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Custom and Treaty: A Response to Professor Weisburd*

*Anthony D'Amato***

Arthur M. Weisburd's article, *Customary International Law: The Problem of Treaties*,¹ focuses on an important problem that has been relatively overlooked: whether current doctrinal scholarship accords too much weight to treaties as constitutive of customary practice. Few issues in international law are more important than the question of where an international rule comes from and how it is proved. Professor Weisburd has addressed a significant component of this basic question. Since he regards me as the leading offender among writers who overdetermine the value of treaties, I would like to take this opportunity to respond.

As a preliminary matter, I must say that I could not be more gratified than to be accused of giving treaties more weight than they deserve as components of the state practice that generates customary international law. When I wrote my book on custom in 1971,² publicists of international law generally agreed that the content of treaties was irrelevant to customary law; therefore, treaties deserved no weight at all in the assessment of custom. At that time I could hardly anticipate a day when a writer would worry about giving treaties too much weight.

My great law school teacher, Professor Richard Baxter, summarized the prevailing consensus in a 1961 seminar by proposing that parties enter into treaties either to carve out for themselves a special rule that derogates from the underlying rule of customary international law, or to reaffirm the underlying rule in contractual form. In the former case, the underlying rule of customary law is unaffected, since the parties deliberately derogated from it; in the latter case, the underlying rule remains the same by definition. Hence, why look at treaties at all if the purpose

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1. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1 (1988).

2. A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971) [hereinafter A. D'AMATO, CONCEPT OF CUSTOM].

is to discover the general customary rule? The treaty itself can never determine what the general rule is, Professor Baxter concluded, because it is equally likely to derogate from or to affirm the customary rule.

The discussion arose because I had asked him whether I could take as a topic for my seminar paper the proposition that treaties have a substantive impact upon custom.³ I argued that his logical position on treaties seemed to be at variance with the historical reality of the matter: that many—if not nearly all—rules of contemporary customary law had their origin in treaties. This could not have occurred, I said, if the content of treaties is irrelevant to customary law. I detected a deep problem with the surface conclusiveness of Professor Baxter's logic, but I did not know what it was. I handed in the seminar paper, which was published the following year,⁴ largely as an exercise in devising a way around the surface logic. The paper was merely a first cut at the problem—a problem which would absorb me for the next decade. Years later, having worked it out at least on paper, I wrote the aforementioned book on customary law.⁵

In the ten-year period between the seminar and the book, I talked with Professor Baxter from time to time about the impact of treaties upon custom. The evidence I had accumulated about treaties generating customary rules led him to reconsider his position. He published an essay in the *British Year Book of International Law* in which he modified his own previous position to a limited extent.⁶ He argued that multilateral treaties, but not bilateral ones, could constitute evidence of international law.⁷ He also conceded that humanitarian treaties might give rise to new rules of international law.⁸ I sent Professor Baxter comments on his position, but he did not want to get into a written correspondence, which he colorfully said would be like "taking in each other's wash." He did, however, encourage me to continue to publish on the subject. My eventual critique of his 1965 essay comprised about eight pages of my

3. As Professor Baxter's seminar addressed the topic of nationality in international law, my proposed paper was in left field. Professor Baxter, in demeanor a very formal and proper man, was not at all formalistic, however, when it counted—in his attitudes. When I proposed my paper topic he said, "Why not?"

4. D'Amato, *Treaties as a Source of General Rules of International Law*, 3 HARV. INT'L L.J. No. 2, 1 (1962).

5. A. D'AMATO, *CONCEPT OF CUSTOM*, *supra* note 2.

6. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 1965-66 BRIT. Y.B. INT'L L. 275.

7. *Id.* at 277-78, 297.

8. *Id.* at 280-86, 294-97.

1971 book.⁹ Quite apart from the doctrinal issues, I could not see any difference between the custom-creating effects of a multilateral as compared to a bilateral treaty, since a multilateral treaty among ten nations would have the same effect as fifty-four identical bilateral treaties between each nation-pair of those same nations.¹⁰ Moreover, it is not at all clear why humanitarian treaties should be excepted from Professor Baxter's general position—as indeed Professor Weisburd now convincingly demonstrates in his article.¹¹

Professor Baxter followed with his Hague lectures entitled "Treaties and Custom," which were published in 1970.¹² He mentioned my seminar paper as having "shed much light on a number of the questions dealt with in this and the preceding chapters . . ." ¹³ In the lectures he modified his position as to a series of bilateral treaties, using my example of similar provisions in the Bancroft Treaties.¹⁴ Fundamentally, however, he did not depart from the "establishment" view that treaties intrinsically can have no necessary effect upon customary law.

