Vanderbilt Journal of Transnational Law

Volume 21
Issue 3 *Issue 3 - 1988*

Article 3

1988

A Reply to Professor D'Amato

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I. INTRODUCTION

In the foregoing article,[1] Professor D'Amato has taken issue with a number of arguments I raised in an article published in a recent issue of the *Vanderbilt Journal of Transnational Law*.[2] In this reply, I attempt to refute his criticisms. The discussion that follows briefly recapitulates my article. I then seek to deal with the points made in Professor D'Amato's response one by one.

My article addressed an aspect of the relationship between treaties and customary international law. Taking as a starting point the assumption that treaties can be an element of the state practice necessary to constitute customary law,[3] the article inquired whether treaties were so important a form of state practice that one could derive rules of customary law solely from treaties, even in the face of other types of practice coterminous with relevant treaties but inconsistent with them. It concluded that treaties were not such strong determinants of customary law

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1. D'Amato, *Custom and Treaty: A Response to Professor Weisburd*, 21 VAND. J. TRANSNAT'L L. 459 (1988) [hereinafter D'Amato, *Response*].

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

3. This conclusion resulted, in part, from Professor D'Amato's extensive work on the subject. *See id.* at 10.

that they could, in effect, overwhelm other types of practice. The article sought to demonstrate this conclusion through three lines of argument. First, it described instances in which customary law had developed rules that ran contrary to existing treaties.[4] Second, it showed that treaties themselves can be modified through practice, arguing that, if a treaty itself is not immune to modification through practice, then customary law can hardly be immune to similar modification merely because treaties exist relating to the area of customary law in question.[5] Third, the article argued that a particular subclass of treaties—those that can be seen as denying the existence of customary rules on the subject governed by the treaty—ought not be seen as constitutive of custom in that they deny the existence of the *opinio juris* element of custom.[6] This portion of the argument focused specifically on international conventions forbidding states parties to engage in torture and asserted that such conventions, in effect, denied the existence of a duty outside the convention to refrain from torture.[7] Thus, these conventions should not be seen as the basis of a customary rule against torture. Finally, the article addressed certain arguments contrary to those it made.[8]

As I hope this summary makes clear, my article did not really focus on the subject to which the bulk of Professor D'Amato's *Response* is directed: whether use of torture by states is a violation of customary international law. Yet, even though that subject was not the focus of the article, Professor D'Amato was certainly correct in observing that the article strongly implied, if it did not exactly express, considerable skepticism toward the proposition that torture is such a violation. Since many of Professor D'Amato's comments dealt with this issue, I feel it would be useful at this point to clarify my position.

It is my understanding that a rule may be considered a rule of customary international law, according to the traditional formulation, if it asserts a general practice of states accepted as law. Applying this formulation to a putative rule to the effect that customary international law forbids states to employ torture, I cannot help observing that a significant number of states employ torture, according to evidence such as reports by Amnesty International. This is important because, as I understand the usage, a practice would not be labelled "general" for purposes of determining the content of customary international law merely because a ma-

4. *Id.* at 11-20.
5. *Id.* at 20-23.
6. *Id.* at 23-29.
7. *Id.*
8. *Id.* at 29-45.

jority of states follow it if a significant minority do not. Further, I observe that the vast majority of non-torturing states respond to the use of torture with silence; that is, very few non-torturing states deal with torturing states as though they were dealing with lawbreakers. Since the use of torture is too widespread to permit labelling its nonuse as a general practice, as I understand that term, and in view of the failure of nontorturing states to respond to such putatively illegal acts, it seems to me inaccurate to state that nonuse of torture is a general practice of states accepted as law.

