

2011

The Relation of Theories of Jurisprudence to International Politics and Law

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Repository Citation

D'Amato, Anthony, "The Relation of Theories of Jurisprudence to International Politics and Law" (2011). *Faculty Working Papers*. Paper 1.
<http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/1>

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The Relation of Theories of Jurisprudence to International Politics and Law,
by Anthony D'Amato,* 27 Washington & Lee Law Review 257-277 (1970)

Abstract: In this essay we shall be concerned with the real world relevance of theories of international law; that is, with the question of the theories themselves as a factor in international decision-making. To do this it is first necessary to review briefly the substance of the jurisprudential debate among legal scholars, then to view some basic jurisprudential ideas as factors in international views of "law," and finally to reach the question of the operative difference a study of these theories might make in world politics.

Tags: Jurisprudence, International Politics, International Law, International Decision-Making

[pg257]** International law is studied these days in the real context of international politics,^{FN1} but jurisprudence—or theories about law—tends to be studied in a vacuum. Jurisprudence may be one step removed from law itself, but does this mean that it is of purely theoretical interest? A political scientist has recently drawn a sharp distinction between "the most important aspect of the law—its operation in the international environment" and "jurisprudence *per se*."^{FN2} Of course, part of the reason for the seeming remoteness of jurisprudence is the highly ramified and artificial atmosphere in which it is discussed by some scholars. Glanville Williams has called the entire history of jurisprudence a mere "verbal dispute," acknowledging however that "it requires perhaps some temerity to suggest that a discussion carried on over many generations has been wholly unreal."^{FN3} Professor Ehrenzweig characterizes jurisprudence as a "tragedy of waste," a "Great Name-calling," a battle between "truly great minds" fighting each other "in seemingly hostile 'schools' of thought, storming the heavens in their Tower of Babylon."^{FN4} We might be somewhat skeptical of Williams and Ehrenzweig, however, inasmuch as they are both legal scholars with their own pet jurisprudential theories.^{FN5}

In this essay we shall be concerned with the real world relevance of theories of international law; that is, with the question of the theories themselves as a factor in international decision-making. To do this it is first necessary to review briefly the substance of the jurisprudential debate among legal scholars, then to view some basic jurisprudential ideas as factors in international views of "law," and finally to reach [pg258] the question of the operative difference a study of these theories might make in world politics.

I. THE VIEWPOINT OF THE LEGAL SCHOLAR

Legal scholars have traditionally concerned themselves with discovering "the" meaning of law and the necessary preconditions for its "validity." Classically this endeavor has led to the construction of grandiose logical theories to which empirical instances of laws had to conform at the expense of otherwise being declared invalid by the theorist. To John Austin, for example, law is a command backed by sanction; without these elements, an alleged rule of law is not "really" law. Thus at one stroke he consigned all international law to the dust heap of "positive morality" since it did not conform to his domestic-law model.^{FN6} To St. Thomas, law is the reflection of right reason; all laws which do not conform, even if they happen to be commands backed by sanction, are presumably invalid. Professor H.L.A. Hart today would argue that if there is no "rule of recognition" enabling us to distinguish laws from other standards of social conduct, there is no "law."^{FN7} Not quite wanting to dismiss international law in the way Austin

did, Professor Hart argues that the international legal system is "primitive" and hopefully on its way toward acquiring its own rule of recognition.FN8 And Professor Lon L. Fuller might rejoin that rules of recognition are not enough: law is not "law" if it does not aspire to regulate its own procedures for definition and promulgation according to standards of clarity, consistency, and even morality.FN9 The counterparts of all these theories can be found in abundance in writings addressed specifically to international law, from the positivism of Oppenheim and Kelsen to the naturalism of Lauterpacht and Brierly to the eclecticism of Schwarzenberger and most of the American scholars.FN10

If we stand at some distance away from these theories, refusing to be drawn in to the fascinating consideration of their intrinsic merits, we may find that their existence is not at all irrelevant to our assessment of the function of law among nations, though the relevance may [pg259] be of a kind not thought of by the jurisprudential theorists themselves. First, we must disavow the basic premise of these theorists that law has a discoverable single meaning. Any word, including the word "law," carries with it a set of dictionary denotations (not all of which are always logically consistent *inter se*) and a spectrum of usage connotations ranging from popular stereotypes to all kinds of questionable uses, and even misuses or witty uses (such as puns). Any attempt by any writer to fasten upon a single meaning, or majority meaning, or best meaning, of any word is likely only to add to the permissible connotations and eventually denotations of the word (if the writer becomes widely read).

Since it is a fact that some writers, particularly positivists such as Austin and Hart, have had trouble with the term "law" in the phrase "international law," we can conclude that for most people the term "law" probably connotes domestic "laws"—those duly enacted by legislatures or promulgated by dictators. Indeed, most people only have experience with domestic laws; public international law is outside the ambit of their connotative acquaintance. It was only natural, therefore, that some writers would seize upon the salient characteristics of domestic law, label that "real" law, and then proceed to call international law fictitious since it lacks a central legislature or pervasive judicial system or other features of the law to which people are accustomed.

We might, just for a moment and to demonstrate the relativity of verbal behavior, imagine that the situation were reversed and that international law was the everyday experience of most people while domestic law was the rare occurrence. Then self-styled "positivists" might arise who would proclaim that domestic law is merely "positive morality" since in order for it to be obeyed the state must use coercive police machinery, pervasive judicial systems with penalties for disobedience, and enactment by the ritual of a legislature supposedly representing the popular will. None of these are necessary for the true international law, they might add; international law is obeyed because it genuinely meets the interests of all concerned and fairly represents the consensus of its subjects.

