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Legal Challenges Facing the United Nations: An Appraisal from the Legal
Counsel's Perspective

Introductory Remarks

Dear Colleagues and Friends,

I am sincerely grateful for your interest and for your attention this evening. I see this not as a personal compliment but as an indication of your interest in the work of the UN and in international law. Since its creation in 2002, the Irish Society of International Law has not only made a remarkable contribution to promoting study and debate in our field within Ireland, but has also played a noticeable role in the worldwide discussion on the most complex international legal issues of our time, many of which are a major part of my daily work at the United Nations.

I am deeply honoured and humbled to have been invited to give a lecture carrying Seán Lester's name. For any international civil servant, Seán Lester is a role model for his loyalty and devotion to the cause of a universal organization. His "internationalism" has often been saluted. It matured during his years in Dublin at the Department of External Affairs and found a powerful manifestation when he was appointed as the Free

State's Permanent Delegate accredited to the League of Nations. From Geneva, Lester advocated for Ireland's increased involvement in international affairs. In a very short space of time, he became a highly respected government representative, through his proactive role in the Council of the League. His internationalism was severely tested when he was appointed the League's High Commissioner to Danzig, in 1934: faced with the rise of Nazism and its defiance to the Constitution of the Free City and the League's administration, Lester defended the rights of Danzigers at his own personal risk. His internationalism, however, faced its ultimate trial when he agreed to take the reins of the League during its darkest times, in 1940 and throughout World War II. As Carl Hambro observed, "what it cost Sean Lester to hold the fort in Geneva, in a world that was falling apart, cannot easily be measured today"¹. Throughout his professional life, Lester defended the ideal of the League and his speeches show his conviction that the principles upon which it was founded were perennial and that, if the League were to disappear, "something would have to take its place"².

Sixty five years after its creation and 55 years after Ireland joined in 1955, that "something", the United Nations Organization, faces challenges of its own. And I am focusing my talk this evening on some of those challenges and how international law may be instrumental in resolving them. Before addressing those issues in more detail, I would firstly like to give you a brief overview of my role and essential functions as the Legal Counsel of the United Nations.

The Role of the Legal Counsel and the Functions of OLA

It is now a year and a half since I joined the UN as Legal Counsel to head the UN Office of Legal Affairs. OLA, as it is known throughout the Secretariat, employs about 160 staff on a full time basis and effectively acts as in-house Counsel to the Secretary-General, the senior management and the wider UN system. Our overall objectives are varied and include: providing a unified central legal service for the Secretary-General, the Secretariat and the principal and other organs of the United Nations; contributing to the progressive development and codification of international law; promoting the strengthening and development as well as the effective implementation of the law of the seas and oceans; registering and publishing treaties; and performing the depositary functions which the Charter has entrusted with the Secretary-General.

Much of our work is, understandably, carried out quietly and behind the scenes. We cover a wide range of issues of public international law which many people would associate with the UN – for example, advice on the laws of war, on peace-keeping operations, international criminal justice, and substantive assistance in the negotiation of international legal texts. Of course, OLA also carries out vital work which, by its nature, does not ordinarily command the attention of Member States or the general public. In this regard, I think, for instance, of the work undertaken on procurement where the Organization's interests must be protected. For instance, the largest unit in my Office – the General Legal Division – last year provided legal support and assistance for peacekeeping logistical contracts, with an aggregate value of some \$4 billion.

OLA's horizons, and the expectations of it from within the United Nations, run very wide. We, like any Department, are making a contribution – and are expected to make a contribution – to the management of the wider Organization. In my capacity as Legal Counsel, I participate, for example, in the Secretary-General's Policy Committee which develops common UN policy approaches to major global issues. I am also a member of the Secretary-General's Senior Management Group and I have also been appointed to various Management Boards, including the Management Performance Board which is responsible for overseeing the senior managers' compact process.

The Centrality of International Law

Before I took up the post of Under-Secretary-General for Legal Affairs, my main experience of the organization was as Legal Adviser to the Department of Foreign Affairs of Ireland. In many respects, I was an outsider – from a committed Member State - looking in on how this vast and complex body worked. Naturally, this only allowed for a fleeting glimpse at most of the issues, or, for a very concentrated focus on an issue of particular national importance. So, in my new role as the UN Legal Counsel, I was curious as to how centrally international law would feature among the priorities of the Organization.

It can safely be said that, since 1945, the Organization and its Members have constantly striven to give practical meaning to the Charter's

resolve to establish conditions under which justice and respect for international obligations can be maintained, and to develop legal bases for peaceful relations between States. However, we all know that, in any given situation or crucial political issue, the importance given to a genuine legal assessment may vary: The UN has thus seen periods of great advancement in international jurisprudence, just as there have been times when our function as guardian of the global legal architecture has seemed more peripheral. After these 20 months in office, I believe that we live in times where international law - and the role of the UN as its champion - is absolutely central to the Secretary-General and his team.

