

International Law And Political Reality: Collected Papers, Volume One, by Anthony D'Amato. The Hague: Kluwer Law International, 1995. *Book Review* by Nicholas Onuf [FN1], 1 *Journal of International Legal Studies* 181 (Summer, 1995)

Anthony D'Amato, Leighton Professor of Law, Northwestern University, is one of the most distinguished international legal scholars in the United States. In a brief Foreword to the volume under review, L. C. Green puts D'Amato in the "younger school of writers." [FN1] Himself retired, Green does D'Amato and his generation an injustice. The term "younger" belies the intellectual maturity of scholars whose careers, like D'Amato's, now exceed three decades, just as this term belies their stature and influence among scholars of all ages. It is a mark of D'Amato's productivity, stature and influence that his collected papers should now be appearing. The first volume consists of twenty-nine papers (including excerpts from a co-authored book, Congressional testimony, letters to the *New York Times* and privately published consultant's reports) organized into twenty chapters. Three additional volumes are planned.

Perhaps Green means to suggest with the word "younger" a shift in substantive orientation from his own generation to D'Amato's (and mine). As D'Amato's early papers (Part I, *The Vietnam War*) so eloquently testify, the experiences of the United States in Vietnam had a formative impact. For D'Amato, as for many others, the legacy of the war in Vietnam is a recurring concern with the responsibilities of the United States as a world leader. Many of D'Amato's shorter essays (Part II, *Other Wars and Interventions*) manifest this concern in reference to permissible uses of force. Other papers reveal a concern for technological hazards (Part III, *Nuclear Weapons and Technology*) largely ignored by the preceding generation. While a few papers (Part IV, *Minority Rights*) return to one of the great concerns of the inter-war period, D'Amato's enduring preoccupations remind us how much the world had changed in his youth.

*182 D'Amato invests all of his topical essays with an energy born of conviction. For an earlier generation, D'Amato's sense of urgency and sometimes combative tendencies hardly comport with the measured, magisterial tone favored by its leading figures. Evidently, style as much as substantive orientation separates D'Amato from his predecessors. D'Amato's style is quite his own. Brash and learned at the same time, he has become even more brash over the years as he has learned the complexities of the law and the power of partisanship. Only in D'Amato's latest work (chs. 7, 17) do we hear a teacher's voice—patient and perhaps a little patronizing. Working through the fundamentals yet another time, D'Amato reaches for the magisterial register but does not quite achieve it.

If D'Amato's style sets him apart, it hardly serves to unite his enduring yet disparate concerns. Pulling together materials written over many years on diverse subjects and for diverse reasons requires an organizing principle. Order of appearance is an obvious possibility. It has the advantage of allowing readers to follow the evolution of the author's thinking. D'Amato rejects this principle, perhaps, on the evidence of these papers, because the underlying pattern of his thought has changed so little through the years.

Any other organizing principle requires the retrospective discovery of a unifying theme. According to D'Amato, the theme unifying this collection is an awareness of "political reality": "I have a hard-headed view of international law."^[FN2] D'Amato's very brief Preface says little more. Nor do we learn what D'Amato thinks political reality is from the new material prefacing most chapters. Nevertheless, a number of papers offer assistance. Despite the claim of hardheadedness, D'Amato does not wish us to think him a political realist:

My starting picture of international relations, therefore, is the opposite of that painted in the past by "realist" political scientists such as Hans Morgenthau. I do not agree with them that states exist in a jungle-type environment, a Hobbesian war of all against all. I do not agree with them that international law pops up, from time to time, to deal with specific problems, but that it is fragile and easily trumped by nations that decide instead to resort to force. Instead, my view of international relations is more Lockean—^{*183} that it is basically a system in peace, and that it strives with great ingenuity to avoid war.^[FN3]

D'Amato wrote these words for an essay on sanctions due for publication in 1995. Five years earlier, he charged Robert W. Tucker with "realpolitik" for defending a possible attack on a Libyan plant evidently manufacturing chemical weapons. After calling Tucker the political realist he avowedly is, thereby clarifying what D'Amato himself is not, D'Amato turns querulous. Tucker "may be conveying to the reader a view that legal considerations are a dispensable form of rhetoric."^[FN4] However, readers may also conclude that, in Tucker's view, "legal considerations"—meaning the operative rules of law—permit the use of force in some instances, including this one. Not only do I think this was what Tucker wanted readers to conclude,^[FN5] it is a view that D'Amato himself seems to support in another context, namely the United States' invasion of Panama.^[FN6]

