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# A Few Steps Toward an Explanatory Theory of International Law

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**A Few Steps Toward an Explanatory Theory of International Law,**  
by Anthony D'Amato\*, 7 Santa Clara Journal of International Law 1-23 (2010)

**Abstract:** If any one sentence about international law has stood the test of time, it is Louis Henkin's: "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." If this is true, why is this true? What makes it true? How do nations invent rules that then turn around and bind them? Are international rules simply pragmatic and expedient? Or do they embody values such as the need for international cooperation? Is international law a mixed game of conflict and cooperation because of its rules, or do its rules make it a game of conflict and cooperation? It is hard to imagine a set of rules in all of human history that is more important and less understood than the rules of international law.

**Tags:** Theory of International Law, Reductionism, Exceptionalism, Legal Realism, Soft Law

[pg1]\*\* In the Preface to his recent book *How International Law Works*, Andrew T. Guzman writes: "[w]hen teaching international law, one is confronted with foundational questions from the very start of the course. Does international law affect state behavior, and if so, how does it do so?"FN1 Professor Guzman is too reserved to say that international law simply lacks a theory that would answer and explain these issues. To be sure, after four thousand years of being the sole and exclusive set of legal rules among nations, it is nothing short of remarkable that international law has not yet become thoroughly understood and explained.

In dogged search of an explanatory theory, Part I of this article is a critical overview of today's most prominent theories of international law. Part II argues that we must construct our theory upon a law that is enforceable and is enforced. Finally, Part III discusses methodologies that should be taken into account in the quest for an explanatory theory of international law.

[pg2] **I. OVERVIEW OF CURRENT THEORIES**

***A. Fragmentation***

As international law gains prominence in global discourse, its detractors claim that if it were really law it would surely have a theory that explains where it comes from, why and how it constrains state behavior, and why it deserves the name "law." Such criticisms, repeated throughout the recent Bush Administration, have succeeded in putting traditional scholars on the defensive. Many of these scholars have already conceded, perhaps prematurely, that their subject is characterized by a cacophony of partial theories that veer off in different directions. At a 2004 symposium, nearly all participants agreed that international law is ineluctably fragmented.FN2 They despaired of ever seeing a theory that could glue all the pieces together.FN3 Perhaps, some suggest, international law is just pluralistic. Yet pluralism gives every topic of international law its own theory even if the individual theories are mutually inconsistent. The problem of incoherence cannot be cured by placing all the theories in one basket and calling it "international law." An ensemble of more or less incoherent theories cannot itself be a theory.

Fragmentation may well be the biggest threat to the search for an overarching explanatory theory of international law. Andrea Bianchi writes, "[t]he extreme fragmentation of the theoretical discourse of international law may well lead to normative relativism and

eventually, to the demise of the system.”FN4 Bianchi concludes that fragmentation, because of its rebellious nihilistic appeal, could erode the enthusiasm of young scholars who chose a career in international law in order to help improve global governance and the condition of humankind.FN5 "Scholars must be aware that theory matters.”FN6

### ***B. Theories as Chapter Headings***

Until a few decades ago, it was rare for a scholar to worry whether international law was really law, much less to be concerned about its lack of a sound theoretical foundation. The classic treatises simply took as given a dozen basic principles [pg3] such as the sanctity of state boundaries, the immunity of ambassadors, the right of states to espouse the claims of their nationals, freedom of the seas, national sovereignty over the territorial seas and superjacent airspace, the laws of war, denials of justice and the responsibility of states for torts against neighboring states. Principles such as these seemed to cover the entire field of discourse, although there was always room to add a new one such as (somewhat grudgingly) human rights. If everything was covered, what need was there for an overarching theory? A few early twentieth-century scholars including T.J. LawrenceFN7 and Georg SchwarzenburgerFN8 tried to collate all the principles and turn them into postulates on the model of Russell and Whitehead's *Principia Mathematica*.FN9 But they were ultimately unable to show that the postulates were complete.FN10 As a result, when today's scholars read the so-called treatises on international law, the "theories" appear to be little more than chapter headings.

### ***C. Reductionist Theories***

Reductionism has also been a failure. Percy Corbett, for example, argued in 1925 that all international rules could be reduced to the voluntary consent of states.FN11 But neither he nor others who later embraced the consent theory were able to explain why *customary* international law was binding in the absence of specific consent to its individual rules. Moreover, if consent supervened upon enforceability—as the consent theory implied—there was no logical reason why a state could not simply withdraw its consent to any particular rule whenever it found the rule to impede its immediate interests.

A different flavor of reductionism was the late Myres McDougal's insistence that all the rules of customary international law collapsed into a single word: "for all types of controversies the one test that is invariably applied by decision-makers is that simple and ubiquitous, but indispensable standard of what, considering all relevant policies and all variables in context, is *reasonable* as between the [pg4] parties."FN12 This rule, in McDougal's view, permitted nuclear testing by the United States in the South Pacific but denied the same thing to the Soviet Union. FN13 The latter, as McDougal thought everyone in the world would readily acknowledge, was simply an unreasonable *state*.FN14 But although McDougal's theory, as he applied it, was supremely chauvinistic, American officials were not tempted to cite it. For it was soon realized that if everything the United States did was by definition reasonable (in domestic law, robbing a bank was reasonable from Willie Sutton's point of view), FN15 its positions on international rules would never be taken seriously.FN16

Martti Koskenniemi and David Kennedy have argued for a quite different kind of reductionism.FN17 They view international law as primarily a discourse that can be deconstructed to reveal the antithetical argumentative positions of the competing states that gave rise to a rule.FN18 Koskenniemi locates the antagonistic forces at opposite ends of a spectrum that he labels apology and utopia.FN19 While some of his followers base their contentions on raw state practice, others opt for utopianism where norms are conveniently found (morality, justice, security) that transcend the empirical data.FN20

Although provocative on an academic level, it is hard to see how the Koskenniemi-Kennedy reductionism would be of any help to international lawyers.FN21 Koskenniemi himself concedes the impracticality of his theory.FN22 Not only is his theory too abstract, but even on its own terms all international legal discourse surely takes place somewhere in between apology and utopia. Neither side would want to move too closely to either of the polar extremes for fear of [pg5] conceding the majority of the spectral space to the other side. But the bottom line is that any theory of law that is inapplicable to the practice of law can hardly be called an explanatory theory.

