Opening statement by Ms. Patricia O'Brien
Under-Secretary-General for Legal Affairs, The Legal Counsel
in the framework of the

36th Meeting of the Committee of Legal Advisers on Public International Law (CAHDI)
Agenda item 5 "Exchange of views with Ms. Patricia O'Brien"
7 October 2008, approximately 3.00pm, Lancaster House, London, UK

Dear Michael,
Dear colleagues and friends,

I am very pleased for the opportunity to have an exchange of views with you in my new capacity as Legal Counsel of the United Nations. Thank you very much for according me this prominent slot in the agenda. This, indeed, is a great honour.

Whereas last time around when we met in Strasbourg I could hide safely behind the "Ireland" nameplate and listen to my predecessor Nicolas Michel, not knowing whether to pity or envy him for being UN Legal Counsel. Now that I am in his place I am not sure which sentiment prevails. As I intend to stay in touch with you and with CAHDI in the future, I hope I will get an opportunity to keep you posted.

On that note, allow me to begin with some introductory remarks. I wish to address three topics:

(i) further to Nicolas' briefing in March in Strasbourg, I wish to provide you with an update on development of the concept of the "responsibility to protect";

(ii) secondly, I propose to share with you some thoughts on the ongoing concerns regarding the proliferation of international courts and tribunals; and

(iii) lastly, I thought you might be interested to have a further brief overview of our thinking on the ongoing conundrum of the peace and justice debate

As Legal Advisers in your respective Ministries of Foreign Affairs I know that you wield great influence on your respective countries' positions with regard to all of these issues.

Responsibility to protect

I was struck by a Foreign Secretary David Miliband's focus last night at the concept of sovereignty as responsibility which lies at the heart of the principle of R2P.

We now widely speak of sovereignty as responsibility – the positive duty of States to protect their populations. Yet, R2P is not exclusively about how we understand relations between States. It is also, perhaps even primarily, about individuals and their place in the international legal order.

For many years, the international community was thought of in state – centric terms. Yet, the UN Charter as a whole has a human face. Its consistent message of maintaining peace and securing freedom is one that can only be understood by thinking of peoples as well as States.
The terrible events of the 1990's which brought issues of sovereignty and intervention into sharp focus were coupled with a deepening recognition that individuals are in a direct relationship with the international legal order. This is not a wholly new development. Individuals have for many years possessed responsibility in international humanitarian law and human rights law.

However, the consequences of that direct relationship have evolved in our globalised and increasingly independent world – where state borders are more and more permeable.

As the international community still struggles to absorb the implications of this new reality, R2P offers a conceptual framework, which could make tangible the role of the individual and human rights at the heart of the UN.

I would emphasize at the outset that legal input and guidance is of course crucial to the clarification and implementation of emerging international principles, including R2P. And we all have a responsibility in this regard. But we, as lawyers, must recognise that key challenges of the R2P concept, such as promoting a conceptual shift in our shared understanding of the obligations of membership of the UN, are clearly not solely or fundamentally legal tasks. My concern as Legal Counsel will be to play a supportive role to ensure that, if and when we invoke the R2P concept, we

do so coherently, with confidence and in accordance with international law, and, in particular, in accordance with the UN Charter.

For your part, I would endorse the statement made by my predecessor that you are each well-placed within your governments to keep the political spotlight on the responsibility to protect and to give thought to how it can be made effective. This will involve raising awareness of the concept whenever and however opportune. It will also involve a responsibility on your part to increase understanding of the concept and to address and dispel the misunderstanding which may abound. We know that ensuring that the relevant criminal legislation is in place and that any offenders are prosecuted and punished is essential of course, but so is an effective strategy for prevention. We can learn much in this regard from the humanitarian law tradition of widespread and effective dissemination of the law. Promoting a rule of law culture among the institutions of government and the population at large is key to prevention.

In the years immediately preceding the report of the International Commission on Intervention and State Sovereignty, the UN and its highest officials had repeatedly spoken of the need for this new age of prevention. R2P, a model with prevention as its keystone, may assist in breaking the cycle of human rights violations and conflict and in ensuring the involvement of the international community where populations are at risk.