In D'Amato's opinion, a political realist would simply dispense with legal considerations. Since Tucker is a political realist, he cannot take law seriously. The problem with this syllogism is that Tucker is not just a political realist, and he does take law seriously. Devising a caricature of Tucker and then assailing it, instead of complementing Tucker for a hardheaded appreciation of law and disagreeing with him on particulars, is itself a rhetorical strategy. It may also be rhetorical blunder, unlikely to win D'Amato very many hardheaded supporters. A knowing political realist might devise loose rhetoric about international law to discredit its rules, but it seems unlikely anyone would bother. More plausibly, enthusiastic but indiscriminating rhetoric from international law's supporters invites political realists to ignore legal considerations. This may be what D'Amato has in mind when, in his Preface, he claims that "much of what passes as 'international law' is little more ^{*184} than international rhetoric."

^[FN7] Rendered vacuous by the twinned terms "much" and "little," any such claim can itself only be rhetorical. Moreover, it is a risky claim to make, for it creates the distinct impression that D'Amato has joined with political realists against international law in order to save it from its admirers. Compounding the confusion, in his discussion of the

Panama invasion and its critics, D'Amato tells us that "Professor Farer has been carried away by the rhetoric of statism."^[FN8] "Hegelian"^[FN9] as well as "tautological,"^[FN10] statism is a sin that political realists and international lawyers jointly commit in their service to the status quo.

If anyone has gotten carried away by rhetoric, it may be D'Amato, who shows no signs of recognizing this tendency in himself. Instead, D'Amato seems to believe that the mark of his realism is close attention to the facts. D'Amato's discussion of the Panama invasion illustrates this well:

We are better off with rules of international law that at least point us to important factual and contextual considerations than we are with rules that point us only to an endless series of subrules, explanatory rules and learned commentary regarding the interpretation of all of those rules—commentary that then itself must be interpreted. . . . The factual situation of the people of Panama cannot be found by consulting textbooks on the legality and exceptions regarding the use of force in international law.^[FN11]

Rules always point to factual considerations by virtue of their propositional content. Clearly some rules refer to other rules and the relations among rules, but these are facts to which any given rule may point as warranting consideration. Rules must be interpreted with respect to status and function. Are they legal? For what do they stand? Scholars ("academic apologists")^[FN12] must examine the propositional content of the rules in question, not to mention the content of other rules and any number of other statements about these rules and their relations.

*185 Furthermore, the propositional content of rules must also be interpreted with respect to a larger world of facts—factual claims not confined to rules and their relations. Are the facts proposed by the rule contestable? Are they relevant to factual conditions claimed for the world? Are the latter claims contestable? If D'Amato means to say that scholars spend too much time and energy on the first set of interpretive tasks, and not enough on the second set, one can see the force of his position and the source of his frustration without necessarily having to agree with him in every instance. If, however, D'Amato wants us to believe that there are facts about Panama, for example, that need no interpretation, he can be right only in the most trivial sense. Any fact that bears significantly on the invasion (notice the interpretive freedom that the term "significant" affords) is subject to contestation on grounds of accuracy, relevancy and weight. Facts are obviously not equal in weight. D'Amato insists on a metafactual criterion for assigning weight to facts. What people do counts more than what they say.^[FN13] D'Amato is not alone in making this claim, and I have addressed its conceptual inadequacies elsewhere.^[FN14] I turn here to the practical difficulties that arise from insisting on such a criterion. According to D'Amato, "what I am suggesting requires research into the history of governmental interactions, the facts that occurred, the settlements that were reached, the agreements that were entered into."^[FN15] History is a matter of words and thus a matter of choices about which words to use, which events to render into words, and so on. Settlements and

agreements are typically events that cannot be extricated from the words used to record their occurrence. We are left with no criterion: facts are the facts to which we should give weight.

D'Amato goes on to say that "the researcher should be highly skeptical about the negotiating positions taken by the governments involved, their unilateral proclamations, the briefs they file in a court or arbitral tribunal, the opinions of their attorneys general or their foreign offices."^[FN16] This is, of course, good advice. Some words count more than others. The point, ^{*186} however, is that weighing words involves judgmental, metafactual criteria. Words count more when more people use them. Words count more when people repeat them exactly. Words count more when people mark the occasions for their use. The work of lawyers is substantially to specify many such criteria, assign them weights and apply them to factual claims. Throughout these papers, D'Amato does this kind of work routinely and effectively. One might wish him to value it more.

