What Does ‘Change’ Mean? International Law vs. the International Legal System

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I. Introduction

It is always wise to give oneself time to stand back from events in order to pass judgement on their significance. The shockwaves from the appalling incidents in New York (and elsewhere) on the 11th of September 2001 reached deeply into the universal human consciousness. When they, and the reverberations of the world events that came in their train, reached the shores of the lawyers’ domain, there was an instant reaction too, something like a reflection back of the shock received. But the task of the lawyer is to make mature, considered judgements, not instantaneous ones. And, while the practice of international law very often demands immediate judgements as a guide to legitimate action, that does not stand in the way of reconsideration and reassessment, when circumstances allow, and significances become clearer.

The theme for this Agora asks us to give our view on whether the nature of the international legal system is changing. By that it means of course changing under the cumulative impact of pressures, both recent and not so recent, pressures which have been brought about not just by blind events, but by shifts in the pattern of power in the world within which we live.

II. Changes in the Rules vs. Changes in the System

Likewise, our views are sought on whether the international legal system is changing. Not, in other words, on whether international law is changing. Naturally, the rules which make up the corpus of international law are changing. They are changing all the time; that is what one would expect. It is in fact the mysterious and elusive processes of adaptation and change that give international law much of its fascination,
as well as its real-world importance. Whether the *principles* (encapsulated in that common catch-phrase ‘principles and rules of international law’) are also changing is a much deeper question altogether. For many of us—probably all of us—the ‘principles’ are expected to have an enduring permanence quite different in kind from the stability (or otherwise) of particular rules.

From there, I think we have to move on to recognize that international law does not exist for its own sake, but to serve a purpose. The purpose (or in fact the multiple purposes) are exactly the same as we would recognize to be the goals of good policy-making: the preservation of peace and order; social progress; protection of the rights and freedoms of the individual; facilitation of legitimate trade and travel; etc., etc. Sometimes, especially at moments of challenge, international lawyers do tend to react in ways that look to the policy-maker like a defence of ‘international law’ for its own sake. In fact, when that happens, it is usually because what the international lawyer is standing up for is not particular rules, but the underlying legal principles that animate them and which (as I suggest above) are intended, for the good of the system, to be more enduring and permanent than the particular rules valid at any given moment. Of course there is room for honest argument about what is an (evanescent) rule and what is a (permanent) principle, but if the purposes of international law and the goals of good policy-making are broadly the same, that should be a constructive debate not a damaging one.

That brings us directly back, if not to the processes of change, then to the pressures for it. If international law is a system in a process of continual change and development, then it should not be in the slightest surprising, or shocking, that States bring conscious pressure to bear in order to produce change. Indeed, it is pretty hard to see how, without such pressure, change could ever happen! This is something that strong States have always done; the surprise would be if they hadn’t. But it is equally something that weak States have always done, if they could. It might have been individually, by exploiting, say a geographical position around a key strait or shipping lane. It might have been on a group basis, as for example the drive by a numerically quite limited number of Latin American States for acceptance of 200-mile territorial seas, later transmuted into 200-mile resource zones; or the attempt by the group of equatorial States to assert ownership over the geostationary orbit. Or it might have been by sheer weight of numbers, as in the strenuous efforts to conjure into being a ‘New International Economic Order’ by majority voting power in the UN General Assembly. Or it might have been by sheen of numbers, as in the strenuous efforts to conjure into being a ‘New International Economic Order’ by majority voting power in the UN General Assembly. But these all fall to be classed as ‘pressures to change international law’. And now we face the phenomenon *de nos jours* by which other organized groupings outside the State system as such, i.e. NGOs and pressure groups, mount campaigns with considerable skill and resourcefulness, but campaigns to do what? why to change international law.