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SEND BACK THE LIFEBOATS:
CONFRONTING THE PROJECT OF SAVING INTERNATIONAL LAW

Jean d'Aspremont

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SEND BACK THE LIFEBOATS:

CONFRONTING THE PROJECT OF SAVING INTERNATIONAL LAW

*By Jean d'Aspremont**

The idea that international law is in crisis¹—needing the inspired thinking and skilled practice of many kinds of international lawyers to save it—has a rich history in those countries where the enterprise of international law has been most deeply established and embraced.² Unsurprisingly, saving international law remains a project shared by many twenty-first-century international lawyers.³ Such a commitment is certainly not confined to legal academics. Even some legal advisers, counsel, judges, and activists think of themselves as having a role to play in rescuing international law. Being a disengaged bystander while grave hazards supposedly threaten international law has not seemed a proper option for many of these professionals who share a calling for heroic self-sacrifice to salvage the seemingly endangered entity of international law.⁴

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¹ E.g., Hilary Charlesworth, *International Law: A Discipline of Crisis*, 65 MOD. L. REV. 377 (2002); Anne Orford, *The Destiny of International Law*, 17 LEIDEN J. INT'L L. 441, 443 (2004).

² The idea that international law has failed and needs to be saved from its own failure dates back to at least the post-World War I scholarship. See generally Justin Desautels-Stein, *Chiastic Law in the Crystal Ball: Exploring Legal Formalism and Its Alternative Futures*, 2 LONDON REV. INT'L L. 263 (2014).

³ See generally Sahib Singh, *Appendix 2: International Law as a Technical Discipline: Critical Perspectives on the Narrative Structure of a Theory*, in JEAN D'ASPREMONT, *FORMALISM AND THE SOURCES OF INTERNATIONAL LAW: A THEORY OF THE ASCERTAINMENT OF LEGAL RULES* 236, 236 (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2270415.

⁴ Frédéric Mégret has argued that events like 9/11 create an “irresistible pressure [for international lawyers] to rise to the event,” to avoid being “exiled to the

Against this backdrop, Anthony D’Amato’s concept of self-preserving international law⁵ seems original and appealing. Indeed, if international law constitutes a self-preserving system as D’Amato claims, it is misguided to think that it needs saving. This response argues that the greatest merit of D’Amato’s audacious construction is that it challenges the heroic mind-set of many twenty-first-century international lawyers.

Parts I and II of this piece sketch the various facets and implications of D’Amato’s self-preserving international law as well as highlight its originality in Anglo-American scholarship. In part III, this response proposes a more nuanced understanding of how international law “preserves” itself. Part IV makes the argument that if some self-preserving aspects exist, they are the product of the collective attitudes of the professional groups organized around international law but are not intrinsic to international law itself. Because I posit that we cannot possibly have any meta-standpoint to (in)validate and rank conceptions of international law, I conclude in part V with some critical reflections on what D’Amato’s conception means for those twenty-first-century international lawyers who feel that international law needs to be saved.

I. THE ARGUMENT:

D’AMATO’S SELF-PRESERVING INTERNATIONAL LAW

According to D’Amato, international law constitutes a self-preserving, self-sustaining, and self-salvaging system. More specifically, he contends that international law is engaged in a Darwinian struggle to survive. In this struggle, coherence, equality, and the pursuit of peaceful dispute resolution ensure that the international legal system is able to preserve itself. Because international law is a self-preserving living system, it exists independently of state consent and operates to safeguard its own survival.⁶

labour camps of dreamers and utopians for decades to come.” Frédéric Mégret, *Justice in Times of Violence*, 14 EUR. J. INT’L L. 327, 331 (2003).

⁵ Anthony D’Amato, *Groundwork for International Law*, 108 AJIL ___, ___ (2014).

⁶ *Id.* at ___. For a different attempt to move away from consent in the theory of sources, see JAN KLABBERS, *THE CONCEPT OF TREATY IN INTERNATIONAL LAW* 245–50 (1996); D’ASPREMONT, *supra* note 3, at 185 (arguing that consent should no longer be considered the primary treaty-ascertainment criterion).

