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## Is International Law Really ‘Law’?

by Anthony D’Amato\*, 79 Nw. U. L. Rev. 1293-1314 (Dec.1984/Feb.1985)

**Abstract:** International law is enforced by the process I describe as reciprocal-entitlement violation. The violation may be of the same entitlement or, more likely, of a different entitlement. But it is on the whole an effective process—as effective for the international legal system as is the enforcement of most laws in domestic systems via the state-sanctioned deprivation of one or more entitlements held by individual citizens or corporations. It is impossible to understand why nations do or refrain from doing the things they do without understanding what the entitlements are and how nations act to preserve their full complement of existing entitlements.

**Tags:** Reciprocal entitlements, Countermeasures, Tit-for-Tat, Proportionality of Response, International law, Vienna Convention on the Law of Treaties

[pg1293]\*\* Many serious students of the law react with a sort of indulgence when they encounter the term ‘international law,’ as if to say, ‘well, we know it isn’t *really* law, but we know that international lawyers and scholars have a vested professional interest in calling it ‘law.’ Or they may agree to talk about international law *as if* it were law, a sort of quasi-law or near-law. But it cannot be true law, they maintain, because it cannot be enforced: how do you enforce a rule of law against an entire nation, especially a superpower such as the United States or the Soviet Union?

### I. THE ‘ENFORCEMENT’ ARGUMENT

One intriguing answer to these serious students of the law is to attempt to persuade them that enforcement is not, after all, the hallmark of what is meant, or what should be meant, by the term ‘law.’ As Roger Fisher observed, much of what we call ‘law’ in the domestic context is also unenforceable.[FN1] For example, where the defendant is the United States, such as in a case involving constitutional law, how would the winning private party enforce his or her judgment against the United States? Upon reflection, we see that the United States, whenever it loses a case (and these cases are very frequent—the myriad cases involving income taxes, social security benefits, welfare, and the like), only complies with the court’s judgment because it wants to. The winning private party cannot hold a gun to the head of the United States to enforce compliance, even if there were a natural meaning to the term ‘head of the United States.’ We can go even further than Professor Fisher did: every criminal law prosecution is a case of an individual pitted against the state (or the ‘people’ of the state). What is to stop the state from saying, ‘you were acquitted by the jury, but that was a travesty of justice, so we’re [pg1294] going to imprison you anyway’? How does the defendant, in handcuffs, stop the state from going ahead? In some countries, at some times, we have heard of dictators or military regimes proceeding with the imprisonment and execution of defendants who were acquitted by their own courts. In terms of power, there is nothing to stop the United States from disregarding adverse judgments of its own courts. In this sense, therefore, a great deal of what we normally call ‘law’ in the United States is unenforceable by private parties arrayed against the state.

It is no objection to this line of reasoning, by the way, to dismiss it as far-fetched. If one objects that the United States, in any event, routinely complies with adverse judgments of its own courts, then the international lawyer can answer that the same is true of rules of international law. As Louis Henkin put it, ‘almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.’[FN2]

But a more substantial critique of Professor Fisher's analogy between cases involving the government as a party and international-law cases is that *most* domestic litigation, after all, does *not* involve the government as a party. Most cases involve one citizen against another ('citizen' including artificial persons such as corporations), and as to *those* cases the law is enforced by the full sovereign powers of the state against the losing litigant. This majority of cases, then, tends to define what we mean by 'law'; it constitutes the paradigmatic instance of law. Therefore, the argument goes, the minority of cases that do involve the state or the United States as a party are, in a sense, parasitic upon the paradigmatic instance. We tend to regard this latter minority of cases as 'law' only because they share certain attributes with the generality of cases. But if we look hard at this minority of cases where the government is a party, we must concede that they are not really 'law' because, at bottom, they are unenforceable. They only appear to be law when looked at uncritically. In short, this line of argument *concedes* Professor Fisher's major premiss—that international-law cases are similar to domestic cases where the government is a party—but denies his minor premiss, that such cases are instances of 'law.' Hence, international law is no more 'law' than is constitutional law or even criminal law. As John Austin stated, both constitutional and international law are merely 'positive morality.' [FN3]

[pg1295] One might object and say that it is frivolous to exclude the vast body of constitutional law and criminal law cases from what we mean by 'law.' If you say that, then you see the force of Professor Fisher's argument. You are well on your way to accepting the 'reality' of international law. But I have presented the skeptical argument against Professor Fisher's view because I want to be rigorous and not have to rely on an argument by analogy, which is ultimately the kind of argument that Professor Fisher has used.

Let us then consider a second line of reasoning against the proposition that enforcement is the hallmark of law. This argument is not associated with any particular writer, because it relies on early conceptions of law and also on the philosophy of law itself. If we consider what law is *not*, we soon realize that it is *not* a rationale for the application of force. It is not a system of 'might makes right' in the sense that the state constantly has to compel people, at gunpoint, to behave in a certain way. If you look through a volume of cases, or even a volume of statutes or annotations, you will find that most of the matters therein concern the working-out of private arrangements in a complex society. Most of 'law' concerns itself with the interpretation and enforcement of private contracts, the redress of intentional and negligent harms, rules regarding sales of goods and sales of securities, rules relating to the family and the rights of members thereof, and other such rules, norms, and cases. The rules are obeyed not out of fear of the state's power, but because the rules by and large are perceived to be right, just, or appropriate. No state could possibly compel people to obey all these rules at gunpoint; there would not be enough soldiers and policemen to hold the guns (a sort of extreme Orwellian vision of society), they would have to sleep sooner or later, and then anarchy might break out.

Even more fatal to this view of extreme enforcement is that the state would need many rules to channel the behavior of the enforcers themselves. For instance, how would all these police officials and soldiers know what rules they must enforce, and who would make sure that they enforced the rules as written? We would need another phalanx of soldiers to police the enforcers. [FN4] And on top of that, another layer of officials pointing the guns at the heads of the gun-

pointers. The whole process would break down of its own weight. Indeed, Orwell in his novel, *1984*, avoided the question of how to coordinate and control the activities of the officials of the state he described. He simply referred to the state in the abstract as exercising monolithic power over the citizenry, [pg1296] finessing the real problem of how to organize such a state so as to control the controllers.

If law is not, by and large, a body of rules that are enforced at gunpoint, what is an individual rule of law? Is it, as the nineteenth century positivists maintained, a command of the state that is backed by the state's enforcement power? [FN5] To be sure, some 'laws' might be just that: a dictator issues a command for his personal indulgence or whim, and if he has sufficiently satisfied his close advisers and the military in other areas, they will probably enforce his command. But most laws will not have this characteristic. Indeed, looking at the matter more microscopically, what is it that *forces* a judge to decide the case before her on the basis of precedent and statutes? Is another judge holding a gun to her head? Does she examine whether the law will be enforced to see whether it is law? How does she know, in advance of her own decision, what will be enforced?

