Mainstreaming international law within the United Nations

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The United Nations recently has engaged itself in a series of activities regarding respect for the rule of law. Most of these focus on the promotion of the rule of law within the domestic orders of member states, in the context of inter-state relationships as well as in the context of conflict management and post-conflict activities (through, inter alia, the establishment of international tribunals, truth and reconciliation commissions and the reform of national human rights institutions).

This quest for greater respect of the rule of law brings to light the need to suggest new approaches to the role that international law plays within the United Nations itself as well as in the context of the increasingly large range of activities and operations carried out by the Organization. International law should play a greater role in these circumstances, not only for the sake of coherence in its implementation, but also because an explicit adherence to the dictates of international law by the United Nations in its own activities would provide a strong example to States,
stress the relevance of international law in international action and strengthen norms of international law.

The first step towards achieving this goal would be a more proactive recognition by the United Nations of the relevance of principles and norms of international law. In addition to the taking into account of the UN Charter, the resolutions and decisions of UN organs and the commitments of the Organization with respect to principles and norms (for example, international humanitarian law principles), consideration of the various principles and rules that are binding upon States with which the Organization is engaged should become a standard practice. This is not to say that the Organization never takes such rules and principles into account. However, where it does, it does so mostly on an ad hoc basis, due to particular circumstances, or because the acknowledgement of a said corpus of norms has a particular role to play, as for example human rights principles in the context of counter-terrorism activities. This plea for a more comprehensive and coherent approach in the taking into account of international law binding upon member states would help both to increase the legitimacy of the UN’s activities and to strengthen its accountability in legal terms. Because they are defined through law-based processes and thus commonly accepted by all parties concerned, principles and rules may constitute important parameters of predictability as well as accountability.

Since the end of the cold war, the scope of the UN collective security system has expanded significantly to cover new areas. This is raising new challenges regarding the relevant regulatory framework of decision and action. These new UN activities can extend to complex UN peace-keeping and peace-building mandates with civil, economic, social, political and military dimensions. It is important to identify the standards, principles and rules that are applicable to those actions - not only the ones that are binding upon the Organization, but also those binding upon member States. Yet the issue of the legal framework applicable to such action remains partly unanswered. Other activities such as the United Nations’ issuing of sanctions and management of the “Oil for Food” Program in the aftermath of the 1991 Gulf War, as well as the United Nations’ involvement in the “International

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Advisory and Monitoring Board for Iraq” following the U.S.-led armed intervention of 2003 raise similar questions.\textsuperscript{6}

This call for mainstreaming international law is a companion to the constitutionalist approaches that focus on the primacy of certain norms and values as enshrined in the UN Charter and other international law instruments. By focusing predominantly on the operational activities of the Organization and their enshrinement in law, this approach takes the Organization’s contribution to international law beyond the issue of respect for the UN Charter or the question of the allocation of competences between the main bodies of the United Nations (i.e., the Security Council, the General Assembly, and the Secretary-General) and the checks and balances test. It intends to broaden the scope of the rule of law.

Yet it should be stressed that this plea does not aim at prejudicing Article 103 of the UN Charter. This provision establishes the primacy of the Charter over other international treaties in the event of a conflict between Member States’ obligations under the Charter and their obligations under any other international agreement. It creates a normative hierarchy in case of conflict of norms. However, the point here is precisely that it is better to avoid creating a conflict of norms with widely accepted treaty rules of, for example, an economic or environmental nature, in the first place by ensuring that conflicts do not arise through inadvertence (such as that of the Security Council when, pre-occupied by the problem of terrorism, it imposed “smart sanctions” against alleged terrorists without paying sufficient attention to the fundamental procedural rights of the individual). Security Council measures, and UN actions in general, which consciously complement the existing framework of international law norms will not be less effective as enforcement measures. On the contrary, a closer alliance between such actions and the existing corpus of international law will add to their acceptability and effectiveness.

The time is ripe to attempt to think about the regulation of UN Security Council action from a broad perspective, which, however, does not preclude the functioning of Article 103, based on respect for not merely principles of human rights\textsuperscript{7} and humanitarian law, but also other key norms of international law. This would result in greater “transparency” in the work of the United Nations and would contribute to the establishment of mechanisms and processes that ensure accountability according to objective criteria such as standards and rules negotiated and adopted by all the relevant actors. The UN Charter and the Security Council resolutions should be


\textsuperscript{7} In Resolution 1244, the UN Security Council stated that “the main responsibilities of the international civil presence will include: j) Protecting and promoting human rights.” S.C. Res. 1244, supra note 4, para. 11(j).
complemented by other regulatory instruments. In this context, it is interesting to note that Security Council Resolution 1244 on the administration of Kosovo refers explicitly to human rights principles.\(^8\) However, the obligations involved in the proper administration of a territory may well extend beyond the observance of human rights principles, which might not be able to cover all activities.\(^9\) Why not take into account other principles such as those related to the management of natural resources or principles of international economic law? Other sets of norms and standards may also be taken into account such as the good practice guidelines emanating from professional associations, which have been relied upon from time to time.\(^10\) It might be time to shed more light on them.

The scope and content of the respect for the rule of law within and by the United Nations itself, as well as issues of legitimacy, transparency and accountability in that context, deserve to be addressed more thoroughly.

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\(^8\) See id.
