

ments of municipal law into international law," but one of "identifying in their convergence a principle derived from common social necessity." He concludes his review of recourse to municipal law analogies with the observation that "recourse to general principles of law is up to a certain point an exercise in what is called the policy of the law" (C. De Visscher, *Theory and Reality in Public International Law* 400 (rev. ed., Corbett trans. 1968)). The policy, equally of manorial commons in medieval English law and of the world's commons in contemporary international law, is the efficient creation of commodities (wealth) out of the raw materials of the "waste"—given the available means at the time.

It is with considerable regret and hesitation that I have become impelled to take Mr. Herman to task over his many solecisms, especially as he is on record as having participated in one of the annual conferences on international law held at the Syracuse University College of Law. On the other hand, I hope that my present effort will, at last, help Mr. Herman better to understand what I explained to him originally in February 1979. I told him then, and now repeat: "When we were drafting [the Deepsea Ventures] notice of claim we were very concerned to draw the distinction between *profits à prendre* and any assertion of territorial *res corporales*—the distinction being the conveyancers' one between incorporeal and corporeal hereditaments" (6 *Syracuse J. Int'l L. & Com.* 187 (1978–79)).

TO THE EDITOR IN CHIEF:

September 20, 1985

Professor D'Amato misrepresents my views when he writes (79 *AJIL* 657, 663 (1985)) that "[g]overnmental *statements*, and not their actions (and the rules inferable from them), constitute what Dr. Akehurst calls custom." What I have always maintained is that state practice, from which customary international law is derived, consists *both* of what states do *and* of what they say.

Moreover, what states do is often ambiguous or meaningless unless one looks at the accompanying explanations which states give for their behavior. The United States intervention in Grenada, which Professor D'Amato mentions, is a good example. What the United States did on that occasion could be described in various ways—(a) the United States overthrew a left-wing government of a small state in the Caribbean; (b) the United States overthrew a government which had seized power in a bloody coup d'état; (c) the United States overthrew a government which, if it had continued in power, might have violated human rights in the future; (d) the United States overthrew a government which, if it had continued in power, might have practiced subversion against its neighbors in the future; (e) the United States restored law and order in Grenada at the request of the Governor-General of Grenada; (f) the United States intervened at the request of the Organization of Eastern Caribbean States; (g) the United States rescued some of its citizens who were alleged to be in danger. To each of these descriptions corresponds a rule or alleged rule of international law which has been "articulated" (as Professor D'Amato would say) at some time or another—spheres of influence, interventions to protect constitutional legitimacy, humanitarian intervention, anticipatory self-defense, and so on.

Are we to regard any action by a state as a precedent in favor of every alleged rule of international law which someone might regard as relevant

to any of the possible descriptions of that action? The answer must surely be no; otherwise no law-abiding state would ever dare do anything, for fear of creating a host of undesirable precedents. In order to make sense of state practice, it is necessary to select some possible descriptions of a state's actions as legally relevant, and to dismiss other possible descriptions of its actions as legally irrelevant. I would submit that the descriptions of a state's actions which are legally relevant are those which the state itself chooses to give to its actions; customary international law is created by states, not by academics, and what counts are the descriptions and justifications which a state invokes for its actions, not the descriptions and justifications which academics may invent.

To try to go behind the stated reasons for a state's actions, in search of the "real" reasons for its actions, is a hopeless quest; the internal deliberations of most governments are secret. Moreover, such a quest is as inadmissible as trying to go behind the reasons given by a judge for his judgment, in the hope of finding the "real" reasons for his judgment (bad temper, racial prejudice, etc.). A system of judicial precedent will work only if a judgment is treated as a precedent for the rules of law invoked in that judgment; in the same way, that other system of precedent which we call customary international law will work only if a state's actions are treated as a precedent for the rules of law which the state invokes as the justification for its actions. Nor does this approach condemn international law to unreality and immobility, as Professor D'Amato fears; states often invoke justifications which academic international lawyers do not expect to hear, or which are entirely new. For instance, the states which claimed exclusive rights over the continental shelf in the years following 1945 were consciously creating a new rule of customary law; they did not try (as many academic international lawyers at that time tried) to justify their actions by reference to old rules of customary law.

Similarly, when states (either individually or through United Nations resolutions) protest the illegality of another state's actions, their protests should be taken to mean what they say. To question the value of such protests by producing evidence or conjectures that the protesting states did not mean what they said is as inadmissible as questioning the validity of an Act of Congress by producing evidence or conjectures that the legislators who voted for the Act were not sincere in their support for it and that they voted for it solely in order to placate a pressure group. No system of law can work unless people are regarded as meaning what they say.

