WELCOME TO PROFESSOR SYKES

ANDREAS F. LOWENFELD*

My reaction upon being asked to respond to Professor Sykes's inaugural lecture was to reply with a farewell address. Of course professors, like sopranos and quarterbacks, may stretch out their farewells, and I don't promise that this brief essay will be my last word. But Professor Sykes tells us that he started out dubious about the value of international law, and gradually has found a few places where international law is worthwhile, with dispute settlement rules that are linked to enforcement and to algorithms, whatever those are. Though I share Professor Sykes's interest in international economic law, and indeed have devoted a major part of my career to international trade and foreign direct investment,[1] I think, however, that his proof of the existence or value of international law is much too narrow.

When I arrived at the Law School in 1967, no invitation was extended to give an inaugural lecture, and there were only three professorial chairs, all of them occupied. But we did have something to inaugurate—this Journal. I say "we" because the editor-in-chief of the fledgling publication served at the same time as my research assistant.[2] My assignment was to write an essay entitled "On Teaching International Law," opposite another quite different essay by my then colleague Gidon Gottlieb entitled "The Study of International Law."[3] I had actually never taught international law—or indeed taught anything—but I had had four years of practice in a firm specialized in international law, and more than five years in the Office of the Legal Adviser of the U.S. State Department. I thought I knew what international law was, or rather how it ought to be viewed. Fishing the piece out of 45 years' accumulation of articles, books, briefs, arbitral awards, and lesson

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1. *See, e.g.*, ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW (2d ed. 2008) (exploring all major aspects of international economic law).

2. That was Carol Bellamy, who later served international law as Head of the Peace Corps and Director of UNICEF.

3. Professor Gottlieb soon left NYU; evidently, I remained.

plans, I remain content with my contribution to Volume 1, Number 1 of this Journal:

> First, it seems to me that often study and writing on international law has proceeded from a kind of "Yes, Virginia, there is a Santa Claus" approach—occasionally charming but in the long run embarrassing. Second, the effort to articulate principles has alternated between the hortatory and the descriptive, so that the statements that emerge tend to resemble the pronouncements of the oracle at Delphi, leaving to each interested party full freedom of interpretation. Third, and as a consequence of the first two points, the language of international law—aggression, self defense, sovereignty, and so on—has lent itself too easily to the uses of propaganda, thereby debasing both legal analysis and political persuasion. Fourth, and also I believe as a consequence of the first two points but the reverse of point three, many of those who have written about and taught international law have focused on narrow issues essentially removed from the great problems of our time—for example how to draw base lines separating a bay from the high sea.[4]

Perhaps Professor Sykes would go along with this paragraph, though I suspect he would shrug his shoulders, because it doesn't support his search for enforcement, which he regards as necessary to separate meaningful from meaningless international law. I view law—and particularly international law—as much broader, and much more interesting. To me international law is, on the one hand, a bundle of principles, guidelines, precedents, techniques, and probabilities, and on the other hand, an accumulation of skills and experience that one looks for in an international lawyer.

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Professor Sykes writes of his "once held belief" that international law ultimately does not matter "when international law asks nations to behave in ways that they would not other-

4. Andreas F. Lowenfeld, *On Teaching International Law*, 1 N.Y.U. J. INT'L L. & POL. 61, 61 (1968).

wise, it will fail because it lacks the enforcement mechanism that gives much of domestic law its bite."[5] I regret to conclude that this is still his belief. In two areas, he sees enforcement, and therefore regains a partial confidence in international law. But for the rest, he concedes that we will observe "a considerable degree of 'compliance' [his quotation marks] with international law" but asserts that this is so for reasons that have nothing to do with international law itself.[6]

I think Professor Sykes has it backwards. It is the consensus—sometimes written down, often not—that creates and constitutes the law. Is a statement that contracts and treaties must be observed—*Pacta sunt servanda*—not law? Or that one cannot profit from one's own wrong? Or that a controversy once decided remains decided—*res judicata*? One doesn't need the Security Council or the World Court to answer these questions, though it is pertinent that the overused Article 38 of the Statute of the World Court relies on "general principles" as one of the basic sources of international law.

