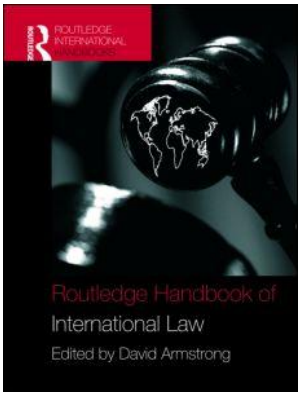

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International Law as a Unitary System

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International law as a unitary system

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The thesis of this chapter is that rethinking international law as a unitary system will yield important insights into the still controversial questions of how international law works and what role it plays in international relations. It begins by clarifying some of the key terms used in international law, especially the distinction between consensual and nonconsensual law. It then argues the case for using a systems analysis perspective in order to build in the international legal system (ILS) as an actual player in the international relations game. The presence of the ILS transforms what was previously analyzable as a two-person zero-sum game (between A and B) into a three-person non-zero-sum game (A, B, and the ILS). Under game theory, two-person zero-sum games can reach a maximin result solely through conflict (acts of war). By taking active part in the game, the ILS necessitates some resort to cooperation in order to bring the game to the equilibrium point. ILS is a purposive self-regulating system hardwired in favor of cooperation.

The thesis of this chapter is, as just stated, that rethinking international law as a unitary system can yield important insights into still controversial questions of the workings of international law and the role it plays in international relations. First, however, we should take a moment to make sure that we are talking in the same language.

Toward a uniform terminology

The terminology of international law has become increasingly imprecise and muddled. As a result, many scholars are talking past each other. Here are some suggested clarifications of some of the more important terms.

It is convenient at the outset to divide international law into consensual law and nonconsensual law. The former depends on the consent of the governed. It includes treaty law and the law of title to territory (territory may no longer be acquired by conquest). The latter – law that applies irrespective of any state's consent – is usually called customary law. The term "customary" is misleading; a better name for it would be "general" international law. Here is a brief summary:

CONSENSUAL LAW	NONCONSENSUAL LAW
Conventional	Customary
Written	Unwritten
Specific	General
Applies only to the parties	Applies to all states equally

Although a treaty can sometimes affect third parties indirectly, it cannot bind any state directly other than the signatories. The

parties are bound "by convention" insofar as their relations to other parties are concerned.

Why is general international law often called customary law? The term "customary law" was imported into textbooks of international law in the late nineteenth century for no apparent reason other than giving the writers of those textbooks something to say about the source of general international law.[1] In 1890 Pitt Cobbett (1922) invented a simile that has stuck: Custom is like footsteps across a common that eventually becomes a path habitually followed by all. Writers were quick to restate Cobbett's image as a metaphor: Customary law is formed by a norm that takes time to ripen into a binding rule of international law. Yet, it was asked, how can we pinpoint the time when the norm ripens or the footsteps become a path? And what was the status of international law *while* the norm was ripening or the footsteps were trampling out a path? Alas, the Latinism offered for curing the problem was worse than the disease: *opinio juris*. When states act under a belief that their actions are required by international law, then they are said to be acting with *opinio juris*. Thus, all that seemed to be needed to determine *when* the path formed or the norm ripened was to test or measure whether states were acting under a belief that the norm in question was legally compulsory.

However, no one in the 4000-year history of international law has ever been able to determine, even once, whether any state was acting under the belief that its action was compulsory under international law. Obviously states don't *have* beliefs; states are artificial constructs. Are a state's officials a reasonable surrogate for the state itself? These officials may have beliefs, but how are those beliefs to be ascertained? By a telephone survey of the 1000 leading state officials? By a questionnaire? Consider a current dispute. With the advent of global warming, frozen waterways in Canada are beginning to thaw and may open up the fabled Northwest Passage connecting the Pacific and Atlantic Oceans through various Canadian Arctic rivers and lakes. Some ships that now travel through the Suez or Panama Canals would welcome the much shorter route through the Northwest Passage. However, its high economic salience almost guarantees an international controversy. The Canadian government considers the Northwestern Passage part of Canadian internal waters, whereas the United States and other countries regard it as an international strait, open to all. If we could somehow ask all Canadian officials whether they believe that there is a rule of international law that the Northwest Passage is an international strait, we can be quite certain that they will respond in the negative. If we ask the same question of officials of the United States, we can be equally sure that they will respond in the affirmative. We may well suspect that the uniformity of responses within each of the two states reflects policy and not a penchant for telling the truth to strangers. Presidents and other high government officials only say things that serve their strategic interests. Hence *opinio juris* can never be measured. It is not a test for law, for it presupposes that which it seeks.

