Law Reform: A New Idea for International Lawyers

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At first sight one is inclined to say that the last thing international law needs is yet another journal; but this new journal is devoted to law reform; and that is a different matter. Movements for the reform of municipal laws are recognized to be important; but in public international law one gets the impression that the words, 'law reform', seldom, if ever, pass the lips of the majority of public international lawyers. It is now high time for a change.

The present writer is old enough to remember the time between the wars when many lecturers called upon to give a course on public international law felt obliged to begin with an apologia for the subject in the form of a reasoned argument that, in spite of many understandable doubts, public international law really was law and not just a proposal by professors of international law. It is not surprising therefore that many generations of teachers of public international law have been driven by a sort of missionary spirit and zeal, which also found expression in associations of international lawyers like the International Law Association and the *Institut de droit international*. The ostensible primary aim was 'scientific' (then a buzz word for intellectual respectability); but a principal component of the endeavour was what would now be called a public relations and propaganda exercise.

For their own time these public international lawyer enthusiasts were right. The results of their devotion and labours have been remarkable. No international law lecturer today would think him or herself required to begin the course with an elaborate apologia for the subject. International law has been developed and elaborated into a sophisticated system. It has even attained that ultimate accolade of present times: of being accepted as sometimes relevant to questions of international commerce and finance.

But one needs, it is submitted, to recognize that large parts of the central core of international law are deficient and in need of serious reformation. Anyone with doubts about this should look again at the sad story of the break up of former Yugoslavia or of the appalling happenings in Somalia or Rwanda for instance and contemplate the human suffering and degradation involved; and look at the same

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time at the painfully inadequate part played in these tragedies by international law. International law proved inadequate not so much, as is popularly supposed, in the lack of enforcement or sanction, as in the lack of any clear message to be enforced.

There has been a great deployment of paper apparatus, and much talk and many lectures, about more or less relevant, well-documented and discussed legal concepts. There has been the familiar question of 'recognition' of new states and governments; the principle of the *ita possidetis juris*; the so-called 'right' of self-determination; the law of state or governmental succession; the Charter law governing the use of force and of self-defence; these are only a few principal topics of international law involved. But none of these gave a sufficiently clear indication of how the principal actors were required by international law to behave in situations where there has been a collapse of *domestic* law and order.

The politically crucial legal question has been about the problems that result from the outbreak of civil war, but international law, particularly the UN law, has relatively little to say on this subject even though the 'right' of self-determination seems almost designed to propagate situations of civil war. It is true that the UN has established, somewhat ironically as part of its 'peacekeeping' apparatus, two international criminal tribunals, for former Yugoslavia and Rwanda, to try a relatively few individuals for behaviour no doubt abominable but nevertheless the almost inevitable product of the kind of situation the UN and international law and its legal concepts and processes had been wholly inadequate to prevent. Doubtless these situations have been a tragedy for mankind in general and not just for international law, yet international lawyers have a good deal to answer for. It is not just international law that is inadequate but the thinking and writing of international lawyers which is inadequate to the kind of task that somehow has to be coped with of controlling the international repercussions and responsibilities that can arise from domestic destabilization.

These situations have provided dramatic evidence of the need for the reform of the main core of general international law. Particular examples could be multiplied. It would seem reasonable, therefore, to suggest that the idea of international law reform might not be amiss. However, the whole system of international legal scholarship is heavily weighted against reform. The main endeavour is ever in the direction of 'codification and progressive development' of the law which is already there; which in practical terms means more and more of the same. Yes, as has already noticed there are great efforts to fashion new laws for modish new topics. Yet suggestions for reform, i.e. radical change in some of the main seams, is likely to be regarded almost as a kind of treachery to the subject or 'cause' of international law. Admittedly law reform always requires not only making new laws but also being able and brave enough to abolish some parts of the old and familiar juristic ideas and concepts; and there is a great lack of international law procedures for abolishing parts of the law, wherein international law differs basically from municipal systems. Yet writers and commentators on international law have greater influence by far than their counterparts in domestic systems of law. So perhaps one could at any rate make a useful beginning by thinking about international law reform. That law

reform requires the legislative power of destroying the old as well as creating the new is certainly the truth of the matter, for otherwise attempts to improve the law may only add complexity, controversy and doubt to existing old law. In international law we not only lack any such proper machinery of reform, but the possibility has not even been much thought about by writers. Seldom do writers even ask, for instance, what should be done about a law governing the use of force which is almost entirely concentrated upon the control of the kind of inter-state hostilities which was indeed the major problem in earlier times, but has very little to say about the programmes of destabilization and civil conflict which is manifestly the major problem today. It has been said that Generals often seem to spend their time planning to fight the *last* war all over again; much the same is true of international lawyers' ideas of the legal control of the use of force.

There has indeed been one great exemplar of radical change in international law; the Third United Nations Conference on the Law of the Sea, and the Convention of 1982 as eventually modified and coming into force in 1994. This was an act of reform for it changed some of the basic principles of the Law of the Sea. The impetus which brought about the powerful movement for the complete restructuring of the Law of the Sea was, as indeed it had to be, political rather than legal. Significantly, the ILC was not involved, even though much of its work in preparing for the 1958 Geneva Conference and resulting 1958 Conventions, survived in the new Convention. And, be it noted, at the Third UN Conference the delegations included not only lawyers but diplomats and politicians, as well as those with expertise in, for example, maritime and naval matters, the oil industry, shipping and the merchant marine. In short the membership suited legislation and reform and not just codification and progressive development.

However, the circumstances that made possible the Third UN Conference on the Law of the Sea, and a process of law making that in the end spanned two decades, would not easily be repeated for other topics of international law. Nevertheless the fact remains that considerable swathes of core international law are in urgent need, not just of further elaboration but of serious reform. How is it to be done? Well the first thing is for more people to begin to think about international law in these terms; and the establishment of a journal devoted to law reform is a splendid and imaginative beginning on the task. It is very much to be hoped that the journal will attract writers from other disciplines besides international law; politics, military matter, economics, geography, political and diplomatic history, sociology and in some matters at least, the sciences. It is for lawyers to draft laws; but questions of policy which drive the making of new law or reform of law (other than merely formal tinkerings) constitute an interdisciplinary subject. We must rescue international law from being an esoteric cult for a handful of specialists and get it more generally recognized for what it is: a matter of the very gravest concern to everybody. But its present state is largely the fault of us, the international lawyers. If all our time is spent talking and arguing amongst ourselves it should not be very surprising that scholars in other subjects do not talk very much to us or concern themselves over our subject.