

**Brandeis Institute for International Judges
Toward an International Rule of Law
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Keynote address

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Introductory Remarks

Excellencies,
Ladies and Gentlemen,

I am very pleased to be here at the Brandeis Institute for International Judges and am greatly honoured to have been asked to give this keynote address.

It is quite a daunting task for me to speak nearing the end of a week of discussions on the topic "Toward an international rule of law". The debate on the meaning of an "international rule of law" is undoubtedly a crucial one in the challenging times in which we live. And the promotion of the rule of law at the international level necessarily requires an understanding of the role that the international judge has to play in this context.

It is now almost two years since I joined the UN as Legal Counsel to head the Office of Legal Affairs, which employs about over 200 on a full time basis and effectively acts as in-house Counsel to the Secretary-General, the senior management and the wider UN system. Much of our work is, understandably, carried out quietly and behind the scenes. But OLA's horizons, and the expectations of OLA from within the UN, run very wide.

Many of the issues which you have been discussing are an integral part of my daily work. My perspective on these issues is therefore influenced by my own professional experiences, by the legal work of the United Nations which I have received the mandate to conduct, and by the challenges faced by the Organization as I witness them every day.

I propose to describe some of the issues and challenges which the UN is currently facing. 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 political situation, 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 almost two years 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 Organisation and to the Secretary-General and his team.

My objective today is to demonstrate how this legal perspective has contributed to a trend "toward an international rule of law". In doing so, I will first refer to those numerous instances where the Organization reaches out to the world and strives to contribute to the establishment of an international rule of law. But I would also very much like to draw your attention to a less visible aspect of the paradigm of the rule 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 rule of law is, for the Organization, a goal to be achieved everyday.

1. Contributing to the establishment of an international rule of law

So, to my first point: how the UN contributes to the establishment of an international rule of law. 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. These ends include: the maintenance of international peace and security; the development of friendly relations among nations; international co-operation on economic, social, cultural or humanitarian matters; and the promotion of human rights and fundamental freedoms. It became obvious that the Organization is 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 was to play 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 the dawn of the twenty-first century as it was originally foreseen in the immediate aftermath of World War II. The UN has shifted its attention to new pending issues and has proposed innovative ways of addressing them. The promotion of the rule of law at the international level obviously lies at the heart of these contemporary endeavours. But, beyond the direct efforts made to promote the concept of "*l'état de droit*", the UN constantly strives to build up an international rule of law when we have to manage post-conflict situations and to reconcile peace and justice; or when we explore new concepts, such as the "responsibility to protect", which are aimed at ensuring greater respect of 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, 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 its promotion. 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 to ensure the overall coordination of the UN efforts. This Group is chaired by the Deputy Secretary-General and I am a member together with other senior UN officials. Furthermore, the issues relating to the rule of law are being discussed by Governments both in the Security Council and in the General Assembly. 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.

In the preamble of the Charter, 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, constitute the foundations of an international society based on the supremacy of the law, equality before the law, and accountability under the law. As recently recalled by the Secretary-General in a report on strengthening and coordinating UN rule of law activities, “the demand of the Charter for a rule of law ... aims at the substitution of right for might”: as he pointed out, “the equal protection of the law as the means to achieve freedom from fear and freedom from want is the most sustainable form of protection” and “[p]erhaps, the United Nations contributions to such protection are its most profound achievements”. Today, the concept of the “rule of law” is present 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.

This concept, which is so familiar to us lawyers, has the effect of placing our field of expertise at the very heart of the Organization’s mission. This raises an interesting question: how does the UN conceive what some have called the “exceedingly elusive notion” of the rule of law?

Within the Organization, the “rule of law” has been described as:

“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

What is of particular interest — and plainly stems from the emphasis put on the universality of the principles which inspired the Organization’s action in this area — is that the UN

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 in the Millennium Declaration, whereby the Heads of State and Government affirmed their resolve to “strengthen respect for the rule of law in international as in national affairs”. As was authoritatively stated, this implies 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”².