As I look back on those events, what Professor Baxter and I were trying to do was to make some sense of the international law materials which told both of us that treaties indeed have an impact upon customary rules. While he was approaching the matter with great caution, I leaped to the radical position that treaties directly generate customary rules. At first, the international community responded to my book by dismissing its thesis as absurd; the book was "panned" by reviewers in the leading journals. The reason for this icy response was simply the feeling that I had gone overboard in suggesting that treaties can have an actual impact upon custom. My thesis was distinctly anti-establishment

9. A. D'AMATO, CONCEPT OF CUSTOM, *supra* note 2, at 152-60.

10. *Id.*

11. Weisburd, *supra* note 1, at 39-41.

12. Baxter, *Treaties and Custom*, 1970-I RECUEIL DES COURS 25.

13. *Id.* at 75 n.1. I would have been more pleased with this acknowledgement were it not for the fact, which severely depressed me at the time, that Professor Baxter made prominent mention in his lectures of an article by Ibrahim Shihata, *The Treaty as a Law-Declaring and Custom-Making Instrument*, 22 REVUE ÉGYPTIENNE DE DROIT INTERNATIONAL 51, 74-79 (1966). Baxter, *supra* note 12, at 66 n.32. Dr. Shihata wrote that article as a paper for Professor Baxter's seminar in a year subsequent to the one in which I wrote and published my paper on treaties and custom. In a footnote toward the end of his essay, Dr. Shihata gave a lone citation to my previous paper on an inconsequential point. To my amazement, however, a great deal of Dr. Shihata's organization, structure, argumentation, and logic was extremely similar to, if not in some places identical to, my previous article. Professor Baxter surely must have known this, but I never asked him or Dr. Shihata about it.

14. Baxter, *supra* note 12, at 75.

at that time, and viewed as a threat to scholars who had constructed their writings on the old theories.¹⁵

Nevertheless, over time my thesis has made some headway, which is why I find it so satisfying that I am now criticized by a scholar of international law, not for taking the big leap from no weight to some weight for treaties, but for the small jump from a little weight to a lot of weight. In fact, I think Professor Weisburd misreads my position, attributing to me a stance I did not take. If so, the fault is mine for not making my position clearer to the reader. In any event, what I said, what I meant to say, and whether Professor Weisburd has correctly interpreted me, are eminently trivial questions. The only matter of any lasting importance is getting the underlying logic straight.

Professor Weisburd's starting point is that treaties constitute state practice just like any other state act. Hence, treaties "count" in proving up a customary rule.¹⁶ But he does not want treaties to count for too much. His problem may be broken down by asking at the outset precisely *why* treaties count at all.

What makes the content of a treaty count as an element of custom is the fact that the parties to the treaty have entered into a binding commitment to act in accordance with its terms. Whether or not they subsequently act in conformity with the treaty, the fact remains that they have so committed to act. The commitment itself, then, is the "state practice" component of custom.

Why does this commitment have legal significance? The only plausible answer is that customary law itself gives it significance. A treaty is binding by virtue of the underlying customary law of treaties; without that law, the treaty would be a mere scrap of paper.¹⁷

This analysis suggests that the commitment is an act that is defined in

15. Though I can hardly compare my little effort to what Kuhn has called a "paradigm shift," the resistance to my thesis of many older professors (which has continued unabated to the present day) seems to be akin to what Kuhn was discussing when he said that scientists who have staked their professional careers on old views will resist "progress" because it would be an admission that they were wrong. See T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962).

