# THE ROLE OF LAW IN THE UNITED NATIONS *

Discussions of the role of law often focus on the settlement of disputes by courts according to law. Justice Oliver Wendell Holmes' famous definition of law is the archetype:

> The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.[1]

This concentration carries over into discussions of international law. Thus, the World Peace through Law Conferences held at Athens in 1963 and at Washington in 1965 declared that one of the general principles for a world Rule of Law is that

> international disputes [must be resolved] by adjudication, arbitration or other peaceful procedures.[2]

The emphasis is placed on third party judicial settlement and, of course, the whole arbitration movement of the late nineteenth and early twentieth century was based on the belief that war could be replaced in international relations by compulsory third party resolution of disputes according to law.

But let us take a broader view, and take account of other functions of law. First and most obviously, law provides a framework within which those subject to it can operate, with some expectation that most others will also comply. After all, the essence of a law ordered system is substantial voluntary compliance, not official application and enforcement. Second, law provides procedures, techniques and institutions to enable those subject to it to achieve their purposes in an effective manner, to settle their disputes – and this by many methods other than compulsory adjudication – to accommodate conflicting interests and to promote common interests. Law is not simply a judge.

We can conveniently consider law in the U.N. then, under three headings:

I the development and codification within the U.N. of general rules of international law;

* An address given on 13th June 1966 as one of a series of lectures on the United Nations arranged by the Law Faculty.

II the relevance of international law to the functioning of the political organs of the U.N.; [3]

III the development of procedures and institutions for the settlement of disputes, the accommodation of conflicting interests and promotion of common interests.

## I

Article 13 (1) of the Charter, in a provision not paralleled in the Covenant, requires the General Assembly to

> initiate studies and make recommendations for the purpose of:
>
> (a) promoting international cooperation in the political field and encouraging the progressive development of international law and its codification;

Notice first the connection between international political cooperation and international law. Writers on the codification and development of international law when quoting Article 13 often omit the reference to political cooperation, but, as we shall see in a moment, the connection has been increasingly stressed in recent years. Second, note the emphasis on change, on the dynamic nature of law. An early Secretariat memorandum [4] on development and codification stressed that the framers of the Charter did not wish the new organization "merely to pick up the threads of international action where the League of Nations had left off. Rather it was hoped that, with the new powers vested in the Organization, a fresh and bolder approach could be made . . . . "

Perhaps it is worth taking up in this context the view held by many – Morgenthau [5] is a principal exponent – that law, and especially international law, is static, that law invariably favours the *status quo*. Accordingly, the argument runs, law is, in this time of tremendous political, economic and technological change, an inadequate method of international social control. But is international law static? Does it invariably favour the *status quo*? It is submitted that such a view shows lamentable ignorance of the amazing and rapid developments in the corpus of international law.

Consider the almost overnight development of space law – what Dr. Cheng has referred to as "Instant Customary Law"; [6] consider the development, in little more than ten years, of the continental shelf doctrine, [7] giving *exclusive* rights to

coastal states over the shelf and its enormous mineral and animal resources in derogation of the apparently well established rights of all nations to exploit the resources of the high seas; or consider the enormously important development of the right of self-determination of peoples and nations especially since the General Assembly in its famous Declaration of December 1960 on the Granting of Independence to Colonial Countries and Peoples declared that

> All peoples have the right to self-determination; . . .[8]

Or, if you like, consider the jurisprudence of the International Court: The *Anglo-Norwegian Fisheries* case [9] where the Court refused to accept predominant state practice relating to the drawing of territorial seas and fishing zones and adopted what seemed to be a new rule which, *inter alia,* allows consideration of the economic interests of the coastal state; or the *Reservations* case [10] where in considering a question of treaty law the Court rejected an apparently settled rule in favour of a more flexible rule which reflects more accurately current trends in international relations; or, finally, the opinion relating to the expenses for U.N.E.F. and O.N.U.C., [11] where the Court in interpreting the broad language of the Charter took account of and confirmed the practice of the organization which had, contrary to the view held by many at San Francisco in 1945, conferred considerable peacekeeping authority on the General Assembly.

Perhaps Morgenthau's objection should be not that international law is static but, on the contrary, that it is *too* dynamic [12] – and accordingly often uncertain. Thus at the 1964 meeting of the U.N. Committee on the Principles of International Law concerning Friendly Relations and Cooperation among States, several representatives stressed that

> no State could risk endangering its vital interests by having recourse to procedures of arbitration or compulsory judicial settlement as long as uncertainty remained about the scope and content of international law.[13]

But let us return to the story – to the power of the General Assembly progressively to develop and to codify international law. The Assembly's major agent in this operation is the International Law Commission which now consists of twenty-five jurists who act, not as representatives of states, but in their individual capacity. From others' [14] discussions of the work of the Commission, several points emerge.

First, the procedures laid down in the Commission's Statute incorporate a nice balance between the technical legal expertise of its members (and of other

organizations of international lawyers), and the knowledge of other experts where it is relevant, on the one hand, and the political interests of governments in the law making process, on the other. The interests of governments are protected by their right to comment on the work of the Commission, by the annual scrutiny by the Sixth (Legal) Committee of the Assembly of the Commission's work and by the diplomatic conferences which, in a number of cases, have been held to give final form to the Commission's work.

