framework for interpretive acts driven by the conviction that, in an anarchical system, states sometimes need a pass to operate outside the Charter's procedural requirements in order to sustain minimal order or to defend human beings from gross assaults on their declared basic rights.

On the question of whether the United States can violently punish the Assad regime, my sympathies lie with Koh, but I cannot see any legally creative way around the continuing opposition by China and a fair number of other states of the Global South to humanitarian or law-enforcing military interventions unauthorized by the Security Council. Their opposition may not last forever. And, as Koh proposes, international lawyers may contribute to the evolution of a broad consensus accepting intervention by coalitions of the willing to halt awful crimes against humanity where a permanent member vetoes Security Council authorization. Until then, I would rely on the distinction between the legal and the legitimate, defining the latter as narrowly as possible but knowing that, as long as some states are ruled by people like Putin, precedents will be cynically exploited. Still, I take solace from the conviction that the Putins of the world would act the same even if liberal states watched the slaughter of innocents with heroic self-restraint (as they have done on too many occasions—just ask the widows of Srebenica).

## V. Conclusion

While one's vision of international law influences normative assessment of state action, jurisprudential conceptions alone are not always decisive. For in addition to their respective visions of the law, legal scholars and practitioners lug around the heavy baggage of their moral intuitions and tribal identities. Intuitions and identities—among other things—shape their convictions about cause and effect, their characterization of an event, and their view of the relevant breadth of the event's historical context. For instance, one's assessment of Israel's use of force in Gaza will vary depending in part on whether Gaza is seen as lying inside or outside Israel's de facto jurisdiction, in part on one's perception of whether Israel has had nonviolent options for protecting its citizens from rocket attacks, and also in part on the connections that one draws between the 2014 violence and the vastly wider history of Zionist-Arab conflict and between that conflict and the norms of decolonization and self-determination. Ideally, we should debate moral intuitions with the same scholarly cool that we bring to the discourse of competing legal visions. Isn't it pretty to think that we could.

# Anthony D'Amato Responds

To Tom Farer:

Tom Farer's first and most important objection to *Groundwork* is that it is theoretical. Indeed, it is theoretical from top to bottom. Farer's antipathy to theory challenges me to go back to a step prior to drafting *Groundwork* and defend the general use of theory in international law.

Farer contends that theorists view law as a "closed discursive universe with distinctive modes of reasoning and interpretation insulated from the volatile world of power politics and ideological and sectarian struggle." This contention evokes Kant, who wondered how the closed

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analytic system of mathematics could be congruent with the unruly facts of the real world. Finding no satisfactory answer, Kant concluded that mathematics was not analytic after all; rather it was synthetic—that is, empirical. This kind of system would presumably be one that Farer would welcome. But years later, Rudolf Carnap replied that if mathematics were empirical, we could wake up tomorrow to find people saying that two plus two equals five. In order to communicate with those people, we would have to accept two plus two equaling five. But since that would render all our other mathematics absurd, it cannot be synthetic. Mathematics must be a closed analytic system. So too, by extension, are all forms of theorizing. But then, is Farer right that there is always a disconnect between theory and the real world?

Let's look more closely at mathematical systems. Consider three different types of internally consistent systems (although it follows from the Löwenheim-Skolem theorem that any type can be converted into another). The first type has an infinite number of points of contact with the real world—for example, a mathematical system that allows division by zero. This range makes the system as useless as a map that is as large as the territory it covers. The second type of system is one that appears to have no point of contact—for example, linear algebra as it stood when invented by several mathematicians in the mid-nineteenth century. It remained an oddity of pure mathematics until the 1920s, when it was discovered by Werner Heisenberg and others to apply to the new field of quantum mechanics. The third type is exemplified by Russell and Whitehead's *Principia Mathematica*, consisting of ordinary arithmetic plus a list of logical operators. This third type is internally consistent even though incomplete (as Gödel demonstrated). It has innumerable, but finite, points of contact with the real world: every bridge, tunnel, and skyscraper relies upon mathematics in its design, as do molecular biology, genetic engineering, and all statistics. A point of contact, or isomorphism, is a two-way street. Not only does it confirm the applicability of the system to a real-world event, but it also counts the real-world event as corroborating the utility of the system. The net result is a heightening of our level of confidence that the system can successfully predict other potential applications to real-world events. This is not to say that mathematics is analytically congruent with the real world, but it fits well enough for practical purposes.

To go from the sublime to the humdrum, *Groundwork* is an analytic legal system whose points of contact with the real world include all the examples I offered as applications of the system—the *Fisheries* case, diplomatic immunity, cruel weapons, neutrality, proto-states, entitlements, local custom, war on terrorism, material breaches, nuclear installations, atmospheric space, territorial sea, *opinio juris*, *The Paquete Habana*, persistent objector, the *Lotus* case, and others. These points of contact not only assist in fine-tuning the internal mechanism of the *Groundwork* system, but each one also raises our level of confidence in using the system to predict other potential applications. But that, after all, is what law does all the time. Laws are analytic generalizations that apply to real-world events and controversies—sometimes small ("this is the amount of income tax you must pay") and sometimes large ("you have a right to due process of law"). An exception is the name of a person or state. Proper names attach directly to the person named—see Plato's dialogue *Cratylus*—and hence are not mini-theories. But perhaps because they attach directly, they are impermissible in statutory law as bills of attainder. They are also impermissible in international customary law precisely because they are not generalizations.

