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International Law and Political Reality:

Collected Papers, Vol. 1

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**INTERNATIONAL
LAW
SOURCES**

***COLLECTED PAPERS
VOLUME THREE***

Anthony D'Amato

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FOREWORD

For many years Anthony D'Amato has been widely appreciated as one of the clearest and most original thinkers among international law professionals. Indeed, his reputation has been growing ever since the publication of his path-breaking book, *The Concept of Custom in International Law*, in 1971. At the same time, Professor D'Amato has in many important, and admirable, respects stood alone. I believe that his relatively solitary splendor reflects a temperament that seems rare among international lawyers, especially those who are American: although keenly interested in matters of policy, D'Amato is impossible to classify as friend or foe of US government. Rather than partisan presentation, D'Amato's consistent preoccupation is with the fundamental juridical ideas and the moral vocation of international law as the foundation for his policy recommendations. In this sense, D'Amato consistently manages to avoid the twin shoals of apologetics and legalism that have stranded so many of the most distinguished international law specialists over the centuries.

Part of D'Amato's charm is that like a revered judge in a truly democratic society, he allows the chips to fall where they may. This quality makes it hard to discern how D'Amato will "read" a given set of circumstances. He often argues vigorously on behalf of rather unusual policy positions. For instances, he supports the controversial notion of the "legality" of nuclear weaponry, but only so long as this weaponry is confined strictly to deterrence roles. D'Amato has provided eloquent support for specific interventionary undertakings that are *genuinely* dedicated to the promotion of human rights and democracy. Thus he has forcefully written in favor of interventions in Grenada and Panama, while emphatically rejecting the normative claims made by the US Government to justify its interventions in Vietnam and Nicaragua. As usual, the patterns of D'Amato's views assume coherence only at the level of fact, evidence, and values, which itself reflects his conviction that legal norms abstracted from context are virtually useless when it comes to assessing legality.

D'Amato's political identity is derived from the adoption of a Machiavellian view of law and politics: namely, the belief that the power of the prince tends to be enhanced by adhering to law at home and abroad. This is a pragmatic view of legal obligation that should not be confused with the sort of "realist" interpretations of international law that subordinate law to power and interests. D'Amato's particular brand of realism is impressively rooted in a deep theoretical understanding of both the proper contributions but also the very decided limits of international law, given the prevailing structure of power as distributed unequally among sovereign states. In effect, D'Amato is acknowledging that law provides a crucial guideline even for powerful governments most of the time, but at the same time he recognizes that law is not able to exert an unconditional influence, especially

where political leaders perceive the survival and national security of the state to be at stake. In D'Amato's view it is as important to be candid about what international law cannot do as it is to celebrate its achievements. It is this balanced understanding that gives D'Amato's approach the right to be called realist, and yet to be seen as taking seriously the role of law in international society.

In central respects, then, D'Amato takes his place within a long tradition of thought that prides itself on a fusion of realism and morality. This powerful jurisprudential heritage in international law has been associated with many types of natural law thinking, and thus traces its origins back at least as far as the great Catholic philosophers, Augustine and St. Thomas Aquinas, and perhaps even earlier, to the Greeks, especially Aristotle with his emphasis on teleological reasoning. Among contemporary scholars, D'Amato seems to have been most directly inspired by two of the greatest American pedagogical figures in the twentieth century: Lon Fuller and Myres McDougal. From Fuller D'Amato takes at least two things that inform and animate his work. He adopts Fuller's insistence that moral purpose is intrinsic to the role and function of all law, including international law. He brilliantly adapts Fuller's methodological innovation of exploring difficult legal ideas and controversies by constructing imaginary scenarios, and then interrogating them from all angles with an engaging vivacity that can only be described as Socratic delight. From McDougal, D'Amato takes the sense of law as in motion, evolving by stages in the course of experience, and crystallized temporarily by what states as a collectivity through their highest officials appear to accept as law at a given point in time. Such a dynamic view of law, especially given the absence of authoritative decision-makers and the tendency of governments to conceal their real motives, inevitably gives the interpreter a great deal of leeway in any given situation. But D'Amato, and many others who interpret international legal obligations, would contend that this is the best that can be done, and is far preferable as a basis of thought and action than are the illusions of positivism or the specious clarity of legalists who pronounce assuredly on what states can do by reliance on textual prohibitions. D'Amato particularly dislikes the pseudo-objectivity of positivism, believing that such a misleadingly decontextualized view of international law either operates as a dangerous constraint on what political leaders conceive to be legal or provides false comfort in the form of an illusionary rationale for acting in a specific manner.

