

LECTURE

REFLECTIONS OF THE UNITED NATIONS LEGAL COUNSEL ON THE WORK OF THE OFFICE OF LEGAL AFFAIRS

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14 March 2018

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Washington, DC

Professor Murphy,
Ladies and gentlemen,

It is a pleasure to be with you today. I thank you for the opportunity.

While it is a great honour and a privilege to go to work each day at United Nations Headquarters in New York, which I hope you will all visit, including later this spring when your professor will be working diligently as a member of the International Law Commission during its 70th session, it is also nice, once and a while, to stretch one's legs and get outside the office.

That is what I hope to do today. I will welcome any questions you may have (even if I cannot answer all of them), and I hope we can engage in a fruitful conversation.

We often hear about the future of international law, but I look around this room and I see it. It's you. And students like you, around the world, dedicating their time and substantial energy and intellect to the study of international law. Keep at it. We will all need you in the years to come.

I thought I might start by describing some of the current work of my office. The goal here is to give you a flavour of what I, as Legal Counsel, and my staff, encounter as members of what I consider to be the greatest public international law practice in the world: The United Nations Office of Legal Affairs.

I will try to keep these remarks relatively brief. But I think it is important, for your understanding, as well as for framing our discussion, to describe what we do and how we do it.

First, given that we have an esteemed member with us in the room, let me address the International Law Commission, to which my office provides substantive support.

This year marks the seventieth anniversary of the International Law Commission, which is tasked with promoting the “progressive development of international law and its codification”. It held its first session in 1949 in Lake Success, New York, where the United Nations had its temporary Headquarters at that time.

The mandate of the International Law Commission draws on Article 13, paragraph 1 (a) of the Charter of the United Nations, which explicitly instructs the General Assembly to encourage the progressive development and codification of international law. However, the codification movement predates the Charter by at least a century. It stems from the belief that written rules, rather than unwritten customary international law, form the foundation of a peaceful international order.

Early codifiers tended to consider their project a technical exercise, requiring them to clinically distil and write down rules derived from diplomatic practice. The League of Nations established a “Committee of Experts on the Progressive Codification of International Law” for this purpose in 1924, and convened an ambitious Codification Conference in 1930. The Conference did not live up to expectations, as delegations failed to reach consensus on most of the agenda items.

This experience demonstrated that codification involves more than mechanically transcribing customary international law into written agreements; it also requires the progressive development of new rules, to fill gaps and resolve conflicts – a political as much as a legal exercise.

These lessons were reflected in the Statute of the International Law Commission. It also encourages the Commission to actively interact with governments, who are regularly invited to comment on the Commission’s work. Every year, the Commission submits a detailed report of its session to the Sixth (Legal) Committee of the

General Assembly, where the report is extensively debated by legal advisers from capitals.

In addition, the Commission can rely on the dedicated support of my office, the Office of Legal Affairs, which through its Codification Division has served as the Commission's secretariat and research resource since the Commission's inception.

A brief glance at the past seventy years reveals the significant contribution of the International Law Commission to the codification and progressive development of international law.

Many instruments resulting from the work of the Commission, such as the Vienna Convention on the Law of Treaties and the Articles on the Responsibility of States for Internationally Wrongful Acts, have become part of the fabric of the international legal order. The Commission laid the foundations for the Vienna Conventions on Diplomatic and Consular Relations; pioneered the codification of the law of the sea; and contributed to the establishment of the International Criminal Court. It has also branched out to specialized fields of international law, making important contributions to international water law and the law on the protection of persons in the event of disasters, among others.

That brings us to today. Under the theme "Seventy years of the International Law Commission: Drawing a balance for the future" the Commission will be commemorating the seventieth anniversary of its first session with events in New York and Geneva. The two events, the proceedings of which will be published in a book, reflect both the political and legal aspects of the Commission's work.

As part of the celebrations, the Commission will enter into a dialogue, consisting of a series of panels, with delegates to the Sixth Committee of the General Assembly. Commission members and delegates will reflect on the relationship and interaction between the Commission and the Sixth Committee, from a legal and political perspective.