Each application of an analytic generalization is an interpretation. Each application increases our level of confidence that the same laws similarly interpreted (similarly fine-tuned)

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will apply to other events. Hence we can go about our daily business with trust in our ability to navigate the shoals of legal coercion.

The second major objection that Farer has about *Groundwork* is his "eclectic" view that the best and highest use of international law is to advise governments. Thus, if you are in-house counsel to the president and he asks you whether international law is any impediment to his planned invasion of Syria, you tell him what he wants to hear. You "find ambiguities" in the texts of treaties and the UN Charter; you "claim that a literal reading would produce an absurd result"; you point out that the norms are always changing; and you advise him that it is important to avoid "epistemologically constrained interpretation." Your catchall is the lubricious locution that even if the invasion is unlawful, it is nevertheless legitimate.

My approach in *Groundwork* is entirely different. We start with a case or controversy—real or posited—between nations A and B. The argument about international law takes place before a real or imagined judge, jurist, or arbitrator. I assume that each side has its own Farerian apologist, but put them together and they cancel each other out. The judge wants to hear legal arguments, not circumlocutions. I make a further assumption that A argues persuasively that international law favors A's position, while B argues convincingly that international law is on B's side. Indeed it is the norm, rather than the exception, that the two sides in any given international case or controversy will each make convincing arguments (recall your own experience as a judge or participant in the international Jessup Moot Court Competition). *Groundwork* suggests that when both sides are equally persuasive, an additional argument that might win the case or controversy for your side would be for you to show—if you can show—how your position is more conducive to stability and peace than your opponent's position.

I thank Tom for his interesting Comment.

TO JEAN D'ASPREMONT:

I confess that until I read Jean d'Aspremont's Comment, I never thought of myself as an inspiring knight trying to save international law. The most I've ever done along those lines was trying to save international law as a required course rather than as a perspective elective.

It is encouraging to hear from d'Aspremont that grand theorizing about international law is alive and well. He knows a lot more about this than I do.

When the grand theorizing takes the form of systems, he writes that the systems become ends in themselves—he uses the word *reified*. That is actually not true of *Groundwork*, which I regard as a heuristic and not an end in itself. In my response to Tom Farer (above), I tried to indicate the type of system I have in mind for *Groundwork.*

My thanks to Jean for his informative Comment.

TO MÓNICA GARCÍA-SALMONES ROVIRA:

I would like to thank Mónica García-Salmones Rovira as well as Jean d'Aspremont for the kind things they said about my essay. However, we should all heed Oscar Wilde's admonition that if he knew what people were saying about him behind his back, it would make him too conceited.

It is a privilege to engage with a scholar whose understanding of Kelsen is so deep. García-Salmones Rovira insightfully observes that I adopt only half of Kelsen's project. I choose the Pure Theory half and abandon the Normative Theory half.

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My reading of Kelsen is that the core of his legal philosophy (which applies to both halves) is that morality, justice, fairness, and equity are not *in* the law but rather are *commentaries* upon the law. They belong not to law but to "religion or social metaphysics."[1] Law as pure science has neither room nor occasion for subjectivity.

A human being in Kelsen's legal philosophy is free to make her own decisions on a cost-benefit basis without having to internalize anyone else's emotions, morality, or obligations. In our first of three cases, let us suppose Liesel wants to walk diagonally across a busy street. She knows:

1. There is a pattern of behavior among police officers and courts that jaywalkers will be arrested, fined $200, and sentenced to three days in jail.
2. She calculates that her costs in being caught jaywalking would be $200 for the fine plus $80 per day of lost wages times three days:

   $$\$200 + (3 \times \$80) = \$440$$

3. She also calculates that the probability of being caught jaywalking is 90 percent:

   $$\Pr(\text{jaywalking}) = .90$$

4. If she is hit by a car, her cost in lost wages and hospitalization would be $50,000.
5. The probability of being hit by a car is 1 percent:

   $$\Pr(\text{hit by car}) = .01$$

6. In sum, Liesel's expected cost is as follows:

   $$\Pr(\$440) = .90 \times \$440 = \$396$$

   $$\Pr(\$50{,}000) = .01 \times \$50{,}000 = \$500$$

   $$\text{Total expected cost: } \$396 + \$500 = \$896$$

7. Her expected benefit is saving ten extra steps by crossing diagonally instead of via two right angles at the intersection. Each saved step is worth $2 of her time and $2 of her energy:

   $$\$2 \times \$2 \times 10 = \$40$$

8. Now she divides her expected benefit by her expected cost:

   $$\$40/\$896 = 0.045$$

Although tempted to jaywalk, Liesel decides it is not in her best interests to do so, because the ratio of the benefit ($40) to the cost ($896) is less than 1. There is nothing moral or normative about her calculations or her decision.

