



**UNITED NATIONS
OFFICE OF LEGAL AFFAIRS**

**The Third Annual Philip J. Shapiro Endowed International
Visiting Scholar Lecture
“Legal Aspects of Modern United Nations Peacekeeping”**

by

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Hempstead, New York

Vice-Dean Colombo,
Professor Ku,
Distinguished Members of the Faculty,
Dear Students,
Ladies and Gentlemen,

[Introduction]

It is a great pleasure to deliver the Third Annual Philip J. Shapiro Endowed International Visiting Scholar Lecture here at Hofstra Law. Thank you very much inviting me.

As United Nations Legal Counsel I am often asked to speak about international criminal justice which is a topic that preoccupies me a lot. International criminal justice is a topic on which my Office leads the entire United Nations system. So I was very happy to see that the inaugural Philip J. Shapiro Endowed International Visiting Scholar Lecture was delivered by Judge Song, the President of the International Criminal Court, who spoke about the key challenges of the Rome Statute System of International Justice.

This gives me the opportunity to speak to you today about a different

topic. A topic that preoccupies me since Secretary-General BAN appointed me Legal Counsel of the United Nations some seven months ago: Legal Aspects of Modern United Nations Peacekeeping.

[The role of OLA]

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

The Office of Legal Affairs employs about 200 staff of some 60 nationalities 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 international humanitarian law, 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 - and in particular the Secretary-General - very much want to understand the legal context, even though this might sometimes seem to complicate their lives in the short-term.

In the short time that I have now been on the 36th floor of that iconic glass tower on the East River, we have been called upon to provide legal advice on almost every hot political issue, from the activities of our international criminal courts and tribunals, to peacekeeping in Africa, the upheaval in Ukraine and, most recently, the question of the non-issuance by the United States of a visa to the designated new Permanent Representative of the Islamic Republic of Iran to the United Nations.

As I have already mentioned, the topic of my lecture today is: Legal Aspects of Modern United Nations Peacekeeping.

[Evolution of UN Peacekeeping]

UN Peacekeeping has been part of the UN's mandated activities since its earliest years. In the last two decades it has rapidly evolved, from what had come to be regarded — perhaps not entirely accurately — as the traditional model of troops or military observers monitoring ceasefires and borders following inter-State wars, to operations that combine interdependent military, police and civilian components with complex mandates primarily responding to situations of intra-State conflict — conflicts that have just ceased, conflicts that are thought to be imminent or even that are ongoing.

Since 1999, the Security Council has increasingly authorized peacekeeping operations to use force beyond self-defence, in particular, for the protection of civilians facing imminent threat of physical violence.

[MONUSCO]

Perhaps the most noteworthy example of these developments involves our activities in the Congo.

The Organization's peacekeeping operation in the Democratic Republic of the Congo - MONUSCO - has been the subject of a great deal of political and legal discussion over the past twelve months. To explain: in the spring of 2012, a large number of soldiers deserted from the Congolese army and joined a rebellion mounted by the so-called M23 movement. In November 2012, the M23 even took Goma, the main city in the Kivus, close to the border with Rwanda.

In the light of this development, the Security Council took the step of establishing, within MONUSCO's military component, a special unit — the Force Intervention Brigade — specifically tasked with mounting “targeted offensive operations”, either unilaterally or jointly with the Congolese army,

- “to prevent the expansion of all armed groups [in the eastern DRC],
- to neutralize these armed groups,
- and to disarm them”.

This is far from being the first time that the Organization has fielded an operation that has been authorized to take the initiative in the use of armed force. Indeed, the operation in the DRC itself has had a mandate that has allowed it to do this for certain purposes and in certain circumstances for a number of years now. However, it is certainly the first time that the Security Council has specifically and expressly tasked a United Nations peace operation with carrying out “offensive” operations.

As a result of this development, my Office has had to deal with a wide and extremely interesting range of legal questions over the past year.

In what circumstances would the United Nations operation, MONUSCO, become a party to the armed conflicts that are ongoing between the Government of the DRC and the many various illegal armed groups that are operating in the eastern DRC? What would be the consequences in law if and when it did?