The “rule of law” acts as a vector for the engagement of the Organization in various areas of the international arena when properly combined with the principles and purposes of the Charter,. In the 2005 Outcome Document, 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”³ and that human rights, the rule of law and democracy “are interlinked and mutually reinforcing”⁴. These general statements are accompanied by calls for action on more specific issues of concern, such as the adherence to international treaties, implementation of international law at the domestic level, 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 which discriminate against women. The Security Council, for its part, also expressed support for the peaceful settlement of international disputes and for rule of law activities in the peacebuilding strategies in post-conflict societies. The Council has amply 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 crimes⁵.

This broad scope of the rule of law within the UN has been reaffirmed as recently as last month, in the context of an open debate of the Security Council on “The promotion and strengthening of the rule of law in the maintenance of international peace and security”. That debate was proposed by the Mexican presidency both with the objectives of “more strongly embedding the rule of law and international law in the daily work of the Security Council” and of “increasing the level of adherence to the rule of law and international law”, both of which were considered indispensable for the Council to fulfil its primary responsibility. I participated in this debate and, as was apparent from the various

interventions, the UN has endorsed the idea that the promotion of the rule of law may not be limited to specific situations or circumstances, but should expand to cover the rule of law at the international level.

In sum, the concept of the rule of law in the UN embraces the most classical and fundamental principles of 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. Let me turn to that issue.

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 assist 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 international rule of 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 gross violations of Human Rights, International Humanitarian Law and Refugee Law.

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. 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 should not allow the impact of justice to be undervalued when weighing objectives in resolving a conflict. We are thus currently witnessing a 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. In this context, therefore, the issue should not be framed as a debate between “peace and justice”, but rather between “peace and what kind of justice”. The issue is, in other terms, how to articulate the various possible elements of justice in a comprehensive conflict settlement. These may include: international

accountability mechanisms; hybrid accountability mechanisms; strengthened national accountability mechanisms; and alternative (national, international or hybrid) justice mechanisms, such as Truth and Reconciliation Commissions. Undoubtedly, setting the debate in these terms is, as such, a major breakthrough.

Therefore, the problem now relates to the best way to interlink peace and justice, 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, if we insist at all times on a relentless pursuit of justice, a delicate peace may not survive. This pragmatic assessment should not, however, be misinterpreted. Freedom from fear is, first and foremost, what all people in 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 one way or another on a daily basis.

The perpetrators of international crimes, of war crimes, crimes against humanity, and 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. In his opening address to the recent Review Conference on the International Criminal Court in Kampala, he eloquently referred to the birth of a new "Age of Accountability", under which those who commit the worst human crimes will be held responsible. I would suggest that, under his leadership, real progress is being made in this quest to end impunity. Everyday, I try to do my part to support these efforts.

In this respect I would like to 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.

We are now heading towards a critical phase for international criminal justice when the *ad hoc* tribunals 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 associated costs, and 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. It is now time to build on these early efforts so as to develop and maintain a culture of accountability.

Complementarity

The recent Kampala Declaration spelled out the resolve of the States Parties “to continue and strengthen effective domestic implementation of the Statute, to enhance the capacity of national jurisdictions to prosecute the perpetrators of the most serious crimes of international concern in accordance with internationally-recognized fair trial standards, pursuant to the principle of complementarity.” This issue of complementarity is at the heart of much of our current work.

Against this background and in light of the outcome of the Review Conference in Kampala, the principle of complementarity is – in my opinion – of crucial importance for the future of international criminal justice and the ICC.

We are all aware that international justice mechanisms, whether permanent or *ad hoc*, are not intended to supplant States where they have organized criminal justice systems which are willing and able to ensure that there is accountability for the crimes concerned.

International mechanisms are not substitutes for national mechanisms. Thus we see that, within the Statutes of the international criminal courts and tribunals, there is ample room for the exercise of national jurisdiction.

It is clear that the primary role of national jurisdictions in the prosecution of crimes has been thrown into greater relief as international justice has evolved and as the ICC in particular has become operational. The principle of complementarity has thus become the bedrock of international criminal justice.

