

B-4 Obligation, Responsibility and Punishment in the International Arena

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State Responsibility for Non-State Actors in the Law of Self-Defense

Abstract:

Self-defense is the most widely accepted basis in international law for a state's resort to using military force. While the threat or use of military force by states is generally prohibited by Article 2(4) of the UN Charter, Article 51 of the Charter clearly leaves room for states to use force in self-defense if they are the victim of an "armed attack." In an era when terrorist groups, militias, and other armed groups are using military force with increasing frequency and devastation against states, the concern of whether non-state actors can undertake an "armed attack" that would trigger a state's right to self-defense has acquired new prominence. Can a non-state actor commit an "armed attack" for the purposes of Article 51? What, if any, degree of state involvement must be present? To what extent are states responsible for the acts of non-state actors that launch attacks from their territory? Against whom may a victim state use force in self-defense if it is attacked by a non-state actor operating from a foreign state?

This paper revisits these important concerns by examining the Israeli/Hezbollah conflict of July of 2006. I argue that since the US invasion of Afghanistan in response to the September 11 attacks, states have acquired an increased responsibility for the acts of non-state actors that operate from their territory, even if there is little meaningful connection between them. Based on this emerging norm, I conclude that the degree of Lebanon's involvement in Hezbollah's attack against Israel was, in principle, sufficient to justify the use of force in self-defense by Israel against both Hezbollah and the state of Lebanon. I ultimately argue that this lowering of the threshold for state involvement in attacks by non-state actors is a potentially dangerous development in international law, for it creates a normative basis in the law of self-defense for using military force against virtually any state from which non-state actors plan or launch violent attacks.

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Why are Contracts Binding? A Comparative Study of *Pacta Sunt Servanda* in Western Legal Philosophy and in Islam

Abstract:

Pacta Sunt Servanda has been the subject of many philosophical, legal and moral speculations for centuries. This paper attempts to identify the major themes in Western thought and in Islam regarding this principle. This categorization is neither *a priori* nor exhaustive; the themes are not mutually exclusive. In Western thought, two groups of justifications can be recognized. The first is functional perceiving obligation more or less as a vehicle for an intended consequence. This includes Roman (necessity); Hobbesian (necessity); and Lockean (preference) approaches. The second is essentialist ascribing a more or less essential legitimacy to *Pacta Sunt Servanda*. This includes the Legalist/Rawlsian (justice); Linguistic/Constructivist (definition); Kantian (universal morality); Customary (practice) and Natural Law Traditions (secular and Christian). The Islamic treatment of contracts bears similarities to the Christian natural law, yet there are differences. The first is theological: Islam is far more legalistic. This legal characteristic of the religion not only reinforces *Pacta Sunt Servanda*, but also, based on the Quran Islam itself can be perceived as a mega-contract with God. Second is the pragmatic twist which buttresses the notion of "honoring the treaties as strategy" in international relations, lucid in the doctrinal letter of the forth caliph, Ali. The last is the implications of this understanding for "political Islam." The evaluation of theological claims is not the intent of this paper, instead, the authors try to illustrate how mainstream political Islam has failed in to introduce an "alternative" discourse in international law based on the Islamic scriptures.

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Just Punishment for War Crimes

Abstract:

Traditional justifications for punishment fail when applied to war crimes because the psychology of war criminals differs from the psychology of domestic criminals and the goals of war crimes trials differ from the goals of domestic crimes trials. Punishment of war criminals does little to dissuade potential war criminals from acting; accordingly, the consequentialist justifications of deterrence and promotion of civic peace rarely are applicable to war crimes trials. Additionally, retributive justifications for war crimes trials are unsuccessful because no punishment accurately corresponds to war crimes and ‘victor’s justice’ prevents the trial and punishment of some war criminals. If war crimes trials and punishment of war criminals are justified, then the justification must be to express disapproval of tried and punished war crimes. This expressive justification avoids the problems of consequentialist and retributive justifications for punishment of war criminals and more accurately represents the goals of war crimes trials.

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Peremptory Obligation and International Punishment

Abstract:

The practice of international punishment articulated *inter alia* by Grotius and Locke, challenged by Pufendorf and Wolff, and engaged in by the colonial powers of the 16th and 17th centuries – asserting that whenever any nation violated any of the fundamental laws of the society of nations, any other state might inflict punishment upon the malfeasant – was conceptually predicated upon a natural law-based idea of peremptory obligation. These obligations were universal in scope, exceptionless and generated a corresponding universal right to enforce them. This congeries of practices passed from international relations, replaced by a voluntarist understanding of obligation rooted in the idea of the state as a rights-bearing sovereign *person*. Under these principles, no state might interfere in the domestic affairs of another; states were not subject to any obligation they had not voluntarily undertaken; states could not be coerced into fulfilling their obligations; and there was no hierarchy among norms or obligations. Recent decades have seen a return of many of the components of the classical practice of international punishment, and in some instances the outright call for its rehabilitation. In this essay, I am concerned with tracing the conceptual linkages between the type of obligation associated with *jus cogens* and its precursor. The modern idea, although not formulated in punitive terms, shares the same categorical character, is similarly compulsory rather than voluntary and – it is argued – extends the same universal scope for enforcement. The most important question becomes conceptualizing categorical obligation in a positivist international legal environment.

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