This point came up in the famous case of *Marbury v. Madison*, [FN6] familiar to generations of American law students but often misinterpreted. In that case, Chief Justice Marshall's 'bottom line' was that the Supreme Court had no original jurisdiction to issue writs of mandamus. In short, there was no power to enforce that which the plaintiff demanded. If 'law' were coincident with enforceability, then, since under Marshall's reasoning there was not power of enforcement in the Supreme Court because it lacked *jurisdiction*, nothing Marshall said in his opinion would have had any legal significance. To put it another way, lacking a 'remedy,' the plaintiff would have no 'right,' not even a right to get a decision from the Court on the question of 'right.'

But Marshall took an entirely different tack. He *began* with the question: does the plaintiff have a right? He then asked the second question: if the plaintiff has a right, does he have a remedy? And his third question was, if the plaintiff has a remedy, can the relief issue from this Court? By putting the questions in this order, Marshall did the opposite of what the positivists would require. By dealing first with the question of 'right,' Marshall was able to address that question wholly apart from whether there was a remedy or whether the remedy was available from the Supreme Court. As all law students know, Marshall answered his own question that there was indeed a right, and secondly, there being a right meant that the plaintiff had a remedy. By going through this reasoning, Marshall was able to establish the groundwork for his path-breaking assertion of judicial review of questions of constitutionality. He held that, in the face of a right and remedy, the congressional statute purporting to grant that remedy to the Supreme Court as a matter of original jurisdiction violated the Constitution. Marshall would [pg1297] not have been able to make his assertion of judicial review if he had begun and ended his opinion with the simple sentence, 'we have no jurisdiction; case dismissed.' Hence, we see that in a case where by the Court's own admission it lacked jurisdiction and the power of enforcement, nevertheless the Court was able to establish a point of fundamental substantive significance.

Marshall's persuasiveness was dependent upon a consensus at the time he wrote his opinion that there could be such a thing as a 'right' without a real remedy. This was part of a larger conviction in those days that the 'law' itself was not something that only works when a

policeman is standing by ready to enforce it physically. Law indeed is something that is opposed to force. Right is not the same thing as might. In Continental countries, the word for 'law' is, as translated, the word 'right.' In law, there is a fundamental element of right, of justice, dating back to Cicero's and St. Thomas' equation of 'right reason' with the natural law (the latter being those reasonable rules that accommodate the peaceful affairs of persons in a society). [FN7]

Under this argument that we are developing, the relation of force to law, of might to right, is a contingent and not a necessary relation. We can imagine a society under law where there is no force. People obey the laws, and no one disobeys. There is no need, in this idyllic utopia, for enforcement, because there is universal willing compliance. Surely we cannot claim that such a society does not have 'law.' It is clear that the society is one that is under law, and that the contingent use of force is simply not necessary. To take an example closer to home, suppose that in some state of the Union there has not been a kidnapping since that state entered the Union. Would we say that the law against kidnapping in that state is not a law? Certainly no one would argue that if a law is so successful that it never needs enforcement, it is not a law. Thus, we can conclude from this hypothetical that enforcement is not intrinsic to, is not necessary to, the idea of law.

But you might object that enforcement must potentially be present, even if it is not invoked. In other words, in the state that has no kidnapping, it is nevertheless true that if someone commits this crime—or even contemplates committing it—the potential for enforcement is ever-present. It is this potential for enforcement, after all, that the positivists insist upon when they draw our attention to the necessary connection between a rule of law and its enforcement.

To take care of this objection, we may simply modify our previous [pg1298] hypothetical of the idyllic utopia. Assume not only that they have never had a need to enforce their laws, but also that they have no enforcement machinery—no police, no jails, no sheriffs, no marshals. They can still have a system of laws, as complex as you please, even without the potential for enforcement.

Yet you might now object that we cannot prove something about the nature of law, an all-too-human institution, by postulating the existence of a utopia where the inhabitants never break the law. Can we modify our utopia to make it seem more realistic? Suppose occasionally someone breaks the law, but is ostracized from society. Suppose one who breaches a contract is considered a moral renegade who should not be entrusted with any further business dealings. These expressions of sharp social disapproval, and occasionally of ostracism, may work to discourage the few people who would disobey the law. They may not always work, but they may be potent enough to deter most of the people (a minority to begin with) who might consider breaking the law. Thus, our not-perfect utopia now consists of a regime where almost all of the laws are obeyed almost all of the time, where occasional disobedience is met with sharp social disapproval, and where occasionally, despite the 'mechanism' of social disapproval, occasional violations of the law occur. [FN8] Is this not, nevertheless, a legal system?

A positivist might happen to object to this concept as follows: the idea of social disapproval, and sometimes social ostracism, is the same thing as a sanction. It constitutes a way of enforcing the law. Hence, by introducing this social-disapproval factor into the utopia, we have simply

underscored the original point—that law (except in idyllic utopias which do not exist) depends upon potential enforcement.

But if that is the positivist's position, then the international lawyer should gladly concede the point. For international law recognizes that the social-disapproval factor operates as a sanction. A nation among the community of nations which violates the law, for example, by disregarding a treaty obligation, would certainly be subject to social disapproval by the other nations. In this sense, international law is really 'law.'

Now it is perhaps the positivist's turn to beat a hasty retreat. The positivist may now want to retract the equation of social disapproval with 'sanction,' for fear of including international law under the term 'law.' Instead, the positivist will retreat to the original position that physical or even violent enforcement is necessary to make law 'law,' and hence international law is not 'law.' We may, however, suspect that the positivist is reshaping definitions in order to *exclude* the international-law case, rather than to arrive at a general definition of law. [FN9] Consistent [pg1299] with this position, the positivist will have to argue that any legal system in which social disapproval functions as the sole sanction (for example, in a peaceful tribal society) does not have 'law.' 'Law' is present only when, in addition to social disapproval, there is physical coercion stemming from the sovereign power of the state. But what if there is no *need* for this physical coercion? The positivist must then conclude that there is no law.

Such a position would be difficult to defend, for if there is a society where people are so law-abiding that they get along only with the social-disapproval sanction, that society manifests a rather good case of 'law.' It is strange to insist that, for there to be law, physical coercion must also be used even if there is no need for it.

Yet the serious student of law may not be satisfied with the preceding argument in its entirety. We want to ask what happens if the need for physical coercion should arise. In the international system, at least, we have states which occasionally break the rules of international law and which seem not to be deterred by expressions of social disapproval from the other states. This is a reality of international life. Therefore, unlike the tribal society where social disapproval may constitute an effective sanction, international society needs a physical sanction to underscore its legal rules. Otherwise, the rules will occasionally be flouted. Perhaps they will be ignored most often when the 'chips are down,' which is exactly when they most need to be enforced. How can we call such a system, dependent for its support on so feeble a mechanism as social approval, a 'legal' system?