With regard to its programme of work, the Commission has completed many of the items that it identified at its first session in 1949, when it surveyed the field of international law to select topics ripe for codification. At the same time, international law has continued to evolve over the past seven decades.

Here, I would like to emphasize that codification is not a static process: rather than halting the progressive development of international law, it sets a new benchmark from which international law can flourish.

The Commission continues to build on its own work. For example, while the Commission initially focussed on the law of treaties, it has now expanded its work on the sources of international law to include the topics Identification of customary international law and Peremptory norms of general international law (*jus cogens*).

The Commission's current programme of work demonstrates its continuing relevance to the progressive development of international law and its codification. For example, last year the Commission adopted, on first reading, draft articles on Crimes against humanity, under the expert guidance of Special Rapporteur Sean Murphy, your very own Professor.

The draft articles seek to complement other international instruments in the field of international criminal justice. We at the Secretariat look forward to the second reading of the draft articles and, perhaps, to a possible convention.

During the commemorative events in New York and Geneva this spring and summer, the Commission will seek the input of others in determining what pressing international legal questions to address next.

To conclude, the Commission has a lot to celebrate this year, but its work is not done. While the topics on its agenda might have changed, the Commission continues to serve as the centre of gravity for the progressive development of international law and its codification. The seventieth anniversary of the Commission provides an excellent opportunity to, as the theme of the commemoration has it, "draw a balance for the future".

As for the past seventy years, the Office of Legal Affairs will remain at the Commission's side as it revisits old questions and pursues new avenues.

Allow me to move to another subject that is salient right now, and that is the forthcoming Intergovernmental Conference on an international legally binding instrument under the United Nations Con-

vention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.

It's a mouthful, I know. In the parlance of the office we have shortened it to "BBNJ", which as you can imagine makes for much easier discussion at meetings.

The importance of marine biodiversity to the health of our planet and life on earth cannot be overstated.

For example, marine biodiversity produces a third of the oxygen that we breathe, moderates global climate conditions, provides a valuable source of protein for human consumption, and is host to many organisms of interest to various sectors, including the pharmaceuticals industry.

However, the pressures on marine biodiversity are increasing. The First World Ocean Assessment indicates that the world's oceans are facing major pressures simultaneously, with such great cumulative impacts that the limits of its carrying capacity are being or, in some cases, have been reached. It concluded that if these problems are not addressed, there is a major risk they will combine to produce a destructive cycle of degradation in which the ocean can no longer provide many of the benefits that humans currently enjoy from it. These observations are valid both within and beyond national jurisdiction.

It is estimated that areas beyond national jurisdiction cover nearly 60% of the world's oceans.

The scope of these areas is set out in the United Nations Convention on the Law of the Sea, which provides the legal framework within which all activities in the oceans and seas must be carried out, including for the conservation and sustainable use of marine biodiversity.

In short, areas beyond national jurisdiction comprise all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State (the high seas) as well as those areas which encompass the seabed and ocean floor and its subsoil beyond the continental shelf of coastal States (the Area). The high seas and the Area are governed by two very different

regimes – the freedom of the high seas and the common heritage of mankind, respectively.

In addition to the United Nations Convention on the Law of the Sea, several other international and regional instruments are also relevant to the conservation and sustainable use of BBNJ. Numerous sectoral organizations have competence in areas beyond national jurisdiction, including in relation to fishing and shipping to name but a few.

The conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction, including questions as to whether there is a governance or regulatory gap and if so how it should be addressed, has been the subject of extensive discussion in the General Assembly over the past 15 years.

Based on the recommendations of a Working Group mandated to study issues relating to BBNJ, the General Assembly decided, in 2015, to develop an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction. To that end it established a preparatory committee to make recommendations on the elements of a draft text of such an instrument.

The Preparatory Committee reported to the General Assembly in July 2017. On the basis of its report, the General Assembly decided, in a resolution adopted on 24 December 2017, to convene an Intergovernmental Conference to consider the Preparatory Committee's recommendations on the elements and to elaborate the text of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction, with a view to developing the instrument as soon as possible.