General international law, or just plain international law, is what states invoke to defend their entitlements against illegal acts by other states. From time to time, some writers will contend that there is no such thing as general international law. Bismarck took this position in the nineteenth century, as did the Soviet Union in the twentieth century. Some officials in the Bush administration and their academic apologists assert exceptionalism – the idea that the most powerful state is not subject to international law. Every chapter in the book you are reading refutes these extreme notions. International law provides the legitimate framework within which states interact with each other. Although some of the more interesting topics of international law concern law-in-formation, it is clear that these topics would not even arise were it not for a shared framework of boundary delimitations laid down by international law. Even

the most basic player in international law, namely the state, is defined by international law. We know an entity is a state when international law tells us it is a state.[2]

In short, if a new state calls itself a state, it is, in fact, scanning the panorama of legal rules that tell us what a state is. If the facts comport with its assertions, the new state is close to achieving statehood.

Analytical advantages of systems analysis

International law is often, in fact offhandedly, called a system.[3] If we take seriously the proposition that it constitutes a system, we just might change forever the way we think about international law and the role it plays in international relations.

The first change in our mindset is to regard the international legal system (henceforth "ILS") as an actual player in the international relations game. The rules of international law that are incorporated in the ILS are the resultants of vectors of compromises and dispute resolutions extending back to the beginning of recorded history 4000 years ago. A rule of international law encapsulates the aggregate interest of the states of the world. Thus if states A and B are having a dispute, the ILS insists on intruding like a busybody. It defends the collective interest of the non-participating states. In doing so it also defends the long-term interests of both A and B in international stability, even if neither A nor B is willing to acknowledge this beneficial input in the heat of their battle with each other. The bottom line is that international law should no longer be viewed as a set of background rules; rather, it is an actual player with real beliefs and objectives that participates in every bilateral or multilateral dispute among states.

The second shift in the way we think about international relations is that the presence of the ILS transforms what was previously analyzable as a two-person zero-sum game (between A and B) into a three-person non-zero-sum game (A, B, and the ILS). Under game theory, two-person zero-sum games can reach a maximin result solely through conflict (acts of war, etc.).[4] But a three-person non-zero-sum game can only reach a maximin equilibrium by some mixture of conflict and cooperation. By taking active part in the game, the ILS necessitates some resort to cooperation in order to bring the game to the equilibrium point. This conclusion explains the large degree of cooperation through the history of international relations: we find that the non-participating states are usually the most powerful force for cooperation. If it were not for this third-party initiative, international relations over the years would be buffeted by a series of random wars with random outcomes. There would be nothing like the degree of cooperation we enjoy today in a global economy that could have ever arisen by chance out of a random process.

A third change in the way we think about the role of law in international relations follows from the "cooperation" element just discussed. We found that non-zero-sum game theory creates a kind of vacuum for the element of cooperation to fill in, for there can be no equilibrium solution of a non-zero-sum game without resort to cooperation (in addition to conflict which is always abundantly present). Why is the ILS biased in favor of cooperation when it might have consisted of a random collection of rules? The answer is that the ILS is hardwired in favor of cooperation, peace, and stability. Hence, it is necessarily biased against conflict. States are not similarly hardwired, of course; we know this from the fact that states have often resorted to war when it was unnecessary for their self-defense or even disastrous for their self-interest (e.g. Saddam Hussein's attack on Kuwait).

Of course, the hardwire explanation, standing alone, is empty. We need to know how the hardwiring came about. To go there, we first need to establish that the ILS is a purposive self-regulating system. We will

then find that the hardwiring is the result of a process akin to Darwinian evolution.

