

Northwestern University School of Law

Public Law and Legal Theory Research Paper Series

THE NEED FOR A THEORY OF INTERNATIONAL LAW

Anthony D'Amato

Leighton Professor of Law

Contact Information:

Web page: <http://anthonydamato.law.northwestern.edu/>

Northwestern Law School
357 E. Chicago Avenue
Chicago, IL 60611

Phone: 312-503-8474

THE NEED FOR A THEORY OF INTERNATIONAL LAW

Anthony D'Amato

ABSTRACT. A coherent theory of international law would have explanatory power. It should indicate where international rules come from, how they are changed, and how they are enforced. The theory could usefully employ theoretical advances from other disciplines, such as systems theory, n-person games, network theory, emergence, complexity, and inference to the best explanation.

As international law gains prominence in global discourse, its detractors claim all the louder that if it were really law, it would have an explanatory theory. The theory would explain what international law is, where it comes from, and why and how it constrains state behavior. Their criticisms have put traditional scholars on the defensive. They agree, perhaps too readily, that their subject is characterized by a cacophony of partial theories that seem to go in different directions. At a recent symposium, nearly all participants agreed that international law is ineluctably fragmented.¹ They despaired of ever seeing a theory that could glue all the pieces together. Perhaps, some suggest, international law is inherently pluralistic. Yet clearly pluralism at the basic level of theory is likely to be an excuse for incoherence.

¹ Symposium: *Diversity or Cacophony? New Sources of Norms in International Law*, 25 MICH. J. INT'L L. 845 (2004).

A. TRADITIONALIST MISGIVINGS

Up to 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 such as the fixity 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. A few scholars including T.J. Lawrence and Georg Schwarzenberger tried to collate all the principles and turn them into postulates on the model of David Hilbert's basic postulates of mathematics. But they were ultimately unable—as indeed Hilbert was unable in his own field—to show that the postulates were either substantively linked or mutually exhaustive. As a result, today's scholars view the classic speculations about principles as amounting to little more than chapter headings.

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.² 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. Moreover, if consent supervened upon the will of states to be bound, there was no logical reason why a state could not withdraw its consent to any particular rule whenever it found the rule to be inconvenient.

² See Percy Corbett, *The Consent of States and the Sources of the Law of Nations*, 6 BYIL 10 (1925).

A different attempt at reductionism was the late Myres McDougal's insistence that all the rules of customary international law collapsed into a single rule of reasonableness.³ 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. The latter, as McDougal thought everyone in the world would readily acknowledge, was simply an unreasonable *state*.

Martti Koskenniemi⁴ and David Kennedy⁵ have argued for a quite different kind of reductionism within the classic tradition. They view international law as primarily a discourse which can be deconstructed to reveal the antithetical argumentative positions of the competing states that gave rise to the rule. Koskenniemi locates the antagonistic forces at opposite ends of a spectrum, which he labels apology and utopia. Apologists base their contentions on raw state practice. Utopians add norms (morality, justice, security) that transcend the empirical data.

Although provocative on an academic level, it is hard to see how the Koskenniemi-Kennedy reductionism would be of any help to international lawyers.⁶ Koskenniemi himself concedes the impracticality of his theory. Not only is his theory too abstract, but even on its own terms all international legal discourse surely takes place in between apology and utopia. Neither side would want to move too closely to either of the polar extremes for fear of conceding the majority of the spectral space to the other side.

³ See Myres S. McDougal, *Studies in World Public Order* 778 (1960).

⁴ See Martti Koskenniemi, *From Apology to Utopia* (1989).

⁵ See David Kennedy, *International Legal Structures* (1987).

⁶ Professor Kennedy candidly reveals an incident early in his teaching career at Harvard Law School when Professor Abram Chayes came "bursting into my office to declaim, 'why would you want to deconstruct international law, we've hardly got it constructed yet.'" David Kennedy, Tom Franck and the Manhattan School, 35 *Int'l L. & Pol.* 397, 426 (2003).

B. THE ATTACK OF THE LEGAL REALISTS

If traditionalists are concerned about the absence of a coherent theory to support international law, legal realists such as Myres McDougal, W. Michael Reisman, Philip Trimble, John Carter, Jack Goldsmith, and Eric Posner offer an easy way out. They argue that there is no need for a theory inasmuch as international law has no independent force. The only forceful thing in international relations is force, not law.

