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**“The Role of the United Nations in Peacekeeping – Recent
Developments from a Legal Perspective”**

Keynote Address

by

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Ladies and Gentlemen,
Dear Colleagues and Friends,

First, let me thank you warmly for the invitation to address you on this occasion. It is indeed an honour and a pleasure to be among you tonight. I recognize in the audience colleagues who I have met before and with whom I have had the pleasure of cooperating on various matters in the past, both in my capacity as Legal Adviser in the Ministry of Foreign Affairs of Sweden and, since 1994, as the Legal Counsel of the United Nations.

I was asked to address you on “The Role of the United Nations in Peacekeeping”. I choose to qualify it by adding “Recent Developments from a Legal Perspective” in order to bring additional focus to it. This is necessary because of the rather dramatic changes that we have experienced over the last couple of years in the field of peacekeeping.

In my presentation* I will touch upon three distinct issues:

First, the fact that peacekeeping operations, or rather peace operations, have gradually become more complex and acquired an increasingly legal dimension;

Second, the fact that peace operations are presently under review by the General Assembly, the Security Council and the Secretariat; and

Third, the fact that the rule of law has become a distinct element in peace operations.

Let us now look at the first issue: the fact that peace operations have gradually become more complex and acquired an increasingly legal dimension.

When in the beginning the United Nations engaged in peacekeeping operations, the situation was typically that there had been an international conflict, that there was a peace accord, and that the parties to the accord welcomed the United Nations peacekeeping force to assist the parties in its implementation, primarily to separate the opposing military forces. There was also a reasonable expectation that the operation would be successful.

In later years, however, the United Nations peace operations have gradually become more complex. First of all, most of the conflicts with which the Organization is now faced are intra-national rather than international. Experience shows that these conflicts are more difficult to deal with than international conflicts. The United Nations peace forces have been sent to areas with much more demanding mandates, but often without the necessary resources to enable them to deliver what is expected from them. The experience of Somalia,

* The views expressed are my own and do not necessarily represent the opinion of the United Nations.

Rwanda and the Former Yugoslavia could be mentioned as examples of operations where the United Nations have faced great difficulties for this very reason.

A particular problem is that, since there is not always a peace agreement to implement, there is a clear risk that the parties to the conflict will not see the United Nations forces as impartial. The result is that the parties to the conflict have targeted United Nations peacekeepers. A sad fact is also that participants in the conflicts have deliberately targeted civilian personnel, including representatives of non-governmental organizations and the Red Cross. Experience in Burundi, Central Asia and West Timor testify to this sad tendency.

Tonight, I should like to focus on two specific operations, since they are of particular interest to an audience of lawyers: the United Nations Mission in Kosovo (UNMIK) and the United Nations Transitional Administration in East Timor (UNTAET).

On 10 June 1999, the Security Council adopted resolution 1244 (1999). In this resolution, which may be one of the most complex resolutions that the Security Council has placed in the hands of the Secretary-General of the United Nations, the Secretary-General is authorized to establish an international civil presence in Kosovo in order to provide an interim administration under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia. The purpose of this civilian presence is to provide transitional administration by establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants in Kosovo.

Furthermore, the responsibility of the international civil presence is to promote the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo. Reference is made to the Rambouillet Accords.¹ The mission shall also perform basic civilian administrative functions where and as long as required.

An important element of the mandate is that the mission shall organize and oversee the development of provisional institutions for democratic and autonomous self-government pending a political settlement. This expressly includes the holding of elections.

As these institutions are established, the mission is to transfer its administrative responsibilities to these institutions. The mission shall also facilitate a political process designed to determine Kosovo's future status. In a final stage, the mission shall oversee the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement.

When this resolution was adopted, an immediate legal analysis led to two important conclusions: the United Nations had to govern Kosovo and the United Nations also had to legislate for the province.

Since June 1999, under the leadership of Dr. Bernard Kouchner of France, UNMIK has established a number of institutions.