It is hard to discern the logic behind the preceding objection, even while it is easy to understand it. We all recognize, and regret, that rules of international law are flouted on occasion, and we are all too aware of the fact that an outraged world public opinion simply is incapable of discouraging the violation. Should our conclusion then be that the rules of international law are not 'law' as we know the term, because as we know the term the 'law' involves the concept of physical enforcement? Yet, even in asking this, we acknowledge that physical enforcement is not a *necessary* characteristic of law (our 'utopian' examples). And we also acknowledge that, even in domestic cases, where the state is one of the parties, we cannot meaningfully speak of physical enforcement (Professor Fisher's argument). These two arguments

destroy most of the logical force of our position that international law is not really law, and yet, we may cling to that position.

Some early writers on the law of nations attempted to meet the enforcement objection head-on, by asserting that rules of international law [pg1300] are indeed enforced by the mechanism of war. A nation that violates the rules will be the object of a 'just war' initiated precisely to punish the transgressing nation and to enforce the validity of the rules.[FN10] This argument today sounds like an archaic ploy, for we know enough about wars to have learned that the 'transgressing' state may occasionally win if it has the physical power to do so. Physical might bears no necessary connection to international right. Interestingly, the concept of a 'just war' has become, if possible, even more archaic under the collective security mechanisms of the League of Nations and its successor the United Nations. These bodies, in principle at least, are designed to stamp out acts of aggression wherever they occur. In other words, they are not set up for the purpose of enforcing international law, but simply for the purpose of enforcing international peace. It follows that if the peace is unjust, it will be enforced anyway. The United Nations seems to call for a 'cease fire' in disregard of the merits of the local conflict, and it appears to be less concerned with enforcing international law than with enforcing a prohibition against the use of force no matter what the justification.

Yet there is something in the notion of a 'just war' that may help us to fashion a more compelling case for the proposition that international law is really 'law' than the other arguments we have examined. I will try to show in Part Three that what I will label as reciprocal-entitlement violation is a mechanism akin to the old 'just war' notion that underlies a realistic enforcement mechanism for international law.

At present, we may conclude tentatively as follows:

(1) The fact that some states disobey periodically some rules of international law does not itself mean that those rules are not rules of 'law,' because even in domestic society some people (e.g., criminals) break the law from time to time.

(2) On the other hand, the fact that most states obey most rules of international law most of the time is not enough to call those rules 'legal' because we are especially concerned with 'important' cases where states may get away with violating rules of international law. If states can violate rules with impunity when it is in their national interest to do so, how can we call those rules 'law'?

(3) We recognize, even though it makes us somewhat uncomfortable, that international law is more properly analogized to domestic cases where the state is a party than to domestic cases where one citizen sues another. Under this conception, we concede that our usual notions of 'enforcement' are not appropriately applied to the state. But because we recognize as 'law' those domestic cases involving the state as a party, we should also recognize as 'law' those international controversies involving states as parties.

[pg1301] (4) We further concede that physical coercion is not a necessary component of 'law.' However, we are reluctant to conclude that it is totally unnecessary, because we have seen too many cases where a nation violates international law and gets away with it because of the lack of an effective enforcement mechanism.

(5) Hence, we are somewhat, though not totally, persuaded that international law can properly be labelled 'law' for most purposes. But we may remain unconvinced, at this point, that it is *really* 'law.'

## II. THE 'VERBAL' ARGUMENT

Let us for the moment look at the question whether international law is really law from an entirely different angle. Suppose we were to read all the communications that governments officially make to one another: letters, speeches, proclamations, treaties, agreements, diplomatic initiatives, and so on. Suppose we read these with an eye toward whether the language contained in these communications refers to 'law' and is 'legal' language. In brief, we would be engaging in a 'content analysis' of these communications to see whether what is being asserted and claimed therein can properly be called 'legal.' [FN11] We will find that, indeed, much of the content of intergovernmental communications is self-consciously grounded in legal terminology. There should be nothing surprising about this, considering the fact that lawyers typically help draft these documents and speeches. We will find, indeed, that the more important the communication the more likely it is cast in legal terms, and the more likely it is that lawyers have played a role in drafting it.

We might then want to argue that, given the reality of this legal language, it would be rather absurd to maintain that 'law' is *not* involved in these intergovernmental communications. If the relevant actors call it 'law,' who are we to say that they are all wrong? Rather, is it not our job, as observers or scholars, to employ the terms the way the relevant actors intend those terms to be employed? Thus, the very utilization of legal language in intergovernmental communications is an argument for the proposition at least that governments resort to 'law' in their attempts to influence each other; or refer to 'law' in an attempt to appear to be legal and thus ward off disapproval of other states.

We might want to add to this argument the position taken by the 'policy-oriented jurisprudence' of Myres McDougal and his colleagues, including Harold Lasswell, Michael Reisman, Lung-chu Chen, and others. [FN12] We might collect on a library shelf their voluminous works and [pg1302] ask, 'what have they written about?' If our answer is not 'law,' what is it? To be sure, when we take their books down from the shelf and look into them, we begin to get an extraordinarily broad definition of 'law.' The concept is so broad, indeed, that we wonder if there is anything which they can properly call 'non-law.' They cite works from the social sciences, from the humanities, as well as works on international law and international politics. Their idea of international law is that it is a process of authoritative decision-making, but then they seem to view 'authoritative' so broadly as to encompass just about any decision made by any international decisionmaker. [FN13] Finally, they disassociate law from enforcement. Legal rules, according to Professor McDougal, 'exhaust their effective power when they guide a decision-maker to relevant factors and indicate presumptive weightings.' [FN14]

According to the policy-oriented jurisprudence school, therefore, international law is nothing other than international communication. Under the first argument I made in this Part, the prevalence of legal language in international communication indicates that nations are talking about, and believe they are talking about, 'law' in the positions they take vis-a-vis each other. Under the second McDougal-type argument, international communication itself is 'law'

irrespective of its being couched in legal terms. Taken together, both of these positions may convince the reader that international law is really law.

In the past, I was intrigued by the law-as-communication approach.[FN15] Recently, I have become uneasy with it, in part because it proves too much. *Any* international contention couched in legal language (or even, following McDougal, not couched in legal language) becomes ‘law.’ Yet surely the ‘law’ is not everything. It does not include contradictory positions, although McDougal comes perilously close to this in his notion of the complementarity of customary prescriptions.[FN16] If international ‘law’ says that nations may or may not attack one another, that the high seas are free to all and closed to all, that genocide is both permissible and prohibited, then I would conclude that there is no international ‘law’ worth talking about on these points. (Someone who disagreed with me would probably say that the ‘verbal’ argument I have [pg1303] outlined in this Part compels the conclusion that there *is* international law, but that its content is incoherent.)