If we want to remain on the offensive in our quest to end impunity and to ensure the prospects for a genuine age of accountability, we must be truly committed to strengthen national judicial capacities. The United Nations can and will assist States with technical cooperation and rule of law support. But again it is, first and foremost, up to States to embrace and implement the principle of complementarity.

Justice is a nation's choice. In its realization, the United Nations and the International Criminal Court can assist to a certain extent. But the fight against impunity will not be won at the international level. It must be fought and won inside the States, with the political will of the Governments and in the hearts and minds of the citizens. Only then will we truly see the dawning of an age of accountability.

For this, the principle of complementarity is key. Kampala has provided us with an important inspiration and foundation in this direction.

With full respect for its independent character, the Secretary-General has and will continue to support and assist the International Criminal Court, which is at the heart of our 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.

This aspect of the Court's contribution to the furthering of an "international rule of law" has now taken a new dimension, following the outcome of the Review Conference. The Conference adopted a resolution by which it amended the Statute so as to include a definition of the crime of aggression and the conditions under which the Court could exercise jurisdiction with respect to that crime. If the actual exercise of jurisdiction remains subject to a decision to be taken in 2017, the progress accomplished by the

Review Conference nevertheless constitutes a major breakthrough. I believe that it is important for me to make a few comments from a United Nations perspective.

First and foremost, by confirming their determination to recognize the Court's jurisdiction for the crime of aggression, States parties to the Rome Statute have renewed their commitment to strengthen the *jus contra bellum*, as enshrined in the Charter of the United Nations. It should not be forgotten that this is the first time that a "truly international tribunal"⁶ has been given jurisdiction to prosecute those responsible for crimes against peace. It is also noteworthy, in this regard, that the definition of the crime is based on that adopted by the General Assembly in its landmark resolution 3314 (XXIX) of 14 December 1974, thus confirming the special relationship between the Court and the United Nations, as reflected in article 2 of the Rome Statute.

Another interesting feature in the same perspective is that the Statute qualifies aggression as a crime committed by a political or military leader which, by its character, gravity and scale constituted a manifest violation of the Charter. While the primary role of national jurisdictions in the prosecution of international crimes and the principle of complementarity (which constitutes the bedrock of international criminal justice) are maintained, this development confirms something that I and so many others have stressed many times, namely that the Rome Statute is designed to reach those who bear the ultimate responsibility for actions of State organs.

Finally, it is remarkable that the States Parties to the Rome Statute have been able to strike a balance between the need for the Court to effectively exercise its jurisdiction for the crime of aggression and that of preserving the primary responsibility of the Security Council for the maintenance of international peace and security. As you know, the reviewed Statute provides that the Security Council, acting under Chapter VII of the Charter, may refer to the Court a situation in which an act of aggression appears to have occurred, irrespective as to whether it involves States parties or non-States parties, but the Prosecutor is also authorized, under certain strict conditions, to initiate an investigation on his own initiative or upon request from a State party, even in the absence of a determination by the Security Council. This is yet another example of the necessity – and the possibility! – of overcoming the potential dilemma between peace and justice.

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. However, my description of how upholding the rule of 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 have chosen two examples: the actions currently taken to address piracy and the notion of the “responsibility to protect”.

As we all know, acts of piracy and armed robbery at sea have widespread repercussions, including the disruption of international navigation and trade. Such acts also have significant negative impacts on the lives and livelihoods of seafarers, as well as on the security situation in the regions where piracy is pervasive. If international law *does* provide an adequate legal framework for addressing the crime of piracy, it is also clear that more needs to be done to implement this framework, especially at the national, but also at the regional and international levels.

When piratical acts are committed within the territorial waters of a State, they are not qualified as “piracy” under the 1982 United Nations Convention on the Law of the Sea (UNCLOS), but are known as “armed robbery at sea” or “armed robbery against ships”. Given that piracy, by definition, can only occur beyond the territorial sea, the Convention and customary international law provide for universal jurisdiction over acts of piracy. In the context of piracy, it means that any State may seize a pirate ship or a ship under the control of pirates, any State may arrest the suspects, and any State may prosecute them, pursuant to the provisions of UNCLOS. While UNCLOS sets forth a legal framework which allows States wide latitude to take measures against piracy, the responsibility is on States to implement these provisions within their own national legislation. It is important, in this regard, to also be aware that under UNCLOS, universal jurisdiction is “permissive”, even though all States must “cooperate to the fullest extent possible in the repression of piracy” (Article 100).

