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Diffusion and Focus in International Law Scholarship

Diane P. Wood*

Although the advent of the *Chicago Journal of International Law* is a welcome event, that fact may not be obvious to all followers of international legal scholarship. After all, there are well more than seventy international law journals already being produced in the United States alone.¹ A complete list would be hard to compile, and in the end would still be uninformative, because of the simple fact that many international articles regularly appear in general law reviews. Moreover there are many distinguished journals published outside this country.² Even if parochialism can be forgiven in some areas (though it is hard to say which ones), surely it has no place in a field devoted to reaching across national boundaries. The new *Chicago Journal* must therefore find its place not only among its U.S. counterparts, but in the broader crowd of journals devoted to international matters.

Even in making this point, however, the biggest problem for international legal scholarship should be apparent. Which "international" things should the *Journal* be addressing: classic public international law? Classic comparative law? The law of international organizations? The law of regional groups such as the European Union or the Asia-Pacific Economic Conference? Domestic laws addressed to international issues? National laws regulating international transactions? Beyond those questions of subject matter are questions of audience. At one extreme, the study of international law is a highly philosophic inquiry that delves into topics such as the meaning of sovereignty and the meaning of law itself. At the other extreme, international law may conjure up the problems of the American lawyer trying to practice in Tokyo, Beijing, or Paris, or the complexities of setting up a joint venture that will be entitled to operate in Brazil. The audience interested in reading about the latter set of issues may not have much overlap with the audience fascinated by the former.

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1. See <<http://www.law.umich.edu/pubs/journals/mjil/links.htm>> (visited Mar 4, 2000). This is the number listed on the web site of the *Michigan Journal of International Law*, which has links to the other journals. And that list is not a complete one, as is evident by the fact that it does not include journals such as the ABA's *International Lawyer*, the University of Iowa's *Journal of Transnational Law & Contemporary Problems*, the *American Journal of Comparative Law*, the *Asian Law Journal*, and the *Journal of International Taxation*.
2. The list is almost endless. For some of the more well-known journals, see, for example, the *Swiss Review of International Law*; the *British Yearbook of International Law*; *Académie de Droit International*, The Hague, *Recueil des Cours*; *Journal of World Trade*; and *European Competition Law Review*. There are a great many yearbooks of international law published in different countries, including (alphabetically) the African, the Canadian, the Chinese, the German, the Hague, the Palestine, the Polish, and the South African yearbooks, to name a few. And this list excludes the many publications in languages other than English.

Naturally enough, international legal scholarship has reflected the diffuse nature of the subject matter it nominally addresses. Recently the *American Journal of International Law* published papers from a symposium on Method in International Law, which explored such approaches as positivism, policy-oriented jurisprudence, international relations theory, feminism, and economics.³ The *Yale Journal of International Law* offered an article by Jeffrey L. Dunoff and Joel P. Trachman on *Economic Analysis of International Law*,⁴ and another recent issue of the *American Journal of International Law* had as its lead article, *The Contemporary Law of Superior Responsibility*, by Ilias Bantekas, which examined the painfully topical issue of the degree to which high-ranking military officers have a “command responsibility” pursuant to which they are liable for their subordinates’ crimes.⁵ These are all important contributions to an understanding of the international legal order. Indeed, the recent attention to methodology may throw light on the vexing question of whether there even is something that can be called an international legal order as opposed to a political or social order. Skeptics (particularly those from the legal realist tradition who see law in terms of raw power) have questioned the aptness of the term “law” for the set of principles that govern relations among nations. This criticism may have been well-founded, or understandable, in the past. Nevertheless, the more rigorous methodologies now being brought to bear on international law show great promise of beginning to reveal what deserves to be called “law” in the international realm and at the same time of helping to develop the law further.

Legal scholarship in general reflects much the same variety of perspective and audience, of course: it runs the gamut from the most abstract and theoretical examination of the nature of law to the how-to-do-it articles and surveys that are useful to the practicing lawyer in need of continuing legal education. But the fact that international law has not even proven itself as “law” creates an important difference between scholarship directed to issues of domestic law, whether it is the law of civil procedure, or antitrust, or constitutional law, or the criminal justice system, and international legal scholarship. This is because international law in its purest sense does not enjoy the support, forceful or otherwise, of any single organized regime. Instead, as J. L. Brierly put it in his classic treatment of the subject, “The Law of Nations, or International Law, may be defined as the body of rules and principles of action which are binding upon civilized states in their relations with one another.”⁶ Contrast that to the ordinary definition of law that appears in Black’s Law Dictionary: “. . . Law, in its generic sense, is a body of rules of action or conduct prescribed by controlling authority, and having binding legal force. . . . That which must be obeyed

3. Steven R. Ratner and Anne-Marie Slaughter, eds, *Symposium on Method in International Law*, 93 Am J Intl L 291 (1999).

