

Reflections on *A Convenient Untruth*

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The excellent article by Professors Ludington and Gulati provides food for thought on several levels. In some ways its most important contribution, though I give it little attention, is to force readers to wonder how a man of obvious intelligence and energy could find himself, in his last years, poverty stricken, friendless, and humiliated. On a much more prosaic level, it helps to throw light on the difficulties of dealing with issues of public international law.

The concept of odious debt which has brought Alexander Sack so much belated attention does not, as a matter of logic, depend on the facts of Sack's life. If it is claimed that the concept reflects the general practice of states accepted as law, that is, that the concept is an existing rule of customary international law, then the claim can be checked against the facts of state behavior. Either the facts bear out the claim or—more likely—they do not, but in neither case does it make any difference whether the person who is cited as originating the concept was the Tsar's finance minister or an undergraduate writing a term paper. Similarly, if it is argued that international law should incorporate the concept as an element of the law of state debt, for example, through the negotiation of a multilateral treaty, then whether or not the idea is a good one depends in no way on Alexander Sack's biography.

Even given these points, however, the account of the way Sack has been inaccurately characterized offers valuable insights into the problems international law presents for those who seek to apply it or study it.

In considering these difficulties, it helps to start by asking why someone might care if some governmental action was contrary to inter-

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national law. Unless the action is also one within the jurisdiction of the International Criminal Court, no individual need be concerned with the possibility of criminal sanctions. And, given the absence of any method of enforcing the judgments of those international tribunals with jurisdiction to hear claims against governments, a government held by such a tribunal to have violated international law need be concerned only if the victim state is in a position to resort to self-help to vindicate the rights the tribunal has recognized.

That international institutions are unlikely to be able to act against a law breaker does not, however, mean that violations of international law have no consequences. A claim that a particular action is a violation of law can trigger diplomatic difficulties, not only with the state against which the action is directed, but also with third party states, as is shown by the international reaction to the invasion of Iraq by the United States and its coalition partners. An allegation of an international law violation can also be an effective advocacy tactic, helping to pressure governments to oppose the action. Finally, in at least some cases, domestic law provides remedies for violations of international law; however, the remedies are available only if a judge in such a domestic court system can be convinced that international law has been violated. It is this last use of claims of international law violation which bears closer examination.

How does one make a showing to a domestic court of a violation of international law? If the alleged violation is the breach of a treaty, one may at least start with the language of the treaty. If, however, the violation is of customary international law, the situation is more complicated. Customary international law (CIL) is defined as the general practice of states accepted as law.¹ Thus, ideally one would determine the content of this body of law by examining the actions of the entities—states—allegedly governed by the law and by deciding, somehow, when a particular general practice has been accepted as law. This is not the sort of legal inquiry normally made by either common law or civil law courts. Judges in these systems expect to find the law in statutes, administrative regulations, or, in some cases, in judicial decisions. While any of these sources might be difficult to interpret, there is at least rarely any doubt whether any particular group of words really is a statute or judicial decision. In contrast, it can be difficult to determine what sorts of action count as “practice” or whether some statement, action, or reaction dem-

1. Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993.

onstrates a given state's belief regarding the legal character of an asserted rule of CIL.

This context explains the significance of labeling “the teachings of the most highly qualified publicists of the various nations” as “subsidiary means for the determination of rules of law.”² Not to put too fine a point on it, scholars of international law can save judges of domestic courts a great deal of work. The scholars can collect both instances of state practice regarding particular subjects and manifestations of states' understandings of the law on those subjects, summarize their findings, and, one hopes, even abstract from a mass of state actions and reactions the formulation of a rule of law. But these writings are “subsidiary means” for determining rules of law because the scholars are not legislators. Their function is not to make law, but to make clear what has been done by the entities with the authority to make law—states. Thus, a scholar's assertion as to the content of a particular rule of CIL can be falsified; if the scholar has mischaracterized the practice of states, omitted from his discussion crucial instances of practice, or failed to consider the effect of behavior casting doubt on the legal significance of some behavior, his assertion as to the content of the law is not merely incorrect—it is *demonstrably* incorrect, and thus can be ignored.

How probable is it, though, that a domestic court judge will be in a position to conduct the research necessary to verify the correctness of a scholar's opinion? It is much more likely that the judge will assume that the scholar knows what he is talking about and accept his views. And, of course, the more distinguished the scholar is understood to be, the more deference his views are likely to command.

