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The Coerciveness of International Law

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The Coerciveness of International Law, by Anthony D'Amato,
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Abstract: This article shows that an important part of the deep structure of international law is its self-referential strategy of employing its own rules to protect its rules. International law tolerates a principled violation of its own rules when necessary to keep other rules from being broken. It extends a legal privilege to states to use coercion against any state that has selfishly attempted to transgress its international obligations. International law thus protects itself through the opportunistic deployment of its own rules.

Tags: Monism, Dualism, Consent, Domestication Theory, Soft law, New Haven School, Exceptionalism

[pg437]* According to *Hans Kelsen*, "the law is a coercive order."FN1 Nevertheless many scholars have questioned whether States are actually coerced to obey the rules of international law. Does fear of some kind of physical punishment deter States from violating international law? If so, what forms could the punishment take? When and how would it be meted out? Indeed, how can an artificial entity be punished at all? One might have thought that such basic questions would have been settled decades ago. Yet international law seems to have gotten along quite well without answering them. I say seems because for all we know a better understanding of how international law works might have strengthened its time-honored role of providing rules and reasons that help steer inter-State disputes away from the battlefield and into the negotiation room. FN2

Most researchers today do not so much shy away from addressing the topic of coercion as simply deny its importance. They contend that States obey or disobey international norms for a variety of reasons which need not include fear of punishment, retaliation, or reprisal. Some even argue that international law is [pg438] inherently a non-coercive kind of law. Their views need to be taken seriously. They may be sorted into six categories with some overlap between them: dualism, consent, domestication, soft law, the New Haven school, and exceptionalism. In this Article, after a brief examination of the relation between rules and their enforcement, I criticize each of these categories. My overall thesis, presented mostly in the second half of this Article, is that there is no significant difference between international law and domestic law with respect to the issue of enforcement. *Kelsen* was right that one cannot have law without coercion.

In offering a critique of the six views that international law is not a coercive regime, this first Part sets forth 22 sequential propositions. This philosophical technique is known as aporetics.[FN3] In addition to preserving logical rigor, the *aporia* serves a secondary purpose in providing seriatim a summary of the present thesis.

- (1) The irreducible essence of law is that it is a collection of precepts that guide or regulate human behavior. Although laws or regularities may be deduced from a study of the behavior of the higher animals, the difference between those laws and human laws is that law can effect changes in human behavior by the mere issuance of a command or signal.
- (2) There is a possible world in which everyone, without deviation, obeys all the precepts, thus obviating the need for, or threat of, coercion, compulsion, or physical punishment.

- (3) Coercion is not a necessary part of law in all possible worlds.

The foregoing possible-worlds construct shows that there is nothing incoherent in the idea of law without sanctions.[FN4] International law can be complete if it is always obeyed; the question of enforcement would simply not come up.

It follows that whether international law needs to be enforced is not a jurisprudential question about law; rather, it is a question of the inherent nature of *homo sapiens*. It is common knowledge that no society on Earth has lasted more [pg439] than very briefly if it did not enforce its rules.FN5 There is a simple reason for this: human nature is attracted to free riding. The free rider wants the full package of benefits given by society but would like a personal exemption from one or more of its rules. Free riding appears whenever it is possible to get something for significantly less than it would cost to pay for it (for example, benefits from robbery and embezzlement). Free riders are able to convince themselves that only clueless folks internalize and obey norms like morality, justice, fairness, civic virtue, doing one's share, helping a neighbor in need, serving in the military, and respecting the human rights of others when no one is watching.

Free riding tends to be contagious; if left unchecked it can spread rapidly through a population as people increasingly become addicted to doing as little as they can get away with. Eventually society may break down. This possibility is so evident that societies from the earliest hunter-gatherer groups to the complex nations of today have used their monopoly of power to fight all forms of free riding.FN6 Societies can impose virtually limitless costs upon would-be free riders. These costs are called punishments; they include deprivations of life, health, freedom, and property.FN7 A free rider by definition will not be deterred by norms, rules, and principles standing alone. He or she will only be deterred if society attaches a punishment to the violation of rules—a punishment that exceeds whatever benefits the free rider might derive from the violation. More precisely, a rational free rider is deterred if the probability of punishment times its severity exceeds the probability of getting away with the crime times the monetary value of the crime. Accordingly, we might say that phrases such as "law without sanctions" or "rules without penalties" are oxymoronic in the possible world we inhabit whenever the subject is the regulation of conduct by precepts—that is, whenever the subject is law.FN8

[pg440] Nothing that has been said so far would suggest that we should distinguish between international law and domestic law. Whether the subjects of the law are States or people, our experience in the real world teaches us the unassailable fact that, to be effective, law must be enforced by physical sanctions. Thus:

- (4) To guide human behavior, law must be backed by force in all human societies including the international community of States.

A. Six Perspectives on Non-Coerciveness

I. Dualism

- (5) The theory of dualism claims that every State is sovereign. Thus, no State is subject to a higher law.
- (6) Under dualism, international law, whatever it may mean, cannot coerce sovereign States.
- (7) It is a primitive postulate that every State promulgates and enforces laws that apply exclusively within its territory. This proposition is expressed descriptively, not prescriptively. (The prescriptive form might say "each State *may* promulgate and enforce laws ...") But the prescriptive form would be misleading under dualist theory which holds that it is not international law that gives States sovereignty over their own territory but rather State sovereignty is a primitive postulate.
- (8) No State's law extends into the territory of another State. No State is sovereign over part or all of any other State.
- (9) There are well-known rules of customary international practices, misleadingly called international law and correctly called comity, which States usually observe on a voluntary basis.
- (10) Areas that are external to all States (oceans, polar regions, outer space, etc.) may be regulated by treaty, but the regulations shall only apply to the States party to the treaty.

[pg441] Propositions (5) through (10) spell out the theory of dualism. Advocates of this theory assume that there are two non-overlapping spheres of legal interest, the domestic and the international. Domestic law and international law are each sovereign in their own spheres. The objects of domestic law are people; the objects of international law are States.^{FN9} What happens in cases where domestic law and international law clash with each other? The dualists invariably give the same answer: domestic sovereignty prevails. In other words, international law is inferior to domestic law.