In making such a claim, D'Amato builds on his earlier work exploring the autopoietic character of the international legal system.⁷ Autopoiesis teaches that international law's territorial and state-based configuration does not sufficiently account for how it works.⁸ Legal systems interact on a functional basis beyond territorial units and nation states and achieve stability through the generation of their own parameters of validation (self-referentiality).⁹ This autopoietic understanding of legal systems leaves little room for human agency.¹⁰

While such features of autopoietic system theory were already present in D'Amato's earlier work, he now refines his understanding of international law by borrowing from biological theories of the self-reproducing nature of living systems. His emphasis is on those aspects of living bodies that permit them to maintain their essential form while perpetuating themselves according to their distinctive internal organization. D'Amato gives his autopoietic conception of international law an anthropomorphic spin by envisaging it as a living body intent on survival and capable of self-perpetuation.

While anthropomorphic concepts are common in international legal scholarship,¹¹ the anthropomorphic turn embraced by D'Amato comes to qualify the systemic nature of autopoietic theory.¹² In D'Amato's anthropomorphic understanding, the system of international law, accordingly, is not only self-generating (as are all autopoietic systems), but it is also self-preserving in that it is equated to a living body that develops its own means of survival.

D'Amato's concept of self-preserving international law rests on a view in which international relations constitutes the environment of international law, so that the two are related but formally autonomous from one another. This view is

⁷ Anthony D'Amato, *International Law as an Autopoietic System*, in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 335 (Rüdiger Wolfrum & Volker Röben eds., 2005).

⁸ See Martti Koskeniemi, *Law, Teleology and International Relations: An Essay in Counterdisciplinarity*, 26 INT'L REL. 3, 5 (2012).

⁹ Niklas Luhmann, *Law as a Social System*, 83 NW. U. L. REV. 136, 139 (1989).

¹⁰ In this respect, it has been claimed that autopoiesis "has dethroned the 'subject' in its claim to be unique in its self-referentiality." *Id.* at 137.

¹¹ E.g., Jean d'Aspremont, *The International Law of Recognition: A Reply to Emmanuelle Tourme-Jouannet*, 24 EUR. J. INT'L L. 691 (2013).

¹² See Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999 (2004); see also Luhmann, *supra* note 9, at 136.

consistent with the standard autopoietic premise that the system is highly dependent on its environment but autonomous at the level of its own operation.¹³

While these aspects of D'Amato's concepts of self-preserving international law are clearly and explicitly articulated in his famous enchanting style, some other aspects of his concept of international law are either undefined or ambiguous. For instance, D'Amato does not address the immense challenge of incommensurability underlying his enterprise: why and how exactly can we extrapolate from the experiences of living things to those of a legal system?

D'Amato's readers are also entitled to some explanation of whether his concept of a self-preserving system is intended to be a descriptive or a normative account of law. It is unclear whether D'Amato is only trying to describe matters as they are or constructing a normative theory that seeks to revolutionize the way that we think about international law with a view to simultaneously "help(ing) litigators and negotiators make their international-law arguments sounder and more persuasive."¹⁴ This ambiguity is exacerbated by D'Amato's recourse to axiomatic reasoning, an approach that appears slightly suspicious of false objectivism. This equivocality is further aggravated by constant oscillations between deductive and inductive moves.¹⁵ Such methodological hybridity,

¹³ Luhmann, *supra* note 9, at 148.

¹⁴ D'Amato, *supra* note 5, at ____ .