So, however true it is, as noted above, that Alexander Sack's biography is logically irrelevant to the correctness of his view of the law, it is also true that his biography is of considerable practical importance. The views of an obscure refugee law professor who commanded so little respect that even his faculty colleagues supported depriving him of his tenured position would carry much less weight with a U.S. district judge than those of the Tsar's former Minister of Finance. Once Sack is understood to be a refugee from New York University as well as the Soviet Union, his prestige value is reduced, and the position he advocated must stand on its own, as good or bad policy, as an accurate or inaccurate characterization of state behavior.

What is particularly striking in this regard is that there is evidence relating to the illegality of collecting some governmental debt that is

2. *Id.*

stronger, as a matter of strict international legal analysis, than Sack's writings could be. In October 2006, Norway cancelled debts owed to it by five states in connection with a Norwegian government program intended to facilitate the export of Norwegian-built ships.³ According to an annex to the press release announcing the cancellation:

It is now generally agreed that the Ship Export Campaign was a development policy failure. As creditor, Norway shares part of the responsibility for the...debts. By canceling these claims, Norway takes the responsibility for allowing Ecuador, Egypt, Jamaica, Peru and Sierra Leone no longer to be obliged to service the remainder of these debts.⁴

A state's assertion that it is obliged *not* to collect a debt owed to it is much more powerful evidence as to the legally doubtful status of such debts than a pronouncement by an academic, no matter how distinguished. Customary international law is, first and foremost, a matter of state practice, and Norway's action is clearly an instance of practice supporting the odious debt doctrine.

It is not clear, however, that the matter under discussion is really the precise status of the odious debt doctrine in international law. Instead, the issue appears to be the identification of arguments most likely to impress an audience unfamiliar with questions of customary international law that odious debts are legally doubtful. And for that purpose, statements by someone supposed to be an academic acknowledged as an expert may well carry more weight than the actions of one small country.

In this sense, the story of Alexander Sack's role in the odious debt debate relates to a larger phenomenon—that of using doubtful evidence to bolster arguments as to the state of CIL, at least before domestic courts. For example, the court in *Alvarez-Machain v. United States*⁵ purported to find a rule of customary international law forbidding arbitrary arrest by citing a scholar's compilation of provisions of 119 na-

3. Press Release No. 118/06, Royal Norwegian Ministry of Foreign Affairs, Cancellation of Debts Resulting from the Norwegian Ship Export Campaign (1976–80) (Oct. 2, 2006).

4. Annex to Press Release No. 118/06, Royal Norwegian Ministry of Foreign Affairs, Cancellation of Debts Resulting from the Norwegian Ship Export Campaign (1976–80) (Oct. 2, 2006), available at <http://www.regjeringen.no/en/dep/ud/Documents/Reports-programmes-of-action-and-plans/Reports/2006/Cancellation-of-debts-incurred-as-a-result-of-the-Norwegian-Ship-Export-Campaign-1976-80.html?id=420457>.

5. *Alvarez-Machain v. United States*, 331 F.3d 604, 620–22 (9th Cir. 2003), *rev'd sub nom. Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

tional constitutions, the Universal Declaration of Human Rights,⁶ the International Covenant on Civil and Political Rights,⁷ the Restatement on Foreign Relations Law,⁸ several of its own decisions, various treaties to which the United States is not a party, a decision of the European Court of Human Rights, and a non-binding study by a United Nations body.⁹ What is striking in this list of sources is the absence of anything approaching an account of whether states generally actually refrain from carrying out arbitrary arrests.

With courts approaching CIL in such a way, it is easy to understand why those who argue that CIL does not require repayment of odious debts seek to enlist in their cause Alexander Sack as he was imagined to be. Of course, the Supreme Court rejected the customary law analysis in *Alvarez-Machain v. United States* in its decision in *Sosa v. Alvarez-Machain*,¹⁰ but the Supreme Court can hardly review every lower court case involving CIL. The temptation to resort to doubtful authorities regarding the content of CIL therefore ought to remain powerful. And, as long as that is true, we will probably continue to see the equivalent of phantom tsarist ministers cited to support insecure legal arguments.

6. Universal Declaration of Human Rights, G.A. Res. 217A, at 9, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

7. International Covenant on Civil and Political Rights art. 9, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

8. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).

9. See *Alvarez-Machain*, 331 F.3d at 620–22.

10. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734–38 (2004). The Court rejected reliance on the Universal Declaration because it was non-binding, on the International Covenant on Civil and Political Rights because it is non-self-executing in the United States, and on the survey of national constitutions as speaking at too general a level to be useful; it viewed the Restatement of Foreign Relations Law as cutting against the holding of the lower court. *Id.*