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International Law: Process and Prospect

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INTERNATIONAL LAW: PROCESS AND PROSPECT. By *Anthony D'Amato*. Dobbs Ferry, New York: Transnational Publishers. 1987. Pp. vi, 250. \$45.50.

Two of the most important issues of contemporary international law are the transboundary use of military force and the protection of individual human rights. In *International Law: Process and Prospect*, Professor Anthony D'Amato¹ develops an entitlement-based theory of the underlying foundation of international law through an examination of these issues, both in the abstract and in light of recent events.² His argument — that international law is enforced through reciprocal entitlement violations — provides a useful explanatory mechanism for the well known observation that “[a]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”³

To develop his reciprocal entitlements theory, D'Amato initially addresses the question of whether international law is really “law,” given that, unlike a typical domestic legal system, there is no central enforcement authority, no court system of compulsory jurisdiction, and no legislature. He argues that despite these differences, international law does exist, and that it is enforceable in a manner very similar to domestic legal enforcement mechanisms.

He advances this argument by identifying characteristics of enforcement common to all legal systems and then analyzing their operation in international law. In any legal system, enforcement consists of some legally imposed sanction. These sanctions may be physical, such as imprisonment, or may be nonphysical, such as imposition of a monetary fine. Either of these sanctions, however, can be characterized as a deprivation of a right or entitlement. Such methods of enforcement are premised on the notion that individuals are assigned some entitlements in the first place — as D'Amato notes, “[t]here is no ‘law’ in the ‘jungle’ ” (p. 15). He states that in all legal systems, without exception, there is legal recognition of certain rights of the people, making each person vulnerable to removal of some of those rights by the law. He asserts that “[l]egal systems typically enforce their own rules by

1. Anthony D'Amato is a Professor of Law at Northwestern University, and serves on the Board of Editors of the *American Journal of International Law*. He is president of the International Law Section of the American Association of Law Schools, and he founded the Human Rights Advocacy Group of the American Society of International Law.

2. In a postscript, D'Amato also discusses the difficulties facing a young attorney who wishes to pursue a career in public international law, and gives practical suggestions on how these difficulties can be met. Pp. 233-45.

3. L. HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979) (emphasis omitted).

removing one or more entitlements of persons who violate the rules" (p. 15).

D'Amato argues that international law is enforced in a similar manner. He suggests that "[a]s a construct of international law, a nation is nothing more nor less than a bundle of entitlements . . ." (p. 19). Every state possesses the same entitlements, although the interest states have in a particular entitlement may vary.⁴ In response to skeptics of international law who contend that it is not really "law" (since there is no effective enforcement mechanism), D'Amato argues that these entitlements are protected through a system of reciprocal entitlement violations.⁵ If state A violates an entitlement of state B, state B is justified under international law in violating an entitlement of state A. The reciprocal violation may be of the same entitlement or a different one.

To illustrate how the system operates, D'Amato offers the hypothetical situation of a primitive international system involving two states who are at war, but desire peace. Assuming there are no prescribed methods of establishing peace, state *A* may decide to dispatch a courier to state *B*, carrying a letter requesting safe passage and expressing state *A*'s desire for peace. If state *B* kills the courier, the war will continue. However, if the courier is not harmed, the beginning of a limited ambassadorial immunity is established. D'Amato posits that a single entitlement such as this is precarious, because the only remedy for violation of the entitlement by a state is that of reciprocal violation by the other state of the same entitlement. This tit-for-tat strategy can have the effect of eroding, rather than preserving the entitlement.⁶

Although D'Amato does not discuss how particular entitlements arise, he does argue that an increased number of entitlements is more stable in two ways. First, a state will be hesitant to violate an entitlement of another state because it will not be able to predict which of its own entitlements will be violated in response (p. 16). Second, this tit-for-a-different-tat strategy will not have the effect of eroding the original entitlement. For example, in response to the seizure of the United States Embassy in Tehran, the United States froze Iranian assets rather than retaliating by jailing Iranian consular and diplomatic officials. The United States' action was tolerated by general silence.