In the grade schools, we were all taught to "define our terms" before proceeding to use them in an essay. But it is precisely such an attempt to *define* "law" that starts students of jurisprudence off on the wrong foot. Rather, what we should do is to attempt to understand the ways in which others use or even misuse the term. And even this is not an end in itself, for we would like to proceed to discover what [pg260] similarities of factorial constants attend the use

of the term in varying contexts. And finally, our aim is to understand how these factors convey structured sets of expectations from one context to another and thus influence those who use the terms to communicate to one another.

Thus, with respect to international law, we should attempt to discover the connotative expectations engendered by the use of the term "law" primarily in the domestic context when the same term is applied to intrastate relations. Of course, we are not interested solely in the phrase "international law," but rather that phrase and all the cognate terms and procedures associated with it. For it is not simply the application of the single term "international law" to international relations that enables us to talk about legal concepts in the international arena; rather, an entire body of legal procedures, terminology, analogies, and the like are habitually used in diplomatic discourse and international claim-conflict situations. H.L.A. Hart has correctly referred to the "range of principles, concepts, and methods which are common to both municipal and international law, and make the lawyers' technique freely transferable from the one to the other."^{FN11}

Professor Chayes was appointed Legal Adviser to the Department of State by President Kennedy even though Chayes had absolutely no experience in international law. He obviously had no trouble adjusting to his new job, and turned in a widely-acclaimed performance. Nearly all states have as their counsel in foreign affairs lawyers who were educated in the states' domestic systems and who passed local bar examinations, and it is only natural to see these men using their domestic legal concepts in international discourse. Any glance at a collection of state papers will immediately reveal the preponderance of legal terminology and argumentation used in international discourse—with, one might add, hardly ever a doubt raised as to whether what is being discussed is really "law."

II. JURISPRUDENTIAL FACTORS ASSOCIATED WITH "LAW"

Since we are not chasing after a single meaning for the term "law" nor attempting to define for eternity the preconditions of legal validity, we are free to take account of all of the well-known jurisprudential theories as representative of what scholars have at different times thought were necessary components of the concepts of legality. Although we are not directly interested in what the scholars themselves thought, their theories are significant because they have been [pg261] communicated to lawyers, statesmen, diplomatic representatives, and others concerned with international politics in the educational process and through legal socialization.

One of the main jurisprudential ideas, though not amounting to a "school" in itself, is the insistence that law is something that is backed up by sanctions. Though the idea stems from Austin, it has been most consistently applied to international law by Hans Kelsen. In Kelsen's view, modalities of social and political influence accomplished by persuasion, "setting a good example," or the promise of reward, are all non-legal. Law comes into the picture only when a "threat of evil", consisting of depriving the individual of life, freedom, property, or other values, is the basis of inducing the individual to behave in the desired manner.^{FN12} It would appear that with such a rigorous notion of "law," Kelsen would want to avoid the concept of international law and stick to certain kinds of domestic law where sanctions are easily

pinpointed. Yet he does deal extensively with international law, not without a good deal of difficulty.

Kelsen would like, for example, to think of wars as the sanction for illegal aggression, yet the "threat or use of force" itself has been outlawed by article 2, paragraph 2 of the United Nations. He tries to meet this obstacle by arguing that the collective will of the international community, acting through the Security Council, may use force to combat aggression; article 2 only prohibited individual states from doing so. Yet as Professor Robert W. Tucker, editor of Kelsen's second edition, recognizes, the veto power in the Security Council is an effective barrier to this reasoning, particularly when one of the permanent members itself is guilty of aggression and uses its veto to stop other states from interfering. Tucker's way out of this quandary is to enlarge the inherent right of states to self-defense, but before he is through the enlargement encompasses anticipatory self-defense which in the nuclear age is hard to distinguish from preemptive aggression.FN13

Unless one counts himself among the devoted followers of Kelsen, perhaps the best thing that can be said for Kelsen's single-track theory is that it occasionally leads to brilliant briefs for a point of view. But if we step outside the jurisprudential arena, we can recognize in Kelsen's theory the deep importance of having sanctions behind *some* [pg262] laws. Unless some laws are occasionally enforced, respect for laws might break down completely.FN14 In the international arena, though most of the laws are well-rooted in the self-interest of the states, it is still important that some transgressions be punished and that some effective threats of sanctions be made in some situations.

To insist that an alleged legal rule is not "law" or not legally "valid" unless it itself is backed by a threat of sanction, is to insist that one connotation of the term "law" is the only possible one and that everyone else who has used the term differently has been in error. But in the domestic legal system, to pick the hardest example, "law" and legal terminology are often used when there is no possibility of sanction. When the Supreme Court declared President Truman's seizure of the steel mills unconstitutional, it had no means of enforcing its decree. When the Court of Claims decides against the government in favor of a private contractor, it too has no means at its disposal for making Congress comply (and in approximately a dozen cases since the Court of Claims was established, the government in fact did not comply with the judgments against it).FN15 Yet everyone agrees that the Court of Claims applies "the law," and that when the Supreme Court handles constitutional issues its decisions have "legal validity."FN16

