



U.N. Packing the State's Reputation? A Response to Professor Brewster's "Unpacking the State's Reputation"

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I wish to address some cursory statements made by Professor Brewster, mostly in the introduction of her recent article *Unpacking the State's Reputation*.¹ I present my ideas point by point as "responsa" to her work²—as expansions on her points—rather than present my own views (a monist, materialist, cognitivist theory of international law).³ This has the benefit of limiting my commentary to some brief positive points of public international law.⁴

Professor Brewster stated that: "The defining characteristic of international law is the lack of a centralized enforcement mechanism."⁵ That statement is a bit simplistic and inaccurate. The United Nations (UN) operates as a central clearinghouse for the formation of global and

1. Rachel Brewster, *Unpacking the State's Reputation*, 50 HARV. INT'L L.J. 231 (2009).

2. To understand the responsa format, see Thomas Aquinas, *Summa Theologica*; see also the Decisions of the European Court of Justice which, doubtless under the Thomist influence, also used a response format.

3. See Eric Engle, *Ontology, Epistemology, Axiology: Bases for a Comprehensive Theory of Law*, 8 APPALACHIAN J.L. 103 (2008),.

4. See *id.* Responsa present answers to legal questions; they are found in Jewish law. Their most famous civilianist is Thomas Aquinas, *Summa Theologica*. Decisions of the European Court of Justice are issued in responsa format: a question is posed, each contrary argument is presented, and the Court's decision is then presented, point by point.

5. Brewster, *supra* note 1, at 231.

regional multilateral conventions—treaty law. The UN also regularly promulgates “soft” law: non-binding, persuasive, and hortatory international norms. As to enforcement, the UN regularly sends out peacekeeping forces throughout the world to enforce international law. Moreover, several international tribunals (ICJ, ECtHR, IACtHR, ITLOS, ECJ, WTO-DSB, ICTY, ICTR)⁶ adjudicate international claims.⁷

As to international law itself, there is no question that since World War II there are rules of international law, *jus cogens*, which bind *all* states *regardless* of the state's consent.⁸ Similarly, norms *erga omnes*, are owed by all states to the international system as a whole.⁹ Thus, *any* state may (not must) enforce such norms. The concept of *erga omnes* norms (norms owed to the international system as a whole), though recognized internationally is not so well developed in U.S. legal discourse.¹⁰ In contrast, the concept of *jus cogens* norms (non-derogable norms) is well developed in U.S. legal discourse,¹¹ as well as internationally.¹² The existence of norms *erga omnes* and *jus cogens* norms show that the international system *as a system* offers rights and remedies *regardless* of the opinions of *any* particular state.

Professor Brewster is most likely aware of all that—and would probably also point out the limitations of the ICJ and the UN as global (and globalizing) institutions. However, whatever her views are, the international system is *not* a lawless state of nature inhabited by self-interested power-maximizing states, which only interact in zero sum

6. MERCOSUR—Southern Market; ASEAN—Association of Southeast Asian Nations; ECtHR—European Court of Human Rights; IACtHR—Inter-American Court of Human Rights; ITLOS—International Tribunal for the Law of the Sea; ECJ—European Court of Justice; WTO-DSB—World Trade Organization, Dispute Settlement Body.

7. ICJ—International Court of Justice; European Court of Human Rights (ECtHR); Inter-American Court of Human Rights (IACtHR); International Tribunal for the Law of the Sea (ITLOS); European Court of Justice (ECJ); Dispute Settlement Body of the World Trade Organization (DSB).

8. *See* *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 714-19 (9th Cir. 1992).

9. *See* *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5).

10. For example, a search in the “tp-all” database of Westlaw for works with “*erga omnes*” in the title yields just eight results, most of which are book reviews by foreign authors. In contrast, a title search in the same database for “*jus cogens*” yields 45 results; a title search for “*ius cogens*” yields two more results.

11. *See, e.g.* *Matar v. Dichter*, 563 F.3d 9 (2d. Cir. 2009); *Enahoro v. Abubakar*, 408 F.3d 877, (7th Cir. 2005).