#### ***D. Legal Realism***

If traditionalists are concerned about the absence of a coherent theory to support international law, proponents of American legal realism such as Myres McDougal, W. Michael Reisman, Philip Trimble, John Carter, Jack Goldsmith, and Eric Posner offer a facile way out. They argue generally that international law is nothing but a set of strategic considerations that can often be usefully consulted in the game of international power politics. Law does not constrain any state's behavior; force is the only true constraint.

When Myres McDougal, a specialist in property law at Yale, decided to import legal realism into the then moribund field of international law, FN23 he formed an interdisciplinary partnership with Harold D. Lasswell, a leading political-science exponent of power politics.FN24 They found common ground in their belief that a rule of international law is nothing more than a helpful guide to relevant decisional factors for officials whose job it is to project state power into the international arena. This formula struck some of McDougal's international listeners in the 1950s as a new idea, just as its resuscitation by Jack Goldsmith and Eric PosnerFN25 (who betray no awareness of McDougal's massive work) has been honored as a new idea.FN26

Through the ages, most lawyers, judges, and philosophers of law have maintained that law regulates power. Even Hobbes and Machiavelli viewed the purpose of law as regulating power. Only in the strange world of some legal realists does power somehow regulate law. However, the idea of power regulating law is incoherent; power has no internal structure that the word "regulate" could describe. Indeed, Machiavelli took the analysis further, arguing that the Prince's personal power is [pg6] *enhanced* by the rule of law. It is of limited value to a Prince or Leviathan to be the strongest person in the jungle; his power will not extend much beyond his fists. But where a population respects an orderly rule-governed society, the Prince or Leviathan may achieve vast power. True, they have to appear to follow the law that is on the books until they decide to change it (in order to reassure their subjects that the law is doing its job of

regulating power), but this is a trivial cost compared to the power benefit that they derive from law in consequence of its ability to radiate out and control public behavior on a large scale.

Yet like fragmentation, legal realism has nihilistic appeal to legal scholars. And like severe reductionism, legal realism fails in the courtroom or around the negotiation table. Suppose in court an attorney argues that the plaintiff should win because he is richer and more powerful than his opponent. In quick response, the opposing attorney says that the plaintiff's attorney has now conceded that she does not have good legal arguments—she has simply fallen back on the illogic of sticks, stones, and guns. Similarly, in a negotiation, the side that claims it ought to win because it is more powerful is not appealing to a neutral principle that has any possibility of inducing the other side to yield argumentative ground. Only rules of law—accepted *ex ante* as impersonal and neutral—have a chance of mediating between opposed political adversaries.

Finally, ordinary language suggests that although power may back up the law, power is not the same thing as the law. A striking example can be drawn from archaic Rome. When Rome was vastly superior over the nations it wished to conquer, it observed rules of battle and conquest that treated both sides equally.<sup>FN27</sup> Military power may be unequal, but international law treats states equally. For if law were itself unequal, the weaker side could never be persuaded to obey it. The weaker side might be forced to obey it, but in that case, we would be within the domain of force and not of law.

### *E. Exceptionalism*

Nevertheless, some American scholars, intoxicated perhaps by the fact that the United States is now the world's sole superpower, claim that international law is indeed unequal: it favors the United States.

[pg7] Neither Machiavelli nor Hobbes went so far as to claim that the laws on the books should be differentially interpreted in favor of the more powerful party. For although the Prince could change the law whenever it suited him, the law that was in place—so long as it remained in place—was perceived to apply just as much to him and his close friends as it applied to his subjects. Yet McDougal's student, W. Michael Reisman, has taken the step that was too radical for Machiavelli and Hobbes. Inasmuch as Reisman's voluminous writings are highly contextualized, qualified and nuanced, exegesis is sometimes necessary to dig out their operative message. Once extracted, the message is always the same: powerful states enjoy, and ought to enjoy, an interpretive advantage if and when international law is cited against them. On some occasions, notably at a meeting of the American Society of International Law, Reisman candidly admits his power-based theory of law: the notion of law as a body of rules, existing independently of decision-makers and unchanged by their actions, is a necessary part of the intellectual and ideological equipment of the political inferior.<sup>FN28</sup>

Philip Trimble and John Carter have offered a modest retreat from the unabashed exceptionalism of McDougal and Reisman.<sup>FN29</sup> They use the term "domestication" to refer to the incorporation of an international norm into a state's own legal system.<sup>FN30</sup> Only if and when a norm is domesticated does it become binding on that state's officials and ministers. The Department of Justice's infamous "torture memo" perhaps reflects the Trimble-Carter view in

contending that any alleged torture of prisoners by United States military personnel abroad is governed by the meaning that United States law gives to the term "torture".FN31 Thus, under the Trimble-Carter view, a rule of international law undergoes a change of meaning when it is domesticated. Of course, if one can unilaterally narrow down the definition of torture so that it does not include, say, waterboarding, then former President George W. Bush could claim—as he did [pg8] claim—that the United States does not torture enemy prisoners.FN32 However, there is an obstacle to self-serving definitions: the words being redefined already have settled meanings within the relevant linguistic community—in this case all the nations party to the Convention on Torture.FN33

Under Trimble-Carter, even multilateral treaties ratified by the United States, such as the Geneva Conventions, can be more deformed than transformed when they become part of United States law. Over time, the domestic meaning will inevitably diverge from the international definition. If all 190 states domesticate an international rule each in their own way, then, like the Cheshire CatFN34, the only transnational law remaining is the grin.

