

**Power Politics and International Public Law:
Lessons from Benito Cereno**
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Silent leges inter arma. During war, the laws are silent.

Marcus Tullius Cicero, *ProMilone 11*

I. Introduction

Alone on the high seas, on the verge of the 19th century, the Spanish galleon *San Dominick*, captained by Benito Cereno, is engulfed in revolution when its cargo decides to alter their status.¹ The slaves' rebellion, led by their most intelligent, Babo, and their strongest, Atufal, upends the Spaniards' routine transportation of their "legal property" to the New World. When an American ship crosses paths with the *San Dominick*, its captain, Amasa Delano, boards the Spanish galleon as Cereno's guest, blissfully unaware that Cereno is no longer in power. Knowing that his rebellion will be quickly quashed if the Americans discover the slaves' mutiny, Babo orchestrates an elaborate act, in which the slaves pretend to be slaves, and the masters pretend to be masters, on pain of death. Eventually, though, Cereno manages to alert the naïve Delano to the situation, and the Americans promptly overpower the slaves with their superior strength, numbers, and firepower. In the battle, Atufal is shot and killed, and Babo is captured. He is taken back to land and subjected to a trial under Spanish law. With all "due process," Babo is tried, and hanged.

On the high seas, the law is the tool of the strong, not necessarily the just. What passes for "governing law" on the high seas is not a mutually agreed-upon compact of peace and order between equals, but the law of the slave owners, enforced at gunpoint. In the sea of international relations, a veneer of agreements, protocols, and resolutions passes for public international law. But as Herman Melville's 1855 novella *Benito Cereno* suggests (certainly not for the first or last time), law is meaningless in the absence of power. While a putative first-world definition of

“law” is absolutely dependent on mutual compacts between equals, the inequality between first world and third world in international relations, represented by the novella’s white owners and black slaves, means that there can be no such compact. How can treaties between “partners” that are radically unequal be bargained for fairly and justly? How will deals between the developed and developing world be enforced when—not if, but when—the powerful decide to abrogate their agreements and flout the very notion of an international law? What recourse, for example, do Bangladesh and Micronesia—countries whose very existence is threatened by global warming—have against the United States for abandoning the Kyoto Protocol? If a just law requires a contract of equals, public international law is a “knot of contrariety” between two paradoxical pulls. On one end of the rope is the first world’s advocacy of democracy and justice. On the other end is the first world’s vested interest in maintaining the globe’s order of inequality.

Babo’s execution may suggest that any temporary disorder on the high seas will be ordered by the law of the victor, inexorably quelled, by violence if necessary. But Captain Benito Cereno’s desolate demise, following shortly after the legal formalism of his testimony in the Babo case as presented through a deposition transcript, hints that even the master of a system of radical inequality cannot survive it.

This paper examines the connections between the power imbalance on the high seas of Melville’s text and the power imbalance that inheres in international relations, in order to explore how parties of unequal status behave, and why they behave as they do, in the absence of a controlling and enforcing authority. Section II discusses the power politics surrounding the formation of two recent international treaties. Section III explores the similarities between the formation of these treaties and Melville’s concept of the law of the high seas. Section IV discusses the complexities in the concept of self-defense in criminal law and its application to these questions. Finally, Section V asks whether Melville offers any lessons on power politics, or whether Benito Cereno (the man or the text) suggests any way to cut the Gordian knot² that is the law in a world of unequally powered relationships—whether it may be possible for international law to rise above the paradox of its birth.

II. The Ratification Process In Two Recent Treaties

As the world's most powerful nation-state, the United States plays a significant role—be it a beneficial one or a detrimental one—in virtually every major international treaty. Two recent major treaties, the Rome Convention forming an International Criminal Court and the Kyoto Protocol of the United Nations Framework Convention on Climate Change, proved no exception.³ In both cases, the United States took part in the negotiations for these treaties, attempting to form them to suit the United States' desires—hardly an unusual or blameworthy move, as all nations negotiating the treaties were doing the same. Yet the United States failed to ratify both treaties, leaving their efficacy uncertain at best. In both cases, the United States defended its non-ratification as a defense of its interests, and implying an attack by the treaty-supporting countries.

A. The Rome Convention and the Kyoto Protocol

The Rome Convention forming an International Criminal Court (ICC) was adopted on July 17, 1998 by a vote of 120 to 7 among the countries discussing it. All European Union member states voted in favor of the treaty, as well as some countries whose governments had good reasons to oppose a criminal court that would punish large-scale human rights violations, such as Afghanistan and the Democratic Republic of Congo. Voting against the treaty were the People's Republic of China, Iraq, Libya, Yemen, Qatar, Israel, and the United States. Following the vote, the countries that voted for it each went to their national legislatures to ratify the Convention. The treaty quickly reached the 89 countries necessary (under its own terms) to come into force.

United States President Bill Clinton signed the treaty on the last date it was open for signature, December 31, 2000. However, when he signed it, Clinton explicitly said that he had no intention to submit it to the Senate for ratification (as is arguably necessary under the Constitution).⁴ Clinton cited the United States government's concern that the ICC would exercise jurisdiction over United States soldiers involved in United Nations peacekeeping missions abroad. The George W. Bush administration distanced itself more permanently from the

treaty, saying that the United States had no intention to become a party to it.⁵ Despite American opposition, the ICC collected enough ratifying countries to launch, without the Americans, on March 11, 2003.⁶

One might think that the United States, as an actor ostensibly concerned with the rule of law, might like to have an International Criminal Court. Such a forum would provide the ability to try widely acknowledged war criminals without the political difficulty of unilateral action. Additionally, a ready-made forum alleviates the need to set up special ad hoc tribunals as was done in Rwanda and Yugoslavia, each of which took a great deal of time and political capital to initiate, and each of which have been haunted by inefficiencies that a permanent tribunal might be able to avoid through regularized practice.⁷ However, concerns over the protection of American interests against foreign countries who might seek to bring United States citizens in front of this Tribunal outweighed any perceived benefits, and so the United States backed out of the Rome Convention.

