that time. He particularly criticized the commitment of the President in putting forth counterproposals to the Soviet initiatives that recently had been presented.

DENNIS G. TEREZ*

Reporter

THE THEORY OF CUSTOMARY INTERNATIONAL LAW

The seminar was convened on April 22, 1988, at 8:30 a.m. by its Moderator, Anthony D'Amato.**

REMARKS BY PROFESSOR D'AMATO

My starting point for this discussion is an observation—international law is declining in importance in U.S. law schools. There are many reasons this is happening, but one extremely important reason is that our discipline is not considered sufficiently rigorous intellectually. We are seen as loose and muddled in our sources of law. We claim to find support for our propositions of international law in literature, polemics, debates, almost anything. It appears that international lawyers will cite almost any source to support a claim of law. Critics see this as nothing more than rhetoric and superficial persuasiveness.

Our colleagues in other fields are confined to statutes and cases, and must defend their propositions with precise analytic techniques. When they see that we are not similarly restrained, they lose respect for those of us working in the field of international law. This leads to the decline of the subject in the law schools.

What can we do about this situation? Today we explore the concept of custom, which is often cited as an example of this intellectual nebulosity by our colleagues. Grigori Tunkin, who is here today, pioneered in this field long before I did my work on the subject. Custom is something that is strange to many of our colleagues. While they can look upon treaties as something vaguely familiar, much of international law is nontreaty. Even the interpretation of treaties is generally nontreaty in origin.

ISAAC DORE:*** There is an additional factor in the decline in importance and prestige of international law in American law schools. It seems to me that the psychology of the perception is conditioned by the lack of any central law enforcement mechanism, such as our colleagues normally find in their own disciplines.

Professor D'AMATO: That's true. In addition, they look to our lack of legislation and our scant case law. All of that is endemic to our situation. My conviction is that our colleagues are the ones who should be on the defensive. Their disciplines are generally very mechanical, almost a kind of ersatz law. We, on the other hand, engage in what I would call pure law—law that is fundamentally growing from the interactions of states, who both create and enforce the law over time. It is law within a society, not law imposed by authority. According to Hegel, what we have here is that the creator-subjects of the international legal order are always unfolding the law as it is manifested in interactions with other creator-subjects. Hegel's process can apply to individuals, too. In the 11th century, the common law was derived in this manner. Parliament then stepped in and took over the process. For a long time now, the only pure common law has been international law.

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We could have expected to see upon the international scene nothing but chaos and anarchy, everybody fighting with each other all the time and nobody having any idea about what’s going on—in other words, Hobbes’ state of nature. But that’s not true. We look on the international scene and see enormous regularity. We see for the most part peace and accommodations of a most substantial nature. Nobody really contests that a state is entitled to borders around it, that states have certain exclusivity claims. No one contests that a state may represent its nationals who go abroad. No one contests that the high seas are open to all. There are many things that no one contests.

Looking at the scene in systemic terms we find that these aggregates of units that we call states—but they are really combinations of people who have certain claims to territories—are getting along with each other in some kind of way. We don’t yet know how, because we haven’t introduced any notion of law. But somehow they’re getting along. They’re interacting, and they seem to be behaving in some kind of orderly way. So we say to ourselves: “Aha! Something’s going on here that’s not explained.” There is a systemic notion here. These units somehow are interacting in a fashion that cannot be explained by the laws of chance or randomness. We are witnessing ordered behavior.

What accounts for this order? What accounts for this sense that certain things are norms that are adhered to? We don’t have to attribute any kind of consciousness to the unit-states. It’s just that somehow these units are behaving in a purposeful way. They don’t clash with each other at all possible points of interaction, although they may clash on some points. And so we say that there must be some laws in the system. There must be something that accounts for the regularities of this behavior. What are these laws?

Well, that’s our problem: to figure out what laws account for these regularities. And so we start looking at what states do and what they claim. The laws could have been anything. We don’t dictate what international law is; we find it out there. International law is implicit in the interactions of these state units. Somehow they’re interacting in ways that tell us that there is regularity there. If we were physicists we would say the same thing. If we saw a bunch of microbes, and they were acting this way, we would say that there must be some laws regulating their behavior. If we see the planets going around a certain way, we say, well, there are certain laws of gravity, certain quantum theories, that account for that behavior. Instead, we’re looking at states, and we say the same thing—that there are certain laws that seem to account for this behavior.

Norms of custom are manifested by the behavior of these units and their interactions with each other. Not only do the norms characterize the interactions of the units, but they tend to define the units. In other words, this evolving customary law that we get out of the system tends to define what a state is. This is hard to convey because people who are unfamiliar with Hegelian logic and dialectic theory tend to think too positivistically—they think that law is something from above. But if you look at law growing out of the interaction of these units, you will see that the very same law that is in the process of always developing is also in the process of always defining, so that a state is defined as a territory that has a right to certain boundaries, and a right to certain claims over the individuals in it, and certain kinds of competences with respect to other states with other boundaries and certain kinds of competences with respect to other individuals who find themselves in that state. And that notion begins to regularize itself and define what it is that these units are doing.

The norms evolve over time as the units modify their behavior. The 19th-century definition of a state that grew out of the interactions was: “Everything that goes on
within our borders is our business and international law only applies to those times when we bump up against other units. We bump up against them on the high seas or when there's a war or at a few other times. But our boundaries carve out a certain territory that's our own and doesn't affect other territories.” But, however regular that definition may have seemed to theorists like Oppenheim, it has exploded in the 20th century. We now have a concept of a state that is more defined in terms of the state's interests in its own people and their life concerns, so that the human rights notion then becomes one that expands, and in some sense makes more complex, the notion of what a state is.

Peter Weiss:* I have a question about your theory of the self-defining nature of customary international law, based on your analogy with the behavior of atoms and planets. Atoms and planets behave in a certain way because, as most people would say today, that is the way nature behaves, and we have to discover the secrets of nature. Other people would say, it is also because that's the way God willed it, and it's a manifestation of the divine plan.

Now, that corresponds to a certain interpretation of customary international law. You can have purely natural customary international law and say the reason these rules are developing as they are is because they correspond to the nature of society or the nature of human beings, or to a working out of the divine will.

But then there is another possible interpretation of why things tend to behave in regular ways. It is totally different from what you can say about microbes or atoms or planets: states tend to behave in a certain way because the powerful states impose their rules on the less powerful. That could be either a North-South relationship or a Capitalist-Socialist one, or whatever. What importance do you attach to the element of the more powerful defining the rules to the less powerful?