II. Reply to Professor D'Amato

Before replying to Professor D'Amato's criticisms, two preliminary matters must be addressed. First, I believe that it is crucial to stress that Professor D'Amato and I agree on one very important point: We agree that it is necessary to take into account evidence of practice contrary to rules asserted in treaties in determining whether treaties have given rise to rules of customary international law.[9] Professor D'Amato applies this approach in arguing, that practice has not, in fact, undermined a customary law rule against state torture.[10] Although, as I explained above, I have doubts about Professor D'Amato's conclusion on this latter point, our disagreement concerns the proper interpretation of evidence that we agree is relevant, not whether evidence of practice is relevant at all. I am gratified at Professor D'Amato's conclusion on this point, as my most important objective in writing my original article was to establish that evidence of practice contrary to a purported rule of customary law can never be ignored—even if the rule is derived from a treaty and relates to human rights. Knowing that Professor D'Amato shares this conclusion is reassuring to me, to say the least.

The second preliminary matter is related to the first. I owe Professor D'Amato an apology for coming close to misstating his position on the issue discussed in the foregoing paragraph. I had read various of his writings in which he urged that certain human rights treaties had given rise to rules of customary law forbidding certain human rights violations. In those discussions, Professor D'Amato did not address the effect of what I perceive to be extensive state practice contrary to the rule he espouses. I was, therefore, uncertain of his views on the legal consequences of that practice. I did not, in my article, assert that he had expressly labelled such practice irrelevant, but I did say that he "presuma-

9. D'Amato, *Response, supra* note 1, at 466.
10. *Id.* at 467-69.

bly" considered such practice irrelevant, given the absence in his writing of any discussion of it.[11] Although I believe my inference was explicable, Professor D'Amato's *Response* makes clear that it was incorrect, and I regret my misreading.

A. *Torture, Piracy, and Drugs*

Turning now to the points on which Professor D'Amato and I continue to disagree, I first note that I continue to have difficulty with an analogy he uses which I questioned in my article and which he repeats in his *Response*. Originally, as I understand him, he urges that the fact of torture by states no more proves that torture is legal than did the fact of piracy in the seventeenth century prove that piracy was legal. In his *Response* he offers an additional analogy, asserting that the same point could have been made by noting that widespread drug use does not prove the legality of drug dealing.[12] He seems to be saying that, just as the existence of pirates and pushers does not affect the legality of piracy and the drug trade, so the existence of torture by states does not affect the legality of torture.

As I argued in my article, I do not believe the analogy works.[13] My problem is that acts by pirates or pushers are in no sense legislative; as long as laws against piracy and drug dealing exist and are enforced by the authorities responsible, those activities are illegal. Acts by states, on the other hand, can be legislative in customary international law, since states are simultaneously subjects of the law and legislators. As Professor D'Amato has persuasively argued, even violations of international law by states can give rise to new rules of international law.[14] Thus a state's use of torture can be what amounts to a legislative act—in essence, a negative vote against a rule forbidding torture. However, the acts of pirates and pushers cannot be legislative, since the legal systems in which they operate accord no lawmaking authority to them. If Professor D'Amato's analogy is intended to equate the lawmaking effect of acts by states with the lawmaking effect of illegal acts by private persons in domestic legal systems, the analogy seems to incorrectly characterize the effect of acts by states in the international system, and thus does not work.

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11. Weisburd, *supra* note 2, at 5 n.14.

12. D'Amato, *Response*, *supra* note 1, at 464.

13. Weisburd, *supra* note 2, at 30-31.

14. A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 97-98 (1971) [hereinafter A. D'AMATO, CONCEPT OF CUSTOM].

B. *The Contradiction Between Anti-Torture Treaties and State Practice*

Professor D'Amato's next difficulty concerns my treatment of the contradiction I perceived between treaties forbidding torture and state practice contrary to the treaties. He deals with that contradiction in two ways. First, he observes that we could avoid the contradiction if the treaties were not to be taken seriously, but, he states, they are. Treaties are commitments, not mere public relations activities. Second, Professor D'Amato notes that we could avoid the contradiction if practice is not really adequate to support the existence of a rule for which he concludes I must be contending, that is, a rule that "makes it legal to torture people" under international law. And he argues that such a rule cannot be asserted because: (1) states deny rather than proclaim their acts of torture; and (2) the rules against torture have at least some effect on restraining state behavior.[15]

