INTERNATIONAL LAW AT THE CROSSROADS

BY

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We live in a time of crisis. Every day the press, radio, and television bear fresh testimony to this fact. We live in an era of great changes, and we are heading towards even greater changes. The crisis, and the changes too, are largely of a global character; in almost every instance we find, at least, a global dimension.

The study of global conditions, of international relations, has therefore become vitally important. Lawyers, in particular, are facing enormous challenges. Every issue at the international level demands legal expertise: legal knowledge, experience, and understanding. But this expertise must be coupled with a true insight into the material, the economic and—not least—the psychological factors which provide the framework, and spell the limits, for the activities of humankind on this planet of ours.

International law, too, is in a state of crisis. But this is a crisis of a different kind, a crisis at the intellectual level. Three hundred and fifty years after Hugo Grotius wrote his great work, *De jure belli ac pacis,* we face the task of adapting this honourable branch of the science of law to the demands which a profoundly new world situation imposes upon us.

In 1945, the United Nations had about fifty member states. Today, there are three times as many. Most of them are new states, created in the course of the last twenty years. The states vary in population from several hundred million to less than one hundred thousand inhabitants. We have become conscious of the enourmous differences in the standard of living between the industrialized societies in our part of the world and the more primitive economies and the vast oceans of human beings in what is often referred to as the Third World.

The new states have been admitted not only to the United Nations but also to the so-called international community, the community of international law. Thereby both the world organization and international law have been subjected to strains which, of necessity, have caused, at least to some degree, a change in their character. Many time-honoured ideas have had to be scrapped. We have acquired a new perspective on many problems which often are of profound importance.

In many of the new states, there has been a tendency to question the old customary law as a basis for the resolution of conflicts between nations. How, it is asked, can the new states be bound by a custom which has been developed in the interaction between a limited number of states in a different part of the world and on the basis of conditions differing from those which exist today? Little by little we have been forced, even in our part of the world, to admit that not all customary law can claim to be of global validity. We must differentiate, and accept that many established rules must be given a new interpretation, and that in part they are of merely regional relevance.

On the other hand, it was once an uncontested maxim that resolutions adopted at international conferences or by international organizations were not legally binding. Neither the League of Nations, nor the United Nations, was conceived of as an organ for international legislation. And yet we see today how many international legal scholars have advocated that such resolutions—and even proposals which have not been formally adopted, but have been supported by a majority of delegations—are to be accepted as expressions of an international consensus, and for that reason must be recognized as guidelines for the intercourse between states.

The attitude which states adopt towards an issue under discussion at an international conference is being accorded a new importance. To some extent, the statements made by delegates are taken as signals and may add momentum to a quite revolutionary development, such as the one we experienced in 1976–77 with respect to the law of the sea. All important coastal states realized almost simultaneously that they could dare to take the step of unilaterally proclaiming economic zones up to two hundred nautical miles (370.4 km) wide. Attempts have been made to explain the legality of this step on the basis of the international law which existed up to 1975. But it is probably better to admit that what happened was a leap in the development, which has come to be accepted by operation of the mechanism of estoppel, because, as we know, a person who has taken the law into his own hands cannot protest against others doing the same thing.

The efforts towards a new economic world order have very clearly demonstrated the belief that substantial results can be achieved by way of resolutions in international fora. With great sincerity delegates from all nations have engaged in veritable battles over hairsplitting formulations in drafts for General Assembly resolutions.

In some areas formal agreeements have been concluded, for instance concerning tariff reductions, in order to improve the competitiveness of the poorer nations. A classic instance is the so-called Kennedy Round

regarding the exemption from duties on textiles from developing countries. The agreement is now openly circumvented in a number of industrialized countries, by means of internal discriminatory measures aimed at safeguarding employment in the industrialized countries themselves.

