Statement by Dire Tladi, Legal Adviser of the South African Permanent Mission to the United Nations, to the Sixth Committee of the General Assembly of the United Nations, on the Rule of Law at the National and International Level

October 2012

Mr Chairman

I thank you again for affording us the floor and allowing us the opportunity to share some thoughts on the very important question of the rule of law at the national and international level.

I associate myself with the statements delivered by the representatives of the Islamic Republic of Iran on behalf of the Non-Aligned Movement and Egypt on behalf of the African group.

Barely three weeks ago, our Heads of State and Government were gathered here to consider the very issue under consideration today. In the course of that historic meeting our leaders adopted a Declaration on the rule of law at the national and international level. It is therefore, a singular honour for me to address you today, to amplify South Africa's perspectives on the rule of law at the national and international level.

At the outset I wish to reiterate that the rule of law is alive and well in South Africa. Our Constitution is rooted in the democratic values of human dignity, equality, freedom and the rule of law. Our constitutional order, founded on the principles of deliberative democracy and a culture of justification, holds public institutions and officials accountable, insists on the equality of all and enshrines a set of human rights protections designed to protect the dignity of all who live in South Africa. And while, like all democracies we face challenges from time to time, the constitutional and legislative framework, coupled with a strong judiciary have proven the ability to overcome these challenges.

South Africa continues to play an active role in the pursuit of peace and harmony, including through bilateral arrangements, African Union and SADC initiatives, as well as mediation efforts in various parts of the world. Our contribution to highlighting "positive complementarity", as a means of strengthening the capacity of national institutions in the fight against impunity, is also motivated by the promotion of the rule of law.

We emphasise, in this context, our commitment to the fight against impunity for serious crimes. While, consistent with complementarity, we believe that the primary responsibility for ensuring justice and promoting accountability, rests with national systems, we recognise that where the domestic system systems are unwilling or unable to investigate or prosecute perpetrators of serious crimes, the international community has to step in to prevent impunity. It is for this reason that we applaud the contributions of international, mixed and ad hoc tribunals to the fight against impunity and the promotion of justice and accountability. The International Criminal Tribunals for the former Yugoslavia and Rwanda respectively have now entered a new phase of operations, with the Reidual Mechanism taking over some of the functions. The Special Court for Sierra Leone is a year away from fully completing its case load with only the appeal in the *Taylor case* remaining. The mandate of the Special Tribunal for Lebanon was extended earlier in the year.

All these tribunals have made a significant contribution to the fight against impunity and the promotion of the rule of law. The establishment of the International Criminal Court in 1998 reflected recognition by the international community that a permanent international structure, complementary to domestic system, was a necessary tool in the fight against impunity. 2012 marks the tenth anniversary of the entry into force of the Rome Statute. In that ten years since its entry into force, there have been challenges, flowing mainly from its difficult relationship with the Security Council, but there have also been significant achievements, including the handing down of the first judgment in the Lubanga case and the adoption of the amendment to

operationalise the crime of aggression which we hope will enter into force in 2017 in accordance with the entry into force requirements. We are steadfast in our confidence that the ICC has the potential to turn the tide against impunity and, as a consequence, the commission of egregious international crimes.

Mr Chairman,

While exerting efforts to promote the rule of law at the national level equal attention must be paid to the rule of law at the international level. If not, the United Nations runs the risk of being accused of double standards and hypocrisy. We need to ask whether the international community can be said to be governed by the rule of law.

As we stated previously, for us, the rule at the international level is not just about the number of international instruments that are adopted, ratified or even implemented – although this is certainly part of it. It is just as much about the normative content of international law. A case has been made in academic literature by authors such as the late Thomas Franck, Philippe Sands, Emmanuelle Jouanette and South Africa's own John Dugard, amongst many others, that the assessment of international law, in its post-ontological state, has to be undertaken with reference to its fairness, equity and justness. We need to ask ourselves, therefore, whether we are contributing to a fair, just and equitable international order based on the respect for international law and the adherence to the rule of law.

In assessing the rule of law at the international level it is perhaps appropriate to begin by asking whether the United Nations, the pre-eminent international organisation, whose Charter could be conceived of as the constitution of modern international law, reflects principles of deliberative democracy and a culture of justification, holds its organs accountable for adherence to its foundational values and insists on the equality of all its members. An attitude

of critical loyalty is necessary if we are going to faithfully make such an assessment

The Security Council, as both a product and source of international law, provides an excellent vantage point from which to consider these questions. Firstly, decisions emanating from an unrepresentative organ such as the Security Council will constantly be attacked for lack of legitimacy – regardless of the content of the decisions it makes. A fair, just and equitable international order implies a governance system that recognises the equal worth of all members of the international community. A Security Council in which Africa is underrepresented generally and unrepresented in the permanent category can hardly be reflective of the equal worth of all members. We must therefore make a concerted effort to achieve tangible results towards Security Council reform, as a critical element deliberative democracy and, as recognized in the Declaration adopted on 24 September, a necessary condition for attainment of the rule of law at the international level.

Secondly, we also have to ask whether the content of the decisions emanating from the Security Council are themselves fair. Since 2003, the Council has held regular thematic debates on the rule of law, and several Presidential Statements, including the first Presidential Statement in 2012, have recognized the crucial relevance of the Rule of law across the full spectrum of the Council's agenda. Over the past year we have seen both inspiring improvements and spectacular disappointments in the promotion of the rule of law through the Council's work. The adoption of Resolution 1989 bringing the Al Qaida regime closer to human rights and due process standards is a noteworthy illustration of the Council action to promote the rule of law. Although, even here, more needs to be done to widen the gap between political considerations and the listing and delisting process. Moreover, as we noted during the Security Council's debate on the rule of law in January this year, there is a need to ensure that Council action does not result in the flouting of international law, including by promoting greater accountability for action taken in the name of the Security Council.

Mr Chairman,

Questions relating to the implementation of Security Council mandates – indeed questions pertaining to the mandates themselves – will continue to exist, because, as one author has observed "legal criteria [as to the jurisdictional limits of the Council], if they exist, are not at all clear [and while] the availability of judicial process to resolve disputes .. is haphazard."[1] The truism that the Council's mandate is limited by *ius cogens* and the principles and purposes of the UN as reflected in the Charter, and that the implementation of mandates of the Council must take place in faithful respect of the letter and spirit of such mandates, should not continue to be fairy tales with little connection to the real world.

This delegation has stressed on a number of occasions the importance of the International Court of Justice as a means of avoiding auto-interpretation and, in that way, promoting the rule of law at the international level. We continue, in this regard, to encourage organs of the United Nations, including the Council, to make greater use of the International Court of Justice, by making requests for Advisory Opinions when confronted with complex legal questions. Moreover, decisions of international courts, including advisory opinions, should be fully respected and implemented.

Mr Chariman,

We are firm in our conviction that a creation of better world for all who live in it will only be fully realized where there is a global commitment to the promotion of the rule of law, respect for international law and the realization of human rights. This requires a commitment from all of us to promote the rule of law at both the national and international level.

I thank you

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[1] Tsagourias "Security Council Legislation, Article 2(7) of the UN Charter, and the Principle of Subsidiarity" 24 (2011) *Leiden Journal of International Law* 539.