Monism is the opposite of dualism. It says that when domestic law clashes with international law, international law takes precedence. Clearly monism and dualism cannot co-exist. ^{FN10} At first glance, monism seems superior to dualism because it accounts for the existence of international law in the ordinary and full sense of the word law. To be sure, if it could be shown that international law cannot be enforced against States, then dualism will have validated itself. Hence the present critique of dualism must remain incomplete until a showing is made, later in this Article, that international law is physically enforceable against States. Only then can the theory of dualism be falsified.

II. Consent

From time to time a State will announce that although it believes its own sovereignty is superior to international law, it will nevertheless obey any international norm to which it has

expressly consented. During the Cold War, for instance, the Soviet Union denied the existence of customary international law but asserted on many occasions that it would adhere strictly to all its treaties and agreements with other States. What about treaties entered into prior to 1917? These old Tsarist treaties, the USSR said, were "unequal" treaties and hence did not need to be honored. However, the Soviet Union did in fact honor them (with the exception of its repudiation of railway and commercial development bonds issued by the Tsars).

[pg442] Nevertheless there is a fatal flaw in the consent theory. Suppose that N is a norm in both a dualist world and a monist world. The two worlds are physically the same in every respect but have different attitudes toward dualism and monism. Any example of N will suffice for present purposes. Suppose N is the norm entitling every coastal State to a 200-mile exclusive economic zone (N = EEZ). In the monist world, N is a norm of customary international law. In the dualist world, N is a norm provided for in a multilateral treaty devoted just to the topic of the breadth of the EEZ. Now we further assume that M is a State in the monist world and D is a State in the dualist world. Both M and D decide to repudiate rule N. They do this by having their ships fish in the EEZ waters of other States.

M's fishing vessels in the monist world are violating norm N of customary international law. All the other States are thus entitled to take proportionate retaliatory measures against M. The legitimacy of proportionate retaliation will be discussed in the second half of this Article. However, as a preview, the retaliation in this case might work as follows. By satellite reconnaissance, coastal States are able to track M's fishing vessels as they violate the EEZ waters. They wait until the vessels have completed their catch, and then they send in their naval ships to forcibly board M's fishing vessels and confiscate the catch. M's fishing vessels will thus have nothing to show for their labor and they will soon discontinue their practice of fishing in the EEZ waters of other States. Of course, it might be noted that M could protect its fishing vessels by accompanying them with an escort of its own military vessels. However, the cost to M of this tactic would far exceed the value of the protected catch and therefore M would have to give up the fight and bar its vessels from fishing in the EEZ waters of other States.

By contrast, in the dualist world D can only be charged with repudiating the promise it made in ratifying the multilateral EEZ treaty. Many dualist theoreticians hold, or appear to hold, that consent once given cannot be taken away. In their view, D has no right to repudiate its promise. But no writer, as far as I know, has ever given a reason why D is bound by its promise. Indeed, they all agree that D is a sovereign State. But then it follows that a sovereign has just as much power to make a promise as to later take it back. The acts of making and breaking are equal powers of a sovereign. To be sure, a dualist might hint or infer that international law does not allow a State sovereign to withdraw its consent. But this suggestion is stillborn; there simply is no international law [pg443] "behind" or "above" the sovereign's promises. If there were, then we would be in a monist world and not in a dualist world.FN11

The dualist world is not bereft of remedies for D's actions. Other States could reduce their trade with D, or shun D's representatives at international conferences, or unreasonably detain tourists from D when they seek to enter those States. But these remedies are external to international law and not internal to it. As external remedies, they are not constrained by the rule of proportionality (which is a rule of customary international law)FN12 and hence

misunderstandings and conflicts may arise that could escalate into war. The need to go outside norm N in order to enforce it is simply another indication that dualist theory is threadbare.

III. Domestication

The domestication theory of international law is a pragmatic attempt to accord a kind of enforcement to international rules while leaving intact the dualist theory that each State is sovereign over international law within its territory. Enforcement coming from domestication does not emanate from other States but rather is home-grown. A rule of international law is domesticated when a State incorporates it and weaves it into its own domestic legislation and rule-making procedures. When that happens, the government will find it harder to violate that rule of international law because there will be official and bureaucratic resistance where the rule has settled in internally. By way of analogy, consider an empty cargo ship on the high seas that is able to reverse its course by 180 degrees in one hour. But if loaded with cargo, the same ship would require five hours to make the turn due to the five-fold increase in weight. Domestication increases the inertia of international rules by adding them to dualism's only available enforcement mechanism—the individual State.

[pg444] There is no doubt that domestication represents progressive development in a world order based upon the rule of law. FN13 But it cannot be a logical substitute for coercion. A State wishing to violate a rule of international law may do so at the cost of some inconvenience at home. First, it can ignore the domesticated versions of the rule it wishes to violate. Second, it can enact legislation overriding the domesticated incorporations of international rules. Third, it can (perhaps laboriously) rescind the relevant domesticated versions of the international rules prior to taking action on the international front. FN14 Naturally any State that can violate an international rule without suffering international consequences by merely making adjustments in its internal law cannot be said to be subject to, or bound by, the international rule.

IV. Soft Law

Soft law is a strategy for formalizing directives or agreements that depend for their adherence upon good will rather than physical enforcement. FN15 Soft law is a kind of rule without bite, an agreement with no consequences for its breach other than negative reputational effect. The strategy of soft law appears to be working fairly well: Think of the Helsinki accords (East-West political relations) and the Basel resolutions (global banking). Most observers seem to think that disembodied norms are good things to have around. FN16 Soft law can signal the future direction for a norm that may someday find a body all its own.

Soft law *sensu stricto* would not appear to affect the thesis of this Article in any interesting way. However, various dualist scholars who have been intrigued [pg445] by the notion of soft law have taken it into a new direction. By combining soft law with dualism, many European scholars, for example, write as if soft law has, for most practical purposes, replaced international law. FN17 This is not wholly remarkable since to them, as dualists, international law is not binding. Other writers suggest that soft law can lead us to a higher level of development in the area of human rights. It certainly seems true that when writers quote soft-

law norms, they usually cite norms that promote human rights. Soft-law norms seem to have acquired a reputation for humanitarian content.

