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A Grotian Moment

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A GROTIAN MOMENT

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The community of nations has entered a new era. The international system that sustained us in the past has yet to be replaced. We are in the process of building a new international system, and we are doing so under unprecedented conditions.

The outset of the modern age, some three and a half centuries ago, was an uncertain time, filled with both promise and peril. The foundations for a stable and progressive system of relations among States were laid, at that time, by Hugo de Groot (1583-1645), known as Grotius, the father of international law. Perhaps today we have come to another such "Grotian Moment" in history, one in which a renaissance of international law is needed to help transform the world scene in this new era that all States have entered.

The United Nations (or "Organization") was established fifty years ago to further peaceful and cooperative relations among States. Its creation was based upon the recognition that collective security, shared values, and cooperative problem-solving could be in each state's own interest. Today, these matters remain of fundamental importance. The United Nations, however, now operates in a world where the major forces are global and internal. The result is a paradox: the institutions created for peaceful and cooperative relations among States are now needed to sustain the States themselves from new global and internal pressures.

The Organization confronts this paradox in its daily efforts. It has therefore been forced to find new approaches to fulfilling its objectives within the original framework of the Charter of the United Nations (or "Charter").¹ In the process, the United Nations is helping to put forth new rules of international law. It is helping to shape a new international system. This is particularly evident in the effort undertaken by the United Nations at the jurisdictional level in the field of international peace and security.

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1. June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 (amended 24 U.S.T. 2225, T.I.A.S. No. 7739).

Throughout most of the United Nation's history, the primary threat to international peace and security has been aggression by one State against another, but the bipolar system fashioned by the Cold War helped to maintain an overall international peace. With the collapse of that order, long suppressed political and ethnic rivalries have burst forth. They have erupted into violent conflict in many newly independent States, as well as in many parts of Africa. Appalling cruelty, human rights violations, and crimes of war have taken place.

At the same time, therefore, that global pressures are challenging all States from above, some States are being torn apart from within. In some places, State institutions have collapsed. Such conflicts and confrontations within States are now more prevalent than wars between them.

Yet, it would be dangerous to assume that international conflict has been forever relegated to the past. The traditional problems of international peace and security, originally contemplated by the founders, still exist. And so the principles of the United Nations laid out in Article 2 of the Charter — respect for the territorial integrity of Member States, preservation of the political independence and sovereignty of Member States, and the inadmissibility of the acquisition of territory by force — remain valid and must be upheld. The same is true for the mechanisms established to further positive relations among the nations of the world. Both the principles and mechanisms are fundamental to addressing the new problems.

It is for this reason that on the jurisdictional level, a primary objective of the United Nations has been to encourage and facilitate the use of the International Court of Justice (or "Court") by its Member States. The Court, established under Article 7 of the Charter and serving in accordance with Article 92 as the principal judiciary organ of the United Nations, had a record number of fourteen cases before it from 1993 to 1994. Twelve of these were contentious cases as opposed to advisory opinions. Of considerable political as well as legal importance, these cases underscored the potential of the Court not only to settle questions of law, but also to serve as an integral part of U.N. peace efforts.

An example is the case concerning the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*. On February 3, 1994 the Court delivered its judgment in this case, finding that the boundary

between the Libyan Arab Jamahiriya and the Republic of Chad was defined and determined by the Treaty of Friendship and Good Neighbourliness concluded on August 10, 1955, by France and the Libyan Arab Jamahiriya. On April 4, 1994, in the Agreement signed at Surt (the "Agreement"), the parties pledged themselves to abide by the judgment of the Court. Upon the request of the parties, the Security Council, by Resolution 915² of May 4, 1994, established the United Nations Aouzou Strip Observer Group ("UNASOG") to observe the implementation of the Agreement. This case shows how the United Nations can help parties to implement a Judgment of the Court. It also highlights the role of the Court, in cooperation with the Security Council, as an important component of the peacemaking apparatus of the United Nations as a whole.

It is this role that moved me to recommend in "An Agenda for Peace" that the Secretary-General might be authorized to take advantage of the advisory competence of the Court. In the same report I called for increased support for the Trust Fund established to assist countries unable to afford the cost involved in bringing a dispute to the Court. Since then, the Trust Fund has received broad support from all regions of the world; it has been utilized in two cases thus far, and others are pending.

A new type of situation, found in today's conflicts, has spurred the innovative development of jurisdictional measures beyond those envisioned for the International Court of Justice. This arises when serious violations of international humanitarian law, accompanying an internal conflict, create a situation that threatens international peace and security.