12. *See, e.g.*, *ICJ, Nicaragua v. Columbia* (2007) CR 2007/19, *available at* <http://www.icj-cij.org/docket/files/124/13889.pdf#view=FitH&pagemode=none&search=“COGENS”>.

conflict like isolated billiard balls.¹³ The international system is something much more complex, beautiful, and rational. It is a self-governing society comprised of 1) *states* with unlimited international legal personality; 2) *international organizations* with derived international legal personality; and 3) even *non-state actors* with limited international legal personality interacting almost always in positive sum economic terms and only very exceptionally in negative sum violent conflict.

International organizations today enjoy derived international legal personality.¹⁴ They are subjects (not objects) of international law. They make and enforce international laws, and yet they are not states. The WTO is not a state, yet its Dispute Settlement Understanding is a global, centralized quasi-judicial mechanism for resolving international conflict. I have argued elsewhere that the European Union (E.U.) is a confederation, a weak state, *alongside* its Member States. My view, though defensible, is not the majority view.¹⁵ The majority view is that the E.U. is becoming a state and is already a state-like body. Most international lawyers regard the E.U. as a “mere” international organization, and not (yet) a state.¹⁶ However, in any case, the E.U. makes and enforces international laws by and for its Member States. Many international organizations (UN, MERCOSUR, Andean Community, ASEAN, African Union) contribute to the formation and enforcement of international law. True, only states were subjects of international law in the Westphalian state system. However, since 1945, States are definitely no longer the only subjects of international law. Today, a variety of actors have varying degrees of international legal personality under international law.¹⁷

13. See generally HEDLEY BULL, *THE ANARCHICAL SOCIETY, A STUDY OF ORDER IN WORLD POLITICS* viii-ix, 23, 36 (3d ed. 2002) (describing competing theories of international relations).

14. See THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY 890 (Ronald St. J. Macdonald & Douglas M. Johnston eds., 1983).

15. See Eric Allen Engle, *The Professionalization Thesis: The TBR, the WTO and World Economic Integration*, 11 CURRENTS: INT’L TRADE L.J. 16 (2002); Eric Engle, *Theseus’s Ship of State: Confederated Europa Between the Scylla of Mere Alliance and the Charybdis of Unitary Federalism*, 8 FLA. COASTAL L. REV. 27 (2006).

16. Eric Engle, *Theseus’s Ship of State: Confederated Europa Between the Scylla of Mere Alliance and the Charybdis of Unitary Federalism*, 8 FLA. COASTAL L. REV. 27 (2006).

17. See generally Eric Allen Engle, *The Transformation of the International Legal System: The Post-Westphalian Legal Order*, 23 QUINNIPIAC L. REV. 23 (2004) (describing the transformation of the international system from the Westphalian model of isolated sovereign states acting as rational zero or negative sum power maximizers to the post-Westphalian model of relativized sovereignty centered on human rights and commerce as the basis of an integrated globalized world order).

Even private actors shape and enforce international law today. For example, works of learned scholars form doctrine (Fr. jurisprudence, Ger., *Rechtslehre*), which in turn shapes *opinio juris*—one element of customary international law. Moreover, private law actors form contracts with state actors; they also promulgate model codes and codes of good conduct. Private actors also contribute to usages, one element of customary international law. The second necessary element of customary international law is *opinio juris*—that not only do states act as they do, but they also believe that they are obligated to act as they do.¹⁸

States simply do not have a monopoly on the formation or enforcement of international law. Public international law contains several enforcement mechanisms for international law. Some enforcement mechanisms, such as customary international law and *jus cogens*, operate in a manner similar to legislation produced by private citizens through voting and their representatives. International law also permits private law enforcement of some claims and international law generally can be, and is, invoked before national courts. For example, the Alien Torts Statute (28 U.S.C. § 1350) allows private persons to sue for monetary damages when they are tortiously injured in violation of the law of nations (i.e. *public* international law).¹⁹ Similar statutes can be found in the laws of Europe and even in the laws of some third-world countries.²⁰

Though Professor Brewster clearly states that international law is enforced by states (just like national law) and points out that international law is not always enforced, it is simply not the case that only states enforce public international law (or private national law for that matter).²¹ Exile governments and insurgencies are examples of non-

