THE CRISIS OF THE RULES OF INTERNATIONAL LAW AND THE NEED FOR GLOBAL REFORM

AHMED AMIN FATHALLA*

Introduction

The content of this essay and its analysis is based on my experience as a practitioner of international law within the UN system for more than 40 years—comprehensive practical experience in the development of international law as a representative of a State (Egypt) negotiating international legal instruments, a lawyer in the UN Secretariat, as well as an independent legal expert, a former chair of the UN Human Rights Committee, and a present member of the UN International Law Commission.

The United Nations Charter, adopted in the wake of the Second World War, is the basic international legal document reflecting the will of the international community. The Charter set the tone for the basic legal principles and obligations governing the relations between the members of the United Nations. It also defined the role of the organization in achieving the aims and objectives stipulated in the Charter, as well as ways and means to develop rules of international law and their application. Two factors should be taken into account with respect to the will of the international community at the time of the drafting of the Charter. The first is the exclusion of the States which lost the Second World War from contributing to the establishment of the new legal regime reflected in the Charter. The second is the limited number of independent States participating in the exercise. Consequently, and in order to avoid the failure of the system as well as to take into account new developments, there was a need to develop, on a regular basis, the rules of international law set up in the Charter. This was necessary to take into consideration not only the huge increase of

* Member, International Law Commission; Chair, United Nations Human Rights Committee (2019-2020); former Ambassador of Egypt to the Kingdom of the Netherlands, Governor of Egypt to the Common Fund for Commodities and representative of Egypt to the International Court of Justice, the International Criminal Court, the Permanent Court of Arbitration and the Hague Conference on Private International Law.

the number of States members of the UN and the emergence of new military and economic powers, but also the role played by non-State actors within the UN system such as non-governmental organizations and private entities. In other words, there is a need for the UN as an interstate organization and its Charter to evolve in a manner that takes into account the role played by additional international stakeholders.

The present essay will address a number of challenges facing the legal system set up by the Charter, in particular those which relate to the maintenance of international peace, security, and the peaceful settlement of disputes.

It is important to note that in other aspects and areas, international law has been successfully developed, at least partially, as in the case of human rights.

In dealing with the above-mentioned two subjects, I will address a limited number of issues as concrete examples. The focus on the subject of international peace and security will not address certain issues like the rules of international law governing the use of outer space, the law of the sea convention, and the law of the sea tribunal etc. When addressing human rights, the focus will be on the International Covenant on Civil and Political Rights.

This approach will allow me to focus on limited issues in order to address them in detail and hopefully with enough clarity to allow the reader to go in-depth and evaluate my assessment of the crisis of the rules of international law.

I will address in this essay the present rules of international law, their development, both in terms of success and failure, in these two fields, as well as the ways and means to reform and strengthen the present international legal system.

The Peaceful Settlement of Disputes and the Maintenance of International Peace and Security

Failure to respect the main principles of the Charter on the settlement of disputes by peaceful means and refraining from the threat or use of force (Article 2 paragraphs 3 and 4 of the UN Charter) is on the rise. Moreover, only a limited number of disputes have been settled by peaceful means in accordance with Chapter 6 of the Charter. This is primarily due to two factors. First, the law of force and not the force

of law continues to govern international relations. Second, the imbalance of power among member states. These two factors affect negatively not only negotiations as a way to settle disputes, but also other ways and means such as mediation and conciliation, stipulated in Chapter 6 of the Charter. Unfortunately, most of the mediation and conciliation efforts, mostly undertaken by Special Representatives and/or Envoys of the Secretary General have had limited success in resolving conflicts. Meanwhile, UN members have been hesitant to resort to judicial settlement. Such judicial settlement could be through arbitration or the International Court of Justice (ICJ). The hesitation to resort to arbitration is due to the difficulty of the parties to agree on the procedure of the "*compromis d'arbitrage.*"

As for the ICJ, the main judicial organ of the United Nations, the hesitation to resort to it is manifested by the fact that, since 1946, the Court has considered only 181 cases translating into a mere 2.4 cases per year.[1] In disputes between two States, the competence is granted to the Court in two cases. The first one is consensual jurisdiction, according to which States may declare the jurisdiction of the ICJ as compulsory without any special agreement in relation to any other State accepting the same obligation.[2] In this regard, not all States have granted such consent. For those who did, they can withdraw it. The second one is the submission of the conflict to the Court based on a special agreement.[3] In these cases, Article 59 states that, "the decision of the court has no binding force except between the parties and in respect of the particular case."[4]

Unfortunately, although the decisions are formally binding, since there are no international enforcement measures, the judgments of the court can be ignored. The main issue with the UN system, including the ICJ, is not the qualification of the decisions as binding, but the ways and means to implement such decisions. The Court has no tools for their implementation.