The other misgiving I have about the verbal argument is that scholars are, after all, not precluded from criticizing the propriety of the use of language by other persons. Even though international communications are couched in legal terms, an observer does not have to conclude that the use of those legal terms is proper. In the insurance business, contracts between insurance companies are called ‘treaties,’ even though this is not the use of the term that international lawyers recognize. An international lawyer is not precluded from criticizing the terminology of ‘treaties’ if that criticism throws some light on what insurance companies are really doing. For example, does the use of the term ‘treaty’ imply that rules of international law relating to treaty interpretation should be followed in disputes among insurance companies, instead of domestic contract rules? The answer is no, and thus the term ‘treaty’ can be criticized as misleading. Similarly, we might properly criticize the resort to legal terminology in international communications if we can show that it is not really ‘law’ that is being invoked.

We may therefore conclude this Part by saying, simply, that the prevalence of legal language in international communications *adds* to our previous conclusions that international law is properly called ‘law’ for most purposes and in most contexts. We still, however, reserve final judgment on the question whether it is really ‘law.’

### III. THE ‘RECIPROCAL ENTITLEMENTS’ ARGUMENT

I believe that a conclusive argument can be fashioned that international law is really law, by showing that international law is enforceable in the same way that domestic law is enforceable. Of course, I cannot make the claim that international law is always enforced. Rather, what I shall proceed to do is to take a closer look at what we mean by enforcement, and then show that it is applicable equally to the domestic and to the international legal systems.

When we examine the concept of enforcement of law, we find that law can be enforced in many ways. For example, a parent might frown upon a child who does not brush his teeth, or might express stern disapproval. This tends to ‘enforce’ the law, although as we saw in Part I it is

not a satisfactory concept when we think of enforcement.[FN17] For it is too easy for the child, or the nation, to decide to violate the law and pay the mild price of incurring social displeasure.

Thus, we want to narrow the concept of enforcement. Perhaps a good way to begin to narrow it is to exclude all modes of 'enforcement' that are extrinsic to the legal system itself. Social disapproval, for instance, is extrinsic to the legal system as is social approval. These are [pg1304] external mechanisms for enforcing, or more accurately reinforcing, the law, but we know intuitively that they are not provided by or required by the law itself. (If the law *required* them, then you would have the regressive problem of how to force people to socially disapprove of a miscreant's behavior.)

When we look at the legal system itself, we find that it typically provides for deprivations, for disabilities. When a person disobeys the law, the law 'punishes' him in some way. The possibility of punishment, in turn, is supposed to deter a rational person from violating the law in the first place.

Enforcement thus consists of some form of legally imposed sanction. A monetary fine is an example of a punishment that is not physical. Physical punishments include being deprived of your freedom, for example by being incarcerated or being forced to perform some kind of community service as part of your 'sentence.' In the extreme, you may be deprived of your life if convicted of a capital crime.

In this entire spectrum of legally imposed sanctions for violation of the law, we find that the law has removed one or more of your entitlements. I could use the word 'rights' here—for example, your rights to life, to liberty, and to property. But the word 'entitlements' is more precise, because it denotes legally recognized rights. If you claim a right that the law does not recognize (for example, a woman's claim to the right to vote before the Constitutional amendment of 1920 providing for universal suffrage), you do not have an 'entitlement.' Since we are talking about enforcement mechanisms intrinsic to the legal system, it is more precise to speak of entitlements than to speak of rights.

In all cases of law violation, the law responds by depriving you of one or more of your entitlements. You have a legal entitlement to liberty; you lose it if you commit a crime punishable by incarceration. You have a legal entitlement to your bank account; you lose it if you have failed to pay your taxes or if someone obtains a judgment against you and attaches it. You have an entitlement to performance under a private contract that you make with someone else; if you fail to perform your part of the bargain, a court may decide that you have forfeited your entitlement under the contract. Some of these entitlement deprivations that you suffer because you have violated the law can be effectuated against you without any need for physical enforcement. Your bank account can be taken away from you by a bookkeeping entry made in the bank pursuant to a court order. Your marriage can be legally dissolved by a court decree without your willing compliance or participation. Thus, when we think of legal enforcement, we need not imagine the use of physical force against the person of the law-violator, although, of course, in some cases physical force is appropriate. The deprivation of either your entitlement to liberty, or your entitlement to life, may result from your conviction of a major crime.

[pg1305] Furthermore, there would be no possibility of enforcement by entitlement deprivation if people were not assigned some entitlements in the first place. If you had no entitlements, you would obviously suffer no loss if the law deprived you of some of them. (There is no 'law' in the 'jungle.')

However, we find in all legal systems without exception the legal recognition of certain rights of the people, which we call entitlements. At a minimum, there is recognition of life and liberty. With a set of entitlements, therefore, each person is vulnerable to removal of some of them by the law. Legal systems typically enforce their own rules by removing one or more entitlements of persons who violate the rules.

If the account I have just given of the function of entitlements in the enforcement of law is persuasive, and if it fully captures the more diffuse notion of enforcement, then we next can turn to the international legal system to see how the process of entitlements and entitlement-deprivations works to provide for the enforcement of legal rules.

Let us imagine a primitive international situation. Two nations are at war with each other, but are weary of it and are interested in the possibility of peace. The problem now is how to send a peace ambassador from one nation to the other. The war between them is so total and brutal that no one wants to be an emissary for fear of being killed by the other side. We assume that this is the first 'case' of resolving the conflict between the two nations so there are no prescribed methods of establishing peace.

Perhaps nation *A* could dispatch a particularly brave person who would carry a letter saying, 'don't kill the bearer of this letter, as we are attempting to set up communications with you, and we promise to give safe conduct to any person you choose to send to us who has a letter from you. Moreover, as evidence of our good faith, you can hold the bearer of this letter hostage while your emissary is en route to us.' Such a letter, of course, would not guarantee that its bearer would be safe. All we know is that, in some instances, letters such as this one actually worked. [FN18] We don't know much about those instances where the letter was ineffective and its bearer was killed. But in those cases where the letter worked, a primitive entitlement—a limited ambassadorial immunity—between the two nations was set up.

This single entitlement, however, is precarious, for the only remedy for entitlement violation by one nation is that of a reciprocal violation by the other nation of the same entitlement. Thus, suppose nation *A* is furious with the peace terms brought by nation *B*'s emissary, and responds by killing the emissary. In effect, nation *A* has opted to resume total war. Nation *B*, it is true, can retaliate by killing the emissary it is holding, but nation *A* presumably had already taken this possibility into account and [pg1306] decided to 'sacrifice' its own emissary. The two nations have thus destroyed the only entitlement that existed between them. They revert to a lawless state of war, from which extrication will now be harder given the unfortunate experience with the emissaries. Clearly the entitlement of diplomatic immunity would have had a better chance to survive had there been a second and different entitlement between the two nations. Then a threat by one nation to destroy the diplomatic immunity could be countered by a threat to destroy the other unrelated entitlement.