16. See D'Amato, *What Counts as Law?*, in *LAW-MAKING IN THE GLOBAL COMMUNITY* 83 (N. Onuf ed. 1982).

17. One may even ask a prior question: How did this "bindingness" of treaties find its way into custom in the first place? Paradoxical as it may sound at first blush, I believe that the bindingness of treaties stems from the provisions in early treaties that they are indeed binding. In other words, even this bedrock rule of custom—the rule of *pacta sunt servanda*—originated in treaties. For a brief discussion, see A. D'AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECT* 125 (1987) [hereinafter A. D'AMATO, *PROCESS AND PROSPECT*].

temporal terms. It "occurs" at the moment the treaty becomes binding on the parties, and this may be the moment of signing, ratification, or deposit, depending on what the treaty provides for on its entering into force. Thus, we see that the impact which the treaty has on custom occurs at one point in time. In that respect, it is like any other state act that is formative of international custom—a "one-shot" proposition. Why, then, does Professor Weisburd believe that a treaty has a greater—perhaps too great—impact upon custom compared with the impact of any other state act?

One possibility is that he thinks that a treaty, once it enters into force, exerts a continuing commitment. The United Nations Charter, for instance, has continued its impact upon state behavior from 1945 to the present day. But the answer to this contention is to point out that any state that acts in the international arena has created an act/precedent that continues in the same way that a treaty continues; that is, it continues until a state acts contrary to the act/precedent. Contrary state action then presents a problem in determining whether the contrary act violates the previous understanding or creates a new and different understanding. Difficult though this particular problem may be, it is the same problem that confronts a treaty regime. For example, if states begin to act contrary to Article 2(4) of the United Nations Charter, there is the problem of determining whether that Article retains vitality or whether it has been, in Professor Franck's words, "killed."¹⁸

Another possibility—this one more clearly explicit in Professor Weisburd's article, and the one he directly attacks—is that once there is a treaty, no amount of contrary state practice can ever overcome it.¹⁹ In a curious sense, this is the obverse of the position that writers were taking prior to 1961: once you have custom, treaties can never overcome it no matter how many treaties you cite. Professor Weisburd writes that "some commentators have expressly denied the relevance to customary law analysis of practice other than treaties and General Assembly resolutions when such exist."²⁰ Specifically with regard to me, Professor Weis-

18. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809 (1970).

19. See Weisburd, *supra* note 1, at 30-31.

20. *Id.* at 11 (relying on Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53, 79-81 (1982), and A. D'AMATO, PROCESS AND PROSPECT, *supra* note 17, at 123-47. It is unclear from his citation whether "some commentators" refers only to Blum & Steinhardt, or to all three of us. For my part I have never denied, expressly or implicitly, the relevance to customary law analysis of practice other than treaties, not to mention General Assembly resolutions.

burd says that I have disregarded state practice contrary to treaties in two substantive legal areas: torture²¹ and piracy.²²

As for torture, Professor Weisburd notes that there is extensive state practice: "roughly one-third of the states in the world routinely employ torture."²³ He later states that I mistakenly ignored all this state practice of torture by falsely comparing it to the old practice of piracy—and getting the latter wrong as well:

Professor D'Amato, seeking to establish that human rights treaties have created a customary law of human rights, has argued that practice contrary to human rights ideals no more established the legality of such practice than the flourishing condition of piracy in the seventeenth century, due in part to failures by states to act against pirates, established the legality of piracy.²⁴

What I actually wrote was:

For Lane and Watson to contend that the often appalling statistics of human-rights violations by governments vis-a-vis their own nationals are evidence that what those governments are doing is legal under international law would be very much like a seventeenth-century legal scholar stating that piracy must be legal because it is flourishing. Rather, the critical legal question for the seventeenth-century scholar was not whether nations in fact combatted piracy but whether they were legally entitled to do so if they chose.²⁵

I could have made the same point by citing the drug problem in the United States today: the widespread use of drugs and even the corruption of the police forces in the distribution of drugs does not mean that narcotics dealers are legally free to ply their trade. Just visit your nearest prison and ask some of them.

Of course, the international legal system differs dramatically from the domestic system in that there are no international statutes which state that torture or piracy is illegal in the same way that domestic legislation outlaws drug trafficking. And I certainly have never suggested that treaties are a substitute for international statutes, not to mention United Nations resolutions. The question that Professor Weisburd tackles is: How can we be sure what the international customary law rule is when we

21. *Id.* at 6 n.14.

22. *Id.* at 30.