Yet there is a downside. The ease of articulating norms can lead to a flood of norms coming from enemies of human rights. They could be generating counter-norms such as "women are inferior to men," "a man's testimony in court counts twice that of a woman's," "a husband may beat his wife," and "no woman may travel without her father's or husband's consent." Suddenly soft law may not look quite so benign. Moreover, occasional judicial decisions will cite soft law as if it constitutes binding precedent. The ill-advised opinions by the International Court of Justice (ICJ) in *Nicaragua v. United States* FN18 have encouraged many non-governmental organizations to proclaim all kinds of soft-law norms as if merely pronouncing them breathes life into them. The more that writers talk about soft law, the more it seems to be invested with a kind of *elan vital* it neither possesses nor deserves.

However, advocates of soft law do not want to be left holding an array of disembodied norms. Encouraged by the loosely worded opinion in the *Nicaragua Case*, FN19 the idea seems to be taking hold that soft law may have found an environmental niche by providing content for the hitherto elusive element of *opinio juris* in the formation of customary law.

[pg446] In 1971, I argued that *opinio juris* is impossible to pin down.FN20 So far I have not seen any documented case out of the millions of reported inter-State transactions where *opinio juris* was actually proved. To be sure, there have been many suggestions, including my own, for an objective test that could fully substitute for *opinio juris*. Yet even a perfect objective test would be rejected by the advocates of soft law. For an objective test would support the monist position that international law is fully determinable without reference to the wishes of the target State (that is, the State against which the law is said to apply).

Both soft law and *opinio juris* grow out of the assumed sovereignty of the target State.FN21 In short, so long as *opinio juris* is required to be subjective, its evidence must be found in the target State.FN22 If soft law is used as a window onto *opinio juris*, it too must be attributed to the target State. In that case, both *opinio juris* and soft law are subjective. Hence, finding a norm of soft law to which the target State subscribes is just as difficult as finding *opinio juris* directly without the intermediate step.

V. The New Haven School

The New Haven school is one of the most uncompromising variants of dualism in the literature of international law. Rather than denying that law needs to be enforced by physical power, the late *Myres McDougal* and his associates founded the New Haven school upon the proposition that physical power is law. That which is enforced is law. All other norms can be disregarded; they are nothing but paper-and-ink norms. Obey the sword, for it is mightier than the pen.

[pg447] These ideas originated with *John Austin*, a nineteenth-century British positivist.FN23 *Austin* held that law was nothing more nor less than a command—a top-down order from a commander to his subordinates. The commander's only qualification for the title is

that he holds the reins of power. In *Austin's* words "[t]he matter of jurisprudence is positive law; law, simply and strictly so called; or law set by political superiors to political inferiors."FN24

It was *McDougal's* great insight—or error, as the case may be—to apply the Austinian vision to international law. McDougal's renowned protege, *W. Michael Reisman*, stated in words that invite comparison with those of *Austin* quoted above: "The notion of law as a body of rules, existing independently of decision-makers and unchanged by their actions, is a necessary part of the intellectual and ideological equipment of the political inferior."FN25

Of all the bodies of law that *McDougal* could have chosen as exemplifying *Austin's* command theory, international law was the most ill-fitting. There is practically no evidence that States obey international law because a commander is threatening to punish them if they disobey.FN26 Or to put it more precisely, smaller States may, if necessary, make a show of bending their acts and policies to the demands of a superpower, but they will hardly regard those demands as constituting the law. They will hardly feel "bound" by those demands. To the contrary, they will strive to engage in just enough passive resistance as to require the superpower to expend more energy or resources (such as bribery in the form of foreign aid) in enforcing its unwanted rules than the rules are worth.FN27

[pg448] It would be misleading, however, to claim that the New Haven School exalts power. It believes that power is arbitrary and evil unless constrained by moral values including security (is this a moral value?), wealth (a moral value?), respect, enlightenment, well-being, affection, and rectitude.FN28 But where does this morality come from? Not from inside the law, for if it did, then law would have primacy over power. The only alternative is that the moral values are outside the law and, as *Kelsen* would have put it, they are a commentary upon the law and not the law itself.

Experience tells us that the *bona fide* rules of international law enjoy a widespread acceptance simply because they coincide with the interests of the aggregate of States. (If they did not coincide with aggregate interests, they would never have become international rules in the first place.) These aggregate interests include treating each State equally under the law and upholding the idea of reciprocity. By taking the opposite position in claiming that stronger powers are more equal under the law than weaker powers, the New Haven school is making a singularly unpersuasive claim. Thus the jurisprudential destiny of the New Haven school may be its eventual irrelevance.FN29 Its founders were great and provocative teachers, but what they taught was a theory of inequality that was as true for power as it was false for law.

VI. Exceptionalism

As a theoretical spin-off from the New Haven school, the shelf life of exceptionalism might be mercifully brief. The difference is that the New Haven school teaches that the strongest States make the law while exceptionalism holds that the strongest States are exempt from the law.

As we saw in the case of the New Haven school, it is hard to imagine a weak State deferring to a stronger State just because the latter claims that its superior military power gives

it extra legal privileges. In the 1950s, for example, the United States as a superpower insisted on a three-mile territorial sea. Three [pg449] comparatively weak powers, Chile, Peru, and Ecuador in the Santiago Declaration of 1952 claimed a 200-mile territorial sea.FN30 This and thousands of similar examples show that weaker States are more than willing to defy the legal claims of stronger States. This empirical observation in fact is based upon objective probability theory. Since international law embodies the interests of the aggregate of States, the probability in the foreseeable future is very high that weaker States will far outnumber stronger States. Thus, whatever the content of the emerging international law, the weaker States are more likely to be "closer" to that content than the stronger States. By the same token, weaker States tend to see international law as their protector, whereas stronger States view the law more like an obstacle.

