

1988

A Brief Rejoinder

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Recommended Citation

Anthony D'Amato, A Brief Rejoinder, 21 *Vanderbilt Law Review* 489 (1988)

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Anthony D'Amato, A Brief Rejoinder, 21 Vand. J. Transnat'l L. 489 (1988).

APA 7th ed.

D'Amato, Anthony. (1988). brief rejoinder. Vanderbilt Journal of Transnational Law, 21(3), 489-490.

Chicago 17th ed.

Anthony D'Amato, "A Brief Rejoinder," Vanderbilt Journal of Transnational Law 21, no. 3 (1988): 489-490

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D'Amato, Anthony. "A Brief Rejoinder." Vanderbilt Journal of Transnational Law, vol. 21, no. 3, 1988, pp. 489-490. HeinOnline.

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Anthony D'Amato, 'A Brief Rejoinder' (1988) 21 Vand J Transnat'l L 489
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A Brief Rejoinder

Anthony D'Amato

Professor Weisburd's reply to my essay adds helpful insights to the fascinating issue of the impact of treaties upon customary international law. For the most part, I think the positions on both sides have been clearly drawn, leaving to the reader the ultimate judgment on the merits.

One instance where the position is not so clearly drawn, however, is the question of what custom-creating force we can find in a treaty that itself disavows its custom-creating force. If the language says that the treaty is a matter of comity only, Professor Weisburd argues that the treaty cannot give rise to a customary rule of law. My position to the contrary is that the parties cannot in this way carve out for themselves an exception to the general metarule that treaties generate custom, any more than they could effectively use treaty language to confine the treaty rule to themselves by saying, in the treaty, that their particular treaty shall have no general customary law-creating force for nonparties. In neither case do the parties have a general legislative competence that extends to nonparties.

I want to take issue with Professor Weisburd's contention that "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."¹ Why not just the opposite? Why not place the burden on those who assert that torture is *allowed*, and ask them to come up with a rule supporting their position? Surely there is nothing in the words of this or any other formula that places the burden of justification on one party or the other.

Professor Weisburd might answer, as he does in his *Reply*,² that there is a presumption in favor of a state's power to act. But then what about a state's power to refrain from acting? Is there a presumption in favor of that as well? If a ship in distress signals a coastal state for assistance, is there a presumption in favor of the coastal state's *inaction*? Of course, the answer to all of these questions turns on whether another state's

1. Weisburd, *A Reply to Professor D'Amato*, 21 VAND. J. TRANSNAT'L L. 473, 478 (1988).

2. *Id.* at 10-11.

right has been violated, which is the same as asking whether there is a rule governing the situation. Yet, this is precisely the question with which we began. I object to the attempt to answer the initial question by resorting to a presumption (in favor of action or inaction) which can only be dealt with if the initial question has been answered.³

Moreover, we should never begin with the question, "What is the legal rule?" The real world does not come to us in the form of legal rules or questions about legal rules; rules are only our interpretations of the facts of the real world. We should instead question what states are doing and who is being harmed. Out of harm (economic or physical) come conflicts; out of conflicts come conflict resolutions; and out of conflict resolutions come inferences about the operative rules of customary law. If someone is being tortured, a harm plainly exists. Should we remain blind to that harm because the torturer has a license from the state? Why does a state license solve the problem of torture for Professor Weisburd? Why does he consider it his "job" to say that the state license solves the problem? Despite the fact that his *Reply* has contributed to our understanding of the general issues, I have the feeling that these more basic questions remain unanswered.

3. I present these arguments in a slightly different way in my book on custom, other portions of which Professor Weisburd has cited. See A. D'AMATO, CONCEPT OF CUSTOM IN INTERNATIONAL LAW 177-86 (1971).