The Mission's work has been distributed among four different pillars, one for humanitarian affairs, one for civil administration, one for human rights and electoral matters, and one for economic development, including managing the Ministry of Finance. At the Kosovo central level, there are over 20 departments which deal with matters that traditionally are administered by departments within a government structure: justice, fiscal matters, education, just to mention a few. There are five regional administrators, who are in charge of local administration.

An important element in the administration was to organize elections. As I am sure you have noticed, such elections for municipalities were held on 27 October 2000. They were generally seen as fair and just, in spite of the fact that, regretfully, part of the Serbian population chose not to participate. The fact that Dr. Rugova's party emerged as victor (his party received 56 per cent of the votes) was generally seen as an indication that the population of Kosovo supports a more moderate political line.

The legislative work of UNMIK is, of course, a delicate matter. Resolution 1244 (1999) clearly reaffirms the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other states of the region. At the same time, the resolution reaffirms the call in previous resolutions for substantial autonomy and meaningful self-administration for Kosovo.

In this situation, the United Nations had no other choice but to start legislating for Kosovo in areas where existing rules were not appropriate.

The issue of applicable law became a contentious question of principle between the local population and the United Nations. I will not go into detail here, since this would require a too lengthy explanation. Suffice it to say that the relevant UNMIK regulation lays down that the applicable law in Kosovo shall be (a) the regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder, and (b) the law in force in Kosovo on 22 March 1989. Additional safeguards, including rules to secure international human rights standards, are also provided for in the regulation.²

I do not think that it requires much imagination to realize that if you govern a province, you must also have means of financing its government. For UNMIK there are two distinct budgets: the United Nations traditional budget adopted by the General Assembly, as in the case of all missions established as subsidiary

organs under the Security Council, and the budget for the local administration. The purpose of this second budget is to finance the administration of the province. This budget will of course be taken over by a future government of the province of Kosovo the day UNMIK withdraws.

Once UNMIK was established, it immediately became evident that the United Nations had to issue tax legislation and legislation on customs. Other requirements made further legislative acts necessary. As of 30 November, the Mission has issued 88 regulations.

The regulations are issued by the Special Representative of the Secretary-General with reference to his authority under Security Council resolution 1244 (1999). However, since legislation is normally prepared by a government and presented to a parliament for adoption, some kind of preparatory stage had to be developed also for Kosovo. Presently, there is a joint consultative body that examines and provides opinions on any draft regulation considered.

There is also legal unit within the Mission that is in constant contact with the Office of Legal Affairs at the United Nations Headquarters. Through these informal contacts we try to assist the Mission, in particular by reviewing the constitutional elements of the legislation, i.e. that the regulations conform to the Charter of the United Nations, to the mandate given to UNMIK by the Security Council and also respect internationally recognized standards, in particular in the field of human rights.

One conclusion that we drew on the legal side was the following: Just as you need to provide immediately humanitarian assistance – food, water, shelter, etc. – to the population, you need to very quickly provide a functioning police and criminal justice system. It is important to keep in mind that Kosovo is in a post civil war situation where certain elements of the conflict are still present. Serious crimes are committed, and criminality is high.

One problem that we identified already at the outset was that it was difficult to recruit competent judges and prosecutors. Also, some of the persons appointed to hold such positions were threatened or intimidated and had obvious difficulties in performing their tasks. Therefore, it has been deemed necessary to recruit international judges and prosecutors to perform functions within the Kosovo criminal justice system.

It is obvious that it will take a long time until a functioning justice system is in place in Kosovo. However, for the United Nations the establishment of such a system constitutes an extraordinary challenge within the mandate of the peace mission.

Let us now look at the situation in East Timor.

As distinct from the situation in Kosovo, in East Timor we know that a new State is being born. With respect to East Timor, the Security Council adopted resolution 1272 (1999) on 25 October 1999. This resolution provides both for a civilian and a military component. (In Kosovo the United Nations has only a civilian administration. I trust that you are all aware that the military presence there, KFOR, is not a UN operation.) This means that the Special Representative of the Secretary-General, Mr. Sergio Vieira de Mello of Brazil, is in charge of both these components in East Timor.