What had, however, a dramatic impact on the economic relations between the continents was the establishment of the oil cartel—the Organisation of Petroleum-Exporting Countries (OPEC)—and the subsequent quadrupling of energy prices. Other raw-material-exporting countries contemplate similar cartels, but so far they have not succeeded in creating a sellers' market.

What happened to the oil prices has, nevertheless, been sufficient to trigger off an economic crisis, which undoubtedly will lead to changed structures in the western as well as the global economy.

The fact that the demands for a new economic world order came at a time when we became aware in earnest of the limitations of the world's potential for economic growth and regeneration—the basic conditions for our very existence—makes the problems seem overwhelming.

At the same time we experience—and not only with respect to the law of the sea—what we may describe as a retreat to national egoism. We observe in far too many places a more or less articulated distrust of other nations as well as of international solutions, coupled with a belief that the nation state is the proper framework for the resolution of the more pressing problems. The word "sovereignty" is being used, not as a neutral term for a certain concept in international law, but as a justification for demands as well as a basis for conclusions which often have far-reaching consequences.

We are sometimes confronted with expressions of doubt as to whether the law of nations has any reality—whether there really exists anything that deserves the name of international law.

It is pointed out that international law is not effective; that when we come to the crucial questions, the individual states often do as they think fit. And people point in that connection to the balance of terror, but also to a number of other examples, from the Connally Amendment[1] to the Vietnam war, from the Security Council's incapacity to act to the powerlessness of the international community with respect to even flagrant violations of human rights.

It is quite true that there are important areas where the rule of international law is not efficacious—or is not efficacious enough.

[1] A clause by which a state excludes from its acceptance of the jurisdiction of the International Court of Justice disputes with regard to matters essentially within its domestic jurisdiction *as determined by the state itself*; named after the U.S. Senator Thomas Terry Connally.

But such lacunae are not peculiar to international law. Even in the municipal law of the national states there are important areas where much is left to the free interplay of forces. Let me mention labour law, where important questions are decided by struggle and negotiation between the big organizations of employers and employees. I may also mention the law of corporations, which in many countries has remained rudimentary, owing to the resistance of powerful organizations and pressure groups to any kind of legislative control.

Some will deny international law the quality of law, because there are no organs for compulsory conflict resolution and execution.

And it must be admitted that problems arise from the fact that a number of nations, large and small, have consistently refused to submit themselves to any form of international jurisdiction.

On the other hand, this has not prevented those nations from fulfilling, to a great extent, their international obligations. To be sure, the fulfilment has been on their own premises, as is exemplified by the incident immortalized by the great Finnish poet, Johan Ludvig Runeberg, in the poem "Sandels" in *The Tales of Ensign Stål.*[2] The Swedish General Sandels entertains a guest at a leisurely and convivial breakfast:

"Today, at *one*, the battle starts,
It will rage near Virta bridge. –
...
Tutschkoff has sent me a friendly note,
That our truce is to an end.
..."
A message came, an urgent one:
"Our convention has been breach'd:
Brusin's forepost back is thrown,
It's too late to tear the bridge.
Our watch was *twelve,* and we't stood upon,
But by the Russian clock it's *one.*"

[2] Author's translation from the original Swedish. For a different translation, see Johan Ludwig Runeberg, *The Tales of Ensign Stål (Fänrik Ståls Sägner)*, translated by Clement Burbank Shaw, New York (G. E. Stechert & Co.) 1925, p. 97. The problems raised by the poem are discussed by Professor Yrjö Holm, "Sandels: Ett problem i Runebergs-tolkningen", in Societas Scientiarum Fennica, *Årsbok – Vuosikirja,* XI B no. 1,. Helsinki 1933.

In *The Tales of Ensign Stål* Runeberg highlights in heroic poems events and persons in the Finnish war (between Russia and Sweden) 1808–09. The Swedish General Sandels had made a truce with the Russian General Tutchkoff. The truce was due to end at 1 p.m. However, Tutchkoff, going by Russian time, which was one hour earlier, ordered his troops to commence their attack at 12 noon Swedish time. Runeberg's poem relates the dramatic events that ensued.

