The Contribution of the United Nations to the Development of International Law

by

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A Few Words of Welcome

Distinguished guests, dear colleagues, chers amis:

Let me start by saying thank you to Lise Bosman for her kind words, as well as to the members of the Organizing Committee for their invitation to speak before you at this Young ICCA-PCA Lunch Seminar.

My remit today is to discuss with you the accomplishments of the United Nations as an agent of progress in the field of international law.

The United Nations and the Law: Scope of the UN’s Mandate

The starting point, when considering the UN’s mandate in the international legal field, is the UN Charter itself. In particular, Article 13 of the Charter which states that “[t]he General Assembly shall initiate studies and make recommendations for the purpose of […] encouraging the progressive development of international law and its codification”.

This task is a broad one, to say the least. In considering the true scope of this mandate, I was reminded of a paper entitled “The International Rule of Law” written in the early nineties by a dear friend and colleague, the late Sir Arthur Watts. He observed that “[t]he transition from the establishment of international order by the hegemonic power of one, or a few States, to the full establishment of the international rule of law is a still-continuing process”.1 And so it is for the UN’s involvement in the process of “encouraging the progressive development of international law and its codification”.

In fact, the scope and nature of the UN’s legal mandate have not remained static over the years. For instance, as part of the UN Decade of International Law (I was there) (1990-1999), its mandate was extended to encompass the promotion of the acceptance of international law, greater use of the International Court of Justice, and the encouragement of the teaching, study, and dissemination of international law.2

I remind you that the International Court of Justice, unlike the Permanent Court of International Justice, is an integral part of the United Nations and one of its principal organs. The Charter establishes the Court as “the principal judicial organ of the United Nations”3. Its Statute is appended to the Charter and all member States of the United Nations are ipso facto parties to the Statute4.

One essential feature of the UN’s legal mandate remains, however, unchanged, namely the promotion of peace. From the very outset, as part of the historic UN Conference on International Organization in San Francisco in 1945, which gave birth to the UN Charter, it was understood that “[t]he very nature of the United Nations is to establish an organization to maintain peace and security, based on law.”5 Hence, the role of the law as envisaged by the UN Charter was inextricably linked to the maintenance of peace and security from its inception.

The ICJ’s mandate as envisaged in 1945 was to allow for peaceful resolution of international disputes: it can thus be seen as one of the UN’s instruments for maintaining international peace. Although the ICJ has not contributed directly to international peace, it has done so indirectly by contributing to the

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3 See article 92 of the UN Charter.
4 See article 92 of the UN Charter.
development and clarification of the sources, rules and principles of international law in many decisions and advisory opinions.

We must recognize that circumstances have dramatically changed since the UN’s creation -- UN membership alone has gone from 51 founding member States to nearly four times that number today -- and with these changes the very definition of peace has become enlarged. To quote a recent commentary on the UN system: “Peace is no longer simply the absence of war, but includes the entrenchment of a positive peace, promoting justice, human rights, democracy and economic and social well-being. In other words peace in this wider sense can be argued to be an overarching value including all others.”

In these brief remarks, I will elaborate on some examples which illustrate, in my view, how the United Nations, through its principal organs and its specialized agencies, has become a true agent of progress in the international legal field. It bears emphasis that the UN has had a remarkable influence in fostering respect for a wide range of internationally-accepted values and, from a stricter legal perspective, encouraging the development of rules that preserve and protect those values. This is particularly true in matters of a technical nature, where consensus has been relatively easier to achieve.

The United Nations’ role in the development of international law has been of a magnitude that could not have been predicted, or even hoped, in 1945. Commenting on the UN legal order, one author has put it as follows:

“We can be quite sure that when the UN Charter was adopted, its framers did not envisage that a vast and multifarious *corpus juris* would emerge from the new institutions. However, in today’s perspective, it is not surprising that international legal regimes have proliferated in response to new needs and pressures. We are acutely aware of the impact of change through new technology, the population explosion, globalization of production and trade, the emergence of new actors, the claims of formerly submerged peoples – the list can go on. Matters once solely of local concern now have impact across national borders. Conflicts between states, or even within them, engage outside parties. Mass poverty, environmental dangers, shared natural resources are perceived widely as matters of global concern. Each of these problems and many others are perceived to require norms and procedures for resolving conflicts and for collective action to render them effective. The availability of international institutions and the permanent conference machinery makes it virtually certain that law (hard or soft) will be created, adapted, and applied to many of these problems.”

