

ALTERNATIVES TO LITIGATION IN A CIVIL SOCIETY

ICDR/Trinity College Event

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Ladies and Gentlemen,

It is a pleasure and a privilege to participate in today's event. The topic before us today, "Alternatives to litigation in a Civil Society", is a fascinating and relevant one for the United Nations, in particular given its potential in achieving the long-term resolution of disputes and maintaining peace and security.

This morning, I will focus on the role of the United Nations in the field of dispute resolution broadly, and I will share my reflections based on that experience. As the Legal Counsel of the United Nations, I will be addressing the topic from a slightly different angle than the one you may be more used to in the context of strictly commercial disputes. My perspective is that of an international organization devoted to maintaining international peace through the settlement of international disputes in conformity with the principles of justice and international law.

I will start with our focus on preventive diplomacy where mediation plays such a significant role. We have just marked the fiftieth anniversary of the

untimely death of Secretary-General Dag Hammarskjöld, who first articulated the concept of preventive diplomacy. His abiding belief in the useful combination of public discussion on the one hand and private negotiations and mediation on the other holds even more true to this day as the best means of resolving tensions and crises before they escalate and of limiting the spread of conflicts when they occur.

By way of brief background, today's UN is made up of 193 Member States. Almost every country on earth now takes a seat in the General Assembly. The 51 original members from 1945 have been joined by 142 others since then – most recently by the Republic of South Sudan in July of this year. The role of and the expectations for the Organisation have changed quite dramatically in the years since 1945. Since then, the UN has assisted in negotiating more than 170 peace settlements that have ended regional conflicts. Over time, the tasks and mandates given to the Organisation have become increasingly complex. The traditional image of peacekeepers in blue helmets is now only part of the UN story. In recent times, the UN has been called to mediate in a wide range of different cases ranging from cease fires to fully fledged peace agreements including places like Libya, Burundi, East Timor, Cameroon/Nigeria, Kenya, Guinea, Malawi, Equatorial Guinea and Gabon, and others. Our mediation activities are varied. UN peacekeepers have been mandated by the Security Council to support military operations in

the Democratic Republic of the Congo to disarm armed groups, who presented a serious risk to the safety of the civilian population. In Sudan, preventive diplomacy was a major focus of international efforts, led for the UN by its peacekeeping missions, to ensure the successful holding of the 2011 independence referendum for South Sudan. We have been called on to certify the outcome of the contentious presidential election in Côte d'Ivoire and to prevent the escalation of conflict and to shepherd the transition to stability in that country.

UN Preventive diplomacy and mediation actors in Guinea, Sierra Leone, Iraq, Kenya and Kyrgyzstan have been effective in: assisting the path to elections; peaceful dialogue over disputed internal territories; stopping inter-ethnic violence; reducing inter and intra-state tensions and violence; and, helping to pave the way to returns to constitutional order.

More than half of the Organisation's staff are based in the field, conducting work in areas such as peacekeeping, humanitarian relief, human rights work and development assistance. We have 16 peacekeeping operations with about 100,000 peacekeeping personnel. By definition, most of our work is carried out in areas of high risk and underdevelopment. In cities like Dublin and New York, we take for granted the power supplies, the transport networks and the sanitation systems. The UN can do no such thing. All of this makes the work of the Organisation unpredictable and the outcomes

uncertain. The outcomes are sometimes imperfect. Indeed, how could they be otherwise? Given the environment in which the UN operates, the view of Dag Hammarskjöld continues to ring true when he said that the UN was not created to bring humanity to heaven, but in order to save us from hell.

Preventive diplomacy includes diplomatic action taken to prevent disputes from escalating into conflicts and to limit the spread of conflicts when they occur. Mediation lies at the heart of this concept and is growing in relevance and importance. As our Secretary-General said last month:

“Preventive diplomacy is delivering concrete results, with relatively modest resources, in many regions of the world, helping to save lives and to protect development gains”.