If international law is to be a useful instrument for international progress in the years ahead, a realistic understanding of what international law is and what international law can achieve is necessary.

This presupposes a realistic understanding of the matter of law in general.

I do not consider myself a fully-fledged legal philosopher. But I have received strong impressions from the Uppsala School[3] and Scandinavian realism in general.

Metaphysical notions or explanations of the legal phenomena are not adequate; least of all in a world that stretches far beyond the frontiers of Christendom.

I do not believe in any "valid law" (*geltendes Recht*), if by "validity" (*Gültigkeit*) is meant something else and something more than the fact that people abide by certain rules, or can be expected to abide by them, should a certain situation arise. An expression such as "the obligatory power of the law" (*die verpflichtende Kraft des Rechts*) is to me empty words, if thereby it is intended to state anything beyond the fact that the individual considers himself compelled (on grounds which I shall discuss presently) to abide by certain rules.

I do not believe in any "basic norm" (*Grundnorm*), from which one may deduce a hierarchy of subordinate norms.

On the other hand, I cannot accept that the science of law can be reduced to the science of judicial behaviour. The reality is much more complex.

I think that in evey organized community there exists a legal system—a system of rules which are being upheld by organs of the state, and which the individual, for one reason or other, takes into account in many of the situations which he faces during his lifetime.

I think that legal phenomena may best be explained by the opposition: the One against the Many. We are all, each by himself, born into a society where a number of rules are practised and enforced.

The breach of certain of these rules is met with purely social sanctions: a higher or lower degree of disapproval by the offender's fellow citizens, or at least by certain individuals or groups of citizens. These rules are often referred to as moral rules; I think it is better to call them social norms, because I should like to reserve the word "morals" for certain ethical conceptions, which make a person feel obliged to commit or omit certain

[3] For an account of the Uppsala School, see Folke Schmidt, "The Uppsala School of legal thinking", 22 *Sc. St. L.*, pp. 151–75 (1978). I fully share Professor Schmidt's criticism. Another author who meant much to me in my formative years was Ingemar Hedenius, in particular his *Om rätt och moral*, Stockholm 1941.

acts, irrespective of other people's reaction or other personal consequences.

Certain other rules are administered by the organs of the state, and non-abidance may lead to sanctions by those organs. These are what we call legal rules.

It should be stressed that sanctions are relatively rare and affect only a comparatively small number of persons. Thus, the sanctions have mostly exemplary importance. The vast majority of people abide by the rules out of habit, out of a sense that "one ought to obey the law", or out of fear for the consequences. Here I may add that our cultural heritage and our upbringing play very important roles.

The legal system consists of a multitude of norms. Some of those norms are created spontaneously in the society and may after some time be recognized as customary law. Some rules are shaped by the practice of the authorities—perhaps in particular that of the courts. And some come into being by decisions of persons or collectives which are generally considered competent to make such descisions, such as the nation's parliament, goverment, and administrative authorities.

The relative importance of the different legal norms is not clear and unequivocal. We often speak of a hierarchy, in particular with respect to the written norms: constitution, statute, order in council, administrative decree. But such a hierarchy cannot be assumed automatically. Norms at all levels may be interpreted and applied in different ways, and some are considered so old-fashioned, unpractical, or inconvenient that they are either explained away somehow or quite simply ignored.

From what has been said, it will be realized that the legal system is in a process of continuous change. Each of us is born into the system. At some point in time we may come into positions which enable us to influence the rules, to a greater or lesser extent, by participation in the work of parliament or government, as judges or civil servants, by activities in different political parties, or simply by obeying or ignoring the various rules. But irrespective of the influence any one individual may possess, he or she remains subjected to the legal system as it is constituted at any particular time.