18. Customary international law consists of two elements: usages (state practice) combined with *opinio juris*—the belief that such usages are consistent with or even obligated by international law. Judge Blackstone states that “custom must: (1) have been ‘used so long, that the memory of man runneth not to the contrary;’ (2) be continued without interruption; (3) be peaceably acquiesced; (4) be reasonable; (5) be certain in its terms; (6) be *accepted as compulsory*; and (7) be consistent with other customs.” Jo Lynn Slama, *Opinio Juris in Customary International Law*, 15 OKLA. CITY U. L. REV. 603, 610-11 (1990). *Caveat*: Blackstone was describing *national* customary law although *ceteris paribus* what holds true nationally should also apply internationally.

19. See Eric Engle, *Alvarez-Machain v. United States and Alvarez-Machain v. Sosa: The Brooding Omnipresence Of Natural Law*, 13 WILLAMETTE J. INT’L L. & DISP. RESOL. 149 (2005).

20. See Eric Engle, *Alien Torts in Europe? Human Rights and Tort in European Law*, ZERP Discussion Paper No. 1/2005, Zentrum Für Europäische Rechtspolitik—Center for European Economic Research (2005) (Germany).

21. “International law is enforced (when it is enforced) by states themselves.” Brewster, *supra* note 1, at 231. So? National law, likewise, is generally enforced by states.

state actors that enforce international law against states via self-help.²² Exile governments make de jure claims to auctoritas—one element of sovereignty (that they “ought” to rule) while insurgencies claim, de facto, potestas (that they in fact do rule—practice) without having yet obtained the auctoritas to rule.²³ These non-state actors (or if you prefer quasi-state actors) seek to, and at times do in fact, enforce *legal* claims under international law against the states opposing them.

Professor Brewster also points out that international law is not always enforced—implying that the non-enforcement of international law warrants a claim against the validity of international law. Professor Brewster writes it “is not shocking that international law is not always a meaningful constraint on state action.”²⁴ However, national laws likewise often go unenforced. Sometimes criminals are not caught. At other times the state sees no reason to enforce laws with no real victims (minor infractions), or in unusual cases (e.g. suicides). Laws aren’t always enforced, whether in national or international law. That does not mean laws do not exist or lack validity.

We can also look at the problem the other way: is there always a central enforcement mechanism in private national law? No. Private law actors often use contracts to shape their legitimate expectations. Private law parties also may resort to arbitration, whether binding or not. In cases of private law contracts, just as in treaties, there is no centralized legal enforcement mechanism, yet the contract or treaty is nonetheless valid and enforceable law.

Professor Brewster’s understanding of international law seems formed by a state-centered realist paradigm. That model emphasizes the use of force as the key central issue of interstate relations. That model may have been somewhat accurate in early modernity, following the Treaty of Westphalia. However, since 1989 at latest, if not already since 1945, states have interacted with each other primarily in positive sum economic terms, not in zero sum or negative sum military terms. The realist model of state interactions is outmoded, inaccurate, and even dangerous.

22. See Robert D. Sloane, *The Changing Face Of Recognition In International Law: A Case Study Of Tibet*, 16 EMORY INT’L L. REV. 107, 170-71 (2002); A. F. M. Maniruzzaman, *International Development Law as Applicable Law to Economic Development Agreements: A Prognostic View*, 20 WIS. INT’L L.J. 1, 13 (2001) (arguing that international organizations, insurgents, and even individuals may have some form of international legal personality).

23. See generally Eric Engle, *Beyond Sovereignty? The State After the Failure of Sovereignty*, 15 ILSA J. INT’L & COMP. L. 33 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1269445.

24. Brewster, *supra* note 1, at 231.

What are we to make of the ideas Professor Brewster alludes to so perfunctorily? Professor Brewster's sketch seems to reflect a shorthand view of international law as the law of armed conflict and humanitarian law: respectively *jus ad bello* (the right to go to war) and *jus in bello* (rights during armed conflict). If so, that is the wrong focus for an accurate understanding of international law and politics. The overwhelming majority of transactions among states are commercial and positive sum, not militaristic and zero or negative sum. There is much more to public international law than the right to go to war (when may a state go to war?) and rights during armed hostilities (the rights of warring parties).