Professor D'Amato: That's something De Visscher talked about 30 years ago in Theory and Reality in Public International Law, claiming that it was more realistic to note that more powerful states are more powerful. I don't attach too much importance to that. It seems to me that international law is very democratic in a strange sense—the participants in the system tend to regard at least the international rules as applying to all of them. All of the units. It's very hard to say that certain rules only apply to some—only give certain units advantages and not other units.

Now, this gets very complicated. The notion of a system is one that certainly can tolerate large units as well as small. We can have the planet Jupiter and the planet Mercury and there's a very big difference in size, but they seem to be following the same laws of gravity. There's no exception for one of them as opposed to the other. When we talk about international rules, we seem to be saying that the same rules, the same entitlements that define one state define all states.

It's very hard to conceive of a bundle of entitlements as defining some units but not others. Now, Myres McDougal tried to get away with something like this. He tried to say that there are certain situations where the rules benefit, say, the United States but don't benefit the Soviet Union. And I think that all of us, except for Professor McDougal, found that to be totally unpersuasive. How do you even make a rational argument when you're saying that the other side of the argument isn't entitled to the same debating time, the same rules of the game, that you're entitled to? It's very hard to make those claims. That doesn't mean that some states aren't more powerful than others. But it's an incredibly interesting fact that whenever one powerful state tries to impose its rules on anyone else, it finds that those rules get reflected back on it.

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A sort of a watershed example of this is what happened in Nuremberg. When the victorious Allies decided to prosecute the leaders of the Third Reich, many thoughtful leaders in the United States and in other countries said: “Wait a minute. If we take this step, aren’t we committed to the proposition that in the future we might be the ones who are in the dock? As soon as we prosecute leaders for leading their countries and doing certain kinds of things, we’re committing ourselves irrevocably to the proposition that someday we might find ourselves on the losing side of the war and be up there as criminals.” And that concept of reciprocity was so strong that a lot of people opposed the Nuremberg proceedings on that ground. But there were very few people—I don’t even know if there were any—who tried to say: “No. This is a one-shot deal. This only applies to the Third Reich, and it only applies if it’s German. But it never will apply in the future.” It is very hard to say that, because there’s something about the notion of law that makes that an impossible thing to say. As soon as you talk law, as soon as you talk rules, as soon as you talk regularities, you’re already opening yourself up to accepting the fact that it can work against you as well as for you. And that to me is more significant than the differences in power.

Charles Marvin:* This all makes me think of Luis Buñuel’s film Viridiana, with too many peasants flocking around the table. Going back to 11th-century England, at least, you had William the Conqueror and the Domesday Book. You had a register. Yet the states are flocking around the table, lacking etiquette, stealing the silverware. From an etiquette point of view, looking back at your casebook of a few years ago and the Waltz of the Toreadors, how are we to deal with one another in an orderly, civilized fashion? To my mind, with the proliferation of nation-states, all the way down to 5,000-person islands, it does pose a problem of scale as well as of values.

Professor D’Amato: Yes, we would like to clean up the system and make it better. We have to start out at least by asking: “What exactly is going on? What are these rules?” Now, if we find out that we don’t like some of these rules, then we resort to all the processes that we have invented over the years for straightening up the rules. In the 11th century, leaving it to the courts did not clean up the process. Parliament had to pass some laws to make the system that had evolved more fair.

But what we are not entitled to do is simply to sit back and say: “Well, we would like these rules to be different, so we can cite 20 resolutions and add a lot of footnotes to make them come out the way we want it.” That’s what our colleagues from other disciplines don’t like. The first thing we have to do is say: “Whether we like the rule or not, this is the rule that’s evolved.” This is just as your colleague would say: “Whether we like the statute or not, this is what the statute says. We may not like the result, but as a lawyer I’m telling you that’s what the result is.” We may not like all the rules we see out there but if we don’t first discern and articulate what those rules are, we’re not going to get anywhere. Customary rules exist in the real world, not in the mind of the beholder.

Grigori Tunkin:** I was struck by your argument in the American Journal of International Law on whether the President of the United States is bound by the rules of international law.† Would you speak to that? I can’t understand it.

Professor D’Amato: Well, of course, that’s part of the problem. Actually, Professor Tunkin’s question is the deepest possible question in this area. It’s one that I don’t

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have an answer to, although I'm working on it as best I can. The problem is, how can any state say that its own leadership might possibly be in violation of an international rule? Let me see if I can break this problem down into some manageable components.

First of all, let's ask a more primitive question: "Can any state ever violate international law?" Yes, but with a qualification. If you have a system that's not statutory and not precedential, but rather a Hegelian developing system of customary law, then every violation contains the seeds of a new rule. Therefore, the development of these rules must consist always of violations of previous rules or else the rules would have been frozen many centuries ago. So, in one sense a state can violate international law but in another sense it creates the law. Now, how can we reconcile these two possibilities? Well, because of the reactions of other states. You try to do certain things. The United States might take a forceful military position and then maybe back off if it turns out that it doesn't wash with the international community. Or, just to take an example of a couple of days ago, the United States goes in and retaliates against certain Iranian oil rigs and boats as a response to the laying of mines.

Professor TUNKIN: At a certain moment there is an international law in force. It may be changed later on, but we take it as it is at the moment. The action of the state at this moment may contradict international law. I understand your thinking that in the future these violations may become a rule of international law. It has happened in history. In the future it may be accepted as a rule of international law, but at the moment it is a violation.

Professor D'AMATO: I don't think so—and we may disagree on this—at the moment it's very hard to tell it's a violation until we see what the reactions are.

Professor TUNKIN: Well, then you accept McDougal's position that international law is something obscure, changing every day?

Professor D'AMATO: No. Let me finish the analogy with the U.S. reaction in the Persian Gulf. We bomb a couple of oil rigs and justify that action as a measured response to Iran's violation of international law when it set mines in international sea lanes. Elisabeth Zoller, who is here, has written a book about countermeasures,2 and I think that the notions in her book were played out and were realized by this event. The United States says going in: "We're not trying to take over Iran. We're not trying to destroy the country. We're not trying to do anything disproportionate. We're acting within our conception of the rules in this retaliatory countermeasure." It may be, Professor Tunkin, that we went a little too far. Maybe we shouldn't have blown up six oil rigs, we should have blown up only three. That's the problem that we're talking about. It may be, that the difference between blowing up three oil rigs and six oil rigs is the difference between complying with the law as it is at the moment and pressing that law to something a little beyond what present international law says. But we don't know until we see the reaction.