Second, and this underlines the dynamism of international law mentioned above, the Commission has found it impossible, and really no longer attempts, to draw a clear line between progressive development and codification. All so called codification has been found to involve development of the law.

Third, and perhaps most significant, is the range of topics considered by the Commission. It has dealt with substantial success with: the high seas, the territorial sea, the continental shelf, the conservation of the resources of the high seas, statelessness and nationality, diplomatic and consular relations and immunities. In all cases, widely accepted treaties resulted from the Commission's draft. It has just concluded a draft convention on treaties and has on its agenda state succession, special missions and state responsibility. This final topic, state responsibility, has been on its agenda for many years, but the Commission has not really grappled with it yet. There is a basic deep difference between proposed approaches to this question. Western states see it as concerning the duties of states towards aliens, while the Soviet and some "new" states want the Commision to consider the much broader issue of states' duties in general, and play down any special consideration of states' obligations towards aliens. Such a topic would be very much like one of the areas where the Commission's work was unsuccessful: the rights and duties of states. The Commission was also unsuccessful in reaching results satisfactory to itself or the General Assembly on the topics of aggression and arbitral procedure.

In other words, if we leave aside these early, unsuccessful and tentative forays into the fields of rights and duties of states, and of aggression, the International Law Commission has not been concerned with that part of international law which is relevant to the major tensions and power struggles of the modern world. Concern about this limit on the U.N. activities relating to international law reached an early peak at the historic session of the General Assembly in 1960, the session attended by many heads of state and government, the session marked by the admission of 16 new members from Africa, the session which adopted the Declaration on the Granting of Independence to Colonial Peoples. In marked contrast to all this activity the agenda of the Sixth (Legal) Committee of the Assembly was paltry; international law seemed of no significance.

Several factors [15] then – the small agenda, a concern that international law was not playing the role it should, and was indeed lessening in importance, a vague feeling by the new and developing states that current international law was contrary to their interests and had been developed without their participation, the vast technical and political changes – led the Assembly unanimously to declare

> [1] that the conditions prevailing in the world today give increased importance to the role of international law – and its strict and undeviating observance by all Governments [this is a Ukrainian amendment] – in strengthening international peace, in developing friendly and co-operative relations [not peaceful coexistence as the Soviet bloc urged] among the nations, settling disputes by peaceful means and in advancing economic and social progress throughout the world;
>
> . . .
>
> [2] that many new trends in the field of international relations have an impact on the development of international law. [16]

Two comments might be allowed: first the close connection between international law and peaceful interstate relations is stressed and second, the broad functions of law which I identified at the beginning are underlined. Law, to repeat, is much more than what the judge does in a particular case. Discussions and Assembly recommendations at this time were mainly directed towards new topics for the International Law Commission – Ghana, for instance, suggested the law of space and the compulsory jurisdiction of the International Court, Burma statelessness and sovereignty in air space [17] – important topics but hardly commensurate with the rhetoric of the Assembly resolutions. There were, however, some hints of a new emphasis. Yugoslavia and Indonesia suggested for elaboration the principles of peaceful and active coexistence and the rights inherent in the sovereignty of a state. [18] The principal reactions [19] to these suggestions were, first, that it was doubtful whether states would agree on more than general statements of principle such as are already found in Article 2 of the Charter, and second, that the topics were too controversial for the International Law Commission; moreover, governments would want to retain very close control over such questions. Accordingly, in 1962 the Assembly and in 1963 its delegate – a committee of twenty four on Principles of International Law concerning Friendly Relations and Cooperation between States – were given the task [20] of elaborating seven basic principles: the prohibition on the use of force; settlement of disputes by peaceful methods; non-intervention in the domestic affairs of a state; the duty of states to cooperate; equal rights and self-determination of peoples; sovereign equality of

states; and the good faith fulfilment of Charter obligations. Before considering the efforts of this Committee, it is instructive to note the emphasis in the relevant Assembly resolutions on the relation between the maintenance of international peace and security and international law. Those adopted in 1961 and 1962 [21] repeated the 1960 opinion that present world conditions give increased importance to the role of law in international relations, and in January 1966 the Assembly stated its view [22] that the faithful observance of "international law is of paramount importance for the maintenance of international peace and security and the improvement of the international situation". In violent opposition to the view expressed by the Assembly is that of the *real politikians*, the Kennans and the Morgenthaus [23]. They claim that the single minded pursuit of the national interest should not be impeded by vague notions of morality and international law. This is not a matter which can be pursued at length here. But is such an attitude in fact consistent with the *real* national interests of states, even of large states? Consider in addition to the firmly held view of the General Assembly the opinion of Grotius, the father of modern international law as expressed over three hundred years ago: first, he said, international law had in view "the advantage, not of particular states, but of the great society of states" and, second,

> the state which transgresses the laws of nature and of nations cuts away . . . the bulwarks which safeguard its own future peace. [24]

And just last year, in discussing the American adventure in the Dominican Republic an eminent international lawyer [25] argued persuasively that recognition of and compliance with the basic rules of international law were themselves long term policy interests of the United States.