If Reisman, Trimble, and Carter have left international law in critical condition, Jack Goldsmith and Eric Posner seem eager to administer extreme unktion. They see no shadow of compulsion attached to any rule of international law. Rules are, at best, mere suggestions for ways to cooperate with—or sometimes bamboozle—other states. States only act for self-interested reasons; their self-interest is determined by political, not legal, factors. On those occasions when a state decides, in its self-interest, to cooperate with other states, it might look up a few rules of international law to get a suggestion or two about how best to go about cooperating. As Posner said in a recent debate, speaking for himself and Goldsmith, "[t]he first point that we want to make is that the government should never comply with international law just for the sake of international legality."FN35 Judge Douglas H. Ginsburg replied that the Goldsmith-Posner conception "is not law in anything other than the most misleading way."FN36 Indeed, Goldsmith and Posner do not define "international law" but simply *substitute* "international strategies" whenever someone suggests that law is at work. In one respect, however, their claim that international law lacks enforcement machinery requires a response. The counter-argument that international law is a coercive system will be [pg9] taken up below in Part II.

### ***F. Soft Law***

A simple view of a rule of law is that it consists of a norm sitting on top of a sanction. The norm tells us what we must do; the sanction informs us of the physical disability that will befall us if we disobey the norm. For theorists who believe that international rules have no sanctions, the norm is the only thing remaining if the rule is to be called "law" at all. The norm without the sanction is called "soft law"; the norm-plus-sanction is called "hard law" or just simply "law."

Soft law has the distinction of being introduced to international lawyers by an article that warned them against using it. In 1983, Prosper Weil published *Towards Relative Normativity in International Law*, deploring the use of soft law to characterize some norms that are not legally

binding but often considered preferable to a failure to agree upon binding norms.FN37 Weil's fear was that soft law might act as a kind of strange attractor (not his terminology), pulling down standard rules of international law to a lower level of non-bindingness.FN38

Eight years before he wrote his article, a paradigm of soft law—the Helsinki Accords of 1975—was concluded among thirty-five states including the U.S. and the U.S.S.R.FN39 The text was written so as to sound as un-treaty-like as possible. It was called a "Final Act of the Helsinki Conference" and not a Convention; it contained "principles" not rules; the sections were called "baskets" not "Parts"; the paragraphs spelling out the principles were not numbered; the principles were entitled to "respect" and not to observance; and at the conclusion the parties merely "[d]eclare their resolve, in the period following the Conference, to pay due regard to and implement the provisions of the Final Act of the Conference."FN40

Professor Weil's reaction to the Helsinki Accords was that of a traditional international law scholar who was skeptical of any variations on the nature of international law that might degrade the precarious position of law among nations.FN41 He felt that agreements like the Helsinki Accords might substitute "relative normativity" (soft law) for the absolute normativity (hard law) of any [pg10] given rule of law.FN42

As international conferences go, the Helsinki Accords have been a considerable success. Yet Professor Weil and his numerous followers must have been surprised to find that as the Accords settled into global expectations of international behavior, they did not de-legitimize other conferences that resulted in binding multilateral treaties.FN43 Instead, the treaty conferences seem to have pulled up the Helsinki Accords to a near-binding level. It is as if the theory of international law abhors a vacuum—the empty space between enforceable norms and unenforceable norms. Soft law resides (temporarily?) in that space; it is neither law nor non-law. If this analogy to a vacuum is correct, soft law may be a precursor to hard law.

Soft law may simply be a norm looking to hitch onto a sanction. Dinah Shelton observes that soft law may "precede and help form new customary international law" and "form part of the subsequent state practice that can be utilized to interpret treaties."FN44 Alas, these are not theoretical attributes of soft law, but rather a selection of pragmatic influences. For soft law tends to come in paired opposites: women (have, do not have) rights equal to men; women (have, do not have) a right to an abortion; adults (have, do not have) a right to use drugs; people (may, may not) be sentenced to capital punishment; adolescents (may, may not) be sentenced to capital punishment; nations (have, do not have) a right to burn fossil fuels; the Inuit (have, do not have) a right to kill bowhead whales. If some of these norms are helping to form customary practice or to interpret treaties, their paired opposites are working in the equal but opposite direction. The result is that on the large scale soft law cancels itself out.

### ***G. Reputational Sanction***

A state may incur a cost when its reputation is damaged by its non-compliance with a rule of international law. Andrew Guzman lists this "reputational sanction" first in his account of compliance as a game that states play.FN45 However, when the stakes are big enough, reputational damage is weak tea compared to national interest as perceived by the state actor (as

we saw in the earlier discussion of [pg11] nuclear weapons testing in the South Pacific).FN46 But even when stakes are low, President Franklin Roosevelt compared international relations to a game of poker in which a certain degree of bluffing is necessary if a player wants to win in a tournament or competition. Indeed, the best player not only bluffs, but occasionally allows herself to be caught at bluffing—thus revealing to the other players that at any time she may be raising their bet on just a bluff. If she had no reputation for bluffing, the other players would "fold" when she raised their bets, thus drastically reducing her potential gain over a series of hands.

Although reputational sanction is undoubtedly a factor that nations take into account in playing the game of international diplomacy, it may be weak when the stakes are high, and less effective when stakes are moderate or low than occasionally taking a reputational "hit."

## **II. INTERNATIONAL LAW IS ENFORCEABLE LAW**

As we have seen so far, the sheer difficulty of finding an explanatory theory of international law has led many scholars to reduce the meaning of the term "international law" to a status below that of real law in order that their theories will fit the redefinition. But once they redefine international law as something involving less than force, the harder and more complicated it becomes to explain why states obey it.

There is no need to search for a theory of international law that is based on making it into something that is less than law, for a proof was made twenty-four years ago and never challenged that international law is indeed enforced. FN47 In Kelsen's words, law is a "coercive order."FN48 International law is "law" like any other kind of law.