23. *Id.* at 6 n.14 (relying on AMNESTY INTERNATIONAL, TORTURE IN THE EIGHTIES 2 (1984)).

24. *Id.* at 30 (citing D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1126 (1982)).

25. D'Amato, *The Concept of Human Rights in International Law*, *supra* note 24.

have treaties prohibiting torture on the one hand, and extensive state practice of torture on the other?

Obviously, we must examine this apparent contradiction more closely. Let us consider the first half of the dilemma: that treaties prohibit torture. Is it possible that those treaties are less than what they appear to be? Perhaps they simply codify ideals that states want us to believe while those same states go about their preferred practice of torturing people. Professor Weisburd implies that I do not understand this possible reality of international relations in my ivory tower approach to treaties. However, in a recent book, I thought my skepticism about what governments say as opposed to what they do was fairly explicit:

It almost appears at times that governments invoke precisely those legal rationales in favor of their positions that they believe *academic* international lawyers want to hear. They may announce that they are following the X set of rules when the actions they take have a hidden agenda labeled Y; yet X is proclaimed because international legal scholars want to hear X and expect to hear X. By invoking the X set of rationales, governments appease the international legal community, which is one of the many pressure groups governments attempt to accommodate by their verbal policies.

Not only do many international legal scholars accept these verbal rationalizations when they are made, but they also proclaim that it is important that governments invoke those rationales. If a government says X when it does Y, these scholars say that the government refrained from invoking Y because that would be tantamount to admitting a violation of international law. Hence, these scholars tell us, the government-invoked rules of international law (meaning set X) remain intact even though a government may have deviated from them in practice (in doing Y). Given this self-referential reinforcement of their own theories by scholars, one can hardly blame governments for going along with the game. One is reminded of La Rochefoucauld's observation, "L'hypocrisie est un hommage que le vice rend à la vertu."²⁶

There is, however, a fundamental legal difference between what governments say when they are rationalizing their policies to the world, and what they commit themselves to do in treaties. Going back to my starting point, a treaty is itself a legal commitment. For that reason alone, it has impact upon customary law. But what governments *say* is at best a *theory about* international law, and not international law itself.²⁷

26. A. D'AMATO, *PROCESS AND PROSPECT*, *supra* note 17, at 229. Professor Weisburd cites this book, but on a different matter. *See* Weisburd, *supra* note 1, at 11 n.31.

27. This is, incidentally, why I was so surprised by Professor Michael Akehurst's article that takes me to task for insisting that customary law is a matter of what states do—including what they do in their treaties—and offering instead his theory that inter-

Thus, conventions against torture cannot be dismissed as simply public relations activities by governments. Whether or not conventions represent what states believe, they certainly represent what states have committed themselves to do. Indeed, it seems to me that Professor Weisburd should be the last person to dismiss such conventions, since his own starting point is that treaties are a component of state practice that determines customary international law.²⁸ What, then, is he arguing? Does he contend that an anti-torture convention should be ignored because it is contrary to extensive state practice? Or that I should ignore it? He complains that I assign it too much weight,²⁹ but if he prefers that I assign it no weight at all then he is back to the pre-1961 "establishment" view that treaties are irrelevant to custom.

The most logical interpretation I can give to Professor Weisburd's position is that he would grant an anti-torture convention *some* weight in establishing an anti-torture rule of customary law, and that such weight could be overcome by ensuing and extensive state practice to the contrary. If that is his position, then I completely agree with him. But we still have to face the question regarding the second part of the dilemma: Is there extensive state practice of torture and, if so, how do we deal with it in light of the treaty-based rule prohibiting torture?

Let us consider, then, the second half of the dilemma—Professor Weisburd's depiction of extensive state practice of torture. If Professor Weisburd had to define the legal rule that this state practice has created, what would it be? I think he would have to reply: "There is an international rule of customary law that makes it legal for states to torture people." Such a rule would clearly conflict with the treaty-based rule prohibiting torture. So we must ask, is there such a rule? Is it the rule that has been generated by the state practice which Professor Weisburd cites?

