

36th Round-table on Current Issues of International Humanitarian Law

“Respecting IHL: Challenges and Responses”

organized by the International Institute of Humanitarian Law in cooperation with the International Committee of the Red Cross

Statement by Ms. Patricia O’Brien*

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Opera Theatre, Casino of the Municipality of Sanremo, Italy

Professor Pocar (President of the Institute),
Vice-President Beerli (Vice-President of the ICRC),
Distinguished guests,
Ladies and Gentlemen,

Opening Remarks

It is my great pleasure to attend this Round-table again and to say a few words about the respect for IHL from the United Nations perspective.

This is a symbolic occasion for me personally as I have just stepped down as Legal Counsel of the United Nations. It is also symbolic that this speech after five years as Legal Counsel is about IHL, a subject that I have dealt with extensively throughout my term and which is very close to my heart.

I wish to thank the International Institute of Humanitarian Law for inviting me to this Round-table, and for giving me this opportunity to address the distinguished participants.

* NB: Ms. O’Brien stepped down as Legal Counsel on 3 September 2013. This statement was delivered in her capacity as Special Adviser to the Secretary-General.

I am also pleased to see Ms Christine Beerli (VP of the ICRC) again. The ICRC is celebrating its 150th anniversary this year and in this regard, I wish to pay, once more, special tribute to the ICRC and its staff for their tireless work in promoting IHL, and in providing such important services to countless people affected by conflict around the world.

The theme of this year's Round-table is, as we can see in the programme, "Respecting IHL: Challenges and Responses". This is very much relevant to the recent developments at the United Nations, and I would like to say a few words from the United Nations perspective about the two sides of the coin: 1) United Nations' efforts to ensure respect for IHL by parties to the conflict and 2) respect for IHL by the United Nations itself.

Ensuring respect for IHL by parties to the conflict

The general principle to respect and to ensure respect for IHL is reflected in Article 1 common to the Geneva Conventions of 1949.

When States negotiated additional protocols to the Geneva Conventions, they decided to include a unique article which elaborated on the principle to ensure respect for IHL. This is Article 89 of the First Additional Protocol of 1977 by which States Parties undertook to act in cooperation with the United Nations and in conformity with its Charter, in situations of serious violations of the Geneva Conventions and the First Additional Protocol. This article is a clear reflection that the United Nations can play an important role in inducing parties to the conflict to respect IHL.

When we look at the concept of the "Responsibility to Protect", it is apparent that the rules of IHL that I have just mentioned are incorporated in that concept. However, of course, the provisions of the Geneva Conventions and the First Additional Protocol are stand-alone provisions that are not in anyway limited by the concept of the "Responsibility to Protect".

The concept of the "Responsibility to Protect" was formally endorsed in 2005 at the High-level Plenary Meeting of the General Assembly which marked the 60th anniversary of the United Nations, which was attended by more than 150 Heads of State and Government.

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 States to protect populations from those crimes.

In elaborating on the concept, the Secretary-General has articulated a three-pillar strategy:

Pillar I stresses the responsibility of the State to protect its populations, whether nationals or not, from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement.

Pillar II emphasizes the commitment of the international community to assist States in meeting their obligations to protect its populations. This Pillar seeks to draw on the cooperation of Member States, UN System, regional organizations, civil society and the private sector.

Pillar III involves the responsibility of Member States to respond collectively in a timely and decisive manner when a State is manifestly failing to provide protection to its population. Possible measures include peaceful means to settle disputes under Chapter VI of the Charter, in collaboration with regional arrangements, or non-military or military actions under Chapter VII of the Charter.

While the topic of my presentation is focused on IHL, and thus focused on what happens during armed conflict, we should be mindful that war-time atrocities are often preceded by and are therefore a continuation of egregious violations committed in the period leading to the outbreak of hostilities. In some cases, mass atrocities may be committed without any ensuing armed hostilities. Accordingly, the United Nations views R2P as part of the larger architecture of norms to protect the dignity and physical integrity of the human person at all times, be it in peace, political crisis in an environment of relative peace, or in war. It is important for the international community to be engaged to ensure observance of IHL during armed conflict, or

to intervene to ensure accountability for any violations that have already occurred. Equally important, however, is the need to be alert to risks that may lead to generalized violence or other international crimes against civilian populations in the absence of any armed conflict, and to ensure that such risks are addressed before they materialize.