But there is law going on there. This is not a lawless behavior. This is not the United States dropping a nuclear weapon on Iran because we're mad. The only way you can even interpret what the United States did is against the background of international law. It would be impossible to interpret the U.S. action if there weren't plenty of rules out there that were informing what we were doing. The U.S. action is informed by a very lush and detailed contextual background of legal principles.

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INGRID DETTER DE LUPIS:* I'm not sure you're talking about legal principles. You have one legal rule that is more or less static in the Gulf situation you're referring to. What you're talking about is whether you can subsume certain facts under that rule.

Professor D'AMATO: I don't regard the rule that way. When you say there's a rule, you're talking as if there's a statute, and we can understand it and interpret it. What I'm talking about is the customary rule that's going on there.

Professor DE LUPIS: So you think it's always fluid?
Professor D'AMATO: Yes. In some respect.
Professor TUNKIN: Then there is no international law any more.
Professor D'AMATO: No, I don't think Hegel would have said that.
Professor DE LUPIS: Well, I don't agree with anything Hegel says.
Professor D'AMATO: You don't have to agree with anything I say, either. I'm trying to do what I do in my classes, which is to be intentionally provocative, and if I send you out of here very mad, very upset, I will feel that we had a useful seminar.

DANIEL M. PRICE:** Does your position include any concept of a breach of international law or a violation of international law? If so, how do you identify the elements of a breach?

Professor D'AMATO: There is no list of elements in any positivistic sense, but you can say that a particular retaliation went too far. Suppose we dropped a small nuclear weapon on Iran in response to its mining of the shipping lanes. I think that clearly would be a breach. It would be a disproportionate response. Everybody would agree that it would be. And it would be a violation.

Mr. PRICE: So you can judge at any particular moment in time whether a state's conduct violates international law?

Professor D'AMATO: That's right. The clearest example in recent years was the Iranian taking of the American hostages. It was so clear that every judge on the International Court of Justice agreed. It was absolutely clear. That was a breach. There was no doubt about it.

The way the world works, we normally don't get an Iranian hostage situation. That's a crazy one. That's so far removed from the way that states interact with each other that everybody immediately knew it was a breach. What we get 99.9 percent of the time are interactions that test the system, that are in the area where there's a certain potential for creativity. It's like the United States with the oil rigs. Perhaps we blew up too many, but we certainly did not drop a nuclear weapon. A nuclear weapon would be like the Iranian taking of the hostages. Normally, states don't take that kind of action because they're conscious of the system within which they're operating. They're conscious of the rules of the game. That, indeed, is why international law seems to work.

JOAN HARTMAN:*** It's not that there can't be dramatic changes in international law. I think that's a difficult question. You can have an incremental change that doesn't provoke a dramatic response. But you could also have a sudden change in behavior that wouldn't provoke a dramatic response, yet that would change the law suddenly. I'm thinking of the switch from a three-mile territorial sea to a 200-mile exclusive economic zone.

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Professor D'AMATO: But international law doesn't change that dramatically. When a state such as Ecuador makes a claim for a 200-mile zone, does anybody respect that? We have to wait and see. Sometimes they do. Sometimes they flout it. Sometimes they have an understanding with Ecuador—you can seize our ships only for delay, but you have to return them to us. Or sometimes the United States gets into these convoluted things where if your fish is taken by one of these countries then the Congress will reimburse the vessels for the confiscated fish. There's so much to figure out. The raw claim is simply an opening sally in a very complex move.

Professor DELUPIS: You're saying that nothing ever happens quickly like that? What about when Gagarin went into space?

Professor D'AMATO: It was very interesting when the satellites went up that no nation claimed a breach of international law. When the satellites starting circling, no nation said: “Oh, you can't fly over our airspace!” It's almost as if the system had preaccommodated it. This is almost a mystical process. It's not our thinking that's making it happen, it's the way that states react to these events. They react in ways that are lawful. In other words, they made an immediate decision that the satellites were not going over airspace but they were somehow in outer space. Now, that's not a distinction that we made in our own minds; it's an objective decision that nations somehow reached very quickly.

ELISABETH ZOLLER:* I have serious doubts whether customary rules may emerge from a succession of breaches. I'd like very much to be made aware of a customary rule that has emerged from a succession of breaches.

Professor D'AMATO: Well, you see, you're loading the question, Professor Zoller, because you're saying “breaches.” But I don't know that they're breaches.

Professor ZOLLER: But that's precisely the point. I don't think that a new rule may emerge from a succession of breaches. I think that these claims that may lead to the formation of a new rule take place in areas that are not regulated internationally.

Professor D'AMATO: I don't think so. Take the three-mile limit. For many years the United States was saying there was only a three-mile limit, and everything else was a breach. A whole succession of breaches was going on. What was happening was that the law was developing beyond three miles.

Professor TUNKIN: That's what I said about the U.S. position at the time.

Professor D'AMATO: You certainly did! And the United States was taking a very bullheaded position, because it wanted to negotiate something with that three-mile limit. But the reality was the way you said it.

Professor ZOLLER: I don't find support for your position in the example of the 3-mile limit that became a 12-mile limit. That was not a breach because no international rule prohibited a state from extending its jurisdiction to the 12-mile limit. If you take the argument of the Lotus case, it is clear that states may do whatever they want provided they do not run up against a rule of international law. There was no prohibitive rule of international law that precluded coastal states from extending their jurisdictions up to 12-mile limits.

Professor D'AMATO: Professor Zoller, the prohibitive rule that you're talking about is one whose existence we are trying to determine. We don't know yet whether there is a prohibitive rule.

Professor ZOLLER: In that particular case, there was not one.

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Professor D'AMATO: The *Lotus* case said that there was nothing to stop jurisdiction from being asserted by Turkey. There were some cases where there were complaints about these kinds of assertions, and there were other cases that went the other way. And the Court said that the rule hadn’t developed yet, not that there was no prohibitive rule. So Turkey was, in a sense, in a position to develop the rule further by its assertion of jurisdiction, the same way that we did with the oil rigs the other day. But to return to the three-mile limit, the United States was at least claiming, back in 1958, that any attempt to go beyond three miles violated international law, not that it was a permissive possibility, but that it was a violation.

Professor ZOLLER: That was the wrong argument in the light of the *Lotus* case.

Professor D'AMATO: I disagree. I think that was a developing argument. It developed from what you call a series of breaches. I simply call them a series of developmental stages.

ISTVAN POGANY:* Are you not introducing an unfortunate and possibly dangerous element of indeterminacy? I'm thinking of your comments about the situation in the Gulf and the actions of the U.S. forces. Do you characterize them as a reprisal?