Almost daily, I have witnessed the global challenges with which the UN is asked to grapple: some are predictable and perennial; many are unforeseeable. **My purpose today is to emphasize how a legal perspective has proven instrumental in facing some of these challenges.** In doing so, I will first refer to those numerous instances where the Organization reaches out to the world and strives to **uphold the law in a complex political environment.** The Secretary-General's commitment to the strengthening of the rule of law, the pursuit of justice and the determination to end impunity for international crimes are obvious illustrations.

But I would also very much like to draw your attention to a less visible aspect of the centrality of law for the UN or, to be more specific, within the UN. In our Organization, acting in conformity with legal requirements is a constant and dynamic pattern which is present in all our activities. In other words, respect for the law helps us to perform better. As I will explain, the current administration has achieved significant progress to

put into practice the will and objective of Secretary-General Ban Kim-moon that the United Nations be irreproachable.

1. Upholding the Law in a Complete Political Environment

So, to my first point: how the UN upholds the law in a complex political environment. Under Article 1 of the Charter, the United Nations is expected to be “a centre for harmonizing the actions of nations” in the attainment of a number of common ends, which include the maintenance of international peace and security, the development of friendly relations among nations, and international co-operation on economic, social, cultural or humanitarian matters and the promotion of human rights and fundamental freedoms. It became quickly obvious, however, that the Organization was not to remain a passive spectator of the political environment which surrounded it, and that it was expected to take an active stance in the attainment of the purposes of the Charter. From a legal perspective, this has meant that the United Nations plays a key role in upholding the law in contemporary international relations.

It is almost a truism to observe that the realization of this objective cannot be confronted in the same manner in this early part of the twenty-first century, as it was originally foreseen in the immediate aftermath of World War II. The United Nations has shifted its attention to new, contemporary issues and has proposed innovative ways of addressing them. In legal terms, these include: the promotion of the rule of law at the international level; the management of post-conflict situations, reconciling peace and justice; and the exploration of new concepts, such as the “responsibility to protect”,

which are aimed at ensuring greater respect for international law. I hope to show to you how the Organization has been able to propose novel legal ways of responding to the changing political environment particularly in the recent past, while maintaining a solid attachment to the principles and mechanisms provided for under the Charter.

A. Promoting the Rule of Law at the international level

The concept of the “rule of law” is today at the centre of the United Nations’ concerns. Many offices within the system, including my own, are involved in the promotion of the rule of law. In view of the significance and diversity of the Organization’s involvement in this area, the Secretary-General proposed in 2006 to establish a Rule of Law Coordination and Resource Group, chaired by the Deputy Secretary-General and of which I am a member together with a few other senior UN officials, to ensure the overall coordination of the UN efforts. Furthermore, the issues relating to the rule of law are being discussed by Governments both in the Security Council and in the General Assembly, which has, since 2006, included on its agenda as an item “The rule of law at the national and international levels”.

These efforts are well-known within the system and focus much of the attention of my Office every day. What may, however, be less evident is that the “rule of law” is a theme that has always been present in the Organization.

I have already referred to the preamble of the Charter in which the Peoples of the United Nations express their determination “to establish

conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained”. It is in this perspective that the purposes and principles proclaimed in the Charter are to be understood. Principles such as the sovereign equality of States, the fulfillment in good faith of international obligations, the peaceful settlement of disputes or the prohibition of the threat or use of force in international relations, all constitute the foundations of an international society based on the supremacy of the law, equality before the law, and accountability under the law. This idea was eloquently expressed by Secretary-General Hammarskjöld, when he declared that “the demand of the Charter for a rule of law ... aims at the substitution of right for might and makes of the Organization the natural protector of rights which countries, without it, might find it more difficult to assert and to get respected”³. One may hear in this statement echoes of Seán Lester’s powerful case for Ireland’s involvement in the League of Nations, when he argued that, without the League, the small powers’ “rights and independence would be in very much greater danger than with the small and uncertain degree of protection they may count upon, through their shelter behind theoretical equality”⁴.

The concept of the “rule of law” is present today in most of the areas of action of the Organization, from the protection of human rights to the maintenance of peace and security, from the fight against poverty to the most sensitive political affairs.

The omnipresence of this concept, which is so familiar to us lawyers and has filled entire libraries on legal philosophy and political theory, has the effect of placing our field of expertise at the very heart of the

Organization's mission. This should not come as a surprise to us, but does raise an interesting question, namely: how does the UN conceive what some have called the "exceedingly elusive notion" of the rule of law?

In a 2004 report of the Secretary-General, the "rule of law" has been described as referring to:

"a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."¹

The Secretary-General insisted on the universality of the principles that had inspired the Organization's action in this area, pointing out that its norms and standards had been "accommodated by the full range of legal systems of Member States, whether based in common law, civil law, Islamic law, or other legal traditions"².

¹ S/2004/616, para. 6.

² S/2004/616, para. 10.

