

THOUGHTS ON PRACTICING INTERNATIONAL LAW

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I.

“How can Newfoundland join the United States?”

The year was 1948, and the question was addressed to the distinguished professor of international law with whom I had recently become associated. The questioners were a delegation of Newfoundland citizens concerned over the choice to be made that year between independence and union with Canada. Neither of these options appealed to them and they were exploring other ideas for Newfoundland's future.

The answer in this case, as a practical matter, was easy: no way. It was the United States policy, verified by informal enquiry in Washington, to view Newfoundland's union with Canada as the best solution for Newfoundland's economic problems. That marriage took place in due course, and the rest is history; but it is interesting to recall that union won out over independence in the final Newfoundland referendum by only some 52 percent of the vote.

I mention this episode only to illustrate the kind of unexpected query which a practitioner in the field of international law may encounter. But what in general does such a practitioner *do* for a living in a field where the law is often regarded (with some truth) as at best “soft” or uncertain and at worst irrelevant or non-existent?¹ The answer is that it all depends, and depends in the first instance on what kind of international law one is talking about.

International law in the strict sense is public international law, the law governing the relations of states and public international organizations with one another. But obviously these relationships give rise to only a fraction of the thousands of events and transactions which occur daily and which affect more than one country. Trade and commerce, investment and development, patents and trademarks, descent and transmission of property rights, marital and family relations, tourism and travel, can all present problems which cross international boundaries. Whether or not the private international law which normally applies to these matters is techni-

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1. I shall not enter here into the abstract question, beloved of scholars, of what international law is and whether it is “law.” I think the best short discussion is still that in J. BRIERLY, *THE LAW OF NATIONS* (6th ed. Waldock 1963). But I would say that the very uncertainties which exist are in part what makes the subject so challenging.

cally "international law," there is no doubt that it exists and requires the constant attention of counsel. Though often involving questions of public law (such as the interpretation and application of relevant treaties), it represents a different kind of practice and a different perspective. While the divider between public and private sectors is a lattice rather than a wall, there is still a difference between the two which justifies the traditional distinction as a general guideline.

My own preference has always been for work in public international law, or at least work involving substantial elements of public international law; and I have been fortunate over the last 25 years in finding a good deal of this. Boundary problems on land and sea, questions arising under the continental shelf doctrine, fishery disputes, and matters relating to concession or other agreements between governments and private parties of different nationalities have been among the things to come my way. Each, without exception, has had its special points of interest.

II.

Take boundary problems, for example. These can be particularly intriguing because of the mixture of geography, history, politics and law which they often present. Historically, they may turn on treaties or activities centuries old. For example, in the *Minquiers and Ecrehos Case*² some 20 years ago, the International Court of Justice had to consider a mass of medieval documentation submitted to support competing French and British claims to those minuscule islands. The *Grisbadarna Case*³ before a tribunal of the Permanent Court of Arbitration in 1909 turned in part on the interpretation of seventeenth century treaties. I myself have struggled with the problem of proving that tribes or places in the Arabian desert referred to by one name in early records were the same tribe or place known today by another. The problem was not made easier by the varying phonetic transliterations of early travellers not versed in modern comparative philology.⁴

Geographically, the shortcomings of maps, together with inade-

2. [1953] I.C.J. 47.

3. (Norway v. Sweden), Hague Court Reports (Scott) 121 (Perm. Ct. Arb. 1916).

4. A similar difficulty has been known to arise from the good-humored willingness of local guides to satisfy Western explorers unfamiliar with the language but anxious to ascertain names of prominent landmarks. Later research sometimes indicated that the names supplied were often jovially obscene inventions of the moment.

quate descriptions in boundary treaties, have presented many difficulties. One example in my own experience will serve to illustrate. More than 50 years ago, the boundary between Iraq and what is now Saudi Arabia was delineated on paper.⁵ Its western terminus was declared to be at a supposedly prominent mountain named Jabal 'Anaiza, which was described, on the basis of the map used at the time, as lying near the intersection of latitude 32° N. and longitude 39° E. A few years later the boundary between Saudi Arabia and the present state of Jordan west of Iraq was also delineated on paper.⁶ This line was defined to commence at the intersection of 32° N. and 39° E., without mention of Jabal 'Anaiza, and thence run westerly to a defined point. Obviously the intent in these agreements was to fix a common triple point at which the boundaries of Iraq, Jordan and Saudi Arabia were to meet.