It is an approach that may not be effective in all situations and will continue to face the uncertainty, risks and evolving challenges which, in a sense, come with the terrain. Yet, I truly believe that better preventive diplomacy is not optional. It is essential.

My perspective is inevitably based on my own experience at the UN in dealing with complex international situations such as those in DRC, Lebanon, Sudan, Cambodia, Sri Lanka, Libya, Gaza and the Middle East more broadly Guinea, Côte d’Ivoire, Madagascar. Just as an example, Somalia, where its deep poverty, endemic corruption, political instability and lack of effective

and legitimate justice and security institutions have brought the country to virtual collapse. Crime and piracy are widespread there principally as a symptom of the lack of institutions and the existence of a conflict that has persisted in the country for 20 years. My office has recently been advising the Security Council on possible options to address the scourge of piracy to the extent it poses a serious threat to peace and security in the region, imposing an enormous commercial and economic cost on the Somali people and on the world at large. Last month, in pursuit of preventive diplomacy, regional mediators met with the UN to discuss the situation in Somalia and to lay out a path for establishing stability in that country over the next 12 months – an undertaking that some would have called an impossibility in the past.

Another obvious example is the case of Libya. We are deeply involved. Our attention has been galvanised by the need to re-establish its institutions after years of dictatorship. The efforts to resolve the national conflict exacerbated in the past months has focussed our attention. This includes the establishment of a UN mission there. We are engaged with the question of how those responsible for war crimes and crimes against humanity should be tried and held responsible.

Alternative and pacific means of settlement of disputes are tools for the United Nations in building a solid foundation for peace. The General

Assembly earlier this year recognised the “untapped” potential of mediation in the peaceful settlement of disputes. In its resolution, the General Assembly invited States to optimize the use of mediation and other tools for the peaceful settlement of disputes, as well as conflict prevention and resolution and encouraged them to develop, where appropriate, mediation capacities in order to ensure coherence and responsiveness. The resolution also requested the Secretary-General to continue offering his good offices, to appoint women as chief or lead mediators in United Nations’ sponsored dispute resolution processes, and to strengthen the Organization’s mediation capacities.

The role of preventive diplomacy and mediation in the settlement of disputes was recently chosen by the President of General Assembly as the theme of this year’s general debate. As he explained in his opening speech last month, his choice was motivated by the need to fulfil the General Assembly’s peacemaking role “at this major juncture in international relations”. We are all now in no doubt that preventive diplomacy and mediation are crucial to defusing tensions before they escalate into conflict and efforts of preventive diplomacy are increasingly being undertaken by the UN and Member States amid the changing political and security landscape.

But mediation is just one of the dispute resolution mechanisms mentioned in the Charter. Indeed, where disputes are concerned, there is no one-size-fits-all.

The Charter refers to judicial settlement which – for our purposes today – should be equated with litigation. Article 33 of the UN Charter makes reference also to other means, alternative means, of peaceful settlement of disputes such as negotiation, conciliation, mediation and arbitration.

So in this framework, why should disputing parties resort to these mechanisms as opposed to judicial settlement?

I suggest that the answer is similar in the context of both commercial disputes and inter and intra State disputes.

Alternatives to litigation can reduce antagonism, foster dialogue and are based on consent.

These mechanisms are based on party autonomy which allows the parties to retain control over the dispute resolution process. They can provide a high degree of confidentiality and flexibility and help in reducing costs. They are perceived as affording parties a neutral forum where prejudices are less likely to occur.

We all know that resorting to litigation in general is certainly a valid option to resolve any dispute. For particular disputes, both in private, commercial and state to state relations, court action can be far from ideal because of challenges such as length of procedure, legal uncertainty, costs, and the negative impact on existing relationships. In addition, the adversarial nature of litigation often fosters hostility and resentment, rendering disputes sometimes intractable. Alternatives to litigation offer a means to mitigate antagonism and, in some cases, to foster mutual understanding.