Thus, stability has a better chance the more entitlements there are. It is not the purpose of this essay to discuss historically how entitlements arose among nations, or how they became more

complex and differentiated. Yet we might briefly consider the perspective of a new nation (perhaps a nation that has just received its independence from a colonial power).

Our new nation receives at its birth a host of entitlements. It has not chosen nor selected any of these entitlements; instead they are, so to speak, thrust upon the new nation. The first entitlement is of fundamental importance: the entitlement of statehood, which means, in the international system, that our new nation is a geographic entity entitled to exert its own legal jurisdiction in the area within its boundaries and to claim the inviolability of those boundaries against all other states. The legal sanctity of its borders signifies that our new state is a state in a community of states, and not merely a gang of thieves subject to the untrammelled degradations of other neighboring gangs. Indeed, it appears that the very definition of a state, or nation, involves an entitlement to the sanctity of its borders. Without such boundaries, the entity is hardly a 'state.' Yet, the boundaries are boundaries only by virtue of their recognition by all the other states in the system.

In sum, still considering this first entitlement, our new nation depends for its very identity upon the recognition of other similar states in the community of states. I am not talking about *de jure* recognition; rather, all that is necessary is a sense in the international community that the new state is enclosed by international boundaries, and those boundaries, like all boundaries, are lines that differentiate the internal affairs of the state from the external affairs and cannot be crossed at will by military forces in either direction. This notion of a boundary is so fundamental that the Vienna Convention on the Law of Treaties specifically excepts boundary-establishing treaties from the normal rules of *rebus sic stantibus*,<sup>[FN19]</sup> and the World Court in its leading decision in the *Continental Shelf Cases* made it clear that the normal generation of customary international law cannot affect ownership of territory (in those cases, the submerged land areas) absent a showing of consent from the owner. <sup>[FN20]</sup>

[pg1307] Our new state might, therefore, look upon the international law of the sanctity of its boundaries as a gift of a valuable entitlement. But the entitlement carries with it reciprocal duties, so that it is not necessarily a gift. The entitlement provides that our new nation must respect the borders of all the other states. Suppose our new nation is very powerful militarily, and expansionist-minded; it might want to extend its boundaries at the expense of its neighboring states. In that case, the entitlement of sanctity of boundaries is, in the first instance, more of a curse than a gift. (Later on, if the new state has succeeded militarily in extending its dominion, it might then want to establish the principle of sanctity of international boundaries, so as to secure its own gains.) Obviously, we cannot know, a priori, whether a new state likes or dislikes any particular entitlement. And that is indeed the point: the new entitlements that accrue to the new state at its birth are those that the international system has imposed upon the new state. If pressed to make a judgment whether the host of entitlements as a whole are a blessing or a curse to the new nation, we would conclude that, on the whole, the system of entitlements is beneficial to the new nation. This conclusion follows from the simple observation that international entitlements did not descend from God, but rather they evolved slowly over time to serve the collective self-interest of all the states. It is unlikely, therefore, that a system of rules that serves the collective self-interest would be inimical to the individual interests of any given state. Nevertheless, it is possible that *some* of the entitlements would be contrary to the interest of our new nation. If so,

there is nothing our new nation can do about it. The list of entitlements is a given; they are thrust upon our new nation without its initial consent.

At least, there is no provable manifestation of initial consent by the new nation's. But there is an inferred consent which stems from our new nation taking its position among the community of nations. By asserting the inviolability of its borders from external attack, our new nation defines itself as a state that has internationally recognized boundaries. Indeed, it is hard to think of what our new nation would be if it did not have those boundaries, and therefore the inference of its consent to statehood is very powerful. Our new nation also has the entitlement to send ambassadors to other states who want to receive them; and even before the first treaty is concluded giving those ambassadors diplomatic protection, there is an international entitlement that they have initial diplomatic immunity to proceed to other countries to negotiate such treaties. Moreover, our new nation is the beneficiary of the whole set of entitlements regarding its capacity to enter into binding treaties with other nations, and to have those treaties construed and applied according to the customary international law regarding the interpretation of treaties. Additionally, [pg1308] our new nation, at birth, benefits from the entitlement that all nations are free to use the high seas, to send satellites into outer space, to claim for themselves a territorial sea, an underlying continental shelf, and an exclusive economic zone. It may be that our new nation does not border upon any ocean, or if it does so border, that there is no underlying continental shelf. All the international entitlements say is that if a nation does border on an ocean it is entitled to claim an exclusive territorial sea, and if it has a continental shelf it is entitled to claim certain exclusivities with regard thereto. The full list of entitlements embraces areas such as the entitlement to protect nationals abroad, the protection of the laws of war and rules regulating the conduct of hostilities, rules regarding the exertion of extraterritorial jurisdiction, and among other topics the following: international servitudes, succession of states, international rivers, lakes, canals and straits, polar regions, rights and duties of states in outer space, nationality and status of ships, piracy, slavery, international traffic in narcotics, nationality and statelessness, rights of aliens, asylum, extradition, international communications including satellites and 'jamming' of broadcasts, immunities of states and their agencies and subdivisions, protection of human rights, diplomatic and consular privileges and immunities, status and privileges of international organizations, status of armed forces on foreign territory, limits of criminal jurisdiction, enforcement of foreign judgments and commercial arbitrations, treaties (entry into force, modification, termination), pacific blockade, reprisals, arms shipments, relations between belligerents and neutrals, etc. The point of making such a list is that for our new nation, all the specific entitlements in these subject-matter categories work two ways: first, to benefit our new nation to the extent that it has any interest in claiming any specific entitlement; and second, to impose upon our new nation the duty to respect those same entitlements when they are asserted against it by other nations.

Taken as a whole, these entitlements define what it is to be a 'nation' or 'state' in the modern world. [FN21] To be sure, these are the legal definitional parameters of a nation, but a nation is admittedly a legal fiction. As a construct of international law, a nation is nothing more nor less than a bundle of entitlements, of which the most important ones define and secure its boundaries on a map, while others define its jurisdictional competency and the rights of its citizens when they travel outside its borders.

