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The UN75 Declaration, Our Common Agenda and the development of international law

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Abstract

In the declaration on the commemoration of the seventy-fifth anniversary of the United Nations, Member States requested that the Secretary-General provide recommendations to advance "Our Common Agenda" and to respond to current and future challenges. The Secretary-General issued a report entitled "Our Common Agenda" on 5 August 2021, which, among others, reinforces the role of the United Nations as a place of choice for the development of international law, also putting in context the role and specific prerogatives of the Secretary-General in the promotion of international law. The declaration and "Our Common Agenda" have also presented an opportunity to counter sentiments regarding a supposed general decline in respect for international law.

Keywords: Development of international law, role of the United Nations, Our Common Agenda, UN75 Declaration, crisis of multilateralism, compliance with international law.

* The views expressed herein are those of the author and do not necessarily reflect the views of the United Nations.

Introduction

On 21 September 2020, the General Assembly at the level of Heads of State and Government adopted a declaration on the commemoration of the seventy-fifth anniversary of the United Nations (UN75 Declaration) setting out a "common agenda".[1] In the UN75 Declaration, Member States strongly and unequivocally supported international law, declaring that they "will abide by international law and ensure justice".[2] They also declared that "[t]he purposes and principles of the Charter and international law remain timeless, universal and an indispensable foundation for a more peaceful, prosperous and just world",[3] and that "[w]e will abide by the international agreements we have entered into and the commitments we have made".[4] In particular, Member States reiterated "the importance of abiding by the Charter, principles of international law and relevant resolutions of the Security Council".[5] Interestingly, Member States specifically singled out international humanitarian law in the UN75 Declaration, stating that "[i]nternational humanitarian law must be fully respected".[6]

Member States requested that the Secretary-General provide recommendations to advance "Our Common Agenda" and to respond to current and future challenges.[7] The Secretary-General reported back to the General Assembly, issuing a report entitled "Our Common Agenda" on 5 August 2021, which also included references to international law.[8] The General Assembly, in its Resolution 76/6, of 15 November 2021, welcomed the report.[9] It also requested the Secretary-General "to inform Member States and to engage in broad and inclusive consultations with them, all parts of the United Nations system and other relevant partners on his proposals in the report"[10] and called upon the President of the General Assembly:

> to initiate, under his overall guidance, a process of follow-up to enable all Member States to begin inclusive intergovernmental consideration of the various proposals, options and potential means of implementation and on ways to take them forward, in collaboration with all relevant partners through broad and inclusive consultations.[11]

As far as international law is concerned, the report of the Secretary-General contains a number of statements and proposals which reinforce the role of the United

1 United Nations General Assembly Resolution 75/1, Declaration on the commemoration of the seventy-fifth anniversary of the United Nations, UN Doc. A/RES/75/1, 21 September 2020.
2 *Ibid.*, operative para. 10.
3 *Ibid.*
4 *Ibid.*
5 *Ibid.*, operative para. 9.
6 *Ibid.*
7 *Ibid.*, operative para. 20.
8 Report of the Secretary-General, Our Common Agenda, UN Doc. A/75/982, 5 August 2021.
9 United Nations General Assembly Resolution 76/6, UN Doc. A/RES/76/6, 15 November 2021, operative para. 1.
10 *Ibid.*, operative para. 2.
11 *Ibid.*, operative para. 3.

Nations as a place of choice for the development of international law, also putting in context the role and specific prerogatives of the Secretary-General in the promotion of international law. In addition, the UN75 Declaration and the "Our Common Agenda" report have presented an opportunity to counter sentiments regarding a supposed general decline in respect for international law, in spite of the challenges that multilateralism is facing.

The United Nations as a place of choice for the development of international law

The report of the Secretary-General seeks to address a wide variety of issues under four broad headings, namely: strengthening global governance; focusing on the future; renewing the social contract; and ensuring a United Nations fit for a new era. As far as international law is concerned, his report calls for international cooperation that is guided by international law, noting that "consideration could be given to a global road map for the development and effective implementation of international law".[12]

Unlike other subjects mentioned in the UN75 Declaration and in "Our Common Agenda", international law is not, as such, a thematic area entailing programmatic activities. Rather, it is a framework and a tool, which is applicable to most of the questions discussed under "Our Common Agenda". In other words, the development of international law is not just about the adoption of new normative instruments, but also about processes. Normative development also occurs through the establishment, the activation and/or the use of a set of tools and processes that make possible the preparation of new legal instruments and facilitate the implementation of existing international law. The Secretary-General has a specific role to play in this regard.