4. 24 Yale J Intl L 1 (1999).

5. 93 Am J Intl L 573 (1999).

6. J. L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* 1 (Waldock 6th ed 1963).

and followed by citizens subject to sanctions or legal consequences is a law.”⁷ Note the importance of force standing behind legal norms in this definition. Although, happily, this is rarely necessary in societies that live under the rule of law, twentieth-century Americans know that it happens from time to time: recall the use of the National Guard to enforce school desegregation orders, the use of the power of a court to throw someone in jail for contempt to force compliance with orders, or, at a more ordinary level, the ability of the local sheriff to seize property to compel compliance with a money judgment.

It is hard to find a real equivalent at the international level. The idea of war as the compliance-forcing mechanism is profoundly unattractive to a world that lives under the United Nations Charter, and in particular Chapter VII of the Charter, which entrusts the Security Council with the responsibility of deciding where and how force should be used to maintain or restore international peace.⁸ Worse than that, in the eyes of some, is the fact that the sources of international law are notoriously squishy. Public international lawyers point to Article 38 of the Statute of the International Court of Justice (“ICJ”) for the definitive list of these sources, which reads:

1. The [International] Court [of Justice], whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59 [which provides that a decision of the Court has no binding force except between the parties and for the particular case], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Yet, particularly given the very narrow scope of the ICJ’s jurisdiction, it is difficult to see how these sources can add up to a body of international law that finds international acceptance. National courts may express their opinions about international questions; foreign ministries may write diplomatic notes; national legislatures may enact laws that purport to reflect international principles. But there is no final arbiter over the content of the law in the vast majority of cases, nor is there any way to ensure that anyone follows it.

The biggest problem with the picture that emerges for international law is that it is one that should not—indeed, cannot—continue. No one needs to be told that the world has shrunk, that human rights violations in one part of the world are not only morally reprehensible but also have practical repercussions elsewhere, that environmental problems demand international solutions, that weapons of mass destruction know no boundaries, and that the world has become a single economic

7. *Black’s Law Dictionary* 884 (West 6th ed 1990).

8. Charter of the United Nations, June 26, 1945, 59 Stat 1031.

9. Statute of the International Court of Justice, June 26, 1945, 59 Stat 1055.

unit. The question instead is how to bring our laws and legal institutions into line with this reality. Here, in the middle ground between the philosophy and cookbooks that have largely characterized international legal scholarship, the need for creative thinking and innovative scholarship is pressing. This is the gap that the Chicago Journal and its counterparts should strive to fill, because international law is important, necessary, and it makes a difference.

In the United States, the Supreme Court announced long ago in *The Paquete Habana* that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”¹⁰ Years later, in *Banco Nacional de Cuba v. Sabbatino*, the Court, while holding on the one hand that the act of state doctrine is not part of international law, concluded on the other hand that “legal problems affecting international relations” were to be determined according to federal law.¹¹ Treaties, of course, are specifically mentioned in the Supremacy Clause of the Constitution, Article VI, clause 2, but the *Sabbatino* decision indicates that customary international law, as part of federal common law, is also supreme. And yet, no one has ever found that customary international law can override an express statute in the same way that a later treaty supersedes inconsistent earlier domestic laws.¹² This leaves international law in a rather unsatisfactory position in U.S. courts: there, but not there, perhaps at most supporting a canon of statutory construction that requires courts to interpret statutes so as not to conflict with international law if this is fairly possible.¹³

If anything, these general principles overstate the status that international law has enjoyed in U.S. courts in recent years. The Supreme Court has had before it a significant number of cases in which not only international law, but an international vision, should have been woven into the fabric of the decision, but it was not. A few examples will suffice to illustrate this point.

*Breard v. Greene*¹⁴ presented the question whether the petitioner, Angel Francisco Breard (a citizen of Paraguay) could pursue a claim for habeas corpus relief in U.S. courts. In that case, petitioner wanted to argue that his conviction for murder and capital sentence should be overturned because the State of Virginia violated the Vienna Convention on Consular Relations at the time of his arrest when it failed to

10. 175 US 677, 700 (1900).