American legal realism goes back to the academic debates of the 1920s and 1930s when it was argued that law is just a mask for power. But legal realism eventually ran out of steam because of its failure to generate a research agenda. Once mainstream scholars agreed with the realists that power influences law, there was little more to say. Power, along with morality and fairness, are generally viewed as exogenous to the legal system. But within the legal system—for example, in the discourse that takes place in a courtroom—the attorney who spends time arguing from power is implicitly conceding that she does not have good legal arguments to fill the space. Or, in a negotiation, the side that claims it should 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 in a courtroom or around a negotiation table.⁷

As legal realism was overstaying its welcome in domestic jurisprudence, a few scholars saw an opportunity to make hay in the then marginal field of international law. Myres McDougal, a legal realist specializing in property law at Yale during the 1930s, decided during the war years that he could effectuate an international-law power grab. One of his core theses was that an international rule 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 struck some of his international listeners as a new idea, just as its resuscitation by Jack Goldsmith and Eric Posner has received the attention often accorded to a new idea.⁸ Perhaps to Goldsmith and Posner it was a new idea; their footnotes and indices betray no awareness of McDougal's voluminous writings.

The classical realists, Machiavelli and Hobbes, 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. But 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—applied 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 so highly contextualized, qualified, and nuanced, their operative message often has to be dug out.

⁷ For additional argument, see Anthony D'Amato, *The Limits of Legal Realism*, 87 *Yale L.J.* 468 (1978).

⁸ Jack Goldsmith & Eric Posner, *The Limits of International Law* (2005).

Yet the message once unearthed is always the same: that powerful states enjoy and ought to enjoy an interpretive advantage if and when international law is cited against them. As Reisman explained at a panel of the American Society of International 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.”⁹

Philip Trimble and John Carter have offered a modest retreat from the unabashed exceptionalism of McDougal and Reisman.¹⁰ They use the term “domestication” to refer to the incorporation of an international norm into a state’s own legal system. 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” 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.”¹¹ Thus under the Trimble-Carter view, a rule of international law undergoes a change of meaning when it is domesticated. Even multilateral treaties ratified by the United States, such as the Geneva Conventions, are 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 cat the only international law remaining is the grin.

⁹ W. Michael Reisman, *The View from the New Haven School of International Law*, 86 ASIL PROCEEDINGS 118 (1992).

¹⁰ The leading casebook in American law schools is Barry E. Carter, Phillip R. Trimble, & Curtis A. Bradley, *International Law* (4th ed. 2003).

¹¹ See Memorandum, Standards of Conduct for Interrogation, Aug. 1, 2002, at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>

If Reisman, Trimble, and Carter have left international law in critical condition, Jack Goldsmith and Eric Posner seem eager to deliver the last rites. They see no shadow of compulsion in any rule of international law. Rules are, at best, mere suggestions for ways to cooperate with 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, “The first point that we want to make is that the government should never comply with international law just for the sake of international legality.” Judge Douglas H. Ginsburg responded that the Goldsmith-Posner conception “is not law in anything other than the most misleading way.”¹² Indeed, if we substitute “international strategies” for “international law,” the Goldsmith-Posner project would probably commend itself to a broad spectrum of viewpoints. But the punch-line would vanish, for Goldsmith-Posner insist that international law is not congruent with international strategy without telling us what the difference in the two terms might possibly be. In short, their claim has become controversial just because they have by fiat defined international law as international strategy.

Is the reason for the high visibility of the legal realists their apparent ability to take a jurisprudentially discredited idea and use it to put traditional international scholars on the defensive? If so, traditional scholars of international law need to respond.

¹² American Enterprise Institute, *Debate on the Limits of International Law*, March 30, 2005, at <http://www.aei.org/events/filter.all.eventID.1023/transcript.asp> (site last visited on May 10, 2005).