Basically, the United Nations experienced the same legal problems in East Timor as in Kosovo. The difference was, however, that there were hardly any lawyers among the population in East Timor. Also, because of the destruction after the popular consultation in August/September 1999, almost all buildings in the region were destroyed.

The legal issues, on the other hand, were basically the same. Important elements of the resolution are that UNTAET is endowed with overall responsibility for the administration of East Timor and is empowered to exercise all legislative and executive authority, including the administration of justice. Among the elements of the mandate are to provide security and maintain law and order throughout the territory of East Timor and to establish an effective administration. The Special Representative of the Secretary-General has the power to enact new laws and to amend, suspend or repeal existing ones. This is done by means of regulations.

As in the case of UNMIK, UNTAET is in close consultation with Headquarters on legal issues. There are approximately some 30 regulations promulgated, covering basically the same subject matters as the ones in Kosovo. An explanation for the difference in numbers of regulations is that UNMIK adopted a regulation for each department established and has promulgated regulations governing municipal elections and various commercial activities.

A tremendous effort is being undertaken by many international organizations, including the World Bank and the IMF, to establish a viable society in East Timor. Negotiations with Australia on the important Timor Gap Treaty, which may very well generate the lion's share of the national income of the future sovereign state of East Timor, are under way; there are substantial oil and gas resources in the maritime area between Australia and East Timor.

As you are well aware, the situation is very tense in the region, and the intimidation of the East Timorese refugee population still in West Timor is often referred to in the media. The brutal murder of three UNHCR officials on 6 September 2000 shocked the world.

However, I think that it is fair to say that UNTAET has achieved a very successful result during the little more than a year in which the Mission has been in place. Preparations are under way to establish a constitution for the new state, and eventually elections will be held in order to nominate an Assembly to adopt the same.

Ladies and Gentlemen,

I have used these two examples to demonstrate that peace operations under the auspices of the United Nations have become quite different from what they were in the early years of the Organization. It is true that the United Nations also performed administrative functions in West Irian, in Namibia and in Cambodia. However, the two missions in Kosovo and East Timor are unprecedented.

There are many lessons to be drawn from these two missions, and some of these lessons are presently being discussed within the Organization. This brings me to the second element of my address: the present review of United Nations peace operations by the General Assembly, the Security Council and the Secretariat.

The Secretary-General himself initiated this review. On 7 March 2000, Secretary-General Kofi Annan convened a high-level panel to undertake a thorough review of the United Nations peace and security activities. The mandate of this Panel was to present a clear set of specific, concrete and practical recommendations to assist the United Nations in conducting peace and security activities better in the future. The Panel's report, often referred to as the Brahimi Report after its Chairman, Mr. Lakhdar Brahimi, former Foreign Minister of Algeria, was presented to the Secretary-General on 17 August 2000. The Secretary-General transmitted it to the General Assembly and to the Security Council, describing the Panel's analysis as "frank yet fair" and its recommendations as "far-reaching yet sensible and practical".³

The report contains a number of recommendations. It would go far beyond the purpose of my presentation to look at all of those. I will therefore focus on the ones that have a legal dimension. Permit me, however, to quote one of the more famous conclusions that the Panel has drawn: "The Secretariat must tell the Security Council what it needs to know, not what it wants to hear, when formulating or changing Mission mandates."⁴ Furthermore, says the report, with respect to peace-keeping doctrine and strategy, once deployed, United Nations peace-keepers must be able to carry out their mandates professionally and successfully and be capable of defending themselves, other mission components and the mission's mandate, with robust rules of engagement, against those who renege on their commitments to a peace accord or otherwise seek to undermine it by violence.⁵

In one of its recommendations, the Panel proposes a doctrinal shift in the use of civilian police, other rule of law elements and human rights experts in complex peace operations to reflect an increased focus on strengthening rule of law institutions and improving respect for human rights in post conflict environments.⁶

