Excellencies, Ladies and Gentlemen,

It is now six years since we organized, working with the Austrian Mission to the UN, the first panel on the UN Security Council and the Rule of Law. The series of panels culminated in a report that summarized key findings and proposed concrete recommendations that would enhance the role of the Council in strengthening a rules-based international system. (UN Doc A/63/69–S/2008/270)

From the beginning, we decided that our work should be pragmatic and realistic. We decided not to consider proposals that would require amending the Charter (such as expanding the membership of the Council) or look narrowly at the foreign policy of specific states.

We also attempted to take into account the interests of large and small states, permanent and non-permanent members of the Council, and those from the global South as well as the industrialized North.

At the same time, the report that was produced in 2008 was intended to be the starting point for further, more concrete discussion to support the Council’s role in strengthening a rules-based international system and maintaining international peace and security under the rule of law.

Today is a billed as a “stock-taking” exercise. I’m an academic, but I don’t think it’s appropriate to grade the performance of the Council in this area.
Instead, what I would like to do is take the opportunity to look back at why we started this process; consider what has been happening in recent years, in particular since the report; and look forward at where we might be going.

I will refer to these three parts of my presentation as “past”, “present”, and “future”.

I. Past

The origin of the panel series was the recognition that the Security Council had grown beyond its initial function as a political forum and frequently served important legal functions.

Among other things, the Council has established binding rules of general application, made determinations of law or fact, and overseen the implementation of its decisions.

These new roles of the Council — as legislator, judge, and executive — have made possible swift and decisive action in response to perceived threats to international peace and security on the basis of international law.

At the same time, however, they have raised questions about the legal constraints that determine how the Council’s new functions are exercised.

These developments coincided with a period in which the rule of law came to be widely accepted.

At the UN World Summit in September 2005, less than a year after our first panel, member states unanimously recognized the need for “universal adherence to and implementation of the rule of law at both the national and international levels” and reaffirmed their commitment to “an international order based on the rule of law and international law”.

This echoed earlier calls in documents such as the 1970 Declaration on Friendly Relations and the Millennium Declaration.

Such a high degree of consensus on the virtues of the rule of law is possible, in part, because of relative vagueness as to its meaning.

One of the things we hoped to achieve in this process was to build on that general consensus and yet avoid the definitional problems that often undermine concrete action. Drawing on the report and the important 2004 statement by SG Kofi Annan, three basic elements of the rule of law can be identified.
First, public power should not be exercised arbitrarily. This incorporates the rejection of “rule of man” and requires that laws be prospective, accessible, and clear. In the domestic context, this can be understood as meaning a government of laws.

Secondly, the law must apply also to the public authority itself, with an independent institution such as a judiciary to apply the law to specific cases. This implies a distinction from “rule by law” and can be abbreviated to the idea of the supremacy of the law.

Thirdly, the law must apply to all persons equally, offering equal protection without prejudicial discrimination. The law should be of general application and consistent implementation; it should be capable of being obeyed. This means equality before the law.

The “international rule of law” may be understood as the application of these principles to relations between states, as well as other subjects and objects of international law.

But the concepts cannot be translated directly. At the national level, the rule of law regulates subjects in a vertical relation to the sovereign; at the international level it regulates entities that are theoretically equal in a horizontal relationship.

It can be helpful, in this context, not to think of what the rule of law means, so much as what it is intended to do. Based on the above elements, each can be understood as having a specific function that is applicable both domestically and internationally: first, to strengthen predictability of behaviour; secondly, to prevent arbitrariness; and thirdly to ensure basic fairness.

In this light, these principles raised questions with regard to the legitimacy of certain Council activities, in particular when it passed resolutions of a law-making character — counter-terrorism and proliferation of WMD — or targeted sanctions against named individuals, as in the Al-Qaida/Taliban sanctions regime, without clarity as to the appropriate process for listing and delisting.

As the Deputy Secretary-General said in her June statement, and again this afternoon, adherence to the rule of law begins at home.