It makes hardly any sense for a strong State to assume that weaker States will accord to it exceptionalism. If a schoolyard bully issues rules for all the children to follow, they might follow the rules as long as the bully is watching, but behind his back they will do everything they can to subvert those rules. The concept is that simple, but it seems to have eluded the *Bush* Administration in its first few years in office. President *Bush* at that time took a strong exceptionalist position in rejecting the International Criminal Court, the Kyoto Protocol, the applicability of the Geneva Conventions and the Torture Convention, and multilateralism in general. Toward the end of his Administration, after traveling abroad, President *Bush* reported that foreign countries were not holding the United States in the highest esteem.FN31

Closely related to the doctrine of exceptionalism is *Michael Glennon's* contention:

The needs of the powerful are different from the needs of the weak; the powerful don't need to be concerned about penalties for violation that might dissuade the weak. Obligation is therefore a function of power and influence. A rule that 'obliges' the weak may not oblige the powerful—even though the powerful may miscalculate and flout that rule to their peril.

That, in a nutshell, is how legal obligation emerges and also how legal obligation fades: ... Norms pervade the international system and provide constant incentives [pg450] and disincentives for compliance. When norms generate a sufficient measure of compliance, we call them "law",FN32.

Suppose Professor *Glennon* is advising the United States on narcotics control. Would he contend that the United States Navy has a right to stop and search for narcotics any vessel anywhere on the high seas? Would he further say that the United States could either sink or seize the vessel if it had narcotics on board? To be sure, he would add that the United States might have to pay damages to the owners of the vessel for destruction of their property. But the United States can easily afford it. Indeed, when the owners of the vessel show up with proof of ownership to collect the damages, they could be arrested for trafficking in narcotics. According to Professor *Glennon's* argument quoted above, the rule of freedom of the seas that "obliges" the weak may not oblige the powerful. The very idea of obligation is different for rich States than poor States, he contends.

Would other States readily accept Professor *Glennon's* argument? Would they be willing to let the United States take the lead in eroding the rule of freedom of the seas? Or is Professor *Glennon* simply pouring the wine of exceptionalism into a new bottle labeled "obligation?"

B. International Law is a Coercive Order

Since the international legal system lacks the usual legislative, executive and judicial institutions, its rules must be self-enforcing if they are going to be enforced at all.

In the propositions that follow, some terminological clarification may be helpful. A State's reaction to a delict (illegal act) has variously been called a retaliation, a reciprocal violation, a countermeasure, and a reprisal. *Kelsen* used the term "reprisal,"^{FN33} which is perhaps the most exact. If E has only violated a practice of international comity, and if F's retaliation itself falls short of violating a rule of international law, F's response is called a retorsion.

[pg451] (11) A reprisal is an action under international law that would be illegal standing alone but becomes legally privileged when used to deter or punish a delict.^{FN34}

(12) Reprisals are bounded by the rule of proportionality. A reprisal that is disproportionate to the original delict becomes itself a new delict.^{FN35} Although, as we shall see below, a reprisal can be more severe than the delict, it cannot be disproportionately more severe.

(13) If State A commits a material breach^{FN36} of one of the provisions of a bilateral treaty it has with State B, State B's obligations under that provision will automatically terminate. In other words, A cannot violate B's rights under the treaty provision and yet claim that B's obligations under the same provision remain intact.

(14) Since bilateral treaties are ratified in their entirety (there is no such thing as a reservation to a bilateral treaty), the breach of any material provision by one party gives the other party the legal right to repudiate any or all of the other provisions in the treaty.^{FN37} The repudiation of a different treaty provision in retaliation for the other side's initial breach—a tit-for-a-different-tat^{FN38}—is a powerful remedy whose deterrence value largely accounts for the fact that most treaties are never broken.

(15) Bilateral treaties containing just a single provision are unstable. Suppose an A-B bilateral treaty had only one provision, Article 1. Then if B abrogates Article 1 and A wants to punish or deter the abrogation, A does not have the choices in proposition (14) because the treaty only contains one provision. However, repudiating Article 1 is tantamount to terminating the entire bilateral treaty. It follows that one-issue treaties are unstable. Treaties become more likely to be self-enforcing the more provisions they contain.^{FN39}

[pg452] (16) For enforcement purposes, all of customary international law can be analogized to a very large treaty. Thus if State C violates a rule of customary international law that harms State D, it is legitimate for D to violate a different rule of customary international law in reprisal for C's act.

The preceding propositions may be illustrated as follows:

I. Reprisals Inside a Treaty Regime

A norm that is important in a different sense is the rule of diplomatic immunity. For although the norm against aggression has frequently been violated over the years, an important and much clearer case on the question of a secondary penalty for rule-of-law violation is the *U.S.-France Air Service Award*.^{FN40} France had issued a regulation prohibiting American intercontinental aircraft that stopped at Heathrow Airport to continue their flights into *DeGaulle* Airport. The United States claimed, and France denied, that the French regulation violated the Air Services Agreement of 1946. The United States thereupon adopted a countermeasure: it prohibited French intercontinental aircraft from landing in Los Angeles, in clear violation of the Air Services Agreement. The countermeasure was economically more severe than the original delict. An arbitral tribunal held that the French action was a delict but the American sanction was not excessive.

Elisabeth Zoller has argued that if the sanction imposes a cost greater than the delict, the excess must be considered punitive.^{FN41} Yet international law, she claims, does not allow one State to punish another for violating its rules. *Lori Damrosch*, on the other hand, has argued that the excess was not punitive but instead was necessary as a deterrent against future violations of the treaty.^{FN42} For if the sanction is made economically equivalent to the delict, then nations [pg453] would be encouraged to violate rules of international law whenever they calculate that they are willing to pay fair price for the violations. Professor *Damrosch* concludes that an extra measure of cost, for the purpose of deterrence, may be included—provided it is not unreasonably excessive.

There is some support for Professor *Zoller's* position in ordinary language. It is generally regarded that compensation in excess of the exact dollar amount of damages sustained is "punitive." Professor *Zoller* also argues persuasively that if all States are equal under international law, no State has a right to penalize another State. Yet Professor *Damrosch's* position allowing extra compensation surely reflects the experience of international relations through the centuries that unless penalties are attached to rule violations, States would frequently violate the rules depending on their own cost-benefit analyses.