---

[1] Report of the International Court of Justice 21-35, U.N. Doc. A/76/4 (July 31, 2021).
[2] Statute of the International Court of Justice, art. 36(2).
[3] *Id.* at art 36(1).
[4] *Id*. at art. 59.

The Court also has the competence to issue advisory opinions on legal issues referred to it by the UN organs and specialized agencies.[5] Such advisory opinions are by their nature non-binding. Another issue of great importance, which makes its use irrelevant at present, is the use in the Statute of the term "civilized nations" in sub-paragraph c of Paragraph 1 of Article 38, which states that:

> The Court, whose function is to decide in accordance with the international law such disputes as are submitted to it, shall apply:
> …
> c. The general principles of law recognized by civilized nations.[6]

There is no basic rule of law setting the criteria of who are these civilized nations. This concept also ignores the precept that rules of international law should be general and accepted by all the Nations who are part of the present international system. Unfortunately, this terminology has been utilized in other organs and instances within the UN system, when discussing the application of rules of law. This is in particularly clear in the deliberations of the Human Rights Committee and the use by some experts of this concept.

These are two examples which should lead the international community to undertake reforms to the Statute of the Court, in order to make its decisions more effective and also encourage non-parties to the Court to become parties on the understanding that its decisions will in the future be not only binding, but also implemented.

Chapter Eight of the UN Charter[7] accords a main role to regional arrangements in achieving the peaceful settlement of local disputes before they are referred to the Security Council. The Security Council can also take the initiative to refer such conflicts to the regional arrangements. However, recently we have witnessed the reverse: regional organizations are choosing to refer such cases to the Security Council. This has led to the internationalization of these conflicts, thereby rendering peaceful solutions more complicated. They

---

[5] *Id.* at art. 38.

[6] Statute of the International Court of Justice, art. 38(1).

[7] U.N. Charter, arts. 52, 54.

also defeat the discipline of law reflected in both Articles 2 paragraph 3 and Chapter Eight referred to above.

In addition, both the General Assembly of the United Nations and the Security Council frequently failed to implement resolutions adopted under the provisions of Chapter Six of the Charter. Most of these resolutions, even those adopted repeatedly on a yearly basis for more than half a century, were never implemented. Moreover, no reference is made to other General Assembly resolutions of significant importance like the "Definition of Aggression"[8] (GA resolution A/3314 of 1974). Other resolutions, such as "Uniting for Peace,"[9] adopted in 1950 as the result of the Korean crisis, was only used once in 1957 by it instead of the Security Council to establish the first UN peacekeeping force in Sinai, the United Nations Emergency Force 1 (UNEF1).[10] Subsequently, it was used exclusively as a mechanism to convene Emergency Special Sessions of the General Assembly. This led to the deterioration of the situation between the conflicting States, which in many cases affected neighboring States in the region and beyond adversely, with the clearest example being the flow of refugees with its negative economic and social effects.

These negative effects went as far as the non-implementation of obligations by States Parties of the 1951 Refugee Convention, in particular the duty of *non-refoulement*.[11] Conversely, rules of national law and bilateral agreements have been formulated lately contradicting the provisions of the Convention. Also, some discriminatory practices vis-à-vis refugees are taking place depending on their State of origin. The effects of the refugee issue were also extended to create problems related to food security, human rights, and the environment, with a direct bearing on international peace and security.

Also, the Security Council has often failed to fulfill its main task of the maintenance of international peace and security. This is mainly due to the right of veto attributed to the five Permanent Members. The threat to use, or the actual use, of this prerogative has been

---

[8] G.A. Res. A/3314 (1974).

[9] G.A. Res. 377A (1950).

[10] UNITED NATIONS PEACEKEEPING, https://peacekeeping.un.org/en.

[11] 1951 Convention Relating to the Status of Refugees, 14 Dec. 1950, 189 U.N.T.S 137, art. 33 (entered into force 28 July 1951).

implemented to protect the interest of a permanent member or to defend its friends and allies. As a result, the condemnation of Permanent Members has been impossible, even though breaches of international peace and security by these States are often much more dangerous compared to those effectuated by a non-permanent member. This is due to the fact that the Permanent Members – who are also nuclear weapon States – possess exceptional military strength. The use of the veto power has more often than not paralyzed the application of Articles 41 and 42 related to economic and military sanctions and thereby limited its application in cases involving small- or medium-sized States not protected by a permanent member of the Security Council. Most importantly, the use of the veto right gave the opportunity to powerful States, mainly the five permanent members, to unilaterally impose economic or military sanctions outside the scope of the United Nations, in clear violation of the UN Charter and thus the rules of international law – moreover, often dictating that other states observe such unilateral decisions. Such violations confirm that the law of force is still prevailing over the force of law, thereby necessitating major reforms to the existing international system.