The convening of this Conference, the first session of which will take place in September 2018, will be an historic event. Following on from the adoption of the United Nations Fish Stocks Agreement in 1995, this Conference will be the first time in more than 20 years that States have convened to negotiate a legally-binding international instrument under the United Nations Convention on the Law of the Sea.

There are several substantive issues to be addressed in these negotiations.

The General Assembly has decided that the negotiations should address a package of issues related to the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction.

The first topic is marine genetic resources, including questions on the sharing of benefits. In simple terms, marine genetic resources are genetic material of plant, animal, microbial or other origin containing functional units of heredity and of actual or potential value. According to the Organisation for Economic Cooperation and Development, the global marine biotechnology market, the worth of which was estimated at 2.8 billion dollars in 2010, was thought to increase annually by 4 to 5% according to most conservative estimates. This shows the significance of discussions on marine genetic resources.

As I mentioned earlier, the high seas and the Area are subject to different legal regimes. There are diverging views on the application of these regimes – that is the freedom of the high seas or the common heritage of mankind – to marine genetic resources of areas beyond national jurisdiction. Views are also divided on whether it is necessary to agree on the applicable legal regime to consider practical ways to share benefits.

Further discussions are required on these and other issues, including on whether the instrument should regulate access to marine genetic resources; the nature of these resources; what benefits should be shared; whether to address intellectual property rights; and whether to provide for the monitoring of the utilization of marine genetic resources of areas beyond national jurisdiction.

The second topic to be addressed is measures such as area-based management tools, including marine protected areas. There is a convergence of views on the importance of these measures, consistent with international law, as a tool for conservation of biodiversity and sustainable use of its components. However, there are differing views and further discussions are required on the most appropriate decision-making and institutional set up, with a view to enhancing cooperation and coordination, while avoiding under-

mining existing legal instruments and frameworks and the mandates of regional and/or sectoral bodies.

The third topic is environmental impact assessments. Both the International Court of Justice and the International Tribunal for the Law of the Sea have confirmed that the obligation to conduct an environmental impact assessment is a general obligation under customary international law. States hold differing views on many questions, including on the degree to which the process should be conducted by States or be "internationalized", as well as on whether the instrument should address strategic environmental impact assessments. Further discussion on these and other issues will be required.

The fourth topic to be discussed is capacity-building and the transfer of marine technology. There is a general recognition that both these aspects are fundamental to the conservation and sustainable use of marine biodiversity. However, further discussions are required on certain issues, including the terms and conditions for the transfer of marine technology.

Finally, the Conference will also discuss cross-cutting issues such as the relationship of the instrument with the UN Convention on the Law of the Sea and other instruments, as well as the relationship between possible institutions established under the international instrument and relevant global, regional and sectoral bodies. Other issues include guiding approaches and principles, institutional arrangements, how to address monitoring, review and compliance, funding, dispute settlement and responsibility and liability.

Another topic that has gathered a lot of interest, and has kept us very busy in recent months, is criminal accountability.

Within the United Nations, the Office of Legal Affairs is the lead entity in combating impunity for atrocity crimes. Since the 1990s, at the behest or instruction of the United Nations legislative bodies, in particular the Security Council, the Office of Legal Affairs has supported the establishment and operationalization of tribunals to pursue accountability for perpetrators of the most serious crimes.

In the last 25 years, the principle of individual criminal responsibility, particularly with respect to acts of senior government officials, has gained significant traction in international law, and has grown to become a well-accepted concept in general. Two of the pioneer institutions in contemporary international criminal justice, the International Criminal Tribunals for the former Yugoslavia and for Rwanda, have now finished their work: the ICTR closed its doors on 31 of December 2015 and the ICTY on 31 December 2017.

Since the establishment of the ICTY, we have seen a flourishing of various entities established to ensure accountability. In the last two decades, as you know, there has been a proliferation of new forms of United Nations-assisted tribunals, and of domestic tribunals with some level of international assistance, so as to hold those responsible for serious violations of international law.