¹⁵ All four of D'Amato's axioms are presented as describing basis requirements of the international legal system as well as components of the theories of the self-preserving international legal system, while the propositions are meant to illustrate the sorting process that the system imposes on all potential legal rules that strive to become part of the system. This intricate construction is both deductive and inductive as both the axioms and the propositions seem postulated and inferred from another postulate. Such oscillations between deductive and inductive moves are certainly not unprecedented in the categories and constructs of international legal scholarship. International law is replete with doctrines that blend deduction and induction. A good example of this phenomenon is the account of how customary international law arises. See Jean d'Aspremont, *Customary International Law as a Dance Floor: Part I*, EJIL: TALK! (Apr. 14, 2014), at <http://www.ejiltalk.org/customary-international-law-as-a-dance-floor-part-i>; Jean d'Aspremont, *International Law as a Dance Floor: Part II*, EJIL: TALK! (Apr. 15, 2014), at <http://www.ejiltalk.org/customary-international-law-as-a-dance-floor-part-ii>; see also William Thomas Worster, *The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and*

however common that it may be in international legal scholarship, obfuscates the nature of D'Amato's concept of self-preserving international law.

II. THE CONTEXT: SELF-PRESERVING INTERNATIONAL LAW IN AMERICAN INTERNATIONAL LEGAL SCHOLARSHIP

D'Amato's concept of self-preserving international law constitutes a serious rupture with mainstream approaches to international law currently found in the United States. Although dominant in Europe, systemic conceptions of international law are often contested in the American tradition of international law.¹⁶ This is not to say that the idea of a system is unknown to the American tradition of international law, for, according to its common-law foundation, every adjudicatory case creates (and contributes to) a precedent-based system.¹⁷ In that sense, the difference between the European and the American traditions lies more with their respective understandings of what constitutes a "system."¹⁸ Even so, U.S. scholarship tends not to pursue holistic systemic approaches to international law.¹⁹ D'Amato can accordingly be seen as a refreshing maverick within the

Modern Approaches, 45 *GEO. J. INT'L L.* 445 (2014); Stefan A. G. Talmon, *Determining Customary International Law: The ICJ's Methodology Between Induction, Deduction and Assertion*, 25 *EUR. J. INT'L L.* (2014).

¹⁶ Eyal Benvenisti, *Comments on the Systemic Vision of National Courts as Part of an International Rule of Law*, *JERUSALEM REV. LEGAL STUD.* Apr. 2012, at 42.

¹⁷ Alexander Somek, *The Indelible Science of Law*, 7 *INT'L J. CONST. L.* 424, 439 (2009) ("Every case is its own small system of legal science."); *see also* Gerry Simpson, *On the Magic Mountain: Teaching Public International Law*, 10 *EUR. J. INT'L L.* 70, 75 (1999) ("By giving international law the appearance of the common law, we hope it will be magically transformed into a system with a commensurate degree of certainty and status.").

¹⁸ This being said, European approaches to the international legal system are far from homogenous. For example, the concept of legal system in most German international legal thought is different from that held among many French international lawyers. Compare Jochen von Bernstorff, *German Intellectual Historical Origins of International Legal Positivism*, in *INTERNATIONAL LEGAL POSITIVISM IN A POST-MODERN WORLD* 50 (Jörg Kammerhofer & Jean d'Aspremont eds., 2014), with Jean Combacau, *Le droit international: bric-à-brac ou système?*, 31 *ARCHIVES DE PHILOSOPHIE DU DROIT* 85 (1986).

¹⁹ See Emmanuelle Jouannet, *French and American Perspectives on International Law: Legal Cultures and International Law*, 58 *ME. L. REV.* 291 (2006).

American system-adverse community.²⁰ The same probably holds true for his reliance on autopoiesis system theories, which have otherwise had only limited currency in American approaches to international law.

D'Amato's most significant estrangement from the mainstream American legal scholarship lies elsewhere, however. Clearly, much has changed since the time when the *American Journal of International Law* was founded in order to produce orderly knowledge of international law based on analysis of cases and specific texts.²¹ Anyone seeking to navigate American international legal scholarship must now be methodologically multilingual.²² Each of the different streams of that scholarship is constituted by and constitutive of methodological choices that may be difficult to decipher. Some are regulatory in nature, while others are meant to be more predictive or explanatory. After the turn to instrumentalism by the New Haven School in the 1950s and 1960s—of which D'Amato has always been very critical²³—there was a subsequent turn to liberal individualism through global institutionalism advocated by the Manhattan School in the 1970s and 1980s.²⁴ These later developments had in common a move away from formalism²⁵ and a desire to be taken seriously by authorities.²⁶ Since then,

²⁰ Mónica García-Salmones Rovira, *Who Is the System? On Commitment, Biology, and Human Beings in the Politics of a Groundwork for International Law*, 108 AJIL ___, __ (2014) (highlighting some of the European overtones of D'Amato's construction).