The two theoretical positions may be reconciled by allowing the imposition of the extra penalty as Professor *Damrosch* urges, but re-characterizing it as a cost instead of a penalty. This is not a mere verbal distinction, for there are additional costs besides those suffered by the United States. The aggregate of States has suffered an indirect, or secondary, damage to their interest in the sanctity of treaties. In the *Air Services Case*, this may only be a slight interest financially for each observer State, but when multiplied by 191 States^{FN43} the total could easily account for the "extra" award given to the United States.^{FN44}

The injury to the integrity of the rule that is suffered by the onlooking States is usually, insofar as individual States are concerned, substantially less than the damages suffered by the State that is directly affected by the delict. Yet these secondary injuries themselves form a

variable scale. On one end nearly all the damages are suffered by a single country. On the other end nearly all damages are suffered by the aggregate of States. The *Air Services Award* and the repulsion of Iraq from Kuwait in 1990 are, respectively, examples of these terminal points of the spectrum. Some cases of humanitarian intervention are close to the Kuwait end of the spectrum. Clearly genocide is one of those cases; it [pg454] targets everyone. Indeed, the magnitude of the crime is such that an onlooking State could be criticized for *not* intervening.

A further word needs to be said about a State's interest in upholding the integrity of a rule of international law—what has been called the "secondary violation" or the "rule-of-law violation." The State's interest is not just a matter of abstract respect for legal rules. International law is not just a set of rules of good conduct. Rather, what is at stake are the deepest material interests of the aggregate of States in their mutual international relations. For example, the division international law draws between airspace and outer space might seem arbitrary to the casual observer. Yet the distinction, which gives exclusive jurisdiction and control over the airspace to the territorial State but regards the space above the atmosphere as belonging to all States, has become so embedded that it is not even questioned. It has become, in fact, definitional. Indeed, part of what we now mean by the term State includes its vertical jurisdiction and control over the atmosphere. This rule is not simply one of convenience or good conduct; it is part of a nation's assets and its national security. Hence if State A challenges B's right to its own airspace, every other nation has an immediate material interest in retaining the integrity of the rule, even if most nations do not care about giving B political support by forcing A to back down.

II. Customary International Law Reprisals

In 1978, in the first such act in recorded history, Iran deliberately violated the rule of diplomatic immunity. It placed 52 American diplomatic and consular personnel in Tehran in military detention.^{FN45} The immediate response that occurred to the government of the United States would be to round up and arrest all of Iran's diplomatic and consular personnel present in the United States—a tit-for-tat strategy. However, advisers quickly pointed out that the new revolutionary government of Iran probably did not care about the fate of these officials since they had all been loyal employees of the previous regime of the Shah. The United States might even be doing the *Ayatollah's* regime a favor if they rounded up and detained all the Shah's officials in its territory. Thus the United States resorted instead to the tit-for-a-different-tat strategy. It [pg455] issued a freeze order to all American banks in the United States and their branches abroad, locking all financial assets belonging to Iran—a total approximating thirteen billion US Dollars. In addition, the United States easily secured the cooperation of the major banks in Europe; they issued a similar freeze. The freezes were clearly a violation of Iran's property rights under international law. Yet because the action was taken in reprisal for Iran's violation of diplomatic immunity, the reprisal was lawful under international law. Iran was notified that the freeze would only be lifted upon the safe return of the hostages.^{FN46} In 1980, after detailed negotiations,^{FN47} all 52 hostages were returned unharmed and Iran's bank accounts were unfrozen. Iran's actions were clearly coerced by the operation of international law.

Although Iran's detention of the American diplomatic personnel directly affected just the interests of the United States, aggregate interests were secondarily affected by Iran's insult to the integrity of the fundamental international-law rule of diplomatic immunity. Was Iran penalized for this secondary infraction? The reported figures are far from clear; my own calculation is that Iran may have been penalized approximately two billion US Dollars for the rule-of-law violation.FN48

III. The Daily Fare of Reprisals and Retorsions

The paucity of cases addressing the proportionality of reprisals may lead readers to think that there are only few such cases. However, the bulk of [pg456] enforcement of international law takes place under the radar. The following composite example is patched together from the kinds of cases that are little noticed even though they happen hundreds of times a day in countries through-out the world.

A high official of State S flying into New York to attend an important meeting is detained by the police upon his arrival at Kennedy Airport. They say he matches a number of identification points on their computer's databank of suspected terrorists. He protests vehemently, but to no avail. He is released a day later, having missed his meeting. The police apologize to him, saying there was a computer error. A week earlier, an American businessperson nearing the completion of a construction contract in State S was told that it would be good public relations if he were to assign 5 % of the equity in his business to a Prince of the royal family. The businessman refused, saying that would wipe out his expected profit. That evening he was arrested in his hotel room, taken to the police station, abused and beaten and kept in unsanitary conditions overnight. His briefcase and laptop were taken away. He was taken to the airport with just one credit card to purchase a flight out of the country. He did not contact the media, and as a result his story received only a brief mention in a foreign newspaper. A week later, when the high official of State S who was detained returned home, he was informed of the prior incident involving the businessperson. The United States had committed an act of reprisal or retorsion against the government of S in a way that made the connection perfectly obvious to S. There was no point in the United States insulting or aggravating the government of S by publicizing the reprisal. Yet the two stories taken together form an unremarkable everyday incident of delict-plus-reprisal that if the stories were taken alone would be baffling.

IV. Reprisals Against a Superpower

Alain Pellet, as summarized by Professor *Glennon*, argues that "the needs of the powerful are different from the needs of the weak; the powerful don't need to be concerned about penalties for violation that might dissuade the weak".FN49 But why should any State or person undertake an action that is cost-ineffective [pg457] even if it can well afford to do so?FN50 To be sure "costs" cannot always be exactly monetized. Iran, for example, when it held on to the diplomatic hostages for many months, may have placed a high value on "bragging rights" in disrupting the Great Satan (the United States) and ruining President *Carter's* chance for re-election. Let us assume that Iran was willing to pay a price of two million US Dollars for each hostage. This is the average figure paid to the victims of the 9/11

World Trade Center disaster.FN51 Suppose the United States had frozen 104 million US Dollars of Iranian bank accounts until the hostages were returned. It is quite likely that Iran would have paid the price, kept the hostages, and put them on trial as enemies of the State. Instead, the United States froze thirteen billion US Dollars of Iran's financial assets. This effectively placed a price of 270 million US Dollars on each of the 52 hostages. The Iranian government, deciding that the agents of Satan weren't worth that much money, returned all of them.

