

Institute of International and European Affairs

**“Legal issues facing the United Nations -
Reflections from four years as Legal Counsel”**

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

**Tuesday, 2 October 2012, 12.45pm
Europe House, Dublin, Ireland**

Excellencies,
Ladies and Gentlemen,

[Introduction]

It is a great pleasure to be here at the IIEA today and to share with you some insights and reflections on my role as Legal Counsel at the United Nations, and on some of the issues that have arisen over the last four years. I am deeply honoured and grateful for the opportunity to address you this afternoon.

I will speak about three areas: - first the nature of my job as Legal Counsel of the United Nations; second, 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 third, I’ll discuss a number of high profile issues that my Office is currently dealing with.

[The Role as Legal Counsel]

It is almost four years since I was appointed as Legal Counsel. Before I was appointed to this post, my main experience of the UN was as the Irish Foreign Ministry's legal adviser. In my role as Legal Adviser of the UN, I have a clear sense of how centrally international law figures among UN priorities.

Before I give you a sense of the centrality which I found, allow me to mention the Charter, which is of course the fundamental legal basis and primary law of the UN. The UN was established not only to save succeeding generations from the scourge of war and to reaffirm faith in fundamental human rights, but, as the Preamble also provides,

"to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained".

Encouraging and supporting the development of international law as a way to regulate international relations has been a major objective of the UN since its beginning.

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.

The Office of Legal Affairs employs about 200 staff (over 60 nationalities) and acts as in-house Counsel to the Secretary-General, to the senior management and the wider UN system, and we also advise the SC and the GA. I have to underscore that some of our clients carry out their roles in environments which are constantly changing, in some of the most physically hostile places around the world, and often under incredible pressure. Much of our work is, understandably, carried out quietly and behind the scenes. My day-to-day work is hugely varied, and there are times when it is very challenging. It ranges from advice on Public International Law, the laws of war, – IHL, PKOs: - 16 peacekeeping operations and 13 political and peacebuilding missions around the world, privileges and immunities, Oceans and the Law of the Sea, Treaty Law and SG's depositary functions for over 550 multilateral treaties, codification and progressive development of international law, procurement contracts – \$4 billion, Administration of Justice for staff of over 60,000, International Trade Law – ITLD Vienna – Secretariat of UNCITRAL.

Being a lawyer in a political environment like 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 at an early stage, and to arrive at legally sound decisions. (Issues: Middle East issues : Gaza, Libya, Sri Lanka, Haiti, DRC, Sudan, Palestine, Côte d'Ivoire, Piracy, Oceans and maritime issues).

[Vision]

What vision do we have with respect to the implementation of international law for the UN as a global actor? In essence, it is very simple. It comes down to promoting respect for the rule of law at the international level and 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, 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.

In this connection, I was delighted to participate in the High-level Meeting of the 67th Session of the General Assembly on the rule of law at the national and international levels - the first meeting ever at the level of Heads of State and Government dedicated solely to this important topic – which was held on 24 September. More than 50 Heads of State and Government took the occasion of this truly historic meeting to reaffirm their solemn commitment to international law and justice, and to an international order based on the rule of law, which are indispensable foundations to a more peaceful, prosperous and just world. This alone shows you, in my opinion in a very impressive way, how important the rule of law, international law and legal affairs are in today's world.

[Current Legal Issues]

What are some of the major legal issues that we are dealing with? There are three particular areas that I would like to address today. These relate to: (i) the relevance of actionable legal advice in a challenging and rapidly evolving situation – the situation in the Democratic Republic of the Congo; (ii) the UN's work to end impunity for international crimes; and (iii) the emerging doctrine of the "responsibility to protect".

[Providing actionable legal advice for challenging situations – the example of the DRC]

I would like to give you a sense of a "real world" example that - I hope - will give you an impression of how we provide actionable legal advice, often at very short notice, for the challenging situations the UN faces, on a daily basis and in difficult places.

My Office often finds itself called upon to interpret the mandates of our peacekeeping operations —what exactly they are authorized to do and, most dramatically, in what circumstances and for what purposes they are authorized to use armed force.

In the past year, we have been closely involved in the rapidly evolving situation in the Democratic Republic of the Congo – "the DRC". Our peacekeeping operation in DRC, known as "MONUSCO", is our second largest peacekeeping operation with an authorized strength of 23,400 (the largest being UNAMID with 26,600). It is mandated to assist the government forces in the protection of civilians and the disarming of rebels. The government (Kabila) looked to our peacekeepers to help it put down the rebellion.