How should MONUSCO treat any members of armed groups that it might capture in the course of its operations? How should MONUSCO deal with any allegations or suspicions that its members may have committed violations of international humanitarian law, or even war crimes?

It would be incorrect to say that none of these questions has ever been considered before. Our archives show that many of them were examined as long ago as 1961, when Secretary-General Hammarskjöld was wrestling with the first United Nations Operation in the Congo, ONUC.

But international humanitarian law, the international law of human rights and international criminal law have all undergone major changes since that time, particularly with respect to situations of non-international armed conflict, which is the domain in which we are operating.

We have had to carefully research these fields of international law and — what is not always so easy for a lawyer — to find ways to communicate our conclusions in terms that non-lawyers can easily understand and apply. Thus, my Office has prepared practical guidance for military commanders in how to apply certain fundamental principles of international humanitarian law when launching attacks against armed groups. And we have developed what I believe to be a “state-of-the-art” set of procedures for the handling members of armed groups who are captured during offensive operations.

The Congolese army, with the support of our peace operation, succeeded

last fall in putting an end to the M23 rebellion. Attention is now focused on two other armed groups — the FDLR, a group whose leaders and members include perpetrators of the 1994 Rwandan genocide, and the ADF, a Ugandan rebel movement with alleged links to Al-Shabaab in Somalia. We wait to see what legal issues will emerge.

[CAR]

Every so often we see the birth of a new UN peacekeeping operation. Two weeks ago, we saw the arrival of our newest peace operation, in the Central African Republic.

Since last spring, the situation in that country has been marked by an almost total breakdown of law and order. Atrocities are being committed countrywide; there are targeted killings against Muslims and against Christians; and approximately a quarter of the population has been displaced or fled the country.

The African Union has deployed an armed operation, French forces are supporting them and the European Union is also preparing to deploy a force in support.

The new United Nations operation, MINUSCA, has begun operations with a civilian component only. On the military and police side, it will take over from the AU operation later this year, in September. Indeed, it is anticipated that many of the troops and police serving in the African Union operation will be “re-hatted” as UN peacekeepers.

My Office has been involved, as it so often is, in the planning for this operation. As was the case with our peace operation in Mali that was established last year, we will be faced with a range of issues of a kind that are becoming increasingly frequent in the field of United Nations peacekeeping:

- the conclusion of arrangements for the provision of support to a military operation mounted by a regional organization — here, the African Union and its force, MISCA, which will continue to operate until the autumn, when the UN force will commence military and policing operations;

- compliance in that connection with the Human Rights Due Diligence Policy on UN Support to non-UN Security Forces — a policy, pioneered by my Office, that seeks to avoid the UN becoming complicit in violations of international humanitarian, human rights and refugee law;
- the re-hatting as UN peacekeepers of contingents from a non-UN operation, and compliance in this connection with the Organization’s human rights screening policy — a policy that seeks to avoid the UN taking human rights abusers into its ranks;
- and cooperation between a UN operation and non-UN armed forces deployed in the same theatre of operations — here, the French “Sangaris” forces, which will continue to operate alongside and support the UN operation.

With experience, we are becoming familiar with these questions; but they nevertheless remain delicate and often very tricky to resolve.

On top of this, there is the very practical problem in the case of the Central African Republic that the apparatus of criminal justice has essentially disappeared in large parts of the country. The police have disappeared, prosecutors and judges have fled, courtrooms and prisons are damaged or destroyed. Little or nothing stands between the population and a situation of total lawlessness and anarchy.

In response, the Security Council has granted the new operation the authority, where the Government requests this, to take “urgent temporary measures . . . to maintain basic law and order and fight impunity”. The UN operation may accordingly find itself, in the absence of the national police, having to be the police force, and maybe even the criminal courts and the prisons.

This may necessitate the negotiation of the necessary legal arrangements with the Transitional Authorities — a delicate task, touching on the most fundamental areas of State sovereignty, yet necessary, if public safety is to be assured, basic law and order maintained and the civilian population protected from further depredations.