C. CONSTRUCTING A THEORY

To respond by criticizing legal realism is not enough. An affirmative defense is needed. Scholars of international law need to construct a theory that explains why international law is law, where it comes from, how it is proved up, and how it works. Here are eight signposts along the route to a comprehensive theory:

1. *Evolutionary epistemology.* The previously-noted failures of deductivism and reductionism in effect say that the rules of international law were not handed down to Grotius from a mountaintop but rather slowly emerged as societies evolved. When the early nomadic hunter-gatherers gradually settled into sedentary agricultural communities, group interactions gave rise to certain legal rules that were found to be useful in facilitating trade and helping to avoid war. Archeologists have discovered among the earliest records from Mesopotamia in the period 3,000 B.C. to 1,000 B.C. numerous treaties of peace and of annexation, agreements for the return of fugitives, and delimitation of state boundaries. There was even a customary rule of treaty interpretation. For instance, a clay-tablet treaty between the kingdom of Hatti and the Land of the Seha River of 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.¹³ This could be history's first expression of Justice Scalia's theory of originalist interpretation.

Peace treaties are not coercive agreements, as some observers assume; rather they reflect egalitarian trade-offs 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 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 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 the incontrovertible baseline, we immediately find that there are gaps in the record regarding the formative processes of customary law.

¹³ GARY BECKMAN, *HITTITE DIPLOMATIC TEXTS* 85-86 (2d ed. 1999).

2. *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.¹⁴ 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 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.

¹⁴ See Peter Lipton, *Inference to the Best Explanation* (2d ed. 2004).

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 and receiving messages and translating and delivering them. 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.

3. *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 (of which more below). 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 types of rules.¹⁵

4. *Power vs. law.* A comprehensive theory of international law must confront the dichotomy and yet partial symbiosis between law and power. Only in the strange world of some legal realists does power somehow *regulate* law. Instead, most lawyers, judges, and philosophers of law through the ages have agreed that law regulates power. For Machiavelli and Hobbes, the definition of law was precisely a mechanism for regulating power. But the opposite is not true: power cannot “regulate” law because power is a brute-force instrument lacking an inherent regulatory structure. Indeed, Machiavelli took the analysis further, arguing that the Prince’s personal power is *enhanced* by the rule of law. For 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 a set of Type I rules, the Prince or Leviathan may achieve vast power. True, they have 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.

¹⁵ For further argument, see Anthony D’Amato, *International Law: Process and Prospect* 27-55 (2d ed.1995).

Power is *formally* harnessed in the service of law only when a person or a state decides not to respect a Type I rule. Then law-enforcers, operating under Type II rules, use their physical power to coerce people into obeying the Type I rules or to punish them for disobedience. This works the same way in international law as it does in domestic law and is indeed the underappreciated key to the proof that international law is real.

5. *N-person games.* Suppose in a world consisting of two states, both A and B recognize 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 existing rules. Yet when there are only two players, the two types of injuries are congruent. The seizure of the ship is ipso facto the destruction of the rule. State A cannot credibly say to B that it only intends to violate this one rule and not all the others. To the contrary, A's seizure of B's vessel is sufficient to demonstrate A's willingness to be an outlaw across the board. A and B, in their bilateral world, are thus forever poised at the tipping point of war.

A theory of international law would be qualitatively strengthened by going beyond the simple bilateralism employed by Goldsmith and Posner.¹⁶ Just the addition of state C makes it theoretically possible to separate the strategic injury from the legal injury. For with C as a player, the new triangular matrix can assign different weights to the two types of injuries. This follows from the fact that in any given dispute between

¹⁶ Goldsmith and Posner use two-person game theory to try to prove that international law is just politics. See Goldsmith & Posner, *supra* n.8. Although they do not deny that there are more than two states in the world, they retrofit most of their real-world examples into a two-person game, a game of United States vs. Everyone Else. 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.

two out of three players, the third state may not wish to make a political choice between A or B although it may want to secure its own interest in the integrity of the rule.. (To be sure, a third state could also have a *strategic* interest similar to the British game of balance-of-power in the eighteenth and nineteenth centuries. Whenever two political coalitions formed on the continent, Great Britain would align itself diplomatically with the militarily *weaker* coalition.) In our posited A-B dispute, it is reasonable to suppose that C has a distinct interest in rule-preservation for, after all, C bought into that rule in the first place. Hence, other things equal, we may expect C to come to the legal support of B by bringing diplomatic pressure on A to desist from breaking the rule. Thus, A's calculation to break the rule must assign distinct weights to the likely opposition of both B and C. This can add considerably to A's expected cost of breaking the rule and in some cases deter A from doing so.¹⁷