Finally, I am surprised to see that Professor D'Amato supports humanitarian intervention, because, if I have understood him correctly, he regards consensus as a separate source of international law, distinct from custom (D'Amato, *On Consensus*, 8 Can. Y.B. Int'l L. 104 (1970)); and in recent years there seems to be a consensus among states that humanitarian intervention is unlawful (see my chapter on humanitarian intervention in *Intervention in World Politics* (Hedley Bull ed. 1984), especially at pp. 97-99 and 108-09).

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Anthony D'Amato replies:

Dr. Michael Akehurst has provided us with extraordinarily detailed and rich research on the sources of international law and their hierarchy, and I

am delighted that he has given us an additional contribution in the form of a letter of criticism. But I am not sure that he has clarified his own position to the point where he can claim that I, or anyone else, have misrepresented it.

While Dr. Akehurst may claim that the state practice that constitutes customary international law consists both of what states *do* and what they *say*, his previous writings, as well as the present letter, make it quite clear how unimportant he considers what states *do*. He gives seven highly varied "descriptions" of the Grenada intervention, all of them purporting to describe what the United States *did*. Indeed, such a list is not limited to seven; one could continue the process of possible descriptions indefinitely, just as the Skolem-Lowenheim theory in mathematics proved that, as to any given mathematical facts, an indefinite number of different theories can be constructed that are consistent with, and explanatory of, all the data. It thus seems to me to be a reasonable inference to draw from Dr. Akehurst's work that what states *do* does not constitute customary practice, because he relies not at all on what they do. Whatever states do—or for that matter, refrain from doing—is of next to no importance to him. What states *say* they did, in contrast, is all-important. In fact, if Dr. Akehurst wants to adopt extreme philosophic relativism, he might argue that states do not "actually do" anything until they tell us what they have done.

My position, as Dr. Akehurst recognizes, is quite the opposite. I think it is open to states to say just about anything that serves their interests. Whether or not they have a good attorney such as Dr. Akehurst on hand to advise them, they are likely to come up with self-serving formulations that render even the most blatantly illegal acts consistent with a rule of international law—simply by distorting and mis-describing what they actually did. This is the point in my editorial that Dr. Akehurst now criticizes. May I add to it the homespun example that, in domestic law, we do not wait to see how the criminal characterizes his deed before deciding whether what he did was illegal. A thief, apprehended as he exits from a bank with a sackful of swag, might explain that he was simply effectuating a Rawlsian distribution of wealth from the most advantaged sector to the least advantaged. We arrest him anyway for robbing the bank.

Given the simplicity of verbal invention, and the infinite variety of sentences that can be used to explain or mis-explain events, I find it unpersuasive to base a theory of customary law upon what states *say*. Yet I sympathize with those who, like Dr. Akehurst, search for absolutes. It would be very convenient for scholars to rely upon what nations say as a source of customary rules, just as it would be convenient to accept any General Assembly resolution as defining norms of international law. But neither of these things works because of the simple fact that nations do not always tell the truth. They will deliberately mis-characterize an illegal act as one that is consistent with international law, just as they will vote for a UN resolution for political reasons while saying privately that they disagree with it.

My own writings have attempted to show that custom is not an absolute, and that norms of international law are more or less persuasive depending upon the evidence of state practice that can be mustered in their favor. I may have been too insistent in the past that state actions are unambiguous; all I meant to say was that actions in the real world can only do one thing at one time (as contrasted with verbalizations, which can be infinitely various). In any event, I do not agree with Dr. Akehurst that any one of a long list

of descriptions of real-world events is as good as any other; that is a recipe, I think, for legal futility. Some descriptions *are* more persuasive than others—whether or not they are the ones articulated by the state-actors themselves.

Further elaboration on the interesting points raised by Dr. Akehurst is not possible in the limited space here. But I do want to respond to two other issues in his letter. First, states sometimes use protests, as they do General Assembly resolutions, to condemn things they secretly approve of, for political and public relations reasons. These international linguistic usages are not equivalent to domestic legislative processes, even though Dr. Akehurst's contrary view would have the benefit of making law-determination easier for international lawyers. Second, I have tried *not* to say that "consensus" is a "source" of rules of international law (I even think the word "source" is misleading and ambiguous). The consensus of states may be what we *mean* by "international law," but the only actual consensus I have found has been with regard to process (what Hart calls the secondary rules of law formation) and not with regard to individual rules. For instance, Dr. Akehurst thinks that there is a consensus against humanitarian intervention, whereas the majority view on this side of the Atlantic is, I think, quite the opposite. This disagreement simply shows the poverty of assertions about "consensus." But I would argue that customary law is forging precedents in favor of the legality of humanitarian intervention.¹

¹ I am pleased to recommend a forthcoming study that reaches this conclusion by my student, Professor Fernando Tesón, who is in the process of completing his SJD dissertation on humanitarian intervention.