The Kyoto Protocol was born from the 1992 United Nations Framework Convention on Climate Change. The Protocol was signed by the United States (specifically by then-Vice President Al Gore) on November 12, 1998, joining 177 other nations. The Protocol called for a 5% reduction in carbon dioxide by 2012 from advanced nations, and essentially exempted many developing nations, such as China and India, from those targets.⁸

Two conditions were required for the Kyoto Protocol to come into force. First, the Protocol must be ratified by at least 55 of the countries that originally signed the Convention (known as Annex I countries). Second, the ratifying countries must represent among them at least 55% of the carbon dioxide emissions from Annex I countries for 1990.⁹ After being stalled just short of the 55% level for some time, the Kyoto Protocol achieved these ratification goals and entered into force on February 16, 2005, ninety days after Russia ratified the treaty.¹⁰

The United States alone could have ratified the treaty before Russia's ratification, as the United States is the world's largest producer of green-

house gases, emitting around 25% of the total. However, once again, the Bush administration distanced itself from an international treaty the United States had signed, publicly withdrawing from the Kyoto Protocol. The Protocol was never submitted for ratification to the United States Senate,¹¹ since that body would not have ratified it—in fact, the Senate passed a resolution (by a vote of 98 to 0) making ratification of the Kyoto Protocol conditional on assurances that United States' competitiveness in world markets would not be harmed. As one conservative American critic put it, "Kyoto is arguably in truth an economic instrument by which foreign competitors hope to mitigate U.S. competitive advantages."¹² Again, the rationale presented was one of a defense of United States interests—and once more against "foreigners," the developing world who would be exempt from restricting their own pollution so as to enhance their economic development.

There has been, of course, a wealth of opinion on the costs, benefits, and climatological effects of the Kyoto Protocol. But one point is starkly clear: to the extent a cost/benefit analysis is predictable and would yield net benefits, such benefits would inure disproportionately to poorer countries. One such analysis of the Kyoto Protocol predicts a global benefit-to-cost ratio of \$166 trillion to \$94 trillion, but because the costs would be borne principally by the first world, the ratio for the first world would be less than one, which explains the United States' disinterest in signing on.¹³ And the worst-case costs of not controlling carbon emissions are not just hampered child development due to local pollution, but a global sea-level rise, which could be disastrous in low-lying countries such as Bangladesh and Micronesia. How can such countries, with neither altitude nor affluence, bargain with the first world in defense of their very existence?

III. Rome, Kyoto, Senegal, Peru

The purpose of a treaty, like the purpose of any contract, is to protect agreed-upon rights, and provide for predictability and stability in a relationship. But how protective and predictive is a contract—or a treaty—if it can be abrogated at will by the stronger party? And what incentives prevent the stronger party from abrogating those agreements?¹⁴

A. Entering Unequal Treaties . . .

The formation of the contract may affect how we analyze that question. At one point during the revolt aboard the *San Dominick*, Benito Cereno enters a kind of contract with Babo: if the former slaves stop killing the Spaniards, Cereno, the ship's only remaining capable navigator, will guide them from their current position (off the coast of Peru) to Senegal. In the midst of a slave rebellion, a treaty of equals seems to emerge. They need each other: Cereno is dependent on Babo for his life in an immediate way, and Babo is dependent on Cereno if he ever wants to return to Africa safely. This is a contract that could not have been made between master and slave.¹⁵

Who has the superior bargaining position in the formation of this contract? Most immediately, the ship is bereft of crew and short of supplies, and probably is not capable of sailing across the South Atlantic to Senegal. The slaves may not actually need Cereno to pilot them back to a local harbor where they can restock and repair, making him of little immediate use—and thus expendable. But they will need Cereno once they reach a local harbor to secure provisions, since the local Spanish authorities would quickly recapture masterless slaves captaining a Spanish galleon. And if the former slaves decide to press on to Senegal, with or without fresh supplies, Cereno's advantage increases, as his navigation skills will be needed all the more.

As with many contract negotiations, information is key. Cereno's strategy depends on what he knows (or what he thinks he knows) about what Babo knows (or what he thinks he knows). Babo may have no idea they are close to South America and that a local port is an option. If he thinks their only option is to sail across the seas to Senegal, and Cereno is vital to that grand plan, Cereno's bargaining power is improved. On the other hand, they have little to no chance of reaching Senegal in their current depleted state. If Cereno knows that (and Babo does not), Cereno is playing a desperate strategy: betting on Babo's ignorance of the impossibility of their voyage, he may be stalling, playing time as his only card, as skillfully as he can. Or, if Cereno knows that an attempt to go to Senegal will surely result in his (and everyone else's) death, and a local landing is their only option, he could be angling for such a local

landing. Again relying on Babo's ignorance, Cereno could keep the ship at sea for some time—enough to make it seem to inexperienced sailors like a transatlantic voyage, but not enough so that their supplies run out—before a turn back to Spanish territory in South America. Cereno may also be gambling that even if his ploy were discovered, Babo would be hard-pressed to enforce their deal, given that Babo's basic method of enforcement (killing Cereno) is only effective in its threat.¹⁶ The deal is not only unenforceable: Cereno is in fact quite likely to breach it in any event. He knows that in the unlikely event they should actually reach Senegal, he will have outlived his usefulness.

All of the above stratagems were worth considering when negotiating this contract. But all of the strategies assume rational actors. Cereno does not know whether, despite their recent enslavement and debasement, Babo and all of the former slaves will be rational and patient during any such "negotiations." Indeed, Babo does not know whether, despite his recent enslavement and debasement, and the constant threat of imminent death, Cereno is still capable of the same. So each party has imperfect information about the counterparty's intentions, and even less perfect information about the probability of success for any possible choice. Who, then, is the "stronger" party? This might be a moment of true equality between the parties after all—neither Cereno nor Babo have much hope of extricating themselves from their current positions. Both are equally stuck.

