



UN at 75: Effective Multilateralism and International Law

Online Conference, 9 October 2020

Chair's summary

Introduction

On the occasion of the 75th anniversary of the United Nations, the Office of Legal Affairs of the United Nations and the German Federal Foreign Office jointly hosted a high-level conference on “Effective Multilateralism and International Law” featuring three panel discussions on the evolution of international law since the establishment of the United Nations, the achievements of the UN in advancing international law and its future in supporting multilateralism.

In his opening remarks, the German Federal Minister for Foreign Affairs, Heiko Maas, highlighted the importance of the UN Charter as an invaluable achievement for a more just and peaceful world while expressing his concern that the Charter's principles and the idea of international law itself were challenged today in various ways. He further emphasized the importance of cooperation to tackle global challenges like the current pandemic and referred to the Alliance for Multilateralism, a format in which 70 countries work together to defend and strengthen the international order.

Director-General for Legal Affairs at the German Federal Foreign Office, Mr. Christophe Eick, welcomed the panelists, chairs and participants. He underlined that the conference provided a unique opportunity to discuss the evolution of international law during the last decades by taking stock of the contributions made by UN bodies, international courts and tribunals as well as academia. Mr. Eick stressed that international law was a crucial basis for all countries to be able to participate in international relations on an equal footing, acted as guardrails with regard to a just foreign policy and created peace.

UN Undersecretary-General for Legal Affairs and UN Legal Counsel, Mr. Miguel de Serpa Soares, recalled the Declaration on the Commemoration of the seventy-fifth anniversary of the United Nations by which world leaders had reemphasized their commitment to abide by international law and ensure justice for a more peaceful, prosperous and just world. He further stressed that the UN had demonstrated, time and again, its flexibility and adaptability to the changing priorities and concerns of the international community. International law would continue to be an essential tool to address what might be two of the most crucial issues of the next 25 years: our relationship with the planet we inhabit and our relatively new ability to interact with each other in cyberspace.



1. The Role of the General Assembly and Its Subsidiary Organs (ILC, Sixth Committee) and the Importance of Academia

Chair: Christophe Eick, Director-General for Legal Affairs, Federal Foreign Office, Germany

Panelists:

Mariana Durney, Professor at the Catholic University of Chile

Georg Nolte, Professor at the Humboldt University of Berlin, Member of the International Law Commission

Nilüfer Oral, Professor at the Istanbul Bilgi University and the National University of Singapore, Member of the International Law Commission

The panel discussed the role of the United Nations as an ‘epicenter’ of the *development* of international law and, at the same time, as a crucial actor in the *implementation* and *interpretation* of international law. Panelists *inter alia* referred to the historical and political context, objectives and purposes as well as to the evolution of the United Nations system. They highlighted its role in promoting multilateralism and international cooperation and the United Nations’ function as a convening power and principle driver for the adoption of specific multilateral treaties in different areas such as, for example, human rights, international humanitarian law, international criminal law, maritime law and environmental law/climate change. The function of multilateral treaties as solemn commitments of States was underlined, as was the important role of the UN Charter in articulating a general confidence in international law and of the UN organs as the institutions safeguarding this confidence.

The panel examined the roles and contributions of as well as the cooperation mechanisms between the General Assembly, Sixth Committee and the International Law Commission (ILC) regarding the creation of broad-based international rules. Furthermore, the increasing importance of soft law vs. hard law was discussed: The panelists highlighted aspects of soft law such as its purported efficiency, flexibility and quick responsiveness to challenges as well as its role as a “forerunner” of hard law. In addition, the panel reflected on the ILC’s function concerning the codification and progressive development of international law and stressed the impact and significance of the Draft Articles on State Responsibility as one of the most prominent outputs of the ILC. Other topics included the use of Art. 17 of the ILC Statute, according to which the ILC also considers proposals and draft multilateral conventions submitted to it by Members of the United Nations, as well as the question whether there was a need for the ILC to review its workload and working methods.

The panel also looked into the contributions of the Security Council. With its specific powers, the Security Council reinforced *inter alia* the principle of sovereign equality of all States with institutional means. Moreover, the Council fulfilled an increasingly important function in raising awareness about



new topics on its growing agenda such as, for instance, in the areas of climate change, sea-level rise, etc.

Furthermore, the panel touched upon the increasing relevance of non-state actors, including NGOs, the ICRC, civil society in general as well as scientists, in the formulation and application of international law. Non-state actors were important because of their representation of general and special interests and because of the knowledge they could bring to processes of international law-making, application or clarification. Moreover, the panelists specifically reflected upon the experiences of the ILC in this regard, for example, during the Commission's works on topics like crimes against humanity, protection of the environment in armed conflict, protection of the atmosphere or sea level rise.

Further discussing the importance of academia for international law and institutions, the panelists addressed questions on how academia and practitioners interact and cooperate, on the relationship of theory vs. practice, on the different approaches and working methods and on changes in the functioning of academic life in recent years. The positive effects of academic teaching, research and knowledge dissemination on the wider appreciation of international law were highlighted.

2. The contribution of international courts to the development of international law

Chair: Alain Pellet, President of the French Society for International Law

Panelists:

Xue Hanqin, Vice President of the International Court of Justice
Ben Kioko, Vice President of the African Court on Human and People's Rights
Roman Kolodkin, Judge at the International Tribunal for the Law of the Sea

The panel focused on the extent to which international courts and tribunals have contributed to the development of international law and on the question to what extent decisions of international courts may exert general impact on the conduct of States.