Further, we have also seen an increased interest in establishing non-judicial international accountability mechanisms. Particularly in contexts where it is difficult to foresee effective accountability, there is an increasing appetite for, at a minimum, gathering and securing evidence in the interim so that such evidence can be used in national, regional or international courts that may in the future have jurisdiction over these crimes.

In this regard, the General Assembly established, in December 2016, the new International, Impartial and Independent Mechanism, or the “Triple-I, M”, to assist in the investigation and prosecution of persons responsible for the most serious crimes under international law committed in Syria since March 2011. It has not yet been made operational but we expect this to happen in the next months.

More recently, the Security Council requested the Secretary-General, in September 2017, to establish an Investigative Team to support domestic efforts to hold ISIL (Da’esh) accountable, by collecting, preserving, and storing evidence in Iraq of acts that may amount to war crimes, crimes against humanity and genocide committed by ISIL in Iraq.

Let me give you an idea of what happens once the Secretariat receives a request from a UN legislative body to establish an accountability mechanism. I think this will shed some light on how these projects move from conception to implementation.

Generally speaking, legislative bodies request the Secretary-General to make criminal accountability mechanisms operational.

On some occasions, the Secretary-General has been requested to enter into agreements with Member States in this regard. This was the case for the establishment of the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia or the Special Tribunal for Lebanon.

On other occasions, the Secretary-General has not been asked to enter into international agreements but to develop directly the necessary tools that would allow an accountability mechanism to start its operations. For example, in its resolution 2379 (2017), on Iraq, the Security Council requested the Secretariat to draft Terms of Reference for the operation of an Investigative Team.

The Terms of Reference are to be considered as the main constitutional document of the Investigative Team and contain important provisions concerning, amongst others, the Team's mandate, its guiding principles and its composition.

In both scenarios, while my Office carries the responsibility of drafting documents of this nature, these are consultative processes, in which we first consult with all relevant departments and entities within the United Nations system to ensure that the Terms of Reference were comprehensive, and addressed the United Nations' system's concerns as a whole.

We also usually consult with civil society partners, in order to understand the pertinent and practical issues that we ought to take into consideration. Key Member States are often also consulted, to have a good understanding of their expectations or concerns.

In the case of the recent resolution on the establishment of an Investigative Team in Iraq, the Security Council specifically requested that the Secretary-General consult the Terms of Reference of the Investigative Team with the Government of Iraq.

This is quite unusual as, in general, constitutional documents of international bodies are not discussed or agreed with concerned Member States. In this case, as the Security Council intended for the Investigative Team to operate within Iraq territory to collect evidence, it was integral that the Government of Iraq accepted the

Terms of Reference of the Investigative Team, to ensure Iraq's future cooperation.

Once the first foundational steps are completed, the Secretariat starts the process of establishing the accountability mechanism on the ground. This includes both an identification of the needs of the future mechanism and recruitment processes of its key members.

Last but not least, once an accountability mechanism is established and commences its operations, my Office continues to provide legal support for the duration of its operations, in particular, providing guidance on the interpretation of its foundational instruments as well as, as appropriate, on United Nations policies and standards.

Let me conclude on this point by saying that it is crucial that we leverage the experience and knowledge in criminal accountability, not only to improve the functioning of the existing institutions so as to ensure that they operate with efficiency, but also to establish future international criminal justice mechanisms that are capable of fulfilling their purpose and mandate effectively. This is the only way to ensure that the integrity of the international criminal justice process is maintained and sustained for a long time to come.

Finally, allow me to address a few aspects of our support to the Organization's peace operations. As you can imagine this gives rise to very challenging, not to mention very impactful, legal questions.

Peacekeeping is a critical on the ground capacity for the UN not only to contain conflicts, but also to rebuild countries devastated by conflict. Currently, there are over 100,000 troops and civilian police serving in 15 different peacekeeping operations around the world.

Lots of interesting legal issues come up in the context of peacekeeping, which is highly operational, dynamic, and political in nature.

