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Columbia University – Center on Global Governance

"Current Legal Issues Facing the United Nations"

Statement by Ms. Patricia O'Brien,
Under-Secretary-General for Legal Affairs
The Legal Counsel

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Columbia Law School, Jerome Greene Hall, Room 101
12:15pm – 1:10pm

Professor Doyle,
Professor Gardner,
Distinguished Members of the Faculty,
Dear Students,
Ladies and Gentlemen,

[Introduction]

It is a great pleasure to speak at the Center on Global Governance here at the Columbia Law School. Thank you very much inviting me.

The Center is known for its interdisciplinary research and scholarship on the legal dimension of globalization. The activities of the Center interplay with the great number and variety of course offerings in the field of international law at the Columbia Law School. , Like many of those currently working in the area of international law, we see it as a key responsibility to ensure that the next generation of international lawyers will be fully prepared to assume their responsibilities in good time. Columbia Law School plays an important role in this process, by providing a deep and rich education in a broad range of international law topics for its students.

I am grateful for the opportunity to address a few legal issues which the United Nations is currently facing.

[The role of OLA]

But before that, allow me perhaps to say a few words about the role of my office, the Office of Legal Affairs, in the United Nations.

You will find that I and my colleagues are not often directly associated with the public face of the Organisation. The Office of Legal Affairs employs about 200 staff on a full-time basis and acts as in-house Counsel to the Secretary-General, to the senior management and to the wider UN system. Much of our work is, understandably, carried out quietly and behind the scenes. We cover a range of issues of international public law which many people would associate with the UN – for example, advice on the law applicable to war, Peacekeeping Operations, Oceans & the Law of the Sea, international criminal justice, contracts of over $4 billion annually, procurement matters, Treaty Law, privileges and immunities, International Trade Law and the system of administration of justice for a staff of more than 60,000. Being a lawyer in a political environment such as the UN brings with it a distinct role, where the provision of objective legal advice is essential for political decision-making. It is critical for decision makers to understand the legal implications of their choices, and to arrive at legally sound decisions. What I can also say is that I find that decision makers very much want to understand the legal context, even though this might sometimes complicate their lives in the short-term.

Over the years, the UN has seen periods of great advancement in international law and jurisprudence, just as there have been times when our function as guardian of the global legal architecture has seemed more peripheral. Since joining the Organisation, it has become clear to me that international law - and the role of the UN as its champion - is central to the work of the UN and to the Secretary-General and his team.

We - as lawyers - are at the Secretary-General's table on many issues. I think it is only fair to say that it is the Secretary-General himself with his wish to see international law at the centre of UN work – who provides us with our seat at the table.

So - what is the vision of my office? One answer is the focus on promoting respect for the rule of law by the UN itself as an actor.

As the Legal Counsel, my task is to support the Secretary-General's commitment to the strengthening of the rule of law, the pursuit of justice and the determination to end impunity for war crimes, crimes against humanity, genocide and other serious violations of international human rights law. This topic, in one way or another, permeates my activities on a daily basis.

My office plays a key role in promoting the rule of law at the national and international levels and this is at the heart of the UN's mission. Establishing respect for the rule of law is fundamental and essential for a number of reasons, including firstly: prevention of conflict; secondly, achieving a durable peace in the aftermath of conflict; thirdly, the effective protection of human rights; and also, of course, sustainable economic progress and development.

It is my mission to help the UN to act in accordance with the rule of law. My Office plays a role – to help with the concrete and practical application and implementation of the rule of law. It is my Office's job to ensure that UN departments and offices develop and implement policies in accordance with the law.

In view of the short time available for my initial remarks, I decided to focus on three topical issues we currently spend a lot of time on: international criminal justice and the fight against impunity, the concept of the "responsibility to protect" - R2P - and the scourge of piracy.

[International criminal justice and the fight against impunity]

Under the leadership of the Secretary-General, the UN has achieved significant progress in the fight against impunity. BAN Ki-moon has consistently called for the enhancement of accountability for those who commit international crimes, including for serious violations of human rights and international humanitarian law.

