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New Approaches to Customary International Law

Anthony D'Amato

Northwestern University School of Law, a-damato@law.northwestern.edu

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REVIEW ESSAY

NEW APPROACHES TO CUSTOMARY INTERNATIONAL LAW

The Perils of Global Legalism. By Eric A. Posner. Chicago, IL: University of Chicago Press, 2009. Pp. xvii, 266. Index. \$29.

How International Law Works: A Rational Choice Theory. By Andrew T. Guzman. Oxford: Oxford University Press, 2008. Pp. xi, 260. Index. \$35, £22.50, cloth; \$24.95, £15.99, paper.

Customary International Law: A New Theory with Practical Applications. By Brian D. Leppard. Cambridge: Cambridge University Press, 2010. Pp. xx, 419. Index. \$125, £70, cloth; \$54.99, £38, paper.

After a century of benign neglect, international law theorizing has suddenly taken off. No article can proceed without an obligatory assortment of theoretical epigrams. Books on theory are published, like the three under review here. Lawyers at cocktail parties chat about nothing other than legal theory and Bernie Madoff. Judges join the cacophony as the international claims they are called upon to adjudicate go global. Everyone seems to be talking about theory, but few seem to be listening. Ah well, it's early days. International law proceeds—as my great mentor Richard Baxter once said about how long it took to get an article into the *British Year Book*—“under the aspect of eternity.” Since then the *Year Book* has been running hard to catch up to its annual title, but strangely the volumes are getting thicker rather than thinner. Perhaps theory, cleverly concealed

under its austere prose, is responsible for the *avoir-dupois*.

The three contributors to legal theory under review here can be placed along a linear spectrum, with Eric Posner at the extreme political science end, Brian Leppard at the opposite international law end, and Andrew Guzman holding up the middle.

The simplest theory of international law is that it does not exist. Posner, a newcomer to the field, seemingly took that position in his earlier book co-authored with Jack Goldsmith called *The Limits of International Law* (2005). The only international law I found in that book was in its title. But Posner now maintains in his elegantly written monograph *The Perils of Global Legalism* that he never said that international law does not exist or that it is nothing but collective gamesmanship writ large.

He begins his explanation with a circularity: “International law is effective because states defer to it; they defer to it because it is effective.” I confess that this struck me as a truism neatly limned. But the author tells us that the rest of his book will be devoted to breaking through the circle.

The first thrust is his argument that international law is effective only when it is so inconsequential that no state bothers to violate it. Like most game strategists, Posner tends to philosophical presentism: the past does not exist, we live only in the now. Perhaps a more historical view would reveal that a great many rules that now appear inconsequential were once the subjects of violent conflicts that were eventually resolved by recourse to customary international law. Not that customary law preceded the conflicts, but rather that rules of international law evolved to push for and incorporate the settlements that were reached. Today those rules may seem like fossils from beyond space and time.

I have more sympathy with Posner's second stab at circle-penetration. "The military intervention in Kosovo by NATO forces," he writes, "violated the UN Charter and was clearly illegal. . . . Many international lawyers cut the Gordian knot by declaring the war 'illegal but legitimate.'" The latter weasel words (as FDR used to call them) bother me as much as they do Posner. He explains: "But this is only to say that states can depart from international law when they have good reasons." His punch line is that "international law will always be more appealing in theory than in practice."

Although I agree that the Kosovo bombing was illegal, for me it was because some of the hothead NATO pilots flew beyond Kosovo and dropped bombs on river bridges in Belgrade that were crowded with pedestrians at the noon hour. Posner's explanation that states routinely find good reasons for departing from international law is unpersuasive. So do bank robbers depart from municipal law when they have good reasons, and Winona Ryder shoplifts even though she can afford to buy all the dresses in the store. It is the penalties for violation that deter (but not always prevent) states, bank robbers, and movie actresses from lawbreaking every time they spot an opportunity.