Although the legal basis for the prosecution of pirates under UNCLOS is thus well-established, some States have encountered substantial practical and legal difficulties in its implementation. These include a lack of national legislation or of updated national legislation, evidentiary issues, human rights concerns, coordination problems and a lack of capacity. Most recently, in its resolution 1918 (2010), of 27 April 2010, the Security Council has stated that “the failure to prosecute persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia undermines anti-piracy efforts of the international community”. The situation of piracy off the coast of Somalia provides, I believe, a striking illustration of the measures that are being taken by the UN, in particular by the Security Council and the Secretariat, to strengthen compliance with international law.

In resolution 1918, the Security Council called upon the Secretary-General to prepare a report on “possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia”, including in particular, “options for creating a special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements.” In preparing that report with other relevant partners, my Office has thoroughly reviewed a large series of options, ranging from an enhanced UN assistance to increase the prosecuting and imprisoning capacity of States in the region; to various kinds of special chambers; and to regional or international tribunals to be established on the basis of a treaty with UN participation or by Security Council resolution under Chapter VII of the Charter of the United Nations.

In doing so, we have strongly underlined that any such new judicial mechanism, if established, would be addressing a wholly different situation to that addressed by existing UN and UN-assisted tribunals. These tribunals were established to achieve accountability for a relatively limited number of serious international crimes, or acts of terrorism, which are at the heart of the events which have rendered the affected State unable or unwilling to prosecute them. As a consequence, these tribunals are an integral part of UN efforts to assist the affected State to achieve peace and reconciliation. By contrast, piracy and armed robbery at sea are but a symptom of the ongoing conflict and lack of rule of law in Somalia. It follows that a new judicial mechanism to prosecute acts of piracy and armed

robbery at sea off the coast of Somalia would address a symptom of Somalia's ongoing instability, not its causes. It is necessary for us to address the root causes of these acts on land in order to achieve a sustainable long-term solution to the problem of piracy.

The response to piracy demonstrates that strong laws 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, when it conveys 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 Council⁷, to proclaim the concept of the "responsibility to protect"⁸, 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 crimes⁹.

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, in which he outlined 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. Interestingly, the notion of an "international rule of law", which — I believe— lies at the heart of the responsibility to protect, may again prove useful in understanding the action needed under these three pillars. Under the first pillar, there is a

need for States to become parties to relevant international instruments on human rights, IHL and refugee law, and to the ICC Statute; and the core international standards need to be faithfully embodied in national legislation. The presence of a strong culture of rule of law in a society may prevent or minimize the risk of deterioration into an “RtoP” situation. Under the second pillar, there is a need for assistance programmes to build specific capacities within societies that would make them less likely to travel the path to crimes relating to the responsibility to protect. Under the third pillar, emphasis is needed on all the available tools provided under the Charter, notably in Chapters VI, VII and VIII. 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 respect for the rule of law at the United Nations

Let me now turn to the second part of my presentation, which – as I mentioned before – will be devoted to enhancing respect for the rule of law within the UN.

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 in 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, discussions in the Sixth Committee on the criminal accountability of UN officials and experts on mission, or the reform of our internal system of administration of justice. As for today, I would like to examine in more detail two areas in which significant progress has recently been made: the implementation of sanctions; and the responsibility of international organizations. Something indeed needs to be said as to the necessity for the UN to face the impact that its acts may have on actors outside the system, even — or, should I say — most importantly when these acts have prejudicial consequences.