Regardless of how equitable the eventual "contract" may seem, in the end, this treaty seems forced upon Cereno, given the more immediate threat to his own life, making Babo not his equal, but his superior. How highly, then, should Cereno have valued that contract? If the law is meaningless in the absence of an outside power capable of brokering and enforcing equal agreements, contracts are made with whatever advantage can be brought to the table at the time of formation, and broken at the first opportunity for advantage.

B. . . . Leaving Them . . .

Realizing the hopelessness of the deal he has entered, Benito Cereno abrogates his agreement to take Babo to Senegal by signaling his di-

lemma to the Americans at the first opportunity he can do so without being killed. As the American captain Amasa Delano takes his leave and boards his own ship, Cereno jumps aboard Delano's ship. In the chaos that ensues, the Americans amply demonstrate their strength, both individually and collectively. Captain Delano begins the battle by assessing the situation: he physically holds down Cereno with one hand, and Babo with one foot, while he pauses to consider the situation, and who may pose a real threat to himself and his crew. Delano, however, quickly grasps the situation, deciding that Cereno is escaping from Babo, and that he should come to Cereno's aid. He thus surrenders the role of an arbiter to become a partisan, and orders an American attack. The Americans swiftly overtake the Spanish ship and install a new order.

Cereno's physically manifested leap out of his agreement with Babo begs the question: does a party to a contract, however entered, have a moral right to abrogate that contract at will? The first answer in the laws of an advanced nation is the underpinning of the entirety of contract law: contracts must be honored, assuming, rightly or wrongly, that the parties entered the deal freely.¹⁷ When a party abrogates a contract in the law of the developed world, the counterparty, weaker or stronger, generally has recourse to a neutral forum with the power to administer the dispute and enforce compliance with the terms of the deal (or at least award monetary damages against an aggrieved party).

But sometimes there is no such neutral arbiter, or as in Delano's case, the neutral party becomes a partisan. We might all agree that a sufficiently great harm being inflicted on a weaker party by their treaty partner in the context of the treaty relationship justifies abrogation. The type or level of "harm" that is sufficient to justify breaking a treaty is a fact-specific inquiry in each instance, and of course this inquiry will depend on the (third-party) inquirer's opinion of what is justified. Babo and Atufal's revolt signals an abrogation of the revolting "treaty" forced upon them. Babo and Atufal were clearly not willing parties to a contract of slavery, but once captured and brought on board the *San Dominick*, a deal was implicit: they behave like slaves, and in return, they remain alive. It does not take a "treaty" as unequal as a compact of slavery for a third-party observer to sympathize with and support the weaker party in

abrogating the deal. American contract law is filled with (controversial) examples of judges allowing a party to breach a contract entered from a radically weaker bargaining position under the doctrine of unconscionability.¹⁸ So the law recognizes situations in which weaker parties may breach their contracts, and indeed, abrogation is all but inevitable when an unequal treaty is forced on a weaker party and will inflict sufficiently great harm on that party. It is not difficult to sympathize morally with the weaker party in these instances.

But is there ever a justification for a stronger party to abrogate a treaty, or, further, to refuse to enter a treaty that will not inure entirely to its benefit? In rejecting the Rome Convention, the justification offered by the United States was potential violence to Americans in the form of imprisonment (or at least violence to their due process rights). In rejecting the Kyoto Protocol, the United States justification was potential “violence” to its economic interests. Finding harm sufficient to justify breaking a contract is a matter of opinion. And power helps opinions prevail.

C. . . . And Enforcing Them Against Those Who Leave.

Justification or fairness aside, Spanish justice applies to Babo in the end, and he is tried for crimes under Spanish law. In modern international law of the sea jurisprudence, the law that is applicable aboard a vessel on the high seas is the law that is applicable in the home country of that vessel. Every vessel is supposed to have a “nationality,” and fly the flag of a given country. The “flag state” is supposed to exercise effective authority and control over the ship, and may exercise jurisdiction to prescribe, adjudicate, and enforce any conduct that takes place on the ship.¹⁹ In the case of the *San Dominick*, flying under a Spanish flag, Spanish justice applied to Babo from the moment he came aboard. Once Babo is transported back to land, he is subjected to the penalties of Spanish colonial law. The law on the land ends up being much the same as on sea—the strong win, and, as demonstrated by Babo, who never again speaks after his defeat on the ship (including at his trial), the weak don’t even have a voice. The only difference between the law of land and sea is that the law on land is better dressed, clothed in the formality of legal

process, a process more expansive than at sea, where juries, lawyers, and appellate courts are in short supply.

The pomp and circumstance of judicial process in a formal courtroom may salve our consciences about an execution—but only when we are comfortable with the system that renders the verdict. If Babo had prevailed, taken Benito Cereno to Senegal, given Cereno a fair trial under Senegalese law, and then executed him, would we be comfortable saying justice had been done? Perhaps. Could such a trial be called fair? In our positions, in our day and age, we might be comfortable with such a trial precisely because it would not be “fair,” so much as it might be considered “just”—the slave trader adjudged by the slaves.

If the result of Babo’s trial, or a hypothetical Senegalese trial of Benito Cereno, would be a foregone conclusion, why have a trial in the first place? United States Supreme Court Justice Robert Jackson, who led the United States prosecution team at the Nuremberg trials, offers one possible answer: the judicial process provides a historical record upon which we can reflect, while trying to build a fairer system. In his opening statement at those tribunals, Justice Jackson stated:

That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that power has ever paid to reason. . . . We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. (98)

The powerful nations, the ones who set the rules, are not destined to be powerful forever, and rules designed to favor the powerful only encourage the powerful to do whatever is necessary to remain in power. How can the community of nations ensure the fairness of a process of justice, ensure that the strong do not define that process to the detriment of the weak?