Years later, as is common in boundary settlements, it came time to survey the boundary on the ground. Field parties found Jabal 'Anaiza to be, not a conveniently sharp mountain peak, but an area of upland within which the location of the boundary point could reasonably slide around. This difficulty was surmounted by agreement that the highest ground in the area be selected as the point. But it also turned out that Jabal 'Anaiza was some 38 kilometers northeasterly of the intersection of 32° N. and 39° E. Which reference was to control—the named place or the coordinates? If it were to be the *jabal* for all three countries, one line would result; if it were the coordinates, another. If it were the *jabal* for Iraq and the coordinates for Jordan (as the literal treaty language would indicate), there would be a sizable hiatus between the two. The uncertainties persisted unresolved until 1965, when a Saudi-Jordanian agreement (to which Iraq entered no objection) adopted the hiatus theory and went on to fill the gap with a provision that the boundary between the two states should begin at Jabal 'Anaiza and run first to the intersection of 32° N. and 39° E. and thence westward.⁷

This history reminds us not only that accurate information and careful draftsmanship are as important in international law as any-

5. In the so-called Protocol of 'Uqair No. 1 of 2 December 1922. 11 C. FITCHISON, A COLLECTION OF TREATIES, ENGAGEMENTS AND SANADS RELATING TO INDIA AND NEIGHBORING COUNTRIES 211 (5th ed. 1933).

6. In the so-called Hadda Agreement of 2 November 1925. *Id.* at 221.

7. Agreement of 10 August 1965. The English translation of relevant articles may be found in DEPARTMENT OF STATE, JORDAN-SAUDI ARABIA BOUNDARY, (International Boundary Study No. 60, 1965).

where else, but also that international difficulties are not rapidly settled. This particular example, not intrinsically very difficult, took 43 years, with the last 15 of which I was personally familiar. Such instances are far from uncommon, and patience is a virtue even more necessary for the international lawyer than for his domestic colleague.

III.

Not so long ago the law of the sea was regarded as constituting the most stable and most widely accepted part of international law. True, there was some disagreement over the allowable breadth of the territorial sea and the manner in which it should be delimited. But the differences were small, and it is almost amusing to recall the indignation with which the countries favoring three miles used to rise up to protest claims of five or six miles. There was, of course, the hint of things to come in the novel doctrine of the continental shelf which came into prominence after 1945, but this was widely viewed as applying only to mineral resources in the seabed and subsoil of shallow areas adjacent to the continents.

I well remember the controversy between Japan and Australia in the early 1950's over the taking by Japanese vessels of pearl oysters from shelf areas off Australia.⁸ (In that early plastic era, genuine mother-of-pearl buttons were still in great demand.) At that time it was still possible to develop (at least in my opinion) plausible arguments why pearl oysters should be regarded as a high seas fishery resource, rather than a resource subject to coastal state jurisdiction under the then nascent shelf doctrine; and there was for a while a strong possibility that a case in the International Court of Justice might result. But the trend otherwise was already evident; and the controversy became substantially moot with the adoption, first by the United Nations International Law Commission and then by the 1958 Law of the Sea Conference, of the view that sedentary fisheries should fall within the shelf doctrine. Whether this decision was originally correct or incorrect in theory, there is no question that this is the prevailing view today.

In many ways the conventions which emerged from the 1958 Conference were the high-water mark of the traditional law of the sea. They were regarded as a prime achievement in the process of

8. See Goldie, *Australia's Continental Shelf: Legislation and Proclamations*, 3 INT'L & COMP. L.Q. 535 (1954), for a good general account from an Australian standpoint.

codification and development of international law, which the United Nations was enjoined by its Charter to encourage. Yet less than 20 years later much of the law of the sea is in disarray, and there are those who wonder whether Humpty Dumpty can ever be put together again. This is not fundamentally the result of any calculated campaign by any particular group. Rather, it reflects unprecedented changes in the world scene, brought about by the multiplication of new states, the growth of population, the need for additional resources of all kinds and the explosion in technology. These pressures, accompanied by distrust and dissatisfaction over old norms of every kind, have caused great cracks to open in the fabric of international law, including the law of the sea—and for that matter in much domestic law as well.

There are those who bemoan the falling apart of the old order at sea. I can sympathize with them, for one is entitled to a measure of nostalgia for a regime both familiar and relatively clear. Yet there can be no doubt that the old formulas are not comprehensive enough for a new age. The dilapidation of the old structure is itself a challenge to renovate. It creates an opportunity for a rebuilding which can incorporate the best of the old with what is needed of the new.

The task is not an easy one, for the ways of creating new international law are few and cumbersome in a world of nation states. The effort to do so by international legislation in the form of a multilateral treaty is now under way in the current Law of the Sea Conference. One hopes that this will be successful, though the chances at this moment seem no better than fair. Perhaps it is more likely to be only partially successful, agreeing in some points and leaving others for later resolution. But even if the Conference fails entirely, I do not believe that this need mark the end of a law of the sea. Law is a necessary element of any organized society, including a society of states. One will find, I think, that rules unattainable at one time through international legislation will emerge eventually through concordant state practice and tacit acquiescence. But the process will take time, and the dangers of aberrant growth must be guarded against. With careful guidance, I can see the possible development over a period of time of a new law of the sea responsive to modern needs but built on the solid foundation of past experience.

IV.

Most of an international lawyer's time is devoted to office work,

consultation and negotiation. His opportunities for dramatic trial work or court appearances are rare. Only a small fraction of international legal problems end in formal litigation or arbitration, and international tribunals do not lend themselves to histrionics. Negotiation is the prevailing method for settlement of differences, and, if it fails, few remedies may be available unless the parties to the dispute can agree, or have previously agreed, on recourse to another method of settlement.