11. 376 US 398, 425-27 (1964).

12. For the rule regarding treaties, see Restatement of the Law (Third): The Foreign Relations Law of the United States § 115(2) (1986). See also Comment (d) to that section, which expresses the opinion that “a later principle of customary law would supersede an earlier one [perhaps meaning an earlier law, but unclear].” The Comment goes on to admit that there have been no judicial decisions to this effect, and it concedes that it has not been authoritatively determined whether a later principle of customary international law could supersede an earlier treaty or statute.

13. For expressions of the canon of construction, see, for example, *Murray v Schooner Charming Betsy*, 6 US (2 Cranch) 64, 118 (1804). Consider Restatement of the Law (Third): The Foreign Relations Law of the United States at § 114 (1986).

14. 523 US 371 (1998).

inform him that he had the right to contact the Paraguayan Consulate.¹⁵ In a separate proceeding, the Republic of Paraguay brought suit in federal court for declaratory and injunctive relief finding a violation of the Vienna Convention. Finally, on April 8, 1998, the Republic of Paraguay instituted a proceeding against the United States before the International Court of Justice, alleging that the United States had violated the Vienna Convention. The ICJ responded with lightning speed, issuing an order requesting that the United States take all measures to ensure that Breard was not executed pending a final decision in the case. In a decision handed down April 14, 1998, which began by noting that Breard was scheduled to be executed at 9:00 p.m. that very night, the Supreme Court found that the federal courts had no jurisdiction over Breard's petition because he had procedurally defaulted his complaint about the Vienna Convention years earlier. It rejected Paraguay's claims on Eleventh Amendment grounds and on the theory that Paraguay was not a "person" within the meaning of 42 U.S.C. § 1983.

Of greatest interest for present purposes is the way the Court handled the international dimensions of this case. It first cited only U.S. cases for the proposition that "in international law" it is well established that the procedural rules of the forum state govern interpretation of a treaty. Without looking either to the 1969 Vienna Convention on the Law of Treaties, which represents an international consensus on the methodologies to be used in treaty interpretation, or at the jurisprudence of a single other country, the Court also offered the opinion that the Vienna Convention on Consular Relations also embodied this principle, in Article 36(2). Last, again with very little analysis, it concluded that the subsequently enacted Antiterrorism and Effective Death Penalty Act overrode Breard's alleged right under the Vienna Convention to a hearing on his claims.¹⁶ The latter discussion contains not a word about reconciling international law with domestic legislation if at all possible. The Court was not even willing to issue a stay to protect the status quo while the ICJ proceedings moved forward. All this bespeaks a rather low status for the international principles that were at stake.

Although a look at the briefs that were filed in Breard's case suggests that the problem was not the lawyers' failure to call to the Court's attention the relevant sources of international law, not everyone is as well represented as Breard was in the final days and moments of his life. Not many American lawyers are adept in using the sources of international law, and even fewer have experience searching the laws of other countries to see how they may have interpreted treaties and international agreements to which the United States is a signatory. And yet, even the Supreme Court of the United States has recognized on occasion that if the question at hand is the meaning of an agreement, it can be very useful to see how others subject to the same agreement have interpreted it. It did so in *El Al Israel Airlines, Ltd v Tsui Yuan*

15. Id.

16. See id at 375-77.

Tseng,¹⁷ a case in which the Court confronted a question under the Warsaw Convention.¹⁸ Specifically, it had to decide whether, when the Warsaw Convention itself did not permit a recovery in damages for an incident, an injured party could nonetheless bring a suit for damages under another source of law (there, the tort law of New York). The Court found that the answer was no, and that the Warsaw Convention blocked remedies that went beyond those authorized within the Convention. In so holding, however, it took into account a decision of the British House of Lords that had confronted more or less the same question, and it also referred to decisions from other signatory states.¹⁹

