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IS INTERNATIONAL LAW COERCIVE?

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A foundational question in the current revival of interest in international legal theory is whether states are coerced to obey the rules of international law. Does fear of some kind of physical punishment actually 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 entity as big and unwieldy as a state 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 interstate disputes away from the battlefield and into the negotiating room.[1]

Most researchers today do not so much shy away from addressing the topic of coercion as simply denying its importance. They contend that states obey or disobey

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[1] 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 47 (2d Ed 1979). 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.

international norms for a variety of reasons which need not include fear of punishment, retaliation, or reprisal. Some even argue that international law is 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 is that there is no significant difference between international law and domestic law with respect to the issue of enforcement. The second half of the Article is a defense of this thesis.

I. MUST ALL LAW BE COERCIVE?

In offering a critique of the six views that international law is not a coercive regime, this first Part sets forth 19 analytic propositions. This philosophical technique is known as aporetics.[2] The propositions in this section and additional ones later on are constructed in logical sequence in order to break down and analyze the various arguments. They also serve a secondary purpose in providing an easy cut-and-paste way of summarizing the main thesis of the Article.

(1) The irreducible essence of law is that it is a collection of precepts that guide or regulate human behavior.

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

(2) There is a possible world in which everyone without deviation obeys all the precepts, hence obviating any 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.[3] 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 than very briefly if it did not enforce its rules.[4] 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

[3] 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.
[4] Included are utopian societies, all of which eventually founder on their inability, in the absence of enforcement mechanisms, to prevent free riding.

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.[5] 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.[6] 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 by 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."[7]

Nothing that has been said so far would suggest that we should distinguish between international law and domestic law. Nations are quick to seek free-riding opportunities.[8] Whether the subjects of the law are states or people, our experience in the

[5] *See* Elliott Sober & David Sloan Wilson, Unto Others: The Evolution and Psychology of Unselfish Behavior 132-158 (1998).
[6] Hans Kelsen, General Theory of Law and State 18 (1949).
[7] 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, The Principles of International Law (1st ed. 1895), T.J. Lawrence cautions us 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." *Id.* at § 12. (2) States and scholars regularly use the term "international law" in diplomatic discourse. *Id.* (3) The term usefully separates legal rules from other normative injunctions such as international morality and international comity. *Id*. at § 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.
[8] Belgium's declared neutrality in 1940 can count as a major example of free-riding. Belgium expected France and Great Britain to protect her against Germany. But even if they had, Belgium's future on the doorstep of a racially insane fascist power was clearly foreseeable in 1940 as being intolerable.

real world teaches us the unassailable fact that, to be effective, law must be enforced by physical sanctions. Thus:

(4) Although law is not inherently coercive, it is contingently coercive in all human societies including the international community of states.

(5) When the term "inherently coercive" is used, it is herein intended as a pragmatic truism about law in human societies.

II. Six Arguments that International Law is not Coercive

A. Dualism

(6) The theory of dualism claims that every state is sovereign. Thus no state is subject to a higher law.

(7) Under dualism, international law, whatever it may mean, cannot coerce the sovereign states.

(8) Rules of international law are not binding upon states because states are not bound by any external law.

(9) Every state promulgates and enforces laws that apply exclusively within its territory.[9]

(10) No state's law extends into the territory of another state. No state is sovereign over part or all of any other state.

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[9] This is called the state's internal law, or its domestic law, or its municipal law. The state's internal law includes the Constitution, statutes, administrative regulations, and judicial decisions.

(11) There are well-known rules of customary international practices, misleadingly called international law and correctly called comity, that states usually observe on a voluntary basis.

Propositions (6) through (11) 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.[10] This characterization has a certain tidy elegance which however breaks down as soon as one asks 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.[11] 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, in the second part of this Article, that international law is physically enforceable against states. Only then can the theory of dualism be falsified.

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[10] Dualism holds that states are the objects of international law but are not subject to its rules.

[11] 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, and 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 do not reconcile them.

B. Consent

From time to time a state will announce that although it believes international law is dualistic, it will always 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).

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 exactly the same in every respect except for their 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). We further assume that D is a state in the dualist world, and M is a state in the monist world. Both D and M decide to repudiate rule N. They do this by having their ships fish in the EEZ waters of other states.