Professor *Pellet's* argument, however, raises the larger issue whether reprisals will work against a superpower bent on violating international law. To begin with, we should not imagine reprisals in the form of dropping bombs on cities or adding biological and chemical weapons to dams and storage facilities. This sort of crude reprisal would not likely be levied against the United States any more than the United States would do the same thing against a lesser power. But the assets and values of the United States are not confined to its territory. The United States is vulnerable because its investments and nationals located all over the world are vulnerable. The United States has major financial investments in foreign-owned companies. More importantly, at any given time there are hundreds of thousands of American citizens either traveling or residing abroad.FN52 How many American nationals must a country threaten in order [pg458] to make the United States take notice? Just 52 were sufficient in 1978 when Iran arrested that number of American diplomatic and consular personnel in Tehran. The United States considered many scenarios of removal of the hostages by force, but all of them were far too risky in terms of possible lives lost.

C. Rules Governing Reprisals

Despite the effectiveness of reprisals in holding together, sometimes precariously, the interwoven fabric of international law, the lack of scholarly attention to the system of reprisals has created a gap in the study of international law. However it is not too late for scholars to research examples of reprisals threatened or taken. In foreign office archives all over the world there is a rich lode of correspondence dealing with claims and counterclaims, measures and counter-measures, delicts and reprisals. From these examples one could reconstruct certain implicit rules that keep the reprisal system contained. (We are safe to assume that the system of reprisals has been contained; otherwise the world would have experienced a far greater incidence of runaway reprisals escalating into war than we find in the historical record.)

But even from the paucity of cases certain principles can be adduced. These principles should not be confused with the self-defense criteria in the famous *Caroline Case*: "a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation."FN53 The *Caroline Case* was not a case of proportionality.

The following are principles suggested by customary international law that constrain the resort to and application of reprisals:

- (17) A State that commits a delict impairs three categories of interests: (i) the interest of the State directly affected by the violation of the rule; (ii) the interest of the aggregate of States in the impairment of the particular rule that is violated; and (iii) the interest of the

aggregate of States in the cohesiveness [pg459] of international law as a whole that is loosened by the impairment of one of its rules.

(18) The principle of necessity applies only to the initial decision whether to retaliate by using reprisals. It requires the retaliating States if possible to use means short of violating rules of international law. Inasmuch as a reprisal requires breaking, even if temporarily, one or more rules of international law, obviously the collectivity of States would prefer getting the offending State to back down without the need to depart from any rules. In this respect, the principle of necessity operates to create a presumption in favor of punishments that do not require rules to be broken.

(19) Related to the principle of necessity is the principle of efficacy. Here again it only applies to the initial decision whether to retaliate by using the mechanism of reprisals. If a particular kind of reprisal would take 100 years to do its work, then the rule of efficacy would bar the use of that kind of reprisal in the first place.FN54

(20) The most important rule of international law governing the scope and severity of reprisals is the rule of proportionality. Although vague it is not vacuous. Although not definable in advance, it is easily recognized in practice. Thus, if the retaliating nation uses excessive or unreasonable force, other States will warn it that it is exceeding the limits of proportionality and must cut back lest the reprisal turn into a new delict in its own right, inviting retaliation from the other States.

(21) As a general rule, multilateral reprisals have priority over unilateral reprisals because of every State's interest in the cohesiveness of the entire system of international law.

(22) The principle of relatedness also has presumptive validity. Violation of a trade agreement should be met with a different (and perhaps more important) violation of the trade agreement and not, for example, detention of consular officials. However in some cases relatedness will not work. In the *Tehran Hostages Case*, as we've seen, the only reprisal that had a chance of working [pg460] was one that was entirely unrelated in subject matter to the violation of diplo-matic immunity, namely, the freezing of Iran's bank accounts.

D. Conclusion

At any point in time except during a world war, the nations of the world are in legal equilibrium. Illegal acts, whether big or small, need to be thwarted without delay. Thus, an encroachment by any State upon the rights of another State or States should immediately trigger their threat or use of reprisals. The science formula "for every action there is an equal and opposite reaction" helps describe this process.

Beneath the surface of the intricate network of rules that keep opposable interests at bay is a coerciveness that accounts for the persistence and stability of international law itself. This coerciveness does not always reveal itself to researchers and practitioners,FN55 but it would be

a mistake to conclude that international law is just a voluntary collection of rules. A voluntary set of rules would hardly have survived largely intact for four thousand years. The fact that international law is in place today without major substantive changes in its early rules^{FN56} did not happen by chance.

This Article has shown that an important part of the deep structure of inter-national law is its self-referential strategy of employing its own rules to protect its rules. International law tolerates a principled violation of its own rules when necessary to keep other rules from being broken. It extends a legal privilege to states to use coercion against any state that has selfishly attempted to transgress its international obligations. International law thus protects itself through the opportunistic deployment of its own rules.

FOOTNOTES

*Numbers in the format “pg437” etc. refer to the pagination of the original publication.

FN1 *Hans Kelsen*, *General Theory of Law and State* (1949), 19.

FN2 Louis *Henkin's* famous observation seems to be truer with each passing year: "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." *Louis Henkin*, *How Nations Behave* (2nd ed. 1979), 47. It is instructive to compare *Henkin's* formula with scientific laws. Suppose in stating the law of gravity one says "almost all objects when dropped fall downward almost all of the time." How could this be a "law" at all? Scientific laws do not admit of occasional violations, whereas human law is, practically speaking, predicated upon occasional violations: if there were no violations of a statute, then there would be no need for the statute. For example, "citizens are forbidden to hold their breath for more than five minutes" is an unneeded law because it cannot be violated. By contrast, when a human law can be violated, then the State intervenes to stop the violation. Even more strange, from a scientific viewpoint, is the fact that occasional violations of human law, when punished, strengthen the force of the underlying rule.