What is of particular interest is that the Organization recognizes the existence of two interdependent dimensions to the concept of the “rule of law”, one national and the other international. This interdependence is explicitly acknowledged, for instance, in the Millennium Declaration, whereby the Heads of State and Government of the United Nations affirmed their resolve to “strengthen respect for the rule of law in international as in national affairs”. Secretary-General Annan’s report “In larger freedom” expressed the belief that “every nation that proclaims the rule of law at home must respect it abroad and that every nation that insists on it abroad must enforce it at home”⁵.

The UN also upholds the existence of an intrinsic link between the rule of law and the principles and purposes of the Charter. This is apparent, for example, in the 2005 Outcome Document, which reaffirms the Member States’ “commitment to the purposes and principles of the Charter and international law and to an international order based on the rule of law and international law”⁶.

Finally, the “rule of law” appears as a vector for the engagement of the Organization in various areas of the international arena. In the 2005 Outcome Document, once again, Member States acknowledged that “good governance and the rule of law at the national and international levels are essential for sustained economic growth, sustainable development and the eradication of poverty and hunger”⁷ and that human rights, the rule of law and democracy “are interlinked and mutually reinforcing”⁸. These general statements are accompanied by calls for action on more specific issues of concern, such as the adherence to international treaties, the enhanced role of

International Court of Justice in the peaceful settlement of disputes, the protection of civilians or the eradication of policies and practices that discriminate against women. The Security Council, for its part, also expressed support to the peaceful settlement of international disputes and to rule of law activities in the peacebuilding strategies in post-conflict societies, and emphasized the importance it attaches to the responsibility of States to comply with their obligations to end impunity and to prosecute those responsible for the most serious international crimes, and its resolve to ensure that its sanctions be targeted and have clear objectives⁹.

In sum, the concept of the rule of law in the United Nations both embraces the most classical and fundamental principles of legal philosophy and the international legal order, and allows us to use these principles to face the most urgent and contemporary concerns of the international community. A good example of how this is achieved is certainly the Organization's involvement in post-conflict situations by reconciling peace and justice. So, I now turn to this challenging topic.

B. Managing the post-conflict situation by reconciling peace and justice

The relationship between peace and justice is, indeed, a delicate one. A central part of my task is to help the UN in its approach to these issues and to ensure the pursuit of justice and the ending of impunity. In doing so, I find myself at the core of the tension engendered by the need to uphold the law in a complex political environment. The tension to which I refer includes the need to bring about and sustain peace in post-conflict environments and the concomitant need to pursue justice and to bring an end to impunity for grave

violations of Human Rights, International Humanitarian Law and Refugee Law.

I propose to explore a bit further the contemporary tenets of the relationship between peace and justice. I will then briefly turn to the different “kinds” of justice available and the way they have been practically approached by the UN, before addressing the delicate issues of amnesty, all matters of significant practical importance for the Organization.

The relationship between peace and justice

While many accept that there can be no sustainable peace without justice, it is nevertheless also clear that the relationship between peace and justice is complex and difficult. With the growing involvement of the UN in post-conflict societies, the Organization has frequently been called upon to express its position on this relationship. In the short term, it is easy to understand the temptation to forgo justice in an effort to end armed conflict. But any decision to ignore atrocities and to reinforce impunity may carry a high price. We cannot allow the impact of justice to be undervalued when weighing objectives in resolving a conflict.

In a recent statement - which I had the honour of delivering - the Secretary-General has described this issue as follows:

“As we fight against impunity and seek to strengthen accountability, the relationship between peace and justice has been a frequent point of contention. After a decade-long debate on how to “reconcile” peace and justice or how to “sequence” them, the debate is no longer between peace and justice but between peace and what kind of justice.

Voices that denied the need for justice seem to have disappeared. There is now growing support for the idea that every comprehensive conflict settlement should include elements of justice.

However constructed, there seems to be a consensus that justice must be factored into post-conflict strategies in order for peace to be sustainable. This is a major achievement for international criminal justice.”

The growing consensus – that peace and justice go hand in hand and that elements of justice **must** be factored into every post-conflict strategy in order for peace to be sustainable – is a major breakthrough. It guides us in our fight against impunity, in particular on the way to upcoming landmark events such as the first review conference of the Rome Statute of the International Criminal Court in early June this year in Kampala.

While we will uphold those principles, the challenge is always to find the right balance in each specific instance. 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 one for the other. If we ignore the demand for justice simply in order to reach a peace agreement, the foundations of that agreement will be fragile and possibly unsustainable. But, we must acknowledge also that if we insist at all times on a relentless pursuit of justice, a delicate peace may not survive. At times, we may need to postpone the day when the guilty are brought to trial.

This pragmatic assessment should not, however, be misinterpreted. Freedom from fear is, first and foremost, what all people in conflict and post-conflict societies around the world long for. But they also want justice,

and they deserve accountability. We know that accountability matters for peace. Therefore, it is our duty to fight impunity. For my part, this issue crosses my desk in a way or another on a daily basis.