The responsibility to protect is now slowly beginning to crystallise. Its foundations are firmly placed in existing international law - international humanitarian law, human rights law, international criminal law and the UN

Charter itself. I would also suggest the rule of law itself as a core element of the concept. At the domestic level, the rule of law guarantees basic rights to prevent coercive or abusive action by the State. At the international level, R2P can be considered an essential aspect of international rule of law applying to whole populations. Simply put, sovereign States have a first fundamental duty to protect their populations from the most egregious crimes. Those crimes of course are: genocide; war crimes; ethnic cleansing; and crimes against humanity.

As we are all aware, and as we were reminded by Secretary-General Ban Ki Moon in his July speech in Berlin, the responsibility to protect can, in summary, be broken down into three elements or pillars, which are:

1. that States are under an obligation to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. I think it is important to mention in the context of the first of these elements: To be conceptually coherent and operationally sound, the scope of R2P should remain narrow and tied to these four listed crimes and violations. A key element of this first pillar is that the primary responsibility rests with States to protect their populations.
2. that the international community has a responsibility to assist States in that regard and to use all appropriate peaceful means (political, diplomatic, humanitarian and other means) in pursuit of that protective role; and
3. that MS have a responsibility to respond in a timely and decisive manner when a State is failing to provide protection. The international community is under a responsibility to act where the State is unable or

> unwilling to protect their populations. Response could include the wide range of tools available to the UN under: Chapter VI; Chapter VIII; and coercive measures under Chapter VII, where necessary.

There are of course already a number of legal frameworks and mechanisms upon which we can draw. The Genocide Convention places a legal obligation on all States to prevent genocide. With the Rome Statute, a system of international criminal justice based on the rule of law provides a common framework for the core crimes of genocide, war crimes, and crimes against humanity. And it is also already the case that where States consider intervention, they are required to do so in accordance with the rules of the UN Charter.

We can also look to international human rights treaty monitoring bodies. These mechanisms can act as an early warning system, not merely flagging where breaches of R2P have occurred, but also to proactively identifying where a State's capacity to fulfil the responsibility requires international assistance. This should allow earlier and more effective responses by the international community.

It will be important that measures taken by the international community in pursuit of R2P are recognised as such to ensure that the concept moves at the appropriate time from theory to a real part of the landscape of international law. To quote the Secretary General: "How we are proceeding in the effort to turn promise into practice, words into deeds."

Shared language and visibility of R2P in action could build consensus among the international community on the meaning and scope of the concept, thereby guarding against a fragmented and discordant understanding of the principle. The 2005 Outcome Document is a clear statement of R2P, but the principle must be gradually constructed on the basis of concrete practical actions. There are already several valuable precedents where the international community has acted in furtherance of the responsibility to protect, through mediation and other peaceful supports. Consideration could be given to highlighting such actions as success stories, to assist in further embedding the model in the international order.

However, in expressly using the language of R2P, we must be ever-cautious not to exacerbate tensions or threats to peace and security in particular cases. Equally, the language of R2P should not be employed where actions full outside its remit, at risk of discrediting the model.

In the 2005 Outcome Document, Member States firmly emphasised collective fulfilment of the responsibility to protect, through the mechanisms of the UN and in accordance with the Charter. Collective action and the ultimate threat of force cannot stand without UN engagement. It would undermine both the logic of R2P and the shared consensus of the international community if the UN lags behind or fails to support implementation of R2P at all levels (national, regional and international). Bearing in mind its relative fragility, we should regard R2P as an indispensable and cross-cutting element of our efforts to promulgate the international rule of law.

The international community is strongly anticipating the Secretary General's report to the General Assembly this year, setting out a proposed approach to R2P by the UN. As I take up my duties as UN Legal Counsel, I am very conscious of the great challenge we face in seeking to advance the R2P model, in accordance with international law and in partnership with regional organizations. And, as with my predecessor, I invite you as Foreign Ministry Legal Advisers to keep a focus on this issue within your own countries. In a sense, R2P is a new prism through which to view and crucially to connect the existing blocks of international law. For my part, it is my view that an R2P perspective can be coherently and systematically mainstreamed into most if not all of the activities of the UN and I would encourage you, my colleagues, to also consider the place which this concept can play in the emergence and development of thinking within your national jurisdictions and within the UN.

The proliferation of international courts and tribunals

Let me now turn to the proliferation of international courts and tribunals.