FN3 An *aporia* is a group of acceptable seeming propositions that are then tested for their collective consistency. See *Nicholas Rescher*, *Paradoxes: Their Roots, Range, and Resolution* (2001), 7-9.

FN4 Strictly speaking, if a proposition is not true in all possible worlds, then it is not deductively true. Instead, its truth is a contingent fact of the particular world one has chosen to talk about.

FN5 Included are utopian societies, all of which eventually flounder on their inability, in the absence of enforcement mechanisms, to prevent free riding.

FN6 See *Elliott Sober/David Sloan Wilson*, *Unto Others: The Evolution and Psychology of Unselfish Behavior* (1998), 132-158.

FN7 *Kelsen* (note 1), 18.

FN8 Why not substitute some other word for "law" and thus finesse the question whether international law is really "law'?" In a great and underrated treatise, *T. J. Lawrence, The Principles of International Law* (1st ed. 1895), we are cautioned not to read too much into the word "law." The term "international law," he writes, is useful for at least three reasons: (1) "whatever precepts regulate conduct are laws." *Ibid.*, para. 12; (2) States and scholars regularly use the term "international law" in diplomatic discourse. *Ibid.*; (3) The term usefully separates legal rules from other normative injunctions such as international morality and international comity. *Ibid.*, para. 10. In any event, if we invented a word to replace "law," such as "nomox," the issue examined in the present Article would not go away. It would still be important to know whether international nomox is precatory or coercive.

FN9 Dualism holds that States are the objects of international law but are not subject to its rules.

FN10 More than a few professors of international law have told me informally that they begin their courses with a demonstration that monism is the only theory that is logical and makes sense, but then go on to teach the remainder of the course from a dualistic perspective. When I inquire how they reconcile the two approaches, they reply that they leave the reconciliation as a challenge to the students.

FN11 As a *Gedankenexperiment*, suppose that the multilateral treaty in the dualist world contained two provisions: the first establishing a 200-mile EEZ zone, and the second stating "This treaty is bound by the rule of *pacta sunt servanda*. Each party to the treaty agrees that this treaty can never be denounced, repudiated, or abandoned." Would State D now be unable to repudiate its consent to the 200-mile EEZ?

FN12 See *Thomas Franck, On Proportionality of Countermeasures in International Law*, *American Journal of International Law* (AJIL) 102 (2008), 715.

FN13 Domestication is the recurrent theory of America's best-selling casebook on international law. See *Barry E. Carter/Phillip R. Trimble/Curtis A. Bradley, International Law* (4th ed. 2005).

FN14 In a spirited defense of domestication, *Phillip Trimble* predicts that it will "alleviate the perennial difficulties in explaining whether international law is 'really law' and why it is binding. It would accomplish this final advantage by simply abolishing the question." *Phillip R. Trimble, The "Domestication" of International Law*, in: *Anthony D'Amato* (ed.), *International Law Anthology* (1994), 400, 408.

FN15 For an expansion of these ideas, see *Anthony D'Amato, Softness in International Law: A Self-Serving Quest for New Legal Materials: A Reply to Jean d'Aspremont*, *European Journal of International Law* (EJIL) 20 (2009), 897.

FN16 Not so *Prosper Weil* who prominently called attention to soft law and debunked it at the same time: *Prosper Weil, Towards Relative Normativity in International Law*, AJIL 77 (1983), 413, 414-415.

FN17 See e.g., *Hartmut Hillgenberg, A Fresh Look at Soft Law*, EJIL 10 (1999), 499; *Ole Spiermann, Twentieth Century Internationalism in Law*, EJIL 18 (2007), 785; *Armin von Bogdandy, The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity—Elements of a Beautiful Friendship*, EJIL 19 (2008), 241.

FN18 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Judgment of 26 November 1984, ICJ Reports 1983/84, 392.

FN19 I expand upon this allegation in *Anthony D 'Amato, Trashing Customary International Law*, AJIL 81 (1987), 101.

FN20 See *Anthony D'Amato, The Concept of Custom in International Law* (1971), 47-72. One would have to interview State officials as to what they think their State would think, if it could think, about whether it had an obligation [legal? moral?] to conform its conduct to a certain pattern of state practice. Not only would different officials give different answers, but if the question is of current diplomatic importance to the State, then the officials would probably feel it is their duty to be evasive or to lie.

FN21 Indeed one could think of them as partially overlapping with domestication which holds, in effect, that the only way States will be coerced to comply with international law is for the coercion to come from within.

FN22 The target State is also the source of the exceptionalist position known as the "persistent objector."

FN23 *Austin*, of course, did not write on a clean slate. Paving the way for his ultra-realism were *Marsilius, Bodin, Hobbes, Machiavelli* and *Bentham*, among others.

FN24 *John Austin, The Province of Jurisprudence Determined* (1832), excerpted in: *Anthony D'Amato, Analytic Jurisprudence Anthology* (1996), 40.

FN25 *W. Michael Reisman, The View from the New Haven School of International Law*, *The American Society of International Law (ASIL) Proceedings* 86 (1992), 118, 121.

FN26 If anything, it is the big powers (the former Soviet Union, the United States under President *George W. Bush*) who keep complaining that the smaller powers use international law to gang up on them.

FN27 Defenders of the New Haven school tend to use code words like "authority" and "control" instead of more off-putting terms like "power" and "brute force." The late Professor *McDougal* summed up international law as the "comprehensive process of authoritative decision." *Myres*

S. McDougal, A Footnote, *AJIL* 57 (1963), 383, 383. These circumlocutions strike me as deliberately ambiguating between power and law.

FN28 *Myres S. McDougal et al.*, *Studies in World Public Order* (1960), 32-36.

FN29 I hasten to acknowledge that mine is far from the prevailing view. For example, *Oona Hathaway* praises the emphasis on power as "transforming the study of international law not just in New Haven but, eventually, around the country, and even the globe." *Oona A. Hathaway*, *The Continuing Influence of the New Haven School*, *The Yale Journal of International Law* (YJIL) 32 (2007), 553, 553-554.

