

**Informal meeting and exchange of views with the
Legal Advisers of African Union Member States**

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

**Thursday, 9 May 2013, 16.00 - 17.30 hours
African Union Headquarters, Addis Ababa, Ethiopia**

Excellencies,
Ladies and Gentlemen Legal Advisers of the
African Union Member States,
Colleagues and Friends,

[Introduction]

I am delighted to be back in Addis Ababa to congratulate you on 50 years of African solidarity with the Organization of African Unity and then the African Union. The United Nations has been Africa's strongest partner throughout this half century. We are firmly committed to standing with Africa now and in the future.

I am also delighted to see you again. This is my second official visit to the African Union in my capacity as Legal Counsel of the United Nations. And it will be the last one in this capacity as I will be leaving my post in the autumn. Allow me to extend my sincere gratitude to you for the warm and cordial welcome that you have extended to me here at the Headquarters of the African Union in Addis Ababa.

It is a great honour to address you today.

Earlier today, I met with my counterpart the Acting Legal Counsel of the African Union, Ms. Djeneba Diarra, and had an opportunity to have a discussion with her staff of the Legal Office of the African Union Commission.

I told all of them that the purpose of my visit to the African Union is to listen to their suggestions on how we can strengthen the relationship and cooperation between the United Nations and the African Union, also and in particular with regard to legal matters. Together, we also took stock of what we have achieved since my last visit in April 2012. I will convey the same message to the Deputy Chairperson of the African Union Commission, H.E. Mr. Erastus Mwencha, who I will have to pleasure of meeting tomorrow.

While there is an ever growing cooperation between the UN and the AU in a variety of areas, there used to be very little cooperation in the legal field.

Together with the AU Acting Legal Counsel and my friends and colleagues in the Office of Legal Affairs we have taken some steps to change this:

- we have established cooperation in the field of the law of the sea and my Division of Ocean Affairs and the Law of the Sea assisted the AU Commission with certain aspects of the implementation of the 2050 African Integrated Maritime Strategy;
- we cooperate in the field of treaty law through my Treaty Section;
- my Codification Division has just completed a four-week regional course in international law for Africa here in Addis Ababa;
- and, of course, at the 2012 session of the International Law Commission (ILC), the African Union Commission on International Law (AUCIL) was represented as an observer by its Chairman, Mr. Blaise Tchikaya, and one of its members, Mr. Minelik Alemu Getahun. In that context, the AUCIL provided an overview of its activities and had an exchange of views with ILC members.

These are just a few examples of what we already achieved in only one year. We can do better and we will do more.

I firmly believe that both the UN and the AU will greatly benefit from the strengthening of a UN-AU dialogue on legal matters. This dialogue has the potential of having a positive impact on UN-AU cooperation in other areas.

The issue of cooperation between the United Nations and the African Union features very high on the strategic priority agenda of all major Secretariat units, including in particular DPKO, DFS, DPA and OCHA.

Since about two and a half years, the UN has a dedicated Office to the African Union – UNOAU. I had the great pleasure of meeting with SRSG Mr. Muburi-Muita, the Head of UNOAU, earlier today. Africa is and remains a top priority for the Secretary-General who conducted a number of missions to all parts of the continent. The UN-AU relationship is also a top priority for the DSG. Secretary-General Ban Ki-moon and many other senior UN Officials will be here in Addis Ababa on the occasion of the AU summit which will officially mark the 50th anniversary of the African Union.

Against this background, Djeneba Diarra and I resolved to continue our dialogue on legal matters and to strengthen our cooperation for the benefit of both our organizations. It is in the spirit of this dialogue and cooperation that I stand before you here today. And I stand before you to solicit your continued support for the strengthening of this cooperation.

We must realize the great potential that lies in an ever closer cooperation between the UN and the AU also and in particular in the legal field.

So to start our discussion, let me say a few words about three areas: - firstly, the nature of my job as Legal Counsel of the United Nations; secondly, the vision of my Office in terms of both providing legal advice across the UN system and in promoting the further development and understanding of international law more generally; and thirdly, I'll discuss a number of current issues which we are dealing with.