Or take even the paradigm of the domestic legal system in the eyes of positivists such as Austin and Holmes: the lowly criminal law proceeding. Here the positivists have looked at the law from the bad man's point of law, and of course to *him* law is a collection of rules the transgression of which entails varying probabilities of sanction. But what happens when the criminal is cleared of the charges by a judge or jury? If the police and the prosecutor are nevertheless convinced of the criminal's guilt, what is the legal sanction that stops *them* from punishing the criminal anyway? They represent, after all, the enforcement arm of the state, the dispensers of sanctions, and the reason they typically refrain from punishing acquitted criminals is hard to relate to a Kelsenian notion of threatened deprivations. Nor is it persuasive to try to

get around this by enlarging the notion of "sanction" to include displeasure of one's superiors, enmity of one's colleagues, or hostile public opinion. Similarly unpersuasive is the analogue of this in international law, where Kelsen at times appears to be suggesting that "world public opinion" is a sanction that makes some kinds of [pg263] international rules valid. For the adoption of this kind of argument in the first place breaks down the initial distinction Kelsen made between persuasion and threat of evil; if an aroused public's anger at the district attorney render other decisions he makes illegal (such as "sanction," so too would all other instances of the public's anger at the decision not to prosecute an alleged criminal whom he is convinced is innocent). And, in the second place, the use of ideas such as "world public opinion" for a legal sanction is tantamount to a tautology: the public is upset *because* someone broke the law, and that in turn defines what he did as law-breaking.

A second strand in jurisprudential reasoning is typified in Holmes' dictum that "the prophecies of what the courts will do ... are what I mean by the law."FN17 This too has a great surface appeal and has seemed to many to be the *sine qua non* of any conceivable definition of legality. Of course, it is quite removed from the Austinian view of law as a command issuing from a sovereign; Austin was thinking of legislatures and kings whereas Justice Holmes was court-oriented. Holmes' answer to this was that sovereigns can enact laws, but until the courts pass upon their legality by enforcing them or refusing to enforce them, they have not yet been proved to be true laws. But the difficulty with this view is that while it may apply in large part in the United States, there are many countries without a strong tradition of judicial review in which sovereigns habitually pass laws and enforce them, and sometimes enforce them against the wishes of judges. To say that these are not "laws" again is to deny the empirical basis of language and communications.

And even in the United States, a great many laws are made by administrative agencies and enforced by them, with only limited "judicial review" in rare instances. Additionally, Congress makes the "laws" defining the jurisdiction of lower courts and a goodly portion of the Supreme Court's jurisdiction as well. Finally, although the courts get to pass on the validity of some laws, the percentage of cases reaching the courts out of the totality of law-applications is miniscule, and the percentage of decisions against constitutionality is trivially small. The great bulk of compliance with law, and the biggest portion of enforcement in cases of non-compliance, never get passed upon by courts. If Holmes looks at what courts might do, his vision would take in only a narrow portion of the legal activity going on in the United States. In international law, the situation is far more drastic. The International Court of Justice gets about one case per year out of the [pg264] thousands of claim-conflict situations that annually take place among states in their international relations. Arbitral tribunals are occasionally constituted, but these too account only for a tiny fraction of the legal business. Nevertheless, many scholars and international jurists devote the bulk of their efforts to a study of international tribunals or "case law." They often plead that the jurisdiction of the World Court be enlarged so that the rule of law may truly prevail. Typically they tend to avoid studying the vast effect of the United Nations on international law, the proliferation of multilateral conventions and international agencies of all sorts, and the day-to-day bargaining of foreign offices taking one side or the other in claim-conflict situations.

A somewhat related fallacy, though less harmful, is the position taken by many scholars that one should *think* of international law as something which a *hypothetical* court might decide if it were given jurisdiction in an international dispute. The trouble here is that if a court were given such jurisdiction, the dispute itself would probably not have arisen in the way it did; the opposing contentions would have initially been structured in a different manner in order to take account of the presence of a judicial body capable of rendering an authoritative judgment.

Nevertheless, the insistence by some scholars on the importance of *judicial* activity in international law must not be overlooked. The very presence of their theories in the jurisprudential debate signifies the weight often attached to courts in any legal system. The mere presence of a World Court, even if its docket is singularly uncrowded, adds authoritativeness to the entire legal system which nearly everyone calls "international law."

A variation on the Holmesian view of law, which might constitute a third strand in the literature of jurisprudence, was suggested by Llewellyn in *The Bramble Bush*: "What officials do about disputes is ... the law itself."FN18 By focusing on the broader term "officials," this view would encompass decisions by administrative agencies, legislators, arbitrators, kings, policemen, bureaucrats, embassy officials, and so forth, including of course judges. Similarly, by adopting a sufficiently broad definition of the term "disputes" so that it would include all instances where law is *applied* (i.e., *potential* disputes that are avoided by compliance), the idea comes fairly close to encompassing many of the denotations and connotations of the term "law" in public discourse.

On the other hand, this single-factored view, like the others previously discussed, has its pitfalls. What if officials act illegally? They [pg265] may get away with it, but everyone would still say that their actions were illegal—except Llewellyn, who would have to say that their actions constitute "the law." If Llewellyn were to attempt to answer this by adding the qualification, "law is what officials do when they act legally," the statement would be a patent tautology. Yet something of this tautology lurks in the original definition, for the term "officials" seems to suggest lawfulness and authority. To this extent, of course, Llewellyn's definition is devoid of informational content. Nevertheless, it does convey an important psychological insight into the legal system—that officials by and large must themselves act legally if they are to retain their authority.