Looking at the practice of the United Nations in relation to situations of armed conflict, it has taken a variety of measures to ensure respect for IHL by parties to armed conflicts.

Perhaps one of the most significant measures taken by the United Nations is the establishment of the International Criminal Tribunals for the former Yugoslavia and Rwanda by the Security Council. While these Tribunals are now in the course of winding down, they have made a lasting contribution to international criminal justice and more broadly, they have sent a clear message that serious violations of IHL will not and must not go unpunished. I am confident that the International Criminal Court will build on the experience of the ad hoc Tribunals and uphold international criminal justice in the future.

Beyond the former Yugoslavia and Rwanda, the Security Council has been at the forefront in attempting to induce parties to armed conflicts in various parts of the world to respect IHL. While the Council's primary responsibility is far broader – to maintain international peace and security – it has also made it clear that the Council needs to promote and ensure respect for the principles and rules of IHL in resolution 1502 which was adopted in 2003.

In 2013 alone, the Council has so far called upon the national authorities to hold accountable those responsible for IHL violations in Libya, Somalia and South Sudan; condemned all violations of IHL in Côte d'Ivoire, Mali and the Democratic Republic of the Congo; and called for full respect of IHL throughout Afghanistan.

The Security Council as well as the Human Rights Council have, in the past, also taken more direct measures to ensure compliance with IHL, such as dispatching commissions of

inquiry and fact-finding missions. Such bodies were established in the past years in relation to the armed conflicts in Lebanon, Libya, Occupied Palestinian Territories, the Sudan and Syria.

The Secretariat of the United Nations has also taken action to ensure respect for IHL by others. In particular, the Human Rights Due Diligence Policy on UN Support to Non-UN Security Forces is perhaps a clear example in this regard.

This policy applies across the board where the UN is considering or is actually providing some form of support to non-UN security forces. The policy essentially consists of three elements:

(1) Where the UN has substantial grounds for believing that non-UN security forces may commit grave violations of IHL, human rights law or refugee law, then the UN is obliged to refrain from supporting them.

(2) If the UN goes ahead and provides support to such forces, and then receives information that gives it reasonable grounds to suspect that those forces are committing grave violations of IHL, human rights law or refugee law, the UN must immediately intercede with the command elements of those forces, with a view to putting an end to those violations.

(3) If such violations nevertheless continue, then the UN will be obliged to suspend, or withdraw support, from the forces concerned.

This policy is to ensure that support by UN entities is consistent with the purposes and principles of the UN as stipulated in the Charter, particularly with the purpose to promote and encourage respect for human rights, including IHL and international refugee law.

The Policy was made available to the public as a UN document in March this year (A/67/775-S/2013/110). Since then, the Security Council has already invoked it in four resolutions concerning United Nations support to the African Union Mission in Somalia, to the Congolese Armed Forces, and to the Malian Defence and Security Forces and has recalled it in its recent resolution on sexual violence in armed conflict, there styling it as "a tool to enhance compliance with international humanitarian, human rights and refugee law".

Respect of IHL by the United Nations

The other side of the coin to the principle of ensuring respect for IHL is the respect of IHL by the United Nations itself. The United Nations has consistently been committed to respecting IHL by peacekeeping operations. Status-of-forces agreements concluded with the host States normally provide that the peacekeeping operation concerned shall conduct its operations with full respect for IHL. The Secretary-General's Bulletin on the Observance by United Nations Forces of IHL which was issued in 1999 is a further reflection of the United Nations' commitment to respect IHL.

This question has become much more prominent since the United Nations peacekeeping operation in the Democratic Republic of the Congo, MONUSCO, was explicitly authorized to launch targeted offensive operations against armed groups in Security Council resolution 2098.

Resolution 2098 established an Intervention Brigade within MONUSCO and which is under direct command of the Force Commander of MONUSCO. The Brigade is authorized to carry out targeted offensive operations to "prevent the expansion of all armed groups, neutralize these groups and to disarm them" , "in strict compliance with international law, including IHL".