This issue is, of course, part of the broader discourse on the nature of international law. We live in a time when lawyers speak of a proliferation of international courts and tribunals, a natural offshoot of the increase in transnational forms of governance and co-operation between States. As relations between States are placed on a formal footing in various spheres, such as trade and the environment, they are accompanied by specialised international methods of dispute settlement. This plays an important role in legitimising transnational structures and maintaining the rule of law in international relations. Moreover, individuals have greater interaction with the international legal order, both as rights-bearers under international humanitarian law and international human rights law, and as bearing responsibility under international criminal law. This also contributes to the rule of law, ensuring that State sovereignty cannot place individuals entirely beyond the reach of international law in appropriate circumstances.

We must bear in mind that this expansion of the international judicial architecture is of course accompanied by an ever increasing scope and density of international norms. This raises important questions for the international lawyer, for example whether the risks of fragmentation and the spectre of “self-contained regimes” in international law are real or imaginary.

These questions are also of concern to domestic judges and lawyers. To quote Justice Sandra Day O'Connor, "understanding international law is no longer just a legal specialty, but a duty we all share." Domestic legal systems may feel under stress, as the influence of international law upon a State's internal rules and policies continues to grow. There may be a fear that judicial competence is creeping upward, fuelled by a traditional conception of domestic and international courts standing in a hierarchical relationship. Equally, the reliance of international law on municipal courts for its implementation may suffer greatly if the international legal system *appears* fragmented to those who enter it as unfamiliar terrain, even if that is not the reality. In considering relations between international and domestic courts, we should remain conscious of the overriding obligation to justice and the rule of law at all levels of adjudication.

Peace and Justice

Let me finally turn to the issue of the relationship between peace and justice, an issue that more and more arises in our efforts to help ending violent conflicts.

With the growing involvement of the United Nations in post-conflict societies - both in facilitating the negotiation of peace agreements and in establishing judicial and non-judicial accountability mechanisms - the Organization has frequently been called upon to express its position on the relationship between peace and justice and connected issues such as on the validity and lawful contours of amnesty and on the interaction between UN

representatives and persons indicted by international and UN-based tribunals, who continue to hold positions of authority in their respective countries.

With regard to the relationship between peace and justice, a good starting point is the position taken by the Secretary-General in a landmark address to the Security Council on 24 September 2003:

“We should know that there cannot be real peace without justice, yet the relentless pursuit of justice may sometimes be an obstacle to peace. If we insist, at all times and in all places, on punishing those who are guilty of extreme violations of human rights, it may be difficult or even impossible to stop the bloodshed and save innocent civilians. If we always and everywhere insist on uncompromising standards of justice, a delicate peace may not survive. But equally, if we ignore the demands of justice simply to secure agreement, the foundations of that agreement will be fragile, and we will set bad precedents.” (24 September 2003, the Secretary-General in the Security Council, S/PV.4833).

“There are no easy answers to such moral, legal and philosophical dilemmas. At times, we may need to accept something less than full or perfect justice or to devise intermediate solutions such as truth and reconciliation commissions. We may need to put off the day when the guilty are brought to trial. At other times, we may need to accept, in the short-term, a degree of risk to the peace in the hope that in the long-term peace will be more securely guaranteed.” (24 September 2003, the Secretary-General in the Security Council, S/PV.4833).

While we will uphold those principles, the challenge will be to find the right balance for each specific instance where this issue arises. Justice and peace must be regarded as complimentary requirements. There can be no lasting peace without justice. The problem is not one of choosing between peace and justice, but of the best way to interlink one with the other, in the light of specific circumstances, without ever sacrificing the duty to pursue justice.

On the issue of amnesties for international crimes, the UN position is equally clear:

The UN does not recognize any amnesty for genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. This principle, which reflects a long-standing position and practice, applies to peace agreements negotiated or facilitated by the United Nations, or otherwise conducted under its auspices. Guidelines have been established for UN personnel in situations such as where the UN is involved in the witnessing of agreements or in interacting with indictees. These guidelines follow from the UN's commitment to the pursuit and maintenance of respect for international criminal justice.

Conclusion

Theses are just a few issues which the Office of Legal Affairs of the United Nations is dealing with and which I hope may be of interest to you.
Thank you.