Panelists expressed converging views that international courts and tribunals could not act as substitute legislators, but contributed to the development of international law through their jurisprudence. They highlighted a role and responsibility of every international court to develop international law through its interpretation and application of the law: Courts had to consider and interpret various abstract, uncertain or unclear elements of international law, which they clarified and interpreted with the changing times, and filled gaps. Courts helped develop the texture of



international law through the clarification of issues, standpoints and perspectives. Constantly increasing caseloads and the larger variety of cases have provided more opportunities for courts to consider broader areas of state practice and drawn more attention to the new trends in international law. They also pointed out, however, that there are limitations to the courts' role in this regard: Courts were obliged to faithfully interpret treaty provisions in accordance with the rules of interpretation under customary international law; reinventing or expanding the law would entail the risk of undermining the trust of States in the judicial settlement of disputes. Courts could not be expected to remedy the situation where there was a lack of consensus among States to conclude new treaties; it was up to States to make the law. Furthermore, to maintain legal certainty, courts should pursue consistent jurisprudence.

The risk of a fragmentation of international law due to the growing number of international courts and tribunals could in part be countered by closer cooperation and dialogue between courts, panelists held. In their work, many courts and tribunals cited decisions of other courts, while in certain cases they further developed the latter's jurisprudence. Yet, such a cooperation required sensitivity by every court to other courts' decisions. Generally, the panelists agreed that if a court followed the consistent jurisprudence of various courts, it would increase the legitimacy and acceptance of its own judgements. One panelist stressed that irrespective of fragmentation in specialized areas, it was crucial that general international law and its framework should be kept intact.

Asked about the specific point in time in which a certain jurisprudence should be further developed or changed, panelists underscored that there was no mechanism to determine such point in the abstract, as law was a 'living organism' which had to move with the developments in society. Courts needed not only to look at what the law was, but also keep in mind discernible trends in state practice and prevailing views of the international community. Circumstances changed and new developments occurred, which had to be taken into account accordingly. Judgments were not delivered in a vacuum, but in constantly changing times and different societal contexts.

3. International Relations Based on International Law

Chair: Anne Peters, Professor and Managing Director at the Max Planck Institute for Comparative Public Law and International Law Heidelberg

Panelists:

John B. Bellinger, III, Partner, Arnold & Porter, LLP, and Adjunct Senior Fellow in International and National Security Law, Council on Foreign Relations, Washington, DC

Päivi Kaukoranta, Ambassador of Finland to The Netherlands and Permanent Representative to the OPCW

Elizabeth Wilmshurst, Chatham House



The panel discussed the role of international law in establishing a framework for international relations. Panelists *inter alia* pointed to the function of international law in regulating and stabilizing international relations. International law, it was argued, did not only function as a limitation to policy-makers but also provided for ‘tools to *build* international relations’. As one panelist put it, international laws were the ‘gears’ that allowed states to work together even if they disagreed on certain issues, thereby providing the basis for people to meaningfully engage with each other across borders. International law also set a framework for the protection and pursuit of common interests among nations and their populations in a variety of areas such as the environment or diplomatic relations.

As regards the development of international law, the panelists noted that recent years had seen a stagnation of international law-making and an increased withdrawal from treaties. The divergence of interests among an increased number of states made it more difficult nowadays to agree on new large multilateral treaties or renegotiate existing treaties. One panelist highlighted that the UN Charter itself had only been amended rarely even though during its initial phase expectations had been voiced that the Charter would be further improved and developed over time. To overcome the dilemma, it was generally suggested to focus on incremental methods of law-making by which smaller groups of States negotiated treaties or international instruments, which could then be joined by other States over time if deemed fit. Examples for such instances of a ‘practical multilateralism’, as one panelist put it, were the 2008 Montreux Document on Private Military and Security Companies or the Copenhagen Process on the Handling of Detainees in International Military Operations launched in 2007.

The panel also reflected upon the issue of compliance with international law and highlighted that even fundamental norms, such as the prohibition of the use of force or the principle of territorial integrity, were violated with some regularity. ‘Grey areas’, i.e. a lack of clarity with regard to the contents of certain international norms, for example, on the use of force against non-state actors, added to the challenge. There were converging views among panelists that strategies of norms affirmation and clarification were crucial to counter non-compliance: States should speak out and address norms violations more openly. Staying silent carried the risk of signaling acceptance and could hence catalyze the erosion of a contested norm. Also, States, and in particular their legal advisors, should engage more frequently in efforts to publicly clarify and explain their position on what the law was in the first place. The panelists also agreed that States, which resorted to a use of force in self-defense under Art. 51 UN Charter, should provide more detailed and transparent legal explanations in their letters to the Security Council under the second sentence of Art. 51 UN Charter. The panelists also discussed the role of the United Nations in affirming and clarifying the international *lex lata* and referred to the important work of the International Law Commission in this regard.



As regards current developments in specific areas of international law, the panelists *inter alia* discussed the application of international law in cyberspace. Given the current lack of agreement among States even with regard to the modalities of application of fundamental norms such as sovereignty or the prohibition of intervention, the need for States to further explain their positions publicly and engage in debate and cooperation with other States as well as civil society was highlighted. Furthermore, the panelists reflected upon possible lasting effects of the Covid-19 crisis on the international legal order. It was considered that improvements could be necessary with regard to the reporting obligations and compliance assessments under the WHO system. Noting that the pandemic had exacerbated inequalities in the living conditions among people and threatened the protection of human rights in various ways, panelists cautioned that derogations from human rights obligations must not become ‘the new normal’ and (authoritarian) governments must not use the pandemic as a pretext to further stifle democratic space.

Closing remarks

D. Stephen Mathias, Assistant Secretary-General for Legal Affairs at the United Nations Office of Legal Affairs, closed the conference by expressing his gratitude towards the organizers, moderators and participants for the deep and rich discussions and by referring to the importance of enhanced cooperation amongst Member States in view of the COVID 19 pandemic.