It is also noteworthy that restricting the veto right to the five Permanent Members is discriminatory and contradicts the essence of the rule of law which should be general and applied equally to all its subjects, either individuals in domestic laws or States, when it comes to rules of international law. In addition, it is illogical to apply the veto right to issues like peacekeeping operations. While peacekeeping operations cannot take place without the consent of the State concerned, they can only be established by the support of five Permanent Members. The establishment, maintenance and expansion of peacekeeping operations can only be taken by the decision of the Security Council. This is based on a wide interpretation of the responsibility of the Security Council under both chapters VI and VII. As the Charter does not contain any reference to peacekeeping operations, they are referred to as "Chapter VI and a half" operations. The first peacekeeping operation UNEF1 was established, not by the Security Council, but by the General Assembly on the basis of the "Uniting for Peace" resolution. Since then, and due to the position taken by some permanent members

that peacekeeping operations should only be established by the Security Council, all peacekeeping operations were exclusively set up by the Security Council.

The time is therefore appropriate for the international community to find a way to reflect this important innovation - not foreseen in the Charter - in a widely accepted legal instrument.

In this case, the General Assembly should play the major role in setting the criteria and mechanism for creating peacekeeping operations and leave their application to the Security Council. The right to exercise veto power should be excluded in this case.

Instead of positively developing some concepts of international law that are already reflected in the UN Charter, they were developed in a negative manner thereby contributing to the deterioration of international peace and security.

Two examples are the concepts of self-defense and the use of force. An expansion of the concept of self-defense articulated in Article 51 of the UN Charter took place by referring to the new concept of preventive self-defense. This new concept contradicts the essence of article 51, which stipulates that self-defense necessitates the occurrence of an armed attack.

The principle of refraining in international relations from the threat or use of force as stipulated in Article 2 paragraph 4 has been undermined by referring in recent UN resolutions to the new concept of "excessive use of force."[12] This has resulted in the limitation of condemnation in most of the recent cases depending on the qualification of the excessive use of force. This contradicts the concept of the threat or use of force stipulated in the UN Charter. This has led to a major shift and a violation of the principle of non-use of force by limiting in many cases the condemnation to only excessive use of force. This has created the impression that the mere threat or use of force is no longer to be condemned.

---

[12] *See* Security Council Resolution 788 (1992); *see also* Christopher Greenwood, *International Law and the Conduct of Military Operations*, 75 INT'L L. STUD. (2000); SEAN MURPHY, HUMANITARIAN INTERVENTION (1996); FERNANDO TESON, HUMANITARIAN INTERVENTION (2nd ed., 1997).

In addition, the absence of criteria related to endangering international peace and security (article 34) leaves this issue ambiguous and subject to differing interpretations and thus political judgment. This resulted in the unequal treatment of States taking similar actions. Again, such approaches are in contradiction to the basic rules of law, which should be general and applied equally to all States.

Also, what has added to the need to reform the present system of international law related to the maintenance of international law and security, is the weak role of the General Assembly in the event that the Security Council fails to discharge its responsibilities by its failure to adopt decisions. In this case, a decision by the General Assembly should be made by a two-thirds majority of the members present and voting. Such decisions when adopted are not legally binding and lack the necessary tools for implementation and therefore are merely recommendations with only moral effect.

The repeated adoption of General Assembly resolutions on a particular issue should constitute a rule of customary international law. This is not the case up to now, because the implementation of repetitive General Assembly resolutions is rare and is subject to political will.

Other resolutions, although not referring to conflicts but containing important principles of international law, as is the case with the General Assembly resolution on the definition of aggression, are not used as a legal reference. The only binding General Assembly resolutions are those related to the UN budget and elections.[13]

The increasing number of activities financed from voluntary contributions also deserves special attention. Voluntary contributions are subject to the discretion of member States and are thus unpredictable. Given that UN humanitarian and development agencies (*e.g.*, the UN Children Fund UNICEF, the World Food Program (WFP) and the UN High Commission for Refugees (UNNHCR)) are largely financed from voluntary contributions, their activities are always at risk. This makes it all the more evident that rules are needed to regulate such contributions independent of any political influence of contributing States.

Giving more power and privileges to the Security Council compared to the General Assembly composed of all members of the

[13] U.N. Charter, art. 17.

UN, seems legally out of place in the first quarter of the 21st century. It contradicts the democratization of the international regime. The failure of the Security Council to effectively address cases of threat or breach of international peace and security is mostly attributed to the involvement, directly or indirectly, of one of the five permanent members in a conflict.