Perhaps Professor McDougal may be classified within this third jurisprudential position in his writings on international law. To him, law is a "comprehensive process of authoritative decision."FN19 This is an extremely appealing viewpoint insofar as the study of international law is concerned, for it avoids the narrow emphasis on judge-made law and enables scholars to view international law in a much more realistic perspective. Authoritative decision-makers, in McDougal's view, clearly include "nation-state officials" who alternatively are claimants on behalf of their own states and "decision-makers assessing the claims of others."FN20 Surely their actions are an important datum of the content of international norms—the norms that are really applied in day-to-day conflict situations and not transcendental norms that may never have been applied since Grotius, or that are only applied when and if the World Court gets seised of a dispute.

Yet, if we take a closer look at McDougal's definition, we find in it the same hidden tautology as the one just suggested with respect to Llewellyn's "officials." The term "authoritative" decision in McDougal's definition tends to beg the question. What makes the decision "authoritative" if not some prior conception of legality? Yet if there is such a prior conception, then law cannot be defined as the "process of authoritative decision." Of course, this would be just a harmless semantic quibble if McDougal stopped here. But he goes on quite consistently, applying the tautology in all of his prolific writings on international law. The result is that his view of "law" becomes extremely broad, taking in apparently everything that nation-state officials do (or at least, as Professor Falk has suggested, everything that [pg266] non-Soviet nation-state officials do.FN21). McDougal delights in this breadth; to him, policy and law are interchangeable, and he would like to see legal techniques applied in every aspect of foreign-policy decision-making. McDougal at times seems to recognize a distinction between "classical" rules of international law and current policy alternatives, but these classical rules, he says in a footnote, "exhaust their effective power when they guide a decision-maker to relevant factors and indicate presumptive weightings."FN22 Since it is unlikely that classical rules of law will indicate any "relevant factors" that a decision-maker will not already have thought of, these rules in McDougal's scheme become just another set of alternative policy lines. This again is fully consistent with his view of international law, for it accords the lawyer a central role in the making of policy. In an essay jointly authored with Professor Lasswell, McDougal stated that "the lawyer is today, even when not himself a maker of policy, the one indispensable adviser of every responsible policy-maker of our society."FN23 Since the identification of policy alternatives is a prime talent of the lawyer in McDougal's view,FN24 it is little wonder that international law to McDougal is just a collection of data that is part of the lawyer's equipment and subject to changes in content according to the most recent policy decisions of nation-state officials.

The obvious reply to this view of "international law" is that it is so broad as to destroy the concept of law as a restraint on the behavior of decision-makers. McDougal might well reply that in his view there is no such "international law" that effectively restrains decision-makers from doing what they would do anyway, a position that accords with that of the "realist" school in the political science of foreign policy. But, again, it clashes with other people's views of "international law." Not everyone believes that national officials are totally unrestrained in their policy choices, or that "law" does nothing more than indicate to them some of a range of policy alternatives. And in any event, such a thesis must be examined independently by a psychological study of the behavior of national officials. It certainly cannot be resolved by adopting an overly broad definition of "international law" when such a definition conflicts with many of the ideas and concepts most people associated with the notion of "law."

Finally, a fourth line of reasoning in jurisprudence deserves our attention, not only because it is one of the oldest approaches but also [pg267] because of its current vitality: the idea of "morality" in the law. This is part of the natural law tradition—the "right reason" of St. Thomas, the moral duties and prohibitions of the Stoics.FN25 Extremists who take this position—and this includes some street demonstrators in the United States today—argue that any given law is invalid unless it coincides with the dictates of morality, that one's moral duty is to resist immoral "laws" for the latter are not really "laws."

More moderate is Professor Fuller, the leading representative of the natural law school: if *all* the laws of a legal system violate moral standards (as he attempts to define them), then they are not really "laws" and the public need not obey any of them.FN26 On this issue Fuller takes exception to Hart's view that the laws of the Nazi regime were true "laws"; Hart would concede that they were laws and argue that the people should resist them on the grounds of morality, while Fuller argues that because of their secrecy, ambiguity, retrospective application, and so forth, they were not really "laws" at all.FN27 Again, this issue cannot be resolved by the stipulation of definitions; on the particular question, one must resort to an empirical study of the way the term "law" was used by the Germans and what they would have responded if asked whether the Nazi laws were "true" laws. Of course this is now, and probably was at the time, a non-researchable proposition. Yet the question is not simply one of semantics; a great deal can turn on popular acceptance of rules as "legal" or "illegal."

Hart is not quite correct in arguing that people should accept commands of the central government as "law" even if they intend to resist them on moral grounds,FN28 for to most people this would raise a considerable barrier to resistance. The very fact that something is "law" carries with it a good deal of moral pressure. An extreme example may be found in the lowly traffic ordinances: most people would refrain from speeding on a totally deserted highway or going through a red light in a deserted town at 4 a.m. on the ground that it is not "right" to disobey these laws. Moreover, there are several laws that many people think are immoral (laws protecting the freedom of speech of Communists, or income taxation in the 70% bracket!), but these are nevertheless obeyed because "the law requires it."