The stage is now set for us to examine the reaction of other states to the actions of D and M. In the Dualist World, other states may reduce their trade with D because D is a promise-breaker. At international conferences they might shun the representatives of D as untrustworthy. There is no doubt that D has suffered reputational damage. The

government of D is likely to respond by issuing a press release stating that its EEZ decision was a one-time event, that D has a right to change its mind, that its EEZ decision was vital to its national security, that D's nationals have a human right not to starve to death, that D has no plans for repudiating any other agreements, and that D apologizes to other nations if its action has caused them any real discomfort. Note that all the foregoing positions are at least minimally credible because D has violated no law in breaking its promise, for there is no law to violate.[12] D or any other state in the Dualist World may enter into commitments and then break them with impunity, for there is no international law that would compel them to keep promises once made. In order for treaties (or private contracts for that matter) to be binding, there must be a higher law external to the treaty that makes the promises contained in the treaty binding. This bindingness in international law is called *pacta sunt servanda.* Hence:

(12) All treaties implicitly, and some explicitly, proclaim that they are binding. However, a breach of the treaty automatically entails a breach of the bindingness provision. Hence a rule that a given treaty is binding can only be found, if at all, external to the treaty.

Entirely different are the consequences in the Monist World. Although the underlying facts are exactly parallel, the theories of international law in the minds of state

[12] The writers who, from time to time, have asserted that all of international law is grounded in state consent, then have to explain what happens if a state that wishes to violate a rule of international law simply withdraws its consent to that rule right before violating it. This procedure would seem to vitiate all the rules, since they are all (by definition) based upon consent. Most of the writers who defend the consent principle go on to say that consent once given cannot be withdrawn. But they do not explain why. They do not explain where the no-withdrawal rule comes from. Since there is no overarching rule of international law in the dualist system like *pacta sunt servanda*, states are surely as free to withdraw their consent as they were in giving consent in the first place.

officials, diplomats, and legal scholars, and accepted by them in everyday practice, are quite the opposite. If M threatens to disregard the EEZ, other states will be impelled to react not by just criticizing M but by using force to prevent M from fishing in other states' exclusive economic zones.[13] States will be justified in using force for three reasons: to prevent overfishing by M, to punish Spain for violating a treaty provision, and to reinforce the entire fabric of rules of international law by preventing any one of them from unraveling.

(13) Because international law in a Monist world is enforceable, it must be enforced. Failure to enforce a rule tends to weaken it and to degrade international law generally.

C. 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. 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

[13] Compare Canada's deployment of its navy to prevent Spanish ships from fishing just outside Canada's EEZ. Canada's justification is that migratory fish, that are protected within the EEZ for conservationist reasons, often swim beyond the EEZ. Spain argues that it has no obligation to respect Canada's conservation regimes if the fish are physically in the high seas.

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° 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.

There is no doubt that domestication represents progressive development in the path toward world order based upon the rule of law.[14] 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.[15] 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.

(14) Because international law in a Dualist world is unenforceable, there are theoretically no adverse consequences in failing to enforce it.

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[14] 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).

[15] In a spirited defense of domestication, Philip 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 International Law Anthology 400, 408, at 401 (Anthony D'Amato, ed. 1994) (italics added).

D. Soft law

Soft law is a strategy for formalizing directives or agreements that depend for their adherence upon good will rather than physical enforcement.[16] 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 Basle resolutions (global banking). Most observers seem to think that disembodied norms are good things to have around.[17] Soft law can signal the future direction for a norm that may someday may 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 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 for most practical purposes has replaced international law.[18] 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.

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[16] For a concise overview, see Dinah Shelton, Soft Law, *in* Handbook of International Law, downloadable at *http://ssrn.com/abstract=1003387.*

[17] Not so Prosper Weil, who prominently called attention to soft law and debunked it at the same time. See his Towards Relative Normativity in International Law, 77 AJIL 413 (1983).

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

Yet there is a downside. The ease of articulating norms can lead to a flood of norms coming from enemies of human rights. A billion Muslims 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 ICJ in Nicaragua v. United States[19] have encouraged many non-governmental organizations to proclaim all kinds of soft-law norms as if merely pronouncing them gives them life. 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,[20] 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.

In 1971 I argued that *opinio juris* was impossible to pin down.[21] So far I have not seen any documented case out of the millions of reported interstate 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

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[19] 1984 ICJ Rep. 392.