Methodologically, Professor Brewster analyzes the problem of state compliance with international law using economic analysis (cost/benefit comparisons) and game theory. That is not *legal* analysis. It is game theory and economics and sometimes misses the mark. For example, Professor Brewster writes: "Reputation can pull states toward compliance when the realpolitik tool of retaliation is insufficient."²⁵ Her invocation of Realpolitik implies that states do not have *legal* self-help remedies. In fact, states can legally undertake retorsions and reprisal as self-help remedies. Retorsions are unilateral measures of self-help undertaken by a state which would be valid regardless of the actions of other states.²⁶ Reprisals, in contrast, are self-help remedies which are only legal due to a justificatory wrongful act by another state.²⁷

Similarly, Professor Brewster discusses expropriations, apparently assuming such are illegal under international law.²⁸ There, a deeper *legal* analysis of treaty law and court cases on the specific issue of the legality of expropriation under international law—as opposed to economic theories of gamesmanship, which have been well analyzed already—would have been more fruitful. According to *Banco Nacional de Cuba v.*

25. *Id.*

26. *Marks v. United States*, 28 Ct. Cl. 147 (1893) (stating that retorsions are retaliatory acts short of war), *aff'd*, 161 U.S. 297 (1896); see also George K. Walker, *The Lawfulness of Operation Enduring Freedom's Self-Defense Responses*, 37 VAL. U. L. REV. 489, 534 (2003) (stating that "[r]etorsions are unfriendly but lawful acts," such as mobilizing reserves or recalling ambassadors).

27. The power of reprisal is explicitly recognized in the U.S. Constitution. "[Congress shall have the power] to declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." U.S. CONST. art I, § 8, cl. 11. See also Michael J. Kelly, *Time Warp To 1945—Resurrection Of The Reprisal And Anticipatory Self-Defense Doctrines In International Law*, 13 J. TRANSNAT'L L. & POL'Y 1, 7 (2003) ("While acts that constitute reprisals would normally be illegal, they become legal because of the aggressor's previous illegal act. Moreover, reprisals contain a distinctly punitive purpose and are frequently viewed as justified sanctions.").

28. See Brewster, *supra* note 1, at 251.

Sabbatino,²⁹ there was no recognized right to compensation for expropriation under international law in 1963. Subsequent U.S. court cases (e.g., *Bigio v. Coca-Cola*³⁰) seem to confirm that view, as does the general principle that the state, as sovereign, has absolute and arbitrary power over the lives and property of its subjects—a principle which is increasingly derogated from in the contemporary post-Westphalian system. True, cases litigating the meaning of the *European* Convention of Human Rights seem to evidence the existence of a basic right to compensation for expropriation.³¹ So, one could *argue* that there is now a right to compensation for expropriation under international law. But that is at best unsettled issue—and if settled, is likely settled against what seems to be Professor Brewster's view.

Inasmuch as international legal scholarship contributes to the formation of *opinio juris*, one has the right to demand rigorous *legal* analysis from international law scholars: a searching examination of cases, treaties, legislation, history, and actual state practices. Economic analysis can be a useful *supplement* to legal analysis but is no substitute for the necessary investigation and exposition of cases, treaties, laws, and usages to determine not just what international law *ought* to be but also what it *is*.

My points here are intended to complete rather than correct Professor Brewster's work. I am sure she must be aware of these basic rules of public international law. However, I think it would have been better had she elucidated them rather than glossing over such major points in a perfunctory fashion.

29. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 461 (1963) (White, J., dissenting).

30. *Bigio v. Coca-Cola Co.* 448 F.3d 176 (2d. Cir. 2006).

31. See, e.g., *Loizidou v. Turkey*, 1996-VI Eur. Ct. H.R. 2216 (1996); *Brumarescu v. Romania*, 1999-VII Eur. Ct. H.R. 201 (1999). Right to compensation for expropriation under the *European Convention of Human Rights*—not customary international law.