²¹ Elihu Root, *The Need of Popular Understanding of International Law*, 1 AJIL 1, 3 (1907). But see David J. Bederman, *Appraising a Century of Scholarship in the American Journal of International Law*, 100 AJIL 20, 21 (2006).

²² See Rob van Gestel, Hans-W. Micklitz & Miguel Póiares Maduro, *Methodology in the New Legal World*, at 14 (EUI Working Papers No. 2012/13, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2069872.

²³ Anthony D'Amato, *Non-state Actors from the Perspective of the Policy-Oriented School: Power, Law, Actors and the View from New Haven*, in PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW 64 (Jean d'Aspremont ed., 2011).

²⁴ Koskenniemi, *supra* note 8, at 15.

²⁵ Jean d'Aspremont, *The Politics of Deformalization in International Law*, 3 GOETTINGEN J. INT'L L. 503 (2011); see also Desautels-Stein, *supra* note 2; Samuel Moyn, *The International Law That Is America: Reflections on the Last Chapter of The Gentle Civilizer of Nations*, 27 TEMP. INT'L & COMP. L.J. 399, 405 (2013).

two major changes have occurred. The turn to legitimacy and compliance in the 1990s was followed, albeit not overwritten, by a turn to empiricism in the 2000s. The turn to legitimacy, spearheaded by Thomas Franck,²⁷ has generated deep structural consequences in Anglo-American scholarship and practice. Its impact was so great because an interest in legitimacy allowed empirical inquiries (e.g., why do states comply with international law?) to conveniently converge with definitional inquiries (e.g., what is international law?).²⁸ The search for legitimacy, by virtue of an temerarious presumption that international law can be witnessed and analyzed from an Archimedean vantage point, has simultaneously brought about a move away from conceptual investigation of international law's self-validating nature.²⁹ The quest for legitimacy, authority, and effectiveness (and, relatedly, the study of the dynamics that buttress each of these concepts) has ever since ranked high on the agenda of U.S. international lawyers, and especially its legal academics. As is well-known, more recently, this legitimacy school has gradually ceded pride of place to the empirical school of international law that, even without a detour through legitimacy, prioritizes the study of the conditions under which international law is formed and produces effects.³⁰

The abovementioned turns to legitimacy and empiricism certainly differ in various respects, not least because of the discrepancies between the predictive methods of the former and the explanatory methods of the latter.³¹ At the same

²⁶ See Desautels-Stein, *supra* note 2 (remarks on the New Haven Law School and the Manhattan School); see also Jan Klabbers, *The Relative Autonomy of International Law and The Forgotten Politics of Interdisciplinarity*, 1 J. INT'L L. & INT'L REL. 41 (2004–05) (commenting on the general inclination of international lawyers).

²⁷ See THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 6 (1995).

²⁸ See DAVID J. BEDERMAN, THE SPIRIT OF INTERNATIONAL LAW 3 (2002) (discussing this aspect of the turn to legitimacy).

²⁹ On the Manhattan School, and especially Thomas Franck, see *Symposium: Assessing the Work of the International Law Commission on State Responsibility*, 13 EUR. J. INT'L L. 901 (2002); see also David Kennedy, *Tom Franck and the Manhattan School*, 35 N.Y.U. J. INT'L L. & POL. 397 (2003).

³⁰ Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AJIL 1, 1 (2012).