In international law, it is hard to find many laws which are related in one way or another to "morality." Most of the norms are of the [pg268] traffic-ordinance variety. There are some which are claimed to be "moral," such as the alleged rule against expropriation without compensation, but this is clearly morality of Western capitalist origin and does not fully accord with the views of many states, as the United States Supreme Court itself fully admitted.FN29 However, there are some rules which do intersect with substantive morality—the norm prohibiting traffic in slaves (which was once quite the opposite, as the Supreme Court once heldFN30), the rules against the use of poisonous gases in warfare or the maltreatment of prisoners of war, and rules ensuring the safety of diplomatic representatives, to mention some of them. Moreover, the increasing trend toward the enactment of multilateral conventions setting up agencies to provide for international social and economic welfare legislation, as well described by Professor Coplin FN31 may help to enhance the moral aura of international law in general. Finally, it would be foolish of any international lawyer to discount moral factors in arguing before international tribunals or attempting to persuade opponent national officials; the appeal to morality, while often insufficient if standing alone, usually enhances the legitimacy and acceptability of a legal presentation that is not 100% persuasive standing alone.

To summarize matters as they stand at this point, we have seen that although it is not productive to force one's concept of law into any of the four rigid molds discussed, each of them contributes to our understanding of international law and the way it operates in the international environment. The first idea, that of sanctions behind the law, reminds us that many people take a "bad man's" viewpoint in insisting that no rule is binding unless it carries with it a

threat of deprivation. Any international procedure for strengthening the "sanction" element of law may therefore contribute to the authoritativeness of the entire legal system.

Second, we are reminded by the Holmesian view of law as a prediction of judicial behavior that an important element in the popular idea of international law is the presence of international judicial tribunals. Even if such tribunals are denied the "big" cases, by increasing their jurisdiction over "little" cases we may add to the authoritativeness of international law in the minds of the concerned national [pg269] officials as well as the general public. The more judicial activity one sees, the more "legal" a system may look if one is used to a domestic legal system having a high incidence of court activity. Moreover, the more "little" cases handled by tribunals, the more likely is the general impression that the smooth handling of little cases is preventing many of them growing into big cases—or in other words that the "law" is doing its job.

Third, Llewellyn's idea of law as the prediction of official behavior finds an important spokesman in Professor McDougal, whose idea of international law, though it may err on the side of breadth, at least helps us recognize that the relevant actors in most cases are national officials as they make claims and pass upon the claims of others, and not the fifteen judges sitting at The Hague or the nonexistent central legislators of the idealized world community of the "world peace through world law" school.

Fourth, the natural-law school of the interconnection of law and morals, which has found international-law spokesmen such as Brierly and Lauterpacht, underlines the increased sense of validity of "law" if some or many of the particular rules of law coincide with or reinforce generally accepted standards of morality. To argue for a sharp distinction between law and morals, as some positivists (and "realists" in political science) tend to do, is to take a position that conflicts with the admittedly fuzzy and not entirely consistent concepts associated with the idea of law and legal obligation in the minds of the actual members of legal systems.

III. WHAT OPERATIVE DIFFERENCE DOES IT MAKE?

If a study of theories of jurisprudence only yielded either a more careful approach to terminology and definitions, or some prescriptions that help increase the rule of international law in world affairs, it would be of limited value in analyzing the current role of international law in international relations. Thus it is necessary to proceed to a consideration of the latter. In doing so, it will be seen that the preceding jurisprudential themes are vitally connected with the analysis of the operative effect of international law.

International law, it may safely be said at the outset, is inseparable from international politics conceived as the study of the influence and control of national behavior. Professor Deutsch recently gave a general definition of politics as the "more or less incomplete control of human behavior through voluntary habits of *compliance* in combination with [pg270] threats of probable *enforcement*. FN32 This is very close to a description of international law. The latter is made up largely of voluntary state habits of compliance, termed international customary law, in combination with threats of probable enforcement (usually the threats predominate over the instances of actual enforcement). The result is a loose international legal system, made up of

rules, legal procedures of doing things, standard legal ways of making international claims and phrasing diplomatic notes, and a rough consensus as to permitted modes of legal persuasion. Examples of the latter include the idea of reciprocity, the strong deference given to opinions of the International Court of Justice, and the roughly shared ideas of the limits to which a state may go in acts of retorsion and reprisal.

Most of the substantive rules of the international legal system are in the direct self-interest of the member states. The rules give great deference to physical boundaries and borders, to vital security interests of the states, to relatively easy intercommunication (via the laws of diplomatic exchanges), to the minimal security of tourists and aliens, and increasingly to the development of oceanic and outer space resources for the general welfare of all the states. Of course there are specific instances of rules not in a certain state's interest: Japan, for example, does not have a continental shelf and thus has been unhappy with the rule that coastal states have the right of exploitation over continental shelves. But although Japan would prefer a *res communis* policy of the continental shelf, she has other state interests that are secured by other rules of international law and has chosen to support the rules as a whole by not objecting too strenuously to a particular rule that she does not like.FN33

One could not begin to describe the nature of the international political system without referring to the rules of international law that stake out national jurisdictions and deal with situations where opposing states have conflicts of claims over the same geographic area or physical or human resource. Professor Coplin has well described the function of international law as "an authoritative institution for the communication and development of a consensus on the nature of [international] society."FN34 Previously, Professor McDougal had described international rules as serving the function of "communicat[ing] the perspectives (demands, identifications, and expectations) of the peoples of the world" about the prevention of unauthorized coercion [pg271] and the promotion of optimum order and welfare through the common exploitation of resources.FN35 In short, one could not describe the operation of power in the international environment without taking into account the institutionalization of power as defined by the rules of international law which lay down the jurisdictional competences of states.