It seems to me important to ask whether the states that engage in torture are (a) disclosing that they are torturing people, (b) proclaiming that what they are doing is legally justified, and (c) implicitly inviting other states to do likewise on the ground that, if torture is legally permissible for them, it is legally permissible for all states. Perhaps a recent domestic analogy might be relevant. In the Reagan Administration, many officials have been engaged in activities such as recommending

national law is made up of what states say. See Akehurst, *Custom as a Source of International Law*, 1974-75 BRIT. Y.B. INT'L L. 1. For criticism of Dr. Akehurst's position, see A. D'AMATO, *PROCESS AND PROSPECT*, *supra* note 17, at 124-47.

28. See Weisburd, *supra* note 1, at 5.

29. See *id.* at 30-31.

people for government posts and promoting certain foreign policies that have redounded to their personal financial profit. As various special prosecutors are now looking over these activities and in certain cases bringing indictments against the officials for conflict of interest and ethical violations, the question is whether those officials have acted illegally or are merely guilty of impropriety. As I write these words, the "law" on the subject is not at all clear. Under the American legal system, the "law" will be a matter of interpretation of certain statutes, so the analogy to international customary law breaks down at the level of "sources of law." Putting aside the "sources" question, however, one thing is relatively clear: none of the government officials publicly revealed what he was doing when he did it, and indeed all of them have attempted to cover up what they did. On the ethical question, none of them have attempted to say publicly that conflicts of interest are justified when engaged in by Reagan Administration officials. Rather, they have all said that they "can not recall the specifics" of the transactions. Indeed, one former official pleaded in court that he was drunk most of the time.

The same story can be told of the torture situation. Governments do not admit torturing people; they invariably deny that it happens. When presented with conclusive proof that it has occurred, they appoint Commissions of Enquiry to investigate the circumstances. Sometimes the result is that certain persons are convicted of torture, and they are fined or imprisoned, albeit with far more lenient sentences than they seem to deserve. Moreover, governments do not proclaim that any torture in which they engage is legally permissible. And they certainly do not raise it to the level of a legal principle that would make torture legal for all nations under international law.

The opposite of this was true of medieval state practice. Governments then openly engaged in torture. So did the Church and the medical profession. Governments said publicly that torture brought out the truth. The Inquisitors added that if the tortured person was innocent he was being done a favor by being sent directly to heaven, while if he was guilty he was simply getting a preview of hell. Even doctors engaged in tortuous medical treatment, which was widely believed to cleanse the soul and cast out devils (who presumably could not stand the heat). If this were 1488 instead of 1988, I would have to concede to Professor Weisburd that state practice had given rise to a customary international rule allowing torture.

Still, we need contemporary data other than purely verbal evidence that there is any "bite" to the treaty rule prohibiting torture in the face of extensive state practice to the contrary. Otherwise we would have a situation today in which a treaty would be honored *only* in the breach.

In such a case I would have to agree that the treaty is merely the homage that vice pays to virtue.

The operative empirical question that should be asked is: Are current instances of torture fewer than they would be in the absence of the treaty-based human rights rule of international law prohibiting torture? This way of putting the question stems from a view I advocated in my book on custom—the view that legal rules are not things that obtain in an all-or-none fashion, but rather norms that exert psychological pressure on people to conform to those norms:

For example, the norms relating to “freedom of the seas” probably exert an effective pressure against all nation-state officials not to attempt to expropriate to their own use the Atlantic Ocean, and not to interfere with numerous foreign shipping or fishing activities on the high seas. The idea of a rule of law as an indicator of a psychological pressure upon the person to whom it is addressed might be illustrated by a hypothetical example of one of the simplest of all possible rules of law—a “stop” sign on a street or highway. Imagine that one of these traffic signs exists in a community where every driver habitually does not bring his motor vehicle to a full “stop” at the particular sign, but rather shifts into low gear or otherwise slows down his motor vehicle when approaching the sign and then passes it. Has the traffic ordinance represented by the sign been violated? Yes, from a technical, as well as a legal, point of view. A policeman could, if he so desired, arrest any or all of the drivers in that community for failing to observe the “stop” sign. But does the violation of the “stop” sign mean that the sign is of no value in that particular community? Here the answer would have to be in the negative, for the sign functions as a kind of “pressure” upon drivers to *slow down*. If its purpose was to help to prevent traffic accidents, it may have succeeded admirably by getting motor vehicles to slow down and proceed with caution.³⁰

One could probably design a sociological research project and spend several million dollars investigating whether the treaty-based rules prohibiting torture are decreasing the actual instances of state torture internationally. But I think we can make a good guess as to the results of such a survey without spending the money. The widespread acceptance by state officials that torture is a violation of international law undoubtedly means that the instances of actual torture in the world today—regrettable though even a single instance may be—are far fewer than they would be if the medieval attitude toward torture were prevalent today.