These range from interpreting the Security Council resolution which provides the mandate for an operation; to drafting a status of forces agreement with the country hosting the peacekeeping operation; to reviewing the rules of engagement for the military

which set forth the legal parameters under which force may be used by that operation.

It also includes advising on legal arrangements with partners. We are increasingly engaging with the EU and the AU in peace operations, and only recently advised on arrangements with the EU in respect of the G5 operation in the Sahel to address counter-terrorism in Mali.

It also includes accountability issues – whether how to ensure accountability for crimes committed by our personnel, or how to ensure accountability when others commit crimes against our personnel.

There are also many interesting private-law matters.

Just to give you a sense of these – they include matters like; what to do when someone offers you a “pro bono” aircraft; large scale procurement in respect of delivering goods and services to peacekeeping operations in remote and hostile locations; advising on how to handle complex multi-jurisdictional matters when things go wrong – for example, such as when there is a crash of an aircraft with personnel on board from many different countries. Who investigates, and what standards are used?

All these kinds of issues, and more, are addressed by my Office daily.

I will now speak in a little more detail on some of the latest trends in UN peacekeeping, and how these impact on our work. These include more robust mandates; mandates to protect civilians under threat of physical violence; increasingly working with partners; and heightened efforts to address sexual exploitation and abuse.

While peacekeeping operations have traditionally monitored cease-fires with the consent of the parties to the conflict, and only used force in self-defence (and this continues to be the case in some of the older Missions such as UNTSO and UNDOF in the Middle East, and MINURSO in Western Sahara), the Security Council is increasingly giving peacekeeping operations much more complex, multidimensional mandates, often involving robust use of force elements.

For example, in 2013, the Security Council established the “Intervention Brigade”, a special combat force as part of MONUSCO in the Democratic Republic of the Congo. The Intervention Brigade is mandated ‘to carry out targeted offensive operations to prevent the expansion of all armed groups, neutralize these groups, and to disarm them”.

The Force intervention example is a particularly evocative example of peace enforcement. By peace enforcement, I mean the use of military force to *compel* peace in a conflict.

Traditional peacekeeping comes after peace, or at least a ceasefire, has been reached between parties to a conflict, to monitor the implementation of the ceasefire or peace agreement.

While mandates to perform enforcement tasks are not new in UN operations, this is a particularly robust mandate, and has raised issues about the application of international humanitarian law to UN forces.

While the applicability of international humanitarian law to UN forces used to be a contentious issue, today the issue is not so much whether the UN force is bound by international humanitarian law, but rather, what are the ramifications for UN peacekeeping?

There is no issue about the UN applying international humanitarian law. Relevant international humanitarian law principles are regularly incorporated into the rules of engagement of a force, and are to be applied at all times where conditions for their application arise.

Overall, UN peacekeeping operations remain premised on the basic principles of peacekeeping: consent; impartiality; and non-use of force except in self-defence, or defence of the mandate. In this regard, they are different from peace enforcement actions, notwithstanding that their mandates may include peace enforcement tasks.

For the most part, the States contributing troops to UN peace operations do not expect their personnel to become engaged in armed conflict, and become subject to the application of international humanitarian law.

There are, of course, serious practical consequences of a UN operation becoming a party to an armed conflict, including that:

- Members of the military, together with military objects, would be legitimate military targets;
- Civilians, including UN police and any unarmed military observers, would be entitled to protection as civilians. However, to the extent that they take “a direct part in hostilities”, they would lose their protected status and be considered a legitimate target. Certain activities which support the conduct of hostilities, may, depending on their nature, such as the transportation of military personnel and supplies to the military units engaged in hostilities, entail that civilians who undertake them might be considered as taking “a direct part in hostilities”;
- Further, if the UN operation were to provide logistics support for combat operations by other forces, as UN operations are increasingly doing – (for example by MINUSMA in Mali, and UNSOM in Somalia), many of the objects related to logistics support, such as fuel and transport, could be deemed military objectives, insofar as they would make “an effective contribution” to military action. As such, civilians involved in handling or transporting such objects, would be at risk of attack.

Moreover, under the Rome Statute, attacks against peacekeepers in situations of both international and non-international armed conflicts will not be considered “war crimes” if the peacekeeping operation has become a “party to an armed conflict”.