Giving a “voice” to the weak is not much good when, as in Babo’s trial, its use would be utterly unavailing. Indeed, even the idea of “giving” a

voice is problematic. If a weaker party's opportunity to speak is tied to a procedural format that is tailored by a stronger party, the opportunity may be rendered insignificant. It is hardly generous justice to allow the accused the opportunity to speak for an artificially brief period, or with undue evidentiary or other constraints. Even an accused as intelligent as Babo would have no reason to understand the formal rules of a trial. From his point of view, the trial would be a baffling sequence of times when he may speak (and why, and on what subjects), and times when he is required to be silent; arguments he may make, and arguments he will be summarily disallowed from making. Babo likely recognized the uselessness of a slave's "self-defense" claim, which I will discuss further, assuming that no Spanish court would recognize that a slave had any such right. Procedure can be an instrument of enslavement as easily as it can be an instrument of justice.²⁰

Even the necessary (and thus seemingly innocent) requirement of a common language disadvantages the weaker party. However unappealing Babo's hypothetical statement of defense might have been to a Spanish-speaking court, a presentation in his native language would have been far less convincing to that assembly. The problem is not simply one of translation. At the United Nations, a cadre of skilled translators is always available to translate words and grammar, but a phrase asserted in the "language" of first-world industrial economics regarding a tradeoff between employment percentages and environmental protection may be incomprehensible in the language of an island nation whose existence is threatened by that econometric tradeoff. A Spanish judge's careful explanation of the law of slavery—even skillfully translated into Babo's native language—would be unlikely to convince Babo why the violent enslavement of a Spaniard was punishable by death while the violent enslavement of an African was perfectly acceptable.

We can design, in all good faith, a system of checks and balances, but such a system is useless when no power is strong enough to check any other single power. We can try to design a system where there are no "majorities," no singular power, but what happens if one power becomes stronger than all others? Or when coalitions of pluralities form a strong majority, giving that majority the ability to act against the weak

unilaterally and with absolute force? Once the powerful are entrenched, is there any way to solve this problem, other than waiting for the fall of empire?

IV. The Right of Self-Defense in Criminal Law

Babo, Atufal, and the rest of the former slaves do not merely overpower their captors. They kill most of the Spaniards, and indeed cannibalize at least one of them. Was the harm inflicted upon them sufficient to justify their revolt and murder? Was the harm inflicted by Babo and Atufal in their revolt sufficient to justify an American assault that re-enslaves or kills them? These questions echo longstanding debates in criminal law regarding the boundaries of the right of self-defense.

Generally speaking, a person has a right of self-defense to prevent an imminent harm to himself.²¹ All but the most devout pacifists would agree that, if Adam is in the process of punching Bill (or has done so already), Bill is morally entitled to punch back, in order to stop Adam's assault. Common law countries tend to codify that moral judgment. Further, Bill has a right of mortal self-defense (*i.e.*, killing his attacker) to prevent an imminent mortal harm to himself (*i.e.*, his own death). So, if Adam is indisputably going to kill Bill (Adam has his sword out, say, and is rushing at Bill screaming death threats), Bill is legally justified in drawing his gun and shooting Adam. But the doctrine of self-defense requires proportionality: Bill may draw his gun and fire in self-defense if Adam is rushing at him with pointed sword, but Bill may not fire away if Adam is merely throwing a punch.²² Most jurisdictions extend the right of mortal self-defense to prevent an imminent mortal harm not only to the defender, but also to a third party. So, if Adam is indisputably going to kill Bill (again, Adam has his sword out, rushing at Bill, screaming threats), and Carol wanders onto the scene and witnesses the events unfolding, Carol is justified in killing Adam to save Bill.²³

In these examples, it is a given that harm is imminent. But it is not always so clear. Most common-law jurisdictions in the United States require the harm to be objectively imminent, but a few jurisdictions (and the Model Penal Code)²⁴ require only a subjective belief of imminent harm. The former, the objective standard, requires there to be actual ob-

jective danger of mortal harm in order to justify inflicting mortal harm in self-defense. The attacker actually must be attacking with deadly force, and it is not sufficient for the defender merely to believe such an attack was imminent. The latter, the subjective standard, would only require that the defender “reasonably believed” (or some similarly worded standard) that mortal harm was imminent. In a jurisdiction that requires objective danger to exercise self-defense, the defender must prove the danger to him in order to be excused from any violence committed in self-defense. In a jurisdiction that requires a subjective belief of danger to exercise self-defense, the defender must only prove that he *believed* that there was a danger to him.²⁵

As a concrete example of the important difference between these two regimes, let’s say that Bill claims Adam has “deadly weapons,” and is about to use them on Bill. Bill thus kills Adam in “self-defense.” But in truth, Adam does not have any such weapons. Under the objective standard, Bill’s claim of self-defense is untenable, and Bill should be subject to the legal penalties for murder. Under the subjective standard, Bill would only have to believe that Adam was about to employ his deadly weapons, and at most, Bill would be required to prove to some neutral arbiter (should one be found) that he had some reasonable grounds to believe Adam’s deadly attack was imminent.²⁶

The parallels to the problems of modern international law should be clear. For example, what if the United States claims Iraq has deadly weapons and is about to use them on the United States, and thus attacks Iraq in self-defense? Under the objective standard, if Iraq in truth does not have any such weapons or was not about to use them, the claim of self-defense is untenable, and legal penalties should follow. Under the subjective standard, the United States would merely have to believe that Iraq was about to use its deadly weapons, and at most, the United States would have to prove to some neutral arbiter—should one be found—that there was reasonable grounds to believe a deadly attack was imminent.

The introduction of a third party yields another problem. Let us say, as above, Adam is (objectively) about to kill Bill (sword out, death threats screamed). Bill is justified in drawing his gun, shouting a few choice threats in response, and shooting Adam in self-defense. But this time,

before Bill can draw his gun, Carol walks onto the scene. As mentioned above, Carol would be justified in killing Adam on Bill's behalf, in an exercise of the right of self-defense as applied to the defense of third parties. But, Carol got to this particular scene a little late, and did not see the objective imminent threat from Adam. She only sees Bill with gun drawn, shouting his threats. Carol misunderstands the situation, and thinks that Adam's sword waving is a desperate act of self-defense against Bill's gun attack. Is Carol justified in killing *Bill* to defend *Adam* from Bill's imminent mortal attack?