This assumption—which I cannot prove without doing a huge socio-

30. A. D'AMATO, CONCEPT OF CUSTOM, *supra* note 2, at 32.

logical study, but which I can ask the reader to accept on the grounds of our general experience about the world—leads me to the conclusion that state practice of torture is today generally accepted as a violation of the international customary norm and not as disconfirmatory of that norm. In other words, I read the evidence exactly opposite to the way Professor Weisburd reads it.³¹ To me, the objective evidence shows hiding, cover-up, minimization, and nonjustification—all the things that betoken a violation of law. To him, the evidence of widespread torture indicates that the treaty-based rule has been swamped by negative practice to the contrary,³² and hence leads to his preferred current rule of international customary law that torture is permissible.

To support his conclusion about torture, Professor Weisburd makes wholesale changes in the theoretical structure that I thought was necessary to support the initial idea that treaties can have an impact upon custom. Consequently, I believe he undermines his own position.

Although Professor Weisburd begins his article by stating his conclusion—“that treaties are simply one more form of state practice”³³—in the middle of his article, when he sets out his reasons, he belies the conclusion he said he would reach. For he makes it apparent that only some treaties count as state practice, and the treaties that count are only those that the parties *intend* should count. Professor Weisburd adds that when the parties to a treaty do *not* believe that the background customary law would require them to act in the way that the treaty specifies, then such a treaty can have no impact upon custom. Not only does he abandon the notion that a commitment to become bound by the treaty has a necessary impact upon custom, but he more radically excises from the legal record all subsequent practice by the parties in conformity with the treaty. As Professor Weisburd puts it:

If a treaty demonstrates that the parties believe they would have no legal obligation to behave as the treaty requires but for the treaty, it follows that practice under the treaty cannot supply the usage element necessary to establish a rule of customary international law.³⁴

It now seems that Professor Weisburd is back comfortably with the “es-

31. Or maybe almost the opposite. Professor Weisburd later concedes that a little weight might be given to state denials of the practice of torture if such denials “are not attributable entirely to political motives.” Weisburd, *supra* note 1, at 35. This is a narrow concession, for how would one go about determining whether the motivations of governmental leaders in foreign countries are or are not entirely “political?”

32. *Id.* at 41.

33. *Id.* at 6.

34. *Id.* at 24.

tablishment" view that I started to attack in 1961. For just about every truly innovative treaty in the history of international law—that is, every treaty that gave rise to a *new* rule of customary law or to a *change* in existing customary law—was one in which the parties reasonably believed that they had no legal obligation to behave as the treaty required but for the treaty. Consequently, Professor Weisburd would disbar from customary law all the treaties, and the practice thereunder, that changed customary law from the way it was thousands of years ago. Unless he thinks that present day customary law is roughly equivalent in content to that practiced by the Babylonians in their naval encounters with other city-states, Professor Weisburd should rethink his wholesale exclusion of the impact of all innovative treaties upon international law.

His argument seems flawed not only historically but also pragmatically. What does it mean for a treaty to "demonstrate" what the parties "believe?" The language of the treaty may reveal little more than what the negotiators were able to agree upon. Often the easiest thing for negotiators to agree upon is self-serving language about the treaty either reflecting or departing from the underlying custom. For instance, nation *B* is situated where it is the upper riparian regarding rivers that flow across its southern borders to nation *C*, and is lower riparian regarding rivers that flow into its territory from nation *A* to its north. If *B* concludes a treaty with its northern neighbor *A* and *A* agrees not to divert or pollute the river, *B* might well ask for a clause in that treaty that will preserve its own option to divert or pollute rivers flowing south into nation *C*. Since *A* will not care what *B* does on *B*'s southern border, *A* might well accept a clause that says "this treaty is a clear departure from customary law. Under customary law, the upper riparian has total sovereignty over interstate rivers. By this treaty only, the upper riparian cedes certain rights to the lower riparian." Such a clause would have value for *B* when it later is asked by its southern neighbor *C* to stop diverting and polluting the southern boundary rivers.