[20] I expand on this charge in Anthony D'Amato, Trashing Customary International Law, 81 AJIL 101 (1987).

[21] *See* Anthony D'Amato, The Concept of Custom in International Law 47-72 (1971).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.

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.[22] In short, so long as *opinio juris* is required to be subjective, its evidence must be found in the target state.[23] 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. Fortunately these complexities dissolve if dualism itself, as we shall see, can be falsified.

E. 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.

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[22] 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.

[23] The target state is also the source of the exceptionalist position known as the persistent objector.

These ideas originated with John Austin, a nineteenth-century British positivist.[24] 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:

> The matter of jurisprudence is positive law; law, simply and strictly so called; or law set by political superiors to political inferiors.[25]

It was McDougal's great insight—or error, as the case may be—to apply the Austinian vision to international law. McDougal's renowned protégé, 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.[26]

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 big power is threatening to punish them if they disobey.[27] 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

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[24] 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.

[25] John Austin, the Province of Jurisprudence Determined (1832), excerpted in Anthony D'Amato, Analytic Jurisprudence Anthology 40 (1996).

[26] W. Michael Reisman, The View from the New Haven School of International Law, 86 ASIL PROCEEDINGS 118 (1992).

[27] 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.

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.[28]

However, 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.[29] 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.

F. 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

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[28] 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 M. McDougal, A Footnote, 57 AJIL 383 (1963). These circumlocutions strike me as deliberately ambiguating between power and law.

[29] 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, 32 Yale JIL 565 (2007).

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 3-mile territorial sea. Three comparatively weak powers, Chile, Peru, and Ecuador in the Santiago Declaration of 1952 claimed a 200 mile territorial sea.[30] 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

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

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.[31]

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 and disincentives for compliance. When norms generate a sufficient measure of compliance, we call them "law."[32]

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 above quoted, 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.

[31] See David Scheffer et al., The End of Exceptionalism in War Crimes, 16 ILSA 16 (2007).
[32] Michael J. Glennon, Force and the Settlement of Political Disputes: Debate with Alain Pellet 1, 3, SSRN-id 10092212.pdf (2008).

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."?

The following propositions are now offered as an interim conclusion to Part II of this Article:

(15) International law consists of bottom-up rules: the rules that the aggregate of states are willing to obey because they serve their collective interest in reducing international tensions to promote stability as well as facilitating international trade.

(16) These rules come from—i.e., are inductive derivations from—the active participation of some states in resolving a controversy and the acquiescence of the onlooking states in accepting the resolution that is reached.

(17) It is improbable that any state, even a superpower, would have the wisdom and self-restraint to articulate rules that would all be systemically stabilizing. For that basic reason, among others, no state has ever achieved leadership in international law-making.

(18) It is improbable that any one state, even a superpower, would enhance the interests of the aggregate of states if it alone were privileged to disobey rules of international law whenever it decided that disobedience was in its own national interest.

(19) The fact that the rules of international law serve the interests of the aggregate of states does not mean that individual states, in the short run, will not be tempted to violate particular rules when they find doing so to be in their national interest.

III. INTERNATIONAL LAW IS A COERCIVE ORDER[33]

An Easy Instance of Enforcement

In this Part, the inherent coerciveness of international law will be exhibited. Let us start with an analogy to bilateral treaties. In such a treaty, state A and state B may enforce its provisions against each other. We first take note of the fact that although each treaty provision applies equally to both sides, invariably there are some provisions which benefit one side more than the other. Since this treaty, like all treaties, was negotiated as a package deal, each side received its fair share of these lopsided provisions. Accordingly in the particular treaty we are examining, two important provisions are Article P: nationals of either party may invest in the other party's corporations, and Article Q: fugitives and insurrectionists of one party who escape into the territory of the other party must be captured and returned. Let us consider this situation as if international law does not exist. We are only interested, for the moment, in the strategies of A and B. .

For background, let A be a wealthy post-industrial state and B a developing nation with abundant natural resources and political turmoil. A's nationals have been buying up shares in B's exploration and mining corporations. B's government is beset by guerrilla and terrorist forces that want to take it over and establish a new regime. Many of these forces when pursued by B's police have crossed the border into A to hide in the jungle

[33] This subtitle is a direct homage to Kelsen's statement: "[L]aw is a coercive order." Hans Kelsen, General Theory of Law and State 19 (1949).

areas. Nevertheless, pursuant to the treaty, A has spent some of its resources in capturing some of the insurrectionists and remitting them to B.