Under the objective standard, Carol got it wrong. Bill was not an aggressor, but was rather acting in self-defense, and thus Carol should not have killed Bill—and the appropriate legal penalties may be applied to Carol. However, under the subjective standard, Carol had good reason to believe that Bill was the aggressor, and would have little trouble arguing to a neutral arbiter that she (Carol) indeed believed that, and that her belief was reasonable. Thus, in such a jurisdiction, Carol will be excused from liability on the basis that it was an appropriate extension of the right of self-defense to the defense of a third party.

Once again, parallels to international law are clear. As an example that is hopefully more far-fetched: what if the United States claims Iran has weapons of mass destruction and is about to use them on Israel, and thus attacks Iran in defense of Israel? If Iran really was about to attack Israel, then the United States would be justified under either an objective or subjective standard. But if Iran's attack was actually an exercise of self-defense against an attack by Israel—an attack that was either objectively about to occur, or Iran subjectively believed was about to occur—then the United States would itself have to assert the subjective standard; that it had reason to believe that Iran was the aggressor. Of course, lacking a truly neutral arbiter of such a claim, the United States would never really be required to justify its actions.²⁷

With this analysis as predicate, we now return to the question of whether the harm inflicted by Babo and Atufal in their revolt is sufficient to justify the American assault that re-enslaves or kills them. Captain Delano (Carol, in our hypothetical analysis) has wandered onto a scene in which Babo has inflicted harm on Benito Cereno and his

crew. But between Babo and Cereno, who is our Adam, the “objective” initiator of violence? Certainly, the slave revolt is mortally violent, but is Cereno’s transportation of slaves less of an act of violence just because these particular slaves were not killed? Under the subjective standards of self-defense extended to third parties outlined above, Delano’s violent quelling of the slave rebellion is excusable—he came to the scene just in time to witness the slaves’ mortal violence against the Spanish, after the capture of the slaves (probably violent, but not mortally so) was completed. Delano may have “reasonably believed”—to the extent that such a belief was reasonable at the time—that the slaves were the instigators of the mortal violence.

Of course, as noted above, most jurisdictions would allow mortal self-defense against certain heinous crimes, even when not mortal, and kidnapping and enslavement might easily fall into that category. But recall the year of Melville’s writing (1855) and the year in which the story is set (1799)—at these times, the question of whether enslavement is a crime that justifies mortal self-defense in response was rather more hotly debated. In *The Amistad*, the Supreme Court case whose facts Melville undoubtedly adopted for *Benito Cereno*, slaves aboard a Spanish schooner en route from one Cuban port to another rose up and killed their masters, only to be “salvaged” later by an American ship off the coast of Long Island (40 U.S. 518 1841). The Spanish captain of the *Amistad*, whose life the slaves had spared for his navigation abilities, sailed the ship east (toward Africa) during the days, but northwest at night, in an apparent attempt to reach the Southern United States. Once the ship was discovered, the Spanish made a claim for the return of their “property,” including the ship and the slaves. The United States Supreme Court refused the Spanish claim, holding that if the Africans had been slaves under Spanish law, they ought to be returned. However, they were not slaves, because they had been “procured” contrary to an 1820 treaty between Spain and Britain forbidding the importation of slaves to British territories. Instead, they were deemed to be:

[K]idnapped Africans, who, by the laws of Spain itself, are entitled to their freedom, and were kidnapped and illegally car-

ried to Cuba, and illegally detained and restrained on board the *Amistad*; there is no pretence to say, that they are pirates or robbers. We may lament the dreadful acts by which they asserted their liberty, and took possession of the *Amistad*, and endeavored to regain their native country; but they cannot be deemed pirates or robbers, in the sense of the law of nations. (40 U.S. at 594)

Justice Joseph Story's opinion thus appears to forgive the slaves' violent acts, casting them instead as self-defense—even while cautioning that if the Africans' capture had been “legal” under Spanish law, his ruling might have been different.²⁸ As a counter-example, consider the 1831 slave rebellion in Southampton County, Virginia, led by Nat Turner, which claimed the lives of over 50 whites, mostly slave owners and their families. Scores of blacks were killed in return—not only those who participated in the rebellion, and not only by organized judicial process. After the rebellion, Virginia's state legislature considered abolishing slavery in order to prevent any recurrences, but in the end, decided instead to tighten slavery codes: an unsurprising result.²⁹

In each “jurisdiction,” the question of whether self-defense was an allowable claim was decided by those in power, depending in large part on the tolerance levels of those in power for slavery. After considering the historical context, we are led to harder questions: would Delano be justified in using deadly force to quell the slave revolt under an “objective” standard of self-defense? Whose objectivity is to be used as the measuring stick, and how much has that “objectivity” changed in the last two hundred years? How different are these two theories of self-defense, when what is “objective” is defined by a majority that enjoys a tremendous power advantage, to the point that their subjective beliefs become objective truths, particularly in the application of law through a “reasonability” standard? A community of nations with no neutral arbiter and no interest except self-defense is the ultimate in a subjective system of law. In such a system, how do we avoid a situation where the strong act against the weak, within or without the law, unilaterally and with absolute force?