A short and simplified version of the proof follows:

Suppose states A and B (loosely modeled on the United States and Iran) enter into a bilateral treaty that contains five provisions of equal importance:

- (1) sanctity of borders; [pg12]
- (2) immunity of diplomatic personnel;
- (3) protection of the other party's property;
- (4) most-favored-nation treatment; and
- (5) rights of nationals to travel in or do business in other party's state.

It is a tenet of the international customary law of treaty interpretation that if one party to a bilateral treaty violates one of its important provisions, the other side is released from all its obligations under the treaty. As set forth in the Vienna Convention on the Law of Treaties, "a material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part."FN49 The treaty, in other words, is a package deal; no state party can pick and choose the provisions it wants to obey or disobey.



Now suppose that B abruptly arrests fifty of A's diplomatic personnel stationed in B. What can state A do about this clear violation of provision (2) of the treaty? State A probably would not want to denounce the entire treaty; after all, it was in A's interest to sign the treaty.

Perhaps A could engage in reciprocal retaliation by arresting at least fifty of B's diplomatic personnel. Tit-for-tat reciprocity is the oldest form of enforcement of treaties as well as contracts—indeed down to the level of rules invented by children in playgrounds. But it is also the weakest, because the initial violator always knows that if he breaks a rule his opponent or competitor will certainly not continue to follow that rule. Thus, an immediate cost of breaking a rule is retaliatory breaking by the other side. We can therefore arrive at a logical conclusion: whenever a state breaks a rule, tit-for-tat reciprocity *fails* as a retaliatory strategy. If this conclusion seems strange, we should not forget that most of the time states (or contractors or schoolchildren) do not disobey a rule precisely because they are deterred by the likelihood of tit-for-tat retaliation.

In the real-life exemplar of the model we have been considering, Iran violated the rule of diplomatic immunity in 1978 by arresting fifty American diplomats stationed in Tehran. The immediate reaction of the media newscasters was that the United States should retaliate by arresting at least fifty Iranian diplomats in Washington DC and New York, but the State Department knew better. There had just been a fundamentalist revolution in Iran that overthrew the government of the Shah of Iran. The Iranian diplomats in the United States and other countries had [pg13] all been appointed by the deposed Shah. The new regime of the Ayatollah distrusted these persons, and indeed the United States would be doing the Ayatollah a favor by arresting the Iranian diplomats. Hence, from the point of view of the new Iranian government, violating provision (2) would not only be costless but might also be profitable.FN50

In the model, state A has available a third response: tit-for-a-different-tat. In looking over the five provisions of the A-B treaty, A finds one whose violation would disproportionately harm B. A's quick investigation shows that B's sovereign funds are deposited primarily in banks in state A or in third-country banks that have a working relationship with banks in state A. By contrast, hardly any of A's sovereign wealth is on deposit in B's banks. Thus, the government of A focuses on provision (3).

By an executive order freezing B's bank deposits in A, B is deprived of a significant portion of its sovereign funds so long as it detains A's diplomats. In the real-world archetype of this model, the United States froze \$13 billion of Iran's assets. In a little over a year, Iran returned the Americans unharmed, and the United States lifted the freeze, after imposing a few conditions, upon the Iranian bank deposits.FN51

In the preceding model, the bilateral treaty between A and B became enforceable due to the "package deal" nature of the treaty. Although A and B might not have been able to agree on a treaty containing just one of the five provisions in the model treaty, they were able to reach agreement that contained all five because a provision that favored A would be set off by a provision that favored B, and so forth. This model does not prove that a disagreement between A

and B will never lead to war, but it does tend to stave off war due to the inherent stability of a package deal of this type. The proof shows that international law operates to stabilize an international arena even in a world that consists of only two states.

The core of the proof that international law is coercive has just been given: coercion consists of taking away from a state a legal entitlement that would have been respected had the state not violated the law. It is worth adding that there is no need for the initial violation to be a treaty-breaker; a violation can occur within a treaty and be punished within the treaty. This was the situation in the U.S.-France [pg14] Air Service Award. FN52 France issued a regulation prohibiting American intercontinental aircraft that stopped at Heathrow Airport to continue their flights into DeGaulle Airport. The United States claimed, and France denied, that the French regulation violated the Air Services Agreement of 1946. The United States, thereupon, adopted a countermeasure: it prohibited French intercontinental aircraft from landing in Los Angeles, in clear violation of the Air Services Agreement. The countermeasure was economically more severe than the original delict.FN53 An arbitral tribunal held that the French action was a violation and the American sanction was not excessive.

It should also be emphasized that tit-for-a-different-tat is not confined to treaty violations; it works for international law generally. This was already seen in the real-world exemplar of the A-B diplomatic hostages model in which neither Iran nor the United States asserted rights under a mutually binding bilateral or multilateral treaty. International customary law is itself a package deal: all its rules apply to all states equally, and all rules must be observed on pain of tit-for-a-different-tat retaliation.FN54 In all cases the retaliation must be proportionate to the initial violation; otherwise the retaliation itself would constitute a wholly new violation.FN55

One might ask why so little attention has been paid by scholars of international law to enforcement by tit-for-a-different-tat retaliation. If enforcement is an everyday phenomenon, why are there so few instances of it in the literature? The explanation is simple: most instances of retaliation and countermeasures are deliberately hidden for sound diplomatic reason. Consider the following generic example.

An American businessperson skilled in construction supervision goes to state X to set up a construction company and recruit local workers. He does all the [pg15] necessary paperwork, recruits workers, and is ready to start business. But at the last minute a local governmental official approaches him and demands a large sum of money to permit the businessperson to commence business operations. The entrepreneur refuses, not only because this unexpected payment would wipe out any profit he might have expected from the construction job, but also because bribery of foreign officials is illegal under American law. Late that night, three men enter his hotel room by key and in the dark, brutally gag and blindfold him, beat him many times, take all his money and personal property including a laptop with all his business data, and finally leave. No words were spoken. It takes him several hours to work his way free. On the desk he sees his passport, a few dollars, and a one-way airline ticket out of the country. Back in Washington D.C., he tells his story to a sympathetic State Department official who states, "Yours is not the first case where this kind of thing has happened. Since you have no evidence, unfortunately the government and the courts can do nothing for you."