This was the situation faced by the Security Council in Bosnia and Herzegovina in early 1993. At this time the war in the former Yugoslavia had been under way for more than a year and a half, the center shifting from Slovenia to Croatia and then to Bosnia. From the beginning, appalling brutality had marked the conduct of the parties. It was in Bosnia, however, that evidence of international crimes first surfaced, including mass executions, mass rapes, concentration camps, and "ethnic cleansing." Despite the Security Council's repeated calls for the parties to comply with their obligations under international humanitarian law, and despite my establishment, upon the request of the Council,

2. S.C. Res. 915, U.N. SCOR, 3373d mtg., U.N. Doc. S/RES/915 (1994).

of a Commission of Experts to report on evidence of grave breaches of this law in the former Yugoslavia, the breaches continued.

By February 1993 the Security Council had determined that the situation posed by continuing reports of widespread violations of international humanitarian law in the former Yugoslavia constituted a threat to international peace and security. Immediate action was required. The Security Council, in its Resolution 808³ of February 22, 1993, decided in principle to establish an international tribunal in the former Yugoslavia to put an end to such crimes and to bring the perpetrators to justice, thereby contributing to the restoration of peace.

Less than 100 days later, by Resolution 827⁴ of May 25, 1993, and acting under Chapter VII of the Charter, the Security Council created The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991. The use of Chapter VII placed all States under a binding obligation to carry out this decision, including the State parties to the conflict. In essence, the Council has created as an enforcement measure a subsidiary organ, but one of a *judicial* nature, to apply existing humanitarian law in the former Yugoslavia.

This is the first such tribunal to be established not by the victors in war, but by the entire international community, acting through the United Nations. In the absence of a permanent international criminal tribunal, or even an international criminal code, the international community sought a way to deal with serious violations of international humanitarian law, occurring within the context of an increasingly brutal internal conflict, albeit with inter-State dimensions. The international community summoned the will to apply its traditional United Nations instruments to a new kind of threat, involving matters of substance that have heretofore been avoided.

Thus, the establishment of the Tribunal under Chapter VII of the Charter was a bold and inventive act. And while the legal basis for its establishment is its most strikingly innovative aspect, the Statute of the Tribunal also broke new ground in dealing

3. S.C. Res. 808, U.N. SCOR, 3175th mtg., U.N. Doc. S/RES/808 (1993).

4. S.C. Res. 827, U.N. SCOR, 3217th mtg., U.N. Doc. S/RES/827 (1993).

with the highly complex substantive legal issues regarding the Tribunal's competence, as well as with the detailed procedural and organizational aspects of its work.

Of critical importance in this effort was the widespread involvement of both State and non-State actors. When the Security Council took its decision in principle to establish the Tribunal on February 22, 1993, it was silent on the constitutionally controversial question of the legal basis for its establishment. The Council requested me to prepare a report within sixty days on the effective and expeditious implementation of its decision. I endeavoured to prepare a report, including as well a draft Statute, that would be responsive not only to the particular situation in the former Yugoslavia but also to the wider legal and political concerns of the international community. My report of May 3, 1993, which was adopted in its entirety by the Security Council in its Resolution 827⁵ of May 25, 1993, thereby creating the Tribunal, benefitted greatly from the suggestions and observations put forward by Member States, regional organizations and arrangements, the Commission of Experts, and the International Committee of the Red Cross, as well as non-governmental organizations and individual experts.

The establishment of the International Tribunal for the Former Yugoslavia has thus been a monumental advance. It dealt with a pressing new problem through the creative application of a traditional mechanism. It thereby strengthened and advanced that mechanism. By engaging widespread participation, it contributed to the democratization of international relations. It broke new ground in international criminal law. It helped to achieve, at least on a temporary basis, the longstanding goal of the United Nations to afford jurisdictional protection to international humanitarian law.

Eleven judges have been elected to the Tribunal by the General Assembly, and a Prosecutor has been appointed by the Security Council upon my nomination. As of April 24, 1995, three indictments, including altogether twenty-two accused, have been confirmed.

The existence of this tribunal prompted the Government of Rwanda to request in August 1994 the creation of a similar tribu-

5. See *supra* note 4 and accompanying text (discussing creation of International Tribunal by Resolution 827).

nal to prosecute persons alleged to have committed genocide in Rwanda. By Resolution 955⁶ of November 8, 1994, the Security Council decided to establish an international tribunal to prosecute persons responsible for genocide and other violations of international humanitarian law committed in Rwanda between January 1, 1994 and December 31, 1994. While the two tribunals are separate, independent institutions, they share a common Appeals Chamber and a common Prosecutor.