Having been corralled by political scientists, Posner echoes the party line that diplomats and governmental experts can better manage interstate conflicts than international lawyers, who are always a step or two behind due to their occupational hazard of perusing precedents instead of spinning out scenarios. Yet how would that explain that it was an international lawyer who predicted in the early days of the Balkan civil wars that Kosovo would emerge as the most intractable hot spot? Burns Weston perceived legal tangles that would inevitably lead to political and military confrontation. But the experts and neocons at the time viewed those legal problems as so many electric cords crisscrossing on the floor, good for nothing but to be walked over. The point here is a general one: Posner's thesis, stated in his title, is the perils of global legalism. Perhaps he really does fear international law more than one would infer from the diminished status he accords it in the rest of his book. But the Kosovo example suggests a contrary

thesis—that Posner should fear unconstrained experts and diplomats more one would infer from the enhanced status he gives them in the rest of his book.

"Illegitimate but legal"? France's explanation could be the Duc de la Rochefoucauld's maxim: "Hypocrisy is the homage that vice pays to virtue." "Insufficient," responds customary international law, "you can't make a rule out of that maxim." For despite the Kosovo example, we have the torture example. Just about every government in the world condemns torture and nevertheless looks the other way when authorizing it. Political scientists would say that it's the practice that counts—international law is simply hortatory. But the important thing is that no nation justifies torture or claims it is legal. If states do it anyway, they never say that what they are doing is consistent with, much less required by, customary international law. The Torture Victims Protection Act, a new part of the Foreign Sovereign Immunities Act, chips away at immunity for foreign sovereigns who engage in or condone torture. The customary rule is obvious: torture is a clear violation of customary international law. Or to put it theoretically: torture does not count as practice if no state cites it as practice.

There is one epigraph out of the Kosovo mess that I bequeath to the polysci crowd. A pilot in the German Air section of NATO was heard to remark that it sure felt great invading Europe again after all these years.

Posner's final attempt to pierce the circle is his discovery that international law "is not backed by a world government that has the support of a global community." Therefore, he concludes, only a part (the easy part) of international relations can be successfully legalized, but much of it cannot. I think this a bit like Robin yelling across to Batman that all we need now is a skyhook. No, Robin, there is no world government waiting to descend from the clouds, and frankly I'm relieved. With so many politicians governing me at the local, state, and national levels, I do not need another layer of unaccountable officials on top. Who knows what they might compel me to do, say, worship, believe, or think?

Au fond, what political scientists seemingly find it impossible to understand is that rules of law can back other rules of law in a long, but finite, regress—a function of the heterogeneity of rules suggested by recent studies in complexity theory. One does not need a commander cracking the whip. But even if we had such a supreme commander (Ms. World?), we would still want her to abide by the constitutive rules of her office. Otherwise, we would be no better off than we are now, perhaps a lot worse.

Hopefully, Posner—in his next book—will move closer to the center of the spectrum and give some company to Andrew Guzman, author of *How International Law Works*. Guzman contends that international law works because states have an interest in complying with it. Posner could reply that there is no independent, provable evidence that states comply with international law; it's just that they often appear to be complying with it. Let us proceed to examine how Guzman copes with this basic difficulty.

Guzman's definition of customary international law also struck me as a truism neatly limned: "those norms that, because they are considered to be law, affect state payoffs." But doesn't that conceal a circularity that Guzman should be breaking through? He wants to find out whether customary law affects state behavior. He wants to know how international law works. Is he begging the question in saying law is that which works because it affects state payoffs? He summons rational choice theory. That theory, at least as it has been developed so far, can describe communication matrices when the players (nation-states) agree in advance on a protocol that specifies the ordered values of their individual moves. If the protocol includes rules of international law, it's because you inputted them—a waste of time. For the computer program will produce only law-free outcomes that may or may not coincide with relevant international rules. That would support Posner's conclusion.

Guzman is not giving up. He departs momentarily from computer programming to explain in ordinary language that because states interact repeatedly over time, a state that violates a rule today may compromise its ability to insist upon compliance by another state of a different rule

tomorrow. Thus what makes a state comply is safeguarding its own reputation. When a state violates a rule of law, "its violation will have a negative impact on its ability to extract concessions from others in exchange for its own promises in future agreements." Yet isn't this conclusion just another consequence of the heterogeneity of rules?