But let us return to the Committee on Principles of International Law concerning Friendly Relations and Cooperation, the existence of which shows the resolve of many states that law *will* play a greater role in international affairs. It reached agreement at its 1964 meeting [26] only on the principle of sovereign equality – and then substantially in the general interpretative language which was agreed upon at San Francisco in 1945. The Committee also reached tentative agreement on a vaguely worded elaboration of Article 2 (4) of the Charter, which prohibits the use of force; but the United States government decided that even its general elastic language might restrict its "right of hot-pursuit" of Vietcong into Cambodia and withdrew its consent. Fifteen months later it indicated its adherence, [27] but this incident, (and this is the only reason it is mentioned), shows the great difficulties involved in getting governments to agree to comparatively detailed statements of these basic rules. The Committee met again in 1966; [28] once again it agreed on a

sovereign equality text, also in vague and general terms. It also reached agreement on the principle of peaceful settlement, but in terms which stress the disputants' free choice of methods. Consensus could not be obtained on the other five principles. Technical reasons, it has been suggested, [29] contributed to the Conference's failure: insufficient time; the large size of the drafting committee; the requirement of unanimity; and the calibre of members. There is an element of truth in this, but surely the reasons are more basic: many states feel that they are being asked to commit themselves in these highly political areas without adequate knowledge of what might be involved. Further, and somewhat inconsistently, states also tend to consider the drafts in terms of their immediate political problems. Accordingly, they are willing to accept formulae only if they are general enough to allow them subsequently to take into account a broad context of political and security factors.

The reluctance of many states to commit themselves to international legal rules on major issues without knowledge of what may be involved has equally dogged the unsuccessful discussions in the U.N. of the definition of aggression. Such a definition, some claim, [30] is absolutely essential in a world where aggressive force is prohibited; it is basic to the principles of world minimum order. Further, it would provide certain rules for international organizations, for international courts, for the would be aggressor, for the state acting in self-defence, for public opinion. Decisions could be reached more easily; arbitrary decisions would be excluded. But how persuasive are these arguments?

First, the long inconclusive debates have shown that simple, precisely drafted definitions will never be acceptable: we face the same problem as the Friendly Relations Committee. Many states will insist, to use the language of McDougal, that a broad context of circumstances be relevant to the legality of the use of force. Second, there is little guarantee that the political organs involved in security questions will take any account of any agreed definition. This raises a third and more basic question: to what extent should a political organization in dealing with international disputes, threats to the peace, and aggressive acts give effect to international law and to the legal position of the parties in reaching its decisions? In particular should it automatically apply the law relevant to the use of force? This will be considered later.

It is instructive to compare with these efforts on friendly relations and aggression recent Assembly consideration of other politically explosive topics. One such is permanent sovereignty over natural resources – in traditional language, state responsibility. Here, various organs of the United Nations, assisted by admirable research by the Secretariat [31] on all the relevant economic, physical, development,

technical and legal (both national and international) issues, were able, after close and careful study, to draft acceptable and fairly precise statements of the rights and duties first of states regarding their natural resources and second of foreign investors. [32] It is also interesting to note that this question despite its legal content was never considered by a legal organ of the U.N., although many delegations included lawyers. Equally, space law has been considered by the first – political – committee, with the help, however, of a legal sub-committee. Again there has been careful study of all the elements involved and again reasonably precise rules have been drafted. [33]

Even although this involves some repetition, it is important to attempt to identify the reasons for the differing success of these efforts to establish accepted principles. First, the major space powers (and indeed most other states), and the capital exporting states and the "less developed" states who require vast amounts of foreign capital were generally agreed that comparatively detailed codes of the rights and duties of states in space and in relation to sovereignty over natural resources respectively would be helpful. But is there such a consensus in the case of legal principles concerning friendly relations and of aggression. Surely many states prefer to decide particular cases as they arise, rather than to establish an all embracing detailed code in advance. Here perhaps we see something of the different approaches of the civilian who prefers the code method of establishing rules and of the common lawyer who leans towards the case by case approach, and who is sceptical of codes.

Second, and this point cannot be stressed enough, the codification and progressive development of international law are not purely technical functions, to be performed by lawyers alone [34] – we have already seen the balance incorporated in the Statute of the International Law Commission between the political and technical elements in law elaboration. But before the technicians, the lawyers, can operate in any effective manner there must be not only some basic agreement that there should be a system of rules, but also some consensus as to the content and objectives of the rules. The existence of the former agreement will, of course, help the establishment of the latter. Any attempt to draft an agreed text, where there is no such consensus, will, whatever the legal skills brought to bear, either result in failure or in a text which contains only an illusory agreement. Thus the famous McCloy – Zorin statement of *agreed* principles for disarmament negotiations [35] was so far as the important question of inspection is concerned only a clever disguise of *disagreement.*

On the other hand the United States and the Soviet Union *are* in general agreement about the basic policies and rules in space, and the capital exporting and

importing states were able to reconcile some of the differences by reference to their agreement that the flow of capital should continue. But is there really such agreement in the broader area of foreign relations? If there is agreement about content or objectives in this case is it so general that it is of no assistance in establishing more detailed rules capable of concrete application? A world "rule of law" or a world governed by peaceful and active coexistence mean many things to many people.

