



UNITED NATIONS OFFICE OF LEGAL AFFAIRS

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Keynote Address

by

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Introduction

The international legal order is decentralised and no single central organ exercises functions akin to legislatures in national legal orders. States create international legal rules either implicitly, through their practice and *opinio juris*, the combination of which constitutes rules of customary international law, or explicitly, through the adoption of bilateral or multilateral treaties setting out legal rules and obligations for the States adhering to them. This creates a complex system in which the contribution of international subjects that are not States, such as international organizations, is not always clear.

International organizations are creatures of their mandates, brought into being by States to perform certain tasks. In the case of the United Nations, this mandate is exceptionally broad, encompassing almost all aspects of international life.

Generally speaking, the UN consists of three mutually-reinforcing pillars: (i) peace and security (ii) development and (iii) human rights. As established by the International Court of Justice in the *Reparations* advisory opinion, the Organization also enjoys an independent legal personality “in certain respects in detachment from its Members” that is indispensable to its activities. It is equipped with organs and special tasks.

Accordingly, while States are the legislators of the international legal system, over the seventy years of its existence, the UN has provided not only a forum for collective action, but also a defined legal framework and an independent agency to contribute to the development and consolidation of legal norms.

My comments will briefly trace the contribution of the UN to the development of international law in a few important ways. In particular, I will focus on (i) the role of the Organization as a venue for collective action, including multilateral treaty negotiation, (ii) the law-making that occurs through the organs and institutions of the Organization, such as the work of the International Law Commission, the adoption of resolutions and decisions by the Organization's political organs and the jurisprudence of the International Court of Justice and (iii) the contribution of the legal opinions of the Office of Legal Affairs to the development of international legal rules and customary norms.

Venue for collective action

The broad mandate and near universal membership of the UN makes it a unique venue for collective action. No other international organization can match the breadth or depth of opportunities presented by the UN for States to give voice to their positions.

The UN also enjoys a presumptive legitimacy that complements its structural elements. It is premised on the principle of sovereign equality, giving each Member an important stake in the Organization's activities

The substantive output of this collective action can take many shapes. In the context of contributions to the development of international law, a primary, although not exclusive, form is a multilateral treaty.

The number of multilateral treaties adopted under the auspices of the UN has grown exponentially. In 1977, around 80 multilateral treaties were deposited with the Secretary-General. Less than forty years later, this figure has risen to more than 560.

A further identifiable trend in modern treaty-making is the tendency towards the establishment of institutional mechanisms in relation to multilateral treaties, with Conferences of State Parties, Secretariats and other bodies now delegated core responsibilities in the negotiation, conclusion and implementation of treaties.

Law-making through the organs and institutions of the Organization

The Organization has also been involved in law-making through its various organs and subsidiary bodies, which has had a substantial impact on numerous areas of international law.

Article 13(1)(a) of the Charter calls on the General Assembly to initiate studies and make recommendations for the purpose of “encouraging the progressive development of international law and its codification”. In implementing Article 13(1)(a), the Assembly has essentially established a “conveyer belt” of international law-making. The manufacturing process begins with the International Law Commission, where issues are considered and instruments are drafted, and traverses back through the General Assembly, in particular its Sixth Committee (Legal), where instruments are further considered and developed by Member States before being adopted and opened for accession. Outside of that process, the General Assembly and the Security Council have also been influential on their own accord in developing international law through their deliberative functions. Finally, the International Court of Justice, while not entrusted with any legislative role, also contributes to the development of international law through its decisions in contentious cases and its advisory opinions.

In discharging Article 13(1)(a) of the Charter, the key consideration underlying the dual concepts of “progressive development” and “codification” of international law is the belief that written international law will remove the uncertainties of customary international law by filling existing gaps in the law, as well as by giving precision to abstract general principles whose practical application is not settled.

The practice of the International Law Commission over the last sixty-seven years has demonstrated that maintaining a strict distinction between the codification of settled law (*lex lata*) and the progressive development of international law (*de lege ferenda*) has not always been possible, since the mode in which it was operating when considering any particular topic of international law was largely a matter of opinion. Instead, the Commission has come to view the two modes as a single, composite, concept, where international law-making takes place on a continuum between codifying largely settled rules to progressively developing other aspects.

In the exercise of their deliberative functions, the General Assembly and the Security Council have also been active in the development of international law.

The Assembly's broad mandate has meant that it has considered a wide range of activities and topics. While much of this work has, necessarily, been undertaken at the political level, such activities have been accompanied by, or have led to, the further development of international rules.

Its contribution to the development of international law in this context has been more indirect, either by way of providing general policy guidance to the law-making process, or more procedural through the formal establishment of processes or subsidiary bodies with a mandate to consider the legal aspects of specific issues

Of all the areas the Assembly has been involved in over the course of the last seventy years, its activities in the area of human rights have been particularly normative. The Assembly has adopted a number of declarations and other texts, many of which served as a basis for the subsequent negotiation of major multilateral treaties.