Other examples of concepts that endanger the international legal system set up for the purpose of maintaining international peace and security can be summarized as follows:

1. The lack of legal criteria differentiating legal foreign support from sending foreign fighters, mercenaries and contractors. This has allowed individual States to provide their own qualifications and interpretations. Politics and not the rule of law became the decisive factor.
2. The failure of the General Assembly to agree on a convention on terrorism proposed half a century ago, but never adopted. That was due to the inability to agree on a definition of terrorism, including the issue of State terrorism.

Some progress, however, has been made on how to address the issue of terrorism in the last twenty years by the adoption of General Assembly Resolution 60/288 in 2006 on a UN Global Counterterrorism Strategy. This Strategy is based on four pillars: Prevent, Pursue, Protect and Prepare, and it is revised bi-annually. Unfortunately, the strategy does not contain a definition of terrorism and does not address the issue of State terrorism. The resolution of these two issues is still pending in the draft convention on terrorism. The result is that individual States make their own judgment on what constitutes an act of terrorism. This has often led to interference in the internal affairs of States under the pretext of combatting terrorism. Such interference is a violation of Article 2 paragraph 7 of the UN Charter which prohibits interference in the internal affairs of States.

Other issues related to the maintenance of international peace and security are not legally addressed in a way to guarantee a well-balanced rule of law. Amongst these issues are the highly critical and important rules related to disarmament in general and nuclear proliferation in particular. The Treaty on Non-Proliferation of Nuclear

Weapons (NPT) is based on three pillars. The first is the commitment of non-nuclear States not to acquire nuclear weapons and the second is the obligation of nuclear States to achieve a general and complete nuclear disarmament. The third is the right of Non-Nuclear Weapon States to have access to nuclear technology for peaceful purposes. Whereas Non-Nuclear Weapon States have met their obligations, Nuclear Weapon States have even dragged their feet in meeting their obligations. The result is that the ultimate goal of the Treaty: general and complete disarmament, including nuclear disarmament, remains elusive. Regrettably, Review Conferences held at five-year intervals have not been successful in convincing Nuclear-Weapon States to meet their treaty obligations.

No more is this obvious than in the case of ignoring the follow-up of implementation of decisions addressed to nuclear States on issues involving specific States with a special military relationship with a superpower. The clear example is the failure to implement the 1995 resolution on the Middle East Zone Free from Nuclear Weapons.

Meanwhile, Nuclear States – although having reduced the number of nuclear warheads – have strengthened their destructive nuclear capabilities to almost the extent of making the related provisions of the NPT in this regard almost obsolete. The Stockholm Institute for Peace (SIPRI), while acknowledging that the number of nuclear warheads decreased to 12,705 in January 2022 compared to 13,080 in January 2021,[14] expects an increasing role for nuclear arms in the military strategies of the nuclear powers.[15]

In addition, tactical precision-guided nuclear weapons that would make such weapons equivalent to strategic weapons in their effects are being developed. The threat of their possible use is increasing, an issue which should be seriously and urgently addressed by a legally binding framework. The recent phenomenon of withdrawal from bilateral disarmament treaties further undermines the international arms control and disarmament regimes.

---

[14] *Global nuclear arsenals are expected to grow as states continue to modernize - New SPRI Yearbook out now*, STOCKHOLM INT'L PEACE RSCH. INST. (June 13, 2022), https://www.sipri.org/media/press-release/2022/global-nuclear-arsenals-are-expected-grow-states-continue-modernize-new-sipri-yearbook-out-now.

[15] *Id.*

In dealing with the peaceful uses of nuclear energy in the NPT, the International Atomic Energy Agency (IAEA) plays a pivotal role. Although the safeguard system of the IAEA in its original version has been largely successful, an additional protocol was adopted imposing more obligations on non-nuclear States in relation to their nuclear peaceful activities without paying regard to the fact that Nuclear Weapon States have yet to meet their initial obligations. This has led a number of non-nuclear States not to join the additional protocol.

Last and not least, is the inability of the United Nations Conference on Disarmament to make any progress over the three past decades, including not agreeing on its agenda.

In addition to the negative development of the rules of international law mentioned above, the international community failed to address important emerging legal issues. The clear example is related to the issue of the ever-increasing role of non-State actors.

An emerging parallel issue is the inability of the existing legal international system to address activities undertaken by individuals or private entities. Specifically, their economic and financial activities which can affect the balance of the present system set up in the UN Charter based on the behavior and activities of States. For example: what can be the long-term repercussions of the financial contributions by private entities to a number of UN entities? Will such contributions influence the decision-making process, which is, by the Charter, limited to States? The only exception being the International Labor Organization (ILO), which has a tripartite membership system (governments, employers and workers).