[The situation in South Sudan]

The situation in the South Sudan since the end of 2013 has posed a number of challenges for the United Nations, in particular the United Nations peacekeeping operation in South Sudan — UNMISS.

By way of background, on the advent of South Sudan's independence in 2011, the Security Council established UNMISS, with a very broad mandate given under Chapter VII of the UN Charter. UNMISS was authorized to assist the new State with respect to institution and capacity building, peace consolidation, rule of law and democratic governance, to facilitate the delivery of humanitarian relief, as well as to assist the Government in exercising its responsibility with respect to the protection of civilians, in compliance with international humanitarian, human rights and refugee law.

At the time Security Council resolution 1996 (2011) was adopted, the greatest risk of a return to war seemed to be a failure on the part of Sudan or of South Sudan to live up to their commitments under the Comprehensive Peace Agreement, which ended the conflict between the Government of Sudan and the Sudan People's Liberation Movement that had lasted more than 30 years.

However, it turned out that a return to war has been ignited, not by differences between Sudan and South Sudan, but by an internal split within the South Sudanese army.

From the onset of this new conflict, large numbers of civilians were displaced from their homes and areas of habitual residence. As many as 85,000 people have sought refuge in UNMISS compounds at six locations, including the capital, Juba.

Although UNMISS had previously conducted a risk assessment regarding the potential threats against civilians that could materialize, the influx of civilians in such large numbers and their settlement in UNMISS compounds constitutes an unprecedented development, which has presented a huge challenge to the United Nations and placed a major strain on the Mission's resources.

Under Security Council resolution 1996, UNMISS is authorised to use all necessary means, within the limits of its capacity and in the areas where its units are deployed, to carry out its mandated tasks related to the

protection of civilians.

The interpretation of this mandate in relation to persons who have sought refuge in UNMISS compounds has raised a number of complex questions. Some of these are:

- What can the UN do to maintain order among such a large number of civilians, not all of the same political sympathies, crammed in a limited space?
- What can the UN properly do to ensure the security of its own personnel and property?
- How does the UN handle cases of individuals who may be wanted by local law-enforcement agencies for offences committed outside the UN compound?
- And how should it handle those who are wanted for crimes committed within UN compounds?

These issues are even more acute where, as is the case in South Sudan, the institutions of government are weak and have limited capacity to conduct criminal investigations and to deliver criminal justice pursuant to international standards of due process, yet have the power to impose the death penalty.

I cannot pretend that we have found all the answers to these challenges, but I would like to outline the approach we have taken to address these questions.

In addressing the questions I have just outlined, we have to take into account the delicate balance between the necessity for UNMISS to carry out its mandate, while at the same time ensuring that the UN will respect the primary responsibility of South Sudan to maintain law and order.

However, in cooperating with South Sudanese authorities, the UN should make sure that it is not, directly or indirectly, implicated in any violation of international human rights, humanitarian law and refugee law that those authorities may commit.

The United Nations is always under an obligation to cooperate with relevant national authorities to ensure the proper administration of justice. This is set out in the Convention on the Privileges and Immunities of the United Nations of 1946. In the case of UNMISS, it is also set out in its status-of-forces agreement.

Pursuant to these guiding principles, UNMISS will, to the extent possible,

seek to co-operate with the national law-enforcement authorities of South Sudan in connection with offences that may have been committed in UNMISS compounds.

However, the extent of such cooperation is subject to a number of conditions.

First, in considering what type of cooperation should be extended to the host country authorities in connection with any individual case, the safety of innocent civilians who have sought safe haven on UNMISS premises, and the security and safety of United Nations personnel and equipment and other assets, have been paramount in our approach.

Secondly, any individual accused of having committed a criminal offence who finds him- or herself on UN premises must be treated in accordance with international human rights standards, including the right to due process in the investigation and prosecution of that offence.

Accordingly, persons would not be handed over to national authorities of the Government if there were substantial grounds for believing that there was a real risk that, if handed over, they would face serious harm such as summary execution, torture or the death penalty.

