Chapter 4

Some Thoughts on the Making of International Law

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The Survival of International Law

Learning about international law at a British university in the 1950s was much influenced by the spirit of the time. Barely a decade had elapsed since the end of the century’s Second World War. Under the leadership of the victorious, albeit chastened, Powers, all governments had vowed “to save succeeding generations from the scourge of war,” and to that end, had established the United Nations. The purposes laid down in Article 1 of the new organization’s Charter went beyond the prevention of war through the “maintenance of international peace and security,” to encompass the removal of the root causes of war. This was to be achieved by bringing about international cooperation “in solving international problems of an economic, social, cultural or humanitarian character,” as well as in “promoting and encouraging respect for human rights and fundamental freedoms for all...” Moreover, governments agreed that, to that end they would act in accordance with principles specified in Article 2 of the Charter, including the “sovereign equality” of all Member States, fulfillment in good faith of the obligations assumed under the Charter, peaceful settlement of disputes, refraining from the threat or use of force against the territorial integrity or political independence of a State in a manner inconsistent with the purposes of the United Nations, and non-intervention in matters essentially within the domestic jurisdiction of any State, unless so authorized by the Security Council in the lawful discharge of its responsibilities under Chapter VII of the Charter. Governments and the “specialized agencies” established under the aegis of the United Nations were endeavouring through international cooperation to give effect to these purposes and principles.

It was a time of renewed confidence in the efficacy of international law. The General Assembly of the Organization, required by the Charter to “encourage the progressive development of international law and its codification,” had established the International Law Commission in 1947, and the Commission had begun work in 1949. The trenchant criticism of the subject by Hans Morgenthau and others was not required reading at the time. Morgenthau had written as the ambitions of national socialist Germany were taking shape in 1940:
.... the breakdown of the main bulk of a post-World War [I] international law has altogether destroyed public confidence in a science which, unmoved by what experience may show, invariably follows its preconceived pattern. The breakdown implies the practical refutation of the ideas which have determined the development of international law in the last half-century.1

He ascribed the failure of international law to an approach to the subject by international lawyers characterized by what he called “juridic positivism” or exclusive reference to the written law exemplified – in the case of public international law – by multilateral treaties. Conceding that an approach based upon the “self-sufficiency” of the written law might be appropriate in the case of domestic law (legislation) from which reference to local ethics and mores could readily be made to validate a rule, he argues:

The precepts of international law need not only to be interpreted in the light of the ideals and ethico-legal principles which are at their basis. They need also to be seen within the sociological context of economic interests, social tensions and aspirations for power, which are the motivating forces in the international field, and which give rise to the factual situations forming the raw material for regulation by international law.2

and concludes:

Where there is neither community of interests nor balance of power, there is no international law.3

He goes on to develop a “functional theory of international law” whereby formulation of its rules would be preceded by “search for the psychological, social political and economic forces which determine the actual content and working of legal rules and which, in turn, are determined by them.”

Some seventy years on, the issues arising from the weakness of international law when it confronts the determined exercise of power remain unresolved. As he argued then,

2 Ibid., p. 269.
3 Ibid., p. 275.