In this respect, I would like to refer to the work of some of the various international justice mechanisms, which we assist and support. The 1990s and the early 2000s were historic periods in international criminal justice, when new international criminal tribunals were established to ensure accountability for genocide, war crimes and crimes against humanity. The Tribunals have reaffirmed, and continue to reaffirm, the central principle established long ago in Nuremberg: that those who commit, or authorize the commission of, war crimes and other serious violations of international humanitarian law are individually accountable for their crimes and will be brought to justice, in accordance with the due process of law.

My Office has been closely involved in the establishment and operation of the international criminal tribunals, and although they have only been able to prosecute a relatively small number of defendants, I believe they have already achieved a great deal. A number of those who, from high positions, allegedly planned and directed the most serious crimes have been brought to justice or are currently facing trial. This list is well known - Milosevic, Karadzic, and Mladic (ICTY) Charles Taylor (Special Court for Sierra Leone), Bagosora, Kambanda and Bizimungu (ICTR), Nuon Chea, Ieng Sary, Ieng Thirith, and Khieu Samphan (ECCC). Heads of State have not been exempted.

As the centrepiece of the system of international criminal justice, the International Criminal Court epitomizes the efforts of the international community to ensure justice and end impunity while also seeking to strengthen the rule of law at the national level.

Before the establishment of these accountability mechanisms, impunity was viewed by some perpetrators of terrible crimes as a very likely outcome. This is no longer the case. Significantly, in the case of the International Tribunal for the former Yugoslavia, all 161 indictees have now been brought before the Tribunal. While there has been certain scepticism in some quarters about the value of the Tribunals, this record is remarkable.

[R2P]

Let me now turn to R2P, a very interesting and relatively new political and legal concept which has been the subject of much discussion at the UN in recent times, and in particular in the past year.

[Operationalization of the concept of R2P]

Four crimes and three pillars

While an extensive debate on the conceptualization of the R2P doctrine took place before the General Assembly adopted its framework in 2005, the task of operationalizing R2P has fallen to Secretary-General Ban Ki-moon since he took office on 1 January 2007. During his first term in office, significant progress was achieved on this issue. The Secretary-General identified three pillars for advancing the World Summit's landmark decision in this area: Pillar One on the responsibility of States to protect their own population; Pillar Two on "International assistance and capacity-building" to assist States to protect their population before crises and conflicts escalate to the level of a likely commission of the R2P crimes; and Pillar Three on a "timely and decisive response" by the international community where States are not able or willing to protect their population. Collective action should be taken in a "timely and decisive manner through the Security Council, in accordance with the Charter, including Chapter VII" in cooperation with relevant regional organizations as appropriate when national authorities "manifestly fail to protect their populations" from the four specified crimes and violations.

Allow me to provide you with an overview of the ten situations in which the concept of the responsibility to protect has to date been invoked by United Nations inter-governmental organs:

The Human Rights Council referred to R2P twice in the situation in Libya and once in the situation in Syria – each time ahead of the Security Council. The Security Council referred to R2P in connection with the situation in Libya (in resolutions 1970 in February 2011 and 1973 in March 2011). The Security Council further referred to R2P in connection with the situations

in South Sudan in July 2011 (resolution 1996) and in Yemen in October 2011 (resolution 2014). R2P-like language can also be found in the Security Council's resolutions on Côte d'Ivoire (1975 in March 2011), Somalia (2010 in September 2011), and Children in Armed Conflict (1998 in July 2011).

Before that, namely in Kenya, Kyrgyzstan, Guinea, the Democratic Republic of the Congo, and elsewhere, R2P had already become part of the UN approach and preventive diplomacy.

I believe that this overview shows in a concrete way that 2011 was the year in which the concept of the responsibility truly came of age. The principle was tested like never before and became a real and evolving reality in international relations.