A good example to illustrate that point from an international perspective is the dispute between Nigeria and Cameroon over the Bakassi peninsula. As many of you may know, Cameroon submitted the dispute with Nigeria over the oil-rich peninsula to the International Court of Justice in the early 90s. The dispute eventually expanded to consider also the sovereignty over the territory of Cameroon in the area of Lake Chad. While the Court was considering the case, tension between the two countries mounted and incidents arose at the border resulting in casualties. The Secretary-General met with the Presidents of the two countries who promised to respect and implement the decision of the Court, whatever that would be.

Contrary to the agreed compromise and further to the decision of the ICJ, which essentially awarded Cameroon rights to the oil-rich peninsula, Nigeria

then stated that the judgment did not consider fundamental facts and many in the country called for war against Cameroon.

In order to avert a major crisis between the two countries, the Secretary-General met again with the two Heads of State shortly after the judgment and agreed to establish a UN-backed implementation mechanism, the Cameroon-Nigeria Mixed Commission, which would: (i) consider all the implications of the Court's decision, (ii) demarcate the land-boundary, and (iii) make recommendations on additional confidence-building measures, such as the demilitarization of the peninsula.

The process culminated with the signature of an agreement under the auspices of the Secretary-General. In that agreement, Nigeria formally agreed to respect the decision of the Court, and to withdraw from the Bakassi peninsula.

While to date the full demarcation of the borders has not yet been fully completed, the two countries continue to abide by the terms of the agreement which has been referred to as a major achievement in conflict prevention and a model for the resolution of similar conflicts in future.

Alternatives to litigation are based on party autonomy and allow the parties to retain control over the dispute resolution process.

Contrary to litigation, the parties largely retain control over the process. On the one hand, instead of adjudication by predetermined judges, the parties are able to select the arbitrators or mediators who can contribute crucially to a timely and cost efficient resolution of the dispute. On the other hand, the parties are able to adjust the proceedings to their needs without being subject to strict procedural rules. And finally, the parties can agree on the applicable principles or rules for the resolution of the dispute. Overall, alternatives to litigation offer greater flexibility.

Another example from my perspective is the Rainbow Warrior dispute between France and New Zealand. Due to France's non-recognition of the compulsory jurisdiction of the Court, there were jurisdictional obstacles to bringing the case before the ICJ. The parties approached the Secretary-General to ask him to act as mediator in the dispute between them. The Secretary-General agreed to do so and the two States agreed to refer all the problems between them arising from the Rainbow Warrior affair to the Secretary-General. They also agreed to abide by his ruling. The Secretary-General was given a mandate to find a solution that would respect and reconcile the conflicting positions of the parties, and would, at the same time, be both equitable and principled.

Literally within days of the ruling, the parties exchanged letters amounting to an agreement in settlement of all issues arising from the Rainbow Warrior

affair. In essence, the Prime Minister of France agreed to convey a formal and unqualified apology to the Prime Minister of New Zealand for the attack on the Rainbow Warrior by French service agents which was contrary to international law. He agreed to pay a sum of US\$7 million to the Government of New Zealand as compensation for the damage suffered. On the other hand, New Zealand agreed to transfer the two agents responsible for the sinking of the Rainbow Warrior to a French military facility for a period of 3 years.

Alternatives to litigation can provide a higher degree of confidentiality.

In the context of commercial disputes, it is said that parties to an arbitration or mediation can to an extent, keep the proceedings, as well as the results confidential. While this is true for most disputes, one should also acknowledge that for disputes that are either politically charged or involve States or state entities, this is a feature that is progressively weakening. The current work of UNCITRAL on the issue of transparency in arbitration and investment arbitration is indicative of a change of trend.