To be sure, reputational costs need to be unpacked. Here Guzman brings back rational choice. To begin with, states prefer payoffs now over payoffs later on; hence, there is a general "indifference between a payoff of 1 today and $1 + r$ tomorrow." Guzman advises states to enter into collateral treaties to increase future payoffs so that r goes to zero. Forgive me for thinking that this looks like calling for another skyhook. Since customary international law works and has worked well over the millennia, we could just as well deduce that $-r$ has already been built into the system. Future payoffs are systemically increased by customary law itself, with the consequence that the r factor cancels out. In the seminal *Air Services* arbitration, for instance, the customary international law of proportionality included an extra measure of retaliation to serve as a deterrent to states that might otherwise find it profitable to violate rules in situations where they have already discounted the cost of rule-equivalent reciprocal violations.¹

The rational choice theory espoused by Guzman appears to view cooperation as the reverse side of the coin of conflict. If heads is avoiding war, tails is cooperation. Of course, cooperation in this sense is purely passive. It tells us nothing more than would a minus sign. Yet the emerging interdisciplinary theory of rational choice is beginning to allow for complementary goals that are the converse of each other rather than opposites. Applied to international law, we might identify the binary goals as war avoidance and welfare enhancement. The doctrine of comparative advantage tells us that stronger state *A* and its weaker neighbor *B* may mutually maximize their welfare by trading

¹ *Air Services Agreement of 27 March 1946 (U.S. v. Fr.)*, 18 R.I.A.A. 417 (1978); see Lori Fisler Damrosch, *Retaliation or Arbitration—or Both? The 1978 United States–France Aviation Dispute*, 74 AJIL 785, 791 (1980).

with one another. War cannot maximize their joint welfare because it imposes a net loss on the losing side's capital infrastructure. I suggest that if we look at trade as a systemic incentive for states to maximize their own welfare over time, we add a useful explanatory dimension to the narrow teleological view of international law as a set of prohibitions. Useful, but perhaps boring; students tend to populate courses in political science that deal with conflict rather than cooperation: stimulating war is more fun than simulating peace.

Political scientists used to say that international law is a distracting morality that interferes with a hard-headed view of political reality. Guzman is of political science's second generation: international law cannot be left out of the story of international relations, though swords remain stronger than words. Recall that Eric Posner said there is no independent, provable evidence that states comply with international law. Guzman now responds that there is no theoretical basis for the proposition that customary international law cannot have an independent influence on state behavior. Thus one may choose between Posner's view that "rational choice theory" does not prove the independent influence of international law, and Guzman's contention that "rational choice theory" does not disprove it. I'd say they're both right.

Brian Leppard is another new voice in international law, though one would hardly know it from the prodigious scope of his citations in *Customary International Law: A New Theory with Practical Applications*. The next person who wants to write about customary international law might do well to use Leppard's footnotes as a bibliography.

Leppard begins by rehearsing the traditional dilemma of the material and psychological sources for determining a rule of customary law. If we look at only the material source—namely, the practice of states—we can't tell whether states tend to be repetitive in their practices because they believe that a rule of customary law is compelling them not to deviate, or because repetition is habitual or comfortable, or because they just continue to do what they're doing until their self-interest dictates that they should do something different, or because they believe in a norm that guides their practice, though the norm is not a legal norm. This

last, somewhat unusual possibility occurred when, a few centuries ago, states wrote their official treaties in French. They somehow believed that their doing so would make the treaties more official or solemn in some way, though no state actually believed that a treaty was not binding unless it was written in French. When states started to use other languages in their treaties, no one objected on the ground that the treaties were not written in French. There was a norm, but not a legal norm.

After briefly considering rational choice theory, Leppard has a new reply to Posner's skepticism. He says, in effect, that we can never know whether state practice gives rise to *opinio juris*. And so he takes the bold step of dispensing with state practice altogether. All we will ever need from now on to prove up a rule of customary international law is the psychological component of *opinio juris*. To take a pedestrian example, suppose we want to figure out whether a city has a law against jaywalking by counting how many people cross the street in the middle of the block. We find that some people do and many others don't. But we cannot derive from that practice a rule against jaywalking. If we could psychoanalyze every jaywalker and inquire whether they believe there is a law against jaywalking, we might get closer to deriving a rule of law except that many jaywalkers, rather than admit that they know of such a rule, might simply lie to us and say they didn't think they were violating any law. Of course, in any municipal example such as this one, the easy answer is to look up the statutes, ordinances, and regulations of the city and find out whether there is a law against jaywalking. But in international customary law, there is no place where one can look up a rule.