The results have been uneven but, ultimately, R2P has allowed the United Nations and the international community to give hope to people who have been long oppressed – and many lives have been saved in the process. By our words and actions, we demonstrated that human protection is a defining purpose of the United Nations in the twenty-first century.

How did we get there?

[Implementation and practice of the concept of R2P]

The discussion on a strategy to implement the responsibility to protect is still ongoing, but the concept shows the potential benefits that a unified action in this field may bring to the international community as a whole.

The upheaval in Northern Africa and the Middle East - which have come to be known as the "Arab Spring" - brought about significant developments, which put the concept of R2P to a practice test. The "Arab Spring" has been marked by appalling violence committed by Governments against their own citizens, and represents a clear failure by them to carry out their protection responsibilities under pillar one. Situations throughout the Arab world have highlighted the challenges involved in operationalizing R2P

across the three pillars. The international community, represented by the UN, together with interested States, have taken a series of measures under pillars two and three in order to either assist governments and transitional authorities to meet their responsibilities vis-à-vis their populations, or to intervene to protect populations from the R2P crimes and violations.

Measures have been taken under pillar two to assist national authorities to protect their populations in Egypt, Tunisia, Yemen and Syria.

In Egypt and Tunisia – while the situations are distinguishable and have to be distinguished - the extreme violence came to an end and the countries are in transition to become democratic societies - including the holding of elections and the development of constitutional frameworks, which will hopefully prevent a relapse into conflict.

Regarding Yemen, the Security Council encouraged an expedited implementation of a political settlement negotiated with strong assistance by the Secretary-General's good offices. While former President Saleh stepped aside and the 21 February presidential elections have been held in a largely peaceful manner, challenges for the full implementation in good faith of the settlement agreement remain considerable. The Secretary-General continues his good offices in this regard, through his Special Adviser who is often advised by my Office.

Regarding Syria, the situation continues to be grave. The Government has ignored a number of deadlines set by the League of Arab States and has dismissed numerous calls by others to stop the brutal and bloody crackdown on anti-government protestors.

On 2 December last year, the Human Rights Council met in Special Session to consider the report of the Commission on Inquiry. It adopted a resolution that sent a very clear message to the authorities in Damascus to finally stop the killing and human rights violations.

During its current 19th regular session, the Human Rights Council held an urgent high-level debate on 29 February on the escalating grave human

rights violations and deteriorating humanitarian situation in Syria the outcome of which was another resolution in which the Council, inter alia,- and I cite - "calls upon the Government of the Syrian Arab Republic to immediately put an end to all human rights violations and attacks against civilians, to cease all violence, to allow free and unimpeded access by the United Nations and humanitarian agencies to carry out a full assessment of needs in Homs and other areas, and to permit humanitarian agencies to deliver vital relief goods and services to all civilians affected by the violence (…)."

In a parallel development, the General Assembly adopted a resolution on 19 December 2011 on the situation in Syria, which strongly condemned the continued grave and systematic human rights violations by the Syrian authorities and authorized the Secretary-General to provide support to the League of Arab States Observer Mission to the Syrian Arab Republic.

On 16 February, the General Assembly adopted another resolution condemning the on-going violence in Syria (A/Res/66/253). Pursuant to this resolution, the Secretary-General in close coordination with the League of Arab States appointed Kofi Annan as Joint Special Envoy on the Syrian crisis. As requested, the Secretary-General delivered a first report to the General Assembly on 2 March. In his report, the Secretary-General said – and I quote: "The Syrian government has failed to deliver on its responsibility to protect its people. Civilian populations are under military assault in several cities."

Credible reports from a variety of sources indicate that the total number of people killed since the protests began in March 2011 now probably exceeds 7,500, including women and children. The International Commission of Inquiry for Syria, in a report issued on 22 February, concluded that the Syrian Government forces have committed widespread, systematic and gross human rights violations, amounting to crimes against humanity, with the apparent knowledge and consent of the highest levels of the State.