My Office has been confronted with a number of legal questions arising out of this resolution, particularly those related to compliance of MONUSCO with IHL.

The question of the applicability of IHL to United Nations peacekeeping operations is not new. However, Council resolution 2098 has highlighted, as perhaps no previous resolution ever has, the possibility that a United Nations peacekeeping operation may become a party to an armed conflict.

It is without doubt that MONUSCO must conduct any military operations in full compliance with IHL if and when it becomes a party to an armed conflict. The Secretary-General's Bulletin on the Observance by United Nations Forces of IHL, which I have mentioned

earlier, is a clear expression of the customary rules of IHL which are applicable to United Nations forces.

The Bulletin, among others things, sets out the fundamental principles on the conduct of hostilities such as the prohibition on directing attacks against civilians and the prohibition on indiscriminate attacks. The rules of engagement of MONUSCO have also been adapted to the new mandate of MONUSCO, and my Office has ensured that they are in full compliance with the IHL rules relating to the conduct of hostilities. Therefore, we believe that an appropriate legal framework is in place which governs potential military operations by the Intervention Brigade.

Besides the conduct of military operations, another immediate concern for my Office is the situation where members of armed groups are captured by the Intervention Brigade. The Secretary-General's Bulletin and the Interim Standard Operating Procedures on Detention by United Nations peacekeeping operations provide minimum rules on the humane treatment of captured persons and humane material conditions of any facility in which captured persons are to be held. However, the Bulletin merely lays down some basic principles; while the Interim SOP on Detention was not crafted with the situation in mind in which a United Nations peacekeeping operation captures persons in the course of an armed conflict.

My Office has therefore been working with the Department of Peacekeeping Operations, MONUSCO and the Office of the High Commissioner for Human Rights on generating a dedicated set of standing operating procedures to deal with the specific issue of the handling of persons who might be captured by the Intervention Brigade in the course of its offensive operations.

Obviously, it will be preferable that MONUSCO not have to hold on to any persons whom it may capture for a prolonged period of time. Indeed, it would be preferable that as many captured persons as possible be channeled as quickly as possible into a disarmament, demobilization and reintegration programme or, as the case may be, a disarmament, demobilization, reintegration, resettlement, and repatriation process. However, such programmes are voluntary in nature: people cannot be forced into them and they cannot be kept in them against their will. And this may pose a potential problem in

some cases. It would hardly be consistent with MONUSCO's mandated task of neutralizing armed groups in the eastern DRC or its objective of "reducing the threat posed by armed groups [to] state authority and civilian security" if captured persons were enrolled in a DDR or DDRRR programme, while there are substantial grounds to believe that there is a real risk of them simply abandoning the programme, rejoining their armed groups and resuming fighting.

Where persons cannot safely be diverted into a DDR or DDRRR programme, the preferred route will obviously be to hand over as many captured persons as possible to the national authorities of the DRC. Our concern here is to put in place safeguards that will ensure that captured persons will not face a risk of violations of certain fundamental rights such as the right not to be arbitrarily deprived of their life once they are handed over. To this end, my Office is working on a supplemental arrangement for the MONUSCO status-of-forces agreement, to put in place the legal guarantees and procedural safeguards that the United Nations will need, if it is to be able lawfully to hand over persons it captures to the DRC authorities.

In fact, this is not the first time that we face this question. Over 50 years ago, the same question arose in relation to the United Nations Operation in the Congo, and it is striking to see that my Office was facing exactly the same issues and adopting very much the same position at the time.

Concluding remarks

In this short speech, I have tried to give you an idea of the United Nations' role in ensuring respect for IHL by others as well as the efforts of the United Nations itself to respect IHL.

I understand that the question of enhancing and ensuring the effectiveness of mechanisms of compliance with IHL was one of the areas highlighted by the International Conference of the Red Cross and Red Crescent which was held in 2011. I am sure that this Round-table would provide an important opportunity to exchange views on the way forward in this regard, including the role of the United Nations.

Thank you.