Professor D'AMATO: An enforcement action.

Professor POGANY: Initially you used the term reprisal. It seems to me that most of us probably would characterize the action as a forcible reprisal. I'm wondering how much elasticity there really is in international law in this area, given that there appears to have been a near consensus on the part of states in the postwar period concerning the illegality of forcible reprisals. And at a purely policy level, if one is to say that you cannot determine the illegality of a state's forcible actions until you have determined the reaction of other states, are you not, in a sense, loosening the bonds that deter states from resorting to such measures of forcible reprisal?

Professor D'AMATO: Only if you accept the premise that there was a consensus of states against reprisals. But really I'm trying to proceed from the ground level up, and therefore I say that I don't start by knowing anything about consensus, about rules, about theories. I don't know anything about these rules. All I know is that I'm beginning to see what the rules are that are working in the system. And I would say that the rules that have been working in the system contradict all those notions of consensus that you're talking about. The actual rules that states are using have a lot to do with these enforcement actions. We're seeing many enforcement actions. They're measured, but I think Professor Zoller is a lot closer to the truth that these things are happening out there in the real world, whereas it is misleading to take at face value the rhetoric that you get in the United Nations and the friendly declarations among nations. The law that's happening out there, the reality that's happening out there, is that there are proportionate, measured responses. They definitely are forcible responses. And I think we have to see through the clouds of rhetoric in order to get at the reality that force is being used in a measured way to reinforce the underlying customary law.

Now, let me return to Professor Tunkin's question: How can the President of the United States violate international law? How can we ask the question: "Can the President violate international law?" This goes to the problem of the state units that we're talking about. Hegel is not very favored, but I think he was getting at something that was very difficult, and so I tend to resort to some of his thinking. It may be that the United States has developed the kind of consciousness that says that our country, in order to comply with international law, has to do certain things and can't do others.

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For example, suppose the President of the United States would say: "Let's drop a nuclear weapon on Iran and teach those people a lesson they'll never forget. Let's just blow them up. We'll just press a button and boom, goodbye." I think we have developed a consciousness in this country to say that the President cannot do that. That would be illegal. We say he can't do it. It's illegal for him to do that; if he did that he could be impeached, he could be put in prison. We reach that conclusion through American constitutional law, which is internal to us. But our Constitution has certain parameters that define what the President can do and can't do, and those parameters include aspects of international law. One of those aspects, indeed, is the Nuremberg result. There are certain kinds of things our leaders might try to do that are prohibited by customary international criminal law.

I have a case against the Soviet Union called the Wallenberg case. The Soviet Union is the defendant and the Wallenberg family is the plaintiff. How could we be suing a sovereign nation in an American court? Because we're saying, in some sense, that international law is so pervasive that it even comes into our courts and is a factor in their decisionmaking. The United States can be a defendant here in our own courts when it's violating the norms that are pervasive in the system. Even the President can go too far and violate international law contrary to American law, and his action therefore would be illegal.

Professor Tunkin: That presents another problem concerning the Palestine Liberation Organization (PLO), for instance. A decision of the Congress seems to be binding upon the President. If that is so or not, I don't know. But if the decision of the Congress is contrary to international law, should the President implement it?

Professor D'Amato: No, I think he shouldn't. And I think what Abraham Sofaer, the Legal Adviser, was saying last night, without quite saying it because he's in a very delicate position, was; "Let's play it out in the courts. Let's see if the courts can't get us off the hook." The courts might say, "Look, Congress, you can't do this. You can't violate this U.N. Headquarters Agreement, so it's invalid." That's one possibility. They're not going to say that, though. But they could say that Congress did not intend to violate international law. The court might interpret what Congress really did and find that Congress said: "Close the PLO offices, if you can do that under international law." Congress is interpreted to be saying that the President now has the authority under U.S. law to close the offices, but there is an implicit reservation that he can't do it if it violates international law. The courts could come up with that solution. They could say that Congress really intended not to violate international law but only to provide domestic law authorization to close the PLO office at the United Nations. That would get everybody off the hook, and Mr. Sofaer then would not have to worry about the problem of whether the Executive should implement it or not.

But suppose we got down to that. Suppose the courts said: "No. You have to close the PLO offices." The President of the United States, in many instances, has not

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4Editor's note: On June 29, 1988, amended July 6, 1988, Judge Edmund L. Palmieri of the U.S. District Court for the Southern District of New York decided United States v. Palestine Liberation Organization, 695 F. Supp. 1456 (S.D.N.Y. 1988), available in 1988 U.S. Dist. LEXIS 6388, in which he concluded, inter alia, that the act and the agreement "cannot be reconciled except by finding the [act] inapplicable to the PLO Observer Mission." Id. at 25. Noting "the special responsibility which the United States has to provide access to the United Nations under the Headquarters Agreement," id. at 6, Judge Palmieri found no "clear legislative intent that Congress [in the Anti-Terrorism Act] was directing the Attorney General, the State Department or this Court to act in contravention of the Headquarters Agreement." Id. at 23. See also 27 ILM 1055 (1988). For an interesting discussion of this issue, see the panel on the PLO Mission controversy, infra, at 534.
carried out the will of Congress. In many instances the President, for example, has failed to spend money that Congress has appropriated. The President could drag his feet and say: “Well, I’m getting around to closing the PLO offices. I’m getting around to it. But we have to study it. We have to have a commission. We have to have reports. We have to interview international law scholars, and that could take several years. And so, we’ll see. We’ll see what they all say and then it will be the next President’s problem.”

The sharp question is: can the President violate international law? The answer is, I don’t know, because the sharp question is never asked. These things tend to play out in the real world not in terms of verbal resolutions but in terms of very subtle accommodations. A state can find that its internal mechanisms create something of a friction on its ability to act on the international scene. Customary rules that evolve out of the interaction of states have a lot to do with what goes on inside the states. Interest groups, regular citizens, government officials, professors of international law, may all have something to say about where the state is going, and that is sometimes a braking mechanism on what states do. And in that respect, what we’re talking about under U.S. constitutional law is only a reflection of these internal processes. If a state is the creator of international law as well as the subject and object of it, the internal decision-making processes in that state will have a lot go do with the way the state really behaves on the international front.

It’s such a rich area. We’re dealing with things here—just from the topics you’ve raised this morning—that are so much more complicated and so much more interesting than what goes on in the torts class or contracts class that to think that our profession is looked down upon because we’re not dealing with “real law” is astounding. We’re dealing with real law that is uncluttered by the simplistic straightening processes of legislatures. We’re trying to talk about what really is going on when we peel away the directives of comprehensive codes in domestic legal systems.