The key text is the Universal Declaration of Human Rights, adopted by the General Assembly on 10 December 1948, which served as the basis for the subsequent negotiation of the two Covenants (and inspired several other human rights treaties). The Assembly has also referred, in other major proclamations such as the Millennium Declaration of 2000, to the need, more generally, to respect internationally recognized human rights and fundamental freedoms. This is necessarily only a representative sample.

While the Security Council has a narrower mandate than the General Assembly, it has the power to take binding decisions on substantive matters.

According to Article 39 of the Charter, the Security Council has the authority to first determine the existence of a threat to the peace, a breach of the peace, or an act of aggression, and then "make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security". In practice, such measures have ranged from targeted sanctions against terrorists, to the establishment of peacekeeping operations and the creation of international criminal tribunals. Importantly, enforcement measures adopted by the Council under Chapter VII of the Charter are not constrained by the general prohibition on intervention in matters essentially within the domestic jurisdiction of States contained in Article 2(7) of the Charter.

In the exercise of its functions under the Charter, the Security Council has the power to take binding decisions in specific situations, and it has used its discretion to hold wrongdoing States and non-State actors alike responsible under international law. It has regularly found violations of international law and taken sanctions against the wrongdoer(s), including States and non-State actors, thus contributing to filling the enforcement gap that characterizes the decentralized international legal system.

Some of the first cases concerned Southern Rhodesia in 1966, in relation to the right to self-determination of the majority population; and South Africa, in 1977, in connection with its apartheid policies. In subsequent years, the Security Council strongly condemned “violations of international humanitarian law” in crises such as those in Somalia, Rwanda, and Sudan, which all involved internal conflicts. It also characterized the massacre in Rwanda as constituting genocide. Moreover, the Security Council attributed some such violations of international law to non-State actors, such as UNITA in Angola, the Bosnian Serbs, the Taliban or Al-Qaida, and the Janjaweed in Sudan. Since the early 1990s the Security Council has continuously addressed terrorism issues by means of sanctions.

Another major way by which the Security Council contributes to international law is the authorization of peace operations.

While traditional peacekeeping is said to have its legal basis in Chapter VI of the Charter, the Security Council more recently has developed a practice of invoking Chapter VII of the Charter when authorizing more complex peace operations in volatile environments.

The significant role of the International Court of Justice in the development of international law is commonly accepted. It is the principal organ of the UN entrusted with a judicial function, that is the function of resolving legal disputes, but in the process of this the Court’s ancillary function is undoubtedly to some extent the development of international law.

The almost uninterrupted existence of an International Court for nearly a century has resulted in the development of a significant body of international jurisprudence, which the Court seeks to keep consistent, but also sensitive to the development of international law.

The Court is also the only international law judicial institution with comprehensive jurisdiction under international law: its power to decide disputes extends to all disputes “concerning … any question of international law”. The Court is, as such, uniquely placed among international courts and tribunals to contribute to the development of international law, and has done so in many crucial areas of international law.

Development of international law through the legal opinions of the Office of Legal Affairs

The contribution of the Office’s legal opinions to the development of international law, broadly defined, should be viewed in the context of the Organization’s operations as a whole, as well as its unique composition and the authority and responsibilities accorded to it by its Member States under the Charter of the UN, some of which are *sui generis*. The range of questions on which the Office is asked to provide legal advice is exceptionally broad, extending across the spectrum of international relations and reflecting the unique position of the UN in the larger international system.

The effectiveness of the Office’s opinions relies less on formal authority, which tribunals and other judicial organs may enjoy, than on their intrinsic merits, legal soundness and persuasive force. Legal advice represents a critical element for ensuring that the UN, and each of its constituent entities, holds to its constitutional foundations and operates according to the rule of law.

The legal considerations associated with UN peacekeeping operations illustrate this point. Legal advice is provided at each step of the peacekeeping process, beginning with the establishment of the respective mission by the Security Council, the building-up of the mission’s components through the receipt of contributions of personnel and equipment by Member States and the conclusion of the status-of-forces agreement with the host country.

The sanctions regimes established by the Security Council represent another area where advice from the Office of Legal Affairs has contributed markedly.

Another specialized area where the Office has prominently affected the development of international law relates to the privileges and immunities enjoyed by

international organizations. . Given the breadth of its operations, it is probably the world's most prolific actor in this regard.

To a certain extent, the Office acts for the Organization in its external relations and so is a direct participant in the process of shaping international law. This includes negotiating international agreements, formulating and making protests and presenting claims.

The Office's main activity, however, is the provision of internal advice. When the Office provides its opinion, it is then for its addressees to act (or not) upon that advice. In doing so, it is they, and not the Office, that establish the practice of the Organization. This practice contributes to the development of the Organization's rules. It also shapes the interpretation or application of the treaties to which the Organization is party or under which it has rights and obligations and contributes to or influences the development of rules of customary international law. The contribution of the Office's opinions to the development of international law is therefore largely indirect. It is nonetheless real.