Concept of a purposive system

Systems analysis has been around a long time. At first, static systems were the objects of scientific investigation: think of the steam engine or the wrist watch. The invention of the thermostat in 1885 gave rise to the first cybernetic system, one that seemed to be purposive, namely, keeping room temperature close to a desired norm. During the Second World War, John von Neumann developed a torpedo for the United States Navy that, after being aimed at its moving target, would self-adjust its direction to home in to the target as it moved (see Wiener 1948). This, too, seemed to be a purposive system. Many diverse fields, such as engineering, management, and social science, saw the value of cybernetic modeling in their own research. The definition of system has been steadily honed so that today we may define a system as a mechanical or theoretical organization of components, distinct from its environment, that adds something new, and often unexpected, to our understanding of the ensemble of components out of which it was constructed (see e.g. Ashby 1960; Beer 1959; Buckley 1968; Klir 1969; Laszlo 1972, 1973; McCulloch 1965; Sutherland 1973; but see also von Bertalanffy and Rapaport 1956).[5] One common definition that was generally accepted by researchers was that a system is a self-organized collection of elements that are interconnected in the sense that any force imparted to one of them affects the positions of all of them.[6] Ludwig von Bertalanffy (1962: 1, see also, generally, von Bertalanffy 1968) defined a system as a "complex of mutually interacting components." But a system is more than that; it is an entity in itself that is different from, and perhaps greater than, the sum of its parts.[7] Accordingly, the ILS has a role in international politics that is more than the sum of the interests of the approximately 190 states that are the creators/subjects/enforcers of international law.[8] It carries an additional "emergent" weight because it represents the precedents of previous dispute resolutions – the wisdom of the status quo in the dynamic sense described by Edmund Burke (see e.g. 1774, 1790).

An attempt was made in 1975 to apply cybernetic modeling to law (D'Amato 1975; Kiss and Shelton 1986), but what was not fully available at that time was the theory of autopoiesis. Even so, other important elements of general systems theory were being developed in interdisciplinary contexts. Prominent is the theory of the stability of complexity. Complex systems tend to be more stable than simple systems. (A tricycle is more stable than a bicycle.) The large number of states in the world in the twentieth century with their complex interactions made it possible for the international system to absorb the shocks of two world wars. By contrast, there were very few states of any significance in ancient Rome, making it possible for the Roman Empire to conquer and absorb all states within its extended reach. International law was "suspended" during the Roman era because of the absence of a plurality of nations.[9]

The concept of recursion was another significant development in general systems theory. We have to acknowledge the fact that any system containing norms (such as the ILS) will find that the norms do not precisely fit the empirical facts of the system's environment. For example, the norm specifying the breadth of the territorial sea might be three miles at a time when most states were proclaiming and enforcing a 12-mile limit. The disconnect between norm and reality must be resolved if the model system is to be accurate. This disconnect cannot be resolved a priori (who is to say that three miles is "better" than 12?). Model builders thus resort to pragmatism. They try out certain norms on the environment, and then tinker with them. The tinkering is designed to see whether the environment will react to the norms, or

whether the environment is being stubborn such as to require the model to make adjustments. This back-and-forth adjustment process is called *recursion*. It reduces a large circularity into a set of tiny circles each of which can be adjusted. If the process is successful, the system will contain a rule that both explains the facts and justifies them.

To be sure, a newcomer to international law might object that a recursive process cannot be costless. Recursion dulls the edge of the rules and hence in the long run undermines their ability to draw sharp distinctions between closely argued positions. However, there is a simple evaluative test to see if there is too much recursion. Recall that the rules of international law arose from the aggregate interest of states. Thus the rules are very "close" to what the behavior of states would be if there were no rules. Or to put it another way, the rules of international law do not get in the way of important aggregate interests. For example, if a rule blocks A and B from going to war against each other, then even if both A's and B's own interest in going to war is high, once we add in the countervailing interest of the remaining 188 states in the world in preventing war, we find that the 188 swamps those two. In other words, the rule hardly budged aggregate behavior even though it highly impacted the behavior of two of the states.