By way of background, in 2009, the CNDP —one of the armed groups fighting in the eastern DRC —finally reached an accommodation with the

Government. Its fighters were integrated into the Congolese armed forces — the FARDC. This integration was always an uneasy one and, in the spring of this year, many former CNDP elements mutinied and began to desert. They established a new armed group — the M23 —and, in defiance of the Government, began to set up a parallel administration in the areas that they controlled. The M23 are responsible for widespread atrocities, including summary executions, rapes and forced recruitment.

Over the past few months, in response to the M23 rebellion, my Office has spelled out the options that the law allows in terms of an assertive and proactive approach on the part of MONUSCO to its mandated task of protecting civilians under imminent threat of physical violence. And, consistently with this advice, MONUSCO's attack helicopters have several times gone into action to drive back the M23 when advances by its armed elements threatened civilian centres.

Beyond this, my Office has underlined that the mandate that the Security Council has given MONUSCO also enables it to use force in support of offensive operations by the Congolese army to neutralize and disarm the M23. And to do so, not only in a reactive manner — to come to the assistance of the FARDC and to relieve pressure on them if they meet resistance and their advance is held or repulsed — but also in a robust, proactive way — to suppress M23 resistance and clear the way for the FARDC. If MONUSCO has not used force in these circumstances, at least to date, it is not because of any misunderstanding of its mandate among those in charge of its operations or any misconception about what the law allows. The reasons must be sought elsewhere; and there, it is not for me, as a lawyer, to venture.

This was far from being the first time that a crisis in the eastern DRC had arisen, giving rise to questions about what our peacekeepers could do in

response. In the autumn of 2008, as the CNDP's forces threatened Goma, the main city in North Kivu, I found myself at almost daily meetings with the Organization's senior military advisor and the head of its peacekeeping operations, advising them on the limits that the law set on what our peacekeepers could do, but also, and perhaps more importantly, what the law in fact empowered them to do in defence of Goma and its population. It is not the role of the lawyer to dictate military strategy. But we can help shape it, by making it clear for those whose task it is what options the law places at their disposal. And, in an Organization like the United Nations, which is dedicated to making and keeping the peace, it is vitally important for the lawyer sometimes, where the law allows for this, to dispel possible, limiting or restrictive misconceptions about when our peacekeepers can have resort to deadly force.

[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.

My Office has been closely involved in the establishment and operation of these 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. Heads of State have not been exempted. An impressive body of jurisprudence has developed.

Some 18 years after their establishment, the ICTY and the ICTR are completing their mandates. With the arrest of Mladic and Hadzic last year, the ICTY does not have any fugitives. All the 161 indicted persons have been brought to justice. In both courts, it can fairly be said that their work has contributed to the process of national reconciliation and the maintenance of peace and security. The legacy of the ICTY and ICTR also includes legal and judicial capacity building in their respective regions. The Tribunals have significantly influenced the way criminal justice is exercised in the affected countries and regions.

The issue of accountability for Heads of State on trial leads me to last May's trial judgment by the Special Court for Sierra Leone in the case against Charles Taylor, the former President of Liberia. This judgment is a significant milestone for international criminal justice. It concerns the conviction of a former Head of State by an international criminal tribunal for planning, aiding and abetting war crimes and crimes against humanity. It sends a strong signal to all leaders that they are and will be held accountable for their actions.

The Special court will be closing its doors after the Appeal which is currently underway. A small Residual Mechanism will remain in Sierra Leone.

The Extraordinary Chambers in the Courts of Cambodia (ECCC) are part of the national judicial system of Cambodia, and accordingly work within, and as part of, Cambodia's national legal system. At the same time, however, the ECCC is required under the Agreement between the UN and the Government of Cambodia to function in accordance with international standards of justice, fairness and due process of law. This process of combining Cambodian law and procedure with international standards has

been challenging, but has also had successes. In July 2011, the Court rendered its first verdict in the case against KAING Guek Eav, alias Duch, and found him guilty of crimes against humanity and grave breaches of the Geneva Conventions of 1949. He was sentenced to 35 years of imprisonment, shortened to 19 years to take into account time served in detention. While there are many challenges faced by the ECCC, we should not lose sight of the laudable successes of the Court. The ECCC is conducting the trial of the most senior surviving members of the Khmer Rouge regime. Many commentators consider this the most significant international criminal trial in the world at the moment.

Today it is the Rome Statute - which gave rise to the International Criminal Court - that is at the heart of our system of international criminal justice.

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 centrepiece 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 seven situations: DRC, Central African Republic, Northern Uganda, Darfur, Libya, Kenya and Côte d'Ivoire.