I am not as willing as Professor D'Amato to treat the human rights treaties I examine—the International Covenant on Civil and Political Rights (Covenant)[16] and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention)[17] —as more than public relations gestures for many of their parties. As I discussed at some length in my article, both the Covenant and the Convention offer parties the opportunity to forbid the relevant enforcement committees from considering allegations of treaty violations by particular sources.[18] Likewise, neither the Covenant nor the Convention imposes sanctions for violations of its provisions; the worst consequence is an investigation followed by a report.[19] Adherence to a treaty accompanied by a denial of the right to complain of violations either to other parties or to

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15. *See* D'Amato, *Response*, *supra* note 1, at 465-68.

16. International Covenant on Civil and Political Rights, Dec. 19, 1966, No. 14, 668, 999 U.N.T.S. 171 (1976).

17. U.N. Doc. E/CN.4/1984/72, *reprinted in* 23 I.L.M. 24 *as amended* 24 I.L.M. 535 (1985) (entered into force June 26, 1987, 26 I.L.M. 1490 (1987)).

18. Weisburd, *supra* note 2, at 26-27. As of December 31, 1987, forty of the eighty-seven parties to the Covenant had agreed to permit the Human Rights Committee to hear complaints from individuals; only twenty-one had agreed to permit the committee to hear complaints from other states. *Multilateral Treaties Deposited with the Secretary-General, Status as at 31 December 1987*, at 128, 138-40, 152, U.N. Doc. ST/LEG/SER.E/6, U.N. Sales No. E.88.Y.3 (1988) [hereinafter *Multilateral Treaties*]. As of the same date, only ten of the twenty-eight parties to the Convention had agreed to permit the Committee Against Torture to receive communications from other states parties and from individuals. *Id.* at 174, 176-77.

19. Weisburd, *supra* note 2, at 28.

the individuals affected is a very weak "commitment," especially when the treaty does not require states violating it to make their violations good. This weakness of the treaties is important because it undermines at least one rationale for relying on treaties as relevant to the formation of customary law. All other things being equal, the rationale is that treaties are good predictors of how states parties will behave in the future as to the subject matter of the treaty.[20] But if states are careful to design a treaty so that it may be essentially ignored with impunity, caution is necessary in prediction. This follows because the parties' making breach both hard to detect and costless implies an unwillingness to foreclose the option of conduct contrary to the treaty. This seems especially likely with respect to human rights treaties, which a state could choose to enter in bad faith because of public relations considerations.

The second aspect of this part of Professor D'Amato's argument is his assertion that I must be contending that although there exists a rule of international law permitting torture, states' denials that they engage in torture and the presumed reduction in torture because of legal rules against it undercut my argument. I have several responses under this heading. First, I would say that the best formulation of my position is not as Professor D'Amato suggests, but rather, as I explain above, "that there is no rule of international law forbidding torture." I believe the difference between the way I state my position and the way Professor D'Amato hypothesizes it is very important. As far as I am concerned, those asserting that torture is forbidden are the ones asserting the existence of a rule, and it is therefore up to them to show that there exists consistent practice supporting that rule. I am arguing for the non-existence of a rule; it is sufficient for me to demonstrate the existence of so much practice contrary to the putative rule that it could not be said to amount to a general practice. Professor D'Amato's formulation would shift the primary burden from those contending that a rule exists forbidding torture to those who deny the existence of any rule.

