3rd ed. (Oxford: Oxford University Press, 2005), 87; Barry Nicholas, *An Introduction to Roman Law* (Oxford: Oxford University Press, 1996 (1962)), 60.

    Malmendier—based upon a nonjuridical source, Cicero's *Epistulae Ad Familiares* 13.9.2—asserts that there was a particular class of *corpus,* the *societas publicanorum*, to which the Romans granted *personam*. Close examination of Cicero's original text does not bear this out. Ulrike Malmendier, "Roman Shares," in William N. Goetzman and K. Gert Rouwenhorst, eds, *The Origins of Value* (Oxford: Oxford University Press, 2005), 38; Cicero, *Epistulae Ad Familiares* 13.9.2.

19. Duff, 21, 26 commenting on Ulpian in D.4.2.9.1.
20. Duff, 33. Oakeshott famously also includes *societates*, associations of "individuals each of whom conditions his actions to accord with the terms of a joint agreement." Michael Oakeshott, "On the Character of a Modern European State," in Michael Oakeshott, ed., *On Human Conduct* (Oxford: Oxford University Press, 1975), 199–266. *Societas* is also Malmendier's preferred category term.
21. Duff, 33, 50, 62, 70, 172; Malmendier, 6; Wolff (1951), 235.
22. Compare Duff, 37, 72 with Malmendier, 36.
23. Duff, 171, 175.
24. Hale cites similar passages from I Corinthians 12:12–27. David G. Hale, "Analogy of the Body Politic," in Philip Wiener, ed., *Dictionary of the History of Ideas*, volume 1 (New York: Scribner & Sons. 1974), 68–70.
25. Ernst H. Kantorowicz, *The King's Two Bodies* (Princeton: Princeton University Press, 1997 (1957)), 195–196; Anton-Herman Chroust, "The Corporate Idea and the Body Politic in the Middle Ages," *The Review of Politics* 9 (1947): 431.
26. Cited in Kantorowicz, 194.
27. Chroust documents similar accounts in Remigio de' Girolami and Augustinus Triumphus of Ancona. Chroust, 432–433.
28. Kantorowicz, 200–202.
29. *Judgment of the International Military Tribunal for the German Major War Criminals*, Cmd. 6964, at 41. Cited in Jan Klabbers, "The Concept of Legal Personality," *Jus Gentium* 11 (2005): 45.
30. Crawford and Olleson, 460.
31. Hale, 68–70.
32. Kantorowicz, 210.
33. Kantorowicz, 212–223.
34. Chroust, 445, 447.
35. Chroust, 441.
36. Hannah Pitkin, "Hobbes's Concept of Representation—I," *American Political Science Review* 58 (1964): 328–340; Hannah Pitkin, "Hobbes's Concept of Representation—II," *American Political Science Review* 58 (1964): 902–918; Quentin Skinner, "Hobbes and the Purely Artificial Person of the State," in Quentin Skinner, *Visions of Politics v. III: Hobbes and Civil Science* (Cambridge: Cambridge University Press, 2002), 177–208; Quentin Skinner, "Hobbes on Representation," *European Journal of Philosophy* 13 (2005): 155–184. See also, *inter alia,* David Runciman, *Pluralism and the Personality of the State* (Cambridge: Cambridge University Press, 1997), 6–33, David Runciman, "Moral Responsibility and the Problem of Representing the State,"

in Toni Erskine, ed., *Can Institutions Have Responsibilities? Collective Moral Agency and International Relations* (Basingstoke: Palgrave, 2003), 41–48, and David Copp, "Hobbes on Artificial Persons and Collective Action," *The Philosophical Review*, 89 (1980): 579–606.