Since the 1990ies, the Security Council has also increasingly mandated operations to protect civilians under threat of violence, and authorizing them to “use all necessary means” in order to do so.

Peacekeeping operations in South Sudan, Abyei, Darfur, Central African Republic, Mali and the Democratic Republic of the Congo all have this mandate and legal authority. Although these mandates are restricted in that they are subject to the availability of resources, and geographically limited to areas where peacekeepers are deployed, they provide a crucial means to prevent and stop violent attacks on civilians.

This brings me to the situation in the UN Mission in South Sudan (UNMISS). UNMISS is authorised under Chapter VII of the Charter to “use all necessary means” to “protect civilians under threat of physical violence, irrespective of the source of such violence”, which could include Government forces.

While UNMISS has a robust mandate, and includes a 4000 strong Regional Protection Force to maintain security in Juba, it carries out its protection of civilians (POC) mandate in a unique way. Since 2013, the Mission has been sheltering over 100,000 internally displaced persons in camps throughout the country.

This development has led to considerable operational and legal challenges – in particular, how to address serious criminal acts within the “protection of civilians” sites, which present a risk to the safety of other internally-displaced persons, as well as UN personnel.

On the legal side, the challenges have arisen in terms of how to manage persons who pose a serious security risk to others in circumstances in which (i) UNMISS cannot hand over such persons to the Government on account of human rights concerns as to their possible treatment post handover; (ii) in which the Mission cannot expel them from the POC site, also on account of human rights concerns; and (iii) in circumstances in which UNMISS does not have any executive powers to charge and prosecute such persons for criminal offences.

These challenges have required significant legal advice, including on the procedures outlining when UNMISS can detain such persons on security grounds, and the need for regular independent review of such detention to ensure that it is consistent with basic human rights principles.

MINUSMA is a particularly telling example of a UN peacekeeping mission that was created and currently operates in the midst of a conflict.

The Mission can and must use force to protect civilians and to prevent the return of armed elements to inhabited areas of the Sahel desert in Mali. That mandate leaves the offensive action against terrorists, and armed groups who refuse to participate in the peace process, to other military actors, namely: the Malian Armed Forces,

and French Forces. This “sharing of responsibilities” has not been sufficient in achieving peace since the Mission was created in 2013.

Terrorists and so-called “non-compliant armed groups” are back in the north and the centre of the country, while also threatening neighbouring countries. The threat from these terrorist groups over the whole of the region has prompted the Council to request, last December, that MINUSMA also support a new regional force, with financing provided by the European Union: the Joint Force of the G5 Sahel, a group of countries that share borders with Mali.

The support which MINUSMA will provide is limited to logistics (medical evacuations, provision of fuel and water, construction of camps). It is also limited to Mali. MINUSMA is not expected to carry out offensive operations against terrorists with the G5 Sahel or other military actors.

Nonetheless, this new mandate may lead to a perception that the Mission is gradually drawn as a party into the conflict in the Sahel region.

In addition, the support to the G5 Sahel Force requires that the UN monitor the conduct of the G5 Sahel soldiers, to ensure that the UN does not condone, or facilitate, military operations that violate human rights and/or international humanitarian law. This, after all, would be exactly the contrary of one of MINUSMA’s core mandates in Mali: to protect civilians.

I hope that overview helps to illuminate some aspects of our work. I have not been able to address everything, but this should give you an idea of the breadth and depth of the practice.

As I said at the outset, the Office of Legal Affairs is a tremendous place to practice public international law.

At the end of the day, we have one ultimate master, and that is the Charter, the objectives of which include “sav[ing] succeeding generations from the scourge of war”, “reaffirm[ing] faith in fundamental human rights”, “establish[ing] conditions under which justice and respect” for international legal obligations can be maintained and “promot[ing] social progress and better standards of life in larger freedom”.

Those words have a way of clarifying the mission, and making the difficult daily work of the Office of Legal Affairs a little more worth it.

Thank you. I look forward to our discussion.