I believe my formulation is more reasonable. To phrase a rule in the form he uses—"there is a rule of international law that makes it legal for states to torture people"—implies that torture would not be legal unless a rule of international law authorized it. This in turn suggests a general view that, to be empowered to act, a state must point to some authorizing rule of international law. But surely the formulation of the

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20. *See* A. D'AMATO, CONCEPT OF CUSTOM, *supra* note 14, at 172-77 (arguing that expectations of future action consistent with past acts explains the rationale for deriving legal rules from such acts); *see also* Weisburd, *supra* note 2, at 36-38 (further elucidating prediction argument).

Lotus case that "[r]estrictions upon the independence of States cannot . . . be presumed"[21] would imply that it is the restriction on the independence of states that must be demonstrated—in this case, a restriction on states' power to torture. Indeed, Professor D'Amato has dismissed as "only an artificial construct" the notion that states must point to rules of international law empowering them to act within their own territory.[22]

If the issue is whether there exists a rule of international law forbidding torture rather than whether there is a rule permitting it, Professor D'Amato's argument, from a lack of verbal support for torture, is weakened. As I pointed out in my article, extensive practice contrary to a purported rule of customary law undercuts that rule regardless of how the practice is justified, since it makes untrue any assertion that the purported rule in fact represents a general practice.[23]

Professor D'Amato's reliance on his view that international legal rules against torture have led to a reduction of torture raises several difficulties for me. To the extent that he is asserting that states employ torture much less frequently than was true fifty or one hundred years ago, my hunch is the same as his: I think but cannot prove that the quantity of torture has declined. That, however, does not tell me as much about the existence of rules of customary international law against torture as it appears to tell Professor D'Amato. Before I could ascribe the decline in torture to those putative legal rules, I would need to know more about why torture has declined. I assume, for example, that police forces in the United States use what used to be called the "third degree" much less frequently in 1988 than was true in 1938, but I would attribute this difference to changing views on the social acceptability of police violence in the United States, as well as to changes in American domestic law. Changes in international law would seem to be unimportant on this score. To the extent that torture has declined in other states, I am reluctant simply to assume that similar domestically inspired changes are not the cause. Further, if some states have been influenced by foreign pressure, I would like to know if that pressure could be best labelled legal or political.

In any case, I am troubled by what I understand to be Professor D'Amato's argument that one can identify a norm of customary international law by determining if it exerts on national decision makers a psychological pressure to conform to its prescriptions. I have two difficulties with this concept. First, I do not understand how one can distinguish

21. S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).
22. A. D'AMATO, CONCEPT OF CUSTOM, *supra* note 14, at 80-81.
23. Weisburd, *supra* note 2, at 33.

between psychological pressure created by legal rules and such pressure created either by other types of rules (for example, moral or religious precepts) or by normless calculations of self-interest. Professor D'Amato, in his writing on customary international law, has distinguished between acts undertaken in the belief that they are legally required or permitted, and acts undertaken for reasons of courtesy, morality, or political expediency.[24]

Second, I do not know how to relate this notion of psychological pressure to the traditional formulation for determining the existence of a rule of customary international law. How many states must feel this psychological pressure before it can be said to give rise to a general practice? Under traditional analysis, the practice of a state that engages in torture would count against the existence of a rule forbidding torture. If psychological pressure is the test, could that state's practice be seen as counting in favor of the rule if it could be shown that certain officials of the state had argued unsuccessfully for the abandonment of torture because of the international rule, or if the government limited the use of torture to more restricted classes of victims because of such arguments? It seems to me that Professor D'Amato's test simply sweeps too broadly.