It should come as no surprise that the UN’s involvement in lawmaking has involved not only legal organs, but political ones as well. My friend Rosalyn Higgins, former President of the ICJ, has written that even “the political bodies of international organizations are a relevant forum in which to search for acknowledged sources of law, namely treaties and customs; and further, that the United Nations provides a comparatively sharply focused forum for state practice by United Nations Members; and that United Nations organs, in their day-to-day work, necessarily contribute to the clarification and creation of law”.

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I accept, naturally, that politics and diplomacy are softer agents in the development of international law. Which is why I prefer to leave you today with an overview of the UN’s “hard law” achievements.

The United Nations and the Law: An Overview of the UN’s Achievements

Treaties remain unquestionably the most prevalent source of international law in the UN system. Hundreds of treaties, on matters ranging from the highly technical to those affecting the lives of ordinary people every day, have been initiated, negotiated and adopted by UN organs or by international conferences under the aegis of a UN body. As you know, treaty-making is not, however, the only method of lawmaking at the UN.

Many of these bodies and organs possess recommendatory power within their respective spheres of operation. This power enables UN institutions to pass resolutions and make declarations as to principles and rules of international law. Although not binding in the strict sense of a treaty obligation, these declarations create presumptions in favour of or against the legality of particular conduct. In certain cases, declarations may even crystallize into binding legal norms. The prohibition of genocide is a case in point.

Regardless of the strict binding quality of such declarations, recourse by many UN institutions to this power reflects, in the words of Professor Schachter, a “perceived need for more law in many fields.” This perceived need for “more law” is understandable in view of the exponential growth the UN system has experienced over the past sixty-seven years. The participation of close to 200 States -- new and old, large and small, with diverse cultural, ethnic and religious traditions -- in the mandate for peace and security has led to the UN’s normative involvement in virtually every facet of human life. Naturally, the days of lawmaking by a small cadre of States have also given way to a more inclusive process, described by one commentator as the “apparent ‘democratisation’ of law-making.”

Before we begin our journey over the vast terrain in which the UN, through its various institutions and agencies, is involved in progressively developing “more law” and normative guidance, I would be remiss if I did not at least acknowledge my colleague and friend Kofi Annan’s observation upon his ascension to the role of Secretary General of the UN in 1997: Kofi Annan referred then very realistically to the “sizeable gap between aspiration and accomplishment” of the UN’s objectives. Judge Christopher Greenwood more recently, stated on the same theme that “some of the most dangerous disputes of modern times continue to inflame passions without any realistic possibility of recourse to the Court”. He concludes that “[t]he [compulsory] jurisdiction of the Court is still not as widely accepted as one would wish.”

However, my mission today is not to focus on the UN’s or the ICJ’s shortcomings or growing pains. It is, rather, to illuminate those areas in which the UN system has transformed aspiration to

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12 Ibid. at p. 4.


14 Judge Christopher Greenwood, “The Role of the International Court of Justice in the Global Community”, Lecture given at the California International Law Center, University of California, Davis, on March1, 2011.
accomplishment to the benefit of the international community despite the challenges facing it. The UN’s success as an agent of progress in international law reaches far beyond the field of international arbitration, as important as that particular field may be to many of us gathered here today.

I begin, therefore, with the **heavens and celestial bodies** above. The UN Committee on the Peaceful Uses of Outer Space can be credited with the negotiation and adoption of five treaties and a multitude of resolutions articulating the principles governing the exploration and use of outer space. These instruments are designed to regulate activities in outer space to ensure that space exploration and the use of outer space benefits and is in the interest of all humankind.\(^\text{15}\)

The UN plays a significant role in regulating the “nearer heavens” as well, through its involvement in telecommunications and civil aviation, among other fields. The International Telecommunications Union, for example, provides a global forum to coordinate the growth and sustained development of telecommunications. Perhaps more importantly, however, the ITU has been instrumental in facilitating universal access to telecommunications to ensure that people everywhere can participate in, and benefit from, the emerging information society and global economy.

The regulation of civil aviation is of critical importance in an era of greater environmental awareness and global terrorism. The International Civil Aviation Organization, constituted under the *Convention on International Civil Aviation*, is charged with the safe and orderly development of civil aviation. ICAO has, since 1944, provided a global forum where requirements and procedures in need of standardization may be introduced, studied and resolved. Through this process, ICAO has progressively strengthened the laws governing international civil aviation which assure the safety, security and efficiency of global aviation, while encouraging the adoption of measures to minimize the environmental impacts of this vital sector.