4. For example, every state has an entitlement to jurisdiction over its territorial waters. A country such as Switzerland, which lacks territorial waters and has no near-term prospects of obtaining any, may be assumed to have a near-zero interest in this particular entitlement.

5. D'Amato also discusses two different arguments that international law is "law," neither of which he finds conclusive. The "enforcement" argument suggests that physical enforcement is not the hallmark of law, and that therefore the lack of an effective enforcement mechanism does not mean that international law does not exist. The "verbal" argument contends that the use of legal language in intergovernmental communications supports the proposition that governments resort to "law" in their attempts to influence each other. Pp. 1-13.

6. In the case of the two states in the example above, it would simply eliminate the ambassadorial immunity entitlement and plunge them back into war. See p. 16.

D'Amato infers from the silence that "the community of nations . . . 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."⁷

D'Amato then moves on to examine the substantive issue of the transboundary use of force against the background of the reciprocal entitlement violation enforcement mechanism he has developed. He contends that the use of force is legal under international law only if it is an enforcement action.⁸ To be characterized as a legal enforcement action, a use of force must meet certain tests: The appropriate party must employ the force, use force proportional to the harm, limit the duration of the enforcement action, and refrain from using the force to effect a change in the territorial integrity or political independence of the country against which the action is taken (pp. 29-30).

D'Amato reviews the attitudes of international scholars toward the legality of the use of force in several different situations, including self-defense, self-help, defense and help of others, and group action. He notes that these attitudes have undergone dramatic change in recent decades. Prior to the establishment of the United Nations in 1945, a large body of literature supported the concept that the use of force, short of war, was legal in appropriate circumstances, and that war itself was not inconsistent with international law.⁹ However, since 1945 other authorities have asserted that the United Nations Charter preempts all principles of international law relating to the use of force, and that the propriety of any use of force, including actions in self-defense, must be tested against the Charter.¹⁰ Many scholars, in fact, view the primary objective of the Charter as preservation of peace rather than promotion of justice (p. 54). But some scholars fear that if the Charter is interpreted this way, small states will take advantage of

7. P. 24. D'Amato acknowledges that relying on reciprocal entitlement violations for the enforcement of international law presents a danger of "potential escalation of entitlement violations, ultimately leading to international anarchy." P. 25. However, he argues that because law may become ineffective does not mean that law never existed in the first place.

8. P. 28. Self-defense, which is recognized by all states as a valid use of force, is itself a type of enforcement action, designed to protect against and repel an invader that has invaded illegally.

9. P. 53. See, e.g., 2 L. OPPENHEIM, INTERNATIONAL LAW 79-142 (A. McNair 4th ed. 1926).

10. This view interprets article 51 of the Charter ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. . . .") as restricting the traditional doctrine of self-defense to cases involving actual armed attack. See, e.g., L. HENKIN, HOW NATIONS BEHAVE 140-45 (2d. ed. 1979); I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 275 (1963); Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1633-35 (1984) (supporting an interpretation that would also allow anticipatory self-defense in limited situations).

the legal prohibition against the use of force and take actions that they otherwise would not.¹¹

D'Amato implies, however, that a new attitude toward the use of force is developing, similar to the pre-Charter position (p. 55). The world community, he argues, increasingly views the Charter's protection of human rights as no less important than its prohibitions against the use of force. He predicts that "the more the veto blocks the Security Council from acting in real cases of human-rights deprivations that continue to arise, the more international law will begin to bypass the United Nations Charter and begin to forge a new set of principles that mediate between the use of force and the protection of human rights" (p. 55). D'Amato cites the development of nuclear warfare as a reason for the change in attitudes toward the use of force. Because the collective security system envisioned under the Charter was designed for situations involving conventional weapons, it is ineffective for situations involving nuclear weapons, which cause virtually instantaneous destruction. The collective security system is therefore no longer able to fulfill what D'Amato believes is the purpose of international law: "to create the precondition for peace and human rights" (p. 84). Instead, the legal rules governing the use of force must be reinterpreted in light of current realities. He states, "[T]he destructive potential of nuclear weapons is so enormous as to call into question any and all received rules of international law regarding the transboundary use of force" (p. 86).