Yet simply to describe the international system by cataloguing the rules of international law (and a number of other rules as well) is only a first step toward the understanding of international patterns of influence. The larger question is: can the laws be manipulated to aid or thwart any given nation from increasing its proportion of political influence or allocation of world resources?

The question forces us to leave the security of pontifications in books stating what the current rules of international law are, to proceed to a psychological investigation of the operative force of rules of international law in the minds of the relevant world actors. International law is like any other law in that it must be conveyed to, and understood by, those who are to be influenced by it. What counts is not what some scholar in a book or article says the law "really is," but what national decision-makers and their advisers think the law is. International law is a phenomenological datum at the national level.

We may safely assume that national decision-makers have various stereotypes in their minds about what "law" is as well as various opinions as to their own rights and duties under whatever laws they feel themselves subject. It is also likely, though not always true, that national decision-makers are primarily experienced in their own domestic legal system. As private citizens they are subject to traffic ordinances, laws defining the marital status, laws about the payment of taxes and so forth. Moreover, as government officials, they usually perceive the importance of domestic law in securing their own jobs. If officials subordinate to them obey their laws, then they are relatively secure. If the public obeys the law, insurrection is less likely. One of the ways they can help create an atmosphere of law-obedience is to set an example in the way they behave—at least, in the way they behave publicly. By demonstrating a scrupulous regard for "the law", they help condition others to obey them.FN36

When they, as their nation's representatives, enter into a dispute with their counterparts from another nation, one of the first things [pg272] they will ask their legal counsel is "Does international law say anything about this?" They will find that, in many disputes, international law has a great deal to say, though not always with clarity. But strategically they will not stop at the question just posed; they will go on to ask, "What do our opponents think international law says about this?" For they will be concerned primarily with the latter question. Their task, after all, is to persuade their opponents and win the dispute, not to be "true" to an abstract concept of international law.

Since they normally will not know exactly what their opponents think international law has to say about the matter, they will probably reason that their opponents, like themselves, have a great stake in abiding to law (at least publicly). They will also know, however, that their opponents may draw the line between domestic law and international law; they will feel far less of a compulsion to obey the latter. Nevertheless, their opponents, like themselves, may find it hard to separate the two legal systems entirely. As Festinger has pointed out generally, men tend to avoid the cognitive dissonance that results from adopting contradictory positions with respect to the same phenomenon.FN37

But is "law" the same domestically as internationally? The answer, a legal adviser might say, is that in some respects it is the same and in some respects it is different. But it is *called* the same thing, and that is an important "plus" on the side of similarity. Moreover, the lawyers' techniques that are used are essentially the same. The same general principles of equity appear to apply, and the same use of analogies and precedents that occur in domestic legal argumentation are found in state papers and diplomatic negotiations. Thus, the national decision-maker may conclude that his opposite number feels a certain *pressure* in the direction of conforming with the relevant international rule. This pressure of course does not tell the whole story; the opponent decision-maker may ignore the pressure and decide otherwise. But nevertheless the pressure is a factor to be taken into account, and in the absence of other information, a very important factor.

The importance of the pressure felt by national decision-makers to conform to international rules appears to have increased in a steady progression since the nineteenth century. This does not mean that [pg273] there have not been flagrant violations; but looking simply at the exceptions does not convey a true picture. International transactions, after all,

have increased with the advance of transportation, communication, and the number of states in the international arena. Moreover, the advent of nuclear weapons has in recent times made it especially important that a nation appear not to be upsetting the status quo. (Domestic governments may be upset, but international events since the second world war have been remarkably stable. Most state boundaries, for example, have remained relatively the same.)

But the international status quo is itself a function of the relevant international rules defining jurisdictional competences of states. Thus a nation may appear to be an upholder of the status quo when it wraps itself in international legality, while the nation that appears to transgress international norms may appear to be the innovator. Since innovation can lead to escalatory exchanges, there is great pressure not to be an innovator. Or, if a nation must force through an international change, it will at least attempt to clothe its actions in the greatest possible coverings of international law.

Returning to our calculating national decision-maker, we can see that he will put a high premium on possible ways to persuade his opposite number that his own course of action is the legal and hence conservative one, that he is not asking for anything new but simply for his existing rights under the law. He will attempt to place the burden of explanation of innovation on the other side. In order to do this, he must make several other strategic calculations. He has to try to figure out what the other side really thinks the legal position is. Additionally, he has to try to figure out what the rest of the international community thinks the relevant legal considerations are, since either he or his opponent may sooner or later try to bring in outside help. Next, he has to put some qualitative estimate on the force of the particular international rule or rules that are relevant to the dispute. Some rules, after all, are clear; others are vague; some are clear but only recently established, while others are of a long and unquestioned duration. And finally, he has to estimate the other side's appreciation of the qualitative force of the rule, a task that is complex even if only because the other side will be expected to *argue* that the rule is really different or questionable. What he has to calculate is how much the other side really believes in the position it is taking.

This simple statement of the strategic considerations involved leads immediately to the observation that one side or the other will [pg274] often consciously be taking a position that it knows departs more from the relevant rule of international law than the other side's position. Then the question is, "Should we continue to press this point when we have the poorer case?" The dangers involved in doing so include the *chance* that third party states or neutral observers or the General Assembly of the United Nations will sooner or later say that the case is weaker than the opponent's. Another danger is that the opponent state may attempt to use force to back up its position, calculating that it is "in the right" and that its enemy is unreasonable. (By the use of force, the entire spectrum of retorsions is included, such as making things difficult for the other country's tourists, raising tariffs, withdrawing support at the U.N., and so forth.) The state thus insisting on an unreasonable or illegal position will then find itself the subject of retaliation on other issues, and if it in turn attempts to counter-retaliate the opponent state will say: "We only did it because you took what was obviously an illegal position on the initial issue, and so now we've 'gotten even'; if you now want to counter-retaliate, we will counter-counter-retaliate."