It is thus clear that the development of customary international law over time has ensured the emergence of rules that do not depart appreciably from patterns of state behavior. This may seem a weakness of international law from a moralistic point of view, but it is also a strength of international law from the self-preserving point of view. To restate the important point made above, the "successful" norms in the Darwinian struggle taking place in the international arena are those that are close to the inferences we would draw from state behavior if there were no such thing as international law. The ILS is interested in an orderly and peaceful international environment that is conducive to the maintenance and perpetuation of the ILS itself. This does not necessarily involve "moral" or "justice" considerations except to the pragmatic extent that ignoring such considerations might bring about armed conflict that could destabilize the system.[10]

Light was cast from an unlikely direction on the problem of why and how complex systems can be purposive. In 1980, Chilean biologists Humberto Maturana and Francisco Varela (1980) refined the concept of the self-organization of systems.[11] Their theory of autopoiesis defines living systems as self-producing units which maintain their essential form, perpetuating themselves *according to their internal organization*. Or otherwise stated, the system produces its own organization that maintains itself in the space in which its components exist.

As a complex system, international law closely resembles the self-regulating systems described by Maturana and Varela. It is separate from its environment but at the same time interacts with its environment. The interaction, of course, consists of providing rules of decision and guidance when conflicts arise between states, and of assessing the efficacy of those rules in conflict resolution. A recursive process modifies the rules when they need updating. The ILS makes the modifications according to its internal organization and processes. Thus when international lawyers argue the existence of a purported rule of international law and cite various precedents and events in support of their argument, they are obliquely describing the internal organization of the ILS.[12]

We can now begin to see that the ILS has no direct interest in reducing conflict or promoting cooperation in its environment – that is, in the real world – but rather is only interested in preserving and maintaining itself. Its purpose is nothing other than the preservation of its own existence. This is the same purpose we find in every animal and every plant in the world. All animals and plants that lacked this purposiveness were destroyed by their predators eons ago. The drive to self-

preservation is proportional to the brain power and complexity of the animal. For example, a clam has hardly any intelligence, but it has evolved a hardwired shell that has been successful in protecting it from predators. At the other extreme, humans have not evolved a carapace, which would have required a vast investment of energy. Instead, by evolving a larger brain, Homo sapiens have been able to outrun, outbuild, or outwit their natural predators. (If humans had failed to do so, you would not be reading this sentence.)

The ILS distills the intelligences of several thousand international lawyers and statespersons. In controversies between states, the party that can show its preferred rule to be friction reducing obtains an advantage in the negotiation. Even if the advantage is slight, the cumulative effect of preferring tension-reducing rules over the centuries of conflicts and controversies is a set of well-honed rules of today's international law.

Suppose an occasional rule shows up as outdated and potentially friction producing. The three-mile limit of the territorial sea may have been an example of such a rule. It had lasted for several centuries. But after the Second World War, many coastal states began to assert control over a broader territorial sea, both for reasons of national security in the face of longer ranged weapons aboard ships, and for extending the state's monopoly over coastal fisheries. Some Latin American countries even proclaimed a 200-mile territorial sea. During the 10-year conference on the law of the sea convention, a consensus emerged among the delegates that the most stable rule would provide for a 12-mile territorial sea and a 200-mile exclusive economic zone. These rules quickly became absorbed into international practice well before the treaty on the law of the sea was ready for signing. Indeed, even if nations viewed the resulting Law of the Sea Convention as non-severable, the friction-reducing quality of the new territorial sea and exclusive economic zone was so apparent that those rules could enjoy a severable existence in general international law.[13]

The ILS in the example just given was not interested per se in the breadth of the territorial sea. Neither was it even directly interested in reducing friction between coastal states and others that might disfavor encroachments on the freedom of the seas. Rather, the ILS was interested in preserving itself. Changing the rules of its environment thus becomes desirable from the vantage point of the ILS if there is an overall enhancement of global peace, order, and stability. If the world environment is peaceful and orderly, the ILS will grow and thrive. But if war breaks out, legality could be an early casualty. Indeed, a nation struggling for its life may view war crimes as a trap: if it holds back certain actions because it is law abiding, the enemy might well disregard legal constraints entirely and thus gain a military advantage.[14] If mankind then somehow saves itself after the global war, there could be no assurance that the old system of international law would be restored. Anarchy could bring about the permanent demise of the ILS.