The Security Council is actively seized of the matter but, as you will know, so far has not been able to agree on a comprehensive strategy on how

to resolve this situation. On 1 March, the Security Council deplored the rapidly deteriorating humanitarian situation and demanded access for relief workers. The Secretary-General welcomed the Council's clear and strong statement. However, understandably, given the seriousness of developments on the ground, the international community must urgently find unity in pressing the Syrian authorities and all other parties to stop the violence. It is with this aim that joint Special Envoy Kofi Annan is travelling to the region this week.

With regard to Libya, efforts to operationalize R2P culminated in the Security Council's adoption of two resolutions in 2011 (SCR 1970 and SCR 1973). These are the first fully-fledged "R2P resolutions". When passed, it should be remembered that Qaddafi's forces were threatening to annihilate those Libyans who were challenging his 42 years grip on power. Resolutions 1970 and 1973 recognize the responsibility of the Libyan authorities to protect the Libyan population (pillar one). They identify the wide-spread and systematic attacks in Libya as "crimes against humanity", thus framing them within the "R2P crimes".

The lead-up to resolution 1973 saw numerous "diplomatic, humanitarian and other peaceful means" taken by the Secretary-General, States and regional arrangements to protect civilians under "pillar two". Eventually, in the words of paragraph 139 of the 2005 World Summit Outcome resolution, Member States took collective action in accordance with Chapter VII and upon authorisation of the Security Council (pillar three). This Security Council resolution and its authorization "to take all necessary measures ... to protect civilians and civilian areas under threat" is the most explicit and robust application of the R2P doctrine to date.

On 16 September 2011, the Security Council adopted resolution 2009 (2011). The Council mandated a civilian mission (UNSMIL) to assist Libya in establishing a democratic system of governance based on the rule of law. Targeted sanctions were lifted to support Libya's post-conflict economic and social recovery.

[Assessment of the recent practice]

While it might still be premature to pass an overall assessment of the actions by the international community under "R2P" in the context of Libya, it has to be noted that these actions, undertaken both via the UN and other multilateral and bilateral efforts, have been swift and targeted.

Against this theoretical and factual background it appears clear that the "rule of law" at both the international and national levels lies at the heart of the Responsibility to Protect, and it proves useful in understanding the course of action needed under these three pillars of R2P. The rule of law weaves it way through each of the three pillars.

Under the first pillar, there is a need for States to become parties to relevant international instruments on human rights, IHL and refugee law, and to the ICC Statute; and the core international standards need to be faithfully embodied in national legislation and implemented. Full implementation of the obligations contained in the Charter of the United Nations, and in other international instruments, is central to collective efforts at maintaining international peace and security, effectively fighting the growing problem of terrorism and transnational organized crime, and closing off accountability gaps for the most serious international crimes. There is a good chance that the presence of a strong culture of rule of law in a society may prevent or minimize the risk of deterioration into an "R2P" situation.

Under the second pillar, there is a need for assistance programmes to build specific capacities, including legal institutions and judicial capacities, within societies that would make them less likely to travel the path to crimes relating to the responsibility to protect.

Under the third pillar, emphasis is needed on all the available tools provided under the Charter, notably in Chapters VI, VII and VIII, and thus includes the use of force where authorised by the Security Council. As I already mentioned, it is important to underline that R2P does not provide a third exception to the Charter prohibition on the threat or use of force

against the territorial integrity or political independence of any state – the other two exceptions being acts in self-defence (Art 51), and acts authorized by the Security Council (Articles 2(4) and 42). The Responsibility to Protect does not create any additional exceptions to the prohibition on the use of force, and is not - as popularly misconstrued - another way of talking about "humanitarian intervention"

Finally, while the implementation of R2P in any particular situation is susceptible to political considerations, it is nonetheless a significant political acknowledgment by the international community that sovereignty entails responsibility, and that the international community has a responsibility to act to assist States to protect their populations. The clear focus of our efforts in implementing R2P must be on prevention.