Although a third player may be necessary to champion the cause of rules in an international legal system, it may not always be sufficient. When state A decides to seize one of B's vessels, A may already be counting on some kind of political hold over C that makes it unlikely that C will stand up for the preservation of the legal rule. Thus although C's entrance into the world introduced the possibility of its playing the role of rule-enforcer, there is no guarantee that C will actually accept that responsibility. The best thing to do from the viewpoint of world order is to add more players. As D, E, F, and G enter the world, there are more entities that may each or in combination perceive

¹⁷ 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. See *Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, 1970 I.C.J. REP. 3. 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).

an interest in the application, preservation, and enforcement of rules. Their entry into the increasingly complex configuration of states vastly increases A's strategic uncertainty. A's planned violation of a particular rule could cause an unpredictable shift in the political relationships between other pairs or triads of states. For instance, if A seizes B's vessel on the high seas, the damage done to the rule of freedom of the seas may cause an unexpected diminution of the military value of D's navy vis-à-vis E's army. State D might then take the leading role in preserving the rule. As more states come into the world, it becomes increasingly hard for any single state, even with sophisticated military simulations,¹⁸ to trace through all the effects of any planned rule-violation. This difficulty in practice tends to reify the rules. The increasing ease of taking the rules as written as opposed to deconstructing them becomes a force for catalyzing international stability. Indeed, in applications of complexity theory to cutting-edge research in biological, chemical, and physical systems, experimental scientists have been counterintuitively discovering that adding complexity to a given system usually increases rather than decreases its stability.

6. *Network theory.* Karl Popper famously insisted that studying a subject requires demarcating it from all other subjects.¹⁹ Otherwise, considerations around the edges of one subject would blend into another subject, fuzzing the entire analysis. His advice as applied to law suggests that legal rules should be distinguished from rules of

¹⁸ Any simulation will turn upon the particular values that are programmed into it for various rule-violations. These values are speculative, leading to outcomes that are non-computationally recursive. Even under ordinary combinatorial mathematics apart from recursiveness, the number of possible strategic interrelationships among 50 states is non-computable in the practical sense that it exceeds the number of atoms in the universe. .

¹⁹ See Karl Popper, *The Logic of Scientific Discovery* 4-15 (1959).

etiquette, propriety, prudence, morality, strategy, civic virtue, and even so-called “soft law.” 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. But the state does care when one person 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.²⁰

²⁰ A network of legal rules is a non-scalar network. 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. (Earthquakes are analogous: earthquakes measuring 6 on the Richter scale are twice as powerful as those measuring 3, but they occur only half as often.) 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.

While Type I rules of the system differ from each other at their own level, what connects them into a network is their equally potential selection as candidates for reprisals at the Type II level.

7. *Reprisals.* After repeating his famous thesis that a legal rule must always be coercive, Hans Kelsen in 1948 argued that coercion in international law takes the form of forcible reprisals.²¹ A state that commits a delict (a violation of a Type I rule) thus may legally be sanctioned by other states' modifying or taking away any Type I rule that benefits the violator. A reprisal is an action that would be illegal standing alone but becomes legally privileged when used to deter or punish a delict.²² To put Kelsen's argument in its strongest form, reprisals are both necessary and sufficient in providing the coercion that makes international law really "law."

The international system of reprisals is governed by Type II rules. One of the Type II rules, as it has been honed by custom over centuries, provides that the Type I rule selected as the reprisal mechanism need not be substantively related to the original Type I delict. Relatedness is desirable but not required (as we will see below in the Iranian hostages example). There are three other Type II factors that are more important than relatedness: necessity, proportionality, and efficacy. These factors may seem vague, and yet they have been fleshed out by the many thousands of instances of reprisal that have occurred in international relations over the centuries. Indeed it is noteworthy that states seem to have had little difficulty over the years in perceiving when the combination of

²¹ HANS KELSEN, *LAW AND PEACE IN INTERNATIONAL RELATIONS* 34 (1948).

²² Since the otherwise useful term "countermeasure" can include lawful retaliations (such as reducing foreign aid), it is perhaps overbroad for present purposes. A reprisal is a specific term of art that privileges an otherwise illegal act.

the three factors are satisfied in a given reprisal action. If a reprisal is perceived to go beyond the three factors, states consider it to be a new delict.

