

EU Council Working Group on Public International Law - COJUR

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

**Wednesday, 6 February 2013
Justus-Lipsius-Building, Brussels, Belgium**

I am delighted to be back in a COJUR meeting. I fondly remember attending these meetings in my previous capacity and benefitting from the rich and engaging discussions on various topical issues in public international law. I am grateful and honoured that you invited me to address you on some issues from the perspective of the Legal Counsel of the United Nations.

The mission of the Office of Legal Affairs, which I head, is to provide a unified central legal service for the Secretariat and the principal and other organs of the UN. As a result, our work ranges from legal questions of a purely public international law character to what could be termed as the internal law of the Organization. However, my remarks will focus only on some issues which I believe would be of particular interest to you as legal advisers of your respective foreign ministries.

I will touch upon Palestine, international criminal justice, the UN's Human Rights Due Diligence Policy, rule of law and our capacity building

work. Naturally, I would be happy to take questions on issues that are not covered in my remarks.

Palestine

One of the most interesting developments in the past year, from both a legal and political perspective, is the change in the status of Palestine in the United Nations.

Palestine, has enjoyed observer status in the General Assembly since 1974, albeit initially as the Palestine Liberation Organization until 1988. However, Palestine was not identified as a State and its authorities were not identified as a government.

As you know, by resolution 67/19 adopted on 29 November 2012, the General Assembly decided to

“...accord to Palestine non-member observer State status in the United Nations, without prejudice to the acquired rights, privileges and role of the Palestine Liberation Organization in the United Nations as the representative of the Palestinian people, in accordance with the relevant resolutions and practice”.

The resolution has had little effect on the way that Palestine participates in the General Assembly because it has enjoyed enhanced rights and privileges of participation in the General Assembly since 1998 pursuant

to resolution 52/250 of 13 July 1998. Moreover, Palestine's status in the broader UN system of specialized and related agencies will still have to be determined according to the rules and procedures of the intergovernmental bodies of those organizations.

And, since its admission as a Member State of the United Nations Educational, Scientific and Cultural Organization (UNESCO) in November 2011, Palestine has been able to participate in multilateral treaties and international conferences convened under the auspices of the UN that are open to all States Members of the UN or of the Specialized Agencies (the "Vienna" formula).

A significant legal effect of the resolution for the UN Secretariat is that Palestine may participate in multilateral treaties to which the Secretary-General is the depositary and in international conferences convened under the auspices of the UN that are open to "all States" (the "all States" formula).

In addition, Palestine has informed the Secretary-General that the designation "State of Palestine" should be used in all official documents and for its nameplate in all UN meetings; and that Mr. Mahmoud Abbas is the Head of State and President of the State of Palestine. Accordingly, Palestine is now called the "State of Palestine" in all official documents of the UN and on nameplates.

Having said that, the UN may continue to refer to the “Palestine Liberation Organization”, or the “Palestinian Authority” or to President Abbas as the “Chairman of the Executive Committee of the Palestine Liberation Organization and President of the Palestinian Authority” in certain circumstances.

Further, as the General Assembly has used the term “Occupied Palestinian Territory, including East Jerusalem” even after the adoption of resolution 67/19, the UN may also continue to use this term, depending on the circumstances and the specific context. We therefore expect that we will continue to be called on to advise not only on questions of Palestine’s participation but also on the appropriate terminology to be used.

International criminal justice

Let me turn now to a subject that comes across my desk almost on a daily basis: international criminal justice. For nearly two decades, international criminal tribunals have reaffirmed 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.

The centre-piece of the system of international criminal justice is the Rome Statute, which gave rise to the International Criminal Court. Despite the challenges that the ICC has faced thus far, I truly believe that the world is better off for its establishment. The Court serves as a vehicle for the international community to advance the cause of justice and, in doing so, to reduce and prevent unspeakable suffering.

In line with the Secretary-General's strong, principled and unwavering commitment to accountability, we take seriously our responsibility to support the ICC. And we have been responding positively to its requests for assistance pursuant to the 2004 UN-ICC Relationship Agreement. But, we also recognize that States have an important role to play in terms of becoming States Parties to the Rome Statute, cooperating with the Court, and ensuring that Rome Statute crimes do not go unpunished at the national level.

The last point is worth emphasizing because it 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.

Consistent with the principle of complementarity, the referral of cases to national jurisdictions is a key element of the completion strategy of the International Criminal Tribunal for Rwanda. We are now at a point where both the ICTR and the International Tribunal for the former Yugoslavia are moving toward completing their work and preparing to close.

Similarly, the Special Court for Sierra Leone is in the final stages of its work. Last April, the Special Court convicted Charles Taylor, former President of Liberia, of planning, aiding and abetting war crimes and crimes against humanity. This, the first conviction of a former Head of State by an international criminal tribunal since Nuremberg, was a historic moment. It is projected that Mr. Taylor's appeal will be completed by the end of this year.

