The Role of a Legal Adviser of an International Organization

Second Presentation on 13 November 2008

by

Hans Corell

Welcome to the second of my two presentations on "The Role of a Legal Adviser of an International Organization".

As you already know, the purpose of my two presentations is fourfold. Let me reiterate: my intention is to, first, describe the conditions under which a Legal Adviser works. I then intend to describe in general terms the United Nations Office of Legal Affairs, its management and staff. Thirdly, I will share with you some of my experiences in the legal field during my 10 years as the UN Legal Counsel between 1994 and 2004 and the role that the UN Office of Legal Affairs played at that time. I will then conclude with some general reflections on the role of the Legal Adviser, based on my 42 years in public service.

You will recall that I addressed parts one and two in my first presentation. In this, my second presentation I will address parts three and four.

Third part: some of the events that occurred in the legal field during my 10 years as the UN Legal Counsel

I have now come to the third part of my presentation, namely sharing with you some of my experiences in the legal field during my 10 years as the UN Legal Counsel between 1994 – 2004 and the role that the UN Office of Legal Affairs played at the time.

First, a couple of general remarks.

One of the conclusions from the Legal Advisers meetings that were held on the margin of the meetings of the Sixth Committee was that a Legal Adviser of a Ministry or an Organization must have direct access to the Minister or the Head of the Organization. Otherwise he or she cannot fulfill his or her functions. This was never a problem in the UN. And it often happened that the Secretary-General contacted the Legal Counsel directly to double-check that a matter had been cleared with OLA.

When Kofi Annan, who was "one of us", became Secretary-General he knew that it was important to have regular meetings with his Under-Secretaries-General. He therefore established the Senior Management Group that met at 10:00 am every Wednesday. This time of the day was also suitable to our colleagues in Geneva, Vienna, Rome and Nairobi who participated by video link.

On the agenda of these meetings was always one main topic, which was introduced by one of us and thereafter discussed by the whole meeting. The Secretary-General then made his decision or concluded that he would make his decision having reflected on our contributions.

Following this part, there was a tour de table during which all of us very briefly indicated the most important items on our respective agendas the coming week. This certainly contributed to better coordination of the work of the Secretariat.

Another important element is that a Legal Adviser should be present when important matters are discussed at the highest level. This does not necessarily mean that he or she should express opinions unless legal matters arise. However, it is to the benefit of the work if there is someone present with a "legal ear" who can caution if legal issues emerge in the matter under deliberation.

Another feature is that the Legal Adviser must be kept informed of events. In the Ministry for Foreign Affairs, I had been privy to the cable traffic. (I suppose it is e-mails now!) But this was not the case when I came to the UN. This was changed, which meant that I could follow events as reflected in the cables. In this way I often knew beforehand that I could expect a PM from a colleague, most often the Head of the Department of Peacekeeping Operations, requesting legal advice on the subject matter.

I took up my position as UN Legal Counsel on 6 March 1994. Exactly one month later an airplane was downed in Kigali. This ignited the genocide in Rwanda.

The International Criminal Tribunal for the Former Yugoslavia had already been inaugurated. In November 1994, the Security Council decided to establish the Rwanda Tribunal. I was sent by the Security Council to convince then President Bizimungo that Rwanda should cooperate with this new tribunal; Rwanda was at the time a member of the Security Council and had voted against establishing the Tribunal.

I never forget the impression flying in over the country with all the huts and houses on the ground. The security officer who accompanied me made a sad remark: "There are more houses than people down there now!" The image of genocide!

In the summer of 1994, an effort was made by the Member States of the United Nations to sort out some outstanding matters relating to Chapter XI of the Law of the Sea Convention. I had been entrusted by Secretary-General Boutros Boutros-Ghali to chair informal consultations in order to find a solution.

The effort succeeded thanks in particular to some active and knowledgeable delegates who were very constructive in the consultations. Later in the same year, the Convention entered into force and it was possible to establish its first organ, the International Seabed Authority, in Kingston, Jamaica.

The International Tribunal for the Law the Sea was inaugurated in Hamburg in October 1996. A year later, the Commission on the Limits of Continental Shelf was established. This Commission meets in New York and is serviced by DOALOS.