Generally speaking, however, confidentiality is a feature more often to be found in mechanisms other than litigation. In inter-State disputes, when using means other than litigation, although stakes are high and politically charged, the details of the dispute and the issues involved in resolving it are

not made public. This lack of publicity sometimes offers an opportunity to prepare a dispute for formal adjudication through litigation or through arbitration. The lack of publicity may actually prevent violence in inter-state disputes to the extent that tensions can be contained and issues discussed more freely.

In this sense, the ongoing dispute between Gabon and Equatorial Guinea is a good example. This dispute concerns the sovereignty over the Mbanié, Cocotiers and Congas islands in Corisco Bay, in an area of petroleum and natural gas deposits. While the delimitation of their maritime and land boundaries dates back to 1972, it has remained a source of periodic tension between the two nations over the years. The two States have been engaged in a mediation process under the auspices of the United Nations since 2003. In 2008, the parties agreed that the mediation should focus on the negotiation of a special agreement to bring the dispute to the International Court of Justice. While the process is not secret, the parties' discussions leading up to an agreement are not presented in public, there are no written submissions and the dispute and the means of resolving it is still being shaped.

My predecessor, Nicolas Michel, is instrumental in leading this process. While the last round of negotiations between the two countries has been inconclusive, the negotiations are ongoing and the parties are deeply committed to the process.

Alternatives to litigation can help in reducing costs.

In today's interdependent and complex economy, disputes are increasingly multi-jurisdictional. Hence, resolving such disputes through litigation requires the expense and complexity of pursuing parallel proceedings in a number of different jurisdictions, potentially facing several rounds of appeals.

Alternative dispute resolution mechanisms have the advantage of being able to avoid such obstacles and streamline the process. In arbitration for instance, the end result is a final and binding award saving the parties the potential expense of having to deal with several rounds of appeals. On the other hand, mediation offers a cost-effective and quick extrajudicial resolution mechanism through processes tailored to the needs of the parties.

The Rainbow Warrior dispute speaks to this to the extent that the parties were able to save money and time by means of resorting to mediation by the Secretary-General. In highly complex disputes, however, where essential facts are in dispute and their clarification is necessary, costs easily add up even when resorting to alternative means of dispute resolution.

Alternatives to litigation are commonly perceived to afford the parties the upside of a neutral forum so that neither party is subject to foreign court procedures, laws, customs, languages, and prejudices.

This is even more so when public entities are party to a dispute. If a dispute is between a state entity and a private party, the private party will be disinclined to go to the court of the state entity, and the state entity will not want to submit to the jurisdiction of the courts of another state. This is the scenario often present in investment disputes which I understand will be discussed later. Indeed, in disputes between foreign investors and States, alternatives to litigation are often, if not always, preferred.

But alternatives to litigation are not the panacea.

Whilst in some cases, alternatives to litigation may actually foster prevention and/or resolution of a given dispute, in some others injustice may arise and the conflict may be perpetuated or aggravated. My view on this is clear: for the long-term resolution of disputes, understanding the multidimensional nature of disputes is key and the approach should be tailored to the circumstances.

Now, to illustrate this point, let me briefly tell you a success story involving the Kanak people of New Caledonia in the South Pacific and the Vale Corporation, a Brazilian mining corporation. While the UN was not involved in this particular case, it was among those featured in an interesting and innovative – I would say – dispute resolution database launched by the Secretary-General's Special Representative on Business and Human Rights,

John Ruggie, in cooperation with the Corporate Social Responsibility Initiative at Harvard Kennedy School (and with the support and collaboration of the International Bar Association and the Compliance Advisor/Ombudsman of the World Bank Group).

As some of you may know, Vale is a Brazilian diversified mining multinational corporation; actually, one of the largest logistics operators in Brazil and the second-largest mining company in the world. Part of its success was due to the acquisition of Inco, a Canadian nickel mining company in the year 2006, which effectively turned the company into the world's second largest nickel producer.

At the end of the 1990s, Inco launched a large nickel project in the Southern Province of New Caledonia, an area populated by the Kanak people.