V. The Lessons of Power Politics

Melville offers a way out of this thicket, but it is not a promising one. Aboard the *San Dominick*, before Delano realizes the truth of the situation, he watches a Spanish sailor nervously tying what is described as a Gordian knot. The sailor tells Delano that it is “for someone else to undo,” (176) and then throws it at him, telling Delano (in the only English spoken on the ship), “Undo it, cut it, quick” (176). The knot might well be Walt Whitman’s “knot of contrariety,” the contradictory understanding of slavery in an ostensibly democratic country like America in the 18th and 19th century.³⁰ And although Whitman’s “Crossing Brooklyn Ferry” was written in 1856, one year before *Benito Cereno*, the Spanish sailor sounds to be echoing Whitman’s verse: “I am he who knew what it was to be evil” (line 70 967). Although Delano ponders the knot, he succeeds only in making himself queasy. The knot is tossed around the ship a bit, and eventually thrown overboard. The voyagers, black and white, see no solution but to toss it into the sea. The sailor’s solution (and perhaps Melville’s), to “cut it quick,” is the brutal Alexandrian solution; it would render the rope useless. But it is the solution the Americans employ: aboard the *San Dominick*, the Americans untangle the slave revolt like a sword through rope, at significant cost to both crews. And, to stretch the analogy of the Gordian knot, the Americans have once again fulfilled that ancient prophecy—undoing the knot by use of the sword, and by those means winning an empire.

At least one among the (supposedly) stronger party is rendered useless by the episode. After the revolt is quashed and his deposition testimony proffered, Cereno’s health quickly fails. He predicts his own death, declaring that what has “cast such a shadow” on him is “the Negro” (222). Slavery reversed has made the master understand the nature of slavery. After experiencing the life of a slave—after knowing what it is to be evil, and to have evil inflicted upon him—Cereno’s life is no longer worth living. But having tasted the bitterness of slavery, what other choice does Benito Cereno have? Can he return to captaining slave ships? Can he, in a Spanish colony in 1799, become an abolitionist? Can he escape the question altogether by rejecting his society? If the knot is not cut by the sword, it can only be tossed into the sea. Although we do not see Cereno’s

funeral, we can imagine it is that of a sailor: like the knot, burial at sea, the only other way to “solve” the problem of the knot.

What lessons can the stronger parties of the world draw from this conclusion? What would it take to move the first world to champion the weak, or at least to construct a process through which the weak have a true voice? Perhaps it would take a revolt, a violent upending of the slavemasters, even if only temporary, to make a strong actor who is abusing that strength understand the plight of the weak. After all, it took the Civil War and the subjugation of the South to end slavery in the United States. One would hope that lesser measures could convince the United States merely to honor agreements it signs. But in the absence of a truly neutral arbiter, violence perpetrated by the weak of the world against the strong would almost certainly not be seen by the strong as self-defense, but as an act of aggression—a criminal act, much as Babo is criminalized for his act of rebellion, which he undoubtedly viewed as justifiable self-defense.

Melville was probably not writing with a violent solution in mind, or to provoke a war, but rather to force the stronger parties of his time to think about the problems of a society in which the strong arrange and enforce unfair “agreements” and “protocols” with the weak, only to abrogate those deals when convenient. An objective system depends on a neutral arbiter of such disputes, and in a world where all parties are interested, only process can be neutral. Such a neutral process in the international context requires a tribunal in which the membership rotates regularly, such that no party is forever the stronger, and rule of law is honored not out of convenience or momentary self-interest, but out of fear of being the powerless defendant in the next trial. It is not necessary for the slavemasters to be made slaves to understand that a system of masters and slaves is unjust. It is only necessary that the slavemasters understand that they, like Captain Benito Cereno, forever run that risk, and their best defense is not abuse of power, but use of process. For the United States to be concerned that the International Criminal Court would exercise jurisdiction over United States soldiers may well be the strongest indication that the ICC would be just: only when each country is concerned that it might be unfairly targeted next by the ICC are

the members of that body likely to enact and effectuate neutral procedures that will maintain a balance between the powerful and powerless. The problems inherent in the interaction between unequal powers that Melville frames did not end with the Emancipation Proclamation, and will not end with the International Criminal Court or the Kyoto Protocol. The lessons of Benito Cereno—text and man—are still worth study and debate in the corridors of the powerful, and the powerless.

Notes

- 1 A version of this paper was first presented at the annual convention of the American Comparative Literature Association in April 2003. I am utterly indebted to Professor Robert Ferguson of Columbia University for introducing me to *Benito Cereno*, and several of the ideas in this paper (noted more specifically within), which were presented in lectures on October 16 and 18, 2000. Gratitude is also due to Stephanie Elsky and Gwyneth Horton, both formerly of Cleary, Gottlieb, Steen & Hamilton LLP, for their editing efforts and valuable feedback. Finally, this paper would never have been written is not for the constant encouragement, keen editing, and invaluable advice of Sailaja Sastry.
- 2 The “Gordian knot” was, according to Phrygian tradition, an impossibly complex knot tied by Gordias, who was made king of the city of Telmissus when he fulfilled a prophecy by wandering into town with an ox-cart. In gratitude to the god Sabazios, he tied the ox-cart to a post, creating with the rope the Gordian knot, which became a metaphor for a seemingly intractable problem. It was then prophesized that the one who could undo the knot would become ruler of the Asian empire. Alexander the Great finally “solved” the problem by slicing the knot in half with his sword (Lane 149–51).
- 3 For those unfamiliar with the process of how a multilateral treaty comes into force, I present a brief and simplistic overview. First, a certain number of countries that have negotiated its terms must vote to approve its text as a general matter. Second, if the text is approved by a sufficient number of countries, a designated number of countries have to become signatories to the treaty (that is, their executive or administrative officers must agree to its terms). Third, as most treaties also require countries to ratify them (such treaties are called “non-self-executing”), each signatory country must also approve the treaty in its designated legislative body. For example, for the United States to become party to a treaty, first the U.S. State Department negotiates the terms of the treaty and then, if satisfied with those terms, votes for it; then the President or a designated official signs it; and then the Senate ratifies it by majority vote. For more on the rather complex process of how a treaty is concluded and entered into force, see Sinclair 29–36.

4 Despite American's explicit rejection of ratification, one may argue that the ICC has jurisdiction over Americans anyway. On its face, the treaty gives authority to try non-signatories in the ICC. This makes sense, since it was unlikely that, for example, a Slobodan Milosevic would sign such an instrument. And the treaty was also designated to take into account stateless actors, such as, for example, Osama bin Laden.