In anticipation of the closure of the ICTY and ICTR, and bearing in mind that some residual functions remain to be done post-closure, the Security Council adopted resolution 1966 (2010) in December 2010 establishing the Residual Mechanism for the ICTY and ICTR.

My Office has had the privilege of being at the centre of this fascinating new development in the architecture of international criminal justice. We successfully led the preparations for the commencement of the functioning of the Residual Mechanism. We also negotiated an agreement establishing the Residual Special Court for Sierra Leone, which will commence functioning when the Special Court closes.

These developments will generate new questions – should these new criminal mechanisms combine around one common administrative hub? Is it effective and efficient to have residual mechanisms, potentially lasting many decades, co-existing alongside the ICC?

More questions will arise because, at some point in the future, there may also be some form of residual mechanism for the Special Tribunal for Lebanon and for the Extraordinary Chambers in the Courts of Cambodia.

But we are not there yet. Both the Special Tribunal for Lebanon and the Extraordinary Chambers in the Courts of Cambodia still have work to do.

We are concerned, however, about the financial situation of the ECCC. The ECCC's future is uncertain because both the national and the international components are facing serious funding shortfalls.

I can only underline what a tragedy it would be for the people of Cambodia if the ECCC were to fail financially. It would be an enormous blow to the fight against impunity and to the reputation of the donors as supporters of international criminal justice. It would send a damaging message internationally if States were not to give the UN the financial support necessary to enable the Court to ensure accountability for the shocking crimes committed by the Khmer Rouge leadership.

The Human Rights Due Diligence Policy

Establishing, operating and supporting international criminal tribunals is one of the main ways in which the UN contributes to ending impunity. Another, less visible, means of achieving the same result is implementing the Human Rights Due Diligence Policy. Allow me to explain.

One of the objectives of the United Nations is to promote and encourage respect for human rights and fundamental freedoms. The Organization cannot be true to this objective if, rather than promoting respect for human rights, it helps others to violate them. Nor can it comply with its obligation under general international law not to assist others who violate their legal obligations under international human rights law — or, similarly, international humanitarian or refugee law. For these reasons — and others — my Office has, since 2008, advised

- that the Organization cannot lawfully provide support to non-UN security forces if it has substantial reason to believe that there is a real risk of them committing grave violations of IHL, human rights or refugee law;
- that, if the Organization provides support to such forces and then acquires information that gives it substantial grounds to suspect they are committing grave violations, it must intercede with a view to bringing those violations to an end; and
- that, if despite such intercession, those violations continue, it must, as a last resort, suspend or withdraw its support.

This advice was first given in a series of legal opinions concerning the UN mandate to support operations by the Congolese armed forces against illegal armed groups. The Security Council subsequently reflected our advice in the December 2009 resolution setting out the UN's new peacekeeping mandate in the Democratic Republic of Congo. And, by virtue of later Council resolutions, it continues to apply today.

It is evident from its basis in the Charter that the advice must guide the work of each and every part of the Organization that contemplates providing, or provides, support to any non-UN security forces. Following this logic, the Secretary-General decided in July 2011 that OLA's advice — now known as the "Human Rights Due Diligence Policy"— shall apply "United Nations-wide".

The Policy has recently become a matter of major importance in connection with the situation in Mali. In November 2012, the Security Council asked the Secretary-General to report on the logistics support that the UN might provide to the African-led International Support Mission in Mali (AFISMA) —the international force that the African Union has established to help Malian forces re-take the north of their country.

In his report to the Council, the Secretary-General emphasized that any support to be provided by the Organization to AFISMA would be provided subject to, and consistently with, the Human Rights Due Diligence Policy. In its subsequent resolution, the Security Council endorsed the Secretary-General's position and emphasized that UN support to AFISMA must be consistent with IHL, human rights law and refugee law.

Applying the Policy in the context of support to AFISMA will be an unprecedented challenge for the Organization, as it seeks to ascertain the records of units and their commanders from the many countries that are going to make up AFISMA, and strives to monitor their conduct in a combat zone, including in active combat operations.

In recent days, a number of States have suggested the establishment of a United Nations peace operation in Mali. As part of that proposal, AFISMA troops would be "re-hatted" as members of the United Nations operation. In those circumstances, the Human Rights Due Diligence Policy on support to non-UN security forces would no longer apply in respect of those former AFISMA troops, as they would be part of the United Nations operation itself. As UN forces, they would, quite naturally, be required to respect international humanitarian, human rights and refugee law. That having been said, the Human Rights Due Diligence Policy would remain very much applicable to any support that the UN operation might provide to the Malian Defence and

Security Forces or to any other forces operating in Mali at the Government's request.

Rule of law

The Human Rights Due Diligence Policy and the improvements to the sanctions regime are two examples of how the UN itself as an actor seeks to abide by the rule of law in its activities.