Some writers have tried to base all these competences on the ‘consent’ of the nation. [FN22] They are thus compelled by their own logic to [pg1309] assert that a new nation is not bound by any particular rule of international law until it has consented to that rule.[FN23] The new nation is then in a preferred position; it can pick and choose among the rules those that it likes. This pick-and-choose position is clearly wrong as a matter of historical fact as well as logic. Historically, existing nations have never allowed new nations to pick and choose, nor have new nations asserted a *tabula rasa* position.[FN24] Logically, if a new nation tried to assert such a position, the reaction of the other nations might well be that the new nation's *rights* as well as its duties are up for grabs, thus placing the new nation in a perilous position vis-a-vis its boundaries and other basic legal entitlements. Perhaps some such calculus has operated to dissuade any new nation from making the claim that these writers assert.

‘Consent’ is an elusive notion for yet another reason. If international law is truly grounded in each nation's consent, then what is to stop a nation from withdrawing its consent at any time? Specifically, when a nation finds a particular rule of international law disadvantageous to it, it could simply withdraw consent-even up to the very moment of application of the unwanted rule. The result would be to wipe out the notion of ‘law.’ Of course, some writers, focusing on consent, claim that international law is illusory anyway.[FN25] That claim begs the question, for if international law is real, as I have been arguing, then ‘consent’ does not explain its application to states. What the writers are trying to say is that consent is such a powerful explanatory mechanism that international law as a result is not real. This puts a theoretically false cart before the horse.

If one wants to insist upon finding a role for the concept of consent, it may be useful to view consent in the following way: A nation is a bundle of entitlements which define what the nation is. In choosing to exist as a nation, the nation has consented to the bundle of entitlements. However, this scholastic exercise in logic, the sort that Pascal liked to satirize, is only necessary if someone is actively worried about the concept of consent and its role in international law. The simple conclusion [pg1310] follows that a nation is coextensive with its international legal entitlements.

This conclusion in turn illustrates why, as a matter of its very identity, a state should act in such a manner as to preserve its entitlements. Yet, its identity as a state, its ‘bundle of entitlements,’ is dependent upon the acquiescence of all the other states in the system. Since every state has the same bundle of entitlements-otherwise there would be legal inequality among states, a proposition that has never seriously been advocated-the other states in the system have an obvious interest in acquiescing in the entitlements of any given state. In this manner, a new state starts out, as we have seen, with its full complement of entitlements.

But just as all the states in the international legal system have a collective interest in acquiescing to all the entitlements for any given state in the system, they also have an interest in preserving the entitlements per se. For ease of illustration, let us consider the previously mentioned entitlement of diplomatic immunity. All the states in the system have an interest in the preservation of this particular entitlement. The existence of this entitlement, like other entitlements, helps define what a state is and what the international legal system is. The system

would be something different, perhaps diminished, if the entitlement of diplomatic immunity were undermined.

To preserve this entitlement, the states in the system collectively will allow certain actions to be taken against any given state which violates the entitlement of diplomatic immunity. Prior to 1979, it would have been difficult to come up with a single example of a state which directly violated that entitlement. In nearly every case up to 1979 in which a diplomat's life or liberty was threatened, the host state immediately took action against those persons who threatened the diplomat. If the host state itself wanted to expel the diplomat, it would arrange for the diplomat's return. But in 1979, after some radical students occupied the American Embassy in Tehran, the government of Iran took the unprecedented step of ratifying the action and holding the American diplomatic personnel hostage. This was a case of a deliberate violation of international law, the violation of the entitlement of diplomatic immunity. To allow it to go unremedied would constitute a threat to the existence of that entitlement in the international legal system.

What legal recourse did states have to prevent the erosion of such an entitlement? An obvious move would be to allow the United States to violate Iran's similar entitlement by arresting diplomatic and consular officials of Iran who were physically present in the United States at the time of the takeover of the American embassy in Iran. While this tit-for-tat strategy is generally regarded as legal under international law, it is not always a particularly effective strategy.[FN26] As we saw previously in [pg1311] the idealized example of two states at total war, the tit-for-tat strategy would simply eliminate the incipient ambassadorial-immunity entitlement and plunge the states back into the chaos of total war. Today, under a more developed international legal system, the tit-for-tat strategy might not have as negative an outcome, but it nevertheless could operate to erode rather than to preserve the entitlement in question. For instance, if the United States had jailed all Iranian diplomatic and consular officials, such an action at least in theory could be interpreted not as an attempt to punish Iran for its initial act but rather as a recognition that Iran's act was correct and that in fact diplomats are not entitled to immunity—I say 'in theory' because this example may appear to be farfetched. But since the content of international law depends upon the recognition of what the entitlements are by all the states in the system, the action I have just hypothesized by the United States and Iran might well be interpreted as a new understanding of the entitlement of diplomatic immunity, i.e., that such immunity exists no longer. Consider the following more realistic example of the same theoretical process: nation *A* announces a territorial sea of 300 miles from its coastline; nation *B* argues that *A* has illegally infringed upon the high seas by attempting to expropriate part of it, and in retaliation, nation *B* proclaims its own 300-mile territorial sea. Despite what nation *B* said, the action it took tends to reinforce *A*'s claim. Thus, rather than challenging *A*'s claim to a 300-mile territorial sea, *B* has reinforced it. A new rule, giving coastal states a much larger area of jurisdiction over the high seas will evolve. And the old entitlement—that the high seas were open to all nations—will partly be eroded by these new claims for an extensive territorial sea. Thus, the tit-for-tat strategy, in this example, not only fails to deter the original entitlement violation but in fact reinforces it.

The United States, in fact, did not retaliate by jailing Iranian consular and diplomatic officials, although that action was considered and reported in the press.[FN27] Instead, the United States took steps that were also justified under international law and which constitute a

more sophisticated [pg1312] (though, as we shall see, perhaps more dangerous) method of enforcement. The United States ‘froze’ approximately thirteen billion dollars of Iranian deposits in American banks and in various European banks where the United States, through American corporations, had the power to act.[FN28] If it were not for the initial Iranian act of holding the American diplomats hostage, the United States would be unjustified under inter-national law in violating the Iranian entitlement to the use of its own bank deposits abroad. Indeed, by freezing the Iranian assets, the United States was effectively confiscating the interest those assets would have earned. [FN29] This was a direct deprivation of Iranian property by the United States. Yet there was no condemnation of the American action by the international community; instead, the American action in violating a different Iranian entitlement from the one that Iran violated in the first place (diplomatic immunity) was tolerated by general silence, whereas governments from all over the world expressly condemned Iran's seizure of the American embassy. The workings of international law are rarely as explicit as scholars might like them to be, but I believe we are entitled to infer from the reaction of the community of nations that they did not perceive a threat to the shared entitlement of keeping state-owned deposits in foreign banks as a result of the American action, but rather regarded the U.S. action as a temporary infringement of an Iranian entitlement for the limited purpose of enforcing the original entitlement of diplomatic immunity. [FN30] Thus, the international community implicitly accepted the legality of a strategy that violates an offending nation's entitlements in order to repudiate that nation's initial offence. In the Iran-United States case, the strategy worked well, for the American diplomatic personnel were all safely returned to the United States, and the United States lifted the freeze on Iranian assets.