This leads to a third point: the success in getting substantial concurrence in texts on space and state responsibility followed the careful compiling and consideration of all the relevant and varied factors – physical, economic, technical, political and legal. Such careful preparatory work seems basic, and yet these factors are at their most intangible in the highly political areas the Friendly Relations Committee has been considering.

Before we leave the question of elaboration by the United Nations of substantive rules of international law we should at least note one question. The San Francisco Conference deliberately rejected a proposal that the Assembly be empowered to legislate, to lay down general international law. The relevant articles of the Charter do no more than authorise *recommendations*.[36] What then is the legal significance of the practice of the Assembly and its organs in the development and codification of international law? Time does not allow a detailed answer. But there is now substantial agreement[37] that Assembly recommendations *can* have legal effect: first, as authoritative interpretations of the Charter (at least where, to quote a conclusion of the San Francisco conference, the interpretation is "generally acceptable")[38] – possible instances are the Universal Declaration on Human Rights[39] and the Declaration on the Granting of Independence;[40] second, as an expression by members of what they consider customary international law to be – the resolutions on the Nuremberg Tribunal,[41] on Permanent Sovereignty over Natural Resources,[42] on Space[43] and on Intervention in the affairs of States[44] are examples: and, third, as embodying an *agreement* between interested states – the resolution of 1963 prohibiting the orbiting in space of nuclear weapons[45] for instance. In all these cases, there was "general acceptance", a large majority, with the principal states at least not dissenting. Such consensus, it is generally agreed, is essential to the development and codification of international law. But it does not accord with the majority voting system of the General Assembly. The inability of the Committee on Friendly Relations to adopt texts by consensus has led to threats by Afro-Asian members that a majority system should be adopted. Such a change could only raise considerable doubts as to the value and status of the resulting statements.[46]

In any case, is the distinction between legally binding and non-binding rules always as significant as the previous paragraph might suggest? A non legal rule may, in some circumstances, be just as effective as a legally binding rule established, say, in a treaty. [47] Moreover it may be more easily established; detailed negotiation and domestic constitutional processes might be avoided. Recent arms control efforts provide interesting instances of varying techniques for establishing mutual restrictions: unilateral cut backs of production or of a defence budget; unilateral declarations of intention with varying degrees of coordination; recommendations of the General Assembly with the acquiescence or approval of the principal powers; recommendations incorporating an agreement; and formal agreements in treaties. In all these ways, rules of the game have been established in recent years. The relevant point is that whatever method is used, the only real sanction for non compliance with arms control arrangements of whatever kind available in the present state of world organization is reciprocal non-complying action by the states whose interests are affected. This happened for instance when the U.S.S.R. ended the testing moratorium in 1961 and the U.S. responded, and it would probably happen in the event of a deliberate breach by testing of the 1963 Moscow Test Ban Treaty. [48] This is not to say, of course, that the possibility of a characterization of particular activities as legal or illegal is insignificant. It is not. But there are ways of establishing international rules of the game other than by treaty, or by generally accepted custom.

## II

I have tried to outline the efforts of the U.N. to establish general rules of international law by conscious legislative actions; let me now turn to a discussion of the role of this law in the organs of the U.N. In applying the law to specific cases, these organs, of course, contribute equally to the establishment and development of the law. [49]

Legal questions of various kinds arise when organs of the United Nations grapple with particular issues; (i) is the organ competent in terms of the Charter? (ii) what procedure can or must it follow? (iii) what powers does it have? (iv) what are the substantive rights and duties of the parties? The first three questions relate to what can be called international constitutional law. If the organ wishes to take action of any kind, it will generally be obliged, even implicitly, to take some position on the legal issues presented. Here there is a great mass of U.N. practice relevant both to the Charter and its interpretation and to general international law. As a creature of the law, the Organization is, as the International Court has stressed

on a number of occasions, [50] obliged to comply with the relevant law, especially the Charter. But it by no means follows that the political organs are obliged to go to the principal judicial organ of the U.N to have questions of interpretation settled. The San Francisco Conference in 1945 recognized the inevitability of day-to-day interpretation by an organ of relevant Charter provisions. At the same time it concluded that any reference of disputed issues to the Court was voluntary:

> the nature of the Organization and of its operation would not seem to be such as to invite the inclusion in the Charter of [a provision vesting the final determination of such disputes in the Court or some other authority]. [51]