It seems, however, that the *Tseng* decision may be the exception rather than the rule. The decisions of other jurisdictions are discussed in *United States v Alvarez-Machain*,²⁰ but almost exclusively in the dissenting opinion. *Alvarez-Machain* was a case in which the question was whether a criminal defendant before a U.S. court who had been abducted from his homeland (Mexico) by agents of the U.S. government could assert a defense to the jurisdiction of the U.S. courts. The majority thought that the case could be resolved by asking whether the extradition treaty between the two countries forbade kidnapping; the dissenters recognized that no extradition treaty would so provide, because jurisdictional principles derived from international law make it clear that no country may exercise its police powers outside its territorial boundaries without the permission of the other. The same disregard for international practice appears in *Sale v Haitian Centers Council, Inc.*,²¹ where the Court upheld the U.S. Coast Guard practice of intercepting vessels on the high seas (that is, beyond any arguable limit of U.S. territorial jurisdiction) that were allegedly illegally transporting passengers from Haiti to the United States. By cutting the ships off on the high seas, the Coast Guard could return the people to Haiti without determining whether they qualified as refugees under § 243(h)(1) of the Immigration and Nationality Act and Article 33 of the U.N. Protocol Relating to the Status of Refugees.

For anyone who thinks that international law really is part of the law of the United States, or even that it ought to be, these decisions do not represent a desirable state of affairs. It would be unfair in the extreme to place all the blame at the feet of international legal scholarship, but perhaps some belongs there, and some belongs in the way international law has been taught during the twentieth-century in American law schools. But somehow, the message has not been getting through to the bench and bar that, in the words of the Supreme Court in *Bremen v Zapata Off-Shore Co.*,²² “[w]e cannot have trade and commerce in world markets and international waters

17. 525 US 155 (1999).

18. The full name of the convention is the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct 12, 1929, 49 Stat 3000, TS No 876 (1934), which can be found in the note following 49 USC § 40105.

19. 525 US at 175-76 & n 16.)

20. 504 US 655 (1992).

21. 509 US 155 (1993).

22. 407 US 1 (1972).

exclusively on our terms, governed by our laws, and resolved in our courts."²³ True enough, and the same can be said of issues touching on international human rights, on the resolution of issues concerning legislative and enforcement jurisdiction, on the development of a shared understanding of international agreements to which the United States is party, and a host of similar questions.

Law and lawyers tend to be conservative, in the old sense of the term: change usually comes slowly, in an evolutionary fashion; predictability comes from a refusal to jettison too much of the old too quickly. But it is imperative that we move beyond the parochial approach to international legal matters that characterized much of the twentieth-century. The challenge for legal scholarship in this area is to find a way to bring international law into the mainstream. Step one will be simply to educate students, lawyers, and judges about the subject matter. Step two will be to broaden the perspectives used in that educational process so that the views of people outside the United States are part of the conversation. Even something as well-known and well-respected as the ALI's Restatement of the Law (Third): The Foreign Relations Law of the United States relies to an astonishing degree on U.S. sources and materials. This choice, in the ALI's defense, was surely dictated in part by the fact that the Restatement was designed to present foreign relations law from the U.S. point of view, not from a universal point of view. Yet, one of the leading international law casebooks used in U.S. law schools does much the same thing.²⁴

The second task will be complicated somewhat by language barriers, given the fact that a distressing number of Americans do not have the ability to work comfortably in one or more languages other than English. Nevertheless, English speakers are fortunate (especially as the Internet expands exponentially), because English has become the second language of choice in virtually the entire non-English-speaking world. The excuses for lack of familiarity with scholarship from other traditions have thus already become weak, and they will fall even flatter over time. And of course, a scholarly journal such as the new *Chicago Journal* should take every opportunity to take advantage of the language skills of its authors to help expose its readers to the views of others on the important questions of international law.

Finally, it may be possible to develop a more satisfactory notion of what international law is. Plainly it is no longer limited to Brierly's idea of the law of nations. Too many obligations now run between nation-states and individuals for that to be true. Individuals and companies are also more or less third-party beneficiaries of treaties governing international trade, the environment, the law of the sea, and world health. The newer methodologies noted earlier have begun to look beyond the traditional divisions among public international law, comparative law, and private law, to a broader vision of the international legal order. This too will help bring international law into active play within our legal culture. The challenge for international legal scholarship is not a modest one: shape theories that will work for

23. *Id.* at 9.

24. See Barry C. Carter and Phillip R. Trimble, *International Law* (Aspen 3d ed 1999).

the coming century, not two centuries ago; find a way to make them matter to ordinary lawyers and courts in cases where they should be considered; and above all, abandon parochialism in method, in thought, and in outcome. Even in the midst of so many fellow publications, this mission should keep the *Chicago Journal of International Law* busy for many years to come. .