[Piracy]

Now – for a wholly different flavour of our work, yet connected to the issue of the rule of law – I will speak briefly about piracy.

Ocean and sea transport have for centuries been used for carrying people and goods. The earliest accounts of this transportation method date back to 3000 BC. Technology has critically advanced since these ancient times, yet seaborne commerce remains the cornerstone of the global economy. According to the International Maritime Organization (IMO) "more than 90 % of global trade is carried by sea". About 50 % of the total volume of oil transported by sea passes through the Strait of Malacca on around 50.000 vessels annually and through the Gulf of Aden and about 22.000 vessels annually coming from or sailing through the Suez Canal, carrying more than 12 % of that volume.

Piracy, commonly understood as armed robbery at sea, has existed for thousands of years. It diminished substantially in the end of the 19th century and seemed to have become one of the legends of the past. The crime of piracy thus started to disappear from the criminal law legislation. A few decades ago the "pirate phoenix" appeared to be rising again to become

a regional, if not a global, scourge by the end of the last century. The emergence of Somalia as the main piracy hotspot of the world is relatively recent. South-Asia, especially the Malacca Strait between Singapore, Malaysia and Indonesia, and the South China Sea were the first regions to draw international attention to the crime of piracy. However, since the mid-2000s Somalia has become the primary source of piracy attacks.

For my Office, the piracy file is an active and important one. The human cost of piracy off the coast of Somalia is incalculable, with killings and widespread hostage-taking of sailors whose daily jobs are already filled with risk. The commercial cost, given the statistics above, is also very high. In Somalia, deep poverty, endemic corruption, political instability and lack of effective and legitimate justice and security institutions have brought the country to virtual collapse. Crime and piracy are widespread there principally as a symptom of the lack of institutions and the existence of a conflict that has persisted in the country for 20 years.

Another alarming development in Somali piracy is its extending scope – it has spread from the Horn of Africa across the Indian Ocean. Previously, piracy in this region was mainly concentrated within about 50 nautical miles of the coast of Somalia, gradually pirates have expanded the focus of their activities on the Indian Ocean and they are now regularly operating over 1000 nautical miles from the coast of Somalia. Places as distant as the Seychelles and the coast of India are vulnerable to Somali pirates, who have begun to use hijacked merchant vessels to serve as mobile bases for their attacks.

One recent review of piracy attacks for the year 2011 reported a record 237 attacks – up from 212 in 2010. However, the proportion of successful attacks fell – 28 vessels were captured, compared with 44 in 2010. The human cost is terrible. Twenty-four seafarers died as a result of piracy last year and it is estimated that there are approximately 700 people currently held hostage. Only last week, two hostages were killed during an attempt to rescue 18 who were being held off the Gulf of Aden. Financially, it is estimated that Somali pirates imposed costs of between $6.6bn and $6.9bn on the world during 2011. More broadly, one organization which

monitors piracy very closely estimates that the economic impact of piracy all around Africa – including the growing problem off Nigeria and Benin in West Africa – could have been as high as $12bn during 2011. It is worth noting that last week the Security Council met to discuss piracy developments in west Africa - in particular in the Gulf of Guinea – and urged the States of the region to convene a summit to develop a common maritime security strategy that includes a legal framework for prosecution of persons engaged in piracy.

Now, let us look at the international instruments dealing with piracy. The notion of piracy was first codified by the 1958 Geneva Convention on the High Seas and later by the 1982 United Nations Convention on the Law of the Sea (UNCLOS). The latter treaty provides for a quite technical definition which essentially includes violence or detention for private ends by the crew of a private ship against another ship. It is not a complex crime. Some refer to it colloquially as “robbery at sea”, although, of course it is broader than this, and includes hostage–taking.