Hilary Charlesworth:* You’ve relied upon the reactions of states in defining rules of customary international law. Wouldn’t you say in the Nicaragua case, when faced with constant violations of the U.N. Charter, the Court found principles of international law by which to judge the case?

Professor D’Amato: But the Court stopped considerably short of implementing the Charter. The Court held that American aid to the Contras was not a violation. They held that laying mines was a violation. Most Americans already had concluded that, too. There was very little doubt in this country that laying those mines in the harbor was a violation of international law, and many government officials have concluded it one way or another.

Professor Charlesworth: But the Court went beyond state practice.

Professor D’Amato: I tried to deal with that to some extent in a little piece called “Trashing Customary International Law.”5 The International Court of Justice, it seems to me, never really examined state practice at all. One reason was that nobody was arguing for the U.S. position. The United States walked out, and the result was that the Court was swayed by all the rhetoric coming from Nicaragua, and it wrote a very slipshod opinion that tended to justify certain kinds of abstract norms. It then cut back a little bit politically.

Professor Tunkin: You don’t like abstract norms.

Professor D’Amato: That’s right. Because they don’t solve anything.

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Professor **Tunkin**: Every rule of international law is an abstract norm. If you do not recognize abstract norms, then you should not complain if international relations specialists do not recognize international law.

Professor **D'Amato**: Professor Tunkin, if you believe that international law is a collection of abstract rules, then you might say to me that I don't even accept that, and therefore I'm not talking about the same thing you're talking about. But I believe that abstract norms never solve anything.

Professor **Tunkin**: The problems are all settled by people, not by the norms.

Professor **D'Amato**: I agree. Abstract norms invariably can be applied to either side of any case. There's no such thing as applying a norm and getting a result.

Professor **Tunkin**: There is no rule of international law?

Professor **D'Amato**: No. It's just that I'm talking about a kind of international law that is not made up of rhetoric and norms.

Professor **de Lupis**: Are you sure you're not speaking about words? Earlier, you emphasized the importance of the generality of the law. To some of us generality is precisely the same as the abstract law.

Professor **D'Amato**: I don't mean generality in that sense. What I mean by generality is that when you accept a principle such as the Nuremberg prosecution, you are also accepting that it can be applied to you. I'm talking about reciprocal acceptance of whatever rules apply to all the units in the system. I'm not saying that the rules themselves have to be abstract or concrete.

Professor **de Lupis**: What's the difference between general and abstract?

Mr. **Weiss**: I think what you're giving us here is an invisible hand theory of international law. Actually, I like your Hegelian approach. I like your de-emphasizing the totally abstract nature of the law and relating the life of the law to real life out here, but I am troubled by the way your Hegelian dialectic plays itself out. Your thesis is that there really is a customary international law, and it must be taken seriously. Your antithesis is that it really isn't very important most of the time. Look at the examples you've given us. The Iranian hostage-taking was a clear example of a breach of international law, but that was so crazy that it only happens once in a century. It was a clear case where international law applies. But then you say that most of the other examples—Nicaragua, the three-mile limit—are going to take a long time to sort themselves out. Therefore, it isn't possible to say, unequivocally, that international law has been violated. So on the one hand you're saying international law is there and must be obeyed, and on the other hand you're saying the reason it's real is because everybody can agree on the extreme cases, while on the others there's room for a lot of debate. Is that your synthesis?

Professor **D'Amato**: No. I don't want to say the latter at all. But that may be what you're hearing. And if that's what you're hearing, it's my fault for not making myself clear.

Professor **Tunkin**: At the beginning, you said that international law is downgraded in the United States. Isn't that the fault of American international lawyers who consider international law something that is vague and changing every minute?

Professor **D'Amato**: Well, I don't think so. I think it's more the fault of the people who try to take abstract rules and say that they count.

Professor **Tunkin**: What do you mean by "abstract"?

Professor **de Lupis**: By definition any rule is abstract.

Professor **Tunkin**: "Abstract" means capable of universal application.

Professor **D'Amato**: In that sense I have no problem with the word.
Dean Marvin: Maybe I can help you by displacing the problem slightly to what the United States did under the aegis of the Organization of American States (OAS) with the Dominican Republic in the 1960s, or what the Soviet Union did in the context of Czechoslovakia and the Warsaw Pact countries. You can have this interaction you’re talking about, of two or more countries interacting, calling upon certain norms in a context. But when uninvolved third parties protest the interaction of those two or more parties, does that help define the law?

Professor D’Amato: Yes, you’re talking about community response, which is quite relevant.

But, I want to respond to Peter Weiss’ statement that my antithesis is that the real rules of customary international law are too ill-defined to be of much importance. We have a dense system of rules, a dense system of custom. In fact, the more you study it, the more particularity you can get out of it. The actions of states are informed by this very strong context, so that the action we took in the Persian Gulf doesn’t seem all that problematic. We took a certain response out of an infinite range of possible responses, most of which would have been clearly violative of international law as anybody would have defined it. But what we actually did was clearly within a range of arguably legal responses.

Mr. Weiss: What about Grenada? What about Libya?

Professor D’Amato: We went into Grenada differently from the way a country might have done it in the 19th or 18th centuries. Then, once you were in, you annexed the territory. It became a part of your territory and you moved in your own government. We went in and we came out. Now, isn’t that amazing?

Mr. Weiss: Did we have a right to go in?

Professor D’Amato: Yes. The right to go in came from the human right that the people of Grenada should not have a new government take over power by machine-gunning the previous government.

Professor Tunkin: So the United States is the supreme judge?

Professor D’Amato: In the absence of a collective enforcement mechanism, there are going to be individual autodeterminations. Each state is going to be a judge. Now, I’m not entirely happy with that system. I would prefer a more community-based approach. But, realistically, what is the United States supposed to do? Should it decide that since it cannot be a judge in this case, it should stay away? That would be just as bad.

Professor Tunkin: Article 2(4) prohibits the use of force.

Professor D’Amato: No. Only against the territorial integrity or political independence of another state.

Professor Tunkin: No. Not only. In any other way incompatible with the purposes of the United Nations.

Professor D’Amato: That’s right. I’m saying that what the United States did was what the United Nations might have done had it had the mechanisms in place to do it. Let me put this in very emotional terms: I know you don’t see it this way when you think about Grenada, but at least I’ll try to make my advocate’s case. The people of a country are very defenseless. They don’t have weapons. The government has more or less a monopoly on the instruments of power and death. Given that incredible disparity in power relationships between the people and the government, we don’t want to stand idly by and watch a group of thugs come in and assassinate the previous governors and take over all those instruments of power and then oppress the people. I think we want to have a system of international law that says we care enough about the
people of those countries that we are willing to assist them with force when situations like this occur.

