



**UNITED NATIONS
OFFICE OF LEGAL AFFAIRS**

**American University
Washington College of Law - Tenley Campus**

“UN70 – The Legal Dimension”

Keynote address

by

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President Kerwin,
Dean Grossman,
Chairman of the Board of Trustees Cassell,
Judge Buergenthal,
Distinguished Members of the Board of Trustees,
Distinguished Members of the Faculty,
Students,
Ladies and Gentlemen,

I bring you warm greetings from the Secretary-General of the United Nations, H.E. Mr. Ban Ki-moon, who asked me to represent him and the United Nations here tonight.

Introduction

I want to thank you sincerely for inviting me to this festive occasion, and please allow me congratulate you and the Washington College of Law on the inauguration of its new Tenley Campus. I am sure many great legal minds will be traversing through its corridors in the future, and for that we can all be grateful.

Tonight, I am going to say a few words about the legal dimensions of the United Nations. As you are aware, the United Nations recently turned 70-years-old,

and this milestone offers an opportunity to reflect on where we've been, where we are and where we might be going.

Law and the United Nations are inextricably linked. The Organization is founded on a legal instrument, the Charter, and all of its activities are based on the legal authority that that instrument provides. Day-in, day-out, all over the world, in peacekeeping missions, humanitarian activities, on human rights and development—you name it—legal considerations are an integral part of the Organization's operational calculus.

Like any constitutional system, including the United States political order, for instance, the broad outlines of the founding instrument are sharpened through their application to specific cases. The Charter, like the United States Constitution, and the practice thereunder, is perpetually-evolving.

The United Nations also operates in a unique legal world. International law 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 the United Nations, is not always clear.

The mandate of the United Nations is also exceptionally broad, encompassing almost all aspects of international life.

Generally speaking the Organization 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 of 1949, 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 70 years of its existence, the United Nations 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.

In my comments I will focus on three particular areas:

1. The role of the Organization as a venue for collective action, including multilateral treaty negotiation;
2. The law-making that occurs through the organs and institutions of the Organization; and
3. 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. 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. A primary, although not exclusive, form is a multilateral treaty. A prominent recent example of such an instrument is the climate agreement reached in Paris in December, which was adopted under the United Nations Framework Convention on Climate Change, and for which the Secretary-General will serve as the Depositary.

Overall, 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, such as that established under the United Nations Framework Convention on Climate Change that adopted the Paris Agreement, for instance, 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 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 discharging this task, the Assembly has essentially established what I would call a “conveyor belt” of international law-making. The manufacturing process ideally 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, which is responsible for legal matters, where instruments are further considered and developed by Member States before being adopted and opened for accession.

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.

In the exercise of their deliberative functions, the General Assembly and the Security Council have also been active and influential 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 largely 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 70 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 in this regard is the Universal Declaration of Human Rights, adopted by the General Assembly on 10 December 1948. The elaboration of the Universal Declaration was driven, in many respects, by former first lady and Chair of the Human Rights Commission, Eleanor Roosevelt. It has served as the basis for the subsequent negotiation of the two Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights, respectively, which in turn inspired several other human rights treaties.

The Assembly has also referred, in its other major proclamations, such as the Millennium Declaration of 2000 and in the World Summit Outcome of 2005, 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, which gives it a unique legal authority.

Under Chapter VII of the Charter, the Security Council has the authority to determine the existence of a threat to the peace, a breach of the peace, or an act of aggression, and to make recommendations, or decide what measures shall be taken 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 in the exercise of its Chapter VII authority are not constrained by the general prohibition on intervention in matters essentially within the domestic jurisdiction of States contained in Article 2, paragraph 7 of the Charter.

Pursuant to Article 25 of the Charter, the Security Council's decisions are also binding 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.

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. This has been the case, for example, with respect to the operations in the Democratic Republic of the Congo, the Central African Republic, South Sudan and Mali, where UN peace operations are currently implementing some of the most complex and demanding Security Council mandates.

The Council's contributions to international law are not limited to its Chapter VII actions. For instance, with respect to the situation in Syria, where Council members have been unable to agree on resolutions invoking Chapter VII, there have nonetheless been a number of important actions taken by the Council, including with respect to humanitarian access and relief, the elimination and destruction of chemical weapons and the identification of those responsible for their use, counter-terrorism and, most recently, the call for the Secretary-General to convene, through his good offices and his Special Envoy for Syria, formal negotiations on a political settlement and transition. Each of these developments has included specific legal elements that have had to be considered. They have also produced legal effects.

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.

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—the International Court of Justice was preceded by the Permanent Court of International Justice, which was provided for in the Covenant of the League of Nations—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 to contribute to the development of international law, and has done so in many crucial areas.

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.

In the early days of the United Nations, it was already optimistically envisioned by the members of the Office of Legal Affairs, including, notably, Oscar Schachter, who published an interesting article on the topic all the way back in 1948, that the Office’s legal opinions would have important effects both for the internal deliberations of Organization and for the broader development of international law.

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 also 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.

Thank you all for your attention. I look forward to the rest of the evening.