I would situate Anthony D'Amato in this tradition, which despite its relation to certain tendencies in European thought, possesses a very American tone, and for this reason, raises some suspicions here and elsewhere that seem warranted. Although concerned with the relations between law and morality, D'Amato seems to accept the rationales for the exercise of power much more readily from familiar sources that he does from adversaries. His examples of benign intervention invariably concern the actions of the United States Government. He presents no compa-

rable examples of Soviet intervention to preserve socialist solidarity that win his approval, not that they should, but it would be clarifying to draw some principled distinctions that do not correlate so neatly with national affiliations. Also, intervention is by necessity of the strong against the weak, and this entails an inevitable pattern of double standards that erodes the respect for the uniformity of law as justice (treating equals equally). D'Amato refreshingly criticized McDougal for supposing in the cold war that international law posits one legal standard for acts of free world countries and another for the same acts by their totalitarian adversaries, as in relation to nuclear weapons tests on the high seas.

Yet when it comes to humanitarian intervention and the promotion of human rights, I find myself worried by D'Amato's relatively uncritical attitude toward the exercise of power by the sole remaining superpower, which happens to be his country of citizenship. I also find myself wishing that D'Amato's wonderfully restless mind devoted as much attention to the role of international law from the perspective of weak and historically disadvantaged states. In a widely cited article D'Amato accords Israel an imprimatur of legality for its attack in 1981 on an Iraqi reactor at Osirak without raising any questions *en passant* about Israel's own covert program of nuclear weapons development. Borrowing from Paul Ricoeur, I am much more inclined than my friend to view the claims of the powerful through a prism of suspicion, being especially committed to bolstering that part of the twentieth century effort of international law to withdraw from states their unilateral discretion to resort to force in the conduct of foreign policy. I find myself influenced by two sets of considerations: a commitment to find non-violent alternatives for the policies of states and a belief that independent, academic experts in democratic societies have a particular calling to view the motives and actions of their own government with suspicion, especially if such a government is powerful and active beyond its sovereign space.

Such minor matters aside, it is an honor to welcome the publication of Anthony D'Amato's theoretical writings over the course of several decades. Such a publication is particularly important in D'Amato's case as he has not yet provided a synthesis of his own distinctive approach to theorizing about international law. Although this volume is not a substitute for such a work, which is to be encouraged, it does impart to the reader a strong sense of D'Amato's abiding preoccupations, and offers an illuminating demonstration of how consistently he has pursued several questions of central theoretical importance. D'Amato's most notable theoretical contributions are clearly associated with his conceptualizations of the sources of international law, particularly his daring and provocative, yet powerful, argument about the nature of customary international law, and its intimate links to the treaty making process. More than any other international lawyer in modern times D'Amato has compellingly related custom to practice as expressed through the attitudes of governments toward legal propriety of

FOREWORD

contested action. To the extent that governments acquiesce in response to contested acts of others, a legal precedent of some weight is established, regardless of whether a legal rule appears abstractly to prescribe a contrary result. This approach to legality is well-illustrated by D'Amato's various discussions in the chapters that follow on the legal status of claims to use force. By conceiving of treaties as a form of authoritative practice, D'Amato has made a major contribution to how treaties, despite their contractual character, can give rise to customary norms binding on the entire community of states.

These writings in this volume are amazingly diverse in format and substantive range, a spectrum that goes from casual conversation to conventional law journal format. Many of the pieces are polemical in tone, responding critically, yet fairly, to the writings of others. Nevertheless, the main impression imparted by the volume as a whole is one of jurisprudential coherence and striking originality. It establishes Anthony D'Amato as one of the finest theoretical minds at work on international law issues, and it does so in an engaging manner that gives a reader the pleasure of participating actively in these explorations into the nature and function of international law. Another strength of D'Amato's theorizing is the extent to which it is deeply informed by moral and political philosophy.

In sum, Anthony D'Amato in this collection of theoretical papers stakes out a powerful claim to provide a jurisprudence for international law at the threshold of a new millennium. He writes within the Westphalian framework of a world composed of sovereign states. Given the strength of global market forces and the importance of various types of non-state actors, D'Amato may yet be remembered as the last great legal thinker in the Westphalian era of international law!

RICHARD FALK

Albert G. Milbank Professor of International Law and Practice
Princeton University Center of International Studies

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