The second example is the control of internet by private entities. Such entities, whether by providing or withholding vital information, can have an effect on the maintenance of international peace and security. Such a phenomenon is expected to increase in the future, particularly in outer space. This could make role of the private entities as important as the role of some States in relation to peace and security.

Therefore, there is an urgent need for legal rules to regulate such activities in parallel with the development of technologies controlled by private entities. Such steps will contribute to the maintenance of international peace and security. Elements like food security, refugees and environmental issues are already an integral part of what

constitutes threats to international peace and security. Therefore, the rules of law embodied in the UN Charter or other related instruments should be developed including setting up mechanism of implementation in order to guarantee their application.

Before concluding this section on international peace and security, I will address the newly developed legal system of the International Criminal Court, which is the first international criminal tribunal to be established on a permanent and not ad-hoc basis like the previous ones.

Although individuals and not States are the subjects of the Court, the Court's connection to international peace and security is quite clear through paragraph 3 of the preamble which recognizes that the grave crimes covered by the Rome Statute threaten peace and security and the wellbeing of the world. Paragraph 7 of the preamble establishes the link with the UN Charter by "[r]eaffirming the purpose and principles of the UN Charter of the United Nations in particular that States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, and in any other manner inconsistent with the purpose of the UN."[16] Also, the link to international peace and security is related to the nature of crimes addressed by the Court namely, genocide, crime against humanity, war crimes and the crime of aggression. The exercise of the jurisdiction of the Court is by referral to the prosecutor by a State Party or by the Security Council under Chapter 7 or to be initiated by the Prosecutor General on the basis of information on crime within the jurisdiction of the Court. In this case investigation is to start after the authorization by the trial Chamber.

As is the case in any criminal law and jurisdiction, Article 25 of the Rome Statute is clear that the competence of the tribunal is related to natural persons who commit, order, solicit or induce or any other contribution. Article 27 states clearly that no immunities are granted including for the Head of State.

The importance of Article 103 emanates, in my opinion, from the fact that a clear procedure of enforcement is stated and has been

---

[16] U.N. General Assembly, *Rome Statute of the International Criminal Court* (*last amended 2010*), 17 July 1998, ISBN No. 92-9227-227-6, https://www.refworld.org/docid/3ae6b3a84.html.

applied. This, as previously explained, is not the case in the majority of decisions taken within the legal regime embodied in the UN Charter. This may be due to the fact that the sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons. Therefore, such sentence of imprisonment shall be binding on the State Party and thus implemented. It will be subject to the supervision of the Court (Article 106). Some facts in regard to the ICC should be noted. The first one is the reluctance of a number of States to become Parties to the Statute. This is due, in my opinion, to either the refusal of States that their citizens be a subject to international jurisdiction or that the issue of immunity for the heads of States is not granted.

The second fact is that individuals who were subject to the jurisdiction of the Court are from developing countries. The third fact is related to the power of the Prosecutor General. It was noted lately his reluctance to initiate investigations, in spite of the fact that information on the crime within the jurisdiction of the Court was available.

Human Rights Issues

In this section, I will deal with human rights issues for three reasons. First is the importance attributed to this subject by the UN Charter. One of the purposes of the UN Charter is to promote and encourage respect for human rights and fundamental freedoms for all. Most of the details have been elaborated by the UN members in a later stage. Second, it is my conviction that the respect of human rights strengthens the maintenance of international peace and security and has a direct link to the peaceful settlement of disputes. It cannot be denied that protecting the right to life, which is a basic human right in the International Covenant on Civil and Political Rights, contributes to strengthening international peace and security. This view is confirmed in paragraph 69 of General Comment 36 on Article 6, the right to life of the Covenant.

> Wars and other acts of mass violence continue to be a scourge of humanity resulting in loss of many thousands of lives every year. Efforts to avert the risk of

> war and any other armed conflict and to strengthen international peace and security, are among the most important safeguards for the right to life.[17]

Third, the development which took place in relation to the implementation, through specific mechanisms, as well as the adaptation of the rules of law on human rights to new facts set a good example which can be followed on other issues.

Also, the non-settlement of disputes by peaceful means constitutes a non-respect of the obligation to ensure the right to life. This has also been confirmed by paragraph 70 of the same General Comment which states that: "States Parties that fail to take all reasonable measures to settle their international disputes by peaceful means, might fall short of complying with their obligation to ensure the right to life."[18]

I will exclude from my present analysis the UN political organs addressing human rights, namely the General Assembly, the Economic and Social Council as well as the Human Rights Council. Such exclusion is based on my assessment that deliberations and decisions are left in these UN organs solely to the discretion of States. Therefore, politics play a vital role in that regard.