Of course, I am not attempting here to support my theory of a reciprocal-violation-of-a-different-entitlement by the single case of the American hostages in Tehran. The pattern is a general one and can be substantiated by numerous examples.[FN31] Moreover, the tit-for-a-different-tat pattern ‘makes sense’ in a legal system that does not have a central court of compulsory jurisdiction, a world legislature, and a world police [pg1313] force.[FN32] The absence of these institutions does not mean that international law isn't really law; rather, it simply means that international law is enforced in a different way.

There is a danger in relying on the enforcement of international law by allowing a retaliatory deprivation of the offending nation's entitlement. The danger is the potential escalation of entitlement violations, ultimately leading to international anarchy. In the idealized case where there was only one entitlement, its destruction put the nations back into anarchy. The same result is possible if in the modern world there is runaway destruction of many entitlements. But the fact that law can become ineffective doesn't mean that it isn't law in the first place. Some people expressed fear when President Richard Nixon faced impeachment that he might order the military to seize Congress and the Supreme Court and proclaim himself immune from any attempt to dislodge him as President. While this may not have been a very realistic fear, if such a scenario had occurred, it would mean that constitutional law had deteriorated; but it would not mean that no constitutional law existed prior to Nixon's seizure of the reins of government. Similarly, while international law could destroy itself through a runaway series of violations of entitlements, until then it polices itself by the meta-rule I have described: That it is legal to deter the violation of an entitlement by threatening a counter-violation of the same or a different entitlement. This latter enforcement action is the ‘physical sanction’ provided by the

international legal system, just as the rules regulating police, prison officials, sheriffs, etc., are its domestic legal equivalents.

#### IV. CONCLUSION

International law is enforced by the process I have described as reciprocal-entitlement [pg1314] violation. The violation may be of the same entitlement or, more likely these days, of a different entitlement. But it is on the whole an effective process—as effective for the international legal system as is the enforcement of most laws in domestic systems via the state-sanctioned deprivation of one or more entitlements held by individual citizens or corporations. Occasionally people or states will break laws despite the presence of enforcement machinery, but that does not mean that there were no laws to begin with. Nor, as I have tried to argue, should we swing to the opposite side of the spectrum and say that enforcement has nothing to do with whether laws exist. We don't need to take such an extreme position with respect to international law because there is, in fact, enforcement, resulting in a stable system of international entitlements. It is impossible to understand why nations do or refrain from doing the things they do without understanding what entitlements are included in the bundle and how nations act to preserve their full complement of existing entitlements. In this sense, international law is a very realistic component of the picture that political scientists try to draw of how nations behave. The 'serious students of law' who claim that international law isn't really 'law' make the same mistake that some political scientists make in ignoring norms in order to be 'scientific' in their 'descriptions.' A state cannot be described without reference to its entitlements, nor can its actions be fully understood without reference to the steps it takes to preserve those entitlements.

#### Footnotes

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\*\*Numbers in the format pg1293, etc. refer to pagination of the original article.

FN1 See Fisher, *Bringing Law to Bear on Governments*, 74 HARV. L. REV. 1130 (1961), excerpted in B. WESTON, R. FALK & A. D'AMATO, *INTERNATIONAL LAW AND WORLD ORDER* 125-30 (1980). Professor Fisher has greatly elaborated on ways of improving governmental compliance with international law, and in the process, by implication, indicated how various enforcement mechanisms work against governments. See R. FISHER, *IMPROVING COMPLIANCE WITH INTERNATIONAL LAW* 39-72, 236-300 (1981).

FN2 L. HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979). This statement in a sense follows tautologically from the fact that there is an international system of legal rules. Clearly, the rules that have evolved over time are the ones that nations have found to be in their collective self-interest; this is simply a Darwinian process applied to customary international law. Professor Henkin's statement, however, while tautological, is not vacuous; after all, nations might have instead evolved into a nonrule anarchical system.

FN3 J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 127 (Hart ed. 1954). Austin, however, did not know much about classic international law; he was somewhat taken in by writers who included only treaties as international law. The term 'international law' itself was after all invented by Austin's contemporary, Jeremy Bentham, and Bentham was philosophically inimical to unwritten law. *See* J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 326 n.1 (2d ed. Oxford 1948) (1st ed. Oxford 1789).

FN4 The argument is elaborated and extended in A. D'AMATO, *JURISPRUDENCE: A DESCRIPTIVE AND NORMATIVE ANALYSIS OF LAW* 7-8, 151-53 (1984) [hereinafter cited as A. D'AMATO, *JURISPRUDENCE*], and in D'Amato, *Legal Uncertainty*, 71 *CALIF. L. REV.* 1, 39 n.78 (1983).

FN5 *See* A. D'AMATO, *JURISPRUDENCE*, *supra* note 4, at 118-22 (tracing the command theory of law from Hobbes through Bentham and Austin).

FN6 5 U.S. (1 Cranch) 137 (1803).

FN7 'Natural law' is not something handed down from on high, nor is it the a priori speculations of 'right reason.' Rather, it may best be described in modern terms as those systemic rules that have survived through evolution over time as best fitting the mutual needs of a society. An example of this approach, though not in those terms, is found in J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980). For a categorical historical perspective, see D'Amato, *Lon Fuller and Substantive Natural Law*, 26 *AM. J. JURIS.* 202 (1981).

FN8 *See* M. BARKUN, *LAW WITHOUT SANCTION* (1968); *cf.* Reisman, *Sanctions and Enforcement*, in *INTERNATIONAL LAW ESSAYS* 381, 383-89 (1981) (group and community norms provide a 'civic' sanction, distinguishable from a state-imposed public sanction).

FN9 This is analogous to H.L.A. Hart's exclusion of international law from 'mature' legal systems, because it lacks a 'rule of recognition' (Hart's equivalent of the positivist's command-backed-by-sanction). *See* H.L.A. HART, *THE CONCEPT OF LAW* 208-31 (1961); D'Amato, *The Neo-Positivist Concept of International Law*, 59 *AM. J. INT'L L.* 321 (1965) (natural-law critique of Hart).

FN10 *See* 2 L. OPPENHEIM, *INTERNATIONAL LAW* 177-79 (H. Lauterpacht 7th ed. 1952); M. WALZER, *JUST AND UNJUST WARS* (1977).

FN11 *See* P. STONE, D. DUNPHY, M. SMITH & D. OGILVIE, *THE GENERAL INQUIRER* (1966); *cf.* D'Amato, *Psychological Constructs in Foreign Policy Prediction*, 11 *J. CONFLICT RES.* 294 (1967) (content analysis of writings of foreign policy actors to derive predictive 'general constructs' of such behavior).