Now let us posit a breach of treaty. B decides that its natural resources are in danger of ending up in the hands of foreigners. It enacts a statute imposing a 500% tax on all purchases of stock in B's corporations, the tax to be waived if the purchaser is a national of B. Immediately A's nationals cease to purchase stock in B's corporations because of the confiscatory tax. The government of A protests the tax but B does not revoke it. What are A's remedies?

(20) If a party to a bilateral treaty commits a material breach,[34] the other party's remedies flow from the concept of equality that underlies the treaty.

` (21) The most obvious remedy available to the non-breaching party is to abrogate the treaty. This abrogation would restore both sides to their original position of equality.

(22) Another remedy available to the non-breaching party is to enact legislation copying the other side's breach and then applying the legislation to the other side. This strategy employs the idea of reciprocity (which is itself one way of achieving equality). This strategy (with or without the implementing legislation) may be called *tit-for-tat*. It is also called *reprisals in kind*.

(23) A third remedy available to the non-breaching party is to abrogate a different treaty provision. (It will most likely choose to abrogate the provision that the other side values most highly.) This strategy follows from principle (21): if a party has the right to

[34] A provision is material if it implicates the nature and purpose of the treaty.

abrogate the entire treaty, it also has the lesser right to abrogate any part of the treaty.[35] This strategy may be called tit-for-a-different-tat.[36]

Thus we see that A has three types of sanction available against B:

(i) *The proposition (21) sanction.* In the posited case, A does not want to revoke the treaty in its entirety because it contains many provisions that benefit A.

(ii) *The proposition (22) sanction*. Article P, the "reciprocal" abrogation, is too weak to be productive in this hypothetical case. For A has the vast majority of investors in B's corporations, whereas only a few of B's nationals are investing in A's corporations. If A's remedy is to cut off the latter group, it will hardly make a dent in B's policies.

(iii) *The proposition (23) sanction*. This leaves A with the remedy suggested in proposition (23). If A, in retaliation for B's act, abrogates provision N, then B is very likely to back down. The government of B cannot afford to let A be a safe haven for insurrectionists. Consequently B may rescind its 500% tax.

The argument so far suggests a few critical questions:

1. **If the preceding hypothetical case is a standard instance of the way international law is enforced, why are there hardly any reported cases similar to it?** The reason for the paucity of cases is that there are international lawyers giving advice to

[35] Principles (21), (22), and (23) are part of international law. See Article 60, The Vienna Convention on the Law of Treaties, 8 ILM 679 (1969).
[36] I invented this awkward term over twenty years ago, and it hasn't caught on. See Anthony D'Amato, Is International Law Really "Law"? 79 Nw. LR 1293 (1985).

states A and B. If the head of state of B asks these lawyers whether they see any international-law impediment to a statute that would impose a 500% excise tax on foreign purchases of stock, the attorneys can be expected to reply that, first, such a statute would violate Article P of the treaty with A, and second, A will undoubtedly retaliate by ceasing to apprehend and remit insurrectionists who are hiding in A. Fortified now with this advice, B's head of state may see that it is cost-ineffective to enact the excise tax. Hence the reported cases on international law will be eloquent by their absence of cases like this one. However, a rare case can sometimes come up. We will see below a case like this A-B hypothetical, the *US-France Aviation Case.*

2**. But there must be many minor instances of reprisals. Why aren't they reported in the media?** The connection between delict and retaliation is usually suppressed by the governments involved. For example, a high official of state S flying into New York to attend an important meeting was recently detained by the police upon his arrival at Kennedy Airport. They said he matched a number of identification points on their computer's databank of suspected terrorists. He protested vehemently, but to no avail. He was released a day later, having missed his meeting. The police apologized to him, saying there was a computer error. However, a week earlier, an American businessman 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 member of the royal family. The businessman refused. 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 was received only a brief mention in a foreign newspaper. However, the connection between the two stories was certainly obvious to the government of 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 a classic incident of delict-plus-reprisal that taken alone would be baffling.[37]

3. **Is the A-B hypothetical dependent upon there being at least several provisions in the bilateral treaty?** Yes. Suppose an A-B bilateral treaty had only one provision, Article P. Then if B abrogates it and A wants to punish or deter the abrogation, A has only two choices: propositions (21) and (22). It does not have the choice of proposition (23) because the treaty only contains one proposition. Yet proposition (23) is the only one that would be effective in these circumstances. It follows that one-issue treaties are unstable. Treaties become more likely to be self-enforcing the more provisions they contain.[38]

4**. Does the example of the A-B bilateral treaty beg the question because it presupposes the existence of international law?** No. The strategies by A and B work in the absence of international law. The importance of this point will be seen in the discussion that follows.