International law is—like the internal law of a country—a system of rules, which are considered to be legal rules. These rules are formulated and interpreted by lawyers.

What more than anything else sets international law apart from municipal legal systems is the fact that the number of actors is so much smaller. While each of us, as an individual, is but one among several million fellow

citizens, the state to which we belong has only a couple of hundred co-actors, if by that we mean the other states that make up the international community. Another difference is apparent in the fact that—in traditional international law, at least—there is not the division between the authorities and the public which we know from the internal life of the states.

The small number of actors gives each single actor—each separate state—a much greater opportunity than any citizen in the municipal society to influence the system. Moreover, as we have seen, the states differ enormously with regard to size. The big states have many more opportunities to satisfy their ambitions than the small states have. On the other hand, small states frequently have considerable freedom of action precisely because of their smallness and relative unimportance.

The states are not, however, the only actors in the international arena. International organizations, too, are today generally accepted as co-actors. And we cannot exclude others from taking part. There are today rules which affect—and are influenced by—multinational corporations, non-governmental organizations, and indeed private individuals. And if we consider the development of the rules, we shall have to admit that both arbitrators and legal writers play far from unimportant roles.

I shall not here take sides in the discussion of the question whether or not any of the categories just mentioned may be considered subjects of international law. The concept of "state", just as well as the concept of "subject of international law" (or "international person", which means the same), is of little, if any, value in modern international law. Instead of definitions of concepts, we need a description of actually existing relations. And like municipal law, international law is in constant development. What was true yesterday is not necessarily true today or tomorrow.

At the international level, too, legal rules may develop spontaneously—by the practice of the actors concerned. The development may be slow, but it may also be quick: the Truman doctrine on the continental shelf was proclaimed in 1945. Already at the Conference on the Law of the Sea in 1958, the right of the coastal states to lay claim to the continental shelf was considered to have become customary law! There are clear indications that the international doctrine will very soon recognize the economic zones of two hundred nautical miles.

Nor are decisions in international fora, which are followed up in the practice of states and international organizations, to be ignored by those who attempt to describe or analyse today's international law in some particular area.

The decisions of the International Court of Justice are read, discussed

and commented upon, and they undoubtedly influence the development of international law. Arbitral awards and legal writing are, of course, not to be neglected.

But just as legislation is of great importance within the national society, the written agreements between states or possibly other actors occupy a central position in international law. Such agreements span from administrative and executive agreements between administrations and governments, to formal, ceremonial treaties and conventions—bilateral as well as multilateral.

Pacta sunt servanda—agreements shall be fulfilled—is a basic maxim in traditional international law. And on the whole, agreements are respected. But, like constitutions and laws, treaties are subject to wear and tear. One often speaks of *clausula rebus sic stantibus,* but this is in fact only a concession to what we may consider a universal principle of attrition.

As I have said, the rules of international law are considered to be legal rules. The states and other actors interpret and abide by the rules, in much the same way as authorities and citizens do within the individual country. And like the citizens in the municipal society, the actors in the international arena have a tendency to be law-abiding, provided, with respect to both categories, I am tempted to add, that the abidance by the law does not cost too much compared with the risk connected with non-abidance of the rules.

It is always advantageous for a government to be able to show that is has international law on its side. Otherwise it risks protests from many quarters, both at home and abroad, and it may easily become necessary to provide explanations, often of a very embarrassing character. In extreme cases there may even be a question of retaliation or reprisals, or possibly sanctions under the United Nations Charter.

It is no accident that all ministries of foreign affairs have legal departments and advisers on international law, who are seriously concerned with the task of spelling out the rules of international law pertinent to the international problems with which the respective governments are faced at any particular time.

Sometimes it is authoritatively decided by the International Court of Justice or an arbitral tribunal what is right and what is wrong in a particular relation. And it is interesting to note that in the sensitive atmosphere in which states lead their lives, the fact that a state has lost its case may, indeed, be considered a fully adequate sanction in itself.