In 1995, the Security Council adopted the famous resolution 986 (1995) on the oil-for-food program in Iraq. It fell to me to negotiate the Memorandum of Understanding that would regulate the execution of that resolution.

Those negotiations took place between February and May 1996. It was a complex process, in particular since certain Member States tried to influence it. From a legal point of view, the process was extra difficult because the execution of the resolution meant that extraordinary arrangements had to be made in order to make the process of selling oil and buying humanitarian goods work. In the negotiations, I had advisers who were acquainted with the oil trade and banking arrangements related to this trade. Otherwise the task would have been impossible.

The memorandum was signed on 20 May 1996. Immediately thereafter, the Secretariat began to make all the necessary arrangements.

One of the problems in this context was that the UN Secretariat had not been given the power to fully supervise the program. The Security Council had reserved some of this activity for itself. Furthermore, the UN Secretariat does not have the power to open investigations in the territory of member states. This became problematic when the Secretariat started reporting to the Security Council that the terms of the resolution and the memorandum might be violated by certain actors. In my opinion, the Council failed to take its responsibility when these reports were made.

You might have heard the expression "oil-for-food scandal". Eventually, Secretary-General Kofi Annan appointed a Commission, the Volcker Commission, to investigate the matter.

Surely, the Secretariat could have done better, and the three UN officials who were named as suspects for having committed irregularities in connection with the administration of the programme are three too many.

But the truth of the matter is that the programme fed nearly 25 million people for seven years. The turnover was US $65 billion. When the programme was phased out in 2003, the remaining funds, US $8 billion, in the oil-for-food account held by the UN was handed over to the United States of America to be administered through a fund for the benefit of the people of Iraq. This money was then no longer under UN control.

In my view, most of the vicious criticism of the United Nations was just an attempt at tarnishing the reputation of the Organization. I believe the blame for the so-called scandal lies elsewhere.

In the meantime, the work to establish the International Criminal Court had proceeded. The COD had worked with the International Law Commission and provided a draft statute for an international criminal court that had been examined by the Sixth Committee, and the General Assembly had decided that a conference should be convened in Rome in the summer of 1998.

This meant that OLA had to organize and administer the Conference. The first step was to negotiate a tripartite host country agreement among the United Nations, Italy, and the Food and Agriculture Organization; the UN was allowed to use FAO's premises in Rome.

My function at the Conference was "Representative of the Secretary-General". This meant among other things that I had to follow the work of the Conference closely and, in particular, identify situations where it might be useful for the Secretary-General to intervene with messages, questions or suggestions to the government's of the states involved in the negotiations. So he did on occasions, and I believe that this was very helpful for the outcome of the negotiations.

In the summer of 1998, I also had the occasion to address at a workshop in Sweden a group of Chief Executive Officers and other business people from several countries on the topic "Is the Business of Human Rights the Business of Business?"

The point I made at this event was that business actually has a role to play in enhancing respect for human rights. One suggestion that I made was that companies with good standing might consider including in their annual reports a short chapter describing how the company in question supports human rights and what efforts they make to enhance respect for those rights.

These and other matters relating to human rights and business were discussed in the UN Secretariat at the time, and in January 1999, Secretary-General Kofi Annan launched the Global Compact. The Compact now contains 10 principles that business should observe in their day-to-day activities. They appear under four different headings: human rights, labor law, environment, and anticorruption.

In August 1998, the Security Council adopted a resolution, in which they requested the Secretary-General to assist the Government of Libya to transfer two persons suspected of having committed the bombing of Pan Am 103 over Lockerbie in 1988. The Council had directed that the two should be transferred directly from Libya to the Netherlands for trial before a Scottish court sitting in that country. It fell to me to negotiate, organize and execute this transfer.

The legal elements here were in particular to avoid that complications would arise, for example if the two suspects requested asylum in the Netherlands. It was therefore of great importance that I could testify before a Dutch judge that the two had in fact boarded the plane voluntarily. The two were transported as passengers on the plane. It was also important to surround the arrangements with rigorous security so that the responsibility of the UN would not be engaged. Without going into detail, I would like to say that I had an excellent cooperation with the Dutch and Italian authorities that assisted the UN with the transfer. The airplane, provided by the Italian Air Force, was for the purpose transformed into a UN aircraft with a UN call sign.