Under Article 18 of the Vienna Convention, to which the United States is a signatory, a non-ratifying signatory to a treaty, while not held to the document's specific terms, is nonetheless prohibited from any act, which would defeat the object and purpose of a treaty. See, for example, the Vienna Convention on the Law of Treaties, Exec. L, 92nd. Cong. 1st Session. (1971), art. XVII: "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed." See also *Case of the German Settlers in Polish Upper Silesia*, 1926 P.C.I.J., Ser. A, No. 7, at 30. Formally rejecting the treaty for the formation of the ICC, as the Bush administration did, is almost certainly an act defeating the object and purpose of the treaty. Note, however, that a treaty can lose its binding effect if a sufficient number of parties engage in conduct that is at odds with the constraints of the treaty.

5 See, for example, May 6, 2000 letter from then-Undersecretary of State John Bolton, who is now the U.S. Ambassador to the United Nations.

6 This was not the first time that the United States withdrew from an international crime court. The United States had been a participant in the International Court of Justice since August 1946, but President Reagan revoked the United States' acceptance of the ICJ's jurisdiction and withdrew fully in October 1985 after Nicaragua won a judgment against the United States in the ICJ for mining its harbors and aiding the "contra" rebels in the *Nicaragua v. United States* case. The merits of the decision of that case is available at <<http://www.gwu.edu/~jaysmith/nicus3.html>> (last accessed September 2005).

7 For example, a proposed tribunal to examine war crimes in Burundi following the 1994 massacres in the Security Council because of disagreements over penalties from local states: Rwanda, for example, at the time a nonpermanent member of the Council, would not support a tribunal unless it carried that ability to impose a death penalty, whereas France would veto any proposed Tribunal that had such a capability. Eventually, the proposed Burundi Tribunal became an "international commission of inquiry," without any power to punish. See, for example, U.N. Sec. Council Res. S/RES/102 (1995) 28 August 1995.

8 The overall 5% target for developing countries is to be met through cuts of 8% in the European Union (EU), 7% in the US, and 6% in Canada, Hungary,

- Japan and Poland. New Zealand, Russia, and Ukraine are to stabilize their emissions, while Norway may increase emissions by up to 1%, Australia by up to 8% and Iceland by up to 10%. See United Nations Framework Convention on Climate Change <http://www.dti.gov.uk/ccpo/faqs_kyoto.htm> (last accessed September 2005).
- 9 For more detailed information see Climate Change Projections Office of the Department of Trade and Industry of the United Kingdom, "Frequently Asked Questions: Kyoto Protocol." Available at <<http://www.dti.gov.uk/ccpo/faqs.htm>> (last accessed September 2005).
- 10 See <http://unfccc.int/essential_background/Kyoto_protocol/status_of_ratification/items/2613.php>, as of July 28, 2005. Russia had committed to ratification at the 2002 Johannesburg summit, but did not ratify the treaty until late 2004, after Russia's cabinet endorsed the treaty and sent it to the Duma. See Mydans, Seth and Andrew C. Revkin, "With Russia's Nod, Treaty on Emissions Clears Last Hurdle," *The New York Times*, October 4, 2004. The treaty then entered into effect 90 days later, without any US participation.
- 11 For more details on this see Ackerman, David. *Global Climate Change: Selected Legal Questions About Kyoto Protocol*, January 10, 2001. <<http://www.ncseonline.org/NLE/CRSreporrts/Climare/clim-15.cfm?&CFID=6822400&CFTOKEN=18386234>>.
- 12 For the context of this quotation see Horner, Christopher. "Modern Developments in the Treaty Process: Recent Developments Regarding Advice and Consent, Withdrawal, and the Growing Roles of Nongovernmental Organizations in the International Agreements With Particular Examination of the 1997 Kyoto Protocol." Paper of The Federalist Society for Law and Public Policy Studies.
- 13 See, for example, Cline, William R. "Meeting the Challenge of Global Warming." Ed. Bjorn Lomborg. *Global Crisis, Global Solutions*. Cambridge UP, 2004. Note that prices given are 1990 prices (the goals set by the Kyoto Protocol were to freeze the first world's carbon emissions at 5% below their 1990 levels).
- 14 Of course, this essay is not the first to pose the question of why nations obey international law to the extent that they do; there is widespread disagreement on that question on both positive and normative levels. For a survey of sources examining this questions see Koh, Harold Hongju. "Why Do Nations Obey International Law?" *Yale Law Journal* 106 (1997): 2599, 2603. One of Koh's many contributions in this area is the observation that "fair" international rules must penetrate into a domestic legal system, "thus becoming part of that nation's international value set," such that "repeated compliance gradually becomes habitual obedience" (2599).
- 15 I am indebted to Robert Ferguson for the idea, presented in a lecture on October 18, 2000 at the Columbia University School of Law in New York City, that this compact between Babo and Cereno could be considered some form of contract.