When I spoke about the municipal legal system, I placed more emphasis on the actual law-abidance than on the relatively rare instances when sanctions imposed by the authorities hurt lawbreakers. The sanctions of

international law are different from those of municipal law. But I firmly believe that the international legal system is sufficiently effective to justify our considering it a true system of law.

As lawyers, we operate within a triangle, whose three sides are Law, Power, and Morality.

That international law must make concessions to Power is obvious. We saw this in connection with the unilateral declaration of economic zones by the coastal states. It is clearly expressed in the principle of effectiveness, which is a cornerstone of international law. Should a new state be born somewhere, the international community will have acquired a new member. Should anyone seize power in an existing state, his government will be recognized under international law, no matter how repugnant his regime may appear to be.

In Allan Pettersson's mighty twelfth symphony, which was first performed at Uppsala University's 500th anniversary celebration on September 29, 1977, the following words by Pablo Neruda are sung: I do not want them to reach me their hand ... I do not want to see them as ambassadors."[4] Yet the world's governments do not ask whether the ambassadors they receive are not the henchmen of dictators with blood-stained hands. Neither historical nor democratic legitimacy is required for the recognition of a new government.

Perhaps it cannot be otherwise, if international law is to be relevant to the real world. An international community consisting of dethroned monarchs and ousted presidents would serve no useful purpose.

But how can we fit moral values into a system whose "validity" is based on its mere existence?

It is often said that human rights, as they have been expressed in the existing international conventions, are based on a modern law of nature. There is a grain of truth in this. But whereas the old law of nature claimed that it was able to resolve any kind of legal problems, this modern law of nature is more modest.

It is based on a few simple experiences: People are generally better off if those in positions of power have to respect the life, freedom, and physical integrity of individuals. Freedom of expression and freedom of assembly are preconditions for this. Also, there should be no discrimination without just cause. At least from the point of view of a democratic society, it is

[4] "No quiero que me den la mano ... No los quiero de Embajadores": Pablo Neruda, *Canto General* (Buenos Aires: Biblioteca Ayacucho, 1955), p. 178 (V. La Arena Traicionada: iii. Los muertos de la plaza: Los enemigos). The text used at the quincentennial celebration in Uppsala was from a Swedish version by Artur Lundkvist and Francisco J. Uriz.

a great advantage if as many states as possible have a government based on the active participation of those governed.

It is, so far as I understand the matter, not necessary to seek metaphysical explanations in order to justify such points of view: we want to live, and to live as free persons. And this we shall achieve best if as many others as possible can do the same. One may speak of "relativity morals" and "reciprocity morals". But I believe we can find an empirical basis for certain fundamental human rights.

However, it follows that the desire for universal respect for human rights must be fitted into a larger reality, where those considerations which form the basis for the principle of effectiveness also have their place. At a time when the great powers have arsenals of weapons which can wipe out every living being on the entire globe, preservation of peace must be a paramount consideration.

We do not need to hide our ideals. Indeed, it would be dangerous to do so. But if we want to spread them, we must proceed with caution, and we must not be afraid of detours.

For example, one could imagine a convention which would make it an international crime to become a despot, and which would make the deposed tyrant an outlaw on the earth. Embryos for such rules exist in the Genocide Convention of 1949 and the Refugee Convention of 1951. We may also mention the American Government's extradition of a former Venezuelan president to his home country, where he was wanted for serious economic crimes, which he had allegedly committed while he was president. So the idea of such a convention is not merely utopian. A Convention for the Prevention and Punishment of Tyranny would undoubtedly have far-reaching psychological and political consequences, if it were ratified by an important number of states. Whether this is feasible, only the future can tell.

In an imperfect world we shall have to live with imperfect rules which are applied in an imperfect manner. We must admit the shortcomings and limitations of the international legal system. But at least we shall then have a sound basis for achieving whatever is to be achieved.