II. Present

So if those were the reasons why we started this series of discussions, then where are we today? Let me make three observations.

First, something that hasn’t happened: legislative resolutions of the nature of SC Res 1373, SC Res 1540, and SC Res 1566.
Why have we not seen more such resolutions? It is possible that it is because the Council has thought better of it — indeed, a key message of our report was that the primary restraint on Council power is self-restraint.

But I suspect it is most likely because each of these resolutions followed a specific crisis: 1373 followed the September 11 attacks; 1540 followed revelations of the AQ Khan network; 1566 followed the terrorist attacks in Beslan.

There are, however, some positive signs in the last twelve months that this wasn’t just luck in avoiding comparable crises. Indications that the Council is more sensitive to the criticism of its law-making resolutions include: (i) the October 2009 Arria formula meeting on the ICTY and ICTR that was made open to all UN members, not just Council members; (ii) in the same month, the General debate on the review of resolution 1540; and (iii) the Presidential Statement in June 2010 where the Council expressed its commitment to ensure that all UN efforts to restore peace and security themselves respect and promote the rule of law.

Secondly, one thing that has changed — slowly — concerns the terrorist listing and delisting process.

The Council has taken important steps to address some of the concerns about the sanctions regime. The comprehensive review of the consolidated list pursuant to SC Res 1822 has seen about 45 entries removed from the list. And, of course, an Ombudsperson was created by SC Res 1904 and appointed in June of this year.

The Ombudsperson is a significant advance on the focal point mechanism. Indeed, for those of us who have been following the issue for some years it’s an important achievement. In our 2008 report we called for a small panel of experts able to make recommendations — we got one person able to make a report.

It’s not nothing, but it’s also not clear that creation of an ombudsperson will satisfy the demands of the rule of law, as the ultimate decision-making process remains in the hands of the committee operating, essentially, as a political body.

The European General Court touched on this in the Kadi II decision of 30 September 2010 and proclaimed itself underwhelmed, stating (in *obiter dicta* — a non-binding observation) that the ombudsperson “cannot be equated with the provision of an effective judicial procedure for review of decisions of the Sanctions Committee”.

Earlier this week Special Rapporteur Martin Scheinin expressed his own reservations about the limited powers of the ombudsperson.
It is unfortunate that delays in appointment meant that a third of the 18 month mandate elapsed before Kimberly Prost was appointed.

Most important, however, will be what happens in practice.

My third observation, then, is on some things worth watching closely.

One is the Security Council’s call for the Secretary-General to issue a report in 2011 on the promotion of the rule of law in conflict and post-conflict situations. This offers a real opportunity to build on the 2004 report but also expand it to consider some of the issues touched on here.

Another is whether some of the recent innovations — like the expanded Arria formula meeting procedure — are repeated and become the norm for law-making resolutions that affect the membership generally.

Perhaps most concretely it will be interesting to see what happens with the Ombudsperson’s reports, the Council’s response, and the reaction of courts in other jurisdictions.

In addition to the *Kadi II* decision of the European General Court, in February 2010, the UK Supreme Court quashed in part the UK Al Qaeda Order implementing the sanctions. The Court did so by invoking what some have called a “radical dualist” doctrine that the protection of rights domestically may require contravening obligations internationally. This is easier for courts in common law traditions, where a separation between domestic and international obligations is not unusual. But it may mark a step backward for acceptance of international law more generally — perhaps a far more serious manifestation of the fragmentation issue that has been discussed in, among other places, the International Law Commission.

Here it is worth noting that in the first *Kadi* decision in 2005, what was then called the European Court of First Instance reached the opposite conclusions on the two broad questions ultimately decided by the European Court of Justice in 2008 and essentially reaffirmed in September 2010. The 2005 decision concluded that the Court *could* review the Security Council, at least with respect to *jus cogens* norms; but it also held that the Council’s actions were not so egregious as to warrant judicial voiding. An important part of that decision was the finding that the regime was preventive rather than punitive. That stretched credulity several years into the regime, but a decade on now it is very hard to justify indeed.