About ten days later, the Minister of Trade of state X arrives at JFK Airport on his way to attend a top-level meeting at the United Nations. He is waved through customs, as is normal for foreign dignitaries, but then a security guard says the Chief of Security would like to have a word with him. He is led into an office where he is arrested. He is not allowed to make any telephone calls "for security reasons." Despite his vehement protests, he is led into a small holding cell where he spends the next twenty-four hours, missing his meeting in New York City. He is still furious when the Chief of Security comes to his cell to apologize profusely and personally sets him free. Apparently, there was a computer error; his name and profile fit that of a wanted terrorist. He is treated to a nice meal and escorted to a plane that takes him back to state X.

Back home, he demands that the United States should be made to pay reparations to him for their negligence in programming their own computers. The Minister of Defense replies that it was probably not a computer error and the best thing to do would be to forget the entire incident. He then recounts what happened to an American entrepreneur ten days earlier.

If, by chance, a small story appeared in the Washington Post about a businessman who claimed maltreatment in state X, and two weeks later a small story appeared in the New York Times about a computer glitch at the JFK terminal, it is extremely unlikely that a person who happened to read both stories would think they were connected to each other.

### [pg16] **III. A FEW METHODOLOGIES FOR A COMPREHENSIVE THEORY**

#### *A. Evolutionary Epistemology*

Rules of international law are not top-down; they were not handed down from God to Grotius. Instead they emerged bottom-up from interactions among the early states. Research can begin with the earliest extant diplomatic records: the treaties among small states in ancient northeast Africa and southwest Asia whose clay molds have been recovered by archeologists. The cultures represented include Egyptian, Sumerian, Babylonian, Assyrian, Hittite, Aramean, and Israelite.<sup>FN56</sup> Some provisions recurred in many of these treaties, even among states that were far apart and did not communicate with each other. These common provisions included:

- (1) demarcation of state boundaries;
- (2) sanctity of boundaries;
- (3) safe passage of emissaries;
- (4) diplomatic immunity;
- (5) everlasting peace; and
- (6) duty to return fugitives to their home state.

In some treaties there was even a rudimentary rule of treaty interpretation that over time developed into a default rule of customary international law. For instance, a clay-tablet treaty between the kingdom of Hatti and the Land of the Seha River in 1350 B.C. provided that if any of the signatory kings "do not observe" the words of the tablet, or "turn away," or "alter" these words, then some fifty oath gods named in the treaty "shall eradicate from the Dark Earth" the king, his wives, his sons, his grandsons, his household, his land, his infantry, his horses, and all his possessions.<sup>FN57</sup>

A number of the ancient treaties were treaties of peace. Peace treaties are not coercive signings, as is sometimes assumed; rather they reflect egalitarian tradeoffs as to the bundle of provisions in the treaty. The proof is simple: if A is winning its war against B, A has the choice of either continuing the war to the bitter end and annexing B or discontinuing the hostilities with B's consent. A truce may serve the interests of both sides when B's continued military resistance [pg17] is causing too much deadweight loss. For example, Hitler in 1940 could have defeated France a few weeks earlier if he had bombed Paris. But he decided not to do so based on the quite reasonable calculation that Paris soon would be his. What is less obvious, but part of the same game-theoretic equation, is that the French army in retreat might have burned Paris, thus denying it to Hitler. Thus one of the reasons Hitler invited early peace talks with the French government was to avoid the deadweight loss of Paris that could have been inflicted by either the dejected French army or the hotheaded German blitzkriegers. And the French, for their part, voluntarily agreed to the peace talks as a preferable alternative to continuing the war.

The ancient Hittite treaties contain a number of provisions that we now regard as part of customary international law. But the treaties themselves do not tell us how any particular rule of custom got started. Although we must accept the historical record as a baseline, we immediately find that there are gaps in the record regarding the formative processes of customary law. There is need for a theory to fill or interpolate these gaps.

### ***B. Inference to the Best Explanation.***

Explaining how rules got started is quite similar to the task confronting evolutionary biologists of explaining how species got started. It is an oft-lamented Darwinian fact that the fossil record does not contain evidence of the stages by which one species mutated into another. Instead, paleontologists have to explain the abrupt appearances of new species, the scarcity of transitional fossils, and the apparent differences in morphology between ancestral and daughter species. By scientific consensus, the only reasonable methodology available to fill in the gaps is inference to the best explanation.<sup>FN58</sup> Charles Darwin's *Origin of the Species* itself is the leading book-length example of such an inference. Similarly, in international legal history, the record does not reveal how any rules, including the first one, got started. But it does tell us that rules did get started and, moreover, that many of them were fit enough to survive the vicissitudes of international conflict.

As a possible illustration of inferring to the best explanation of how the first rule of international law arose, we may begin by asking which norms logically presuppose the existence of other norms. A moment's reflection shows that all [pg18] norms presuppose the existence of lines of communication between governments. We then ask how communication itself gets started. We take a minimalist scenario: a world consisting of just two states, A and B. We assume that they are at war. There is no open line of communication between them and, perforce, no rule that they both respect. If A sends an envoy into B's territory to discuss terms of truce, B is likely to kill the messenger. Assuming that this happened many times, we simply have a blank historical record. So far, we cannot account for the rise of any international rule.