[The Role as Legal Counsel]

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 live in an era in which international law is no longer only the business of international courts and institutions. We can all see that international law issues are increasingly being considered by national and regional courts – sometimes in sustained, systemic ways; on other occasions in *ad hoc* or more random ways. I am firmly of the view that we should not underestimate the importance of this evolution.

[Vision]

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, achievement of a durable peace in the aftermath of conflict; thirdly, the effective protection of human rights; and also, of course, sustainable economic progress and development.

[Current Legal Issues]

What are some of the major legal issues that we are dealing with? Let me start with the UN's work to end impunity for international crimes.

[The UN's work to end impunity for international crimes]

Under the leadership of the Secretary-General, the UN has achieved significant progress in the fight against impunity in respect of international crimes. Secretary-General 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 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 first tribunals were the ICTY and the ICTR, established to address accountability for the terrible atrocities of the Former Yugoslavia and Rwanda respectively. These were followed by the SCSL and the ECCC. The international criminal 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.

This leads me to the centrepiece of our system of international criminal justice – the International Criminal Court.

The UN supports the ICC. And we take that responsibility seriously. However, I take every opportunity to emphasise the role of the States. The principle of complementarity is essentially the duty of States first and foremost to prosecute international crimes. Only where national judicial systems are unable or unwilling to investigate or prosecute should international courts be involved. This principle is of crucial importance for the future of international criminal justice and the quest to end impunity for grave violations of international humanitarian law and human rights law. It is clear that the primary role of national

jurisdictions and the principle of complementarity has become the bedrock of international criminal justice. International mechanisms are **not** substitutes for national mechanisms. In the final analysis, **justice is a nation's choice**. Supporting the principle of complementarity through fortifying national judicial systems is a priority in our common fight against impunity for the coming years. But, as we know, where States are unable or unwilling to ensure justice for international crimes, it falls to international justice to fill the gap.

As the beating heart of the system of international criminal justice, the International Criminal Court is at the heart of efforts of the international community to ensure accountability and end impunity while also seeking to strengthen the rule of law. This Court provides the opportunity and the vehicle for our generation to significantly advance the cause of justice and, in so doing, to reduce and prevent unspeakable suffering. When the ad hoc tribunals have finished their mandates, the ICC will remain as the world's only permanent court which administers international criminal justice.

Currently, the ICC is exercising jurisdiction in respect of the following eight situations: DRC, Central African Republic, Northern Uganda, Darfur, Libya, Kenya, Côte d'Ivoire and Mali.

[DRC and Kenya]

And let me now brief you on some recent events which - from OLA's perspective - are all somehow related to international criminal justice. I'll start with the DRC.

There are two major new developments with regard to the DRC. One is Bosco Ntaganda's surrender and transfer to the seat of the International Criminal Court in The Hague. Since 2006, Bosco has been the subject of an arrest warrant by the ICC. A second arrest warrant was issued in 2012. After the power struggle and eventual split in the M23 with a more moderate Makenga on the one side and a more radical Bosco on the other, Bosco reached the end of the line. He had to leave the Kivus, crossed into Rwanda but was not welcome there either. With nowhere to

go, he turned himself in to the US Embassy in Kigali on 18 March 2013. From there, he was transferred to Kigali airport and surrendered into the custody of the ICC Prosecutor who had sent a chartered aircraft to pick him up.

The Security Council and the Secretary-General welcomed the transfer and expressed their gratitude to the United States and Rwanda, both non-members of the Rome Statute, for closely cooperating with the ICC in the transfer. Taking Bosco out will certainly advance the cause of peace in the Democratic Republic of the Congo as well as the fight against impunity in the region.

The second major development is that in the latest Security Council resolution – resolution 2098 of 28 March 2013 - on MONUSCO. For the first time ever, the Security Council expressly “takes note” of a long-standing policy originally devised by my Office and subsequently promulgated by the Secretary-General on the difficult relationship between peace and justice, in particular on the question of amnesties. This is a policy of rejection of any of amnesty for genocide, war crimes, crimes against humanity or gross violations of human rights and international humanitarian law. I see this as a major step in the right direction of rendering amnesties for serious international crimes a thing of the past.