I will focus my analysis on the Covenant of Civil and Political Rights. This Covenant is one example of the ten treaty bodies dealing with different aspects of Human Rights. This comprehensive regime is designed to operate independent of any political influence. This is ensured by the mechanism in charge for monitoring the implementation as well the development of the existing rules of law embodied in the Covenant is constituted of independent experts representing different forms of civilizations and legal systems.

The political impartiality of the independent experts is based on the following foundations:

> 1. Every member of the Committee shall before taking his duties, make a solemn declaration in an

---

[17] U.N. Human Rights Committee, General Comment no. 36, Article 6, ¶ 69, 3 Sept. 2019, CCPR/C/GC/35, https://www.refworld.org/docid/5e5e75e04.html [hereinafter Right to Life].

[18] *Id.* at ¶ 70.

> open Committee meeting that he will perform his functions impartially and conscientiously.
> 2. Members must be persons of high moral character and recognized in the field of human rights.
> 3. Members of the Committee serve in their personal capacity, not as representatives of the Governments. Therefore, the proceedings of the Committee should be politically impartial. Additional guarantees have been adopted in guidelines as well as the rules of procedures in order to promote such impartiality. For example, a Committee member does not participate in the consideration of a periodic report submitted by the State of which he or she is a national, or in the adoption of concluding observations thereon.

Nor does a Committee member take part in discussion of a complaint under the optional protocol that is directed against his or her Country. The practice in this regard evolved lately to cover his or her non-participation even if the complaint is not directed against his or her Country but involves his or her country or a national belonging to his or her Country in a complaint filed against another Country.

In my opinion, political impartiality is guaranteed to a large extent, but other factors can affect this impartiality. The main factor is that the nomination of the candidate is to be submitted for election by a State Party. It has been noticed in several cases that the eligibility of such nomination is linked to the political affiliation of the candidate. Thus, the candidate depends on the government or administration in place at the time of submitting the name of the candidate to be subject for election.

Also, the election of a candidate depends, in addition to his or her qualifications, on the amount of support granted to him by his country, its weight on the international scene, and the lobbying seeking the support to the candidate by other States Parties.

In order to avoid that, I am proposing that all nominations by States be submitted at a preliminary stage to an independent legal committee, which should draw up a shortlist of the candidates based only on their personal capacities as well as their representations of different

legal systems and civilizations. The names included in the shortlist shall be submitted to vote by States Parties.

> 4. As for the representation of the members of the Committee of different forms of civilizations and legal systems, the provision of Article 31 paragraph 2 of the Covenant is general. It states that "in the election of the Committee, consideration shall be given to equitable geographic distribution of membership and representation of the different forms of civilizations and the principle legal systems."[19] Unfortunately, the general terms of article 31 lead in most of the cases to imbalance of representation giving an edge to one or two forms of civilizations and principal legal systems. This has led in many instances, including when adopting general comments, to the prevailing of some concept of law over others. In order to overcome this problem, a clear allocation of number of seats should be attributed to different legal systems and regions, as is the case in the International Law Commission. This approach will also enhance the impartiality of the Committee as a whole because decisions and recommendations will not favor a legal system or civilization. This is a crucial point to be considered when developing future rules of international law in this regard.

The focus of this essay, as previously stated is, on the one hand, the implementation of the rules of law and, on the other hand, the development of the rules of international law.

In order to cover these two subjects, I will avoid dealing with the substantive rules of law in the Covenant and will focus – when speaking about the implementation – on how the Committee on Human Rights is moving on this issue when addressing both States' Reports as well as the individual Complaints under the optional protocol.

---

[19] G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (16 Dec. 1966).

A position paper was adopted by the Chairperson meeting of all ten treaty bodies held in New York in June 2019. The Chair's vision was welcomed by the States Parties to the Covenant when presented to them in Geneva July 2019 meeting. This has encouraged the Human Rights Committee to proceed in applying the guidance contained in the Chair's vision.

The realistic and practicable common vision aimed to focus, coordinate and streamline the reporting process and dialogue. This will facilitate at a later stage the implementation of the Committee's concluding observations on State reports and therefore the implementation of its legal obligations set forth in the Covenant. The reporting is now taking the form of a simplified reporting procedure. By such procedure, the Committee addresses a limited number of specific questions (twenty) to the State Party. The reply to these questions will constitute the State report and will lead to short, focused, concrete and prioritized concluding observations limited in number (also twenty). Three urgent ones are to be selected for response by the State Party within a fixed period of time. For these three concluding observations, criteria have been agreed upon by the Committee for their selection, which includes mainly the urgency and capability of the State to report on them within the above-mentioned limited period of time. Also, coordination with the other Committees is taking place in order to ensure that substantive similar questions in the same time period are not addressed. The aim is to avoid duplication, thus alleviate the burden incumbent on the State Party to several treaty bodies, and to make the task much easier for them to be able to implement the recommendations issued by different Committees.