But there is the possibility of a mutational event. For example, at one point in historical time a messenger from A somehow manages to persuade the king of B not to kill him but to hold him hostage, and meanwhile, send the king's own messenger back to A with a response to A's proposed terms of truce. Then, upon receiving B's messenger, the king of A might in turn hold him hostage and send into B a third messenger with a response to B's reply. The reiterations become increasingly error-prone until it occurs to everyone that it would be more efficient if a group of A's envoys were to reside in a protected enclave in B and a group of B's envoys were to reside in A. Then messengers from both groups could go back and forth, sending, receiving, translating and delivering messages. To secure the process, both sides agree to grant immunity to all envoys. Each enclave is then called an "embassy." As a result, even before terms of the treaty of truce (or of peace) are agreed upon, the first rule of international law has been established—the rule of diplomatic immunity. The survival of this rule over thousands of years is evidence of its fitness as an all-purpose facilitator for the peaceful settlement of disputes.

### ***C. Taxonomy of Rules.***

Legal rules, both domestic and international, may be helpfully analyzed by a three-part taxonomy. Type I rules, the category that most people immediately think of as "law," address the behavior of persons, entities, and states. These rules tell their subjects what to do or not do in order to avoid punishment. Type II rules are addressed to rule-enforcers. In domestic law the rule enforcers are the police; in international law, the rule enforcers are all the states that are not directly involved in a given dispute or controversy (the tit-for-a-different-tat process).FN59 [pg19] Finally, Type III rules, which are often called constitutive rules or meta-rules, address all the other rules. They provide for the creation, modification, change, or deletion of Type I and Type II rules. In international law, Type III rules operate through the constitutive processes of treaty-making and custom. Of course the labels suggested here are unimportant; what matters is that a new theory of international law takes into account the important differences between the types of rules.FN60

### ***D. Non-Zero-Sum Game Theory***

Two recent books on international-law theory, referred to earlier in this Article, employ zero-sum games to help illuminate the role of international law in international relations.FN61 They each make extensive use of variations on the Prisoner's Dilemma game, Goldsmith and Posner more so than Guzman. But that game, though appearing to involve three persons (the District Attorney and the two prisoners), in fact, is only a two-person zero-sum game involving two prisoners who are not allowed to communicate with each other. It is thus an impoverished version of international relations, which perhaps accounts for the Goldsmith-Posner conclusion that the international-law factor (roughly corresponding to the District Attorney) cancels out.FN62

To see why an N-person non-zero-sum game is necessary for modeling the role of international law in international relations, let us begin with a simple world of just two states. They are necessarily playing a two-person zero-sum game. Suppose A and B adopt a rule of freedom of the seas. If A then seizes one of B's military vessels on the high seas, A will have inflicted upon B, at least in theory, two injuries: a strategic injury to B's navy, and a legal injury

to B's stake in the existing rule of freedom of the seas. Yet, when there are only two players, the two types of injuries are congruent—they merge into each other. The seizure of the ship [pg20] is *ipso facto* the destruction of the rule. State A cannot credibly say to B that it only intends to violate the rule this one time—from here on out the rule remains in place. As a result, in their small bilateral world, A and B are forever poised at the tipping point of war.

A non-zero-sum model of the international legal system would make a decisive theoretical difference. More states have to join the system, as historically they did; at the present time there are 193 states. It is clear that international relations involves both conflict and cooperation, even in the stark case of a war. The laws of armed conflict (war crimes, crimes against humanity) operate in game-theoretic terms as an element of cooperation in the conduct of the armed conflict. In peacetime, the economic theory of Division of Labor and its international counterpart the Theory of Comparative Advantage,<sup>FN63</sup> result in an increase in the wealth of nations. Since all nations want to increase their wealth (and well-being) above all other things—conflict is just one possible way to increase a nation's wealth—it is obvious that the role international law plays in promoting cooperation among states (laws of peace) is at least as important as its role in preventing or downsizing conflict (humanitarian law). In any event, international law is a mixed game of conflict and cooperation.

Thus in our two-state model we add state C. Now the two types of interests—the strategic interest and the legal interest—do not necessarily merge. States A and B may view the seizure of B's ship as simultaneously a strategic and legal injury to B, as they did in the previous bipolar world. But now the new player, state C, may view with indifference the strategic interest yet may care very much about preserving the integrity of the rule of freedom of the seas. This result can be generalized as we add more states to the world. States that have no direct political interest in the fortunes of either A or B are nevertheless interested in not allowing A or B to destroy a rule of international law. Since international law nearly always confers a benefit upon neutral states, there is a community-wide interest in rule preservation. In short, if we add one state or many states to the bipolar world we started with, we can conclude that the game-theoretic model for the system can only be a non-zero-sum game.

Even so, the international legal system is strengthened as new states come aboard. To demonstrate this corollary to the general non-zero-sum thesis, let us [pg21] start with a three-state world. It is possible that C might have a strategic/political interest in supporting A's position. C's strategic interest may, thus, outweigh its other interest in the preservation of the rule. In that case, the game has become a two-person zero-sum game, with A and C on one side and B on the other side. International law will then diminish or disappear as a factor in this three-cornered world.<sup>FN64</sup> The obvious cure is to add more states. Today, with approximately 193 states in the world, it is increasingly unlikely that any combination of strategic interests will outweigh the interest of neutral states ("third states") in the preservation of rules of international law.<sup>FN65</sup> As far as a theory of international law is concerned, it is almost guaranteed that today the game-theoretic model will be an N-person non-zero-sum game.

### ***E. Network Theory***

Karl Popper famously insisted that studying a subject requires demarcating it from all other subjects, otherwise, considerations around the edges of one subject would blend into another subject, muddying the entire analysis. FN66 His advice as applied to law suggests that legal rules should be distinguished from rules of etiquette, propriety, prudence, morality, strategy, civic virtue, and even soft law. FN67 For only with respect to full-fledged legal rules is the state clearly committed to their integral preservation by the use of coercion.