Coercive systems

It is one thing to have a legal system; it is another to have people obey it. Do states actually obey international law, or do they simply act in their own interests while simulating obedience? In a chapter published in advance of her forthcoming book co-authored with Dean Harold Koh (Hathaway and Koh 2005), Oona Hathaway says that neither advocates nor skeptics of international law are looking at the whole picture:

> Both fail to consider the role of internal enforcement of international treaties on countries' decisions to accept international legal limits on their behavior and then to violate or abide by them.
>
> (Hathaway and Koh 2005)

As a defense of international law, this is very weak tea. Professor Hathaway is only talking about treaties, which have always been the clearer case of compliance with international law (compared to general international law). Second, she is only talking about an extremely limited form of compliance. She is saying in effect that if a state accepts Rule X by incorporating it into its domestic law, then that very incorporation acts as a brake on political leaders who might otherwise wish to gain a temporary advantage in international relations by violating Rule X. Although this proposition is undoubtedly true (it has been argued by American scholars for years), it amounts at best to saying that states only have to obey the rules of international law that they wish to obey. They may pick and choose, accepting the rules they like and rejecting the others. It is clear that Professor Hathaway has not taken a middle position in the debate. Whatever her intent, she has come down squarely on the side of the skeptics.

Her chapter illustrates a general malaise that younger scholars have with international law. They see the occasional but important violations and gaps that are the very tip of the iceberg while failing to see the vast and complex system of rules beneath the surface that are not only routinely obeyed by nations but are not even questioned. What nation today would attempt to extend its territorial sea beyond 12 miles? What nation would claim the right to arrest tourists and place them in indefinite detention? These and millions of other potential violations of general international law do not even come up for consideration.

However, putting aside routine considerations of compliance, the harder cases cannot be ignored. Is international law a coercive system? Are its rules enforceable against the states? How? Are they enforceable against a superpower? If not, then rules of international law are, in Professor Hathaway's words, "mere window dressing" (Hathaway and Koh 2005). We can be certain of one thing: there has never been a legal system on this planet that allows citizens to decide which laws they will obey. It is no answer to the question of compliance to say that states internalize rules that they decide to internalize. International law skeptics such as Professor Hathaway seem to use the term "international law" as a fashionable tag, but their arguments prove that they are not talking about real law at all.

I argue that international rules are enforced in exactly the same way in which domestic rules are enforced. Every nation prescribes internal punishments for illegal acts. (Just try to argue to a prosecutor or judge that the law is mere window dressing.) The crucial point is that these punishments consist of deprivations of the defendant's legal rights. For example, a defendant who loses a civil case must pay damages; if she does not, the state may invade her right of property by seizing her car and selling it at a sheriff's auction. A defendant convicted in a criminal case may find that his rights to liberty and freedom of movement have been forcibly taken away by the judge's prison sentence. In states that allow capital punishment, a criminal defendant may find that his right to live has been taken away. Thus in all cases, whether civil or criminal, the penalty inflicted on the losing side is the curtailment of one or more of the losing side's legal rights.

When we turn to states as the subjects of international law, obviously a state that transgresses international law cannot be punished by being incarcerated or annihilated. But each state has a bundle of rights under international law. Indeed, since the state is an artificial entity, it may be said that a state is nothing more than the rights it is accorded by international law. These rights are the flipside of obligations. For example, state A has a right to a 12-mile territorial sea, and it also has an obligation to respect B's right to a 12-mile territorial sea.

We now see that the rules of the ILS form a closed loop. Rules that gives state A rights are also the rules that may be taken away

(temporarily) to punish state A for violating the rights of another state. For example, the international imposition of sanctions on South Africa and Rhodesia during their apartheid regimes, which impeded their rights of international commerce and navigation, played a significant role in the eventual dismantling of the illegal (under international law) practice of apartheid.

Suppose, however, that the state committing the initial violation of international law is a superpower. The kinds of economic sanctions that worked against South Africa and Rhodesia could not realistically be enforced against a superpower. Yet if we think beyond the territorial limits of the superpower, we find that it has nationals and investments all over the world that are, indeed, vulnerable as punishments or sanctions.

For example, 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 U.S. 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 that could become "hot spots," the Bureau reports 646 American citizens living in Albania, 1320 in Bangladesh, 1600 in Bosnia, 440 in Congo, 2000 in Cuba, 10,000 in El Salvador, 546 in The Gambia, 11,000 in Haiti, 18,000 in Israel (Tel Aviv), 8000 in Jordan, and 6639 in Kuala Lumpur, and those are taken from just the first half of the list.[15] To these figures must be added the many thousands of American military personnel and their dependants on foreign bases. How many 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 (Marshall and Gurr 2005: 1).