Furthermore, the Panel recommends that the Secretary-General invite a panel of international legal experts, including individuals with experience in United Nations operations that have transitional administrative mandates, to evaluate the feasibility and utility of developing an interim criminal code, including any regional adaptations potentially required, for use by such operations pending the re-establishment of local rule of law and local law enforcement capacity.⁷

The Panel also recommends Member States to establish a national pool of civilian police officers that would be ready for deployment to United Nations peace operations on short notice, within the context of the United Nations standby arrangements system. A revolving on-call list of about 100 police officers and related experts should be created by that system to be available on seven days' notice. Parallel arrangements should be established for judicial, penal, human rights and other relevant specialists, who will make up collegial "rule of law" teams with the specialist civilian police.⁸

Finally, in this context, the Panel recommends that a new unit should be established in the Department of Peacekeeping Operations and staffed with relevant expertise for the provision of advice on criminal law issues that are critical to the effective use of civilian police in the United Nations Peace Operations.⁹

The recommendations of the Brahimi Report were extensively discussed during the Summit Meeting of the General Assembly from 6 to 8 September 2000 and in the general debate of the Assembly. The Secretary-General reacted with great expedition, and on 20 October 2000 he issued a report to the General Assembly and to the Security Council on the implementation of the Panel's report.¹⁰ On 27 October 2000, this report was followed by a document setting out resource requirements for implementation of the Panel's report.¹¹

The Secretary-General basically supported the recommendations, to which I have made specific reference. However, with respect to the recommendation to develop an interim criminal code, the conclusions were somewhat different. The Secretary-General established a working group comprised of experts at Headquarters and legal and judicial experts in UNMIK and UNTAET. This group doubted whether it would be practical, or even desirable given the diversity of countries' specific legal traditions, for the Secretariat to try to elaborate a model criminal code, whether worldwide, regional

or civil or common law based, for use by future transitional administration missions.

However, the Working Group agreed that both UNMIK and UNTAET had faced serious difficulties during the start-up phase, because the personnel engaged in law enforcement duties did not have a common set of criminal procedures on which to rely. Cases of arrests, detentions, searches and seizures were mentioned as examples. The Working Group therefore agreed that further elaboration of the practical aspects of criminal procedures, as opposed to the substantive elements of the law itself, would be of great benefit.

Against this background, the Secretary-General has asked a number of offices in the Secretariat, including the Office of Legal Affairs, and UNMIK and UNTAET to conduct a needs assessment of the areas in which it would be feasible and useful to draft a simple, common set of interim procedures. It is hoped that this team, consulting with outside expertise, as required, could produce the first draft of interim rules by the end of July 2001.

It is interesting to note, however, that the discussion in the General Assembly of the Panel's report and the Secretary-General's subsequent report has provoked numerous reactions, not necessarily positive. Among developing countries there is a concern that the resources foreseen for the implementation of the recommendations in the Brahimi report as suggested by the Secretary-General, would draw on resources that would otherwise be available for development purposes. Since this matter is presently before the General Assembly, it is in my view premature to make any further comments on it at the present juncture.

The reaction in the Security Council was more positive, however. In resolution 1327 (2000) the Council welcomed the report of the Panel and agreed to adopt a number of decisions and recommendations contained in an annex to the resolution.¹² The Council also decided to review periodically the implementation of the provisions contained in the same annex and to remain actively seized of the matter. Among the recommendations in the annex I would like to emphasize that the Council recognizes the problem of the commitment gap with regard to personnel and equipment for peacekeeping operations. Such operations, says the Council, require the assumption by all Member States of their shared responsibility to support United Nations peacekeeping.

The Council also welcomed the proposals to deploy military, civilian police and other personnel rapidly, including through the United Nations standby arrangements system. The Council emphasized that the biggest deterrent to violent conflict is addressing the root causes of conflict, including through the promotion of sustainable development and a democratic society based on strong rule of law and civic institutions, including adherence to all human rights – civil, political, economic, social and cultural.