Professor Weisburd's theory commits him to the position that the aforementioned treaty clause succeeds in depriving that treaty of any impact upon customary law. My view, however, is that we should focus on what nations do and not on what they say. The river treaty clearly is a departure from any notion of upper riparian sovereignty no matter how the parties characterize it. Therefore, it contributes to the development of the rule of reasonable apportionment in the customary law of transboundary river utilization. In the negotiations between *B* and *C*, *C* may justifiably cite *A*'s treaty with *B* as having an equitable-apportionment impact upon customary law.

More generally, Professor Weisburd's repeated references to what na-

tions "believe" stems from his insistence that *opinio juris* is the key element in the development of general customary law. I have not discussed this aspect of his article—even though I think that this is where he makes the initial error that sends his entire analysis down the wrong path—because he has read my book, which discusses the matter at great length, and has implicitly rejected my reasoning. To summarize my argument in two sentences, I would only say the following: It is an anthropomorphic fallacy to think that the entities we call states can "believe" anything; thus, there is no reason to call for any such subjective and wholly indeterminate test of belief when one is attempting to describe how international law works and how its content can be proved.³⁵ In any event, the *opinio juris* requirement entered international law through a misreading of Blackstone's prescriptions for proving custom;³⁶ the concept is at best otiose when used to characterize general customary law, and transmutable into the more stringent test of consent when used to characterize special customary law.³⁷ Although I appreciate Professor Weisburd's willingness to accept at least a part of the conclusion I reached regarding the impact of treaties upon custom, his evident disagreement with how I reached that conclusion would be of great interest to me if he were to spell out the fallacies in the reasoning that led me to the conclusion he partially accepts.

Professor Weisburd's article as a whole is reminiscent of the writings of Professors Lane and Watson, who have taken a debunking view of international human rights norms.³⁸ The reasoning of the penultimate section of Professor Weisburd's article is similar to that of Professors Lane and Watson. Perhaps all three of these fine scholars are motivated by nothing more than the search for truth and an impatience with the sloppy reasoning of others. Certainly their articles are provocative and eminently worth consideration. Yet, I wonder what motivates them to want to prove that genocide (in the case of Watson and Lane) and torture (in the case of all three) are not illegal under present international law. I further wonder why they would want to go to the extreme of

35. A. D'AMATO, CONCEPT OF CUSTOM, *supra* note 2, at 47-56.

36. *Id.* at 241-45.

37. *Id.* at 233-63.

38. See Watson, *Autointerpretation, Competence, and the Continuing Validity of Article 2(7) of the UN Charter*, 71 AM. J. INT'L L. 60 (1977); Watson, *A Realistic Jurisprudence of International Law*, 1980 Y.B. WORLD AFF. 265; Lane, *Demanding Human Rights: A Change in the World Legal Order*, 6 HOFSTRA L. REV. 269 (1978); Lane, *Mass Killing by Governments: Lawful in the World Legal Order?* 12 N.Y.U. J. INT'L L. & POL. 239 (1979). For a detailed discussion of these articles, see A. D'AMATO, PROCESS AND PROSPECT, *supra* note 17, at 90-109.

recasting the doctrinal structure of international law in order to substantiate their positions on the legality of genocide and torture. Perhaps they are motivated by a conviction that genocide and torture will continue as long as the international community has a Pollyannish belief that those practices have been outlawed by international law—a belief that they hope will be dispelled by their own deconstructive writings. If realistic community action to reduce or prevent genocide and torture is indeed their ultimate goal, they ought to reveal to the rest of us why stripping the charges of illegality from genocide and torture should have the counterintuitive effect of galvanizing nations to stop those practices.

If I am correct in assuming that the aforementioned authors are opposed to genocide and torture—an assumption which I hold with confidence—then perhaps they should consider taking a more radical approach. They should frankly discard the current international law doctrine that they do not like and rebuild their own versions of international law from a starting point of morality and justice. The legal community would be well served if they were to construct an alternative legal position directly upon normative foundations.