CHAPTER 30

What’s Wrong with International Lawyers?

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Introduction

I was pleased to be able to pay tribute to Fred Soons at the farewell seminar to honor him on his retirement. At this seminar I was asked to address the question “What’s wrong with international law?” I had no hesitation in replying that there is nothing seriously wrong with international law and that it was necessary to look elsewhere for an answer to the question.

International law is as developed as most national systems of law in terms of its substantive rules and its institutions for dispute settlement and change. Most branches of international law have clear rules. There are treaties, buttressed by custom, that regulate treaties, state responsibility, territory, jurisdiction, the sea, airspace, immunities, international organizations, human rights, humanitarian law, trade, economic relations, the use of force etc. There are a plethora of international courts, monitoring bodies and arbitration tribunals to settle disputes. There are bodies for the codification and progressive development of international law.

There are some black holes. The law of recognition of states, for instance, is uncharted territory but states refuse to submit it to codification, and the International Law Commission has acquiesced in this determination. There are other black holes but no more than in many national legal systems.

The main problem facing international law is enforcement. It is weak and characterized by double standards. But there are enforcement mechanisms and dispute settlement mechanisms. The Security Council is the ultimate enforcement mechanism, but its composition and veto power renders it largely

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1 In 1949 the Secretariat of the International Law Commission, in collaboration with Sir Hersch Lauterpacht, prepared a Survey of International Law in Relation to the Work of Codification of the International Law Commission, A/CN.4/Rev.1, which listed twenty five topics appropriate for codification. The Commission reduced this list to fourteen. Of this list of fourteen topics only one – “Recognition of States and Governments” – has not been addressed by the Commission. The Commission, reflecting the wishes of the Sixth Committee has studiously avoided addressing this subject, largely on the ground that it is “too political.” In 1996 James Crawford proposed that the ILC consider the issue of statehood but it was not taken up. See J. Crawford, The Creation of States, 2nd ed (Clarendon Press, Oxford: 2006) 857–859.
ineffective. There is nothing wrong with the International Court of Justice (ICJ) but only 70 states accept the compulsory jurisdiction of the Court. Similarly there is nothing wrong with the International Criminal Court (ICC) but its failure to achieve universal membership deprives it of jurisdiction over the most sinful states.

The failure of states to enforce international law is mainly the failure of political will. And behind the exercise or non-exercise of political will there is often a lawyer or a number of lawyers. Most political decisions made by states are made in consultation with law advisers. Lawyers are often complicit in political decision-making that seems to violate international law. Controversially, John Yoo, Deputy Attorney-General in the George W. Bush administration, gave legal approval to waterboarding following 9/11; Peter Goldsmith, Attorney-General in the Blair government, gave legal blessing to the Iraq war; and Eric Holder, Attorney-General in the Obama administration has approved the use of drones to carry out extra-judicial killings.

Judicial decisions are made by lawyers. Changes to the law – codification – are made by lawyers. These branches of the law are clearly the responsibility of lawyers.

In short, if anything is wrong with international law, lawyers are partly to blame. Many violations of international law are the result of legal advice; many failures to respect the Rule of Law in international affairs are the fault of lawyers. Bad judicial decisions are the decisions of lawyers. Poor codification is evidence of poor lawyering. Conversely, many good decisions affecting international law are the work of lawyers.

Many will say that is so obvious that it needs no discussion. But it does. Failure to address the human factor results in failure to improve political decision-making, judicial decisions and the progressive development of the law.

A Role for International Lawyers in Shaping International Law

Recently I reviewed Realizing Utopia: The Future of International Law,² edited by Antonio Cassese for the American Journal of International Law.³ It is a collection of forty essays by leading scholars who propose ways in which international law might be brought into line with the expectations of the twenty-first century. Guided by legal idealism, the authors suggest ways in

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