More fundamentally, it seems to go too far to argue that a decline in torture proves the existence of a rule of customary law forbidding torture. Such a decline in torture could exist for reasons having nothing to do with international law. Therefore, to test for the existence of a legal rule of the sort for which Professor D'Amato contends, I would ask if legal consequences follow the breach of the rule.[25] As I argue at some length in my article, it would appear that at least two consequences must attach to the breach of a rule if it is properly to be labelled "legal."[26] First, the allegation of a breach of the rule must entail a right to inquire into the facts of the alleged breach.[27] Second, if a breach is established, the breaching state must have a legal duty to repair the breach.[28]

These consequences do not seem to attach to breaches of a purported rule against torture. Evidence on this point is provided by consideration of the Convention Against Torture, which I assume is one indicator of states' attitudes on this subject. Although the Convention authorizes the Committee Against Torture to carry out investigations of particular al-

24. A. D'AMATO, CONCEPT OF CUSTOM, *supra* note 14, at 76.
25. Weisburd, *supra* note 2, at 7-10.
26. *Id.*
27. *Id.* at 8.
28. *Id.*

leged breaches of the Convention's provisions,[29] it nevertheless qualifies this authorization by permitting individual states parties to reject the competence of the Committee to carry out such investigations as to them.[30] Of the twenty-eight parties to that Convention, seven have refused to recognize the Committee's authority to investigate.[31] Such a relatively large rejection of any right of inquiry into torture seems inconsistent with the notion that the duty not to torture is a legal duty. I am also unaware of any acknowledgment by states of a duty in international law to permit investigations of alleged torture outside a treaty context. Similarly, as noted above, the Convention imposes no duty of reparation for breaches, and it is my impression that states accused of torture usually offer no reparation either to other states or to the victims of torture. Thus, the second consequence of a breach of a legal rule is also absent. Since torture does not appear to entail the consequences one could expect from breach of a legal rule, I conclude that no rule against it exists and the decline in torture must be ascribed to nonlegal factors.

In sum, I believe that the human rights treaties I discussed in my article are so weak that the degree of "commitment" they involve is questionable.[32] I also think that verbal responses to allegations of torture are not particularly important since it is the existence of a prohibitory rule that must be established, not the existence of permission. Moreover, I am less certain than Professor D'Amato about the actual effect of psychological pressure generated by the rule he postulates forbidding torture. I am also less convinced that the existence of such psychological pressure is the best measure of the existence of a legal rule.

C. *Treaties and Opinio Juris*

Professor D'Amato's most serious problems with my article appear to flow from my treatment of the relationship between treaties and *opinio juris*. He asserts that I want only those treaties to count toward formation of customary law which the parties intend to count.[33] Professor D'Amato asserts that to ignore treaties which require the parties to behave in ways that they do not believe are required by background cus-

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29. Convention, art. 20, *supra* note 17, *reprinted in* 23 I.L.M. at 1033; amended 24 I.L.M. at 535.

30. *Id.* art. 28, *reprinted in* 24 I.L.M. at 535 (1985).

31. *Multilateral Treaties*, *supra* note 18, at 174-76.

32. I wish to stress that I am considering only the customary law status of torture. I certainly do not deny the great importance of regional treaty arrangements forbidding torture, such as the European and American Conventions on Human Rights.

33. D'Amato, *Response*, *supra* note 1, at 469.

tomary law would entail ignoring thousands of years of development of custom.[34] He denies that states can "believe" anything in any case, and attacks the concept of *opinio juris* as otiose.[35]

Professor D'Amato has mischaracterized what I wrote. I did not call for some sort of wholesale inquiry into the state of mind of treaty drafters. Rather, as Professor D'Amato quoted, I referred to situations in which "*a treaty demonstrates* that the parties believe they would have no legal obligation to behave as the treaty requires but for the treaty . . . ."[36] That is, I was focusing on indications of the parties' beliefs *contained in the treaty itself.* The only two examples I gave of types of treaties that would fall into this category were treaties that asserted, in so many words, that they were departures from custom and treaties whose provisions were inconsistent with a belief that a legal obligation existed outside the treaty in that they excluded the indicia of legal obligation discussed above. As I phrased it, the issue was not what the parties believed in general, but rather what they asserted or implied in the very text of the treaty.

"Fine," Professor D'Amato might respond, "but so what?" What is the difference between a treaty in which the parties say or imply that they are departing from customary law and a treaty which is silent on the subject but which the parties nonetheless believe to be such a departure?

