

**Informal Meeting of Legal Advisers of Ministries of Foreign Affairs
27 October 2008, 3.05pm, Trusteeship Council Chamber**

**Statement by Ms. Patricia O'Brien
Under-Secretary-General for Legal Affairs, The Legal Counsel**

Thank you, Mr. Chairman, for giving me the floor.

(Introduction)

Mr. Chairman,
Madam President of the International Court of Justice,
Mr. President of the International Criminal Court,
Ladies and Gentlemen Legal Advisers from capitals and from the missions,
Dear colleagues and friends,

Welcome to New York, and welcome to United Nations Headquarters. It is a great pleasure to see you all. Allow me, at the outset, to express my gratitude to the convenors of this meeting and especially this year to the Canadian delegation and, in particular, for providing me with the opportunity to address you for the first time in my new capacity as Legal Counsel of the United Nations.

In keeping with well-established tradition, I wish to say a few words from the perspective of the UN Office of Legal Affairs on the main topic that you have retained for your meeting today: the peace and justice conundrum.

Further to my predecessor Nicolas Michel's statement last year, I am pleased to be able to provide you with a brief update on the issue of the responsibility of international organizations against the background of the Behrami and Saramati cases of the European Court of Human Rights.

(Peace and Justice)

Let me first turn to the issue of the relationship between peace and justice, an issue that more and more arises in our various and wide-ranging efforts to help ending violent conflicts.

With the growing involvement of the United Nations in post-conflict societies - both in facilitating the negotiation of peace agreements and in establishing judicial and non-judicial accountability mechanisms - the Organization has frequently been called upon to express its position on the relationship between peace and justice. This has necessitated our engagement in important connected issues such as on the validity and lawful contours of amnesty and on the interaction between UN representatives and persons indicted by international and UN-based tribunals, who continue to hold positions of authority in their respective countries.

With regard to the relationship between peace and justice: a good starting point is the position taken by the Secretary-General in a landmark address to the Security Council on 24 September 2003:

“We should know that there cannot be real peace without justice, yet the relentless pursuit of justice may sometimes be an obstacle to peace. If we insist, at all times and in all places, on punishing those who are guilty of extreme violations of human rights, it may be difficult or even impossible to stop the bloodshed and save innocent civilians. If we always and everywhere insist on uncompromising standards of justice, a delicate peace may not survive. But equally, if we ignore the demands of justice simply to secure agreement, the foundations of that agreement will be fragile, and we will set bad precedents.” (24 September 2003, the Secretary-General in the Security Council, S/PV.4833).

“There are no easy answers to such moral, legal and philosophical dilemmas. At times, we may need to accept something less than full or perfect justice or to devise intermediate solutions such as truth and reconciliation commissions. We may need to put off the day when the guilty are brought to trial. At other times, we may need to accept, in the short-term, a degree of risk to the peace in the hope that in the long-term peace will be more securely guaranteed.” (24 September 2003, the Secretary-General in the Security Council, S/PV.4833).

While we will uphold those principles, the challenge will be to find the right balance for each specific instance where this issue arises. Justice and peace must be regarded as complimentary requirements. There can be no lasting

peace without justice. The problem is not one of choosing between peace and justice, but of the best way to interlink one with the other, in the light of specific circumstances, without ever sacrificing the duty to pursue justice.

On the issue of amnesties for international crimes, the UN position is equally clear: The UN does not recognize any amnesty for genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. This principle, which reflects a long-standing position and practice, applies to peace agreements negotiated or facilitated by the United Nations, or otherwise conducted under its auspices. Guidelines have been established for UN personnel in situations such as where the UN is involved in the witnessing of agreements or in interacting with indictees. These guidelines follow from the UN's commitment to the pursuit and maintenance of respect for international criminal justice.

(Follow-up on the Behrami and Saramati cases)

Mr. Chairman,
Ladies and Gentlemen,

I would now like to draw your attention to some current aspects of the responsibility of international organizations. The issue had already been addressed by Nicolas Michel last year but the concerns he had expressed on that occasion have since been validated by some legal developments, notably in the case-law of regional and domestic courts.

In the *Behrami* and *Saramati* decision of 31 May 2007, the European Court of Human Rights considered that conduct of Member States carried out in the context of an operation under Chapter VII of the Charter was “in principle” attributable to the United Nations. The Court based its decision on its own evaluation of the “delegation” of Security Council powers. This reasoning has since been replicated in a number of cases relating to very diverse types of involvement of and engagement by the United Nations. For instance, the European Court of Human Rights expressly relied on *Behrami* to consider that the conduct of the German and Greek KFOR contingent, while acting as “NATO-led peacekeeping forces”, were attributable to the UN. The Court came to the same conclusion again as far as the conduct of the High Representative in Bosnia and Herzegovina was concerned.

It is also important to note that the *Behrami* reasoning has been extensively referred to, if not always adopted, by certain national courts. In the *Al-Jedda* case for example, the United Kingdom House of Lords was confronted with issues of detention in Iraq by British troops belonging to the “multinational force under unified command” authorized by Security Council resolution 1511(2003). The argument that the conduct was attributable to the United Nations was rejected by all the Lords with the exception of one, who did not perceive any material difference between the legal position of KFOR and that of the multinational force. Other Lords pointed to the fact that the force was not acting under UN auspices; in doing so, some relied, however, on *Behrami*'s criterion of “ultimate authority and control”, thus basing their assessment on the European Court's line of reasoning. More recently, two civil cases brought before the District Court of The Hague raised the issue of the attribution of conduct carried out by the Dutch Battalion supporting

UNPROFOR during the war in Bosnia and Herzegovina. In both cases, the Dutch Court accepted the State's argument that the impugned conduct was exclusively attributable to the UN, since the forces formed part of the UNPROFOR operation, which exercised operational command and control over them.

As the accumulation of cases tends to demonstrate, there seems to be a trend in the case-law for a wide conception of attribution of conduct to the United Nations. The Organization does not intend in any way to elude its responsibility, whenever this responsibility is actually entailed by a conduct over which the Organization has effective control. But it seems fair to acknowledge that such a broad conception of attribution of conduct will have significant implications on the formulation of mandates and on the effective fulfilment of United Nations' functions. This, obviously, is not only a matter of concern for the Organization itself, but also for Member States.

Lastly, this case-law highlights that careful consideration should be given to the work of the ILC on the topic of responsibility of international organizations. As the first reading of the ILC text will be completed next year, the Organization and Member States should assess the practical impact that the draft articles may have on the operation of the United Nations in the fulfilment of its Charter obligations.

On this note, I wish you fruitful discussions and a successful meeting.

Allow me, before closing, an announcement of a more administrative nature. As you know, my Office keeps and updates a list of all the Legal Advisers of the Ministries of Foreign Affairs. We would, therefore, be grateful if you could notify us regularly of any changes in that respect.

Thank you.