The Kanak maintain a spiritual connection with the land and the living species it supports and their tradition calls for harmony between the physical and spiritual inhabitants of the land in that region and for ceremonies to be carried out at certain times in order to maintain that balance. Not long after mining operations began, the Kanak started to complain about the impact of the company's operations. Among their grievances were allegations that Inco routinely polluted the land and coastal waterways, was insensitive to the

Kanak cultural identity and, more generally, that the Kanak were not able to benefit economically from the mining operation.

Initially, attempts to resolve the dispute with the Kanak involved police intervention and violence against people and property. With the taking over of the company by Vale, a mediation process was initiated coupled with negotiations and consultations. This strategy ultimately led to the signature of a Sustainable Development Pact in 2008 with both the communities and local authorities. The new approach brought all interested parties to the table and sought to understand better their on-going concerns and expectations regarding the project. Without a preconceived framework, a process of reconciliation began. Through the Pact negotiations, the development of a shared and sustainable vision for the future was encouraged and it became apparent that all groups had shared concerns – about environmental sustainability and what would be left for their children after all the mineral extraction was complete.

I chose this example to show that there are no simple disputes. The better one understands the dispute, the more likely it is that one will be able to solve it. The better one understands the parties' motivation, the more likely one is to be able to influence the process. Choosing the right mechanism, be it litigation or an alternative to it, requires first to understand the dispute.

For that reason, efforts to promote alternatives to litigation should not be at the expense of strengthening the judiciary at the local, national and international level. In my view, efforts to boost such alternatives should go hand in hand with efforts to achieve judicial strengthening and reform through capacity building and investment. A strong judiciary is an ultimate guarantee for peace and justice, as the experience of the United Nations shows in the field of conflict prevention and conflict resolution.

The United Nations' greatest efforts concentrate on the avoidance and prevention of disputes.

This includes consideration of ways to prevent disagreements from becoming conflicts and to avoid the escalation of conflicts into formal disputes.

Generally, when UN peacekeeping missions or peace building offices are established, heads of mission and UN staff engage frequently in good offices and mediation processes to ensure that peace moves forward. Staff throughout the United Nations system are involved at many different levels in negotiation and mediation as they undertake their everyday activities.

Efforts have been made to strengthen the UN's capacity in the area of mediation, acknowledging the important role that good offices play in resolving or de-escalating conflicts. As a result, in 2008 the Department of Political Affairs established the Mediation Support Unit (MSU is its

acronym). It is envisaged as a service provider for the entire UN system. It supports the mediation efforts of relevant departments as well as representatives, envoys and resident coordinators.

The MSU delivers services in three main areas: (i) technical and financial support for peace processes; (ii) capacity building; and (iii) mediation, guidance, lessons learned and best practices.

The United Nations plays an active role in helping to mediate inter- and intra-State conflicts at all stages: before they escalate into armed conflict, after the outbreak of violence, during implementation of peace agreements and/or during parallel arbitration or court proceedings.

Good offices are carried out by the Secretary-General and his representatives and envoys at the request of the Security Council or the General Assembly.

The Secretary-General, himself or through his special representatives and envoys, also carries out a wide variety of activities in the context of dispute prevention and conflict resolution.

He is actively engaged in pursuing peaceful solutions to inter- and intra- State conflicts. He was recently requested to designate the Chairman of a Court of Arbitration pursuant to the Indus Waters Treaty, to resolve a dispute on the planned construction and operation of a large dam project by India. The project would involve the diversion of a substantial quantity of water from

one of the rivers part of the Indus system affecting the usage of water by Pakistan. The Indus Waters Treaty, signed in 1960, between India and Pakistan, is a water-sharing treaty brokered by the World Bank that put an end to the dispute concerning the waters of the Indus system of rivers. The Treaty fixes and delimits the rights and obligations of each Party concerning the use of the waters and it makes provision for the settlement of disputes between the parties in this regard.