In its resolution 2098, the Security Council has also tasked MONUSCO with supporting and working with the Government of the DRC to arrest and bring to justice those responsible for war crimes and crimes against humanity in the country, including through cooperation with the ICC.

And now, allow me to say a few words on the situation in Kenya after the presidential elections in mid-March.

Kenyatta and Ruto, were “running mates” in Kenya’s presidential election. Both individuals are also indicted by the ICC for crimes against humanity that they have allegedly committed during the post-election violence in 2007-2008. On 9 March 2013, the Independent Electoral and Boundaries Commission (IEBC) of Kenya officially declared Kenyatta and his running mate Ruto the winner of the 2013 presidential election. Subsequently, the victory was confirmed by the Kenyan Courts.

My Office has consistently advised that all contacts between United Nations officials and persons who are indicted by international jurisdictions be limited to those which are strictly necessary for the carrying-out of essential UN-mandated tasks. With respect to persons indicted by the ICC, this also follows from the Organization's international legal obligations pursuant to the Relationship Agreement between the United Nations and the International Criminal Court.

Kenyatta and Ruto appeared voluntarily in The Hague in April 2011, in response to summonses that they had received from the ICC to appear. Since then, both individuals cooperate actively and to the satisfaction of the Prosecutor in the ICC proceedings.

In light of these particular circumstances, my Office advised that it would not undermine the authority of the ICC, and so would not be inconsistent with the Organization's obligations pursuant to the Relationship Agreement, if UN officials were to continue to engage with Mr. Kenyatta and Mr. Ruto and to have such contacts with them as might be normal in the circumstances currently prevailing.

Should Kenyatta and Ruto, however, decide to cease cooperating with the ICC, my Office further advised that the "essential contacts policy" should immediately apply; and it would be legally necessary for the Organization's officials to limit their contacts with Mr. Kenyatta or Mr. Ruto, as the case may be, to those that are strictly required for carrying out essential UN mandate activities.

Our internal guidance on this matter has recently been published as official UN documents.

There are many instructive lessons to be drawn from the UN's work to end impunity for international crimes. Allow me to summarize them as follows:

- The old era of impunity is over. In its place, slowly but surely, we are witnessing the birth of a new Age of Accountability;

- In this new age of accountability nobody is above the law, including in particular Heads of State. Leaders will eventually be held accountable for their actions;
- Sovereignty as a barricade against international justice is gone;
- And: there is no peace without justice. Peace and justice must go hand in hand and elements of justice must be factored into every post-conflict strategy in order for peace to be sustainable.

Finally, let me say a few words on four situations and issues that we are dealing with.

The conflict in Syria has entered its third year. Both the Government and the opposition continue to pursue their goals through aggression. The mounting death toll and destruction is shocking. In the early stages of the conflict, the Secretary-General's Advisors on the Prevention of Genocide and R2P warned that "the widespread and systematic attacks on civilians could constitute crimes against humanity". The situation has long reached the threshold of a non-international armed conflict, and thus the acts of violence against civilians would amount to the commission of war crimes.

The Secretary-General is very much engaged with regard to the situation in Syria. On 21 March he announced his decision to launch a United Nations investigation into the allegations of the use of chemical weapons in Syria. Over the course of the last two weeks we have been working intensely with the Organization for the Prohibition of Chemical Weapons (OPCW) and the World Health Organization (WHO). We are addressing issues like: the overall mandate, mission composition, and operational conditions including safety and security. We face many challenges – not least of which is the necessary cooperation of the Government of Syria.

We hope that the mission will contribute to ensuring the safety and security of chemical weapons stockpiles in the country. We also hope that it will serve as deterrence for future possible uses of such weapons. It will be important that this investigation mission receives full cooperation from all parties, including unfettered access.