37. Thomas Hobbes, *Human Nature* XIX.7; *De Cive* V.7; *Leviathan* Introduction.
38. Skinner (2002), 197.
39. Hobbes, *Human Nature* XIX.10; the quoted phrase Skinner takes from Cicero's "*De Officis*" I.34. Skinner (2002), 199.
40. Skinner (2002), 192–193.
41. Hobbes, *Leviathan* I.XVI.1–3; *De Homine* XV.1.
42. Hobbes, *Leviathan* I.XVI.13; *De Homine* XV.2.
43. Hobbes, *Leviathan* I.XVI.4.
44. Hobbes, *De Corpore Politico* XX.2; *De Cive* V.9; *Leviathan* I.XVI.14; *De Homine* XV.2.
45. Hobbes, *De Corpore Politico* XX.2; *Leviathan* I.XVI.5; *De Homine* XV.2.
46. Torbjørn Knutsen, *A History of International Relations Theory* 2nd ed. (Manchester: Manchester University Press. 1997), 105.
47. Hobbes, *De Cive* V.9; *Leviathan* I.XVI.13–14.
48. Hobbes, *Leviathan* I.XVI.13.
49. Hobbes, *Leviathan* I.XVII.13.
50. Hobbes, *De Cive* VI.19.
51. Hobbes, *Leviathan* I.XVI.5. Emphasis added.
52. Hobbes, Leviathan I.XV.36; Richard Flathman, *Thomas Hobbes: Skepticism, Individuality and Chastened Politics* (London: Sage, 1993), 56–57; Kinch Hoekstra, "Hobbes on the Natural Condition of Mankind," in Patricia Springborg, ed., *The Cambridge Companion to Hobbes' Leviathan* (Cambridge: Cambridge University Press, 2007), 120–121. May seeks to undermine the significance of this distinction. Larry May, *Crimes Against Humanity: A Normative Account* (Cambridge: Cambridge University Press, 2005), 17–18.
53. Richard Tuck, *The Rights of War and Peace* (Cambridge: Cambridge University Press, 1999), 158–165.
54. Runciman seems to disagree with this conclusion. Runciman (2003) 48.

    May offers a reading of Hobbes that lends support for the idea of International Criminal Law, but he does so at the cost of completely eliding Hobbes's nominalism, and offers no indication that either he or Hobbes envisions *states* ever being criminal.

Just the opposite, he reminds us that notional body of the state is only an "outline," and redirects attention to the individual people composing it. May (2005), 15–16.

55. Arthur Machen, "Corporate Personality," *Harvard Law Review* 24 (1911): 263. Emphasis added.
56. Kelsen (1967), 178.
57. Mark M. Hager, "Bodies Politic: The Progressive History of Organizational 'Real Entity' Theory," *University of Pittsburgh Law Review* 50 (1989): 578. John Dewey tried to set aside the debate, and H.L.A. Hart also tried to move jurisprudence beyond the question "what is a corporation." John Dewey, "The Historic Background of Corporate Legal Personality," *Yale Law Journal* 35 (1926): 655; H.L.A. Hart, "Definition and Theory in Jurisprudence," in H.L.A. Hart, *Ethics in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), 43.
58. Frederic Maitland, "Moral Personality and Legal Personality," *Journal of the Society of Comparative Legislation* 6 (New Series) (1905), 195. Both Laufer and Horwitz identify this position less with nominalism than methodological individualism. William S. Laufer, *Corporate Bodies and Guilty Minds* (Chicago: The University of Chicago Press, 2006), 11. Morton Horwitz, *The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy* (Oxford: Oxford University Press, 1992), 72.
59. Machen, 255.

    Contrast Schane's account: "Legal relations . . . take place between one person and another. Now, individuals may enter into an association, but the resulting group has no independent existence . . . and unlike a natural person, it has no preexisting rights. Only in contemplation of the law does it become a legal entity—a *persona ficta*—an artificial, moral or juristic person" Schane, 565.
60. Machen, 257; Hager, 580.
61. Schane, 566.
62. Morris Cohen, "Communal Ghosts and Other Perils in Social Philosophy," *The Journal of Philosophy, Psychology and Scientific Methods* 16 (1919): 678–681; Laufer, 47.
63. Harold Laski, "The Personality of Associations," *Harvard Law Review* 29 (1916): 406.
64. Ernst Freund, *The Legal Nature of Corporations* (Chicago: University of Chicago Press, 1897), 52. Quoted in Borkowski, 102.
65. Laski, 406. Emphasis added.

    Compare Lord Reid's 1972 decision in the *Tesco Supermarkets* Case, "A living person has a mind which can have knowledge

or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these," which illustrates the longevity of this view. Eric Colvin, "Corporate Personality and Criminal Liability," *Criminal Law Forum* 6 (1995): 5.