- 16 Killing Cereno is not actually Babo's only enforcement option. He could torture Cereno, or threaten torture, until Cereno submitted. Indeed, Babo could even justify such torture as self-defense—were they not to reach Senegal, he and the rest of the slaves are likely to be caught and executed. The legal justification for torture as necessary means of self-defense has been advocated recently by the United States Department of Justice's Legal Office of Legal Counsel, in an August 1, 2002 memorandum written by Assistant Attorney General Jay S. Bybee. After its June 8, 2004 release by the *Washington Post* (see <<http://www.washingtonpost.com/wp-dyn/articles/A23373-2004Jun7.html>>), the Bush administration distanced itself from the memorandum. Subsequent to authoring the memorandum, Bybee was nominated by President Bush, then confirmed by the Senate, as a federal judge on the Ninth United States Circuit Court of Appeals.
- 17 American contract law, at least, allows for an "economically efficient" breach of contract by a rule of damages that generally awards damages to an aggrieved party in the amount that the party expected to receive from the contract. For example, Adam agrees to sell Bill an apple for \$1. Before they can exchange the apple and money, Carol offers Adam \$2 for the apple. Adam can break his contract with Bill, and take Carol's offer for more money. Since Adam has no more apples, Bill is required to buy an apple in the open market, and it is more expensive—\$1.50. Bill can sue Adam for the extra fifty cents he had to spend due to Adam's breach of contract. Adam will have to pay Bill that fifty cents, but will still walk away from the deal with an extra fifty cents more than he would have had if he did not breach the contract. Even in losing the lawsuit Adam has been rewarded for his economically efficient breach of contract. However, Adam's solution does not address the problem of whether the breach was morally justified, given that he has forced upon Bill certain other transaction costs, including time, aggravation, and the cost of suing to recover the fifty cents. These costs were, so to speak, more than Bill had bargained for. Although this scenario raises several issues of justice of a cost-efficient breach, it does not imply any moral failings on Adam's part; simply a rational economic decision.
- 18 See, for example, *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); *Jones v. Star Credit Corp.*, 298 N.Y.S. 2d 264 (N.Y. Sup. Ct. 1969).
- 19 See Restatement (3rd) of the Law of the Sea, § 502. As one British case from around the time of Melville's writing put it, "it is clear that an English ship on the high seas, out of foreign territory, is subject to the law of England" (*Regina v. Leslie* 8 Cox Crim. Cas. 269 Ct. Crim. App. 1860). In another case from the era, an American crewman on board a British vessel in a river in France murdered a crewmate, and a British Court upheld his conviction under British law; see *Regina v. James Anderson*, 11 Cox Crim. Case 198 Ct. Crim. App. 1868.
- 20 See, for example, Gilmore, Grant. *The Ages of American Law*. New Haven: Yale UP, 1979, 48, where he states, "Law reflects but in no sense determines the

moral worth of a society. The values of a reasonably just society will reflect themselves in a reasonably just law. The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell, there would be nothing but law, and due process would be meticulously observed.”

- 21 America’s Model Penal Code of 1962 (in §35.15) does not use the concept of “imminence,” but instead talks about “the Present occasion.” The New York Penal Code (in §35.15) justifies self-defense “from what [a person] reasonably believes to be the use or imminent use of unlawful physical force by such other person.” The Model Penal Code is not itself law, but rather an academic model that some jurisdictions have adopted as law in whole or in part. For a good overview of these issues of self-defense, see Fletcher, George P. *Basic Concepts of Criminal Law*. Oxford: Oxford UP, 1988, particularly chapters 2–3. A classic example of the imminence requirement can be found in *State v. Marshall*, 208 N.C. 127, 179 S.E. 427 (N.C. 1935), in which the Supreme Court of North Carolina held that because an “aggressor” picked up a hammer during a bar fight, but did not have the hammer “in a striking position” the trial court was correct in disallowing the defendant’s assertion of self-defense for shooting the hammer-bearer.
- 22 As a less severe, but similar example, a New York court held that it was not self-defense to throw a rock at an “aggressor’s” head when the “aggression” consisted of a thorough splashing with a bucket of water (*In re Taylor*, 62 Misc.2d 529, 309 N.Y.S.2d 368 (1970)).
- 23 Jurisdictions vary in terms of what assaults can justify mortal self-defense. Most American jurisdictions allow a defender to use mortal self-defense not only to defend against deadly assault, but also against such heinous crimes as rape, and some allow mortal self-defense against other serious crimes. See, for example, Model Penal Code, §3.04(b)(2) that allows the use of deadly force in self-defense against imminent threat of death, serious bodily harm, kidnapping, or sexual intercourse compelled by force or threat. For the contrary view, see *State v. Clay*, 297 N.C. 555, 256 S.E. 2d 176, 182 (1979) which limits the use of deadly force in self-defense to instances of imminent death or great bodily harm.
- 24 Model Penal Code, § 3.04. Most American states have adopted the objective theory of self-defense described herein. But some, such as California, have adopted a more subjective theory, and New York takes the middle ground of requiring the “reasonable” belief that an attack is imminent—giving the defender’s belief some credence, but requiring the defender to have some objective basis for his/her belief.
- 25 This distinction can be broken down further: most subjective jurisdictions require the defender to point to objective factors that caused his belief (for example, that his subjective belief was reasonable), but the degree of latitude that

the defender has in asserting the reasonability of his own belief can vary. For example, in *State v. Fair*, 45 N.J. 77, 211, A.2d 359 (N.J. 1965), the Supreme Court of New Jersey held that, under New Jersey law, a party may intervene in defense of a third person if he subjectively believes that the third person is in danger; but, to avoid being convicted for harming the person the intervener thought was the aggressor, the jury must “objectively find that the intervener reasonably arrived at the conclusion that the apparent victim was in peril, and that the force he used was necessary.”

- 26 To reverse the roles: what if Bangladesh decides its existence is imminently threatened by global warming, which it determines is caused by pollution, the plurality of which is generated by the United States? Would Bangladesh be “justified” in launching an attack on smog-producing factories in the United States? Under the subjective standard, Bangladesh could even prove its theory on an objective standard, if it could reasonably prove to an objective third party—again, if one could be found—that in fact its existence was “imminently” threatened. Of course, it is unlikely that Bangladesh would be provided with “due process” to state any such claims after having attacked the United States.
- 27 The court of public opinion may have some influence, as the United States would want to demonstrate for political reasons that it was justified. However, a position of sufficient strength can adequately substitute for, or render moot, a failure to justify one’s actions.
- 28 Melville handles this counterfactual supposition in part by setting his story in 1799, before the 1820 treaty between Britain and Spain, and thus, presumably alters what would have been the Court’s reasoning had the *San Dominick* been found off the Long Island coast.
- 29 See, for example, Apetheker. See also Foner.
- 30 Again, I thank Robert Ferguson for raising the connection between “the knot of contrariety” from Whitman’s poem “Crossing Brooklyn Ferry,” and the understanding of slavery in 18th and 19th century America.

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