The perpetrators of international crimes, of war crimes, crimes against humanity, and the crime of genocide and serious violations of IHL must be held accountable. The building of a culture of accountability is a challenge that Secretary- General Ban has vigorously undertaken and I would suggest that under his leadership real progress is being made in this quest to end impunity. Everyday, I am trying to do my part to support these efforts.

Peace and “What kind of Justice” – International Criminal Justice Mechanisms

In this respect I will refer to the various international justice mechanisms which we assist and support. We often hear that the robust pursuit of criminal justice at the international level is an erosion of sovereignty, or a new form of western colonialism. But we should recognize, I suggest, that international criminal accountability mechanisms have only been engaged where there is a real need to do so. In some cases, in Sierra Leone and the former Yugoslavia for instance, after a conflict, there is no proper national criminal justice infrastructure. In other cases, such as Rwanda after the genocide, the national judicial system was so overwhelmed that prosecutions were not feasible. In Cambodia, criminal justice was virtually unknown when the mechanism of the Extraordinary Chambers was put in place.

Let me emphasize some of the most noteworthy developments brought by these international justice mechanisms. The Special Court for Sierra Leone is, for instance, the first “mixed” or “hybrid” Tribunal established by Agreement between the UN and a Member State. Its judgment, in February 2008, in the so-called “RUF case” against three members of the Revolutionary United Front, is the first to convict individuals of forced marriage as a separate crime against humanity, and for attacks against peacekeepers as a specific war crime. The Court’s only remaining trial - the case against Liberian former President Charles Taylor - is taking place in the Netherlands. So the Court is preparing to close its doors after a successful undertaking.

As to the Extraordinary Chambers of the Courts of Cambodia, which has recently completed its first trial, I would simply emphasize that it is not just a mechanism for accountability, bringing justice to the victims of the Khmer Rouge regime. It is also a catalyst for national judicial reform and development. The same may be said of the Special Tribunal for Lebanon, launched by the Secretary-General in March 2009, which marks a decisive milestone for bringing those responsible to justice and hopefully, to continue to restore confidence and peace in this country.

We are now heading towards a critical phase for international criminal justice when the *ad hoc* tribunals, ICTY, ICTR and SCSL are completing their work. If we want to make a fair assessment of the work achieved by these Tribunals, we should certainly acknowledge the fact that an appetite to establish further *ad hoc* tribunals is not evident. There may be several reasons for this, including the financial costs, but it should not be taken as an

indication that these institutions have “failed”: instead, their work has marked a very important point in the development of international criminal justice which few might have foreseen when they were established. The time is ripe to build on these early efforts so as to develop and maintain a culture of accountability.

With full respect for its independent character, the Secretary-General has and will continue to support and assist the International Criminal Court, the heart of this international system of criminal justice. As a permanent institution, the ICC has, we believe, the advantage of having a continuing deterrent effect on decision-makers at the highest level. Indeed, the Rome Statute is designed to reach those who bear the ultimate responsibility for actions of State organs. The ICC provides a permanent and standing complement to national criminal accountability mechanisms; and complementarity, as we all know, is a fundamental principle of the ICC regime. Ending impunity must rest upon these complementary efforts.

The lawful contours of amnesty

I firmly believe that peace and justice can and must be pursued in parallel. However, we cannot overlook the challenges entailed in resolving in practice the “peace and justice” dilemma. In places and situations where the United Nations has been engaged in facilitating a peace process, the dilemma is often how to end the fighting without foregoing the prosecution of those responsible for the crimes, whose condition for participation in the peace process is immunity from prosecution. In this connection, the

lawfulness of amnesty for the core international crimes has proven to be a difficult but critical issue.

I would like to briefly explain how we have designed the lawful contours of amnesty, as a salient illustration of the way the UN strives to uphold the law in complex political environments. Voices are currently amplifying in support of the developing legal trend opposing amnesty for genocide, crimes against humanity, war crimes and other serious violations of IHL, in particular for those bearing the greatest responsibility. As exemplified by a recent lecture at the Institute of Advanced Legal Studies,¹⁰ the trend in international law is to question the validity of State amnesty provisions for the most serious crimes because such provisions are contrary to a growing expectation for States to eradicate impunity for serious violations.

The UN has repeatedly reflected this position against amnesties in respect of the most serious crimes. The question of the lawful contours of amnesty was for the first time raised in connection with the 2000 Lomé Peace Agreement between the Government of Sierra Leone and the RUF, which granted a sweeping amnesty to the RUF combatants of all levels and for all crimes committed throughout the conflict. When the UN Representative was asked to witness the Agreement, and was precluded at that point from proposing amendments to the amnesty clause, he appended to his signature a disclaimer to the effect that: “The United Nations does not recognize amnesty for genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law”. Since then, the UN position has been consistently upheld in Angola, Sudan, Uganda,

Burundi and elsewhere. It is also formalized in the Secretary-General's Guidelines for United Nations Representatives in Certain Aspects of Negotiations for Conflict Resolution.