FN30 Later they enforced these claims against American tuna clippers, practically daring the United States to fight back. Instead, the US Congress enacted legislation paying off owners of tuna clippers for the value of their confiscated catch.

FN31 See *David Scheffer et al.*, *The End of Exceptionalism in War Crimes*, *International Law Students Association (ILSA) Quarterly* 16 (2007), 1, 16.

FN32 *Michael J. Glennon*, *Force and the Settlement of Political Disputes*. Debate with Alain Pellet, *The Hague Colloquium on Topicality of the 1907 Hague Conference*, September 7, 2007. Available at SSRN: <http://ssrn.com/abstract=1092212>.

FN33 *Kelsen* (note 1), 57.

FN34 *Hans Kelsen*, *Law and Peace in International Relations* (1948), 34.

FN 35 See *Franck* (note 12), 763.

FN 36 A provision is material if it implicates the nature and purpose of the treaty.

FN 37 See Article 60, *The Vienna Convention on the Law of Treaties*, 23 May 1969, UNTS 1155,331.

FN38 I invented this awkward term over twenty years ago and am still waiting for it to catch on. See *Anthony D'Amato*, *Is International Law Really "Law?"*, *Northwestern Law Review* (Nw.LR) 79 (1985), 1293

FN39 Consider the rocky history of the bilateral Anti-Ballistic Missile Treaty. It lasted, with great controversy, from 1972 to 2002 when the United States, after giving the required notice of consent, unilaterally withdrew from the treaty. Although containing much peripheral language, that treaty was essentially a one-issue treaty and, hence, under the formulation above, was inherently unstable. Its instability showed up as soon as one party desired to violate it.

FN40 *Case concerning the Air Services Agreement of 27 March 1946 (United States v. France)*, *Arbitral Award of 9 December 1978*, *International Law Reports* (ILR) 54 (1979), 304.

FN41 *Elisabeth Zoller*, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (1984), 72-73, 96-98.

FN42 *Lori Fisler Damrosch*, *Retaliation or Arbitration—or Both? The 1978 United States-France Aviation Dispute*, *AJIL* 74 (1980), 785, 792.

FN43 Given a present total of 192 States, all the onlooking States are equally damaged by their interest in the integrity of the rule that has been broken by France. This amounts to 190 States. The total goes to 191 because the United States is damaged both directly by France and indirectly by France's secondary violation.

FN44 Deterrence itself arguably falls into the category of punitive damages. After all, if C commits a crime, he was obviously not deterred from committing it. Therefore, the deterrence portion of his sentencing must be aimed at everyone other than C. To C, the deterrence portion of his sentencing can only be a punitive add-on.

FN45 The diplomats were first held captive by gangs of what were allegedly students. International law was only violated when Iran ratified the students' action by transferring the diplomats to an official detention center.

FN46 It was not clear that the American diplomats were "hostages" as they were described by the media, or whether they were being held pending their prosecution as aiders and abettors of the support the United States had given to the deposed Shah's government—a government now regarded by the successful revolutionaries as illegal.

FN47 For an overview, see *Karen Feste*, *Negotiating with Terrorists: The U.S.-Iran Hostage Crisis* (2005). IACM 18th Annual Conference. Available at SSRN: <http://ssrn.com/abstract=724243>.

FN48 The total amount frozen was approximately thirteen billion US Dollars. Iran eventually received cash and credits amounting to approximately 11 billion US Dollars plus 800 million US Dollars interest paid by the United States to Iran. However, with ordinary interest rates at 15 % at the time, I calculate that Iran may have been underpaid by about two billion US Dollars of the total interest due. The official figures that have been released include unspecified set-offs. If Iran was in fact underpaid by about two billion US Dollars, that amount could be understood as a penalty for the rule-of-law violation.

FN49 *Alain Pellet*, *The Normative Dilemma: Will and Consent in International Law-Making*, *The Australian Year Book of International Law (Australian YBIL)* 12 (1988-1989), 22, quoted in: *Glennon* (note 32), 5.

FN50 It would be different if a State had unlimited resources. But there is no such State in our finite world.

FN51 *Bill Marsh*, *Putting a Price on the Priceless: One Life*, *New York Times*, available at: http://www.nytimes.com/2007/09/09/weekinreview/09marsh.html?_f=I&oref=slogin.

FN52 The Census Bureau reports that in 1998 there were over 56 million Americans traveling abroad (compared to 46 million foreign tourists visiting the United States). Even more striking are the figures of American citizens residing abroad as reported by the Bureau of Consular Affairs in 1999. There were 27,600 citizens residing in Buenos Aires, 55,500 in Sydney, 250,000 in Toronto, 48,220 in Hong Kong, 75,000 in Paris, 138,815 in Frankfurt, 45,000 in Tokyo, and 441,680 in Mexico City. Among the smaller countries which could become "hot spots," the Bureau reports 646 American citizens living in Albania, 1,320 in Bangladesh, 1,600 in Bosnia, 440 in Congo, 2,000 in Cuba, 10,000 in El Salvador, 546 in Gambia, 11,000 in Haiti, 18,000 in Israel (Tel Aviv), 8,000 in Jordan and 6,639 in Kuala Lumpur, and those are taken from just the first half of the list. To these figures must be added the many thousands of American military personnel and their dependents on foreign bases. Available at: http://www.pueblo.gsa.gov/cic_text/state/amcit_numbers.html.

FN53 *The Caroline Case*, Letter of Daniel Webster, available at: The Avalon Project, <http://www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm>.

FN54 Thus when a multilateral blockade was placed upon Southern Rhodesia in the early 1970s to put economic pressure on the State to dismantle its illegal system of apartheid, there were times in the ensuing years that the blockade was criticized for being permeable and inefficacious. The blockade may have seemed ineffective, but its ineffectiveness was not foreseeable and, hence, continued to be legal. Eventually the reprisal worked and the nations that sponsored it were vindicated.

FN55 Sometimes hiding the reprisal works best, as we saw in the case of the official who was detained in order to punish his country's previous violation of a foreigner's rights.

FN56 The two most substantive changes in international law are of recent vintage: the rule outlawing wars of conquest, and the idea, not yet achieved, of giving international-law standing to all persons who wish to assert or defend their human rights.