When Iran detained 50 American diplomatic personnel in 1978, it claimed that its act was justified by the retaliatory rule of international law. In presenting its case before the International Court of Justice, Iran claimed the detention of the hostages was just a "marginal" response to "more than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms." The Court dismissed the Iranian claim in language that reaffirms the "closed loop" view of international law presented earlier:

> [L]egal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and long-standing political dispute between the States concerned. Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to

> resolve for the parties the legal questions at issue between them.[16]

The Iranian hostages case has another important lesson for us regarding retaliation as punishment. When the 50 American diplomatic personnel were arrested in Tehran, the first reaction on the part of the State Department was to arrest 50 to 100 Iranian diplomats and consular officials in the United States and then offer a trade. Even though this strategy appeared as a possibility in the *New York Times*, American officials quickly realized that the United States might actually be doing Iran a favor by arresting its diplomats. The Iranian diplomats in the United States had been appointed by the Shah of Iran, who had been recently deposed. The new fundamentalist Iranian government would soon be in the process of replacing those diplomats with ones more loyal to the new regime. Therefore the Iranian government would probably welcome the indefinite incarceration of the Shah's diplomats by the United States and would not have any desire to trade them for the American hostages.

Thus, from the American point of view, a tit-for-tat retaliatory strategy would probably not work. Instead, the State Department opted for what I have called a "tit-for-a-different-tat" strategy (D'Amato 2004). Their idea was to deprive Iran of one of its international legal rights that carried an exceptionally high cost, and then trade that deprivation for the release of the American hostages. Very quickly President Carter issued executive orders freezing all bank accounts owned by Iran in American banks. In addition, most European countries cooperated by freezing Iranian bank accounts in banks in their countries. The banks were delighted to oblige, because it meant that they might avoid paying interest on the Iranian accounts. The interest rates at that time were at a peak of about 15%. Eventually Iran caved in, returned the American hostages unharmed, and received access to its bank accounts (but not the earned interest).

Conclusion

We saw in the second and third sections of this chapter that the ILS gives expression to its database of rules of general international law when the rules are relevant to a dispute or controversy. We also saw in the fourth section that the same database of rules serves the enforcement function of international law: A state that violates international law may expect that one or more of its rights in the database might be suspended as an official reprisal or punishment for the violation. Finally, in addition to its legal competences just mentioned, the ILS represents the political interests of all the states that are not directly involved in a given dispute or controversy.

Given this combination of competences, it is clear that the ILS does not have its counterpart in domestic legal systems:

COMPETENCES

International legal system	*Domestic legal system*
1 Database of all laws	**1** Database of all laws
2 Control reprisals	**2** Reprisals controlled by political branch
3 Represent political interest	**3** Does not represent political interests

The puzzle for students of international law is not whether international law is effective or whether the ILS is a powerful player in the game of international politics, but rather why the role of international law is so underappreciated. A large part of the reason is the academic separation between departments of political science and law schools. The political scientists, encouraged by Hans Morgenthau in 1946, viewed rules of law as impediments to the national interest (Morgenthau 1946). By defining international relations as "power politics," rules of law as well as rules of morality were pushed aside as ivory-tower idealism. Meanwhile, on the other side of the campus, law schools

sought but could not find points of entry into the realist carapace in which the political scientists had encased international relations.

How can the communications gap between political science and international law be bridged? The burden should perhaps be placed on international lawyers to start the construction of the bridge. The reason for assigning this burden to them is the existence of an educational imbalance: most lawyers have had courses in political science in college on their way to law school, whereas most political scientists have gone straight from college to Ph.D. programs without taking any courses in law.

By taking systems theory seriously, lawyers may find that the ILS as described in this chapter might serve as the long-awaited interdisciplinary bridge to political science. It is at the very least an intellectual vehicle for taking rules out of the background of international relations and promoting them to the status of a player in the game of international politics. This promotion dramatically changes the nature of the game from a two-person (my country versus all others) zero-sum game to a three-person non-zero-sum game (conflict *plus* cooperation) that, methodologically and analytically, offers a far more realistic understanding of international relations than either the political scientists or the international lawyers have come up with separately.