Because states have so many opportunities for inflicting all kinds of subtle degrees of harm on other states, we may conclude that the ability to take a position that is closer to "international law" with respect to any given dispute is itself a "plus" for the state taking that position. It shifts the burden of innovation to the opponent state, and if the opponent state goes ahead and innovates, the "law-abiding" state may retaliate in a manner that does not appear to other states to be escalatory but rather appears to be a fitting reprisal. This is not to say that the "plus" engendered by legality is the most significant factor in any given situation; often it is quite insignificant and cancelled by other factors. Often, too, international law is ambiguous on the subject and either side has an equally persuasive case. (However, even if the "law" itself is balanced, the abilities of the corresponding legal counsel usually are widely disparate, a fact that has played more than a small role in the successes the United States has achieved in the United Nations at the expense of the Soviet Union.) Yet, because international law and legal techniques are the media for international communications in most disputes, the legal factor seems always to be present; it is usually the starting-point in the calculations of the parties; and it often suffices to dispose of the issue, particularly in minor disputes.

Whatever the importance of the legal factor, it is something that is subject to a certain amount of intelligent manipulation; a nation cannot [pg275] change the amount of tonnage of its natural resources, but it might help restructure international expectations by changing international law. Of course it will attempt to "change" the law in any given dispute by argumentation, but that does not always work and is usually well understood by others as being "too late." It can participate in international codification conventions, other types of multilateral conventions, and in the work of the International Law Commission; the majority of states do as a matter of course.

More importantly, a nation should make its own strategic calculations whether it is in general better off because of international law or worse off because of it. Some new nations may genuinely feel that international law is stacked against them, and therefore they should not attempt to improve or strengthen it. On the other hand, a careful assessment of the pros and cons of existing rules of international law may convince the most unlikely states that obeying it is in their national interest.

South Africa, for example, is the subject of numerous condemnatory resolutions in the United Nations; it is watching the spectacle of what it feels are illegal mandatory economic sanctions against Rhodesia; it is continually attacked on legal grounds for its system of *apartheid*. Yet South Africa showed up in the World Court to contest the mandate over South West Africa, and in almost all matters it has adopted, internationally, a scrupulously correct attitude toward the rule of law.^{FN38} It is evident that South Africa feels that the basic rules of international law giving sovereignty to all states, protecting the borders of all states against illegal aggression, and generally excluding from the concern of international law things that go on wholly within the boundaries of a state affecting its own citizens,^{FN39} protect the continued existence of the present regime in South Africa much more than the slings and arrows of legal attacks on *apartheid*.

It is in general no cause for amazement that most if not all states will perceive that the plusses of international law for them outweigh the minusses. International law is the creation of

states, designed for their mutual self-interest. The people as a whole, or humanity in general, have no effective counter-lobby, and therefore they have to be content with the provisions of international law that help them while helping their governments. If in certain instances, such as [pg276] *apartheid*, international law as a whole helps the government more than the people, that is the price the people pay for the system.

If a state concludes that it is better off under an international legal system than being an international outlaw, it will undertake studies for the purpose of discovering how to manipulate to its advantage rules in the present system. It will also undertake to get some idea of the persuasiveness of rules on the decision-makers of other states. For it will be to a state's great advantage if it can make a good guess as to the persuasiveness of a legal position on an opponent and on uninvolved states. Unless a shrewd guess is made, a state will lose considerable bargaining advantage.

In all these calculations, national officials should take into account the classic jurisprudential underpinnings of international legality. The sanctions theory or the morality theory, for instance, may help a state enhance its own case, or help it to change rules by reinforcing desired ones along these lines and extinguishing others by withholding moral approbation or contingents from the U.N. peacekeeping force. More probably, an awareness of the jurisprudential arguments may assist a national decision-maker in calculating the weight of a rule of law as perceived by the opponent side. In such a calculation, one might assess the various weights of the jurisprudential theories in the domestic legal system of the opponent, and then relate these to the international argument being made.

An easy example of this would be to see if the opponent state has a domestic system that is characterized by a pervasive judiciary. If so, one might stress in international argumentation the relevant decisions of the World Court. (South Africa, for example, has a strong judicial system, and the arguments that seemed to score the hardest against her in the South West Africa Cases were those based on decisions of the World Court; on the other hand, South Africa was singularly unimpressed by arguments on an analogy to international legislation that would enhance the role of national decision-makers or the role of the United Nations.) If the opponent state has little domestic experiences with an independent judiciary, then one might stress internationally the rules contained in codification conventions or the rules found in some General Assembly resolutions. Similar examples could be adduced with respect to the role of moral arguments intersecting with legal ones, or the insistence on a clear rule specifying sanctions in the event of transgression.