It suggests, however, a possible model that might make targeted financial sanctions palatable to courts without imposing unrealistic standards of review that would be opposed by some members of the Council. If the regime were premised on, say, annual listings that had to be
renewed after twelve months, with the ombudsperson institution producing reports as requested, that might be acceptable as a truly preventive and exceptional regime. This can be contrasted with what we have now, where the preventive argument is undermined by the inability to reach agreement on releasing the assets of individuals even when they have died.

III. Future

This leads to my last set of remarks, on the future.

Two things are certain. First, the Council is not going to abandon the new tools at its disposal, such as targeted financial sanctions and law-making resolutions. Secondly, however, nor is it going to submit itself to formal judicial review.

The Council is not, of course, free from all legal constraints. Its powers are subject to the UN Charter and peremptory norms of international law, known as *jus cogens*.

There is no formal review mechanism, like a constitutional court, but some checks do exist:

1. The Council’s own voting rules are a check on the unfettered exercise of those powers.
2. The General Assembly can challenge the Council’s actions through a censure, question them through a request for an advisory opinion of the International Court of Justice, or curtail them through its control of the United Nations budget.
3. The issue may be raised in national and international courts as an incidental question in a case before it, as happened in the *Lockerbie* case before the ICJ, the *Tadić* case before the International Criminal Tribunal for the former Yugoslavia (ICTY), and the cases concerning targeted financial sanctions before the European and other courts.
4. And ultimate accountability lies in the respect accorded to the Council’s decisions: if the Council’s powers are stretched beyond credibility, states might simply ignore the expression of those powers and refuse to comply. As Prof Pellet said in our 2006 panel: Without Member State support, Council decisions are mere wishful thinking.

Accountability, in the sense that it is used here, is intended to bolster the legitimacy of the Council’s decisions.

It may be helpful, therefore, to distinguish between, on the one hand, appropriately “political” functions and, on the other hand, situations where it exercises powers that we might describe as “public” and where more structured forms of accountability are needed. In the latter
situation, having and giving reasons for decisions — including, as appropriate, input from states and other actors not on the Council prior to decisions and responding to challenges after them — would be a useful first step.

Indeed, the Council itself is clearly aware of this distinction. When it established the criminal tribunals for the former Yugoslavia and Rwanda, I doubt that anyone considered merely publishing a list of individuals who should be detained. Instead, the Council established an elaborate set of checks and balances, appeals processes, mechanisms to ensure adequate representation of the accused. In part because the targeted financial sanctions and the “law-making” resolutions were adopted in haste there was not the same consideration of the need for mechanisms of accountability.

Recommendation 10 of our 2008 report focused on this: “The Council should limit itself to using its extraordinary powers for extraordinary purposes. The exercise of such powers should be limited in time and it should be subject to periodic review; as a rule the Council should allow for representations by affected States ... and, where possible, individuals...”

The most important check on Council powers, once again, is the Council itself.

In the absence of a constitutional court to sit in judgment of how that self-restraint is exercised, accountability, such as it is, tends to be exercised only through the possibility of extreme reactions: cutting off funding or disregarding Council resolutions.

Such challenges to Council authority are blunt instruments and not to be entertained lightly.

But they highlight the function of law in the context of Council action: as David Caron observed in an earlier panel the law serves not as a wall but as a hedgerow; not to block Council decisions but to channel it away from danger.

The Council’s effectiveness as a political actor and its legitimacy as a legal actor are connected: member states’ preparedness to recognize the authority of the Council depends in significant part on how responsible and accountable it is — and is seen to be — in the use of its extraordinary powers.

All Member States, individuals, the United Nations Organization and the Security Council itself thus have a stake in the Council’s role in promoting the rule of law, in the hope of ensuring that its decisions can be both effective and legitimate.

[end]