66. "A corporation exists as an objectively real entity . . . the law merely recognizes and gives legal effect to the existence of the entity. To confound legal recognition of existing facts with creation of facts is an error . . . A corporation is an entity—not imaginary or fictitious, but real, not artificial, but natural" Machen, 156, 161–162. Emphasis added. On Gierke generally, see Runciman (1977), 34–63.
67. Colvin, 2.
68. Machen, 161–162.
69. Ann Foerschler, "Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct," *California Law Review* 78 (1990): 1291; Hart (1983), 45.
70. Laski, 413–415.
71. Jørgensen, 75; Lee, 9; R.E. Ewin, "The Moral Status of the Corporation," *Journal of Business Ethics* 10 (1991): 749–752. This is, of course, the model that international law follows in the Act of State Doctrine.
72. Colvin, 2; Radin, 663.
73. Colvin, 1–2. Compare Kelsen: "It is the action or refrainment from action by an individual that is interpreted as the action or refrainment of the corporation—'attributed' to the corporation. The human being through whom the corporation acts as a juristic person, and whose behavior is attributed to the corporation, is called the 'organ' of the corporation." Hans Kelsen (1967), 175, see also pages 177 and181 where Kelsen ultimately concludes, however, that juristic persons are "not capable of committing a delict." Earlier, however, Kelsen was willing to grant juristic persons the capacity to commit both civil and criminal delicts. Kelsen (1949), 103–106.
74. Colvin, 8–9. Emphasis added. This decision actually resembles what Jørgensen (following Andrews) calls the "Identification Theory"; in it the "basis for liability is that the acts of certain person are actually the acts of the corporation. 'These people are not seen as the agents of the company, but as its very person, and their guilt is the guilt of the company.' " Jørgensen, 75 quoting J. Andrews, "Reform in the Law of Corporate Liability" *Criminal Law Review* 20 (1973): 91–92.

75. Larry May, *The Morality of Groups* (South Bend: University of Notre Dame Press, 1987) 41.
76. May (1987), 91.
77. This is taken from *American Medical Association v. US* (1942) cited in Foerschler, "Corporate Criminal Intent," 1291.
78. Celia Wells, *Corporations and Criminal Responsibility* 2nd ed. (Oxford: Oxford University Press, 2001), 71. Wells quotes Brent Fisse and John Braithwaite, "The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability" *Sydney Law Review* 11 (1988): 483.
79. Erskine (2001), 70–72.
80. French, 39.
81. French, 42.
82. Foerschler, 1302–1303. Clarkson's approach is similar. C.M.V. Clarkson, "Kicking Corporate Bodies and Damning Their Souls," *The Modern Law Review* 59 (1996): 557–572.
83. Colvin, 24.
84. Colvin, 33–34.
85. Laufer, 77–83. Emphasis added.
86. Colvin, 40.
87. Cohen, 681.
88. Machen, 165.
89. Colvin, 15. Emphasis added.
90. Radin, 661. Emphasis added.
91. French, 188; Clarkson, 563.
92. Lang offers one account of how this might be justified. Anthony Lang, "Crime and Punishment: Holding States Accountable" *Ethics and International Affairs* 21 (2007): 239–257.
93. Donald Davidson, "Intending," in Davidson, *Essays on Actions and Events* (Oxford: Oxford University Press, 1980), 83–102.
94. Malcolm addresses Hobbes's relationship with the Reason of State literature. Noel Malcolm, *Reason of State, Propaganda, and the Thirty Years' War* (Oxford: Clarendon Press, 2007), 92–123.
95. Maurizio Viroli, *From Politics to Reason of State* (Cambridge: Cambridge University Press, 1992); Richard Tuck, *Philosophy and Government: 1572–1651* (Cambridge: Cambridge University Press, 1993), 31–64; Peter Burke, "Tacitism, Scepticism, and Reason of State," in J.H. Burns and Mark Goldie, eds., *The Cambridge History of Political Thought 1450 -1700* (Cambridge: Cambridge University Press, 1991), 479–498; Edward Keene, *International Political Thought: A Historical Introduction* (Cambridge: Polity

Press, 2005), 98–118; Jonathan Haslam, *No Virtue Like Necessity: Realist Thought in International Relations since Machiavelli* (New Haven: Yale University Press, 2002), 17–88.

96. Wendt (2004), 306–311.
97. Amy E. Eckert, "Peoples and Persons: Moral Standing, Power, and the Equality of States," *International Studies Quarterly* 50 (2006): 841–859; Amy E. Eckert, "National Defense and State Personality," *Journal of International Political Theory* 5 (2009), 161–176.
98. Eckert (2009), 167.
99. Eckert (2009), 167.
100. Eckert (2009), 168.
101. Eckert (2009), 170.
102. Kelsen (1967), 356; cf. 106.

    This position represents a complete reversal of his earlier arguments. Writing about the prosecutions after World War Two, he stated, "If it is possible to impute physical acts performed by individuals to the State although the State has no body, it must be possible to impute psychic acts to the State although the State has no soul." Hans Kelsen, "Collective and Individual Responsibility in International Law with Particular Respect to the Punishment of War Criminals" *California Law Review* 31 (1942–1943): 530, 533. Quoted in Jørgensen, *The Responsibility of States*, 281.
103. Maitland, 200 offers a similar formulation.
104. Jorgensen, 170–171.
105. Hugo Grotius, *De Jure Belli ac Pacis,* II.21.7.2 quoted in Lang, "Crime and Punishment," 15.

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