I believe that the two categories of treaties carry an important distinction which is made clear by reflection on the process of forming customary international law as described by Professor D'Amato. First, it is important to consider his concept of "articulation," which he substitutes for the more traditional *opinio juris.*[37] He urges that, for an act to constitute practice contributing to the formation of a rule of customary law, the act must be preceded or accompanied by the articulation of the legal rule allegedly governing the act.[38] Such articulation, he writes, preserves the voluntaristic aspect of international law, preventing the extrapolation of legal norms from patterns of conduct, unaccompanied by such articulation, noticed after the event.[39] Professor D'Amato stresses the importance of this requirement to "distinguish legal actions from social habit, courtesy, comity, moral requirements, political expediency, plain 'usage,' or

34. *Id.* at 470.
35. *Id.* at 470-71.
36. Weisburd, *supra* note 2, at 24 (emphasis added).
37. A. D'AMATO, CONCEPT OF CUSTOM, *supra* note 14, at 74.
38. *Id.*
39. *Id.* at 74-75.

any other norm."[40]

The second element of this process important to this analysis is the fact that new rules of customary law can arise from deviations from earlier rules, as Professor D'Amato also explains. He describes at length a hypothetical situation in which a rule of customary law is altered by subsequent practice violative of the rule.[41]

Professor D'Amato, however, does not address the relationship between the articulation requirement and the idea of change of customary law by deviation from existing law. Presumably, if the change simply takes the form of replacing some rule with no rule—for example, replacing a rule that states are prohibited from doing or are required to do *X* with a rule that states can do as they like as to *X*—no articulation should be necessary, since, as noted above, any conduct contrary to the putative rule will amount to a deviation from the general practice necessary to establish the rule. But even in this case, articulation can be useful, for example, in the form of an assertion that, whatever anyone else thinks, the acting state does not believe the law forbids or requires *X*. And surely if the change is not this simple, articulation would be necessary under Professor D'Amato's formulation. Thus, if the change in law creates a rule where none existed (that is, limiting previously recognized freedom) or alters a rule (for example, states formerly were not free but were required to do *X*; now, they are still not free, but must do *Y* instead of *X*), it would certainly be necessary to make clear that the particular limitation on state freedom was seen as a matter of legal obligation. In short, for all changes in law through deviations, articulation of the view that the deviation is seen as legally correct would be useful to the deviant's position, and in some cases it would be necessary to effect a change, given Professor D'Amato's conception of customary law.[42]

Thus, there is an obvious difference between treaties departing from the background law that is silent as to the content of the background law and those that insist expressly or implicitly that the law is different from the treaties' rules. The former can be seen as an implicit articulation of a replacement legal rule. By framing their deviation in the form of a treaty, the acting states make clear that they believe that their approach is a correct legal approach. The latter makes clear that the inference of articulation of a new rule that would otherwise be justified, given the use of a treaty, is not justified, in the same way that the practice of a state which makes clear that its actions can be ascribed to reasons of "social

40. *Id.* at 76.
41. *See id.* at 92-98.
42. *Id.* at 76.

habit, courtesy, comity, moral requirements, political expediency . . ." and so on would not be seen as contributing to a rule of customary law.

Of course, this whole matter could be more easily addressed with examples from practice. Professor D'Amato offers no examples of treaties that have expressly or by necessary inference from their text labelled themselves contrary to customary law and have nonetheless given rise to new rules of customary law. Neither can I prove that treaties with such qualifications have never changed customary law. The one example with which I am familiar, however, is closer to my position than to Professor D'Amato's. As I described in my article, in the last century and the early part of this one, considerable support existed for the proposition that all states, including non-riparians, have the right to navigate so-called international rivers.[43] This argument was based in part on practice as framed by treaties, including some that described the rights they granted as a matter of grace.[44] In actual practice, however, many states did not permit such a degree of free navigation on their international rivers.[45] In 1921 when an international conference sought to frame an international treaty on the subject, the conference was obliged to acknowledge that Latin American practice was considerably different from that of Europe and Africa, and it concluded that, whereas free navigation was a principle of public law in Europe,