Indeed, a strong argument can be made that an organ which has continuing day to day experience of its difficulties should retain control over their resolution. And the International Court by making liberal use of the Organization's practice in interpreting the Charter, has indirectly accepted this view. [52] Nevertheless, there remains the question: when should the Organization seek advice from the Court about its powers? The Council of the League, especially in its early years, regularly referred legal questions relating to disputes before it to the Court. The U.N. on the other hand, has rarely sought such advice. [53] The statistics, however, do not tell all: most of the questions referred to the Court by the League, related to the substantive rights and duties of the parties (especially under the detailed European treaties of the peace settlement), few to the powers of the League under the Covenant. Certainly it is difficult, leaving aside perhaps the *Nationality Decrees* case, [54] to find amongst the opinions requested by the League and relating to the Covenant any as significant as the *First Admissions*, [55] *Reparations*, [56] *U.N. Administrative Tribunal* [57] and *Expenses* [58] opinions. Moreover, during the League period the disputant states, in nearly every case, agreed to the Council seeking the Court's advice: they were agreed that the issues between them were justiciable; their disputes really legal. In the General Assembly, however, there has rarely been this unanimity and the lack of effect of first, the opinions sought respecting the alleged non compliance by certain Eastern European states with the human rights provision in their peace treaties, [59] and, second, the *Expenses* opinion shows the doubtful wisdom of seeking opinions where all the parties involved are not willing to get legal advice but rather wish to retain close control over the dispute or issue. These doubts perhaps are largely responsible for the virtual non use of the Court by the political organs of the U.N. in the past ten years. A noted commentator [60] on the Court has also suggested that, save in exceptional circumstances, reference of issues to the Court is thought to constitute abdication by the principal powers of their real responsibility for maintaining international peace. Most of these considerations apply equally, of course,

to proposals that the Court's advice be sought on the substantive issues at large between the parties. Just to take up the last consideration a Belgian proposal at San Francisco that a state which considered that a Council recommendation or decision infringed essential rights conferred by positive international law should be able to refer that issue to the Court was not adopted: such a procedure would impede and delay the operations of the Council. [61]

Court participation in dispute settlement by the political organs of the U.N. is, accordingly, rare. What of the role of law in the activities of the organs themselves? I have already made the points (1) that as creatures of law they are obliged to comply with the relevant law and (2) that they will generally be unable to avoid answering legal arguments about their procedure, competence and powers. But the U.N. may be able to avoid legal rulings on the substantive merits of the dispute. First, the organ may suggest a *procedure* to the parties and avoid making any ruling. Second, it may reach a decision solely on political grounds. As an illustration of some of the problems of law application, let us take up again the question of aggression. In an authoritative and excellent U.N. secretariat report League practice was summarized in these words:

> where a conflict was accompanied by hostilities, the organs of the League sought primarily to put an end to it by persuading the parties to cease the use of force and to accept the measures proposed to prevent a resumption of hostilities. To this end the organs of the League appealed to the goodwill of the parties, refrained from condemnatory judgments which might have caused offence, and generally exercised great restraint in pronouncing on the misdeeds of parties, using great tact so that the violators of the Covenant could give way without losing face.[62]

This practice has continued in the U.N. In the case of Korea there were findings of armed attack and aggression, and in the case of Hungary the Assembly declared that the Soviet use of force was a violation of the political independence of Hungary, but formal findings of blame, of breach of the international law regulating the use of force, have been avoided in most other cases of hostilities: Palestine, Kashmir, Indonesia, Suez, Lebanon, Jordan, the Congo (for the most part), Cyprus, the Yemen. The primary effort in the case of conflict has been to stop the fighting, and in many cases this has been achieved only by consent and cooperation; allocation of blame in quasi-criminal proceedings could only impede such efforts.

Similarly, in cases where there has been no outbreak of violence but where the actions of a state seriously threaten to provoke armed conflict, the primary concern

will be with preventing such conflict, rather than with the legality of the actions. A principal instance is the Council's treatment in 1951 of the Israeli complaint concerning restrictions imposed by Egypt on the passage of ships through the Suez Canal.[63] There were detailed, specific legal arguments based on the provisions of the Constantinople Convention of 1888, of the Israeli-Egyptian General Armistice Agreement of 1950 and of the Charter of the United Nations. The Council specifically rejected the Egyptian argument that Egypt's right to self defence under Article 51 of the Charter justified the visit, search and seizure of ships, but refused to make findings on the legality of this action under the Convention and Agreement. Rather it found that the maintenance of such a practice

> is inconsistent with the *objectives* of (1) a peaceful settlement between the parties and (2) the establishment of a permanent peace in Palestine set forth in the Armistice Agreement.[64]

Similarly, the emphasis throughout the discussion was on the spirit and intent of the Armistice Agreement rather than on the strict legal rights of the parties. In the words of the British delegate, it was "unnecessary for the Security Council to become entangled in the maze of legal arguments";

> what matters is not whether there is some technical basis for the restrictions, but whether it is reasonable, just and equitable that they should be maintained.[65]

To quote one commentator

> the Council (in the 1951 resolution) expressed its strong desire to bring to an end a situation fraught with tension, rather than to hand down a juridical judgment on the compatibility of the Egyptian practice with the *terms* of the General Armistice Agreement.[66]

The General Assembly and Security Council have also refused in several cases to pass on the merits – both legal and political – of a third class of dispute: those disputes which have not reached or have passed the stage of armed conflict. Rather they have realised that where there is a possibility of voluntary settlement by peaceful means, those means should be pursued and should not be prejudiced by their findings on the merits: Thus draft resolutions relating to the merits of Egypt's claim in 1947 that British troops should be withdrawn from Egypt and the 1936 Treaty be held invalid were rejected in the Security Council.[67] The parties were left to settle the dispute by negotiation; and negotiations, ultimately, were successful. Council resolutions on the Palestine question have stressed the role good offices

might play.[68] Equally, the Assembly as late as 1954 called for negotiations with the possibility of mediation in respect of the dispute about the treatment of Indians in South Africa,[69] and in the same year expressed its confidence that negotiations between Morocco and France would lead to a satisfactory solution.[70] More recently it has recommended negotiations between Austria and Italy on the Tyrol question.[71]