I would also like to say that I had an excellent cooperation with my Libyan counterpart, former Foreign Minister Kamal Hassan Maghur. I am sure that you realize that the operation entailed a considerable amount of risk.

In the meantime, the UN Secretariat had received a request from Cambodia to assist in bringing the Khmer Rouge leaders to justice for the atrocities committed in that country during the period April 1975 to January 1979.

This negotiation became a lengthy process, in stark contrast with the similar negotiations that I and my team conducted with Sierra Leone for the purpose of setting up the Special Court for Sierra Leone.

In 1998, my collaborators and I also had to defend a case before the International Court of Justice – the Cumaraswamy case. In reality, this was a request for an advisory opinion from the Court in a case involving a Malaysian jurist who was appointed Special Rapporteur on the Independence of Judges and Lawyers by the United Nations Commission on Human Rights in 1994. Cumaraswamy was sued before the courts in his own country in connection with an interview that he had given to a London based newspaper. In the UN's opinion the Rapporteur had simply done his job.

To make a long story short, the Court was of the opinion that Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations was "applicable" in the case of the Rapporteur and that he was entitled to immunity from legal process of every kind for the words spoken by him during the interview as published in the London based newspaper. An advisory opinion of this nature given under the provisions of the Convention is actually binding on the UN and the state in question.

In January 2002, I delivered a legal opinion to the Security Council on the legality of certain oil exploration contracts offered by Morocco to a company that was engaged in such activities off the coast of Western Sahara.

The opinion contains the following conclusion: "- - - while the specific contracts which are the subject of the Security Council's request are not in themselves illegal, if further exploration and exploitation activities were to proceed in disregard of the interests and wishes of the people of Western Sahara, they would be in violation of the principles of international law applicable to mineral resource activities in Non-Self-Governing Territories." I refer to UN document S/2002/161.

On a completely different note, Secretary-General Kofi Annan decided, based on a report prepared by me as Legal Counsel, to reform the system of the administration of the internal rules of the Organization. This meant that these instruments were modernized and issued in a much more stringent format than before. In that connection the Secretary-General also abolished 30 per cent of previously issued Secretary-General's Bulletins.

Here I would like to give a piece of advice. A Legal Adviser, who is in charge of supervising the administration of a system of legal issuances, be it at the national level or within an international organization, must pay great attention to this matter.

From my national experience I knew that it is just as important to have someone at the queue when new rules and regulations are issued. It is imperative that attention is paid to the question what existing rules can be abolished at the same time. The first question I ask when somebody suggests that there should be new rules is: do we really need these rules? If I am convinced, the next question is: what existing rules do we then abolish at the same time?

This system for the administration of the internal rules of the organization was also introduced in Kosovo and East Timor when the United Nations was entrusted with the administration of those territories. Since terms such as "Law" or "Act" should be reserved

for rules adopted by an elected assembly, the Secretary-General decided to name the issuances that were promulgated by his Special Representative in the two regions "Regulations".

At the same time we adopted a method for vetting the drafts of such issuances in OLA. Without second-guessing the substantive provisions proposed by experts working in the field, every draft issuance was reviewed to ascertain that nothing in it would violate international human rights standards. Needless to say, it would be an embarrassment if rules issued under UN auspices did not observe such standards.

Fourth part: some reflections on the role of the Legal Adviser, based on my 42 years in public service

I have now come to the fourth and final part of my presentation: some reflections on the role of the Legal Adviser, based on my 42 years in public service.

As it appears from the foregoing, I have tried to describe the role of a Legal Adviser in an international organization by referring to the United Nations Office of Legal Affairs and to some practical experiences. I thought that this would be more illustrative than giving a more theoretical presentation. Also, I believe that the role of the Legal Adviser is very much the same in other organizations.

As a matter of fact, I had the privilege of interacting with all my colleagues in the UN System during my time as UN Legal Counsel. The UN System – that is all the agencies from FAO to ICAO, the World Bank and the International Monetary Fund – is coordinated through an organ called the Chief Executive Board. Chairman of this Board is the Secretary-General of the United Nations.