In the Democratic Republic of the Congo, the Security Council has decided to strengthen the peacekeeping operation there — MONUSCO — by creating a special “Intervention Brigade”, with the objective of preventing the expansion of the armed groups operating in the east of the country, neutralizing them and forcibly disarming them. Perhaps the mere threat of the Intervention Brigade will be enough to persuade some armed groups to lay down their arms and disband. But, in all probability, we can anticipate that the Intervention Brigade will be mounting targeted offensive operations against armed groups in the eastern DRC within a few months. And, with that, MONUSCO will, in all probability, become a party to the armed conflict in that country. This will have a whole range of legal consequences for the United Nations. Most importantly, international humanitarian law will apply to MONUSCO’s operations. My Office is addressing the resulting issues as I speak – drafting appropriate rules of engagement; preparing procedures for the treatment of members of armed groups who are captured by MONUSCO; and so on. And we will have a situation for the first time where UN peacekeepers will be under the careful watch of the Prosecutor of the ICC, as the Court has jurisdiction over the situation in the DRC.

Last Thursday, the Security Council adopted a resolution establishing a United Nations peacekeeping operation in **Mali**: “MINUSMA”. The African-led operation in Mali, “AFISMA”, will continue its operations until 1 July. Subject to a review of the security situation by the Security Council, AFISMA’s mandate will then come to an end and MINUSMA will commence operations, with appropriate military and police personnel of AFISMA being “re-hatted” as UN peacekeepers. It is unlikely that, by the time MINUSMA commences operations, the problem of terrorist, extremist and armed groups in Mali will have disappeared. If French forces will have done much to degrade the capabilities of the terrorist and extremist groups that formerly controlled the north of the country, it can be anticipated that they will nevertheless much remain a problem. As the United Nations operation deploys to secure key population centres in the north and the communication routes between them, they will in all probability face the threat of a return by armed elements.

My Office is assisting the military planners and the Department of Peacekeeping Operations to define, in the light of the Security Council’s

resolution, what actions our peacekeepers will be able to undertake in order to deter this threat and prevent the return of armed elements to the north's major cities and towns. Again, we will be helping draft appropriate rules of engagement for our soldiers, directives for our police, procedures for detention and so on. And, again, the situation in Mali is one that falls within the jurisdiction of the ICC.

Finally, let me mention a field in which my Office has worked hard over the past few years and is now seeing its labours bear fruit: the so-called "**human rights due diligence policy**". The UN has increasingly been called upon to provide support to non-UN security forces, be it building the operational capacity of national military and police forces, providing logistic support to peacekeeping forces deployed by regional organizations or even conducting joint police or military operations with such forces. Clearly, the law sets down limits on whom we can support and when. That law comes directly from the Charter. My Office developed the human rights due diligence policy in response. The policy essentially consists of three elements. **First**, the UN cannot provide support to non-UN security forces where there are substantial grounds for believing there is a real risk of those forces committing grave violations of international humanitarian, human rights or refugee law. **Secondly**, where grave violations are committed by non-UN security forces that are receiving support from the UN, the UN must intercede with a view to bringing those violations to an end. And **thirdly**, if, despite such intercession, the situation persists, the UN must suspend support to the offending forces.

The Secretary-General issued the policy in 2011 and it was made public in January this year. Member States appear to have embraced it. The Security Council has already endorsed it and asked the Secretary-General to apply it in three resolutions, on Somalia, the DRC and now Mali. And we can see the practical effects of the policy in the Democratic Republic of Congo. Two weeks ago, it was widely reported that the Congolese government had suspended 12 senior officers of the Congolese army and initiated judicial investigations against them, in response to allegations of mass rape in the Goma region last November. This was a result of pressure from the UN, which had warned the Congolese army that peacekeepers would refuse to conduct operations

with two battalions unless the government prosecuted soldiers accused of mass rapes. The Congolese government's action is a welcome development, which demonstrates that the application of the policy can reinforce cooperation between the UN and Member States to achieve greater respect for international humanitarian law and human rights.

[Conclusion]

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

As I already mentioned, this is my last meeting with you as Legal Counsel of the United Nations. In September, I will be starting my new role as Irish Permanent Representative to the UN in Geneva. So let me already at this point wish you all the best for the future and I am sure that my successor will build on what Ben Kioko, Djeneba Diarra and I have started.

I look forward to hearing your comments on the issues I touched upon or on other legal issues that you may wish to discuss with me. Also, I will be happy to answer any questions that you might have.

Thank you very much for your kind attention.

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