Instead, D'Amato constantly urges us to accept reality as he sees it. On the very page from which I have just been quoting, he speaks of "what goes on in the real world."^[FN17] "The truly operative rules," he also asserts, "are the rules that in reality accommodate the most deeply felt interests of the community of states."^[FN18] D'Amato's "real world"^[FN19] is one that scholars in general cannot see, in part because they are prisoners of their "paradigms."^[FN20] More damningly, scholars are members of, or beholden to, ruling elites who "invent" rules—"quasi-rules" as opposed to "real rules"—"for their own self-interest."^[FN21] Real rules should reflect "real values"—values that D'Amato confidently attributes to ordinary people whose world presumably is real, values that get lost in "academic, abstract and formalistic linguistic exercises."^[FN22]

D'Amato's rhetorical appeals to reality undermine his professions of fidelity to the facts. Whether he admires the values and rules for which elites may indeed be responsible, it does him little good as scholar or advocate to deny that these values and rules function as facts in the world we all find ourselves. It does him, and us, an even greater disservice when he loads his picture of reality with insupportable factual claims and inferences. D'Amato's 1983 letter to the New York Times ^[FN23] defending the legality of intervention by the United States in Grenada is an egregious instance.^{*187} The murder of Prime Minister Maurice Bishop by "leftist thugs" (quoting President Reagan) occasioned the intervention.^[FN24] By omission, D'Amato implies that Bishop himself was a worthy man. In fact (this is my factual claim, for which there exists a great deal of support), Bishop was himself a leftist thug, and his murder the result of a falling out among thugs. Yet even this account does not do justice to the facts.

Presidents Carter and Reagan, along with their advisers, had viewed the Grenadian revolution of 1979 with growing suspicion because, at least in its early stages, of the popular fervor it had unleashed. Revolutionary leaders turned against the people and toward Cuba, in part because they styled themselves a Leninist vanguard, in part because officials in the United States had already reacted with hostility. With Cuba and the Cold War ever in mind, these officials tended to believe that popular revolutions are

contagious and unpredictable, that revolutionary leaders almost always sell out the people, and that these "facts" have dire implications for the stability of the region. As the revolutionary leadership slid into thuggery, officials in the United States found their suspicions vindicated. They authorized intervention, not to bring the revolution back on course, but to roll it back entirely.

A number of years later (1990), D'Amato held that "the episode can safely be cited as an instance of limited humanitarian intervention on behalf of the citizens of Grenada," thereby contributing to "the current global revolution of popular sovereignty."^[FN25] Given "the facts" as I have presented them and the "real values" that D'Amato espouses, I see the episode as an instance of intervention against the expression of popular sovereignty. For the usual "statist" reasons, the United States Government misinterpreted this expression of popular sovereignty, thereby substantially fulfilling its own factually misguided prophecy. I cannot imagine why D'Amato thought he could "safely" conclude otherwise, unless he had not bothered to review the mountains of evidence that had accumulated in the several years after the intervention. I see no basis at all for relating events in the Caribbean to the "global revolution" to which he refers, and I fail to see the use of depicting this revolution as a triumph of popular sovereignty over statism. Indeed, I believe that the doctrine of popular sovereignty has consistently worked to strengthen states and support the state system since the end of the 18th century.

*188 Writing for the Times soon after the intervention, D'Amato may be forgiven for undue reliance on President Reagan's factual claims. Nevertheless, those "facts" induced D'Amato to propose an argument in favor of the intervention's legality that is certainly more sophistic, even "unreal," than anything other scholars have ever produced in defense of "statist" interventions. D'Amato noted that international law permits any government in power to invite foreign military assistance. If Bishop had not lost his life, "he might well have invited the United States into Grenada to protect him."^[FN26]

D'Amato then asks, does Bishop's death "erase an invitation that otherwise surely would have been extended? Is there not a constructive invitation to the U.S. to preserve the legitimate government . . . ?"^[FN27] The problem with D'Amato's doctrine of constructive invitation is that it invites a meretricious and self-serving construction of the facts by any government already disposed to intervene. Given my account of the facts, Bishop might well have invited Cuba (which already had official advisers on the scene), rather than the United States, into Grenada. If he had done so, and if Cuba had responded with a substantial infusion of military personnel, officials in the United States would surely have interpreted these deeds in the worst possible light. If Cuba had intervened after Bishop's death and not the United States, and if Cuba had offered D'Amato's doctrine of constructive intervention as its rationale, I doubt that D'Amato would have defended the claim. I doubt that anyone but an "apologist" for the Cuban government would have done so.

