

Informal Meeting of the Legal Advisers of the Ministries of Foreign Affairs

**Remarks by Ms. Patricia O'Brien,
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Thank you, Mr. Chairman, for giving me the floor.

[Introduction]

Mr. Chairman,
Ladies and Gentlemen Legal Advisers from capitals and from the missions,
Colleagues and friends,

Before I begin, I would like to once again pay tribute to Judge Antonio Cassese who passed away over the weekend at his home in Florence. I know I speak for all of us in this room when I express our shared sadness and say that we will miss Judge Cassese, or Nino as he was known to so many of us. The United Nations - and in particular the Office of Legal Affairs - will remember Nino as a friend who was there when we needed his wise counsel and dedicated services, and we will remember him mostly as an exceptionally charming and warm human being who courageously stood up for justice, for human rights and for humanity.

[pause for a moment]

Mr. Chairman, Colleagues,

Welcome back to New York! I am delighted to see all of you gathered again here at UN Headquarters on United Nations Day 2011 for your traditional annual informal meeting.

This meeting is by now a well-established tradition and I again recall our gratitude to my distinguished predecessor Hans Corell of Sweden for starting it when he was the Legal Counsel of the United Nations.

Allow me – first of all – to express my sincere gratitude to the Group of States organizing the Legal Advisers' meetings, and in particular the Delegation of Sweden, the organizing State of the 2011 meeting. Ambassador Anders Rönquist, the Director-General for Legal Affairs of the Swedish Ministry of Foreign Affairs, and Mr. Hilding Lundkvist, the Legal Adviser in the Mission of Sweden in New York, worked very hard to put together an exceptionally interesting programme.

In my remarks this afternoon I wish to address two topics:

- (i) I would like to say a few words on prevention as an essential element of the concept of the "responsibility to protect" following on to the Secretary-General's speech on 4 October;
- (ii) and secondly, I would like to provide you with an update on our UN-established and UN-backed international criminal courts and tribunals.

[R2P and prevention]

I will begin with a few thoughts on prevention as an essential element of R2P.

From a legal point of view, the upheaval in Northern Africa and the Middle East brought about remarkable developments with regard to the concept of "responsibility to protect".

Let me recall that at the 2005 World Summit, the Heads of State and Government unanimously affirmed that "each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity". They also agreed that the international community should assist States to exercise that responsibility, and committed themselves as necessary and appropriate to help States build

capacity to protect their populations from the four crimes and violations, and to assist States under stress before crises and conflicts break out. They further declared that they were prepared to take collective action 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.

To this end, the Secretary-General has 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; and Pillar Three on a “timely and decisive response” by the international community where States are not able or willing to protect their population.

The recent events Northern Africa and the Middle East have 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.

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

Regarding Yemen, the members of the Security Council – in a press statement of 24 September – urged all sides to reject violence, including against peaceful and unarmed civilians, and show maximum restraint. They welcomed the continued efforts of the good offices of the Secretary-General and the Gulf Cooperation Council. The Secretary-General’s special adviser on Yemen, Jamal Benomar, briefed the Council on 11 October on the very serious situation inside the country as violent clashes continue. In its resolution on Yemen adopted last Friday, the Security Council strongly condemned the continued human rights violations by the Yemeni authorities, such as the excessive use of force against peaceful protestors, as well as the

acts of violence, use of force, and human rights abuses perpetrated by other actors, and stressed that all those responsible for violence, human rights violations and abuses should be held accountable. The Council further encouraged President Saleh to implement a political settlement based upon the GCC initiative. The Council requested the Secretary-General to continue his good offices. Special Adviser Benomar will therefore soon return to Yemen.

Regarding Syria, the Special Advisers of the Secretary-General on the Prevention of Genocide and the Responsibility to Protect, together with the United Nations High Commissioner for Human Rights and, of course, the Secretary-General, have raised alarm at persistent reports of widespread and systematic human rights violations by Government security forces responding to anti-government protests across the country. According to UN High Commissioner for Human Rights Navi Pillay, the number of people killed since the violence started in March has now exceeded 3000, including at least 187 children. The Government has been reminded of its responsibility to protect its population and requested to cooperate in an international investigation into possible crimes against humanity. The UN human rights bodies have established an independent commission of inquiry to conduct an investigation. The Security Council has condemned the violations against civilians, called for an end to the violence, and for accountability. Sanctions have been imposed by Member States to place pressure on the Government to halt human rights abuses.

It is true that on 4 October the Security Council failed to adopt a draft resolution condemning Syria's crackdown on anti-government protestors because of negative votes cast by two permanent members of the Council. However, not a single member of the Council endorsed the way in which President Assad's Government has been handling this crisis. The pressure on Syria to immediately end the violence against its civilian population remains considerable. On a number of occasions the Secretary-General has called on President Assad to keep his word and stop the violence and repression. On 17 October, the Secretary-General reiterated his calls on the Syrian Government to stop the killing and to allow the Human Rights Council

established Commission of Inquiry access to the country. Syria remains very high on the agenda of the Arab League and the Gulf Cooperation Council and, in a way, also of the Security Council.