A similar organ exists at the level of the Legal Advisers, and it was my privilege to chair the meetings of this body. Certainly, we had many contacts in various matters on a regular basis. But our annual meetings gave us a possibility of coming together in the same room to discuss matters of common interest. I always found these meetings very useful and highly informative. It is also good to know the person on the other end of the line if you must make a telephone call in an urgent, and sometimes very difficult matter.

Another observation: the argument is often made that international law, and in particular human rights law, is a Western invention. With respect to human rights, I do not believe that this is true. This year, 2008, we celebrate the Sixtieth Anniversary of the Universal Declaration of Human Rights. Many prominent personalities from all over the world participated when the Declaration was drafted, In particular I would mention the personalities from the Moslem countries. When I hear the argument about the Western invention it is interesting to note that it often emanates from governments that may not be so confident that they would remain in power if human rights were fully respected in their country.

Under all circumstances, I never encountered arguments of this nature in OLA. We were all lawyers and we had to apply international law. We could certainly differ, but then we did so based on purely legal arguments. So it should be. This is a sign of health. Legal matters should be examined and discussed thoroughly and in case there are different views, those views should be heard. This is one of the hallmarks of the legal profession.

If you are interested in learning more about the role of a Legal Adviser, I refer you to the list of literature that is available on the UN Legal Counsel's website.

Let me now close by offering some advice in particular to younger lawyers listening to my presentation. I take as a point of departure three indispensable qualities of a Legal Adviser: knowledge, judgement, and integrity.

Knowledge: Inform yourselves! It is impossible to be on top of everything. In particular, it is important to listen carefully to one's own collaborators – also the junior ones. Obviously, legal opinions need careful research before they are delivered. Assign the right persons to do this research.

The first questions to ask would be: Has a legal opinion been given in this matter before, or is this the first time we encounter the question? You should also require that the questions put to you are precise or as precise as possible. Answers should be clear and constructive. Time is of essence. When somebody comes and asks: Can we do this? Is this legal? Then, what they would like to hear most of all is: Yes, you can! Yes, this is okay!

If it is not possible to give such advice in the particular situation, it is important to be constructive, to see whether the legal problem can be avoided if your client chooses another solution, another method or makes adjustments in the planned activity. But it is important to stay clear of the twilight zone. A Legal Adviser of an international organization must base his or her advice on sound knowledge of the law.

You sometimes hear the expression: if you don't get legal clearance, get another lawyer! The first time I heard that remark I thought that this was a rather vulgar attitude towards a profession that must observe high ethical standards. I never changed my mind on this point.

At the same time, it is important that a Legal Adviser avoids getting into the policy area, at least at the initial stage. If asked how one should proceed in a particular case or in a specific situation, it is often much more fruitful to ask: what would you like to do? And then, having received the answer, proceed to analyze if this is feasible from a legal point of view.

This does not mean that a Legal Adviser cannot participate in a policy discussion. Of course he or she can do this! But the Legal Adviser should then take care to make clear when the remarks are purely policy oriented or whether they represent a legal opinion in response to elements in such a discussion.

Good judgement is a must. There might be different ways to proceed, to formulate an opinion, to deal with those who for different reasons oppose you. Sometimes it is good to stop to reflect and consider whether you are on the right course. And pay attention to persons who have the very unfortunate combination of high intelligence and bad judgement. Unfortunately, there are quite a few such people around and their ability to cause trouble is notorious.

With respect to integrity, I would like to emphasize the following. When deciding on how to give advice you are finally on your own. In this situation you must maintain an inner calm. You must be able to look yourself in the eyes in the mirror and say: I have done my best to assess and analyze the situation. I have formulated my advice, and nobody is going

to influence me – be it through threats, flatter or other means. Act in a manner that no one can question your integrity.

This can also be expressed in a manner that I often do when I speak to law students about the legal profession in a more general manner. So, to the students who may listen to this presentation I would add: act in a manner that you can respect yourself. If you do not have self-respect, you cannot expect others to respect you!

Thank you for your attention!