"Our Common Agenda" singles out four specific actions as part of a global road map for the development and effective implementation of international law that the Secretary-General could take: (i) encouraging more States to ratify or accede to treaties of universal interest such as on disarmament, human rights, the environment and penal matters, including those for which the Secretary-General is the depositary (of which there are over 600); (ii) urging States to accept the compulsory jurisdiction of the International Court of Justice and to withdraw reservations to treaty clauses relating to the exercise of its jurisdiction; (iii) assisting States in identifying and addressing pressing normative gaps; and (iv) understanding reasons for non-compliance, drawing on the Secretary-General's role related to compliance mechanisms.[13] In this regard, it is important to recall that some international humanitarian law treaties, and in particular the Additional Protocols to the Geneva Conventions, which are also of universal interest, have not been universally ratified.

12 Our Common Agenda, above note 8, para. 96.
13 *Ibid.*

Regarding the questions of normative gaps (iii) and of compliance with existing legal regimes (iv), the procedural component is particularly relevant, as the Secretary-General can encourage discussions on normative developments, bearing in mind that the lack of compliance with existing legal regimes does not necessarily mean that new ones are required. Here, too, it appears that the Secretary-General is in a unique position to call upon States to comply with their obligations under international law, and to resolve their disputes in accordance with international law. Most Secretaries-General have done so in a wide range of contexts. Their calls, and reminders, for States' compliance with international law have not only been made publicly but have also been made away from the public eye and to those directly concerned as part of the behind-the-scenes political activity of the Secretary-General. In addition, when encouraging discussions on normative developments, a number of considerations need to be assessed, including the risks of unravelling existing agreements on specific issues.

As part of this road map for the development and effective implementation of international law, "Our Common Agenda" also notes that "[s]tates could consider holding regular inclusive dialogues on legal matters of global concern at the General Assembly".[14] The primary role of States in the development of international law is implicitly acknowledged, and the role of the International Law Commission, established by the General Assembly, is explicitly welcomed, recalling that pursuant to Article 1(1) of its statute, the International Law Commission is entrusted with the mandate of making recommendations for the purpose of "encouraging the progressive development of international law and its codification".[15] Other United Nations intergovernmental bodies, although not specifically mentioned in the Common Agenda, like the Human Rights Council or the United Nations Commission on International Trade Law (UNCITRAL), also contribute to normative developments in specific thematic areas and in accordance with their mandates.

These references, both in the UN75 Declaration and in the report of the Secretary-General, to the development of international law within the United Nations framework reinforce the position of the United Nations as a vital forum for the development of international law. For the last seventy-seven years, the United Nations has demonstrated indeed its unique role both as a place where international law, particularly in the form of multilateral treaties, is developed, and as an actor directly participating in the making and interpretation of international law.[16] The United Nations continues to offer a unique platform and international law framework to address contemporary global challenges being, as it is, the only universal intergovernmental organization with a mandate to maintain international peace and security. It is also the only universal platform

14 *Ibid.*

15 Resolution 174/(II), Statute of the International Law Commission, New York, 21 November 1947.

16 See, in particular, the Conclusions on Identification of Customary International Law, *Yearbook of the International Law Commission*, 2018, Vol. II, Part Two. See the draft Conclusions on Identification of Customary International Law, UN Doc. A/73/10, 2018, available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf (all internet references were accessed in October 2022).

where to discuss legal questions of global concern in line with Article 1(4) of the Charter, which provides that one of the purposes of the United Nations is to be a "centre for harmonizing the actions of nations".[17] Within the United Nations, the Sixth Committee, open to all Member States, is the primary forum for the consideration of legal questions in the General Assembly.

The ongoing discussions within United Nations intergovernmental bodies on a number of issues of global concern, such as the use and misuse of information and communication technologies,[18] are an example of Member States' commitment to the United Nations as a place of choice. Also, the discussions in the framework of the Intergovernmental Conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction[19] underscore the importance of the United Nations as a unique forum specifically for the development of international law.

In some cases, States have held negotiations outside the United Nations framework. In particular, related to international humanitarian law and most particularly to conventional processes on disarmament, the "Ottawa process" relating to anti-personnel mines and the "Oslo process" regarding cluster munitions both took place outside of the framework of the 1980 Convention on Certain Conventional Weapons.

To sum up, the practice of the United Nations, including the most recent one, seems to align with the UN75 Declaration and "Our Common Agenda", which both favour a robust and international law-based approach to international relations. Such statements and practice also provide some indications regarding the actual role of international law – including international humanitarian law – for multilateralism in contemporary international relations.

International law as a tool for multilateralism

In the UN75 Declaration, Member States stated, among others, that: "[o]ur challenges are interconnected and can only be addressed through reinvigorated

17 Article 1(4) of the Charter of the United Nations: "The Purposes of the United Nations are: […] 4. To be a centre for harmonizing the actions of nations in the attainment of these common ends."