> The principle of freedom of navigation on rivers has not evolved in the same manner in the American Continent. Freedom of navigation on international rivers has been admitted there, not as an extension of the European principle, but *as a concession accorded voluntarily* by the riparian states through the medium of *inter partes* agreements or of legislative acts.[46]

It was concluded from this situation that it "cannot be said that the principle of free navigation is in the position of a recognized principle" in the Americas.[47]

The treaties on this subject in the Americas included some that asserted in so many words that the rights they granted were a matter of

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43. Weisburd, *supra* note 2, at 11-15.

44. *Id.*

45. *Id.*

46. LEAGUE OF NATIONS, BARCELONA CONFERENCE, VERBATIM RECORDS AND TEXTS RELATING TO THE CONVENTION ON THE REGIME OF NAVIGABLE WATERWAYS OF INTERNATIONAL CONCERN AND TO THE DECLARATION RECOGNIZING THE RIGHT TO A FLAG OF STATES HAVING NO SEACOAST 224-25 (Chilean delegate) (1921) (first emphasis added).

47. *Id.* at 225.

grace and many that made no such assertion.[48] The emphasized language, quoted above, thus cannot be understood as referring only to treaties labelling themselves as contrary to customary law. Nonetheless, the conclusion by an international conference that certain rights could not be said to have become universal principles of international law because some states had granted them as matters of grace only, albeit in treaties, would seem inconsistent with Professor D'Amato's position.

Briefly, then, I was not arguing that only those treaties count which states intend to count, but rather that treaties do not count if their text, expressly or by necessary implication, indicates that they do not count. As demonstrated above, this class of treaties can be distinguished from the much larger group of treaties which are contrary to background customary law but do not say so. I believe that once that silent majority is excluded, the number of treaties that would not count toward customary law under my formulation is too small to require ignoring thousands of years of development of customary law.

Professor D'Amato's other difficulties with my approach to treaties and *opinio juris* can be addressed in brief compass. He argues that determining what states "believe" with respect to a given treaty is very problematic. Yet, as I have explained, my argument looks to the treaty language, not to "beliefs" not expressed or necessarily implied by that language. Therefore, the problem he identifies does not relate to my argument.

Professor D'Amato flatly asserts that a state could justifiably rely on state practice embodied in a treaty with a disclaimer as evidence of customary law despite the disclaimer, since it is an example of behavior no matter how the treaty parties characterize it. This seems to me inconsistent with Professor D'Amato's views as to the importance of articulation in creating rules of customary international law. If he believes that acts taken for reasons of courtesy, political expediency, and so on should not be accorded legal significance, and if he believes that post hoc extrapolations from patterns of conduct are improper, why is it justifiable for a third state to rely on an act that the actors have characterized as beyond their obligations? If, as I argued in my article, deriving rules of law from practice makes sense because past acts are the best indicators of future courses of conduct[49] and if, as Professor D'Amato has written, states rely on the precedent created by acts of other states as justifications for their own acts on the basis of "reasonable expectations of continuity and fair-

48. Weisburd, *supra* note 2, at 13 n.46 and 14 n.52.
49. *Id.* at 36-38.

ness,"[50] why should a third state be able to base expectations on an act when the actors make as clear as possible that their future course of conduct will not be governed by this past act?