FN12 For a good summary statement, with bibliographic references, *see* McDougal & Reisman, *International Law in Policy-Oriented Perspective*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY* 103 (1983).

FN13 *See, e.g.*, M. MCDUGAL, H. LASSWELL & L. CHEN, *HUMAN RIGHTS AND WORLD PUBLIC*

ORDER 161-363 (1980).

FN14 M. MCDUGAL, *STUDIES IN WORLD PUBLIC ORDER* 887 n.109 (1960).

FN15 *See, e.g.*, D'Amato, *The Relation of Theories of Jurisprudence to International Politics and Law*, 27 WASH. & LEE L. REV. 257 (1970); *cf.* D'Amato, *What 'Counts' as Law?*, in *LAW-MAKING IN THE GLOBAL COMMUNITY* 83 (N. Onuf ed. 1982) (attempting to put the law-as-words approach in perspective).

FN16 For a critique, with references to Professor McDougal's writings, see A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 220-26 (1971).

FN17 *See supra* text accompanying notes 3-5.

FN18 *Cf.* G. SCHWARZENBERGER, *THE INDUCTIVE APPROACH TO INTERNATIONAL LAW* 75-78 (1965).

FN19 Vienna Convention on the Law of Treaties, art. 62, *adopted* May 12, 1969, 8 I.L.M. 679, 702 (1969).

FN20 North Sea Continental Shelf (W. Ger. v. Den., W. Ger. v. Neth.), 1969 I.C.J.3. This case has been widely misinterpreted, and thus the statement in the text has been supported by an extensive argument given elsewhere. *See* D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1142-44 (1982).

FN21 *See* D'Amato, *supra* note 20, at 1113-15.

FN22 *See, e.g.*, G. TUNKIN, *THEORY OF INTERNATIONAL LAW* 123-33 (1974); G. VAN HOOF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* 76-82 (1983). For a critique of 'consent' theories, *see* A. D'Amato, *supra* note 16, at 187-99. Even the writers who insist upon consent will accept *tacit* consent; yet it is a short move from tacit consent to inferred consent to legally inferred consent, *i.e.*, that given all the other elements that constitute a norm of international law, consent ultimately is inferred. To the extent that writers espouse consent out of a notion of the sovereignty of national *will* (an insistence based on positivist theory), none of them has ever answered the following question: what happens if a state, having given its consent to a rule, wants to change its mind? Such a change of mind would appear logically to be precluded by consent theory (at least, if that theory purports to explain how nations become obligated), and yet would seem to be required by the predominance of the will.

FN23 *See, e.g.*, Van Hoof, *supra* note 22, at 78. *Accord* E. ZOLLER, *PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES* 6 (1984).

FN24 A. D'AMATO, *supra* note 16, at 191-92.

FN25 *See, e.g.*, Watson, *Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law*, 1979 U. ILL. L.F. 609, 632-35; *cf.* Tieya, *The Third World*

*and International Law*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW*, *supra* note 12, at 955 (recognizing continued validity of international law, but noting changes due to emergence of Third World interests).

FN26 For a recent, provocative explication of the tit-for-tat strategy, see R. AXELROD, *THE EVOLUTION OF COOPERATION* (1984). *See also* A. RAPOPORT, *STRATEGY AND CONSCIENCE* 48-57 (1964); A. RAPOPORT, *FIGHTS, GAMES, AND DEBATES* 166-79 (1960). The most complete analysis of the legality of countermeasures under international law is E. ZOLLER, *supra* note 23. However, it is not clear whether Professor Zoller confines her conclusions to countermeasures which do not violate an independent norm of international law (i.e., those which may simply violate a state's treaty commitments or other such obligations owing to a particular state). In the *Case Concerning the Air Service Agreement (U.S. v. France)*, appended to Professor Zoller's book, the Arbitral tribunal concludes:

Under the rules of present-day international law, and unless the contrary results from special obligations arising under particular treaties, notably from mechanisms created within the framework of international organisations, each State establishes for itself its legal situation vis-a-vis other States. If a situation arises which, in one State's view, results in the violation of an international obligation by another State, the first State is entitled, within the limits set by the general rules of international law pertaining to the use of armed force, to affirm its rights through counter-measures.

*Id.* at 166-67.

FN27 *See* N.Y. Times, Dec. 13, 1979, at § A1, col. 5.

FN28 *See* Nickel, *Battling for Iran's Frozen Billions*, *FORTUNE*, Dec. 15, 1980, at 117.

FN19 At the time the \$13 billion was blocked, interest rates were approximately 15%. The assets were blocked for slightly over one year. At compound interest, this amounts to interest earned, and unpaid, of over two billion dollars. When the hostages were returned to the United States, the United States agreed to pay, in partial settlement, interest of \$800 million to Iran, as reported in the New York Times. *See* N.Y. TIMES, Jan. 21, 1981, at § A9, col. 1.

FN30 Two judges out of the fifteen on the World Court felt that the blocking of Iranian assets should be set off against any reparations owing to the United States, but all fifteen members of the Court agreed that Iran's initial detention of the American diplomatic and consular personnel was unlawful. *See* *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3, 51 (Morozov, J., dissenting); *id.* at 58 (Tarazi, J., dissenting).

FN31 *See generally* E. Zoller, *supra* note 23.

FN32 The employment of a different countermeasure raises the question of proportionality of response. International law has not evolved a specific measure of proportionality, but it is at least clear that the countermeasure cannot be wholly disproportionate to the initial delict. The *Air Service Case*, in E. ZOLLER, *supra* note 23, at 167, calls attention to the possibility of a wholly different countermeasure, and states that it should be measured in terms of quality as well as quantity in order to judge proportionality. Interestingly, the social science literature bears out the

effectiveness of quantitatively non-measurable responses so long as there is an ordinal ordering of preferences. As Axelrod demonstrates, *supra* note 26, at 17-18, the payoffs of the two players need not be comparable, nor symmetric, nor measurable on an absolute scale, and there is no need to assume rationality on the part of the players. The only ordering of preferences is that a nation prefers there to be no rule violation, and prefers taking a countermeasure in the event of a rule violation rather than letting the violator get away with a rule violation. In turn, taking countermeasures, in an iterated series (which for international purposes can extend over the centuries) is a stable and robust strategy for deterring the initial delict. Nations in their interactions seem to have evolved a tit-for-tat or a tit-for-a-different-tat strategy in their numerous interactions over the centuries, and this probably accounts for the stability of international legal rules. The tit-for-a-different-tat strategy is actually codified in the Vienna Convention on the Law of Treaties, art. 60, *supra* note 19, at 701, allowing a party to suspend *any* treaty obligation or obligations if the other party commits a material breach of any of its obligations.