Notes

1 Customary law originated in the writings of Continental legal sociologists and then imported into international law. See the account in Anthony D'Amato, *The Concept of Custom in International Law* (1971: 47–56).
2 The status of some would-be states are at present contested under international law, such as Taiwan, Kosovo, The Vatican, Monaco, Puerto Rico, and the Isle of Man, not to mention Transnistria.
3 The term "unitary system" used in the title of this chapter is mildly redundant. It is intended to emphasize the difference between the holistic approach taken here and the recent spate of essays that label international law as "fragmented" (see e.g. Nicolaidis and Tong 2004) (nearly all participants agreeing that international law is fragmented).
4 Jack L. Goldsmith and Eric A. Posner view international relations as a two-person zero-sum game with occasional nods to a third person (e.g. the Prisoner's Dilemma) in their recent book, *The Limits of International Law* (2005). It is no wonder that they believe the rules are there just to be manipulated for the strategic advantage of whatever state is doing the manipulation. Their assumption that international rules lack a purpose simplifies their analysis: the rules, being random, simply form part of the environment. What is left is a two-person zero-sum game (the manipulating state versus all the other states) that either proceeds randomly or proceeds at the behest of the most powerful state. Clearly, they have an impoverished view of international law. Their willingness to see international law end, as expressed in the title to their book, is simply the product of their belief that international law never got started. To the contrary, we argue that the ILS is itself a significant player in a complex non-zero-sum game of politics among which nations states cannot simply manipulate the ILS; they have to take account of it. The ILS takes an active role in avoiding, reducing, or resolving conflicts. It also promotes international cooperation by fostering rules that maximize the interconnections among states. (Free trade is arguably the most important "connector.") International relations is a large complex system within which exists the ILS, a self-regulating purposive system.
5 The only "system" that has no environment is the universe; for that reason, it is probably misleading to call the universe a system.
6 A system can be open or closed, and still fit this definition. Thus, the human body is an open system (because it ingests oxygen and food and excretes carbon dioxide and waste products). But if we enlarged our definition to "human body + environment," then it could be regarded as a closed system. This frame-of-reference problem is similar to the problem of the entropy of system vs. subsystem (Nicolis and Prigogine 1989: 160–64).
7 For example, any living organism is something quite distinct – and unpredictable – from the collection of its chemical elements. "Living matter" could not have been predicted from such a collection. Or to take a case of an inert element: Imagine meeting someone living on a remote island in the equatorial zone in the

Pacific Ocean who had never seen or heard about ice. He would hardly have reason to believe you if you said that if water is cooled sufficiently it can become so hard that people can walk on it. Ice is an emergent property of water (and water is an emergent property of ice).

8 At present there are approximately 190 states in the world.

9 The Roman *jus gentium* should not be confused with international law. It involved only the extension, with modifications, of Roman law to the outlying provinces. For further details see D'Amato, 1971: 237–40.

10 The developing law of human rights is an example. Although states remain highly reluctant to outside interference in their internal affairs, human rights would hardly deserve the name if they did not constrain the actions of one's home government.

11 Autopoiesis is the process by which a system produces its own organization and then maintains itself in the space in which its components exist. See http://pespmc1.vub.ac.be/ASC/AUTOPOIESIS.html.

12 If I say I'm hungry, I am obliquely describing the medical condition of the cells of my body that objectively require for their continued functioning inputs of energy in the form of nutrition.

13 For further argument on this point, see D'Amato 1985.

14 Several decades ago there was public agitation for a no-first-use treaty regarding nuclear weapons. The United States said it would not support such a treaty because it could amount to unilateral disarmament. In other words, the United States would refrain from first use whereas its opponent might simply violate the treaty. The most notorious precedent in this respect occurred in June 1941 when Hitler suddenly invaded his treaty ally the Soviet Union. Stalin was shocked and went into seclusion for the entire first week of the invasion; he could not bring himself to believe that Hitler had done such a thing.

15 See http://www.pueblo.gsa.gov/cic_text/state/amcit_numbers.html. These numbers do not even include hundreds of thousands of U.S. military personnel and their dependants in bases all around the world.

16 *United States Diplomatic and Consular Staff in Tehran*, 1980 ICJ Rep. 3, Para. 37.