18 United Nations General Assembly Resolution 73/27, Developments in the field of information and telecommunications in the context of international security, UN Doc. A/RES/73/27, 11 December 2018 (Open-ended Working Group on Developments in the Field of Information and Telecommunications in the Context of International Security); United Nations General Assembly Resolution 73/266, Advancing responsible State behaviour in cyberspace in the context of international security, UN Doc. A/RES/73/266, 2 January 2019 (Group of Governmental Experts on Advancing responsible State behaviour in cyberspace in the context of international security); United Nations General Assembly Resolution 75/240, Developments in the field of information and telecommunications in the context of international security, UN Doc. A/RES/75/240, 31 December 2020 (Open-ended Working Group on Security of and in the use of Information and Communications Technologies 2021–2025).

19 United Nations General Assembly Resolution 72/249, International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, UN Doc. A/RES/72/249, 24 December 2017.

multilateralism" and that "[m]ultilateralism is not an option but a necessity as we build back better for a more equal, more resilient and more sustainable world", concluding that "[t]he United Nations must be at the centre of our efforts".[20]

The Secretary-General of the United Nations, in his Global Wake Up Call, had already remarked that:

> [t]oday's multilateralism lacks scale, ambition and teeth – and some of the instruments that do have teeth show little or no appetite to bite, as we have seen in the difficulties faced by the Security Council […] A new, networked, inclusive, effective multilateralism, based on the enduring values of the United Nations Charter, could snap us out of our sleepwalking state and stop the slide towards ever greater danger.[21]

In spite of the challenges that multilateralism is facing, it is important to differentiate them from a supposed general decline in respect for international law. Such reflections are not novel and have been heard before, for instance, in the 1960s and 1970s, when the newly independent States were challenging what had formerly been thought of as established international law; also, after the terrorist attacks of 11 September 2001 (9/11), and after the military intervention in Iraq in 2003. While the decline or decreased use of the International Court of Justice has also been declared in the past, States from all regions of the world continue to initiate proceedings before the Court in a bid to seek the peaceful settlement of international disputes, whether stemming from historical or contemporary crises. In the last decade alone, thirty new contentious cases have been commenced before the Court.[22]

Also, it is important to recall that the development of international law has taken different forms and that it cannot be only measured in terms of numbers of treaties adopted. In a number of instances, States have preferred to contribute to its development through soft-law instruments, among others in the field of international humanitarian law.

Those who challenge established rules do so not by rejecting the notion that there is any international law, but by articulating what they claim the law to be, or at the very least what they think the law should be. Others respond, also in the language of international law. In other words, existing rules are reaffirmed or challenged, or they change and adapt, but there is always international law. Thus, what is sometimes perceived as a crisis of international law is often "simply" a lack of consensus among Member States about the current state of the law or about the direction in which it should develop. The practice within the Sixth Committee of the General Assembly of taking decisions by consensus should be recalled. In this regard, the Secretariat has noted that:

20 United Nations General Assembly Resolution 75/1, Declaration on the commemoration of the seventy-fifth anniversary of the United Nations, UN Doc. A/RES/75/1, 21 September 2020, operative para. 5.

21 António Guterres, "Global Wake Up Call", United Nations Secretary-General, 3 July 2020, available at: www.un.org/sg/en/content/sg/articles/2020-07-03/global-wake-call.

22 As of 19 September 2022, the International Court of Justice had been seized with thirty new contentious cases between 2013 and 2022 (twenty-two between 2003 and 2012; thirty-four between 1993 and 2002).

> [i]n the past 10 years, the Sixth Committee has adopted most of its draft resolutions and decisions without a vote. In the exceptional and rare circumstances in which a draft resolution or decision has been put to a vote, the Committee has done so after exploring other possible alternatives for compromise. In some instances, a vote has been requested on a paragraph, while the draft resolution as a whole has been adopted without a vote.[23]

Also, international law is, at the very least, the basic common language that States use when they talk to each other. If there is a crisis of multilateralism, then, that does not imply a crisis of international law, or that international law is no longer an appropriate tool for the conduct of international relations. International law actually provides stability, even when and where other processes and tools fail.

Conclusion

To conclude, while the focus has been in the past on newly emerging situations and the eventual need of new international rules to address them, today, however, there seems to be a recognition that most rules of international law in a traditional sense have not lost their relevance and value. In this regard, it appears that it is not the rules of public international law in general which require fixing, but their implementation both at the domestic and international levels.

Where States consider that eventual normative developments should be discussed, the report of the Secretary-General on "Our Common Agenda" recognizes and recalls, first, the unique position of the United Nations as a key forum for the development of international law, and second, that such development should occur in a principled framework and involve several and diverse stakeholders. Because, ultimately, international law is not only for States but for the benefit of their people.

23 United Nations Secretariat, Note by the Secretariat, Historical and analytical note on the practices and working methods of the Main Committees, fifty-eighth session, Agenda Item 55, Revitalization of the work of the General Assembly, UN Doc. A/58/CRP.5, 10 March 2004, para. 75.