A. Adapting the regime of sanctions

I will be very brief in addressing how the UN has adapted the regime of sanctions which the Security Council has been using as an important tool in the fight against terrorism. The issue has attracted numerous debates, both in international and regional fora and in legal literature, and I would not like to oversimplify the complexity of the matter. Allow me simply to emphasize 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 a new kind of imminent threats against peace and security, the UN may not have immediately paid sufficient attention to the guarantees to be associated with the imposition of sanctions. Much has been said about the external factors that have called the Organization to address this issue. One of the most frequently mentioned among these external factors is certainly the Judgment of 3 September 2008 rendered by the Grand Chamber of the European Court of Justice in the joined cases of *Yassin Abdullah Kadi, Al Barakaat International Foundation*.¹⁰ As you certainly are 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 a the summary 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 undoubtedly marks 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 regimes 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. In 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 further improved the system of notifications associated with listing procedures and directed a review of the

Consolidated List. These efforts have culminated with the adoption of Resolution 1904 (2009) of 17 December 2009, by which the Security Council decided that an Ombudsperson shall be appointed in order to assist the Sanctions Committee in the consideration of delisting requests. The review of the regime of sanctions is, in other words, an ongoing effort undertaken by the Security Council, which shows once again how the Organization is active in seeking to ensure that its activities are conducted in conformity with the rule of law.

B. Determining responsibilities

Lastly, allow me to address the topic of international responsibility as applied to 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, that the International Court of Justice, in its famous advisory opinion on the *Reparation for Injuries Suffered in the Service of the United Nations*, expressly asserted the autonomous legal personality of the Organization. However, with the multiplication and diversification of its mandates and its increased involvement on the field, the question of the responsibility of the UN necessarily arises.

In addressing this topic, 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 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 against actions on 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, the efficiency of the Organization, this need to deliver which is so central to the work of the Secretary-General and its administration, will be durably hampered.

Allow me to illustrate the importance of this issue with a concrete example. As you 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. I do not intend to discuss the merits of the cases under the special legal regime created by the European Convention on

Human Rights. In some respects however, this decision draws upon significant aspects of the activity of the United Nations.

The two cases concerned events that 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 *inadmissibility*: the European Court finds 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 to 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 replicated 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 UN¹¹. The *Behrami* reasoning has also been extensively referred to, if not always adopted, by certain national courts. In the *Al-Jedda* case for example,¹² 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 Lords with the exception of one. Other Lords pointed to the fact that the force was not acting under UN auspices; in doing so, some relied 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 cases¹³ 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 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 a conduct over which it 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 fulfilment 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 fulfil 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. I have also committed to submit to the International Law Commission—which is currently considering the topic of the responsibility of international organizations—to submit our assessment of the issues arising from the draft articles adopted by the Commission on first reading, including our comments on the evolving jurisprudence generated by the *Behrami* decision. In none of the instances I have just referred to has the UN been held accountable. We cannot however satisfy ourselves with such short-sight reasoning. As I have striven to demonstrate today, the United Nations needs to lead by example.

Conclusion

Excellencies,
Ladies and Gentlemen,

In reaching the conclusion of this statement, I become aware that I have imposed upon you a daunting journey through a wide number of very diverse legal issues. 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 Institute, needs to face together in the years to come.

Thank you very much.

ENDNOTES

¹ S/2004/616, para. 6.

² A/59/2005, para. 133

³ A/60/1, para. 11.

⁴ A/60/1, para. 119.

⁵ S/PRST/2006/28.

⁶ ICTY, Trial Chamber, *The Prosecutor v. Dusko Tadic*, Judgment of 7 May 1997, Case No. IT-94-1-T, para. 1.

⁷ Resolution 1674 (2006), operative paragraph 4.

⁸ General Assembly resolution 60/1, paras 138 and 139.

⁹ General Assembly resolution 60/1, paras 138 and 139.

¹⁰ 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.

¹¹ *Beric and others v. Germany*, decision on admissibility, 16 October 2007.

¹² 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.

¹³ LJN: BF0181 and BF0182, Rechtbank's-Gravenhage, 265615 / HA ZA 06-1671 and 265618 / HA ZA 06-1672 (English translation), 10 September 2008.