D'Amato examines closely article 2(4) of the United Nations Charter,¹² focusing specifically on the phrases "territorial integrity" and "political independence." He contends that "the words of Article 2(4) acquired their meaning from previous usage in international instruments and documents that were accessible to the signatories to the Charter of the United Nations" (p. 57). Based on an historical review of treaties of guaranty, article 10 of the League of Nations Covenant, and other international documents, D'Amato concludes that the notion of "territorial integrity" did not include a concept of inviolability, but instead had a meaning generally equivalent to "preventing the permanent loss of a portion of one's territory" (p. 59; emphasis omitted). However, while he recognizes that an historical approach is only one of several valid methods of interpreting article 2(4) — the others being the context of the article and the meaning attributed to it since it became part of the Charter — he deals only with the historical approach because he feels it has been the most neglected of the three (p. 58).

11. See, e.g., J. STONE, *AGGRESSION AND WORLD ORDER* 22 (1958).

12. Article 2(4) provides: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. CHARTER art. 2, para. 4.

D'Amato argues that uses of force such as the 1981 Israeli raid on the Iraqi nuclear reactor are not violations of article 2(4), despite the fact that the raid was immediately condemned by the United Nations Security Council as violative of international law.¹³ He suggests that destroying another nation's emerging capability to make or prepare nuclear weapons may constitute a new justification for the use of force. "Although Israel's strike was certainly a use of force, it arguably was not directed at Iraq's territorial integrity or political independence," he states (p. 79). He further contends that because there was no evidence of any Israeli purpose beyond destroying the nuclear reactor itself, Israel's action was analogous to a limited "humanitarian intervention" (p. 80). D'Amato also suggests that even if the Israeli action was not justified on that basis, it ought to be justified if Israel compensated Iraq, analogizing to the American law of eminent domain. He states: "International law has not yet evolved to the point of justifying forcible actions so long as compensation is paid, but it is clear that such a norm would introduce a desirable level of flexibility in international law."¹⁴

A major problem with this suggestion is that D'Amato fails to identify the appropriate actor who would make the decision that the use of force is justified, and what the criteria for that determination would be. D'Amato rejects the proposition that Israel's action could be justified as self-defense, noting that "[i]f self-defense is to have any meaning in international law, its meaning must have a degree of objectivity and cannot be wholly auto-interpreted" (p. 78). Yet he does not offer any reason why the use of force with compensation should be different in this regard from self-defense, and he implies that Israel was the appropriate actor to decide the nuclear reactor should be destroyed. Moreover, D'Amato's focus on the historical interpretation of article 2(4) and not the other methods of interpretation makes his claim that the strike was not prohibited by the article at best incomplete.¹⁵

The second major issue on which D'Amato focuses is international human rights. He explores how the law of human rights can be accommodated in an international legal system that addresses itself to nations rather than individuals. Traditionally, a state's treatment of a

13. He notes that although the Security Council verbally condemned the action, no form of punishment was requested or mentioned. P. 77. See 36 U.N. SCOR (2288th mtg.) at 10, U.N. Doc. S/RES/487 (1981), reprinted in 75 AM. J. INTL. L. 724 (1981).

14. Pp. 83-84. D'Amato concedes that this argument has not been well received. Neither Israel nor Iraq supported this position when D'Amato presented it at the Senate hearings on the legality of the Israeli raid, and he states that as far as he is aware, "no one else has reacted favorably to it either." P. 84.