A preliminary objection should be raised here—the kind a student impatiently raises in the classroom at the very outset of a discussion about reprisals: How can reprisals be levied against a superpower? Certainly by nothing so crude or futile as dropping bombs upon the territory of the United States. But the assets and values of the United States are not confined to its territory. The United States is vulnerable because of its investments and nationals located all over the world. The United States has major financial investments in foreign-owned companies in nearly every state. More importantly, at any given time there are hundreds of thousands of American citizens either traveling or residing abroad. The Census Bureau reports that in 1998 there were over 56,000 Americans traveling abroad (compared to 46,000 foreign tourists visiting the United States). Even more striking are the figures of American citizens residing abroad as reported by the Bureau of Consular Affairs in 1999. There were 27,600 citizens residing in Buenos Aires, 55,500 in Sydney, 250,000 in Toronto, 48,220 in Hong Kong, 75,000 in Paris, 138,815 in Frankfurt, 45,000 in Tokyo, and 441,680 in Mexico City. Among the smaller countries which could become “hot spots,” the Bureau reports 646 American citizens living in Albania, 1,320 in Bangladesh, 1,600 in Bosnia, 440 in Congo, 2,000 in Cuba, 10,000 in El Salvador, 546 in Gambia, 11,000 in Haiti, 18,000 in Israel (Tel Aviv), 8,000 in Jordan, and 6,639 in Kuala Lumpur, and those are taken from just the first half of the list.²³ To these figures must be added the many thousands of American military personnel and their dependents on foreign bases. How many

²³ See http://www.pueblo.gsa.gov/cic_text/state/amcit_numbers.html (last visited May 23, 2005). These numbers do not even include hundreds of thousands of U.S. military personnel and their dependents in bases all around the world..

American nationals must a country threaten to make the United States take notice? Just 50 were sufficient in 1978 when Iran arrested that number of American diplomatic and consular personnel in Tehran. The hostage-taking led to severe repercussions in the United States including perhaps the defeat of presidential incumbent Jimmy Carter in the election of 1980.

Superpower vulnerability is enhanced by the bluntness of the military instrument. For example, even though the United States could have annihilated Iran with a volley of nuclear ICBMs, such a wholly disproportionate retaliation would not have saved the hostages. The global scatter of assets and persons from all nations has virtually assured the universal efficacy of the international reprisal system. Indeed, in a shrinking world, the reprisal system is likely to become increasingly efficient. Perhaps there is a correspondence between the efficacy of peaceable reprisals and the recent finding that there has been a steady decline in the global magnitude of armed conflict following its peak in the early 1990s.²⁴

The Iranian hostage-taking can give us a closer look at some of the Type II rules.²⁵ First, Iran's initial decision to take hostages was not itself a legitimate reprisal against the United States. To be sure, the Ayatollah Khomeini argued through his representatives at The Hague that Iran was justified in seizing the hostages because of political and religious wrongs that his people had previously suffered at the hands of the United States. But the International Court of Justice had no difficulty in holding that none of the alleged political and religious wrongs were international-law infractions and

²⁴ MONTY G. MARSHALL & TED ROBERT GURR, *PEACE AND CONFLICT* 2005, at 1 (Maryland Univ.).

²⁵ For an earlier extended discussion, see Anthony D'Amato, *Is International Law Really "Law"?* 79 NW. U.L. REV. 1293 (1984), also available at <http://anthonydamato.law.northwestern.edu/Adobefiles/A853.pdf>

therefore could not privilege any reprisals.²⁶ Second, the United States was clearly entitled under Type II rules to arrest and hold hostage at least fifty Iranian diplomats who were at that time on United States territory, then to trade them for the American hostages. This form of tit-for-tat retaliation (often called “reprisals in kind”) has always been a legitimate reciprocal response to a violation of a provision of bilateral treaties, and it works the same way when a rule of custom is transgressed. The problem in the Iranian situation, however, was that a fundamentalist government had taken over in Iran that had no interest in the welfare of Iranian diplomats abroad, all of whom had been appointed by the deposed Shah of Iran. If the United States had arrested them, it would have done Khomeini a favor. It took the United States just a day or two to figure out a reprisal that would comply with the Type II strictures of necessity, proportionality, and probable efficacy. The United States chose the strategy of tit-for-a-different-tat: it froze all Iranian financial deposits in United States banks and secured the cooperation of other nations to freeze Iranian deposits in their own national banks. The thirteen billion dollars total deposits were later unfrozen in exchange for Iran’s return of all fifty unharmed American citizens.

