Recurring Themes / Thèmes récurrents

100 Years of International Law / Cent ans de droit international

The editors received the sad news of the death of Sir Robert Jennings shortly before this issue went to press. We feel especially privileged to publish this contribution, written for Forum earlier this year, as a tribute to him. Sir Robert was 90. He left his own indelible mark on the century of international law on which he reflects here.

The Imbalance of the International Law System

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My first acquaintance with law was when I started to read it as a freshman at Cambridge in October 1932. The first year then included, besides much Roman law, a course on “international relations” which still seems to me was a sensible preparation for international law in the second year. So I have been dealing with international law during a fair slice of the last hundred years.

When I started on international law, I discovered that there were doubts whether it was properly “law” at all. The “jurisprudence” lecturer, who taught Austin, did not encourage respect for international law, and the then Cambridge international lawyers – with the exception of Arnold McNair – tended to be on the defensive. This was disturbing because, as a naïve “Mr.Verdant Green,” it had not even occurred to me that law professors might teach a law that was not law; until I heard one of them defending it, and that made me wonder.

After all, at that time and on up to the end of the Second World War, international law was, like the leading text book, in two volumes. The international law of peacetime was in volume I. But any state might, in its sovereign discretion, declare war on another. Then one put volume I back on the shelf and took down volume II with its rules about war and neutrality. It is now not always easy to remember that this situation, give or take various feeble attempts at change, was the position until 1946.

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What strikes one now, looking back on some seven decades of international law and comparing it with systems of domestic law, is the relative neglect of procedures for making some international decisions not by applying rules of law but reasons of policy. The last five decades have seen immense changes in international law and relations, but it is that same policy part of it that remains relatively under-developed even today. There has been a tendency of international lawyers, whether in practice or in the study, to become litigation-minded lawyers preoccupied with courts and tribunals. The weight of influential scholarship has consistently leant in that direction, and so tended to neglect institutions for making policy decisions.

The imbalance in international law between the law administered by courts and the laws creating and enabling policy decisions had early been noticed by Brierly, who warned already in 1944 of the need for the creation of “institutions which will enable the manifold functions of government, with whatever adaptations are necessary – and they will be far-reaching – to be performed internationally.” Besides decisions made by courts and tribunals interpreting and applying rules of international law, there is a need for the necessary complementary procedures for making the decisions about the usually far more important matters that fall to be decided by reasons of policy.

It is not that this policy-decision area is outside the purview of the courts. The function of the courts in the policy areas of government is to review the competences of the bodies which have the task of making these decisions and ensure that they act *intra vires*. This is the kind of law that, in developed societies, we call constitutional and/or administrative law. Such constitutional international law as we have is inadequate; indeed the term “international constitutional law” sounds strange; and the term “administrative” has, in international law, been taken over for tribunals dealing with relatively trivial matters, such as the grievances of international civil servants.

The imbalance is well illustrated by the law about the acquisition or loss of territory; always a main stock-in-trade of international problems. The present writer in 1964 pointed out that the law governing territorial changes is in effect a conveyancing system; a system of legal “modes” by which parcels of territory might pass from one state to another. But the big territorial changes – those where whole states may disappear or be created – were historically made in peace treaties at the end of wars. Such territorial changes even today have mostly been effected by military operations; as the recent history of the Balkans tells.

International lawyers have tended not to look for better ways of making policy territorial decisions but have instead tried to extend the legal “modes”; as for example by the transformation of “self-determination” from being a useful political notion, into a “right” of “self-determination,” apparently enjoyed by “peoples.” This