As piracy is a crime which, by definition, takes place on the high seas, beyond the territorial jurisdiction of any State, UNCLOS and customary international law provide for universal jurisdiction over it. Any State may seize a pirate ship, arrest and detain the perpetrators, and prosecute them. There is no lack of international law for dealing with piracy, but rather a lack of implementation. The seizing States seem to be reluctant to exercise the broad powers they have with respect to prosecuting the pirates arrested due to legal complexities, in particular human rights implications. States parties to human rights treaties are concerned that pirates might request asylum in the respective countries in light of the risk of torture or the death penalty if returned to Somalia to serve a sentence. Additionally, once they had served a sentence and been granted asylum they might seek family reunion. Due to these concerns pirates often have been released. I believe the questions surrounding the dearth of requests for transfers for prosecution from navies detaining suspected pirates will be the subject of increased discussion in the period ahead. It is a question that my Office raised in a report of the Secretary-General to the Security Council – and I will touch on our reports to the Security Council in a moment.

Preferably, pirates should be prosecuted in the country of their origin but, in the case of a failed state like Somalia, this is not a realistic option. The alternative would be to conclude bilateral agreements with a country in the region. The efforts of Kenya and the Seychelles in particular to conduct prosecutions is commendable. One of our key efforts must be to try to encourage and assist an increase in the number of such regional States to play an active role. My Office, together with the UN Office on Drugs and Crime represents the UN in the legal discussions of the concerned states in the so-called “Contact Group” and has provided input on the international legal regime applicable to acts of piracy, including with respect to the transfer and detention of persons suspected of piracy.

The Secretary-General has over the past 18 months alone submitted three reports to the Security Council in which he reviewed possible options to further the aim of prosecuting and imprisoning those responsible. The knowledge and experience that the Office of Legal Affairs has developed of international tribunals over the past two decades has been a solid foundation for the preparation of these reports on behalf of the Secretary-General.

In the first of these reports, we identified seven options, including the creation of special domestic chambers in regional States, possibly with participation by international judges and prosecutors; a regional tribunal; or an international tribunal established by the Security Council on the lines of the former Yugoslavia and Rwanda tribunals. The report underlined the pressing need to ensure sufficient prison arrangements complying with international standards for those convicted. The second report examined the "modalities" for the establishment of specialised Somali anti-piracy courts, either within Somalia, or extraterritorially in a third State in the region. The third report, which I mentioned a few moments ago - and which deals with increasing the capacity of specialised anti-piracy courts in Somalia and other regional States to prosecute suspected pirates is currently being considered by the Security Council.

The Secretary-General’s reports have been welcomed as an important and timely contribution, as well as food for thought for the Security Council. It is critical that the international community does not tolerate impunity for

crimes of piracy. However, as my Office also recognises, piracy is a symptom of the instability that has persisted in Somalia for nearly two decades. Prosecution of those responsible must therefore form part of an integrated international response which aims to help rebuild the rule of law, and economic and social stability on land in Somalia.

[Conclusion]

This brings me to the end of my introductory remarks today.

I hope that I succeeded in providing you with a glimpse of what the work of an international lawyer at the United Nations looks like today. If you consider embarking on a career in the practice of international law, the Office of Legal Affairs is – in my admittedly slightly biased view – a very interesting option. I hope that I have succeeded in providing you with a glimpse of what the work of an international lawyer at the United Nations looks like today. I would also like to acknowledge not only the vital role that Columbia Law School has played in preparing its students to embark on careers in international law, but also the historical ties that have existed between Columbia Law School and the Office of Legal Affairs since the inception of the Organization. Oscar Schachter who served in the UN Legal Department as a deputy director in 1946 graduated from Columbia Law School in 1939 and, of course, taught at Columbia Law School for several decades. The Office of Legal Affairs continues to have the good fortune to benefit from the expertise and professionalism of a number of Columbia Law School graduates - Stephen Mathias (class of 1980) is currently serving as the Assistant Secretary-General for Legal Affairs, and a number of other senior legal officers within OLA are also Columbia alumnae. I hope that many of you will consider carrying on this tradition and find ways to contribute the positive development of international law in your future careers.

Thank you very much for attention and all my best wishes for your studies and future career.