Further, as a practical matter, Professor D'Amato's position certainly inhibits relations between states. A state may find itself facing similar legal controversies with several different states. If it has an opportunity to settle one controversy on terms which are acceptable in that context but unacceptable in its other controversies, it is more likely to take advantage of the settlement opportunity if the settlement will not prejudice its position in the other controversies. Professor D'Amato's position would prevent the state in question from protecting its position through disclaimer language in a treaty of settlement, and thus would reduce the likelihood that a settlement would take place. My view would leave the states involved more flexibility. Of course, it may be that in practice—which naturally is the determinant of customary law—states have not in fact conceded such a degree of flexibility to one another. As I admit above, I cannot adduce numerous examples proving that they have done so; I can only put forward the example I have given and my doubt that states would be so willing to tie their own hands.

I cannot follow Professor D'Amato's dismissal of states' "beliefs" as an anthropomorphic fallacy. He refers to states "acting," "saying," and being subject to "psychological pressure;" why they can do those things, but cannot "believe," I do not understand. Of course, in a sense, they cannot do those things, because states are legal fictions and can act only through particular authorized human beings. But if we can ascribe the acts, sayings, and subjections to psychological pressure of those humans to states, why can we not ascribe their beliefs as well, at least those beliefs manifested expressly or by necessary implication in treaty texts?

As to Professor D'Amato's dismissal of the concept of *opinio juris* as otiose, I can only note that neither other distinguished scholars[51] nor the International Court of Justice[52] share his view. I am not sure how broadly he intends his statement to be read, but if he is discarding the notion of any qualitative element in customary law at all, he is contradicting his own quite convincing argument as well.[53]

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50. A. D'AMATO, CONCEPT OF CUSTOM, *supra* note 14, at 174-177.

51. *See, e.g.*, I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 8-10 (3d ed. 1979); Schachter, *International Law in Theory and Practice*, 178 RECUEIL DES COURS 35 (1982); G. SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 32-33 (5th ed. 1967).

52. North Sea Continental Shelf Cases (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 43-44 (Judgment of Feb. 25, 1969).

53. A. D'AMATO, CONCEPT OF CUSTOM, *supra* note 14, at 74-87.

D. *Why Reject A Rule Against Torture?*

Professor D'Amato closes his *Response* wondering why I would take the positions I took,[54] especially at the cost of "recasting the doctrinal structure of international law."[55] I have several reasons. First, I do not see myself as recasting the doctrinal structure of international law, but as defending that structure. As I explained above, I am unable to reconcile the conclusion that customary international law forbids torture with what I understand to be the traditional methods of determining the content of customary international law. Defending that structure is itself one reason I have written as I have. Professor D'Amato assumes, correctly, that I am personally opposed to torture, but that is, as far as I am concerned, irrelevant to the question at hand. If customary international law cannot be said to forbid torture, it is my job to say so.

Further, it seems to me that the continued assertion that torture is a violation can have unfortunate consequences. At bottom, my position is based on the conclusion that a large number of states simply are not ready to give up the authority to treat their citizens in a beastly fashion. Proclaiming that such action is illegal amounts to proclaiming that international law is ineffective, since the beastliness continues despite the denunciation. It seems to me that there is much to be said for preserving respect for international law by not claiming for it authority to regulate subjects it does not in fact regulate. Further, in light of the increased willingness of American courts, as described in my article,[56] to apply what they understand international law to be, we face the prospect of American judicial decisions on this subject complicating foreign policy while having no effect on the practices in issue because of the rejection of the underlying legal rules by the offending government.

What is my prescription for dealing with torture? First, we must accept the fact that there exists no international consenus against the use of torture. This is important because asserting that customary international law forbids torture amounts to saying that there *is* an international consensus against torture. Second, we must accept that law can be used to implement an existing consensus, or used in the absence of consensus if backed by enough force, but that absent both consensus and force, law is a very weak reed upon which to lean. Given these propositions, we eliminate torture by building consensus against it—a political, not a legal matter—or by coercing torturers—again, a matter of policy choice—or

54. D'Amato, *Response, supra* note 1, at 470-72.
55. *Id.* at 24.
56. Weisburd, *supra* note 2, at 3-5.

both. If policy makers cannot or will not do one or the other or both, then I expect use of torture to continue.