Such practice as that just reviewed was predicted at the Charter Conference. The possibility that legal rights might be ignored by the Council and Assembly in their efforts to stop and prevent conflict and resolve disputes troubled many of the smaller states – and some of the larger such as China – at San Francisco. They had fears of sacrificial offerings of small or weak states or of part of the territories to the aggressor in the interests of "peace in our time". The original great power Dumbarton Oaks proposals contained no indication that international law or justice were to be relevant either to the enforcing and maintenance of international peace or to the peaceful settlement of disputes. The pressure of the small states resulted in the amendment of what is now Article 1 (1) of the Charter so that it reads that one of the Purposes of the U.N. is

> to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of . . . disputes . . . .

A similar proposal in relation to Council action to maintain peace did not receive the necessary two-thirds vote.[72]

Of course this fine language in Article 1 (1) means little unless there are adequate procedures for settlement. Time and again, it has been pressed that a prohibition on the use of force – and the argument applies equally to ceasefires which are unsatisfactory to one party – involves the development of other effective means for resolving differences. Equally the famous McCloy-Zorin statement on disarmament emphasises that as nations disarm adequate peaceful settlement procedures must be developed. The development of such procedures is even more important perhaps than the development and codification of substantive law. So Oscar Schachter,[73] in speaking of the Cuban crisis of 1962, while acknowledging that it raised interesting issues of substantive law, argued that the major lesson of the crisis was that procedures for the resolution of such crises should be devised: the "hot line" agreement reflects this.

A fair deduction from the above would be that the substantive rules of international law relevant to the rights and duties of the parties to a dispute being considered in the U.N. play an insignificant role. Notice, however, the limits of

the kind of case we have been considering: the parties are co-operative (at least there is a chance of cooperation) and apparently prepared either to negotiate in good faith towards a resolution of the dispute, or to withdraw from the position they have taken; at least this is still possible. Almost paradoxically, as a distinguished member of the legal staff of the U.N. has recently noted, [74] in the hard cases, the extreme cases, where co-operation seems beyond reach, where compromise appears impossible, the United Nations *has* made specific findings on the legal obligations of the parties. Outstanding instances are Korea, Hungary, Congo, South Africa and the Portuguese overseas territories. The law is relevant in these extremely difficult, intractable cases. Consider some of the advantages of such a legal finding: (i) practice tends to indicate that the states involved, leaving aside the intransigents, will find it easier to comply with any recommendations based on the legal opinion since the political controversy surrounding such compliance may be reduced by the consideration that they are complying with the law; (ii) equally, public opinion at large may rally to a greater extent behind a decision based on the legal holding; (iii) the Organisation will have a firmer base on which to take later action; such action may appear less arbitrary, less politically inspired.

Similar considerations apply to the relevance of law to any later operational – i.e. post decision – action of the U.N. If, in taking action, say in the Congo, the Secretary-General can say that he is acting in accordance with established principles he may be, to that extent, immune from political attack. Thus, in peacekeeping operations, certain principles are established: non participation of the forces of principal members of the Security Council, freedom of movement, and exclusively international control of the forces. [75]

## III

So far I have considered first the U.N.'s role in establishing general international law and second the role of that law in the functioning of the organs of the United Nations. I now turn to the role of law in establishing institutions and procedures for grappling with disputes and other divisive issues and for promoting common goals.

Before considering the role of law in this area, it is most important briefly to analyse the different types of issues which the U.N. has to deal with. There is much talk, in discussions of the U.N., of its function of settling disputes. Here the lawyer tends to think of the regular run of cases which he has in his office: two individuals whose casual contact in the past – either involuntary, as in motor

vehicles, or voluntary, as in a contract – has given rise to rather easily defined narrow issues which are constantly recurring between other similarly placed individuals and whose claims can usually be resolved by a money payment with no need to consider their future relations – often they will have none. Even in domestic disputes where the issues are not as precisely definable and where future relations will often be involved and which, incidentally, are *not* capable in most cases of "settlement" in the sense of a final definitive order removing all question of dispute, it is possible legally and physically to separate the parties. Questions of this precise, past kind *do* arise in international relations and are often settled in the way lawyers settle analogous domestic disputes – by agreement as in the case of many settlements of disputes about compensation for nationalisation, and by adjudication, as in the *Wimbledon,*[76] *Chorzow Factory,*[77] *Lotus*[78] and *Corfu*[79] cases before the International Court and hundreds of others before claims tribunals. But these are not the only differences between states and these, generally, are not the disputes the U.N. deals with. After all, members are obliged in terms of the Charter to use bilateral and other techniques of peaceful settlement before they come to the U.N. and these will often resolve the dispute. Many more disputes involve *continuing* relations and broad issues of national security and prestige. In such cases, either it often is not possible to define the issues in a manner suitable for final settlement – for one thing, monetary compensation will usually be completely inappropriate – or the states involved will not want specific decisions on particular questions at large between them. Much more is involved in these basic differences than can be resolved by a judicial decision or a treaty, or even several of each. It may be that a broad programme for amelioration of the basic problems – political, economic and social – is needed – compare the long standing and continuing efforts of national legislation to redistribute wealth. At this end of the continuum of different situations with which the U.N. deals you have, of course, the technical assistance, development, trade and human rights programmes of the U.N.