C. Exploring new ways to ensure respect for the law

I have given just a few demonstrations of how the promotion of the rule of law is an integral part of the UN mandate and how peace cannot be conceived and sustained without justice. These are already daunting tasks, *per se*. However, my description of how upholding the law helps us in the fulfillment of our mandate would not be complete if I did not refer to our efforts to strengthen international law and compliance to it. To illustrate our current challenges in this area, I will focus on two examples: the strengthening of the rules relating to the protection of civilians in armed conflict and the notion of the “responsibility to protect”.

In the past few years, the UN has faced dramatic challenges in the field of the protection of civilians in armed conflict: humanitarian crises have wreaked local havoc and have challenged the international legal order. While the political and operational dimensions of these crises are quite obvious, one should not forget that they also call for an answer to a crucial legal question: should and, if so, how should international humanitarian law and human rights law be strengthened to secure the protection of civilians?

I should make clear at the outset that international law contains, of course, a well-established set of rules in this field, which are embodied in the major instruments of international humanitarian law, human rights law,

international criminal law and refugee law. I am convinced that the first priority should always be to focus on the implementation and enforcement of the rules already in existence. Most of the efforts of the Organization go in this direction.

Many of the relevant instruments in the field of the protection of civilians, however, have not yet obtained universal participation or their rules are still insufficiently known by those who are called to apply them. The UN therefore encourages states to ratify those instruments, to take steps for their implementation and to ensure their dissemination.

A further dimension to this problem relates to peacekeeping mandates. While protection activities have today become a common feature in the mandates of UN peacekeeping operations, much remains to be done to ensure targeted mandates and support from the Security Council, once a mission is established.

Last but not least, strengthening the law requires that we remain attentive to possible areas for development in existing rules to ensure that international law continues to respond adequately to the realities of the environment in which armed conflicts are occurring and indeed to the changing nature of war. I would like to mention, as an example, one issue of special interest to my office, namely that of the protection of UN facilities in times of armed conflict. We don't have to look too far back to remember that civilians often seek to obtain shelter in UN premises when they face an imminent peril. This speaks highly of the trust that people place in the UN and the message of peace and security that it symbolizes. Sadly, however,

this trust has sometimes been shattered by attacks to UN compounds. In January 2009, I proposed the idea to the Security Council of establishing a special “protected status” for UN premises and facilities, similar to that granted by international humanitarian law to archaeological, historic, artistic and religious sites. The adoption of clear rules recognizing such status could both contribute, I believe, to prevent attacks against UN premises and to ensure their effective protection in times of armed conflict.

Strong laws, however, are not enough. Care also needs to be taken to ensure *compliance* with the law. I have already described one of the international legal tools relevant in this context: the criminal accountability of those responsible for international crimes. Let me now highlight another important, and equally topical, aspect: the “responsibility to protect”.

All things considered, I think that the core idea that has inspired the UN action in the field of human rights and humanitarian law is that compliance with the relevant rules is a matter of concern to the international community as a whole. International law powerfully mirrors this idea, for instance in Common Article 1 of the 1949 Geneva Conventions, which provides that the Parties “undertake to respect and to ensure respect” for their provisions in all circumstances. In the interpretation given by the International Court of Justice, this article entails that “every State. . . , whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with”¹¹. In other words, international law embodies the idea that, while the primary responsibility for complying with international humanitarian and

human rights law falls upon the State directly involved, the international community also has a role to play to ensure respect for the law.

This is the same conviction that brought the 2005 World Summit, and subsequently the Security Council¹², to proclaim the concept of the “responsibility to protect”¹³, which implies both that “[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity” and that “[t]he international community, through the United Nations, also has the responsibility . . . to help to protect populations from” those crimes¹⁴.

This is a powerful notion that has attracted the attention both of Governments and the international legal community. Guidance however is needed as to how to implement this idea. In a 2009 report, the Secretary-General provided a thought-provoking proposal on this matter. He underscored the need to develop a UN strategy to implement the responsibility to protect. He emphasized that the responsibility to protect does not provide any additional basis for the use of force under international law, rather it reinforces the prohibition of the use of force provided for under the Charter. Finally, the Report outlines three pillars for advancing the World Summit’s agenda in this area: Pillar One on the responsibility of States to protect their own population; Pillar Two on “International assistance and capacity-building” to assist States to protect their population; and Pillar Three on a “Timely and decisive response” where States are not able or willing to protect their population. The discussion on a strategy to implement the responsibility to protect is still ongoing, but the concept

shows the potential benefits that a unified action in this field may bring to the international community as a whole.