The Court issued its first judgment on 14 March 2012 - a significant milestone. The Court convicted Lubanga of the war crimes of conscripting children under the age of 15 years into armed groups, enlisting children into armed groups, and using children to participate actively in an armed conflict that took place in the Eastern region of the DRC.

There are many instructive lessons to be drawn. Allow me to mention:

- 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.

[R2P]

Let me now turn to the doctrine of the “responsibility to protect” which was unanimously embraced by more than 150 Heads of State and Government at the 2005 World Summit. They declared that each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity, and that the international community, through the United Nations, has a parallel responsibility to help protect populations from those crimes.

R2P is a relatively new concept but it has been highly relevant in recent conflicts: - Cote d’Ivoire, Libya and Syria. It is still evolving and developing. and my Office is at the heart of these efforts.

In addressing the challenge of “operationalizing” R2P, the Secretary-General has identified “three pillars” of action. Pillar I is the enduring responsibility of States to protect their populations. Pillar II is the role of the international community to assist States to protect their populations before crises and conflicts escalate to the level of the commission of R2P crimes. And Pillar III involves a commitment that States “are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter... where national authorities are manifestly failing to protect their populations”. The commitment thus includes action under Chapters VI and VIII, as well as under Chapter VII, and includes cooperation with relevant regional organizations, as appropriate.

The concept is thus premised on the legal framework provided under the Charter. Any decision of the Security Council to take action would require the concurring votes of each permanent member [Art.27.3]. This underscores that R2P does not create any additional exceptions to the prohibition on the use of force under the Charter [Art.2.4]– the only exceptions being acts in self-defence [Art.51], and acts authorized by the Security Council [Art. 42].

R2P has grown out of a number of important developments. It reflects recognition of the changing nature of conflict since the drafting of the Charter in 1945 – today most conflicts occur within States rather than between them. It signifies a broad acceptance of fundamental principles of human rights, and reinforces the normative content of the crimes of genocide, war crimes,

[ethnic cleansing], and crimes against humanity. And it affirms States' obligations under international law to prevent, prosecute and punish these atrocious crimes.

At the heart of R2P is the recognition that state sovereignty – the cornerstone of international relations – entails responsibility. This underscores that sovereignty entails enduring obligations towards one's people as well as certain international privileges.

So some might ask, what is new? The "added-value" so to speak of R2P, is that it encapsulates the moral and legal imperatives of the international community in relation to the four "R2P crimes ". It is a potentially powerful vehicle for an important political process, where political pressure, as well as tangible technical and material assistance, may be brought to assist States to exercise their responsibilities. It places pressure not only on national Governments, but also on actors in the international community. It provides for a marked shift in perspective. While some would argue that R2P has no normative effect, others hold that R2P is an "enabling new norm", and, while it is not an obligatory new norm, and does not impose binding new duties, it does confer additional responsibility, and that additional responsibility includes taking action to prevent and address the R2P crimes and violations.

The rule of law weaves its way through each of the three pillars of R2P. The first two pillars are focused on prevention. Prevention is key! State's own action or assistance by the international community will prevent situation from deteriorating into R2P crimes.

Under the first pillar on the "protection responsibilities of the State", it speaks to the need for States to protect their own populations, and to

institutionalize and internalize such protections in a purposeful and sustainable manner. It requires that States become parties to, and implement, relevant international instruments on human rights, international humanitarian law and refugee law, including the Rome Statute of the International Criminal Court. The first pillar requires that States manage diversity to promote equality, inclusivity, respect for fundamental rights and observance of democratic values and practices. In this way, States provide the architecture for the prevention of large scale atrocities within their territories.

With regard to Pillar II on “international assistance and capacity-building”, the international community, acting through individual States, regional organizations and the UN, can assist States to build specific rule of law capacities within their societies that will make them less susceptible to R2P situations.

Regarding Pillar III, the rule of law is crucial in the relations between States. Pillar III requires that any action by the Security Council must be in conformity with the UN Charter. The international rule of law promotes international peace and security. Under Pillar III, where necessary, the preference is to persuade national authorities to change their behaviour, employing the tools of Chapters VI, VII, and VIII as needed and authorized by the appropriate international authorities. Chapters VI and VIII of the Charter are underutilized. Where national authorities are failing to protect their populations, the international community has committed to take collective action through the Security Council in accordance with the Charter.

Whether taken under Pillar II or Pillar III, in each case, the international assistance serves to reinforce and not to undermine, national sovereignty while helping governments to provide additional protection and security to their populations.

