vention on the Elimination of All Forms of Racial Discrimination, which had given rise to a constitutional challenge in the High Court of Australia. Professor Stone would not be content with the question-begging solutions and, of course, the illusory categories of reference utilized by those questioning the validity of the new law. He would patiently explain to us that the search for equality was a confusion of means and ends. When international law sought to prevent discrimination and its often horrible consequences, there was really an issue of deeper justice involved. It was not enough that one should treat each of one's neighbors with an equal amount of respect if one did not accord to all of those neighbors that element of dignity for which human beings seeking the "just" society clamored.

As is reflected in his last major work, *Visions of World Order: Between State Power and Human Justice* (1984), and in his earlier contribution to *The Future of the International Legal Order* edited by Professors Falk and Black, entitled *Approaches to the Notion of International Justice,* it is only the constant and constructive clamoring for change throughout the human constituency that gives law its life and permits the search for justice to continue.

I am grateful, indeed, for this opportunity to honor a gentleman who contributed so much to the many members of the international legal community. Even though I had recently moved from Australia to the United States, he corresponded with me until a few weeks before his sad passing. Indeed, the day before he died, he gave a full feature interview with the *Sydney Morning Herald.* Notwithstanding his long fight with cancer, Julius Stone's scholarly pen did not leave his hand until his dying day.

In closing, I feel it apt to share with the readers of the *American Journal of International Law* a message from Julius Stone to his students of both international law and jurisprudence and the many generations to follow: "A society in which the questionings of justice cease to be a constant prod and perplexity would not be human in any sense that matters."[2]

To our scholar, teacher and friend who imbued us all with a love for the law and a passion for justice through legal orderings: *Vale,* Julius Stone.

DAVID D. KNOLL*

CORRESPONDENCE

TO THE EDITOR IN CHIEF:

September 3, 1985

I met Professor Goldie several years ago when we were both taking part in a symposium on deep seabed mining, organized by the Syracuse University College of Law. At the time I was a member of the Canadian delegation to the Law of the Sea Conference. I see from Professor Goldie's recent Comment (79 AJIL 689 (1985)) that his view on the Deepsea Ventures claim has not changed over the years; nor has mine, in one important respect.

[2] J. STONE, HUMAN LAW AND HUMAN JUSTICE 355 (1965).

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https://doi.org/10.1017/S0002930000072456 Published online by Cambridge University Press

Professor Goldie in his Comment analogizes between the Deepsea Ventures claim and the English law concept of *profits à prendre.* Anyone familiar with basic concepts of English law will, however, see that the analogy is highly imperfect.

If one attempts to analogize to the common law notion of *profits à prendre* in the context of seabed mining, it would seem that the analogy is more directly aimed at what is known as the *profits à prendre in gross.* This type of right existed where there was no appurtenant land or, as is requisite in the case of easements, a dominant tenement. But the concepts of easement and *profits à prendre* are similar to this extent. Both created an interest in land and, as the English Court of Appeal made clear in *Webber v. Lee* ([1882] 9 Q.B.D. 315), such a grant must be both in express and in writing. In other words, their creation of the interest flowed from the owner of the land in question and the Statute of Frauds was held to be applicable.

It seems to me, therefore, that to demonstrate a useful analogy with *profits à prendre,* the Deepsea Ventures claim would have to demonstrate that the right derived from a grant made by the owner in some form. I suppose some would argue that the owner in this case, by analogy, could be the international community; but the important point is that the *profit à prendre* does not exist *in vacuo,* in the absence of a definite grant.

Secondly, Professor Goldie also refers to the rights that existed under common law to a common pasture or common well, etc. The rights of commoners under the English legal system arose from feudal times and consisted of rights over "waste" land, very similar to a *profit à prendre.* Again, the existence of such a right required an express or implied grant from the manorial or ecclesiastical owners. Alternatively, the rights of commoners could be established by custom, but the elements establishing a local custom are quite definite, as a glance at the fourth edition of *Halsbury's Laws of England* will demonstrate.