And, in any case in which an individual was handed over to national law-enforcement authorities, legally binding assurances would first need to be obtained that that person's human rights would be respected and the UN would ensure that any subsequent detention or trial was monitored by its human rights and rule of law units.

It is clear from what I have said above that there may well be situations in which the conditions for the hand-over of persons alleged to have committed offences in UNMISS sites will not be satisfied. If, on the other hand, those persons continue to pose threats to civilians on UNMISS premises or to UNMISS personnel, it would be difficult for UNMISS to leave them at large. So there may be cases where UNMISS will have to take such persons into its custody.

By its resolution 1996, the Security Council has authorised UNMISS to "use all necessary means" to protect civilians and UN personnel. This authorisation would extend to holding persons in UNMISS custody so long as such they constitute a risk to the safety of other civilians on UN premises and to UN personnel.

However, if such cases arise, UNMISS would have to put in place a procedure to regularly review any threat posed by a particular person. As soon as the person ceases to pose a threat, the person must be released immediately.

For as long as the individual remains in the custody of UNMISS, the UN would also have to ensure that such person is treated humanely in accordance with human rights law and instruments.

At the same time, UNMISS would work closely with the national authorities with a view to creating conditions that would allow UNMISS to hand over any such person to the South Sudanese authorities.

The situation currently facing UNMISS is ample demonstration that the mandate to protect civilians can present, not only legal, but also operational, challenges.

The situation in South Sudan is extremely dangerous for civilians, even those seeking safe haven on our premises. Only last Thursday, we were reminded of this fact by an assault on UNMISS protection of civilian premises at Bor in Jonglei State which resulted in 14 casualties.

One of the measures already taken by the Security Council is to temporarily increase the overall force levels of UNMISS to support the protection of civilians and provision of humanitarian assistance.

My Office will certainly be called upon to provide further advice on questions arising from this complex situation.

[Security of UN personnel]

I would now like to come to the final part of my address, and mention a few words about the legal protection of United Nations personnel.

The mandate to carry out targeted offensive operations given to the UN operation in the Democratic Republic of the Congo — MONUSCO — may be an exception; but it is also the case that many other recent peacekeeping operations have been provided with more robust mandates than their predecessors.

For example, the United Nations mission in Mali, or MINUSMA, established in April 2013, is authorized to use all necessary means to

deter threats and take active steps to prevent the return of armed elements to key population centres. In addition, MONUSCO, MINUSMA and many other peacekeeping operations are mandated to protect civilians by all necessary means.

Such mandates necessarily bring peacekeeping forces in proximity to civilians. At the same time, these peacekeeping forces may be engaged in hostilities with armed groups in order to carry out their robust mandates. In such cases, attacks against peacekeeping forces could potentially have an impact on the civilians whom those forces are meant to protect. These are difficult operational questions that accompany the mandate to protect civilians and population centres.

The increasing trend of attacks against peacekeeping forces has also prompted States to put in place more effective legal protection for UN personnel. As a result, States adopted the Convention on the Safety of United Nations and Associated Personnel in 1994 and, subsequently, its Optional Protocol in 2005.

The Convention, among other things, requires States parties to criminalize and take measures to prosecute attacks against personnel and objects of peacekeeping operations, as well as personnel and objects associated with such operations. In recognition of the UN's need to deploy other types of field operations than peacekeeping missions, the Optional Protocol extends the scope of protection to include UN operations delivering humanitarian, political or development assistance.

The Convention and the Optional Protocol currently have 91 and 28 States parties respectively.

While the number of States parties has grown over the years, the Convention and the Optional Protocol require wider acceptance, and I encourage those States that have not already done so to become parties.

Where host States are not parties to the Convention, recent status-of-forces agreements require those States to apply the provisions of the Convention. It is encouraging to see this trend to extend the application of the Convention to States that are not yet parties to it. However, difficult questions may arise as to whether a peacekeeping force continues to benefit from the protection under the Convention when it is engaged in an armed conflict against an armed group.

[Conclusion]

This brings me to the end of my lecture 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.

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