In this discussion some attention has been given to the U.N.'s part in settling disputes and stress has been laid on the basic importance of adequate procedures for preventing conflict and for settling disputes. In this area, the U.N. has a fund of experience of its own and of others to refer to: the Secretary-General in quiet diplomacy, the use of fact finding procedures, of rapporteurs, of observation groups and of visiting committees. Let us look in conclusion at just *one* recent development relevant both to broad ameliorative programmes and to the settlement of particular disputes.

The recently established U.N. Conference on Trade and Development provides

first a major attempt to improve the economic lot of the less developed countries, and second, more specifically, a set of interesting procedures for resolving particular differences.[80] The Conference was established as an organ of the General Assembly by an Assembly resolution of December 1964 – the do-nothing Assembly which nevertheless established the first universal trade organisation. The Conference has only recommendatory powers, but these extend over broad and important areas: the promotion of international trade especially with a view to accelerating economic development and particularly trade between countries at different stages of development, the formulation of principles and policies on these questions and the making of proposals for putting these principles and policies into effect. The Afro-Asian members, of course, have a strong voting position in all the organs which like the General Assembly adopt recommendations by a regular two-thirds or simple majority vote. The fear that the less developed countries would force through recommendations which would be unacceptable to the developed states and the realisation by the less developed states that such recommendations would be illusory led to the careful elaboration of a procedure for conciliation before vote. The purposes were first

> to enable resolutions to be adopted with the widest possible support and thus to increase their effectiveness

and second to provide for a more sustained dialogue between the parties with different interests. Conciliation under the relevant Assembly resolution is appropriate in the case of proposals of a specific nature for action substantially affecting the economic of financial interests of particular countries relating to economic planning, trade, monetary policy, economic assistance, levels of employment and treaty rights and obligations. A small number of states can call for the establishment of conciliation committees which are to include states especially affected by the proposals and which are to work by unanimity. It is hoped that in this forum differences will be settled and that meaningful recommendations will accordingly be adopted by the organs of the Conference.

K.J. Keith

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## FOOTNOTES

1. "The Path of the Law" (1897) 10 Harv. L.R. 457, 461.
2. *Building Law Rules and Legal Institutions for Peace* (1965) 3.

3. There are several excellent studies of the application of international law by the International Court of Justice, and no attempt has been made to cover this ground here.

4. U.N. Doc. A/122; G.A.O.R., 1st Sessn (2nd Part), 6th Cttee 227, 233.

5. *Politics Among Nations* (3rd ed. 1961) 90, 91, 426-427. See also e.g. Nicholas, *The United Nations as a Political Organisation* (2nd ed. 1962) 147.

6. "United Nations Resolutions on Space – 'Instant' International Customary Law?" (1965) 5 Ind. JI Int. Law 23.

7. Compare e.g. the opinion of Lord Asquith of Bishopstone in the *Abu Dhabi* arbitration in 1951, (1952) 1 I.C.L.Q. 247, (1953) 47 A.J.I.L. 156, with the Convention on the Continental Shelf adopted at Geneva only seven years later.

8. G.A. Resolution 1514 (XV).

9. 1951 I.C.J. Reps 116.

10. 1951 I.C.J. Reps 15.

11. 1962 I.C.J. Reps 151.

12. See e.g. Dillard's excellent paper, "Some Aspects of Law and Diplomacy" (1957) 91 Hague Recueil 445.

13. U.N. Doc. A/5746, para. 196.

14. See especially Rosenne, "The International Law Commission, 1949-59" (1960) 36 B.Y.I.L. 104; Briggs, *The International Law Commission* (1965). See also Lee, "The International Law Commission Re-examined" (1965) 59 A.J.I.L. 545.

15. See e.g. the report of the Sixth Committee U.N. Doc. A/4605; G.A.O.R. 15th Sessn, Annexes, agenda item 65; Rosenne, loc. cit., 161-164.

16. G.A. Resolution 1505 (XV).

17. U.N. Doc. A/4796 and Add. 1, Annex; G.A.O.R., 16th Sessn, Annexes, agenda item 70.

18. Idem.

19. E.g. by the United Kingdom, idem.

20. By G.A. Resolutions 1815 (XVII), 1966 (XVIII).

21. G.A. Resolutions 1686 (XVI) and 1815 (XVII).

22. G.A. Resolution 2103 (XX).

23. Kennan, *American Diplomacy 1900-1950* (1953) 95-101; *Realities of American Foreign Policy* (1954) 14-26; Morgenthau, op. cit., ch. 18. See also the speech of the Legal Adviser of the State Department concerning the intervention in the Dominican Republic in 1965, discussed by Friedmann, "United States Policy and the Crisis of International Law" (1965) 59 A.J.I.L. 857.