That the Organization does so is only natural, as the rule of law is embedded in the words of the Charter. Specifically, the preamble tells us that, in creating the Organization, the peoples of the United Nations were “determined ...to establish conditions under which justice and the respect for the obligations arising from treaties and other sources of international law can be maintained.”

The success of the historic General Assembly High-level Meeting on the Rule of Law held on 24 September last year is, I would suggest, a testament to the centrality of the rule of law to the work of the Organisation.

I recall that, in his 2005 Report “In Larger Freedom”, the then Secretary-General said that “Every nation that proclaims the rule of law at home must respect it abroad and every nation that insists on it abroad must enforce it at home.” The Declaration of the High Level Meeting, adopted by acclamation, affirms that observance of the rule of law is just as important on the international plane as on the national.

This is a significant achievement given the dichotomy of views in the field of rule of law among States. I think we would all agree, however, that this is just a beginning, and that we must build on what was been achieved at the meeting.

In this regard, the Declaration requested that the Secretary-General report to the General Assembly at its 68th session on proposals to strengthen the linkages between rule of law and the three pillars on which the UN was built: international peace and security; human rights; and development. We intend to invite a number of eminent thinkers and practitioners to produce short thought pieces on this issue, aimed at introducing fresh thinking on the subject and stimulating discussion in preparation for the requested report. This will be followed by extensive internal and external consultations.

Capacity-building/technical assistance

To facilitate the promotion of the rule of law at the national and international levels, it is essential, in my view, to broaden knowledge and understanding of the law.

Indeed, the General Assembly recognized in 1965 that knowledge of international law is an important means of strengthening international peace and security and promoting friendly relations and cooperation among States. It did so when it adopted resolution 2099 (XX) creating the Programme of

Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law.

Since then, the demand for training and research materials has increased significantly, primarily because international law has become relevant to virtually every field of human endeavour and every segment of national society. The Codification Division of the Office of Legal Affairs seeks to meet this demand by running a number of training courses in international law.

The courses include: the International Law Fellowship Programme, organized in cooperation with The Hague Academy of International Law; and Regional Courses in International Law for Africa, Asia-Pacific, and Latin America and the Caribbean. The regional courses cover not only core international law topics but also those topics that are of special interest to a particular region.

However, even if we succeed in conducting all of these courses on an annual basis, the demand for international law training would not be met exclusively by means of traditional training courses.

Thus, in 2008, the Audiovisual Library of International Law (AVL) was created to give the UN the capacity to provide training, by leading experts, on virtually every topic of international law to individuals and institutions around the world - free of charge - via the internet. I am very proud to note

that, in just a few years, the AVL has been accessed by over half a million users across the globe.

I should emphasize that the regional courses and the AVL are dependent on voluntary contributions. Some of your Governments have provided essential financial support for these activities, for which we are grateful. We hope that we can count on your support in the future.

The Codification Division is not the only part of OLA that engages in training and capacity building. The Treaty Section organizes training seminars twice a year in New York in collaboration with the United Nations Institute on Training and Research (UNITAR). These seminars target new delegates to New York as well as visiting officials from foreign ministries and international organizations. They focus on treaty law and the treaty practice of the Secretary-General.

In addition to the New York seminars, the Treaty Section has been organizing regional capacity-development seminars since 2003. Recently, it provided regional training for the members of the Commonwealth of Independent States and for the countries in Central and South America. The Treaty Section also participates in workshops organized by national governments.

Finally, the International Trade Law Division, which serves as the substantive secretariat of the United Nations Commission on International

Trade Law (UNCITRAL), also engages in technical assistance and capacity building.

As you are aware, UNCITRAL is mandated to modernize and harmonize international trade law. One of its key challenges is to make its work better known to end users of commercial legal standards, that is, government officials, judges, academics, arbitrators, practicing lawyers or corporate counsel.

In that respect, the establishment last year of the UNCITRAL Regional Centre for Asia and the Pacific in Incheon, Republic of Korea, with the generous financial assistance of the Government of Korea, was a notable development. This is a novel and important step for UNCITRAL in providing technical assistance to developing countries.

The Regional Centre's objective is to enhance international trade and development in the region by promoting certainty in international commercial transactions through the dissemination of international trade norms and standards, in particular those elaborated by UNCITRAL.

The Regional Centre was a pilot project pursuant to an UNCITRAL decision to establish regional presence around the world in order to respond better to increasing requests for technical assistance. Based on this experience, UNCITRAL wishes to establish more regional centres. A few

governments including the Russian Federation, Singapore, Kenya and Mauritius have shown interest in hosting such regional centres and consultations are underway for arrangements to establish additional centres. Whatever support your Government could provide in this connection would, I can assure you, be greatly appreciated.

This brings me to the end of my remarks. Thank you very much for your kind attention. I will be happy to answer any questions and to discuss any issues that you may wish to raise.