With regard to Libya, efforts to operationalize R2P culminated in the Security Council's adoption of two resolutions (SCR 1970 and SCR 1973). These are the first fully-fledged "R2P resolutions". 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 (pillar two).

In the words of paragraph 139 of the 2005 World Summit Outcome resolution, Member States have taken collective action in accordance with Chapter VII, through 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.

You will have seen the Secretary-General's statement of 20 October on the end of the Qadhafi regime where he said that Libya now closes a painful and tragic chapter and starts a new one based on national reconciliation, justice, respect for human rights and the rule of law. UNSMIL is ready to assist and support the Libyan people and their leadership at their request.

Against this background, I wish to propose to you that the clear focus of our efforts in implementing R2P must be on prevention.

In a landmark speech on 4 October, the Secretary-General outlined his vision for the future of R2P. He recalled that the concept of R2P is too often misunderstood as a license for intervention and went on to say - and I quote: "Yet human protection begins with prevention. We far prefer early engagement to late intervention. We prefer helping States succeed to responding when they fail. Our challenge now is to help these societies successfully manage their transitions, and build the foundation they need to ensure that the gains they have achieved are irreversible, and that the peace they have found is sustainable. That foundation lies in the rule of law." End of quote.

I very much agree with this approach and believe that the concept of R2P should be embedded in a broader vision for bringing about an age of accountability. The concept of an "age of accountability" goes far beyond supporting international criminal justice.

The range of a full-fledged concept for bringing about this age of accountability spans the following, non-exhaustive, stages:

- (a) preventive diplomacy and peaceful settlement of disputes to prevent disputes from escalating into conflicts and to limit the spread of conflicts where they occur;
- (b) the full spectrum of the concept of R2P to support preventive diplomacy;
- (c) international criminal justice to achieve sustainable peace in post-conflict environments and
- (d) sustaining peace processes through peacebuilding assistance and the consolidation of good governance.

Ultimately, accountability is a key element to achieving sustainable peace.

In his 4 October speech, the Secretary-General concluded – and I quote again: “We want to move from retribution to reconciliation, and from punishment to prevention. The trend is clear: we are mobilized against impunity. We are moving with ever greater determination into an age of accountability. I want to see a world where accountability, the rule of law and a culture of prevention work together for sustainable peace.” End of quote.

And finally, I note that this approach is very much in line with the Security Council’s Presidential Statement of 22 September 2011 (on the Secretary-General’s report on preventive diplomacy), where the Council – and I quote again: “recalls that a comprehensive conflict prevention strategy should include, inter alia, early warning, preventive deployment, mediation, peacekeeping, practical disarmament, accountability measures as well as post-conflict peacebuilding (...).”

I’m delighted to see that in your discussions today you will also focus on the preventive notion of R2P.

[UN-established or UN-backed international criminal courts and tribunals]

Let me now provide you with an update on the UN-established and UN-backed international criminal courts and tribunals. Time constraints will only allow me to give you a brief overview of all the activities that are currently under way. I will be happy to provide you with further details on any of those topics in the framework of our discussion.

[ICTY, ICTR and the Residual Mechanism]

The recent arrest and transfer of the last ICTY fugitives, Mladic and Hadzic, was a great success for the tribunal. We do not yet have specific trial

schedules for these cases, but the ICTY will certainly continue its trial function at least through 2014. Any appeals in these two cases, as well as any appeal in the Karadzic case, are likely to be heard by the Residual Mechanism for the ICTY and ICTR.

The ICTR is scheduled to complete all trials by the end of this year or in early 2012, but it has 9 remaining fugitives at large. These include 3 "senior-level" indictees who are earmarked for trial by the Residual mechanism. The other 6 may be transferred to the jurisdiction of Rwanda for trial.

After four years of negotiations, the Security Council established the Residual Mechanism for the ICTY and ICTR in a Chapter VII resolution - 1966 (2010) of 22 December 2010. The Office of Legal Affairs is now leading in the implementation of this resolution so that the Residual Mechanism can commence functioning on 1 July 2012.

[The Special Court for Sierra Leone and the Residual Special Court]

The Residual Special Court for Sierra Leone has been established through an agreement between the United Nations and the Government of Sierra Leone, which was signed in July 2010. It will commence functioning once the Special Court terminates after the conclusion of any appeal in the Charles Taylor case. Judgment in the Charles Taylor case is expected around October, and in the event of an appeal, it is expected that the proceedings would conclude around June 2012. This means that the Special Court is likely to be the first of the international criminal tribunals to complete its work. The Residual Special Court's functions will be similar to those of the ICTY and ICTR Residual Mechanism.