³¹ Behind such discrepancies, fundamental differences exist about the nature, extent, and justification of claims to knowledge. See ALEXANDER ROSENBERG, PHILOSOPHY OF SOCIAL SCIENCE 295 (4th ed. 2012).

time, they share a common openness to multidisciplinary methods.³² This connection is where D'Amato's concept of a self-preserving international law makes its singular contribution. First, his concept of self-preserving international law relegates the pursuit of compliance and, to a lesser extent, those of authority and legitimacy (which become determined within the system and by the system) to second place.³³ His self-preserving international law ensures that rules are patterned after state behavior or, at least, let themselves be informed by state behavior.³⁴ As a result, measuring compliance will generate very limited insights, apart from allowing us to measure the transformation of international law. Second, and perhaps more fundamentally, D'Amato departs from the interdisciplinary mind-set that dominates contemporary American legal scholarship, for autopoietic theory allows one to look at the system exclusively from the inside (that is according to an internal perspective) without the need to resort to the tools or frameworks of other social sciences. This concept is a refreshing alternative to the common criticisms of American-styled interdisciplinarity.³⁵

³² This analysis is nothing groundbreaking in itself. It has been argued that realism made the interdisciplinary study of law respectable. *See* NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 92 (1997).

³³ D'Amato, *supra* note 5, at ____ (Axiom 4).

³⁴ For some critical remarks on such a move, see ROSENBERG, *supra* note 31, at 295 (“[I]t is too easy to tailor a theory to be consistent with data that are already in.”).

³⁵ Klabbers, *supra* note 26; Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization*, 8 *THEORETICAL INQUIRIES L.* 9, 14 (2007); *see also* Martti Koskenniemi, *The Mystery of Legal Obligation*, 3 *INT’L THEORY* 319 (2011). This aspect of D'Amato's construction could be construed as resisting postmodernist scholarship. On the idea that autopoiesis constitutes a response to postmodernism, see ROGER COTTERRELL, *THE POLITICS OF JURISPRUDENCE: A CRITICAL INTRODUCTION TO LEGAL PHILOSOPHY* 249 (2d ed. 2009).

III. THE NUANCE: SELF-DESTRUCTIVE PROCESSES OF A SELF-PRESERVING SYSTEM

D'Amato ignores what might be called the “self-destructive” contradictions within his “self-preserving” system. He argues that self-preserving systems survive because of their capacity to generate crisis, contradictions, and destructions,³⁶ which, in turn, bring about self-regeneration.³⁷ Yet he seems to overlook the constitutive role that self-destruction may play in self-preservation.³⁸

Consider, for instance, the implications of a more traditional rule-based approach to international law infused with Kelsenian positivism—an approach that is not necessarily incompatible with autopoiesis theory. From a rule-based Kelsenian perspective,³⁹ every act of law application becomes an act of law making; law-application generates a single command by virtue of the *auctoritatis interpositio* (intervening authority) “that determines what the rule should mean in a particular case and whether, all things considered, applying the rule might be better than resorting to the exception.”⁴⁰ In this conception, once this individual command is created and applied to the facts and actors involved, it exhausts itself and disappears simultaneously. Although the original norm from which it is derived remains untouched and unchanged by its application, applying the law generates a rule for the case at hand that is automatically destroyed in the course of its application. Such a rule-based Kelsenian approach to international law would provide nuance to D'Amato's self-preserving international law by

³⁶ Luhmann, *supra* note 9, at 148.

³⁷ This dimension has been thoroughly explored in Marxist economic theory whereby overaccumulation leads to crisis, which is a moment of destruction, allowing the system to find alternative avenues for the overaccumulated capital.

³⁸ García-Salmones Rovira, *supra* note 20, at ____.

³⁹ On the relevance of Kelsenian positivism today, see Jörg Kammerhofer, *Hans Kelsen in Today's International Legal Scholarship*, in INTERNATIONAL LEGAL POSITIVISM IN A POST-MODERN WORLD, *supra* note 18, at 81.