Furthermore, the Council welcomed the Secretary-General's intention to spell out more clearly, when presenting future concepts of operations, what the United Nations system can do to help strengthen local rule of law and human rights institutions, drawing on existing civilian police, human rights, gender and judicial expertise.

Finally, the Council welcomed the Secretary-General's intention to conduct a needs assessment of the areas in which it would be feasible and useful to draft a simple, common set of interim rules of criminal procedure.

Ladies and Gentlemen,

I have now come to the third and last element in my address, namely the fact that the rule of law has become a distinct element in peace operations.

Let us first look at this issue in a more general perspective. If we study the Charter of the United Nations and the history of the Organization, it is easy to see how the question of the rule of law has been a constant companion in the many different fields in which the United Nations has been engaged. This is only natural, since one of the purposes of the Charter is to establish the rule of law in international relations. Further, and in particular in view of the references to fundamental human rights, the Charter is also meant to support the establishment of the rule of law at the national level.

Secretary-General Kofi Annan has taken a great interest in this topic. If you look at many of his statements over the last few years, you will notice that the rule of law is a common thought. In his report "We the Peoples: The Role of the United Nations in the 21st Century", the Secretary-General makes several references to the rule of law, which he describes as the foundation of much of the social progress achieved in the last millennium.¹³

Especially encouraging in this context is the so-called Millennium Declaration, adopted by the Summit Meeting of the General Assembly on 8 September 2000.¹⁴ In this Declaration, the General Assembly has identified as one of the key objectives of the Organization "to strengthen respect for the rule of law in international as in national affairs". In the same Declaration, the General Assembly also declares: "We will spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development."

From many parts of the Secretariat great efforts are made to contribute to strengthening the rule of law, both at the national and international level. In the Office of Legal Affairs, we are also trying to make our contribution. For example, on 2 November 2000, I addressed a major conference in Moscow on the topic "International Rule of Law and the Mandate of the United Nations". An action

plan for steps that the various units of the Secretariat and UN programmes, funds and agencies might take to help States strengthen the rule of law is available on the website of the Office of Legal Affairs.¹⁵

From what I have said previously, it should be clear that the question of the rule of law in United Nations peace operations is now a prominent element on the agenda of the Organization. This matter has been controversial. In the past, members of the Security Council have been very hesitant to include any references to the rule of law and, in particular, to human rights in its resolutions.

However, in view of the development over the last few years, I think that it is fair to say that, finally, Member States agree that one of the root causes of the conflicts with which the Organization has to deal, is that human rights are not respected and that the rule of law as understood in a democratic society is not present.

Increasingly, the conclusion has been drawn that peace operations cannot solely be focused on military and, possibly, civilian police aspects. What these operations are addressing are but symptoms of the absence of a system under the rule of law, which, as I said, pre-supposes a democratic system. Therefore, in the years to come, the Organization will most certainly be faced with more and more demanding operations of a much more multifaceted nature than in the past. As is demonstrated by UNMIK and UNTAET, the Organization may be faced with the requirement of fielding missions that, basically, will have to provide governance including administration of justice.

[The appeal directed to the specific audience concerning support for the Rome Statute of the International Criminal Court is excluded here.]

¹ UN Doc. S/1999/648.

² UNMIK/REG/1999/24.

³ UN Doc. A/55/304-A/2000/809.

⁴ Annex III, 4 (d).

⁵ Annex III, 3.

⁶ Annex III, 2 (b).

⁷ Annex III, 6.

⁸ Annex III, 10 (a) – (e).

⁹ Annex III, 16 (c).

¹⁰ UN Doc. A/55/502 and S/2000/1081.

¹¹ UN Doc. A/55/507/Add.1.

¹² See also UN Docs. S/2000/1072 and S/2000/1084.

¹³ UN Doc. A/55/2000.

¹⁴ A/RES/55/2.

¹⁵ <http://www.un.org/Depts>