[Special Tribunal for Lebanon]

The Special Tribunal for Lebanon, which commenced functioning on 1 March 2009, is unusual among the UN-assisted Tribunal in that its mandate is concerned solely with the crime of terrorism under the Lebanese Criminal Code. Since March 2009, the Office of the Prosecutor has continued the investigation of the assassination of former Lebanese Prime Minister Rafiq

Hariri on 14 February 2005, which was commenced by the United Nations International Independent Investigation Commission. On 17 February this year, the Prosecutor filed an indictment, which was confirmed by the Pre-Trial Judge on 28 June. It has since been transmitted to the Lebanese authorities with a request that they arrest and transfer the four accused. An international arrest warrant has also been issued through Interpol. We have no certainty, but our best estimate is that a trial might commence around summer 2012. A week ago, the pre-trial judge asked the trial chamber to determine whether proceedings "in absentia" should be initiated. A hearing on this question is scheduled for 11 November. We therefore now need to look at the issue of renewing the mandate of the Special Tribunal, which runs in the first instance until the end of February 2012. The President is recommending a three-year extension.

[International Criminal Court]

For almost two decades, international criminal tribunals have contributed to the gradual erosion of impunity and the prosecution of those responsible in political and military leadership roles for commission of serious, large-scale crimes. These international judicial mechanisms have been at the heart of the revival and development of international criminal law and jurisprudence.

Today it is the Rome Statute, which gave rise to the International Criminal Court, that is at the centre of our system of international criminal justice. And at its core is the principle of complementarity. International mechanisms are not substitutes for national mechanisms. Ultimately, justice should be a nation's choice.

By way of an update, today, following the ratification this year of the Seychelles, Saint Lucia, Moldova, Grenada, Tunisia, the Philippines the Maldives and Cape Verde 119 States are parties to the Rome Statute and recognize the jurisdiction of the ICC against the principle of complementarity. Currently, the Court is seized of seven situations and 24 individuals have

been subject to arrest warrants or summonses to appear, 10 of whom remain at large.

This year will be a landmark year for the Court. This coming December, in the tenth session of the Assembly of States Parties, a new Prosecutor and six new judges will be elected. The current Prosecutor, whose term will end in June 2012, has taken a proactive role in combating impunity. Preliminary examinations are in progress across four continents and he has exercised his *proprio motu* powers in relation to the situation in Kenya and Côte d'Ivoire. The Security Council has referred the situation in Libya to the Court.

[Extraordinary Chambers in the Courts of Cambodia – ECCC]

And let me now brief you on where matters stand at the “Extraordinary Chambers in the Courts of Cambodia” (ECCC). As you know, the ECCC are part of the national judicial system of Cambodia. It is a national court with participation by international judges, prosecutors and administrators. The ECCC is required under the Agreement between the UN and the Cambodian Government 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. Last July, the Court completed its first trial - convicting Kaing Guek Eav, alias Duch, of crimes against humanity, grave breaches of the Geneva Conventions, and serious offences under Cambodian national law. The substantive hearings in the trial in the second case, involving the four surviving senior leaders of the Khmer Rouge regime, will start on 21 November.

My visit to Phnom Penh last week followed the resignation on 9 October 2011 of the international Co-Investigating Judge, Siegfried Blunk. In his statement to the press on 10 October, Judge Blunk linked his resignation to statements by senior officials of the Cambodian Government opposing the progress of Cases 003 and 004 before the ECCC.

We are working to ensure that the reserve Co-Investigating Judge, Laurent Kasper-Ansermet (Switzerland) will be able to assume the position of international Co-Investigating Judge as soon as possible, and hopefully within a matter of weeks. The Secretary-General has written to the Prime Minister, H.E. Hun Sen, to request his appointment, and we are asking that the Supreme Council of the Magistracy meet as soon as possible for this purpose.

Immediately following the resignation of Judge Blunk, the Deputy Spokesperson of the Secretary-General underlined that the United Nations has consistently called upon all persons to refrain from interfering with the work of the ECCC. He also reiterated that the United Nations would continue to monitor the situation closely, including in consultation with the Royal Government of Cambodia.

In Phnom Penh, I met with H.E. Deputy Prime Minister, H.E. Sok An, with senior officials of the ECCC and with the NGO community. I emphasized our consistent message that the ECCC must be permitted to proceed with its work without interference from any entity, including the Royal Government of Cambodia, donor States or civil society. I also reiterated the need to respect judicial independence and to co-operate fully with the Court during my meeting with Deputy Prime Minister, H.E. Sok An.

[Conclusion]

This brings me to the end of my introductory presentation. I apologize for being a bit longer than foreseen and I look forward to discussing with you.

Also, I look forward to seeing you in an even more informal setting at tonight's reception at the House of the Association of Bar of the City of New York.

Thank you very much.