

REMARK

THE STATE OF INTERNATIONAL LAW: SOME REFLECTIONS ON THE JUDGMENT OF THE INTERNATIONAL COURT OF JUSTICE IN THE *GENOCIDE* CASE AND ON THE CONTRIBUTIONS OF PROFESSOR LOUIS SOHN¹

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I thank the Editors of the Journal for this kind invitation to speak to you tonight.

When I received the invitation, having just read an article by Judge Buergenthal in the *American Journal of International Law*,² I had been reflecting on the recent passing of one of my mentors, Professor Louis Sohn, who was such an important force at this University in one of the last stages of his profound career. I thought it would be appropriate to use this occasion to say a few words about his contribution to the development of international law.

The invitation also coincided with the handing down of the most recent judgment of the International Court of Justice, in the *Genocide* case brought by Bosnia and Herzegovina against Serbia and Montenegro.³ I would like to share some of my thoughts on the impact of this decision on the state of international law. In fact, this decision may prove to be one of the court's most controversial, for reasons very similar to those pertaining to its *Nuclear Weapons Advisory Opinion*⁴ and its decision in the *Nicaragua*⁵ case. I will not, of course, be dealing extensively with what is an extremely complicated case.

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¹ Remarks at the Georgia Journal of International and Comparative Law Annual Spring Banquet (Mar. 26, 2007).

² Thomas Buergenthal, Note and Comment, *Louis B. Sohn (1914–2006)*, 100 AM. J. INT'L L. 623 (2006).

³ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), Judgment (Feb. 26, 2007).

⁴ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).

⁵ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. 14 (June 17).

For example, I will not be dealing with the jurisdictional issues, with a convoluted set of facts relating to the status of Serbia upon the dissolution of Yugoslavia as a successor State and its membership in the United Nations, and accordingly, whether it was at various periods of the proceedings a party to the Genocide Convention or had access to the court. The court's conclusions on these issues are very fact-specific, more so even than in the case of most jurisdictional questions, and will probably have no lasting consequences on the court's general jurisprudence. What I will be dealing with is the court's treatment of the nature of genocide, state responsibility and attributability of individual criminal acts, and the consequent relationship between the various existing international courts; in short, those elements of the case which impact on the theme of my thoughts on the state of international law in contemporary international society.

Indeed, for the field of international law, the past few years have been both the worst of times and the best of times. I come to this period with, shall we say, many many years of experience in the three facets of international law practice: as an advocate, as an academic, and a judge. I have to conclude that in all this time, the most recent years have been by far the most turbulent from the point of view of challenges and opportunities presented to the discipline of international law. I need only mention the Rwanda genocide, the situation in former Yugoslavia, which sets the framework for the case I just mentioned, globalization challenges to the world trade structure, pressures caused by pandemics and the electronic age to the international intellectual property regime, the invasions of Kuwait by Iraq and of Iraq by the United States and its allies, and international terrorism and the effect of responses to it on the international human rights system, as exemplified by the Guantanamo litigation in the United States.

Against this litany, how can I have said it was also "the best of times"? I will go into this in some detail later, but for the moment I can say in summary that for a variety of reasons, including the fact that the Cold War is no more, that there is a vitalized Security Council, and that an intelligent world public opinion has been engaged, there have been real and, at least in my case, unpredicted responses, which have influenced the development of international law and the public perception of its relevance to the solution of international disputes.

This brings me to say a few words in tribute to the late Louis Sohn.

To speak of Louis Sohn as a pioneer in our field is a gross understatement. I remember him telling me of his experience as a legal advisor both at the San Francisco Conference and in the preparatory work leading up to the

Conference. Of course, the negotiation of the United Nations Charter yielded the substantive basis for all of Louis Sohn's later work in the field of international law. Moreover, he was to follow throughout his life the process he identified in that negotiation—the close working together of colleagues of often opposite persuasions, but with a shared discipline, to reach a common goal. In one article, he described the silent revolution that began in San Francisco, which deprived the sovereign states of what he called “the lordly privilege of being the sole possessors of rights under international law,” as the equivalent of the French revolution ending the divine right of kings.⁶ Yet, Louis Sohn was not a rash revolutionary. He wrote of the new law as needing to be accepted by the world's nations, as reflecting the common opinion of mankind; law could not, he said, “be really instant law, but in the long run this method was better and safer.”⁷

Louis Sohn's talents were never more evident than in the forum in which I first came to know him, in the negotiations for the United Nations Convention on the Law of the Sea, beginning in 1973 and ending in 1982. If ever it can be said that there was a right place for the right man, this was it. I will not say single-handedly, but certainly instrumentally, he set up and led the consultations which resulted in the settlement of disputes regime agreed in the Convention, including the establishment of the International Tribunal for the Law of the Sea on which I served. I cannot elaborate fully here, but in order to understand his achievement, one must remember that in the 1970s the very principle of third-party dispute settlement was out of favour in virtually all corners of the world for varying reasons. In this climate, Professor Sohn, then member of the United States delegation at the Third United Nations Conference on the Law of the Sea, was able to assemble like-minded and, I would say, similarly idealistic colleagues from the most influential countries to counteract the prevailing distrust to fashion a comprehensive system of courts, arbitration, and conciliation, which came to be the model for later negotiations. I have argued elsewhere that this system and the trust it inspired is the genesis of the completely changed panorama today, with a plethora of courts and cases brought before them in an order of magnitude which could not even reasonably have been dreamt of in the 1970s.

