Chapter II  Time and Law Revisited: International Law and the Temporal Dimension

I. Introduction

The relationship between International Law and time is an ineluctable one, which requires much more attention than the one dispensed to it thus far. The formation and development of International Law, as well as its interpretation and application, could hardly be dissociated from the temporal dimension, wherefrom precisions and lessons can be extracted, as reflections introductory to the chapters that follow. The incidence of the temporal dimension on International Law is acknowledged in face of new needs of protection of human beings, also in a preventive way, as illustrated in particular by the current expansion of provisional measures of protection. Awareness of such temporal dimension bears witness of the myopia of political “realism” and draws attention to the human quest for justice throughout history.

II. Time and Law: Some Precisions and Lessons

The temporal dimension underlies the whole domain of Law in general, and of Public International Law in particular. Classical International Law departed from an essentially static outlook of the task of regulation. The very conception of a “definitive” categorization of “sources” of International Law, e.g., corresponded to the positivist longing, so much en vogue in the XIXth century, with its emphasis on an inescapable legal formalism. Only in a more recent epoch, closer to our days, one was to recognize the possibility of new manifestations of International Law and to reckon the evolution undergone by rules regarded as “immutable” in the past; “classical” International Law accepted, however, one sole doctrinal category turned to the presence of the temporal element it contained; namely, that

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of the so-called “intertemporal law”, as illustrated by the contribution of the celebrated arbitral award of Max Huber in the case of the Island of Palmas (1928).²

The Institut de Droit International covered this specific topic, that of the so-called “intertemporal law”, in the Sessions of Rome (1973) and Wiesbaden (1975). There was general acceptance as to the basic proposition that the solution of the intertemporal problem consisted in the determination of the applicable norm, among those which succeeded each other in time on the same matter, having every act and situation to be appreciated in the light of legal rules contemporary to them.³ The work and debates of the Institut displayed an awareness of the ambivalence, antinomy or tension between the forces in favour of the evolution or transformation of the legal order and those in favour of the stability or legal security, – and this was to be reflected in the cautious resolution adopted by the Institut in Wiesbaden in 1975.⁴

The impact or influence of the passage of time in the formation and evolution of the rules of International Law is not a phenomenon external to law.⁵ One was, thus, to go beyond the treatment somewhat circumscribed or restrictive of the so-called “intertemporal law” stricto sensu, so as to consider the process of the very formation and evolution of norms in the course of time, or, to use a well-known expression, of the “progressive development of International Law”.⁶ The conscious search for new juridical solutions is to presuppose the solid knowledge of the solutions of the past, and of the historical evolution of International Law as an open and dynamic system, capable of responding to the changing needs of the international community.⁷

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⁴ Cf. 56 AIDI (1975) pp. 536-541 (cf., particularly, the second considerandum of the preambular part of the resolution).

⁵ In the aforementioned work of the Institut, attention was in fact turned to the impact of the passage of time (sometimes a rather short lapse of time) on the development of International Law; cf. 55 AIDI (1973) pp. 108 and 114-115 (interventions by M. Lachs, P. Reuter and S. Rosenne).