2. Enhancing the Legal Performance of the United Nations

Let me now turn to another part of my presentation, which – as I mentioned before – will be devoted to the role of the law as an instrument to enhance performance within the UN. Secretary-General Ban Ki-moon places a particular emphasis on the need to reform the UN administration and to manage the Organization’s resources as effectively as possible, to enable us to better meet the needs of the poor and the afflicted.

Although, strictly speaking, this is a matter which often exceeds the legal context, the Office of Legal Affairs and I are constantly called to give legal advice on these issues, which therefore also occupy a significant part of our time. What’s more, there is a strong legal dimension to the question of how the Organization should enhance its performance.

As the Secretary-General has underlined, the UN, as an organization involved in setting norms and standards and advocating for the rule of law, must itself “practice what it preaches”. This implies that it should be legally accountable for its actions, and that mechanisms are to be put into place in order to ensure that the Organization acts according to the law. There are many dimensions to this issue, which have included in the past years, for instance, ongoing discussions in the Sixth Committee on the criminal accountability of UN officials and experts on mission. I would like to outline in more detail three areas in which significant progress has recently

been made. These are: the internal system of administration of justice; the implementation of sanctions; and the responsibility of international organizations. What I believe is a common feature to these areas is that they reveal how the expansion of UN action, which has implied both a bigger administration and a material broadening of its fields of activity, has a legal impact which requires prompt action by the Organization itself.

A. Administering better

Since its very first steps as an international administration, the United Nations was confronted with the necessity of establishing an internal mechanism of redress for its own staff members. As a result of the jurisdictional immunities enjoyed by the Organization, staff members have no external recourse to national judicial systems. It is therefore essential to have an internal justice system that both provides adequate safeguards and ensures accountability of staff members.

Originally, this problem was limited, given that the Organization's secretariat was of a relatively small size. The system which was created therefore relied heavily on peer review boards, with a possibility of judicial redress before the United Nations Administrative Tribunal.

With the enlargement of the Organization (the UN staff today comprises around 60,000 people), the operation of this system started to face serious difficulties. In 2005, the General Assembly decided to call for an overall review of the system by an independent panel of experts. The reform of the United Nations internal system of administration of justice was

achieved in a remarkably short period of time, demonstrating the capacity of Member States, management and staff to act swiftly and in a coordinated effort. By July last year, the new system had become operational.

The first element of this reform was the strengthening of the so-called “informal” system of administration of justice, around the figure of the United Nations Ombudsman. The integrated and decentralized Office of the Ombudsman for the United Nations Secretariat, Funds and Programmes, now counts with regional offices around the world, and comprises a Mediation Division, aimed at resolving, in an informal manner, possible disputes arising between staff and management. This feature reflects the idea that the best solution to administrative grievances is often prevention and amicable settlement of disputes.

The mechanism, however, is further reinforced by the establishment of a “formal” system of administration of justice, which comprises a first instance United Nations Dispute Tribunal (UNDT) and an appellate instance United Nations Appeals Tribunal (UNAT). The new system is different from the old one at least in three important regards: (1) first of all, it is now a two-tiered system, under which the staff member or management have a possibility to appeal; (2) secondly, it is entirely composed of professional judges with judicial experience in the field of administrative law; and (3) thirdly, both tribunals have the power to deliver binding judgments.

I believe that the impact of this radical reform has not yet been fully appreciated by the international legal community. I am convinced, nevertheless, that this major step should be of great interest for scholars, in

that it echoes some of the most debated issues of international law. In institutional terms, this reform has created, for the first time ever in the history of all international organizations, a true judicial system for the settlement of internal disputes, which will certainly have the effect of promoting a systematic approach to international administrative issues and of strengthening the dialogue with other similar judicial instances in other international organizations (including comparable tribunals in regional organizations, such as the European Union). This is a matter that should be studied in the context of the ongoing debate about the perils of fragmentation of the law that some scholars have feared with the multiplication of international tribunals. Secondly, the statutes of these tribunals contain a fascinating blend of rules that are inspired from the very diverse experiences of administrative law in different legal systems. It may be expected that the application of these rules by judges with an established experience in national jurisdictions will give way to the consolidation of a truly “global administrative law”. In other terms, this reform is not only indicative of the commitment of the Organization to the rule of law, justice and accountability, but also of its possible impact on international law in general.

B. Adapting the regime of sanctions

With the reform of its internal justice system, the Organization has very significantly improved its institutional accountability towards all the persons, agents and civil servants, who are engaged in and committed to its mission. But something also needs to be said as to the necessity for the UN to face the impact which its acts may have on actors outside the system, even

— or, should I say — most importantly when these acts have negative consequences. The first such issue is that of the sanctions regime of the Security Council. I will then deal with the broader issue of responsibility of international organizations.

I will be very brief in addressing how the UN has adapted the regime of sanctions that the Security Council has been using, especially in the aftermath of the attacks of September 11th, 2001, as an important tool in the fight against terrorism. The issue has attracted numerous debates, both in international and regional forums and in legal literature; I would not like to oversimplify the matter. Allow me to just highlight significant recent developments which, in my view, illustrate how the UN constantly seeks to adapt its methods and processes.