[37] The delict in the case of the American businessman is "denial of justice" under international law.
[38] 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.

Expanding the Easy Case

All of international law can be looked upon as a giant debenture with attached coupons for each individual state. (Coupons are non-detachable; once a state is part of international law it cannot get out.) The bond pledges the parties to the mutual observance of all the rules of international law. If one state—call it state B—violates a rule, all the other states (call them "Aggregate A") will experience a diminution of the integrity of the rule that has been violated as well as a lessening of the cohesiveness of the entire set of rules.[39] In other words, the value of the debenture will diminish. Thus Aggregate A has a right under international law to punish or assist in punishing state B for its rule-violation.[40]

(24) If state E violates a rule of international law and in the process adversely affects F's material interests, F is privileged under international law to violate the same rule or a different rule of equal importance that materially affects E's interests. F's action has variously been called a retaliation, a reciprocal violation, a countermeasure, and a reprisal. Kelsen used the term "reprisal,"[41] 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.

[39] Since state A is also a member of the aggregate of states, it too must experience a diminution in the integrity of the very rule that it is violating. However, we may assume that A conducted a cost-benefit analysis that showed that violating the rule was worth its diminution.
[40] The term "right" is used deliberately. Aggregate A's "right" comes from aggregate A itself. There is no international law other than the law of the entirety of states. Hence the entirety of states defines the rights and obligations of individual states.
[41] Hans Kelsen, General Theory of Law and State 57 (1949).

(25) 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.[42]

(26) Reprisals are both necessary and sufficient in adding the element of coercion that makes international law really "law."

Some rules of international law are considered by states to be so important that Aggregate A will take forceful action to punish their violation. In 1990 Iraq attacked Kuwait in what was clearly a war of conquest in violation of one of the most important norms of international law. Saddam Hussein may have had inferior international lawyers advising him, or perhaps he did not seek their advice, or maybe they told him only what he wanted to hear. Obviously he did not foresee that all the states in the world would act to preserve the non-aggression norm he decided to violate. Yet Aggregate A did act; states contributed soldiers, weapons, and financing to the United States-led military repulsion of Saddam's army. There was no veto in the Security Council.

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, Iran in 1978 for the first time in history deliberately violated the rule of diplomatic immunity. It placed 52 American diplomatic and consular personnel in Tehran in military detention.[43] 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

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[42] Hans Kelsen, Law and Peace in International Relations 34 (1948).

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

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 we rounded up and detained all the Shah's officials in this country. Thus the United States resorted instead to the tit-for-a-different-tat strategy. It 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 $13 billion. 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 justified under international law. Iran was notified that the freeze would only be lifted upon the safe return of the hostages.[44] In 1980, after detailed negotiations,[45] 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 a billion dollars for the rule-of-law violation.[46]

[44] 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.

[45] For an overview, see Karen A. Feste, Negotiating with Terrorists: The U.S.-Iran Hostage Crisis, SSRN-id724243,pdf (Feb. 2005).

[46] The total amount frozen was approximately $13 billion. Iran eventually received cash and credits amounting to approximately $11 billion plus $800 million 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

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.[47] . 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 sanction imposes a cost greater than the delict, the excess must be considered punitive.[48] 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.[49] For if the sanction is made economically equivalent to the delict, then nations 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.

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about one billion 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 one billion dollars, that amount could be understood as a penalty for the rule-of-law violation.

[47] *Case Concerning the Air Services Agreement of 27 March 1946*, Arbitral Award of 9 December 1978, 54 ILR 304 (1979).

[48] E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* 72-73, 96-98 (1984).

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

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 onnly be a slight interest financially for each onlooking state, but when multiplied by 191 states[50] the total could easily account for the "extra" award given to the United States.[51]

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

[50] 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.

[51] 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.

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 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 is 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.