Demarcation has an unexpected payoff for international law: it allows the application of network theory to the entire set of legal rules. In H.L.A. Hart's well-known example, the state may not care if a gentleman fails to remove his hat in church; no legal rule is implicated. FN68 But the state does care when one person [pg22] shoplifts or another commits serial murders. What is significant in justifying the applicability of network theory is the fact that the state usually makes no qualitative distinction between these two rule-violations. Although it is likely that the state will expend greater resources in apprehending and convicting the serial killer as compared to the shoplifter, this additional investment can be explained by the different magnitudes of the crimes. That difference is quantitative, not qualitative. The decisive test occurs when A and B violate the same rule and A is quiet about it while B publicly flouts his violation. It is universally known that the police and prosecutors will expend far more resources in tracking down and incarcerating B. They do so because B, by openly violating one rule, has attacked and injured the integrity of the network of rules.

A network of legal rules is a non-scalar network. FN69 The relation between rules is measured by a power law rather than by a bell-curve distribution. These characteristics give rise to an additional useful heuristic. We may predict that the set of legal rules, like any non-scalar network, sets up an inverse power-law relation between the magnitude and frequency of rule violations. FN70 As the legal system gains experience in dealing with minor rule violations that do not risk a world war, then when rarer major violations come along, lines of communication and procedures of diplomatic adjustment are in place and can be extended to those (less frequent) major violations. Over time, a smooth gradient is established that can reduce the disruptiveness of violations. The relative ease of repairing minor violations, thus, promotes overall systemic stability. In turn, the stability itself recursively makes it easier to repair major rule violations.

#### **IV. CONCLUSION**

If any one sentence about international law has stood the test of time, it is Louis Henkin's: "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." FN71 If this is true, why is this true? What makes it true? How do nations invent rules that then turn around and bind them? Are international rules simply pragmatic and expedient? Or do they embody values such as the need for international cooperation? Is international law a mixed game of conflict and [pg23] cooperation because of its rules, or do its rules make it a game of conflict and cooperation? It is hard to imagine a set of rules in all of human history that is more important and less understood than the rules of international law.

## FOOTNOTES

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\*\*Numbers in the format “pg1” etc. refer to the pagination of the original article.

1. ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* ix (2008).

2. Symposium: *Diversity or Cacophony? New Sources of Norms in International Law*, 25 MICH. J. INT'L L. 845 (2004).

3. *Id.*

4. Andrea Bianchi, *Looking Ahead: International Law's Main Challenges*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW 392,407 (David Armstrong, ed., 2009).

5. *Id.*

6. *Id.*

7. *See* T.J. LAWRENCE, *THE PRINCIPLES OF INTERNATIONAL LAW* (1919).

8. *See* GEORG SCHWARZENBURGER, *A MANUAL OF INTERNATIONAL LAW* (1960).

9. *See* ALFRED NORTH WHITEHEAD & BERTRAND RUSSELL, *PRINCIPIA MATHEMATICA* (3 vols. 1925).

10. *Cf.* KURT GODEL, *ON FORMALLY UNDECIDABLE PROPOSITIONS OF PRINCIPIA MATHEMATICA AND RELATED SYSTEMS* (1996) (Translating Kurt Godel's findings that no theory capable of expressing ordinary arithmetic, which might or might not include ordinary language, can be complete).

11. *See* Percy Cobbett, *The Consent of States and the Sources of the Law of Nations*, 6 BRIT. Y.B. INT'L. 20 (1925).

12. MYRES S. MCDUGAL ET AL., *STUDIES IN WORLD PUBLIC ORDER* 778 (1960).

13. *Id.*

14. *Id.*

15. When Sutton was asked why he robbed banks, he famously and quite reasonably replied: "[b]ecause that's where the money is."



16. See ANTHONY D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 223-29 (1971) (discussing the argument further).
17. See DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* (1987).
18. *Id.*
19. See MARTII KOSKENNIEMI, *FROM APOLOGY TO UTOPIA* (1989).
20. *Id.*
21. David Kennedy, *Tom Franck and the Manhattan School*, 35 N.Y.U J. INT'L L. & POL. 397, 426 (2003) (revealing a story from Professor Kennedy who candidly recalls an incident early in his teaching career at Harvard Law School when Professor Abram Chayes came "bursting into [his] office to declaim, 'why would you want to deconstruct international law, we've hardly got it constructed yet. '").
22. See Kennedy, *supra* note 17.
23. America's strict neutrality in the inter-war period nearly drove International Law out of the law-school curriculum.
24. See HAROLD D. LASSWELL, *POLITICS: WHO GETS WHAT, WHEN, HOW* (1936) (Giving away in his most famous book his stance on power without even mentioning it in the title).
25. JACK GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).
26. In fact, the pedigree of the idea" derives from the classical realists, Machiavelli and Hobbes, who in turn probably found it in Socrates' dialogue with Thrasymachus. They believed that rulers of states (the Prince, the Leviathan) wrote the laws to serve their own interests and then revised them whenever they found the old ones to be inconvenient.
27. ALAN WATSON, *INTERNATIONAL LAW IN ARCHAIC ROME: WAR AND RELIGION* 20-23 (1993).
28. W. Michael Reisman, *Remarks at American Society of International Law Proceedings: The Jurisprudence of International Law: Classic and Modern Views* (Apr. 2, 1992), in 86 AM. SOC'Y INT'L L. PROC. 118 (1992).
29. BARRY E. CARTER, PHILLIP R. TRIMBLE, & CURTIS A. BRADLEY, *INTERNATIONAL LAW* (4th ed. 2003) (the most widely adopted casebook in American law schools).
30. See the contribution of Phillip Trimble and the reply by Anthony D'Amato in ANTHONY D'AMATO (ED.), *INTERNATIONAL LAW ANTHOLOGY* 400-410(1994).