As a "linguistic exercise," the doctrine of constructive invitation is transparently oriented to the interests of particular governments and their construction of the facts. Any defense of a government's actions is apologetic, I suppose, but factual credibility and apparent

disinterestedness make some defenses more persuasive than others. An utterly unpersuasive defense calls for the scorn that D'Amato is so accustomed to heaping on others. D'Amato reprinted his letter to the Times without the slightest indication that he has changed his mind either about the facts or the doctrine of constructive invitation. He has passed up an important opportunity to review a precipitate intervention of his own in the "real world" of public affairs. More than a decade later, we might have expected a more fastidious regard for the facts—or, more properly, for the selection and arrangement of factual claims—and then, just possibly, an admission that some ideas do not stand up to the test of time.

*189 D'Amato also has an oft-expressed fondness for contemporary scholarship that brings the assumptions and analytical power of modern economic theory to the study of law. In *State Responsibility for Exporting Nuclear Power Technology*, what D'Amato and his co-author, Kirsten Engel, claim for fact casts doubt on their depth of understanding. They note "the fact that a reasonable person would prefer to avoid a serious physical injury than to receive monetary damages as compensation."^[FN28] Rational choice theory states, not as a fact, but as a theorem, that a reasonable person would be completely indifferent as to receiving a fully compensated injury and not being injured at all. We could hypothesize that a reasonable person might guess that the chances of better-than-full compensation outweigh the risk of worse-than-expected injury, but we would also expect that any given person's tolerance of risk, assessment of life prospects, information about compensation in similar cases, and so on, would significantly affect that person's decision calculus. Research might uncover a statistical pattern with respect to such choices, but such a pattern constitutes a "fact" only in the most provisional sense. If D'Amato fails to grasp simple concepts indispensable to rational choice theory, I begin to wonder if he understands the difficulty in reconciling the uncompromisingly positivist character of that theory with his own naturalist inclinations.

I cannot say whether D'Amato is always cavalier with the facts (I have focused only on matters that I have recently given some attention to myself), but I do not think it likely. I certainly do not want to leave the impression that D'Amato's considerable reputation as a scholar is undeserved. To this end, I conclude with a comment on one of the essays that I think shows D'Amato at his very best. Indeed D'Amato's essay on preparations for a war crimes tribunal dealing with atrocities in Bosnia (written in April, 1994) reveals him to be a striking contemporary version, not of Locke (even if he sees himself a Lockean), but of Grotius.

Just as it was for Grotius, D'Amato's overriding concern is the human cost of war. Quite plausibly, D'Amato reasons that pushing for the tribunal, as justice requires, "has the practical effect of prolonging the war,"^[FN29] because alleged criminals can expect to be prosecuted once they have made peace. D'Amato deftly performs an "economic" (i.e., rational choice) analysis of the situation to support this conclusion, and he suggests that we think of the tribunal as a "bargaining chip."^[FN30] If the tribunal were *190 made credible, then an offer to shut it down might induce the war's beneficiaries to make peace. War criminals would be rewarded for ending a war sooner than later; punishing them for damage already done is not worth the additional costs of war, including more atrocities.

D'Amato acknowledges that this solution is "distasteful"[FN31]—so distasteful that no one in a responsible position could face down adverse public opinion in striking the bargain. In the absence of a properly instrumental analysis, D'Amato worries that some "officials may be proceeding under the assumption that the tribunal cannot be negotiated away, while others may be in the process of giving it away without getting anything in return." [FN32] Either way, the "lack of institutional clarity could result in an unnecessary prolongation of the brutal war in Bosnia." [FN33] Responses to D'Amato's essay were marked, as he notes "by the temperature of their rhetoric." [FN34] In condemning war and not its perpetrators or, for that matter, his critics, D'Amato puts the rhetorical emphasis where it belongs.

As recent scholarship clarifies, Grotius also combined a fierce hostility toward war and a coolly instrumental orientation toward its mitigation. [FN35] Whatever might prove useful is worthy of consideration: justice is justice done. Grotius was brash (what for the time could be more brash than his hypothesis that natural law would hold even if there were no God), [FN36] immensely learned, but not systematic: nature is complexity, not harmony. Grotius immersed himself in the affairs of his time: natural justice meets its test in what people do to each other and what we all do about it.