24. *De Iure Pacis ac Belli*, Book 1, Prolegomena, 17, 18.

25. Friedmann, loc. cit.

26. U.N. Doc. A/5746.

27. G.A.O.R., 20th Sessn, 6th Cttee, 877th mtg, para. 18.

28. U.N. Doc. A/6230.

29. Lee, loc. cit., 560-562; U.N. Monthly Chronicle, May 1966, 55-56.

30. See the summary of the arguments in the admirable report prepared by the Secretary-General in 1952, U.N. Doc. A/2211; G.A.O.R., 7th Sessn, Annexes, agenda item 54, paras 207-272; McDougal and Feliciano, *Law and Minimum World Public Order* (1961) 148 ff. Cf. Stone, *Aggression and World Order* (1958).

31. See especially *The Status of Permanent Sovereignty over Natural Wealth and Resources* (1962).

32. G.A. Resolutions 1515 (XV), 1803 (XVII).

33. E.g. G.A. Resolution 1962 (XVIII) and Cheng, loc. cit.

34. See especially Brierly, "The Future of Codification" (1931) 12 B.Y.I.L. 1 reprinted in *Basis of Obligation in International Law and other papers* (ed. Lauterpacht and Waldock 1958) 189.

35. U.N. Doc. A/4879.

36. E.g. Articles 10, 11, 13, 14.

37. See for a recent interesting discussion Higgins, "Development of International Law by the Political Organs of the United Nations"[1965] Proceedings A.S.I.L. 116.

38. 13 U.N.C.I.O. Docs 709.

39. G.A. Resolution 217 (III).

40. G.A. Resolution 1514 (XV).

41. G.A. Resolution 95 (I).

42. G.A. Resolution 1803 (XVII).

43. G.A. Resolution 1962 (XVIII).

44. G.A. Resolution 2131 (XX).

45. G.A. Resolution 1884 (XVIII).

46. U.N. Monthly Chronicle, May 1966, 55-56; Report of the 6th Cttee, 20th Sessn, U.N. Doc. A/6165, para. 21.

47. For a fascinating early analysis of the possibilities see Fisher, "Constructing Rules that Affect Governments" in *Arms Control, Disarmament and National Security* (ed. Donald G. Brennan 1960) 56.

48. For the U.S. view of its right to respond to a breach of the Treaty see (1964) 58 A.J.I.L. 179 discussed by Schwelb, "The Nuclear Test Ban Treaty and International Law" (1964) A.J.I.L. 642.

49. Higgins, *The Development of International Law Through the Political Organs of the United Nations* (1963) provides ample proof of this.

50. E.g. *Admissions* case 1948 I.C.J. Reps 57, 64.

51. 13 U.N.C.I.O. Docs 709.

52. Especially in the *Expenses* case 1951 I.C.J. Reps 151; see also the *Competence of the General Assembly* opinion 1950 I.C.J. Reps 4.

53. For some statistics see Rosenne, "On the Non-Use of the Advisory Jurisdiction of the International Court" (1963) 39 B.Y.I.L. 1, 21-22.

54. P.C.I.J. Pubs, Series B, No. 4.

55. 1948 I.C.J. Reps 57.

56. 1949 I.C.J. Reps 174.

57. 1954 I.C.J. Reps 47.

58. 1962 I.C.J. Reps 151.

59. 1950 I.C.J. Reps 65.

60. Rosenne, loc. cit. note 53, 31.

61. See Russell, *A History of the United Nations Charter* (1958) 664-665.

62. Loc. cit. note 30, para. 82.

63. For a useful discussion see Tae Jin Kahng, *Law, Politics and the Security Council* (1964) 173-192.

64. S.C.O.R., 558th mtg, 3.

65. S.C.O.R., 550th mtg, 19; 552nd mtg, 3.

66. Tae Jin Kahng, op. cit., 216-217.

67. S.C.O.R., 175th-201st mtgs.

68. Resolutions of 29 May 1948 (S/801) and of 15 July 1948 (S/902).

69. G.A. Resolution 816 (IX).

70. G.A. Resolution 812 (IX).

71. G.A. Resolutions 1497 (XV) and 1661 (XVI).

72. Russell, op. cit., 656-657.

73. Annual Review of United Nations Affairs 1962-1963 at 94.

74. Schachter, "The Quasi-Judicial Role of the Security Council and the General Assembly" (1964) 58 A.J.I.L. 960.

75. See e.g. Hammarskjoeld's summary in U.N. Doc. A/3943.

76. P.C.I.J. Pubs, Series A, No. 1.

77. P.C.I.J. Pubs, Series A, No. 17.

78. P.C.I.J. Pubs, Series A, No. 10.

79. 1949 I.C.J. Reps 4.

80. U.N. Doc. A/5749; G.A.O.R., 19th Sessn, Annex No. 13; G.A. Resolution 1995 (XIX). For discussion by a participant see Gardner, "United Nations Procedures and Power Realities: the International Apportionment Problem" [1965] Proceedings A.S.I.L. 232, 239, 243-244.