Now we go to a second case. The same street is deserted; no person or car to be seen. Liesel is tempted to cross the street diagonally.

9. Her cost (steps 2 and 4 above) remains the same: $440 and $50,000. But their probabilities are different:

[1] HANS KELSEN, *Law, State, and Justice in the Pure Theory of Law*, *in* WHAT IS JUSTICE? 288, 302 (1957).

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Pr (caught by hidden officer) = .02

Pr (hit by car) = 0

10. Her benefit (step 7 above) remains the same: $40.
11. She adds up her costs:

$.02 \times \$440 = \$8.80$

$0 \times \$50{,}000 = 0$

12. She divides her benefit by her expected cost:

$\$40/\$8.80 = 4.55$

Liesel's decision this time is to jaywalk because her benefit-cost ratio exceeds 1. She is not violating any law because (from a Kelsenian perspective) there are no laws—only patterns of coercive sanctions. Patterns are mute; they do not tell you what you ought to do.

In our final case, Liesel is being chased by a killer brandishing a knife. She does not need to do any calculations, because she values her life at infinity. She runs diagonally across the street, dodging traffic. No finite amount of costs will deter her. She even wants to be caught by a police officer so that she will immediately find herself in protective custody. Note that if caught, she will be arrested, fined, and jailed. There are no excuses in the pure theory of law. Indeed, there are no subjective elements at all: no morality, no justice, no fairness. Liesel is free to act in her own self-interest at all times. No one will blame her. No one will expect her to exhibit remorse when she is sentenced.

Liesel doesn't even think she's disobeying the *law*—a word that is, to her, unimportant. To her, the word *law* is not important to understand. What is important is for her to know the patterns of police coercion. The variety of names given to these patterns, such as rules, regulations, norms, precepts, laws, and statutes, are just camouflaged nouns of the state's public-relations department.

Lon Fuller believed that Kelsen's system was reactionary (*The Law in Quest of Itself* (1940)) and that law coheres more with goodness than with evil (*The Morality of Law* (1969)). He also believed that there was morality in procedural rules. Many philosophers agree with him. Aquinas believed that human law was close to divine law if one substituted, respectively, nature for God. Ronald Dworkin held that one could find in Anglo-American law the right answer to any legal question—but he concealed by turbid language the ambiguity of whether by "right" he meant moral or legal. John Finnis is closest to Aquinas in believing in the inherent goodness of legal systems.

The reason I disagree with Fuller, Aquinas, Dworkin, and Finnis is that they endow legal systems with the presumption that their laws are good. Thus, if a legal system were to order the sterilization of all citizens of a particular minority group, these writers would presumably expect initial public reaction to be that the lawmakers probably have a good reason for enacting that law. In short, these writers want to convince us to obey prima facie all laws. A dissenter would have to overcome this presumption as well as to win the moral argument. But why should he? The moral argument exhausts the relevant moral universe. Why should the dissenter then have to argue the same question just because it was advanced by the state? These

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writers seem to be advocating a kind of legal inertia that makes us, initially at least, complacent and tolerant of immoral or evil laws and practices.

These considerations lead us back more directly to García-Salmones Rovira's Comment. We start with H. L. A. Hart's assumption "that human survival is morally good, and that a normative system that did not aim at it would not be a legal system."[2] García-Salmones Rovira compounds Hart's error by adding that survival is as good for a living system as it is for a person; therefore the international legal system I describe in *Groundwork* must be moral. Then, both she and D'Aspremont credit me with trying to save the system of international law.

I agree that autopoietic systems (by definition) try to survive. But that doesn't mean they ought to be saved. The Ebola virus is an autopoietic system, but that doesn't endow it with a moral presumption in favor of continued existence. The tsetse fly has no moral right to survive. On the other side of the coin, consider a doctor who dies from injecting herself with a new virus that has resisted all efforts to produce antibodies. If an effective serum is produced from her antibodies that saves the lives of thousands of people, would we seriously conclude that by her heroic sacrifice she acted immorally?

The Pure Theory instructs us to distinguish between the moral and the legal (remember that morality is not *in* the law). If we are responding to a moral question, our answer should be based on morality. If we are responding to a legal question, our answer is most prudently based on legality. If we are responding to a question in which the moral and legal imperatives are intertwined, then since our *obligation* extends only to the part that constitutes the moral imperative, our answer should be based on morality alone.

García-Salmones Rovira disarmingly asks how states got to the magical and previously unknown land of *Groundwork.* I am, in fact, drafting an essay on this lacuna, and hope that it might see the light of day sometime in 2015.

[2] This description is provided by Leslie Green in his introduction to HART, THE CONCEPT OF LAW, at xv, xxxv (3d ed. 2012).

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