Professor TUNKIN: That was the view in the 19th century, and since that time international law has changed greatly. There is the Charter of the United Nations. There is the United Nations, the Security Council, and so on.

Professor D’AMATO: But Professor Tunkin, as you well know, as soon as you try to do anything, your country or ours is going to veto it.

Professor TUNKIN: No. That may happen, but not always. You can’t say that there is no international enforcement mechanism now. It exists, but it’s weak. We should work on strengthening it.

Professor D’AMATO: Well, you can take that position, but I think it’s more realistic to say the United Nations is pretty much a dead letter as far as these enforcement mechanisms are concerned. I’m a supporter of the United Nations. I think when it can move and when it can work, it’s wonderful. But when it doesn’t work do we simply sit by and do nothing because the United Nations theoretically could step in? I don’t think that you say that, and I don’t think we say that.

Professor de LUPIS: In my 1988 book, I gave a title to this kind of intervention. Because I’m Swedish, I can criticize both superpowers in this area. Both sides are sometimes guilty of what I call “patronizing intervention”: you think you know what’s best for that state and will help it because it doesn’t know its own best interests.

Professor D’AMATO: I know. It’s very hard. Let me put this in very personal terms. Suppose I see a mother hitting her child very, very severely. You might say I would be a patronizing intervenor if I stepped into that situation. The moral choice is always a very existential one. You see a child being abused, and do you intervene or do you keep away from other people’s business? “She’s the parent, she can do it.” At some point you intervene. I think at some point we say: “Look. Enough is enough. We’re not going to allow this. The kid is defenseless. I don’t care that it’s the parent. The parent doesn’t have the right of life or death over even its own child.” And we intervene.

Professor TUNKIN: That situation is quite different, because you are not dealing with international law.

Professor D’AMATO: But it is not morally different. Why is it morally different if the Pol Pot regime is out there wiping out carloads of individuals? Are we going to sit back and say that we don’t want to intervene?

Professor TUNKIN: Well, the moral situation may be similar. But do you think that the moral rule should justify the violation of international law?

Professor D’AMATO: They’re not necessarily opposed to each other. When we do intervene in those human rights situations, the only way we can account for it in legal terms is to say that it’s a reaction—a very deeply felt reaction—to some set of moral principles that is, in a way, even more important than article 2(4).

Professor de LUPIS: Couldn’t that very often be a cloak for self-interest?

Professor D’AMATO: Yes.

Professor de LUPIS: Well, then we agree. I agree that there are occasions when you have to stop certain kinds of abuses.

Professor D’AMATO: That’s right. We can argue specific cases, but we’re not on the opposite sides of the fence. We’re saying there can be a case where intervention would be almost compelled. And there are many cases where intervention would be folly and many cases where intervention would be patronizing or just a cloak for an aggressive move. That’s all very true. As a matter of fact, at the moment when the
United States invaded Grenada, I could not say whether it was legal. Why? Because the situation hadn’t finished yet. If the United States had stayed and annexed Grenada, then going back to the very beginning, I would say the whole thing was illegal and would violate article 2(4).

Professor TUNKIN: So, is it acceptable if a state enters another state and pushes out its existing government and then leaves?

Professor D’AMATO: It depends on how the existing government came into power. Yes, I know it’s the Monroe Doctrine. I realize it. It’s more than that. It’s Woodrow Wilson! I’m not necessarily approving it. I’m just trying to describe the formation of customary law as it actually is happening.

Mr. WEISS: Does that mean that now that Soviet troops are pulling out of Afghanistan, the sending of Soviet troops to Afghanistan was O.K.?

Professor D’AMATO: Well, to some extent they were invited in. I don’t know enough about the Afghan situation to be able to make a judgment. And I say that because I think that it’s too easy to sit in your armchair and say that all these things are legal or illegal. That’s the problem with our discipline. What is needed is a very careful examination of the situation. I want to know whether the people are better off in Afghanistan after the Soviet intervention or worse off. I don’t know.

Professor DE LUPIS: If you come back to your theory of customary law, how do you ever assess whether this is a violation or not? I still don’t understand what you think is the legal rule, or what you think is the law.

Professor D’AMATO: Assessment is something for courts, and we don’t have courts in the international system.

Professor DE LUPIS: Then no one knows what the law is.

Professor D’AMATO: No. That’s not true, because the law certainly is circumscribing a great deal. The actions states take are in a relatively narrow range of legality whereas many potential actions are not being taken.

Professor HARTMAN: Your theory seems to be that we need to look at what’s happening on the ground, what states are really doing.

Professor D’AMATO: This is about custom. That’s right.

Professor HARTMAN: If we have to wait to see how states react to a particular action to decide whether or not it was a breach or an incremental change in the rules or something within the rules as they presently exist, there seems to be a problem of state equality. When a major power acts, or a small country acts in a way that infringes upon a perceived right of a major power, then you get a major reaction. When Burkina Faso interacts with another small country, the reaction is invisible.

Professor D’AMATO: It shouldn’t be. We should be just as much aware of that as we are of large state interactions.

I don’t agree that we only know after the event whether it was legal. We seem to know the legal question before it’s going to happen, when we advise governments. The PLO office hasn’t been closed. But there are many people in this room and elsewhere who are in the process of dialectical examination of whether this would be a violation or not. I don’t know how the United States is going to come out, but I would say international law’s playing an immense role in this question.

Professor HARTMAN: I think that’s right. But how do we know if it’s an incremental change in a customary rule or a breach? You seemed to say earlier that the violence of the reaction tells you if it’s a breach, or an incremental change in the rule, or a sudden change in the rule that’s acquiesced in by everybody. If it depends upon the reaction then what about the small states? If there is no reaction, you still don’t know
if it's a breach. I agree with the thrust of what I think you're saying, which is that international customary law is what is actually happening. It's not what people cast a vote for in the General Assembly. It's what's happening on the ground but it ought to be what's happening on the ground everywhere.

Professor D'AMATO: It should be, yes.

Professor HARTMAN: But how do we find it? How do international law scholars find it, if that's what we're supposed to be doing?