In the past the most common of these methods has been ad hoc arbitration; but even with a valid arbitration obligation in existence, there can be many obstacles to this solution along the way. This is particularly true in situations where a government is a party to the dispute. Unless expressly provided for, non-cooperation by one side can block the process, suitable arbitrators can be hard to find, procedures can be the subject of disagreement and compliance with the award may depend largely on the good faith of the parties.

I do not wish to depreciate the value or importance of the traditional arbitral process, for the majority of arbitral obligations have been fully honored by the parties concerned. But the imperfections suggest two observations. One is the necessity for good draftsmanship in advance: the mutual obligations in any agreement, including the obligations for dispute settlement, must be stated with clarity and fairness. While these should be characteristics of any legal instrument, they are particularly important in international agreements where judicial construction of the text may not be readily available. And it should be noted that the matter becomes more complicated if the text consists of versions in two or more languages. Differences arising from variations in a multilingual text can be a fertile source of misunderstanding, particularly when each party's interpretation may seem justifiable according to the version in its own language.

The second observation about the arbitral process relates to the desirability of improving arbitral machinery so as to eliminate some of the obstacles noted above. This can best be done by further institutionalization of the process wherever possible. In international commercial arbitration, where the procedures and machinery of such groups as the International Chamber of Commerce and the American Arbitration Association have long been available, this has become increasingly commonplace. Additional work is now going on in this field, and further progress can be anticipated. There has also been progress in the institutionalization of procedures for settling

disputes between governments and private parties of different nationalities, most notably in the creation of the World Bank's International Centre for the Settlement of Investment Disputes. ICSID provides an excellent forum for this purpose, but it is to be hoped that it will receive more use in the future than it has had so far.

V.

I have often been asked how one goes about entering the practice of law in the international field. There is no single easy answer, but a number of points can be suggested. The first is to decide what part of the field one is interested in—the public or private sectors referred to earlier. Public international law is usually thought to be the more glamorous, but it is also the one in which opportunities are more limited for a full-time self-employed practice. This economic reality is confirmed by the fact that the leading experts in the field tend to be either professors, legal officers in ministries of foreign affairs or lawyers in the service of public international organizations or agencies. Those genuinely interested in pursuing public international law as a career would, I think, be well advised to contemplate entering one of these categories.⁹ They should be warned, however, that much of the glamor disappears on close inspection: the work, though necessary, can often be tedious and unexciting. Yet time spent in the Department of State, for example, can be highly instructive and a useful enrichment of one's professional experience.

Private international law, taken for the moment to mean merely the practice of law across international boundaries on behalf of private parties, is a different story. There is a great deal of such practice, and people who are competent at it have generally been in demand. (Whether this demand will continue at past levels is, however, open to some doubt.) In this area the large law firms, with clients having world-wide interests, are important employers. The leaders are to be found principally in New York and Washington, but Chicago, San Francisco, Los Angeles, Houston and Dallas are also in the picture. The other major openings of this kind are in the law departments of multinational corporations. These often offer

9. The number of international law professorships in law schools, though larger than it used to be, is not great, and superior qualifications are usually required. Legal positions in international organizations are also relatively few, and are not always easy for Americans to secure because of the pressures on such organizations to achieve wide geographical distribution in their staffs.

extremely interesting and varied careers; but it should be noted that there is frequently a tendency among such corporations to seek personnel with prior experience in a law firm or government agency.

Certain qualifications are highly desirable in connection with any form of international practice. The first is that, in order to be a competent international lawyer, one should be a competent lawyer; it is no easier a field than any other. In the academic realm, political scientists have often won distinction in public international law, but this does not hold true for the practitioner. In order to deal with other lawyers in any country on an equal footing, one must be a member, and a capable member, of the profession.

Within the framework of a good legal education, it is obviously desirable to secure a sound academic grounding in public international law. For those leaning toward the private sector, an acquaintance, at least, with comparative law can also be valuable. Beyond or outside law school (for such matters are rarely dealt with in the American law school curriculum except possibly at a post-graduate level), still further study of special legal topics may be advantageous: the law of a particular country or region, or the law relating to a particular subject matter (international tax law, international economic law, international environmental law and so on). Some of these areas, geographical or functional, will be of increasing importance in international affairs in the next few years, and they will offer opportunities to those ready to take advantage of them. But in this connection I should mention one further skill which often makes a difference in choosing among persons otherwise equally qualified: a good knowledge of one or more foreign languages. This is particularly true if the work is to involve one country or one region in particular.

I do not mean in these random observations to be discouraging. I have found my own work in the international field both fascinating and rewarding, and I know others who have found theirs so. International law will always need good people—and, one hopes, more and more of them in the future. It is admittedly imperfect, and needs development. But that development must have the aid of first-rate minds: a mere benevolence toward mankind or a vague desire to see a better world is no substitute for the rigorous intellectual effort required. Despite some views to the contrary, international law is not law in a fairyland. So far as it goes, it is real law in a real world, and must be so regarded.