⁴⁰ Koskeniemi, *Constitutionalism as Mindset*, *supra* note 35, at 10; Sahib Singh, *The Potential of International Law: Fragmentation and Ethics*, 24 LEIDEN J. INT'L. L. 23 (2011). For a discussion of the concept of *auctoritatis interpositio*, see Andreas Fischer & Ralph Christensen, *Auctoritatis Interpositio: How Systems Theory Deconstructs Decisionism*, 21 SOC. & LEGAL STUD. 93 (2012).

buttressing the idea that the operation of international law is necessarily accompanied by a process of self-destruction of commands.⁴¹

If, instead, law is understood as a form of discourse or argumentative practice⁴² geared towards persuading target audiences,⁴³ a self-destructive dimension is inherent: legal arguments or opinions given in a particular case, once they are formulated and presented, exhaust themselves. The publicization of the legal arguments or opinions annihilates them as *individual* legal arguments and makes them part of the profession's public place or intellectual universe.⁴⁴ Such a self-destructive approach to argumentation is reminiscent of Pierre Bourdieu's idea that legal arguments also constitute a pure product of consumption for the various actors engaged in legal argumentation.⁴⁵

⁴¹ García-Salmones Rovira, *supra* note 20, at ____ (attributing a Kelsenian character to D'Amato's construction).

⁴² See generally Friedrich Kratochwil, *Legal Theory and International Law*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW 58 (David Armstrong ed., 2009); Koskeniemi, *supra* note 8, at 3.

⁴³ Martti Koskeniemi, *Methodology of International Law*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Nov. 2007), at <http://opil.ouplaw.com/home/EPIL>.

⁴⁴ I prefer the notion of intellectual universe rather than that of normative universe developed by Robert M. Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4–5 (1983) (“We inhabit a *nomos*—a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void. . . . Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.”). For a similar use of the idea of “intellectual universe,” see MARIO PROST, *THE CONCEPT OF UNITY IN PUBLIC INTERNATIONAL LAW* 134 (2012).

⁴⁵ PIERRE BOURDIEU, *THE FIELD OF CULTURAL PRODUCTION* 115–16, 158 (1993).

IV. THE CHALLENGE: A SELF-PRESERVING COMMUNITY OF INTERNATIONAL LAWYERS?

Is D'Amato's concept of self-preserving international law valid in the first place? This question has, of course, no clear answer. It has been sufficiently demonstrated that there cannot be a meta-standpoint from which concepts or theories of law can be (in)validated and ranked except in terms of the context and social acceptance of the recipients.⁴⁶ Designing any concept of international law, even a purely descriptive one,⁴⁷ always presupposes subjective and normative considerations that we expect commentators to divulge or acknowledge.⁴⁸ It is now widely accepted that theories of international law do not result from unprejudiced observations made under a veil of ignorance⁴⁹ and that almost any theory can be repudiated merely by changing descriptive, analytical, or conceptual frameworks. For these reasons, my intention here is not to argue for a better idea of international law than D'Amato's offering. Instead, I merely suggest that a different image of international law can be defended on equally convincing grounds. Consider just three alternative frameworks.

First, one could abandon the idea that international law constitutes a system—or adjust the nature of the system so radically—to cast aside any occurrence of self-preservation. This step does not seem to be a difficult move to make.⁵⁰ Although there are obvious advantages to construing international law as a system,⁵¹ systemic thinking about international law is no longer reified in present international legal scholarship, especially within American international

⁴⁶ Martti Koskeniemi, *Letter to the Editors of the Symposium*, 93 AJIL 351, 352, 356 (1999); *see also* Koskeniemi, *supra* note 43.

⁴⁷ Mark Greenberg, *How Facts Make Law*, 10 LEGAL THEORY 157, 160 (2004).

⁴⁸ Benedict Kingsbury & Megan Donaldson, *From Bilateralism to Publicness in International Law*, in *FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA* 79, 86 (Ulrich Fastenrath et al. eds., 2011).

⁴⁹ No preconceptual or even pretheoretical data exist outside any conceptual and descriptive framework. *See* ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 333 (1988).

⁵⁰ *See* Singh, *supra* note 3.

