

THERE IS MUCH WORK TO BE DONE

Kevin C. Kennedy†

I am delighted and honored to contribute to the inaugural issue of *The Journal of International Law and Practice*. The title of the *Journal* suggests a very important question: Just what is “international law” anyway? It’s hard enough trying to define “law”, let alone “international law”. The very existence of international law is often challenged. Some definitions of law would exclude international law. The great legal philosophers Hobbes, Pufendorf, Bentham, and Austin all doubted whether international law was truly law. Indeed, international law’s detractors have compared it to religion: many believe in it, but few practice it.

So, is international law fact or fiction? Philip Jessup, legal scholar and former judge on the International Court of Justice, answered the skeptics with his own rhetorical questions. If international law does not exist, he asked, then why do foreign ministries have legal staffs, why is diplomatic correspondence full of assertions about the international law applicable to a dispute, and why are there jobs for international lawyers?¹

But an empirical argument doesn’t get us a definition of international law. What, then, is international law? The Permanent Court of International Justice in *The S.S. Lotus*,² offered the following definition:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.³

† Professor of Law, Detroit College of Law. B.A., University of Michigan, 1973, J.D. Wayne State University School of Law 1977; LL.M. Harvard Law School 1982.

1. P. Jessup, *The Reality of International Law*, 18 For. Aff. 244 (1940).

2. *The S.S. Lotus* (France v. Turkey), 1927 P.C.I.J., ser. A, No. 10, at 18 (Judgment of Sept. 7, 1927).

3. *Id.* at 18.

In a more elastic definition, the U.S. Department of State offers this view:

International law is the standard of conduct, at a given time, for states and other entities subject thereto. It comprises the rights, privileges, powers, and immunities of states and entities invoking its provisions, as well as the correlative fundamental duties, absence of rights, liabilities, and disabilities. International law is, more or less, in a continual state of change and development. In certain of its aspects the evolution is gradual; in others it is avulsive. International law is based largely on custom, e.g., on practice, and whereas certain customs are recognized as obligatory, others are in retrogression and are recognized as nonobligatory, depending upon the subject matter and its status at a particular time.⁴

The highly respected, authoritative, and influential American Law Institute, whose primary work products are the Restatements of the Law, certainly thinks that international law is a fact and not fiction. In 1987, the ALI, under the stewardship of Professors Louis Henkin, Andreas Lowenfeld, Louis Sohn, and Detlev Vagts, published the Restatement Third, Foreign Relations Law of the United States. The two-volume work canvasses virtually the entire international law spectrum: the rights and duties of states; the making, effect, interpretation, and termination of treaties; state jurisdiction to prescribe, adjudicate, and enforce; state immunities; the law of the sea; international human rights; and international economic law. Section 101 of the Third Restatement offers the following compact definition of international law:

International law, as used in this Restatement, consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical.

Why does so much cynicism and skepticism surround the question of whether there is such a thing as international law? Is it the absence of a central executive body to police and enforce international rules generally? Is it because there is no legislative organ with general lawmaking authority? Or is it

4. 1 M. Whiteman, Digest of International Law 1 (1963).

because no international court exists with general and compulsory jurisdiction? Without a doubt, the absence of central executive, legislative, and judicial institutions hamstrings the international legal order. But let's not forget that many persons commit crimes and are never apprehended, and many persons have money judgments entered against them which are never satisfied. Yet would anyone seriously suggest that this means that there is no domestic law because of these systemic breakdowns? It is undeniable that countries are often at war with each other, which critics cite as proof that there is no international law, only international morality which states follow when it is convenient for them and which they ignore when it is in their interests to do so. But would anyone seriously suggest that law ceased to exist in the United States during the Civil War?

All of this is really beside the point. What is important is that most people do not obey the law out of fear of apprehension, but rather because they view the law as right, just, and appropriate, and that the alternative to disobedience of the law is anarchy.⁵ The same is true with nations. States, like people, observe international law because they understand the need for order and recognize that it is in their long-term national interest to follow certain norms and standards. International law is like domestic law in that it guides, regulates, and restrains a country's behavior. Admittedly, there are sometimes flagrant violations of international law by rogue nations. But in the words of Professor Louis Henkin, "[a]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."⁶

My friend and colleague, Professor John Reifenberg, spent a year in China as a Fulbright scholar. He shared with me the following Chinese curse: "May you live in interesting times." Judging by world events over the past decade, we are definitely living in interesting times. However, we are far from cursed. My career as an international lawyer got launched in 1981. In the intervening decade the world has witnessed fan-

5. A. D'Amato, *Is International Law Really "Law"?* 79 Nw. L. Rev. 1293, 1295 (1985).

6. L. Henkin, *How Nations Behave: Law and Foreign Policy* 47 (1979).

tastic, disconcerting, and breathtaking international events. Who alive in the 1980's would have imagined that they would live to one day see the reunification of Germany, the bloodless revolutions in Eastern Europe, or the eyepopping encore of the dissolution of the Soviet Union? Alongside these monumental world developments that are a source of great hope are the constant reminders that the world is still a very dangerous and volatile place. The Gulf War, the civil war in Yugoslavia, and the struggle in South Africa warn against becoming complacent.

Closer to home, much work remains to be done in acquainting the bench and bar with other parts of the supreme law of the land — treaties and customary international law — as painfully evidenced by the U.S. Supreme Court's decision in *United States v. Alvarez-Machain*,⁷ upholding the DEA's kidnapping of a Mexican national from Mexico, despite the protests of the Mexican government that the kidnapping violated the U.S.-Mexico extradition treaty. What critics are calling the "Rodney King" decision of international law sets a dangerous and embarrassing precedent. There is much work to be done.

Amid all of the ferment, what can a journal devoted to international law and practice contribute? First off, as sadly demonstrated by the *Alvarez-Machain* decision, students, lawyers, and especially judges need to become better acquainted with other parts of the supreme law of the land, i.e., international law. Periodicals such as *The Journal of International Law and Practice* can make a signal contribution to this educative effort. Secondly, if there is a growth sector within the law industry, it unquestionably is the field of international law. This tremendous growth has not been felt only in the halls of the academy. Private practitioners have been increasingly called upon to render international legal services. Just a few short years ago, a practitioner might have been asked to assist in an immigration or customs matter and would consider themselves to be an "international" lawyer. Today's international lawyer is often a specialist with a practice limited

7. 112 S. Ct. 2188 (1992).

to just a small slice of the total international law spectrum. He or she may specialize, for example, in the law of intellectual property, securing patent protection for a U.S. client in France or prosecuting a trademark infringement action against a Taiwanese clothes manufacturer. He or she may assist an American client in the merger, acquisition, or establishment of a foreign business in Germany. Helping the time-pressed practitioner to stay abreast of international law developments can be one of the most important contributions the *Journal* can make to the legal community.

I salute the students, teachers, and attorneys who have committed their time and resources to make the *Journal* a reality. I wish them and the *Journal* every success.