However, some two billion dollars in earned interest attributable to the Iranian bank deposits while they were frozen were not remitted to Iran. This illustrates the previously mentioned fact that two injuries resulted from the Iranian hostage-taking: the injury to the United States, and the injury to the integrity of the network of international rules. If Iran’s original delict had been met with a quantitatively similar reprisal, then only the substantive injury and not the additional injury to the network of rules would have been vindicated.

²⁶ United States Diplomatic and Consular Staff in Iran (U.S. v. Iran), 1980 I.C.J. REP. 3.

8. *Effectiveness.* Whenever a nation contemplates violating a rule of international law, its first strategic task is to calculate the probability of a tit-for-tat reprisal. In most cases, an expected tit-for-tat reprisal is enough to discourage any further contemplation of a delict. In some cases where a nation cares little or not at all about a reprisal in kind (such as the hostages case from Iran's point of view), it must nevertheless undertake an appraisal of a wide array of tit-for-a-different-tat reprisals.²⁷ Since this kind of reprisal can target any Type I rule of international law, the difficulty of calculating its cost adds to the downside of the contemplated rule-violation.

Another factor that makes international rules efficiently coercive is the ability of the retaliating state to graduate its response. For example, there is no need to throw into prison all resident American nationals in order to prevent the United States from committing a Type I delict. Instead, the resident nationals may be subjected to a heavy and rather obvious dose of local bureaucratic red tape, delays in their travel arrangements, lengthy forms that must be filled out, and visa restrictions on their relatives in the United States who might want to visit them.

This is not to suggest that the reprisal mechanism is only effective in discouraging small-scale delicts. One of the biggest non-events of the twentieth century was the decision by the apartheid government of South Africa in the 1960s and 1970s not to relocate its majority black population from the townships to the fenced-in homeland areas. Although doing so might have permanently "solved" the apartheid problem in the eyes of the South African government, the forcible population transfer would have given rise to charges of ethnic cleansing, persecution, and even borderline genocide. The

²⁷ See Anthony D'Amato, *supra* n.15, at 21-25.

gravity of these charges might have led to the largest of all conceivable reprisals: a military attack upon South Africa headed by African states and facilitated by most or all of the developed nations. “Betting the country” was therefore not a reasonable policy.

If reprisals are so effective, why are they not discussed more often in the literature of international law? They are not discussed more often precisely because they are so effective. The vast majority of reprisals never happen. An actual reprisal is the tip of the iceberg in international relations; for every one that attracts attention, there are millions of potential reprisals that never get actuated because they are doing their job of deterring delicts. Louis Henkin’s famous one-liner again warrants quotation: "Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."²⁸

D. CONCLUSION

Eight signposts do not make a theory. Yet neither must the theorist re-invent the wheel. Perhaps the most important (non-coercive) rule in formulating a theory of international law is to refuse to water-down the idea of “law” in order to assuage the detractors. As the foregoing re-examination of reprisals reminds us, international law is indeed a coercive order. The Type I rules interconnect because of the underlying system of reprisals. These rules were not created by logical deductions from a fixed set of principles or postulates. Rather, they are all empirically based. They have survived the

²⁸ LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979).

evolution of states. They all represent interests (or entitlements) of states and people. The many-state game has led to the importance of rules for their own sake rather than as disposables in the politics of power.

While the coerciveness of international norms may check the legal realists, it does not checkmate them. They simply do not take international law seriously. At least some international scholars should accept the challenge of providing a full-fledged theory of international law. Those whose interests are instead directed at specific areas should at least attempt to connect up their research to the current theory dialogue. The theory of international law is not just another research area within the field; rather, it is an organizing conceptualization that can provide coherence—and, dare I say it, *legitimacy*—to any given book or article. Like any part of a hologram, each particular article should contain information about the whole. This information comes from a commonality of questions presented. The questions that the researcher asks about the narrowest of subjects are just reflections of the needed inquiry: what are the rules and norms, where do they come from, and why and how do they work.