The above mentioned confirms the ability of the Committee not only to facilitate the implementation of the Covenant by States Parties, but also to develop the rules of international law already existing in the Covenant.

This leads to the need to address the implementation issue, which is not only limited to the implementation of the provisions of the Covenant but also the implementation of concluding observations and views adopted by the Committee.

The starting point for the implementation by the States Parties of the provision of the Covenant is their obligation to submit an initial report followed by periodic reports to the Committee. A fixed agenda

for eight years has been accepted and implemented. During this period, the process of preparing, discussing and adoption of recommendations is to take place.

Upon the submission of the written report, it is to be translated into the official languages of the United Nations and posted on the website of the Office of the United Nations High Commissioner of Human Rights. Also, the civil society may provide their own submission to the Committee. The submission of the civil society of a common consolidated report will qualify it as "Shadow Report."

The Committee examines the reports of the State Party and the Civil Society. It can also hold unofficial meetings with the civil society requesting clarifications on a number of issues raised in their reports. The reason for such meeting is due to the fact that civil society, although allowed to participate as observers during the oral discussion of the State report, cannot make any intervention or provide any clarification. Such interventions and clarifications are limited only to a constructive dialogue between the members of the Committee and the representatives of the relevant State Party.

The oral discussion starts with opening remarks made by the head of the delegation. Such opening remarks usually include a brief presentation of the written replies provided in the form of a report as well as any related developments, which took place in the State Party after the submission of its written report. This presentation is followed by questions to be raised by the members of the Committee and the related replies provided by the representatives of the State. Such questions usually focus on deepening the understanding of the written replies and the development, which took place thereafter.

After the conclusion of the oral dialogues, the delegation of the State is granted forty-eight hours to provide the Committee with additional information.

As a result of the dialogue, the Committee adopts concluding observations. Such concluding observations contain positive and negative aspects of the States Party implementation of the Covenant. In the negative aspects, the Committee identifies three recommendations to be dealt with by the State Party on a priority basis.

In order to achieve the aim of the implementation by the State Party of the concluding observations, it should widely disseminate them with a view to raising awareness among the judicial, legislative

and administrative authorities, civil society and non-governmental organizations operating in the country as well as the general public and should also ensure that they are translated into the official languages of the State Party. Such dissemination in the official languages will assist all the stakeholders to give effect to the concluding observations.

As for the three observations to be dealt with by the State Party on a priority basis, this is done through the role assigned to the special rapporteur on follow-up of concluding observations, a post which was established in 2001 and allocated to a member of the Committee for two years.

The State is requested to provide the Special Rapporteur no later than three years thereafter, information on the measures it has taken to implement the three specific issues. The assessment made by the rapporteur of the follow-up information is presented to the Committee including recommending further steps to be taken by the Committee.

The assessment made by the Committee will be included in its annual report presented to the General Assembly of the United Nations. This is the reason that, in the majority of cases, States Parties try to avoid the inclusion by the Committee in its report of negative assessments concerning its non-implementation of the Covenant. Such inclusion will constitute a proof of non-compliance by the State Party to its obligations. As for the remaining concluding observations, their implementation is to be reflected in the next periodic report of the State Party.

A similar approach is followed for the implementation of the remedy recommended by the Committee of a violation by the State Party to the additional protocol on individual complaints.

In case the Committee finds a violation by a State Party to the additional protocol, the State Party is requested to provide an effective remedy in conformity with the Committee's view. Through the follow-up rapporteur on views, who is a member of the Committee designated by the Committee for two years, the Committee receives information within 180 days on the measures taken to give effect to the Committee's views. Based on this information, an assessment is undertaken by the Committee to be included in its annual report submitted to the General Assembly of the United Nations. It is to be noted, that in accordance with article 1 of the optional protocol:

> A State Party to the Covenant that becomes a party to the present protocol recognizes the Competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of violation by the States Party of any of the rights set forth in the Covenant.[20]

In accordance with Article 5, the Committee shall consider communications received under the protocol in the light of information made available to it by individual and by the State Party concerned, in a meeting and shall forward its views to the State Party concerned and to the individual. Therefore, the mechanism on which is based the implementation has proven in general to be efficient.

Also, the elaboration of general comments as described above has with no doubt contributed to the development of international law on a purely legal basis with a minimum political influence by the States Parties, whose opinions and comments are taken care of by the Committee of Human Rights in advance and way before the adoptions by the Committee of the general comments. At present the Committee adopted thirty-seven general comments, which constitute a major contribution to the development of the provision and rules of law embodied in the Covenant and their adaptation to new realities.

Focusing on the above two major areas does not mean that in other areas rules of international law have been developed and implemented the way they should be.