Finally, if national decision-makers should make such calculations, we ought to analyze them as well. We should not view "law" as [pg277] a specialized thing, far off to one side and containing weird rules of its own. Rather, "law" is very close to being an expression of the attempt by one person or state to influence another. Since it is a well-known and often powerful force in this endeavor, we should adopt a multifactorial analysis of it. We should not say that something is or is not "law;" rather, we should try to see how others use or manipulate the term. We should not dismiss jurisprudential debates over the "meaning" of law as inconclusive; rather we should look at them to find empirical data as to some of the factors that enter into the multifactored concept of "law" and legal validity. Finally, in international politics, we should be

aware of the jurisprudential factors, among others, since they enter into the persuasiveness of policies that are couched in legal terminology. For it is clear that this kind of persuasiveness is directly related to the game of influencing the behavior of other states.

Footnotes

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**Numbers in the format “pg257” etc. refer to the pagination of the original article.

FN1. See L. HENKIN, *HOW NATIONS BEHAVE* (1968).

FN2. W. COPLIN, *THE FUNCTIONS OF INTERNATIONAL LAW* vii (1966).

FN3. Williams, *International Law and the Controversy Concerning the Word "Law"*, 22 BRIT. Y.B. INT'L L. 146 (1945).

FN4. Ehrenzweig, *Psychoanalytical Jurisprudence: A Common Language for Babylon*, 65 COLUM. L. REV. 1331, 1332-33 (1965).

FN5 Williams adopts a relativistic position, arguing that the classical writers were merely attempting to stipulate definitions. Williams, *supra* note 3. Ehrenzweig would substitute neo-Freudian terminology as the new language for jurisprudence; his view of psychology, however, seems out of date by about thirty years. Ehrenzweig, *supra* note 4.

FN6 J. AUSTIN, *ON JURISPRUDENCE* 183 (5th ed. 1885).

FN7 H. HART, *THE CONCEPT OF LAW* 113 (1961).

FN8 I have attempted to criticize this approach in greater detail elsewhere. D'Amato, *The Neo-Positivist Concept of International Law*, 59 AM. J. INT'L L. 321 (1965).

FN9 L. FULLER, *THE MORALITY OF LAW* 46-91 (1964).

FN10 See S. HOFFMANN, *THE STATE OF WAR* 88-122 (1965); D'Amato, *The Inductive Approach Revisited*, 6 INDIAN J. INT'L L. 509 (1966) (on the theories of Schwarzenberger).

FN11 H. HART, *supra* note 7, at 231.

FN12 H. KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 4 (Tucker ed. 1966).

FN13 *Id.* at 64-87 (new material added by Professor Robert W. Tucker). For a succinct contrary view see Henkin, *Force, Intervention, and Neutrality in Contemporary International Law*, AM. SOC. INT'L L. PROC. 147.

FN14 Cf. Deutsch, *On the Concepts of Politics and Power*, J. INT'L. AFF. 232, 233 (1967).

FN15 Note, *The Court Of Claims: Judicial Power and Congressional Review*, 46 HARV. L. REV. 677, 685-86 n.63 (1933).

FN16 R. FISHER, INTERNATIONAL CONFLICT FOR BEGINNERS (1969).

FN17 O. W. Holmes, *The Path of the Law*, in COLLECTED LEGAL PAPERS 173 (1920)

FN18 K. LLEWELLYN, THE BRAMBLE BUSH 9 (2d ed. 1951).

FN19 McDougal, *A Footnote*, 57 AM. J. INT'L L. 383 (1963).

FN20 MCDUGAL *et al*, STUDIES IN WORLD PUBLIC ORDER 276 (1960). This is the *dédoublement fonctionnel* idea of George Scelle.

FN21 Falk, *International Legal Order: Alwyn V. Freeman vs. Myres S. McDougal*, AM. J. INT'L L. 66 (1965).

FN22 M. MCDUGAL, *supra* note 20, at 887 n.109.

FN23 *Id* at 49.

FN24 *Id* at 58-91.

FN25 A. D'ENTREVES, NATURAL LAW 20-21, 80-94 (1951).

FN26 L. FULLER, *supra* note 9, at 33-94.

FN27 Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 648-57 (1958).

FN28 Hart, *Legal and Moral Obligation*, in A. MELDON, ESSAYS IN MORAL PHILOSOPHY (1958).

FN29 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 429-30 (1964); R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER (1964).

FN30 The Antelope, 23 U.S. (10 Wheat.) 66 (1825). In this case Chief Justice Marshall held that the slave trade, while contrary to natural law, was not a violation of international law.

FN31 W. COPLIN, *supra* note 2, at 102-67.

FN32 Deutsch, *supra* note 14, at 232 (his italics).

FN33 Z. SLOUKA, INTERNATIONAL CUSTOM AND THE CONTINENTAL SHELF (1969).

FN34 W. COPLIN, *supra* note 2, at 8.

FN35 McDougal, *supra* note 19, at 383.

FN36 For a penetrating discussion of some of these issues see Fisher, *Bringing Law to Bear on Governments*, 74 HARV. L. REV. 1130 (1961). See generally Falk, *New Approaches to the Study of International Law*, 61 AM. J. INT'L L. 477 (1967).

FN37 L. FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957). I have attempted to deal with the general question of the consistency of mental constructs at greater length in D'Amato, *Psychological Constructs in Foreign Policy Prediction*, 11 JOURNAL OF CONFLICT RESOLUTION 294 (1967).

FN38 I have elsewhere attempted to discuss South Africa's strategies with respect to the South West Africa cases. D'Amato, *Legal and Political Strategies of the South West Africa Litigation*, 4 LAW IN TRANSITION Q. 8 (1967).

FN39 The rules against genocide are an exception.