Finally, the analysis of the concept of usufruct provided by Jolowicz in Professor Goldie's article is noteworthy. In the short quotation from Jolowicz (p. 692), reference is made to the right's being limited to using and taking the fruits of the property, "without the right of destroying or changing the character of the thing" (i.e., the property itself). The nature of seabed mining is such that once the mineral-bearing nodules are harvested, the seafloor is bare. The character of the land over which the usufruct is claimed is indeed materially altered. This is not the case of a grantee's harvesting crops or reaping fruit from trees, both of which recur in abundant forms season after season.

As I stated at the outset, when I first heard Professor Goldie use this analogy some years ago as a means of justifying the Deepsea Ventures claim, I remained skeptical. As a lawyer, I continue to be skeptical, in spite of Professor Goldie's elegant prose.

LAWRENCE L. HERMAN
Ottawa, Canada

L. F. E. Goldie replies:

Mr. Herman's criticism of my *Title and Use* Comment is beside the point. In addition, his understanding of the use of domestic law analogies in the development of international law misperceives this endeavor.

https://doi.org/10.1017/S0002930000072456 Published online by Cambridge University Press

His reference to the English case *Webber v. Lee* ([1882] 9 Q.B.D. 315) appears, at first blush, to be impressive. But it tells us only that agreements to shoot and divide game, when classified as *profits à prendre* in England, fall within the evidentiary requirements of section 4 of the Statute of Frauds. This statute is law in a number of common law jurisdictions; many of them differ as to its import. In addition, even if the statute were "worth a subsidy," one would surely be unduly parochial to claim that it has become accepted as public international law. My subject, by contrast, was concerned with the reception into international law of the "universally set up" distinction (Bentham) between title and use.

The second example of Mr. Herman's irrelevance lies in his emphasis on the use of the common law of *profits à prendre.* He asserts that rights such as those claimed by Deepsea Ventures can, at common law, only arise from a grant in writing and that this should apparently govern in international law, too. In fact, medieval common lawyers ruled that *res incorporales,* since they could not be the subject of a livery of seisin, "lie in grant." Be that as it may, Sir William Holdsworth, in his justly famous *History of English Law* (vol. 3, at p. 143 (4th ed. 1934)), tells us:

> There are many varieties of rights to profits a prendre in alieno solo known to the common law, and most of them may be the subjects of common rights. These common rights were a necessary part of that common or open field system upon which most of the land of England was cultivated for many centuries.

While it is true that English law resorts to the legal fiction of the "presumed lost modern grant" to justify and explain customary rights of commonage, no one believes that it exists in fact. As Chief Justice Cockburn said, "a jury should be told that they not only might, but also that they were bound, to presume the existence of such a lost grant, although neither judge, nor jury, nor anyone else [except Mr. Herman?], had a shadow of a belief that any such instrument had ever existed" (Bryant v. Foot, [1867] 2 L.R.-Q.B. 161, 181). Moreover, it seems obvious to most that the historical fictions and idiosyncratic technicalities of the English law, like some wines, do not travel well—especially into public international law.

I must stress now, as I stressed in my Comment, that I was merely looking to English and Roman law to show "how diverse legal systems formulate the means for simultaneously enjoying distinct and disparate privileges and rights in the same object without extinguishing any of them" (p. 693), rather than using either (or any) domestic system as directly authoritative.

Finally, Mr. Herman also appears to have misunderstood reasoning by analogy, and this on two levels: on the level of logic and on the level of international law. On the level of logic, as Aristotle pointed out so long ago, reasoning by analogy is subject to the fallacy of the undistributed middle. But that has not stopped lawyers over the centuries from resorting to it. Indeed, resort to that fallacy has been an essential key to creativity in the law (reasoning syllogistically would necessarily stifle growth). By contrast, Mr. Herman's analogies are set out as carbon copies.

On the level of international law, too, Mr. Herman is as at odds with the publicists as he is with legal method. For example, Charles De Visscher tells us that the process of drawing on municipal law for the elucidation or development of international law "is never a pure and simple transfer of ele-

https://doi.org/10.1017/S0002930000072456 Published online by Cambridge University Press

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

https://doi.org/10.1017/S0002930000072456 Published online by Cambridge University Press

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).

MICHAEL AKEHURST
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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

https://doi.org/10.1017/S0002930000072456 Published online by Cambridge University Press

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

https://doi.org/10.1017/S0002930000072456 Published online by Cambridge University Press

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.

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