The ICJ has dealt with some aspects of air law in some of the cases submitted to it\(^\text{16}\). For example in the *Nicaragua* case\(^\text{17}\), Nicaragua argued that the US, in breach of its obligations under general and customary international law, had violated Nicaraguan sovereignty with armed attacks against it by air and by trespass into its airspace. Thus, while this case is essentially related to a dispute pertaining to the alleged use of force by the US against Nicaragua and the right to self-defence, some aspects of the case relate to air law. The Court determined that reconnaissance activities by high-altitude aircrafts were unlawful under international law. It can be said that the International Court of Justice has thus contributed to air law.\(^\text{18}\)

Moving to **terra firma**, the UN’s involvement in human rights, nuclear non-proliferation, health, and cultural heritage and education, to name but a few areas, is unparalleled. In each of these areas, UN bodies, agencies and related entities have taken up the challenge of negotiating and adopting treaties and other normative frameworks which have served to raise the standard of living, security, and dignity of all peoples.

The most striking example of the UN’s normative influence in the area of human rights is embodied in the *Universal Declaration of Human Rights*. The principles articulated in this instrument, though not binding *per se*, are now recognized by all States to reflect the basic rights and freedoms to which every person is entitled. Over 90 States have incorporated these principles into their domestic

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\(^{16}\) The *Ariel Incident*, 1955 (Israel v. Bulgaria), the *Appeal Relating to the Jurisdiction of the ICAO Council*, 1972 (India v Pakistan), *Military and Paramilitary Activities in and against Nicaragua*, 1986 (Nicaragua v USA (Merits)), the *Aerial Incident*, 1988 (Iran v USA); and the two cases over the Lockerbie Incident, 1992 (Libya v UK; and Libya v. USA).

\(^{17}\) *Military and Paramilitary Activities in and against Nicaragua*, 1986 (Nicaragua v USA (Merits))

constitutional framework, demonstrating the capability of international law to transcend sovereign, ethnic, cultural and other boundaries to touch the lives of individuals around the world.\textsuperscript{19}

The ICJ, in the Second Phase of the Barcelona Traction Case (Belgium v. Spain), raised those fundamental human rights to the level of \textit{erga omnes} rights. It said:

"33. … an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations \textit{erga omnes}.

34. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law . . . others are conferred by international instruments of a universal or quasi-universal character."

With respect to nuclear non-proliferation, the “atoms for peace” program launched the International Atomic Energy Agency at the dawn of the Cold War. Since that time, the IAEA has helped to safeguard world security through the conduct of inspections and the engagement of States in policy and scientific dialogue on nuclear energy. The agency was responsible for adoption of the \textit{Treaty on the Non-Proliferation of Nuclear Weapons}, which sought to freeze the number of nuclear states to the five already in possession of nuclear weapons by 1968. Notwithstanding its early efforts, the scourge of nuclear weapons proliferation has persisted to this day. The IAEA has persisted in its efforts to stem weapons proliferation, leading in the 1990s to the negotiation of the \textit{Comprehensive Test Ban Treaty}, which seeks to ban all nuclear weapons tests. I was at the UN at the time and participated in that debate. More recently, it has been charged with yet another urgent mandate – the development of countermeasures against the threat of nuclear terrorism. The IAEA, like Atlas, shoulders one of the heaviest burdens of our times. Its successes must be measured not simply in an end goal, but in the very process of seeking and securing cooperation among States concerning the peaceful uses of the atom.

With respect to health, the World Health Organization has provided global leadership on some of the most pressing health issues of our time, setting global health standards and norms and stimulating the generation and dissemination of valuable knowledge and research.

In 1996 the WHO asked the ICJ for an Advisory Opinion on the legality of the use by a State of nuclear weapons in an armed conflict. The Court found, by eleven votes to three, that it did not have jurisdiction to give the advisory opinion.

The majority considered that there were three conditions which must be satisfied in order to found the jurisdiction of the Court when a request for an advisory opinion is submitted to it by a specialized agency: the agency requesting the opinion must be authorized under the Charter to request opinions from the Court; the opinion requested must be with respect to a legal question; and this question must be one arising within the scope of the activities of the requesting agency. While the first two conditions had been met in this case, the majority opined with regard to the third, however, that although, according to its Constitution, the World Health Organization is authorized to deal with the effects on health of the use of nuclear weapons, or of any other hazardous activity, and to take preventive measures aimed at protecting the health of populations in the event of such weapons being used or such activities engaged in, the question put to the Court related not to the \textit{effects} of the use of nuclear weapons on health, but to the \textit{legality} of the use of such weapons in view of their health and environmental effects.