The original purpose of the Treaty was to reduce hostility between the two countries in the context of a very strained relationship due to the long-lasting dispute over Kashmir. While the dispute over Kashmir has unfortunately not yet been resolved, the Treaty has achieved its purpose insofar as the use of shared waters is concerned and provides an on-going mechanism for consultation and conflict resolution.

Special representatives of the Secretary-General have been appointed to actively engage in the resolution of disputes all over the world. In relation to disputes between States, as in the case of the border controversy between Guyana and Venezuela; in places where there is or there has been open conflict such as Côte d'Ivoire, Libya or Darfur; or in places where there is widespread violence such as Somalia.

But the work of the United Nations is not only about the use of alternatives to judicial settlement for the peaceful settlement of disputes. The UN's work and my work in particular is focused also on the creation and consolidation of international judicial mechanisms and in promoting the rule of law at the national and international levels with a view to peacefully resolving disputes and ensuring that everyone is accountable – from the individual to the State itself.

I already mentioned the International Court of Justice insofar as state to state relations are concerned but I should also mention the international criminal justice mechanisms with the International Criminal Court as the institutional pinnacle. These mechanisms are the instruments to end impunity for genocide, war crimes, crimes against humanity, and other grave breaches of IHL.

I focused earlier on the advantages of the alternatives to litigation. But let me say also that courts are better suited to address certain disputes, involving serious violations of international law. Courts are certainly better suited to develop a jurisprudence in international law than, for example, arbitral tribunals. Courts are better suited to address urgent questions that may require the adoption of interim measures than, for example, a mediator, an arbitral panel or a commission of inquiry. And courts are of course also

better suited to pursue criminal justice. For certain types of conflicts, recourse to litigation is the best option.

Experience developed in my Office over the past two decades with international tribunals, as those for Cambodia, Sierra Leone, Rwanda and the Former Yugoslavia allows me to say that for cases like Cote d'Ivoire, Guinea and Somalia the establishment of the rule of law and the active involvement of the courts can help jump start the process of conflict resolution and peace building.

To conclude, there is no one-size-fits-all approach to disputes but rather a case-specific approach and the choice of mechanism largely depends on the type of dispute.

The development of alternate forms of dispute settlement need not be regarded as a means of remedying deficiencies in the operation of the courts but as a true and legitimate alternative in light of the circumstances of each case.

Alternatives to litigation are better suited to reach a solution to a dispute through negotiation allowing the parties to retain as far as possible an existing relationship. However, to be successful such mechanisms must be perceived and assumed by all potential parties to a dispute as a viable option

and not just an additional hurdle preventing a swift response to the issues at stake. The credibility of the process is key.

It is also clear that alternative means of dispute resolution work best in those places where there is a strong judiciary.

These mechanisms are of special importance to developing countries, especially to those emerging from long periods of turmoil which are facing serious challenges in re-establishing a basic institutional network and the rule of law. In many cases, those countries also need to attract foreign investment in order to get their economies growing and to consolidate peace.

The General Assembly recently called on developing countries to create a conducive climate to investment, part of which is – no doubt – the access to justice. Alternatives to litigation are being encouraged as a means to promote that goal.

However, from the perspective of developing countries, efforts to boost such alternatives should go hand in hand with efforts to consolidate the fundamental role of the judiciary in a Civil Society. National judicial capacities must be strengthened as a guarantee for peace and stability as well as a means of ensuring the ultimate success of alternatives to litigation.

As I mentioned, understanding the dispute is key. Part of the process of understanding the dispute includes identifying the mechanism to resolve it

and/or prevent it in future. In so doing, exchanges such as the one that will take place during the course of today's discussion are no doubt needed to help achieving a better understanding of what alternatives to litigation may offer and for what kind of disputes.

Thank you for your attention today and I wish you all a very fruitful discussion.