It may certainly be argued that, in the turmoil following September 11th, and faced with new kinds of imminent threats against peace and security, the UN may not have immediately paid sufficient attention to the necessary guarantees to be associated with the imposition of targeted sanctions. Much has been said about the external factors which are putting pressure on the Organization to address this issue.

One of the most frequently mentioned among these external factors is certainly the emerging jurisprudence of both regional and national courts. I refer, in particular, to decisions of the CFI and of the European Court of Justice in the joined cases of *Kadi and Al Barakaat*.¹⁵ As you may be aware, the Court annulled in this Judgment a regulation giving effect to Security Council resolutions and ordering the freezing of the funds and other

economic resources of the persons and entities whose names appeared in the list drawn up by the UN Security Council Sanctions Committee. The Court did so in part because it concluded that the rights of the defence (in particular the right to be heard) and the right to effective judicial review of those rights were not respected in the circumstances of the case.

This Judgment has undoubtedly marked an important development in the consideration of the legal regime of sanctions. It would, however, be an unfair assessment to consider that adaptations of the sanctions regime developed by the Security Council have only been triggered by such external elements. Even before September 2008, the UN had taken significant steps to improve the fundamental guarantees to be attached to the imposition of sanctions without undermining their efficiency. By two resolutions adopted in December 2006, the Security Council had already considerably rationalized the submissions by Member States of names of individuals and entities to be placed in the sanctions Consolidated List and instituted a focal point to receive requests for “delisting”. In June 2008, the Security Council had substantially improved the system of notifications associated with listing procedures and directed a review of the Consolidated List. Most recently, these efforts have culminated with the adoption of Resolution 1904 (2009), by which the Security Council has decided that an Ombudsperson shall be appointed in order to assist the Sanctions Committee in the consideration of delisting requests. We are about to begin the process of selection of this Ombudsperson. The Security Council has itself described this latest step as a “paradigm shift in the sanctions regime”. The review of the regime of sanctions is, in other words, an ongoing effort undertaken by the Security

Council, which indicates that the Organization is pro-actively ensuring its activities are conducted in conformity with the law.

C. Determining responsibilities

My last topic is that of the international legal responsibility of the United Nations. In all fairness, this issue does not belong to the traditional culture of the UN. As an Organization striving for peace and justice, the UN has been more used to the position of a victim or injured party than to that of a wrongdoer. After all, it was after the murder of a UN agent, Count Bernadotte, which caused the International Court of Justice, in its famous advisory opinion on the *Reparation for Injuries Suffered in the Service of the United Nations*, to expressly assert the autonomous legal personality of the Organization. However, with the multiplication and diversification of its mandates and its increased involvement in the field, the question of the legal responsibility of the UN is arising more and more.

In addressing this issue, we have to strike the right balance between two imperatives. The first one is credibility: if the UN fails to assume its responsibility, if it gives the impression that it ignores the consequences of its acts, the confidence which the Organization inspires may end up seriously damaged. On the other hand, and this is the second imperative I was referring to, we need to protect the Organization against the detrimental effects of claims for actions in which the UN has had no actual control. If we do not collectively resist the temptation to shift to the UN more than its share of responsibility - that responsibility, which lies elsewhere - the efficiency of the Organization, its need to deliver which is so central to the

work of the Secretary-General and its administration, will be seriously and durably hampered.

Allow me to illustrate the importance of this issue with a concrete example. As you probably know, on May 31st, 2007, the European Court of Human Rights adopted a decision on two cases, *Behrami* and *Saramati*, brought against France and Norway under the European Convention on Human Rights. I do not intend to discuss the merits of the cases under the special legal regime created by the Convention. In some respects however, this decision draws upon significant aspects of the activity of the United Nations.

The two cases concerned events which occurred in Kosovo. You will remember that, in resolution 1244 (1999), the Security Council authorized Member States and relevant international organizations to establish an international security presence in Kosovo – KFOR – as well as an international civil presence named UNMIK. In *Behrami*, the applicants complained of the killing and serious injury inflicted on two young brothers in a tragic accident caused by the detonation of a cluster bomb, arguing that French KFOR troops had failed to de-mine the site concerned. The *Saramati* case was based on complaints relating to the arrest of the applicant by UNMIK police and his extra-judicial detention by KFOR.

The decision is one of *admissibility*: the European Court found that the conduct of the United Nations falls beyond its jurisdiction *ratione personae*, as the Organization has a legal personality separate from that of its Member States and is not a party to the European Convention. The reasoning

of the Court, however, raises concerns. The Court considered, in particular, 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 UN. The Court based its decision on its own evaluation of the “delegation” of Security Council powers, coupled with an approach of the criterion of “effective control” for attribution of conduct which has been recently criticized by the International Law Commission.