In fact, perhaps the most significant feature of the *Genocide* case is that it was brought at all; that the applicant, at a time when the conflict was still on-

⁶ Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 1 (1982).

⁷ Louis B. Sohn, *The Shaping of International Law*, 8 GA. J. INT'L & COMP. L. 1, 25 (1978).

going, should have turned to the court as a viable alternative to address the issues of war and peace and the horrendous issues of crimes against humanity being perpetrated.

In fact, a persistent and, I say, paradoxical criticism of our discipline is that it is too political or that it is not political enough. As for the latter, I can share with you the despair I have experienced as a government legal advisor when my colleagues from other government departments sought to characterize an issue as "political," and thus outside the ambit of my authority to advise.

It is on those occasions that I found solace in the words of another of my mentors, Professor Louis Henkin, who attacked the dichotomy between law and politics: "law is politics," he wrote.⁸ I find that a refreshing approach. Too often one hears reference to seeking a "political" solution, as opposed to a "legal" solution. When one sees the nature of politics, as Professor Henkin does, as the way participants in a society, whether it be domestic or international society, order their affairs, then the dichotomy is a half-truth at best.

In the context of the *Genocide* case, we see a political situation *in extremis*, with entities involved in that most political of activities, the use of force by one state against another. Nonetheless, the court (and I hasten to add that there was dissent on this among the judges) felt that it had the ability to address the legal consequences of the political activity. It must be added here that the efforts by the court to prevent the atrocities, which were ongoing when it first took up the case, were unsuccessful, but this is because of the failure of the parties to abide by its preliminary decisions, not because the court thought itself incompetent to rule on these fundamental questions.

The other side of the political coin reacts to the presentation of the international system as one without that most rudimentary of political functions, that of lawmaking. But this, too, is an oversimplification.

All of my professional life, I have been involved in very active lawmaking under the auspices of the United Nations or the European legal systems. An entire international human rights regime has evolved during this period. Here again, the contribution of Louis Sohn has been acknowledged.⁹ Even in the more traditional fields there has been momentous activity. For example, in the law of the sea, a field I mentioned earlier, the activities on 70% of the earth's surface are now closely regulated by law, and I add the fields of treaty

⁸ LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 4 (1995).

⁹ See, e.g., Jo M. Pasqualucci, *Louis Sohn: Grandfather of International Human Rights Law in the United States*, 20 *HUM. RTS. Q.* 924 (1998).

relations, diplomatic relations, outer space, watercourses, and then, most significantly for most nations, the standards of the prohibition against the use of force against which all modern inter-state activities are judged.

In most recent years, in reaction to the events of Yugoslavia and Rwanda, there has been an acceleration of lawmaking in the international criminal law field, culminating in the establishment of the International Criminal Court. I will come in a few minutes to the question of the criminal courts per se. But as for the corpus of the law, one by one the principles, many of which have been debated for decades, have been ironed out. Turning again to the *Genocide* case, the court has finally put to rest the dispute about whether a state was capable of committing an international crime (through its agents or organs). While I was a member of the United Nations International Law Commission, this was the subject of relentless debate and I am glad that the court has definitively addressed the issue.¹⁰ (To be fair, I would add here that some judges dissented and others sought to re-characterize the issue.)

Let me remark in closing on another contribution of the court in the *Genocide* case to the enhanced status of international law. It is axiomatic that the parallel international society does not lend itself to the enforcement regime found in perfectly-operating domestic societies. To be too dogmatic on this would, however, be to ignore the fact I referred to earlier, that after the end of the Cold War, there is a real possibility of enforcement actions by the Security Council, imperfect though they may be. Equally importantly, I would mention the real enforcement options introduced with the establishment of new international courts, including in the WTO context, the law of the sea and international criminal law, and the restructuring of the older human rights courts. This proliferation brought with it problems of decentralization and lack of certainty, but without going into detail, I think the results have justified the risks. The International Court of Justice, in the *Genocide* case, has now outlined a modus operandi which will serve, I believe, to enhance the opportunities presented by this situation. While at the same time admitting its limitations with regard to operating as a criminal court, the court did not feel itself debarred from acting on the basis of the facts available to it, including through a reference to the jurisprudence of the international criminal courts.

¹⁰ In the context of the International Law Commission's work on State Responsibility, it was able in its final articles to avoid the issue, but the court, in its wisdom, found it needed to address the issue head-on. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.)*, Judgment, paras. 166, 179 (Feb. 26, 2007).

In the words of Judge Tomka: "The activity of the Court has thus complemented the judicial activity of the [Yugoslav Criminal Court] Hopefully, the activities of these two judicial institutions . . . contribute in their respective fields to their common objective—the achievement of international justice" ¹¹

Let me now conclude with a citation from another University of Georgia titan, former United States Secretary of State Dean Rusk, who said of Louis Sohn:

[O]ne of his greatest contributions has been his courage in looking into the future—to look at what international law ought to become. This has led some commentators to put him down as something of a dreamer, but there is no doubt in my mind that the law is steadily moving in the directions he has outlined. ¹²

Today, with the tendencies that I have described, including, on the basis of a charitable reading, the most recent decision of the International Court of Justice, Louis Sohn's dreams are coming ever closer to being realized.

¹¹ *Id.* para. 73 (separate opinion of Judge Tomka).

¹² Dean Rusk, *Introduction*, 24 INT'L LAW. 619, 619 (1990).