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My mentor and colleague, Professor Louis Henkin, used to say that most states observe most law most of the time,[7] which of course defines law much more broadly than Professor Sykes does. This belief, one may say confidence, encouraged Henkin to accept appointment as Chief Reporter of the American Law Institute Restatement (Third) of the Foreign Relations Law of the United States, and three other scholars, including me, to collaborate with him. In fact, the Restatement hardly ever addresses enforcement, except with respect to judgments and arbitral awards. But the assumption is that states—i.e. state actors such as officials, judges, and legislatures—will look for guidance, in some instances in international agreements on various levels, in other instances in what

5. Alan O. Sykes, *The Inaugural Robert A. Kindler Professorship of Law Lecture: When is International Law Useful?*, 45 N.Y.U. J. INT'L L. & POL. 787 (2013).

6. *Id.* at 789.

7. The fuller quotation reads, "It is probably the case that almost all nations observe *almost all principles of international law and almost all of their obligations almost all of the time.*" LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979) (emphasis in original).

the Restatement calls "black letter law," in still other instances in less formal precedents or principles. The Restatement helps to find relevant sources, analyzes them, and attempts where appropriate to fit them together. If none of this matters, we wasted seven years and I don't know how many hours of effort.

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In a famous essay published before he became a Supreme Court Justice, Oliver Wendell Holmes wrote "[t]he duty to keep a contract . . . means a prediction that you must pay damages if you do not keep it,—and nothing else."[8] Is that right? Professor Sykes, it seems, would say yes, but I hope I am wrong about that, and I am pleased to note that Sykes's collaborator in their casebook on International Economic Relations, Professor John Jackson, disagrees with Holmes, as I do.[9]

The world does not need more litigation. In particular, in the GATT/WTO system where Professor Sykes rediscovered international law, noncompliance followed by retaliation usually results in not one but two trade barriers, two distortions of trade.

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In one of my favorite poems, Alfred, Lord Tennyson takes up Ulysses (Odysseus), home after twenty years of travel and adventure, triumphs, and defeat. "Much have I seen and known—cities of men / And manners, climates, councils, gov-

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8. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

9. *See generally* John H. Jackson, *The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligation*, 91 AM. J. INT'L L. 60, 61 (1997) (arguing that though the results of a WTO dispute settlement panel do not have direct application in the United States, U.S. courts must use international law obligations to interpret national law) (responding to Judith Hippler Bello, *The WTO Dispute Settlement Understanding: Less is More*, 90 AM. J. INT'L L. 416 (1996)).

> [T]he good news is that the United States is not required to comply with a WTO dispute settlement ruling adverse to the United States. (The correspondingly bad news is that neither is any other member.) Instead, the United States (and any other member) may choose to comply, to compensate, or to stonewall and suffer retaliation against its exports.

Id. at 418.

ernments . . . .” No, I do not have a Ulysses complex. I don’t identify with Tennyson’s Ulysses (but not Homer’s), who is anxious to keep going after the voyage is over. I do not have my mariners, ready to sail with me beyond the sunset. But I do agree that “I am a part of all that I have met.” For me, almost all of that turned on law, public and private, domestic and international. Drafting statutes, treaties, and implementing legislation; presenting arguments before the Supreme Court, the World Court, and the Southern District of New York; fighting for adequate compensation in aviation accidents; rethinking the Panama Canal; arbitrating disputes between states, between private parties, and between states and private parties; “restating” the law as best I could, and always—yes, always—teaching and learning. In Tennyson’s words, “all experience is an arch wherethrough / Gleams that untraveled world whose margin fades / Forever and forever when I move.”

To Alan Sykes I say “Welcome to NYU, as I say farewell.” But limit not your range; rather draw inspiration from Ulysses: “ . . . this grey spirit yearning in desire / To follow knowledge like a sinking star / Beyond the utmost bound of human thought.”