Professor D'AMATO: We have to dig it up. When states like England have a disproportionate effect on international law, it's because their yearbooks tell us what those cases are. They are constantly coming out with articles. They're promoting their view of the cases, so it has an effect. And that's very smart. I said to a Chinese delegation: "If you really want to have more of an effect on international law, start publishing yearbooks and cases and notes. Publish them and send them around the world, so people will have access to these materials, because they're just as important as anybody else's." We're talking about a trivial amount of money from a government's point of view compared to the amount of impact it can have in the world. It's trivial to cut back on international law scholarship or the dissemination of international law materials. Major powers are smart enough to be publishing and disseminating their materials.

GREGORY FOX:* You have said that in some circumstances, the customary international legality of an act is a post facto judgment. It seems to me that fundamental to any notion of law, and you described international law as pure law, is a concept of notice; that states or actors should be able to regulate their behavior in accord with what they perceive to be the rules. Yet if the legality of any particular act is determined after the fact then how can that self-regulation occur?

Professor D'AMATO: Because the perception is one that is made as you go along. As I said earlier, states are both the creators and the subjects of customary law. The advisors to the Israeli Government say: "Look, you can go into the Entebbe airport and rescue those people even though it's a technical violation of the sovereignty of Uganda." And other people say: "I don't know if we can do that. What about article 2(4)?" And yet other people say: "Look, they're our citizens. If we can do it surgically enough, we can do it." All of the things that we are all talking about were being played out in the Israeli decisionmaking process, as Francis Boyle has demonstrated in his study of the Entebbe raid.6

Sometimes finding custom requires looking beyond words. I think that right now a great deal of customary law is being made between the United States and the Soviet Union that is almost unknown, having to do with how far states can go in war-games and military maneuvers. How close can the submarines come to the other nation's shores? How much nuclear weaponry can they carry when they engage in war-games? How much notice must they give to each other about the war-games? This is going on now in a very rich way. Does anybody know about it? Custom is being made out there. Perceptions are being formed about hostile intent between the two superpowers of which the Department of Defense, at least, is very aware. Our department and theirs are very much aware of who is playing what war-game maneuvers and whether these are simply war-games or whether these are preparatory to some kind of huge invasion. And every time that one is played, they chip a little closer at the implied

*Of the Massachusetts Bar.
rules and restraints. The submarines come a little closer to the shores. Sometimes they give less notice. It's very interesting. But a stability is being worked out in the oceans right now, hidden from our notice. Customary law is being developed there. No amount of verbal proscription is going to tell us what that law is. It's the way custom is happening that someday, if a tense situation arises, custom might provide the rules that could stabilize an otherwise runaway escalation to nuclear war.

Professor TUNKIN: It is a great mistake for American and British lawyers, that they equate their common law with international customary law. They are different.

Professor D'AMATO: Sir, if that's the mistake, then you should give me an "F" for my performance today, because I have failed miserably. I am equating the two, and I'm saying that the notion of a developing customary law—for good or ill, for better or worse, but just looking at the reality of what it is—is one where the law is in a constant process of unfolding and development. In other words, we can never know 100 percent in advance what the law is.

Professor TUNKIN: That's going too far.

Professor D'AMATO: But there is a more radical position that some critical legal studies adherents are now taking that I subscribe to, and that is that even in a codified system, you are just as uncertain as we are. I know you don't think so, because you're used to the certainty of those words. But I would assert that in any individual case you're just as uncertain. That's a concept that takes us beyond the current topic of conversation, however.

Mr. WEISS: I'd like to ask Professor Hartman a question. You said before that you agreed with Professor D'Amato that customary law is what is actually happening, not what gets adopted by the General Assembly. Now there are lots of U.N. resolutions on torture, yet almost every state practices torture. What does that mean for the rule against torture?

Professor HARTMAN: I think that you have to bring in opinio juris. I don't think it can be just practice, per se. I think it has to be what they say they do in that case, rather than what they do.

Professor D'AMATO: I generally agree, but it's more than just "saying." If you focus just on what governments say, then you do what Dr. Akehurst did—you accept what governments say as the reality. But governments can tell you anything. Governments can dissemble and invent just as much as anybody else. What is interesting about torture is that governments don't even admit the facts. They deny the facts and they say: "If you can prove the facts then we will bring these culprits to justice." The Saudis said that. I have a case against the Saudis where they said: "Look, if you can show that any guards were torturing prisoners, we'll dock that guard three days' pay." That's how serious it is to torture a prisoner in Saudi Arabia! And they add; "But of course, nobody would want to have three days' pay docked, so they just don't do this sort of thing."

Professor HARTMAN: I think it has to be what they do with a claim of right attached to it. By and large states don't torture people with a claim of right.

Professor D'AMATO: I agree. Contrast this with the U.S. intervention in Grenada. We intervened in Grenada with a very strong claim of right. We did it openly. In fact, the only thing I didn't like about it was the shielding of the newspapers and the newsmen in the process. That was stupidity. But it was an open intervention. We went in and we came out.

Mr. WEISS: Not all scholars agree that state practice is defined with the qualification that you have a claim of right. Some scholars say that state practice is what states do, period.
Professor D'AMATO: The reason we cannot focus exclusively on practice is because the idea of a rule is itself a construct that we human beings place on activities. We know that when states act, they're acting purposefully in some sense. It's not like the planets that are just going around. States act with a sense of accommodation to other states and with some notion of reciprocity, of what's going to happen to them in the future. Therefore, they're acting in a purposeful and, I would say, normative fashion. The rules that states display in their interactions with each other are the rules that they want the system to have, by and large. So that even if Professor Tunkin and I both think that states can overdo it and intervene in the affairs of other states too much, the fact that they're doing it under some sort of claim that it's the right thing to do is something that we can't close our eyes to. That's really what's happening in international law. Like it or not, that's the way international law is developing.

Professor TUNKIN: That doesn't mean that's international law itself.

Professor D'AMATO: Well, I claim that it is. I say that it's international customary law. It may be that you have another norm like consensus, like U.N. resolutions, whatever it might be that would conflict with custom. But in terms of custom, the customary practice of states is what I'm talking about.

Professor POGANY: You did say earlier that in assessing the legality of the practice of a state, you cannot rely solely on the practice of the individual state. You must also take into account the reaction of other states.

Professor D'AMATO: It's an interactive process.

Professor POGANY: Right. You also said just a minute ago that the United States intervened in Grenada with a strong claim of right. Now, my recollection of the reaction of other states, at least as measured in the context of the deliberations in the Security Council, was that no state joined the United States in opposing the draft resolution, and that even the United Kingdom, which traditionally is aligned closely with the United States, abstained in the actual vote on that resolution. Now, doesn't the reaction of other states in that context tend to reduce the presumed legitimacy of the U.S. intervention?