The Tribunals do face serious obstacles in areas such as financing, the collection of evidence, and the extradition of the accused. The only way to overcome such difficulties, however, is to press on with the work. The momentum created by the establishment of the Tribunals must not be lost. The international community must support the work of the Tribunals in every way possible. At the same time, we must redouble our efforts to create a permanent international criminal court.

Last year, the International Law Commission, in which I worked for many years, adopted a draft statute for an international criminal court. The Commission referred to the General Assembly its recommendation that an international conference of plenipotentiaries be convened to study the draft statute and to conclude a convention on the establishment of such a court. The General Assembly decided to establish an ad-hoc committee to review the major issues arising out of that draft statute and to consider arrangements for convening such a conference. The committee met from April 3-13, 1995 and will submit its report to the General Assembly at the beginning of the General Assembly's fiftieth session.

Through the creative application and innovative development of jurisdictional measures, the United Nations is working to bring peace to a world in which conflicts and confrontations within States are now more prevalent than wars between them. There are signs that in peace and security, as well as in other areas of work, we are proving able to preserve achievements as we transform them to meet new challenges. International law has been, and will remain, central in this effort.

New situations demand new ideas. Yet, sometimes it may seem impossible to bring a new idea into being; the obstacles to securing a vote — or effecting a Charter amendment — may be

6. S.C. Res. 955, U.N. SCOR, 3453d mtg., U.N. Doc. S/RES/955 (1994).

too great. In the face of new situations, we should not allow ourselves to be intimidated by such ostensible obstacles. The Founders of the United Nations deliberately framed the Charter in a flexible way, which, over the past half-century, has enabled the Organization to adapt to changing circumstances and to employ new techniques when the need has emerged. The invention of United Nations peace-keeping to deal with the Suez crisis of 1956 is a shining example. Not specifically mentioned in the Charter, peace-keeping was created by the Organization as a non-coercive instrument of conflict control, at a time when Cold War constraints precluded the more forceful steps permitted by the Charter. In its original sense, peace-keeping involves a lightly armed force — welcomed by all parties to a conflict — whose task is to monitor an agreed cease-fire, already in place, so that the parties can pursue a negotiated settlement.

The United Nations is in the process of transforming its peace-keeping instrument to meet new conditions. It has also invented a new instrument: preventive deployment. In the former Yugoslav Republic of Macedonia, for the first time ever in United Nations history, military units have been deployed as a measure of preventive diplomacy.

Preventive deployment was not foreseen by the international community, but it is grounded in international law. It was devised by the application of elements of the law heretofore not brought together. The unique circumstances of the case drew forward this new departure. Preventive deployment in the former Yugoslav Republic of Macedonia was based upon the fundamental principle of the United Nations — the sovereign equality and territorial integrity of its Member States — and the request of such a State, newly-admitted to the Organization. It was based upon the Charter of the United Nations, which is a source of international law, and on the authority given to the Security Council by that document. And it was based upon the Charter's understanding that regionalism and internationalism are not at odds — that a regional organization, such as the Conference on Security and Cooperation in Europe, which already had a presence in the former Yugoslav Republic of Macedonia, could cooperate with the world Organization under Chapter VIII.

By its Resolution 795⁷ of December 11, 1992, the Security

7. S.C. Res. 795, U.N. SCOR, 3147th mtg., U.N. Doc. S/RES/795 (1992).

Council authorized preventive deployment in the former Yugoslav Republic of Macedonia as part of the United Nations Protection Force in the former Yugoslavia ("UNPROFOR"), and by Security Council Resolution 983⁸ of March 31, 1995, this part of UNPROFOR became known as the United Nations Preventive Deployment Force. Through the creative application of laws already at its disposal, the Council was able to respond to an evident need, on behalf and with the support of the international community, without creating a new law, or amending the Charter, or in any way going beyond the principles and mechanisms set out in that document.

In international law we have a rigorous and analytical framework from which to approach problems of mutual concern. In international law, we have a powerful base from which to take multilateral action. In international law, we have a way to preserve achievements as we transform them to meet new challenges. And in the United Nations, we have a forum and mechanism for the development of international law.

We need to use the law. It is by applying the law to changing realities on the ground that such important inventions as the International Tribunals, as well as peace-keeping and preventive deployment, have come about. And it is clear that in this new era, more such inventions will be needed as we make our way toward a new international system. Expanding the law of nations upon the foundations laid down by Grotius some three and a half centuries ago is a central task of our time.

8. S.C. Res. 983, U.N. SCOR, 3512d mtg., U.N. Doc. S/RES/983 (1995).