By focusing on *opinio juris* and freeing himself from the mortal coil of state practice, Leppard lets his thoughts take wings. At the most rarefied level, what do state officials believe in? They believe in ethics, says Leppard. At least there is no proof that they disbelieve in ethics. In the troposphere below the ethical level, officials believe in human rights. At least they do not seem opposed to human rights. We descend into the atmosphere and take a deep breath. Here we find broad principles of *opinio juris*: the Universal Declaration of Human Rights, many UN General Assembly Resolutions,

the UN Charter itself, the International Covenant on Civil and Political Rights, and many others in your nearby Documentary Supplement. But it is only when we land on terra firma that we get closest to the content of *opinio juris*, namely, the travaux préparatoires of all the aforementioned documents. Lepard relies—perhaps a bit too much—on the arguments that prevailed in the drafting process as revealing the unadulterated content of *opinio juris*.

In opting for the psychological component, Lepard may be implying that the law always affects state payoffs to some degree, whether or not it shows up in their actual practices. But Lepard isn't even making that limited claim. His book is devoted to demonstrating the content of international customary law for those readers who are interested in its content. He is not claiming that customary international law affects state behavior even slightly. Yet the subtitle of his book is *A New Theory with Practical Applications*. What practical applications is he talking about if he excludes state practice?

Consider for a moment two images: a tropical rain forest, and a northern forest of thin-trunked trees and sparse underbrush. In both images, the trees and other plants all represent law. In natural law theory, which has dominated international law during most of its existence, law is unavoidable: you have to brush by plants and bushes on your way through the (rain) forest. There is no case or controversy that is untouched by law, although, of course, some controversies are so trivial that the law does not bother to adjudicate them. By contrast, legal positivism looks at legislative commands as so many individual trees that the traveler can avoid simply by wending his way through the forest. Where there is no tree, there is no law. There is ostensibly more freedom in positivism than in naturalism.

Brian Lepard aligns himself with political scientists in viewing international law as a one-way projection of authority. For Eric Posner, the spaces between the trees are the most important; the trees themselves can be circumvented. To take an important current example: suppose Iran is on the verge of producing intercontinental ballistic missiles with nuclear warheads. Many heads of state,

international diplomats, and political scientists would say that international law has nothing to do with this situation. If nations decide to bomb Iran's underground missile silos, that would be an act of *realpolitik* disconnected from international law. Freedom to act works in both directions: Iran is free to build weapons of mass destruction, and other states are free to bomb them before they can be deployed.

Lepard would reply that *if* states want to argue about the legality of a surgical strike upon Iran's nuclear-weapons silos, then the source of that legality is the theory of *opinio juris* that he has spelled out in his book. By contrast, if states omit international-law arguments from the practical consideration of whether to engage in such a surgical strike, then international law does not have a role to play. This is, indeed, a new theory of customary international law. The problem is the virtual impossibility of excluding international-law discourse from diplomatic and strategic communications among states. International law has a way of filling the legal plenum as vegetation has a way of filling the tropical rain forest. Centuries of practice have taught us that it is harder to argue that international customary law does not apply to a given controversy than it is to argue that the law not only applies, but supports our position.

ANTHONY D'AMATO
Of the Board of Editors

BOOK REVIEWS

Moral Dilemmas of Modern War: Torture, Assassination, and Blackmail in an Age of Asymmetric Conflict. By Michael L. Gross. Cambridge, New York: Cambridge University Press, 2010. Pp. xiii, 321. Index. \$92.00, £50, cloth; \$29.99, £17.99, paper.

Michael Gross is professor of political science and chairman of the Department of International Relations at the University of Haifa. His timely book, *Moral Dilemmas of Modern War*, reflects both his extensive study of the ethical problems inherent in modern warfare and his experience, as