It is worth adding that the reasoning of the Court has since been reflected in a number of cases relating to very diverse types of involvement of the United Nations. For instance, the European Court considered that the conduct of the High Representative in Bosnia and Herzegovina was attributable to the UN¹⁶. The *Behrami* reasoning has also been extensively referred to, if not always adopted, by certain national courts. In the *Al-Jedda* case for example,¹⁷ 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 UN was rejected by all Judges with the exception of one. Other Judges 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 cases¹⁸ 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. The Dutch Court accepted the Netherlands’ 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.

There thus seems to be a trend in the case-law for a wide conception of attribution of conduct to the UN. The Organization does not intend in any way to elude its responsibility, whenever this responsibility is actually entailed by conduct over which the Organization has effective control. But it seems fair to acknowledge that a broader conception of attribution will have significant implications on the formulation of mandates and on the effective fulfillment of UN' functions. The Court's reasoning could, for example, be used to confer upon the UN responsibility for conduct carried out in the context of peacekeeping operations authorized by the Organization and operated by a coalition of the willing on which the UN has no actual control. Any finding of this kind would have significant implications not only for the Organization itself, but also for States as members of the Organization who are ultimately responsible for its financing. What is more, it could seriously hamper the capability of the Organization and the flexibility it requires to fulfill its key mission of maintaining international peace and security.

I have chosen this example in order to better illustrate how the Organization is constantly assessing its methods and procedures. Following the *Behrami* decision, I have actually engaged my Office in a thorough internal review of the past and current practice of the Organization regarding issues of international responsibility. In none of the instances I have just referred to has the UN been held accountable. We cannot, however, satisfy

ourselves with such myopic reasoning. As I have striven to demonstrate today, the United Nations needs to lead by example.

Conclusion

So, dear friends, I have come to the end of my admittedly lengthy but, I hope, somewhat interesting talk.

In reaching the conclusion, I am aware that I have imposed upon you a daunting journey through a wide number of very diverse legal issues: from the notion of the rule of law at the national and international levels to the delicate balance between peace and justice; from the strengthening of the rules of international human rights and humanitarian law to the topical concept of the responsibility to protect; from the intricacies of the United Nations internal system of administration of justice to the complex regime of the responsibility of international organizations... In a sense, by so doing, I may have given you a taste of what a day looks like at the UN Office of Legal Affairs. For these issues have one thing in common: they represent the legal challenges facing the UN in the twenty-first century. And as such, they are the challenges that the entire international legal community, including this learned Society, needs to face together in the years to come.

Thank you very much.

ENDNOTES

¹ C. Hambro, “Sean Lester – The Man Who Remained True to His Ideals”, *Aftenposten* (Norway), 25 July 1959, quoted in R. B. Fosdick, *The League and the United Nations After Fifty Years. The Six Secretaries-General*, 1972, at 71.

² NA, D.F/A, 19/40, Geneva, 31 March 1933, quoted in M. Kennedy, *Ireland and the League of Nations, 1919-1946. International Relations, Diplomacy and Politics*, 1996, at 186.

³ Introduction to the Annual Report of the Secretary-General on the Work of the Organization, 16 June 1960-15 June 1961, A/4800/Add.1, respectively at pp. 1 and 2.

⁴ NA, D.F/A, 19/40, Geneva, 31 March 1933, quoted in M. Kennedy, *Ireland and the League of Nations, 1919-1946. International Relations, Diplomacy and Politics*, 1996, at 186.

⁵ A/59/2005, para. 133

⁶ A/60/1, para. 134, chapeau and *lit.* (a).

⁷ A/60/1, para. 11.

⁸ A/60/1, para. 119.

⁹ S/PRST/2006/28.

¹⁰ See “Can Genocide, Crimes Against Humanity and War Crimes be Pardoned or Amnestied?”, *Amicus Curiae*, Autumn 2009, p. 15.

¹¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 199-200, para. 158.

¹² Resolution 1674 (2006), operative paragraph 4.

¹³ General Assembly resolution 60/1, paras 138 and 139.

¹⁴ General Assembly resolution 60/1, paras 138 and 139.

¹⁵ Yassin Abdullah Kadi, *Al Barakaat International Foundation v Council of the European Union, Commission of the European Communities, United Kingdom of Great Britain and Northern Ireland*, Joined Cases C-402/05 P and C-415/05 P, Judgment of the Court of Justice of the European Communities (Grand Chamber) of 3 September 2008, *OJ C* 285/2, 8.11.2008.

¹⁶ *Beric and others v. Germany*, decision on admissibility, 16 October 2007.

¹⁷ House of Lords, Appellate Committee, Opinions of the Lords of Appeal for judgment in the cause *R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)*, 12 December 2007.

¹⁸ LJN: BF0181 and BF0182, Rechtbank’s-Gravenhage, 265615 / HA ZA 06-1671 and 265618 / HA ZA 06-1672 (English translation), 10 September 2008.