Professor D'AMATO: No. I would say that the reaction was a purely verbal one. It's much easier to condemn somebody in the United Nations and then in cocktail parties say: "You know we have to condemn you for reasons of politics, the Third World, and so forth. I'm sure you don't mind because the Security Council can't do anything about it anyway."

REIN MULLERSON:* What action do you mean would be necessary—military action instead of verbal action?

Professor D'AMATO: Or economic. There could be boycotts. There are many things that you can do to harass U.S. citizens abroad, I suppose. There are many ways you can hurt the United States. But nobody did that. The only thing any state did was engage in verbal condemnation.

Professor TUNKIN: It's a political action when a state states its position on something. This is not necessarily by taking economic sanctions or something like that. The statement of the position of the state is also in verbal form.

Professor POGANY: The U.K. abstention was an application of one of your earlier propositions. I think the United Kingdom was aware that if it actually had approved the U.S. intervention that might in fact have legitimated other interventions. There was a normative element.

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Professor D'AMATO: Sure. I don't take the words as significant, but I take them as indicating where people may be going. These declarations may be starting to prepare us for what states are intending to do. If that’s so, and it plays out—if customary practice actually follows what was said in the U.N. resolutions—then we really have something. On the other hand, there’s the political game: “Let’s just issue this resolution and get it off our backs and take care of it, but we all know that the reality is a lot different from the resolution.” There’s so much of that kind of game-playing going on that I can’t take these words all that seriously.

A speaker from the floor noted that we were seeing news blackouts again in Israel’s handling of the Palestinian uprising. The speaker suggested that states were now wise enough to know that if they did not let other states know what was happening, there could be no legal reaction. Information about the event was being delayed long enough so that it became too late to react legally to the event.

Professor D'AMATO: There is a coverup. To some extent you really have to ask the Israelis, “What are you trying to do there?” The original justification for the beatings was that it was preferable to shooting these Palestinians. Well, I don’t see anything wrong with that; if it’s truly one or the other, you might as well beat them instead of shoot them. I suppose the Israelis were afraid that you would ask the other question: “Well, what are you doing in the West Bank in the first place, when the people are resisting?” And that opens it up too much, and so they don’t want to get into it. I agree that a coverup may be the reaction. On the other hand, we can condemn the coverups. If I can say, for example, that the only thing I found wrong with the Grenada intervention was the news blackouts, then the next time the administration may say: “Well, maybe we have to take that into account too. The perception of the legality of the action will be dependent largely on the openness in which we do it.” In order to be legal an intervention has to be stated to be limited in purpose, not contrary to article 2(4), not an annexationist thing: “This is our purpose, this is why we’re going in, and this is why we’re coming out.” Professor Fernando Teson has just written a book on humanitarian intervention, _Humanitarian Intervention: An Inquiry Into Law and Morality_. He was my student, and I commend it to you. It discusses these questions in a realistic way. There are reasons for humanitarian intervention that we have to take into account if we’re going to see what really is going on.

INGRID KIRCHER:* If you say that the Americans were right to be in Grenada, couldn’t you then look at Haiti? You actually can say the same thing: that there should have been a perceived moral obligation to intervene to prevent innocent people who, in asserting their right to elect their government, were gunned down, if not directly by the government, with the active support of it.

Professor D'AMATO: My guess is that if the United States and Soviet Union can get closer together, as professor Tinkin is advocating that we do in these matters, we may find that in years to come there is going to be a certain concerted interventionist policy. Right now, when the United States goes into Grenada, it looks very bad. We’re a big, paternalistic bully. But I claim that somebody had to do the job, and we did it. I would have been happier if the United nations had done it. I would have been happier if two countries had done it instead of one. I would have been happier if 15 countries had done it instead of 2. My guess is the world is going to be moving in that direction: more sensitivity to human rights, more sensitivity to the rights of the people and against the excesses of some of these dictatorships that carry their power too far.

Professor ZOLLER: Are you suggesting an end to neutrality?

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Professor D'AMATO: That's right. I think that customary law itself is heading in that direction. You see, neutrality is a concept very much like domestic jurisdiction is a concept. You make a rhetorical claim about neutrality because it helps your interest in certain ways. You're no more neutral than any other country!

Professor de LUPIS: I must emphasize strongly that there are Swedes around and other small countries in Europe that begin with "Sw" that would not accept that neutrality is merely a rhetorical claim.

Professor D'AMATO: Not only won't you accept that, but you don't have to accept anything I've said. I hope, however, that I've stirred you up a little bit.

WILLIAM B. T. MOCK, JR.*
Reporter

STRAIGHT BASELINES IN INTERNATIONAL LAW:
A CALL FOR RECONSIDERATION

The seminar was convened at 8:30 a.m., April 22, 1988, by its Moderator, W. Michael Reisman.**

REMARKS BY PROFESSOR REISMAN

At Yale for the last two years, I've been working with Professor Gayl Westerman, sitting here on my right, who is a professor at Pace University School of Law and holds a doctorate from Yale on maritime boundaries. In the course of the last year, we have become more and more concerned with the complete deterioration of any disciplined regime with regard to baselines, and it has become quite apparent that the consequences are very deleterious for any effective public order of the oceans. We have been doing some work on this, and it seemed that it would be appropriate to present it to a group of experts in international law in general and specialists in international maritime law in particular, to see what the reactions might be. I know that many of you here are concerned with this problem in a professional or scholarly fashion, and I know that some of you share the concerns that Gayl Westerman and I have. The seminar might proceed best if I were given 25 or 30 minutes to set out the basic thesis of our concern, and perhaps a brief bibliographical review for those of you who are working on this, and then try to move our discussion on to an inquiry into a variety of problems that we think, as yet, are unresolved.

Since seminars, in my experience, tend to break down in terms of order and become a very productive anarchy, I'd like to set up the basic framework of the ideas I propose to develop just in case I don't get a chance to carry it that far in our discussion. I would like to demonstrate to you, by going back to the 1930 Codification Conference, that straight baselines from the third decade of this century on, though presented as a technique for rationalizing coastlines and, as a result, for smoothing all of the seaward boundaries that might be generated from those coastlines, in fact were being used primarily as a technique for establishing greater coastal jurisdiction over previously internationalized maritime areas. It's quite clear, and I think I'll have no difficulty demonstrating, that the 1951 Anglo-Norwegian Fisheries case was not about baselines at all, but was a precursor of an exclusive economic zone (EEZ) or a fishery zone. If

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