31. See Memorandum for Alberto Gonzalez, Counsel to the President on Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (Aug.1, 2002) (on file with author), at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>.
32. President Bush said, "This government does not torture people." See <http://www.cnn.com/2007/POLITICS/10/05/bush.torture/index.html>
33. Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 UNTS 85.
34. LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND (1865).
35. Eric A Posner, Professor at the University of Chicago Law School, Am. Enter. Inst. for Pub. Policy and Research, Debate on the Limits of International Law (March 30, 2005) <http://www.aei.org/events/filter.all.eventID.1023/transcript.asp>.
36. Douglas Ginsburg, Judge, Am. Enter. Inst. for Pub. Policy and Research, Debate on the Limits of International Law (March 30, 2005) <http://www.aei.org/events/filter.all.eventID.1023/transcript.asp>.
37. Prosper Weil, *Towards Relative Normality in International Law?*, 77 AM. J. INT'L L. 413, (1983).
38. *See Id.*
39. Final Act of the Conference on Security and Co-Operation in Europe, Aug. I, 1975, 14 I.L.M. 1292 (1975).
40. *Id.*
41. Weil, *supra* note 37.
42. *Id.*
43. The human rights baskets played a role in the implosion of the Soviet Union, while NATO refrained from using its power to upset the national boundaries in Eastern Europe.
44. Dinah Shelton, *Soft Law*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW 68, 72 (2009).
45. Guzman, *supra* note 1, at 33.
46. *See* McDougal, *supra* note 12, at 778.
47. *See* Anthony D'Amato, *Is International Law Really "Law"?* 79 NW. U. L. R. 1293 (1985) (In the sciences, a proof would invite attempts at falsification; if none succeeds, then the

proof would be taken as a step toward a better understanding of the world. Sadly, international legal scholarship seems to work in the opposite direction. The more convincing a proof, the more it is ignored, thus making room in journals for other writers to invent their own proofs).

48. HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 19 (1949).

49. Vienna Convention on the Law of Treaties art. 60(1), May 23, 1969, 1155 U.N.T.S. 331 (1980).

50. This argument is expanded, with references, in D'Amato, *op. cit. supra* n. 47.

51. *Id.* at 1310-12.

52. *Case Concerning the Air Services Agreement of 27 March 1946, U.S.-Fr.*, 9 Dec. 1978, 54 INT'L L. REP. 304.

53. *See generally*, Lori Fidler Damrosch, *Retaliation or Arbitration-or Both? The 1978 United States-France Aviation Dispute*, 74 AM. J. INT'L L. 785 (1980); ELISABETH ZOLLER, PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES, 72-73, 96-98 (1984).

54. In the formative days of international law, states consented to its rules by the treaty process. But as the number of nations increased, new states were simply taken to have acceded to international legal custom irrespective of their intent or consent.

55. *See generally* Thomas Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 715 (2008); *Supremacy of Territorial Sovereign, Jurisdiction*, 2 John Bassett Moore, DIG. OF INT'L L. § 179, at 24-30; *Inviolability of Territory, Plea of Necessary Self-Defense, Destruction of the Caroline*, 2 John Bassett Moore, DIG. OF INT'L L. §217, at 409-414 (the Webster-Ashburton correspondence regarding the Caroline case).

56. *See, e.g.*, GARY BECKMAN, *HITTITE DIPLOMATIC TEXTS* (2d ed. 1999).

57. *Id.* at 86 (This could be history's first expression of Justice Scalia's theory of originalist interpretation).

58. *See* PETER LIPTON, *INFERENCE TO THE BEST EXPLANATION* (2d ed. 2004).

59. *See generally*, H. L. A. HART, *THE CONCEPT OF LAW* 81 (2d ed. 1994) (Author inexplicably omits enforcement-type rules. The result is that his two remaining types (corresponding to Type 1 and Type 3 in the present text) seem to be functionally overloaded); *see also* Kelsen, *supra* note 48 (Kelsen made the same omission but it is more consequential in Hart's theory because of the primacy he accords to rules as a source of rules).

60. *See* ANTHONY D'AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECT* 27-55 (2d ed.1995) (discussing the argument in further detail).

61. See GUZMAN, *supra* note 1; GOLDSMITH & POSNER, *supra* note 25.
62. GOLDSMITH & POSNER, *supra* note 25 (Goldsmith and Posner use two-person game theory to try to prove that international law is just politics. Although they do not deny that there are more than two states in the world, they retrofit most of their real-world examples into two-person games, a game of United States vs. Others. However, it is clear that their choice of two-person game theory assumes the very result they believe they have proved—that international rules can be wholly deconstructed into power-strategic choices.).
63. See LUDWIG VON MISES, HUMAN ACTION 143-53 (1949); MURRAY N. ROTHBARD, MAN ECONOMY AND STATE 82 (1962) (explaining wealth is created by an exchange "where each party has a superiority in productivity in regard to one of the goods exchanged").
64. Note however that B might be militarily as strong as the A-C alliance. Consider in this connection the game of Balance of Power played by Great Britain in the nineteenth century. Whenever two opposing political coalitions formed on the continent, Great Britain would align itself militarily with the *weaker* coalition. This is a classic example of preventing war by entering into strategic alliances. However, balance-of-power politics is outside the aegis of international law.
65. See Barcelona Traction, Light and Power Co. (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5) (The International Court of Justice implicitly refers to the weight given to rules *per se* in its discussion of obligations *erga omnes*—*duties* that states owe to all other states and not just the state injured in a bilateral dispute. Moreover, the concept of *jus cogens* is inexplicable in a world of two states. Rather, it can be viewed as a form of rule-protection by third states (*i.e.*, third states will not regard as valid any bilateral agreement that violates a peremptory norm).
66. See KARL POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY 4-15 (1959).
67. See *Id.*
68. H.L.A. HART, THE CONCEPT OF LAW 9 (2d Ed. 1994).
69. See *generally* ALBERT-LASZLO BARABASI, LINKED (2002).
70. For example, earthquakes measuring 6 on the Richter scale are twice as powerful as those measuring 3, but they occur only half as often.
71. LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979).