(27) 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 rule that is violated; and (iii) the interest of the aggregate of states in the cohesiveness of international law as a whole that is lessened by the impairment of one of its rules.

Deterring a Superpower

An observation by Alain Pellet raises the following issue:

5. **Does the operation of reprisals in international law favor the stronger states because they can more afford to pay the penalties?** Professor Pellet, as summarized by Professor Glennon, argued 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."[52] This argument fails because no minimally rational state or person will undertake an action that is cost-ineffective, even if it can afford to do so.[53] To be sure "costs" can not 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 $2 Million for each hostage. This is the average figure paid to the victims of the 9/11 World Trade Center disaster.[54] Suppose the United States had frozen $104

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[52] Alain Pellet, The Normative Dilemma: Will and Consent in International Law-Making, 12 Australian YBIL 22 (1988-89), quoted in Michael J. Glennon, Force and the Settlement of Political Disputes: Debate with Alain Pellet 1, 5, SSRN-id 10092212.pdf (2008).
[53] It would be different if a state had unlimited resources. But there is no such state in our finite world.
[54] Bill Marsh, Putting a Price on the Priceless: One Life, New York Times, http://www.nytimes.com/2007/09/09/weekinreview/09marsh.html?_r=1&oref=slogin.

Million 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 $13 Billion of Iran's financial assets. This effectively placed a price of $270 Million on each of the 52 hostages. The Iranian government, deciding that the agents of Satan weren't worth it, returned all of them.

6. **How can reprisals be levied against a superpower?** 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 of 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.[55] How many American nationals must a country threaten 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

[55] The Census Bureau reports that in 1998 there were over 56,000 Americans traveling abroad (compared to 46,000 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. See http://www.pueblo.gsa.gov/cic_text/state/amcit_numbers.html

removal of the hostages by force, but all of them were far too risky in terms of possible lives lost.

IV. 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. Yet it would not be impossible, if scholars wanted to go back over the correspondence in foreign offices¸ to find many examples of reprisals threatened or taken. 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-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation."[56] Even the meanings of the terms are different. The principles that constrain the resort to and application of reprisals appear to be the following:

(28) 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 that

[56] The *Caroline* Case, Letter of Daniel Webster, The Avalon Project, http://www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm

fall short of violaitng rules of international law. Inasmuch as a reprisal requires breaking, even if temporarily, one or more rules of international law, obviously Aggregate A 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.

(29) 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. (It does not monitor the situation following the institution 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.[57]

(30) One of the most invoked rules of international law governing the scope and severity of reprisals is the rule of *proportionality*.[58] Although vague it is far from vacuous. 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 all its own, inviting retaliation from the other states.

(31) As a general rule, *multilateral* reprisals have priority over unilateral reprisals because of every state's interest in the bindingness of the rules.

(32) The principle of *relatedness* also has presumptive validity. The tit-for-tat response ("reprisals in kind") is the most obvious and hence the most easily justifiable. However in some cases it obviously will not work. In the Tehran Hostages case, as we've

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[57] 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 it was not foreseeably ineffective and hence continued to be legal. Eventually the reprisal worked and the nations that sponsored it were vindicated.

[58] Although the concept of proportionality can be found in the *Caroline* case, the word itself was never used.

seen, the only reprisal that had a chance of working was one that was entirely unrelated in subject matter to the violation of diplomatic immunity, namely, the freezing of Iran's bank accounts.

V. CONCLUSION: THE DEEP STRUCTURE OF INTERNATIONAL LAW

At any point in time except during a world war, the nations of the world are in legal equilibrium. An encroachment by any state upon the rights of another state or states immediately triggers their right of retaliation. The science formula "for every action there is an equal and opposite reaction" is applicable.

Beneath the surface of the intricate network of rules that keep opposable interests at bay is a deep structure that accounts for the persistence and stability of interenational law itself. This deep structure does not always reveal itself to researchers and practitioners,[59] but it would be a mistake to conclude that international law is just a fragmented collection of rules. A disconnected group of rules would hardly have survived for four thousand years. The fact that international law is in place today without major substantive changes in the course of its historical development[60] did not happen by chance.

This Article has shown 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 departure from its own rules when necessary to

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[59] 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.

[60] The two most substantive changes in international law are of recent vintage: the rule outlawing wars of conquest, and the infiltration of human rights into the core interests of states.

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 manipulation of its own rules.

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