⁵¹ Benvenisti, *supra* note 16, at 43 (“The systemic vision of international law suited an evolving and meandering legal order because it provided room for both continuity and change: continuity of the basic principles like sovereignty and the doctrine of sources, and change through opportunities for state actors to adjust specific norms by practice or consent and an opportunity for judges to assert changes in the law through adjudication.”).

legal scholarship, as mentioned above.⁵² Likewise, systemic approaches to international law may be seen as pathological manifestations of the human mind's natural inclination to find patterns in heterogeneous practices and materials⁵³ or as a makeshift tool to quench the taxonomical gluttony of legal academics.⁵⁴

Second, one could contest D'Amato's concept of self-preserving international law from an internal perspective, that is, from the perspective of the autopoietic paradigm. Can an autopoietic system ever be self-preserving? The internal coherence—that D'Amato uses interchangeably with consistency—of the international legal system may be in contradiction with the main paradigms of system theories according to which legal systems create the conflicts that they need for their own evolution and sophistication.⁵⁵

Third, D'Amato's axiomatic construction could be contradicted from an epistemological perspective by arguing that it is the community (or communities) of international lawyers, rather than international law, that is riven by self-preserving dynamics. On this view, which is not without constructivist overtones,⁵⁶ international law is a battleground where professionals of international law advocate, as activists, for a certain vision of the law and, correspondingly, a certain way to make sense of the world. Against the backdrop of this argumentative battleground, international lawyers, like craftsmen, naturally coalesce into groups based on expertise, skills, political projects, or certain visions of the law. In this context, international lawyers come to share an inclination to federate into groups designed along professional activities,

⁵² Since David Hume, it has been accepted that the inductive constructions upon which systems are articulated are highly contested from a methodological point of view. See Philip Allott, *Language, Method and the Nature of International Law*, 1971 BRIT. Y.B. INT'L L. 79, 101.

⁵³ *Id.* at 104; see also Singh, *supra* note 3.

⁵⁴ Jules Coleman, *The Architecture of Jurisprudence*, 121 YALE L.J. 2 (2011).

⁵⁵ Luhmann, *supra* note 9, at 142.

⁵⁶ Nicolas Greenwood Onuf, *International Legal Order as an Idea*, 73 AJIL 244, 266 (1979) (listing an example); Jutta Brunnée & Stephen J. Toope, *Constructivism and International Law*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 119 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2012) (providing some critical remarks on constructivism in international law).

paradigmatic and methodological lines, political aspirations, or, more simply, attitudes and mind-sets.⁵⁷

To capture these federating processes, one could speak of guilds,⁵⁸ community of practice,⁵⁹ or epistemic community.⁶⁰ The terminology does not really matter here. More important is the fact that the binding agent among members of these various guilds of international law professionals is not necessarily faith or belief in a given paradigm or methodology, shared doubts or contestation, but a calling for self-preservation. As Régis Debray has demonstrated, all communities of professionals deploy strategies of self-preservation.⁶¹ International lawyers are no different. The need to preserve both the profession and their role drives international lawyers to form guilds.⁶² But if self-preservation is a mind-set inherent in the communities of professionals organized around international law, rather than a feature of international law itself, D'Amato is focusing on the wrong living entity. While it is true that the self-preserving attitude of such professional communities can reverberate on the object of their practice, the guilds' self-preserving attitudes should not be confused for an inherent feature of that object—here, international law. This consideration possibly points to the greatest weakness of D'Amato's axiomatic construction: like autopoietic system theories in general,⁶³ his self-preserving system constitutes an overly radical break from the agents that operate the

⁵⁷ David Feldman, *The Nature of Legal Scholarship*, 52 MOD. L. REV. 498, 513 (1989).

⁵⁸ See Jean d'Aspremont & Jörg Kammerhofer, *Introduction: The Future of International Legal Positivism*, in INTERNATIONAL LEGAL POSITIVISM IN A POST-MODERN WORLD, *supra* note 18, at 1.

⁵⁹ EMMANUEL ADLER, COMMUNITARIAN INTERNATIONAL RELATIONS: THE EPISTEMIC FOUNDATIONS OF INTERNATIONAL RELATIONS 14–17 (2005).

⁶⁰ Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1 (1992).

⁶¹ RÉGIS DEBRAY, TRANSMITTING CULTURE 5 (Eric Rauth trans., 2000).