I will now touch upon Libya. In resolution 1970 (2011), the Security Council recalled Libya’s “responsibility to protect its population”. This was the first time the Council had referred to the R2P framework since a 2006 resolution on Darfur. The international community, both via the UN and other multilateral and bilateral efforts, took a series of measures under Pillars

II and III to help protect the civilian population from, what were described by the Security Council, as “widespread and systematic attacks ... which may amount to crimes against humanity” – thus framing the attacks within the R2P crimes. These ranged from diplomatic measures, to the imposition of sanctions and referral of the situation to the ICC, to the Security Council’s authorization under SCR 1973 “to take all necessary measures to protect civilians and civilian populated areas under attack”. In Libya, action by the international community was swift, multifaceted and targeted. This was the most explicit and robust application of R2P to date.

While it is premature to pass judgment on the success or otherwise of actions under “R2P” in the context of Libya, the NATO intervention has been applauded for stemming the violence against the civilian population while it has also been criticized for going beyond the limits of the Security Council authorization. Some States have expressed concerns that the NATO action went beyond what was strictly necessary “to protect civilians and civilian populated areas under attack”. However, others maintain that the protection of civilians in Libya required the drastic action taken, and that many thousands of lives were saved by the intervention.

In this connection, the International Commission of Inquiry on Libya mandated by the Human Rights Council found that NATO had “conducted a highly precise campaign with a demonstrable determination to avoid civilian casualties”. NATO has given a detailed account of its targeting decisions, and in particular the focus on minimizing civilian casualties. However, the action serves to remind that sober judgment is needed before undertaking any operation which places civilians at risk.

Looking forward, the Security Council has now mandated a civilian mission to assist Libya in establishing a democratic system of governance based on the rule of law. While many challenges remain, the international community, through the UN, is supporting Libya’s post conflict economic and social recovery. This activity falls within the rubric of R2P and is evidence of its continuing relevance in Libya.

The concept of Responsibility to Protect cannot succeed without a credible threat of a response and common conviction that the world no longer

tolerates impunity for crimes that shock the conscience of mankind. When R2P fails, international and national justice must be engaged, as a logical, natural and necessary consequence when we fail to protect populations from atrocity crimes.

In an interesting development, in order to address some of the concerns raised in connection with R2P in Libya, in November last year Brazil circulated a proposal to supplement the concept by a set of principles and procedures on the theme of “Responsibility while Protecting” (RWP). In essence, RWP can be refined into two criteria. First, the Security Council, before authorizing any military force, would be required to take into account considerations of last resort, proportionality and balance of consequences. Second, the Council would establish a “monitoring and review mechanism” with respect to the implementation of the use of force under these criteria. We are, of course, following this discussion with much interest.

Today, Syria with thousands dead and many more injured, is the gravest situation at the top of the international agenda. As far back as July last year, the Secretary-General’s Advisors on the Prevention of Genocide and R2P warned that “the widespread and systematic attacks by Syrian security forces and associated militias on civilians could constitute crimes against humanity”. The situation has now been described as reaching the threshold of a non-international armed conflict, at least in certain areas, and thus the acts of violence against civilians would amount to the commission of war crimes.

While the concept is very much at the forefront of efforts by the international community to address the tragedy in Syria, the current humanitarian situation is of great concern. Syria is a true test of R2P.

At this stage of the conflict, it is far too late for prevention as such. The challenge for the international community is to find ways to prevent further escalation of the conflict. R2P’s contribution is to continue to underscore the responsibilities of States vis-à-vis their populations, and to pressure and motivate the international community to help States meet those obligations. This includes the taking of collective action where States fail to meet their obligations. To a very large extent, the Syrian authorities have disregarded

their responsibilities. However, the international community is focussed and motivated, and, while much remains to be done, the doctrine of R2P is very much engaged.

In sum, R2P represents an important commitment by the international community to protect populations from egregious crimes. In essence, States have a responsibility to protect their populations as an inherent attribute of Sovereignty and Statehood. The international community has a responsibility to help States meet those obligations, or to step in when States manifestly fail to do so, in accordance with the Charter. These obligations are anchored in international law, and reflect obligations of humanity. It is for all of us to support the responsibility to protect. And this is where civil society is so important. It is for lawyers, and groups like yours who can play a very important role *vis-à-vis* capitals and international institutions in support of the principles of R2P.

We have a long way to go. And we should still be consoled by the wise words of Dag Hammarskjöld, who said: ***"The UN was not created to take mankind to heaven, but to save humanity from hell."***

[Conclusion]

This brings me to the end of my address to you today. Thank you very much for your kind attention. I will be happy to answer any questions and discuss any topic that you may have.

*

*

*