15. For example, D'Amato acknowledges that if a contextual analysis leads to the conclusion that the meaning of article 2(4) is dependent upon the effective use of the enforcement machinery under chapter 7 of the Charter, then article 2(4) must be reinterpreted in light of the subsequent failure of the superpowers to agree on the employment of the enforcement machinery. P. 58.

particular individual was of concern to international law only when that individual was a national of the state in question. A state's freedom to treat its own nationals in the manner it desired was seen as an element implicit in its sovereignty: its actions were not subject to scrutiny under international law. However, international law has long recognized that mistreatment of an alien is an offense against the state whose nationality he bears. Because the violation is viewed as one against the state rather than the individual, the right to seek redress for the violation also belongs to the state rather than the individual.¹⁶

Before examining whether international human rights norms currently exist and, if so, what the content of those norms is, D'Amato explores the more fundamental question of whether, given the classical conception of international law as created by and applied to states, it is possible for individuals to have direct claims under international law, including direct claims against their own states. Although D'Amato does not believe that international law has progressed far enough to recognize direct claims of individuals, he argues that it can be used to protect human rights because human rights norms fit into the general concept of legal entitlements. D'Amato first notes that international law has long recognized that every state is entitled to have its nationals afforded a minimum level of treatment by other states. He then points out that since the distinction between an alien and a national is an "entirely juridical construct,"¹⁷ nothing would prevent an expansion of the notion that a state may ensure that certain minimum human rights are afforded its nationals to include a state's entitlement to ensure minimum human rights for all individuals.

Assuming, then, that there is a norm prohibiting certain treatment of individuals, what state has an entitlement to enforce another state's proper treatment of its own nationals? D'Amato suggests that *all* other states may claim such an entitlement. "The human rights violator is . . . an enemy of all mankind, and jurisdiction to punish his violations is universal" (p. 107). He asserts that these human rights norms are enforceable in the way that all norms are enforced: reciprocal entitlement violations.¹⁸

An element lacking in D'Amato's argument is a discussion of how the doctrine of proportionality would be applied to human rights violations. D'Amato acknowledges that the issue of proportionality arises in all situations where a tit-for-a-different-tat strategy is employed, and that "it is difficult to imagine how rules could be formu-

16. See generally L. HENKIN, *THE RIGHTS OF MAN TODAY* 89-132 (1978).

17. P. 107. In a case involving alleged mistreatment of two individuals, A and B, there may be nothing that distinguishes the individuals except for the fact that A is an alien and B a national of the alleged violator. In this situation, A's treatment is a matter of international law, and B's is not. *Id.*

18. D'Amato acknowledges, however, that the existence of such an entitlement exists does not guarantee that any state or group of states will have the interest to pursue it. P. 108.

lated that deal specifically and usefully with questions of proportionality . . ." (pp. 100-01). The problem becomes even more complex when the original violation is of a universal entitlement. Must the *combined* response of all states be proportional to the original violation, or may *each* state respond in a way that is proportional to the original violation?

Additionally, under D'Amato's reciprocal entitlement violation theory the danger exists that the enforcement of human rights may be used as a justification for a use of force that is, in truth, motivated by much less laudable purposes. For example, D'Amato suggests that Iraq's military invasion of Iran in early September of 1980, the purpose of which was certainly not to make Iran respect its human rights obligations, was viewed with general indifference because "the international community mentally branded Iran an 'outlaw' [for its ratification of the imprisonment of the American diplomats] and was willing to tolerate a severe violation of one of Iran's basic entitlements in retaliation therefor, no matter who inflicted it" (p. 119). Such an indirect method of enforcement of human rights norms creates a grave risk that human rights violations will be used as a pretext to justify use of force in the furtherance of unrelated goals. Because the entitlement belongs to other states rather than the individuals actually harmed, the human rights violator will face a reciprocal entitlement violation only when other states believe it is in their interest to respond.

Overall, D'Amato's reciprocal entitlement violation theory of the enforcement of international law provides an interesting perspective from which to analyze international law. It is a useful mechanism to explain world reaction, or lack of reaction, to recent international events. The principal weaknesses of the system D'Amato constructs are its failure to identify the appropriate actors to decide when to impose a reciprocal violation, and its failure to account for the proportionality of nations' reactions.

— Linda A. Schoemaker