⁶² Akbar Rasulov, *New Approaches to International Law: Images of a Genealogy*, in NEW APPROACHES TO INTERNATIONAL LAW 151 (José María Beneyto & David Kennedy eds., 2012) (applying Debray's insights to the critical legal studies movement).

⁶³ Luhmann, *supra* note 9, at 137.

system.⁶⁴ Yet, if there is anything self-preserving in international law, it seems to lie with the community (and communities) organized around it.

V. THE LESSONS: LET INTERNATIONAL LAW SAVE ITSELF

In the context of American international legal scholarship, D'Amato stands as an inspiring knight confronting the dominant pragmatism of the legitimacy and empirical schools of international law and their interdisciplinary and antisystemic moves. Approaching international law from the perspective of his concept of self-preserving international law is thus novel and will undoubtedly be conducive to gaining new insights in international legal thinking. Whether D'Amato's theory will accede to the pantheon of the classical American schools of international law is not a question that can possibly be answered here, even if the discussion here is a step in that direction. Ultimately, the success of a theory hinges on its persuasiveness and social validation. In the case of D'Amato's subtle constructions, none of them can be prejudged at this stage. It seems more relevant to return to the introductory question raised above: does international law need to be saved?

As the foregoing has shown, the implications of D'Amato's concept of self-preserving international law reveal the futility of international lawyers' attempts to save international law. If D'Amato is right and international law is indeed a self-preserving system, it takes care of itself, and international lawyers should accordingly devote their energy to less heroic tasks. If D'Amato is wrong and international law is not a self-preserving system, however, should international lawyers renew the project of rescuing international law?

David Bederman raised doubts about the project of "saving" international law more than a decade ago,⁶⁵ but the topic has not attracted much discussion since that time. Instead, international lawyers, for the most part, continue to believe in the necessity of shielding or rescuing international law from a variety of perceived imminent perils.

⁶⁴ See García-Salmones Rovira, *supra* note 20, at ____.

⁶⁵ David J. Bederman, *Constructivism, Positivism, and Empiricism in International Law*, 89 GEO. L.J. 469, 471 (2001) (book review).

More orthodox legal academics are usually concerned with what they see as the lethal rise of radical skepticism, indeterminacy, fragmentation, or simply what they call the “political.” More critical academics are wary of the resilience of deceitful objectivism in international legal studies or seek to resist techniques that create the illusion of a stable meaning or that obfuscate the politics of unity or coherence. Legal advisers or activists, for their part, see great hazards in international law’s inability to maintain order or to contain violence, whether the challenge is Crimea and Ukraine, Syria and Iraq, Gaza and Israel, the Central African Republic, or somewhere else. As for judges, they see hazards for international law in the contemporary dejudicialization of international relations or in the opposite phenomenon of its overjudicialization. International lawyers, while united in seeking its rescue, thus diverge as to what allegedly threatens international law.

Those disparate perceptions are the predictable result of the great variety of projects pursued by the professional lawyers involved. Those multiple perceptions can also be traced back to international lawyers’ inclination to see international law as an explanatory project geared towards a decomplexification of the world.⁶⁶ It is argued here, however, that some of the more heroic international lawyers may not fully see that their own efforts to develop international law in ever more sophisticated categories exacerbate the complexity of the world and engender many of those perils from which they want to save international law.⁶⁷ The self-preserving communities of professionals discussed above are thus a source of the perceived hazards threatening international law as well as the bearers of the shared feeling of the necessity to save international law. Even more than his subtle and audacious theoretical construction, it is in posing a stark challenge to international lawyers’ quest to save international law that D’Amato’s article might most durably change international legal thinking.

⁶⁶ See generally Anne Peters, *Realizing Utopia as a Scholarly Endeavor*, 24 EUR. J. INT’L L. 533 (2013) (stating that scholarship is all about the generation of theories to reduce complexity).

⁶⁷ Jean d’Aspremont, “Effectivity” in *International Law: Self-Empowerment Against Epistemological Claustrophobia*, AJIL UNBOUND (June 20 2014), at <http://www.asil.org/blogs/“effectively”-international-law-self-empowerment-against-epistemological-claustrophobia> (projecting international law’s complex categories on the external world).