The Court was of the view that international organizations do not, unlike States, possess a general competence, but are governed by the "principle of specialty", that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose

promotion those States entrust to them. The majority therefore concluded that the responsibilities of the WHO, a specialized agency, are necessarily restricted to the sphere of public "health" and cannot encroach on the responsibilities of other parts of the United Nations system. The request for an advisory opinion submitted by the WHO the majority concluded thus did not relate to a question which arises "within the scope of [the] activities" of that Organization.

I now turn to the United Nations Educational, Scientific and Cultural Organization, one of the oldest Specialized Agencies of the UN. UNESCO has several impressive milestones to credit. From the adoption of the Universal Copyright Convention in 1952 to the Convention concerning the Protection of the World Cultural and Natural Heritage in 1972, and the Universal Declaration on the Human Genome and Human Rights in 1997, UNESCO has consistently contributed to the preservation of the world’s cultural heritage and tolerance among peoples through these and many other instruments.

Beyond the earth and sky, we also find the UN on the high seas and in the depths of the ocean. The scope of legal regulation in this area is, as you all are well aware, as vast as the ocean itself. The UN has contributed significantly to the development of the rules governing international activities both above and below the high seas. Shipping and navigation, marine liability and pollution are closely regulated under the auspices of the International Maritime Organization and an array of conventions governing virtually all matters marine related, including the 1954 International Convention for the Prevention of Pollution of the Sea by Oil, the 1972 Convention on the International Regulations for Preventing Collisions at Sea, and the 1973 International Convention for the Prevention of Pollution from Ships. A discussion of the UN’s involvement in the law of the sea, of course, would not be complete without mention at least of the Law of the Sea Convention, which, among other things, governs activities carried out at sea and on the sea bed, and binds States to the peaceful resolution of conflicts arising in respect of these activities.

The ICJ has contributed to the development of the law of the sea with no less than ten decisions in this area20. These have played a crucial role in the process of codification and progressive development of certain fundamental rules and principles of the law of the sea, which are today embodied in the Law of the Sea Convention. For example, the Court’s equitable solution approach to the delimitation of maritime zones between opposite or adjacent States in the North Sea Continental Shelf case now finds its consecration at Articles 74 (for the exclusive economic zone) and 83 (for the continental shelf) of the Convention which both state that the delimitation “shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution”21.

As I conclude my brief tour of this vast terrain in which the UN and its various constituent organs and agencies, particularly the ICJ, have been involved in the development of international law to govern State conduct, and through them shaping the lives of individuals around the world, I have but touched the tip of the iceberg. The scope of the UN’s involvement in regulating State conduct through the negotiation and adoption of legal rules and behaviour-shaping norms runs the expanse of human imagination and endeavour.

20 North Sea Continental Shelf (Denmark/F.R.G.; Netherlands/F.R.G.), 1960 ICJ REP. 3; Continental Shelf (Tunis./Libyan Arab Jamahiriya) 1982 ICJ REP. 18; Delimitation of the Maritime Boundary in Gulf of Maine Area (Can./U.S.), 1984 ICJ REP. 246 (Oct. 12); Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 ICJ REP. 13; Land, Island and Maritime Frontier Dispute (El Sal./Hond., Nicar. intervening), 1992 ICJ REP. 351 (Sept. 11); Maritime Delimitation in the Area between Jan Mayen and Greenland (Den. v. Nor.), 1993 ICJ REP. 38; Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), 2001 ICJ REP. 40 (Mar. 16); Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nig.; Eq. Guinea intervening), 2002 ICJ REP. 303 (Oct. 10); Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), 2007 ICJ REP. 659 (Oct. 8) and Maritime Delimitation in the Black Sea (Rom. v. Ukr.), 2009 ICJ REP. 61 (Feb. 3).

Concluding Remarks

I leave you with a quote from Constantin Stavrapoulos, former Legal Counsel to the UN, who once said following an address on the legal issues facing the UN in the early seventies:

“I do not wish to present an over-optimistic picture of international law, marching triumphantly in majestic array to victory over discord and disorder in all fields, and I do not wish to minimize the problem, on which I have scarcely touched, of ensuring respect for the rules of law after their existence has been recognized.

I do wish, however, to show how the States of the world, sometimes hesitantly and sometimes confidently, sometimes generously and sometimes with too narrow a view of their own interests, are nevertheless seeking to use the machinery of the United Nations to promote co-operation by legal means. The sum of the effort being exerted is enormous, and that fact alone is encouraging. […]”

And so it remains today.

Thank you for your kind attention. I will now open the floor for some questions.

Good afternoon to you all. Merci.

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