What matters to us about Grotius is the thrust of his work and not its particulars. My sketch of Grotius fits D'Amato better than any other English-writing international legal scholar today. If this judgment even comes close to the mark, then I am disposed to overlook D'Amato's flaws and foibles, just as we all forgive the same ones in Grotius. Instead, it is the cumulative effect of D'Amato's great body of work—paper after paper, volume upon volume—that warrants attention, now and far into the future.

[FN31]. Department of International Relations, Florida International University, Miami, Florida 33199 U.S.A.

[FN1]. L. C. Green, Foreword to 1 Anthony D'Amato, *International Law and Political Reality: Collected Papers* at v (1995) [hereinafter *Collected Papers*].

[FN2]. *Collected Papers*, supra note 1, at ix.

[FN3]. Anthony A. D'Amato, *The Moral and Legal Basis for Sanctions*, 19 *Fletcher Forum of World Affairs* 19 (1995), reprinted in *Collected Papers*, supra note 1, at 140, 145.

[FN4]. Anthony A. D'Amato, *International Law in the Public Forum: The New York Times and the Libyan Chemical Weapons Plant*, 83 *Am. J. Int'l L.* 527 (1989), reprinted in *Collected Papers*, supra note 1, at 158, 160.

[FN5]. I should note here that, while Tucker was my first teacher of international law and relations, I do not presume to speak for him on this or any other matter.

[FN6]. Anthony A. D'Amato, *The Invasion of Panama was a Lawful Response to Tyranny*, 84 *Am. J. Int'l L.* 516 (1990), reprinted in *Collected Papers*, supra note 1, at 180, 185-89.

[FN7]. 1 D'Amato, supra note 1, at ix.

[FN8]. D'Amato, supra note 6, at 183.

[FN9]. Anthony A. D'Amato & Kirsten Engel, *State Responsibility for the Exportation of Nuclear Power Technology*, 74 *Va. L. Rev.* 1011 (1988), reprinted in *Collected Papers*, supra note 1, at 258, 287.

[FN10]. D'Amato, supra note 6, at 190.

[FN11]. *Id.* at 187.

[FN12]. *Id.* at 181.

[FN13]. Anthony A. D'Amato, *Nicaragua and International Law: The 'Academic' and the 'Real,'* 79 *Am. J. Int'l L.* 657 (1985), reprinted in *Collected Papers*, supra note 1, at 170, 176-78.

[FN14]. Nicholas G. Onuf, *Book Review*, 88 *Am. J. Int'l L.* 556 (1994) (reviewing Karol Wolkfe, *Custom in Present International Law* (2d ed. 1993)). See generally Nicholas G. Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (1989).

[FN15]. D'Amato, supra note 13, at 177.

[FN16]. *Id.*

[FN17]. *Id.* (emphasis added).

[FN18]. *Id.* (emphasis added).

[FN19]. See also Anthony A. D'Amato et al., *War Crimes and Vietnam: The Nuremberg Defense and the Military Service Resister*, 57 *Cal. L. Rev.* 1055-1110 (1969), reprinted in *Collected Papers*, supra note 1, at 4, 50; Anthony A. D'Amato, *Against the Crime of Silence*, 57 *Cal. L. Rev.* 1033 (1969), reprinted in *Collected Papers*, supra note 1, at 58, 62.

[FN20]. D'Amato, supra note 6, at 189.

[FN21]. *Id.* at 188.

[FN22]. *Id.* at 186.

[FN23]. Anthony A. D'Amato, *Intervention in Grenada: Right or Wrong?* N.Y. Times, Oct. 30, 1983, s 4, at 18, reprinted in *Collected Papers*, supra note 1, at 190, 190-91.

[FN24]. *Id.* at 190.

[FN25]. D'Amato, supra note 6, at 189-90.

[FN26]. D'Amato, supra note 23, at 190.

[FN27]. *Id.*

[FN28]. D'Amato, supra note 9, at 302 n.148.

[FN29]. Anthony A. D'Amato, *Peace v. Accountability in Bosnia*, 88 Am. J. Int'l L. 500 (1994), reprinted in *Collected Papers*, supra note 1, at 207, 214.

[FN30]. *Id.* at 211-14.

[FN31]. *Id.* at 212.

[FN32]. *Id.* at 214.

[FN33]. *Id.*

[FN34]. *Id.* at 215.

[FN35]. *A Normative Approach to War: Peace, War and Justice in Hugo Grotius* (Onuma Yasuaki ed., 1993).

[FN36]. *Hugonis Grotii, De Jure Belli ac Pacis Libri Tres*, Prol. 11 (1913).