COVID-19 has proven that the rules of the World Trade Organization (WTO) and the way globalization has been perceived was of limited success, not only for developing countries, but also for developed countries for whom at an initial stage most of the rules served their interests.

As for the critical issue of the environment, although rules of international law related to the different aspects of the protection of the environment have been adopted, but their implementation is far

---

[20] Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

from being respected, leading to continuous deterioration of the environment. This has pushed the Human Rights Committee to deal extensively with the relation of the environment with the right to life in paragraph sixty-two of its general comment, which states that "environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the present and future generations to enjoy the right to life."[21]

Another issue related to the development and implementation of international law is the diminishing role performed by some organizations. The clear example is the diminishing role of the United Nations Industrial Development Organization (UNIDO). The peak of the performance of this organization was in the 70's of the last century by setting, developing and applying rules of international law related to industrial development, in particular cooperation between developed and developing countries. Another example is the shrinking role of UNCTAD, which has become much less important in the issues of trade and development.

Some Proposals of the Reforms Needed

We should admit that the existence of an international organization, in our case now the United Nations, is vital because the concept of a supranational organization is not realistic. What is needed is an overall reform to be based on rules of law and their enforcement as much as possible.

The following proposals could contribute to achieving this aim:

1. The existing foundation reflected in the Charter of the UN based on the sole role played by the States members of the UN is logical because the contracting Parties are States, but due consideration should be given to the codification of complementary roles of other stakeholders. These new stakeholders have an increasing role on the international scene (*i.e.*, civil society and private entities). A clear legal framework setting their role as contributing to the

[21] Right to Life, *supra* note 17, at art. 62.

development and implementation of international law has to be agreed upon by the States members of the UN in consultation with them.

2. Definitions and criteria of the terminology used in different legal instruments should be clear in order to avoid vagueness, which could lead to different definitions from different States, satisfying their political ambitions. This has led to confusion as described in the first section of this Chapter. It has also contributed to several cases in which the law of force has prevailed over the force of law.
3. Rules of international law and their application should be general, *i.e.*, equally applied to all States. At present, this is not the case, thus rendered the rules of law not only weak, but also shedding doubts about their implementation or even the value of being respected, if this can be avoided. Therefore, adjustments are needed to render the application of the rules of law equally to all States with no exceptions.
4. The democratization of the UN system based on the respect for the principle of the equality of States and therefore gradually abolishing privileges granted to some countries in UN organs or the reference to the term of "civilized nations" as found in the Statute of the ICJ. Such approach distinguishes between and discriminate against States; this should not be acceptable in the 21st century.
5. Non-politicization, as much as possible, of the process used for the elaboration of the rules of international law and their interpretation. This will imply the involvement of independent experts in such process. This is the present case of the general comments adopted by the Human Rights Committee. It sets a precedent and an example if followed in the elaboration and interpretation of other rules of law, this will constitute a major improvement.

6. The need to codify, in a legally binding international instrument, new concepts and instruments that evolved after the adoption of the UN Charter, such as the peace keeping operations.
7. The need to introduce mechanisms for the implementation of existing and future legal instruments. Such mechanisms should also be incorporated in resolutions adopted by the General Assembly and the Security Council as well as any other UN organs or agencies. For example, the usual paragraph in the General Assembly and Security Council resolutions requesting the follow-up by the Secretary General of the UN has proven not to be sufficient without a clear mechanism for the follow-up and implementation.
8. Due to the absence of verbatim records at the UN interpretation of legal obligations should not be left to the sole discretion of the State members, but renowned international experts should assist in order to reach a well-founded legal interpretation not based on a merely political assessment.
9. Avoid as much as possible the politicization of the work of the ILC submitted by the commission to the General Assembly by giving the guidance to it much in advance before finalizing its work. This will imply that, when discussing the result of the work of the ILC by the General Assembly, a minimum adjustment will take place. Such procedure should also be followed by any other UN organ mandated to elaborate an international legal instrument in different fields.
10. Finding ways and means to implement decisions of the ICJ. For example, the non-implementation by a party to the conflict should lead to deprive it from the right to vote in the General Assembly, as is the present case for members not paying their financial contribution for two years.

11. Setting a time limit for the tasks of special envoys or Representatives of the Secretary General to resolve peacefully a dispute, which is renewed on a yearly basis by the Security Council. If no result is achieved after a certain time limit, the legal aspects of the conflict should be submitted by the General Assembly to the ICJ for an advisory opinion.
12. In the process of election of different experts in the UN Committees, the political role of States should be reduced. This will be achieved by attributing the task of drawing up a short list of candidates presented by States to an independent committee, to draw a short list based only on their qualifications. Only those who are incorporated in the list should be subject to the vote. Such a list should also reflect a fair representation of all regions, civilizations and legal systems.