

ASIL 2012 Midyear Meeting

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

**Saturday, 20 October 2012, 12.45pm – 2.15pm
Athens, Georgia**

Excellencies,
Ladies and Gentlemen,

[Introduction]

It is a great pleasure to be here today and to share with you some insights and reflections as Legal Counsel at the United Nations, and on some issues which are the focus of our work in OLA. I am honoured and grateful for the opportunity to address you this afternoon.

I will speak about three areas: - the Rule of Law at the UN; international criminal justice and accountability; and the concept of Responsibility to Protect and the recent practice on this subject.

[The Rule of Law]

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.

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".

Over the years, the UN has seen periods of great advancement in international law and jurisprudence. Addressing the American Society of International Law, it is appropriate to recall the key role played by representatives of the United States in the promotion of the rule of law on the international plane. The Universal Declaration of Human Rights, adopted in 1948 by the General Assembly, drew upon the foundational instruments at the core of the rule of law at the domestic level: the Magna Carta, the French Declaration of the Rights of Man and the Citizen, and, of course, the American Bill of Rights. Eleanor Roosevelt's tireless diplomatic efforts were instrumental in articulating the international community's clear and uncompromising declaration of the rights to which all human beings are entitled. Mrs. Roosevelt stated to the General Assembly at the adoption of the UDHR:

We stand today at the threshold of a great event both in the life of the United Nations and in the life of mankind. This declaration may well become the international Magna Carta for all men everywhere.

The rule of law lies at the heart of the Universal Declaration of Human Rights. Its Preamble notes that ***"it is essential, if man is not to be compelled to have recourse ... to rebellion against tyranny and oppression, that human rights should be protected by the rule of law"***. Article 7 affirms the equal right of every human being, without discrimination, to have recourse to the law's protection. Indeed, the rule of law is the bedrock upon which all of the rights enumerated in the UDHR rely for their protection and enforcement.

We live in an era in which international law is no longer only the business of international courts and institutions. In the decades following the UDHR, States have entered into numerous treaties upon which individuals can directly rely to enforce their rights: the European Convention on Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social And Cultural Rights to name a

few. That States have binding obligations under such instruments has led to a greater role for international law before national and regional courts.

As Lord Bingham said in his superb book on the Rule of Law "International law is a body of law which complements national laws of individual states, and is in no way antagonistic to them; it is not a thing apart; it rests on similar principles and pursues similar ends". In many ways, the rule of law at the international level is the domestic rule of law writ large. It addresses the exercise of power and the relationship between the individual and the State. It of course goes further and regulates the relationship of States with each other.

Observance of the Rule of Law is just as important on the international plane as on the national. To quote from the 2005 SG's Report "In Larger Freedom",

"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."

Professor Dicey is credited for coining the expression "the rule of law" in 1885. But as Lord Bingham noted, Dicey did not apply his paint to a blank canvas. The qualities embodied in the notion of rule of law have been propounded for centuries and go back to antiquity. I will take the liberty of quoting Plato:

" Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off, but if the law is the master of the governments and the government its slave, then the situation is full of promise and men enjoy all the blessings, all the gods shower on a state."

What vision do we in the UN 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.

For the United Nations, the rule of law refers to a principle of governance according to which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. This principle underpins each of the issues which I will discuss today. The enormous strides taken in the field of international criminal justice in the last 20 years have been driven by the desire for accountability. And, proceedings in which Heads of State have been held accountable for serious international crimes illustrate the fundamental tenet of the rule of law that no one is above the law. The Responsibility to Protect (R2P), like the Universal Declaration of Human Rights, articulates States' moral and political responsibility to protect the rights of all of their citizens.

My Office plays a key role in promoting the rule of law at the national and international levels. 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 70 Member states and 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. The draft declaration adopted by Member States reaffirmed a commitment to the rule of law and stressed the inter-relationship between the rule of law and the three main pillars upon which the United Nations is built: international peace and security, human rights and development.

[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 accountability for those who commit international crimes, including for serious violations of human rights and international humanitarian law. As the Legal Counsel, my task is to support the Secretary-General's commitment to strengthening 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. Indeed, on Wednesday of this week, the Security Council held a debate on peace and justice with a special focus on the International Criminal Court.

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 ICTY, ICTR, SCSL and ECCC 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. These institutions have made a valuable contribution to the rule of law at the international level, including through the development of an impressive body of jurisprudence. Their establishment also paved the way for the International Criminal Court.

My Office has been closely involved in the establishment and operation of the ad hoc tribunals, which have 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, as demonstrated by last May's trial judgment by the SCSL in the case against Charles Taylor, the former President of Liberia. This judgment is a significant milestone for international criminal justice and sends a strong signal to all leaders that they are and will be held accountable for their actions.

Some 18 years after their establishment, the ICTY and the ICTR are completing their mandates. Their work has contributed to the process of national reconciliation and the maintenance of peace and security, and their legacies include 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 Extraordinary Chambers in the Courts of Cambodia (ECCC) combine Cambodian law and procedure with international standards. This system has posed challenges, but the ECCC has also had notable 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. The ECCC is conducting the trial of the most senior surviving members of the Khmer Rouge regime, which many commentators consider to be the most significant international criminal trial in the world at the moment. The proceedings have also had a significant impact on the people of Cambodia: more than 150,000 people have visited the Court, many of them travelling for several days at great personal effort, to witness the proceedings and to learn more about the Court's work.

From our experience with the ad hoc tribunals, we can draw many lessons to bolster the United Nations' efforts to promote rule of law at the domestic and international level. One of the most powerful lessons from the SCSL in particular has been the impact of outreach work, described by the late Judge Cassese as the "crown jewel" of the Special Court. The Registrar has taken the work of the tribunal to the people of Sierra Leone and Liberia, ensuring that victims of the horrendous crimes under the SCSL's jurisdiction knew that those most responsible were being held accountable. This year an independent nationwide survey conducted in Sierra Leone and Liberia to measure the impact and legacy of the SCSL found that almost 80 per cent of the people surveyed believe that the Special Court had accomplished its mandate.

Today the Rome Statute - which gave rise to the International Criminal Court - is at the heart of our system of international criminal justice. However, the international community must keep faith with the ad hoc and

other UN-supported tribunals, to ensure that they have the political and financial support that is necessary to sustain and complete their work. One of the lessons that the Office of Legal Affairs draws from its nearly twenty years of experience in this field is that the political and financial push that is necessary at the time of establishment of a tribunal has to be matched by the political and financial stamina to see it through to the end. To terminate a tribunal, or allow it to fail, on political or financial grounds would fly in the face of the fight against impunity to which the Secretary-General is so strongly committed, and which is central to the work of my Office. To do otherwise would be contrary to the UN's core values of protecting judicial independence and promoting the rule of law - as declared by world leaders in the 2005 World Summit Outcome document.

And let us not forget that even after all trial and appeals cases are finished, there are continuing responsibilities to the victims and witnesses, to those convicted, and to the affected populations. Matters such as witness protection, sentence enforcement, and the preservation and management of the archives cannot simply terminate with the closing of the tribunals' doors. International criminal justice would be on a shaky footing if these matters were not responsibly handled in what has come to be known as the "residual" phase of the tribunals. Ensuring that effective, and cost-effective, residual mechanisms are in place to continue these essential functions and to secure the legacy of the tribunals has become one of the major new areas of work for my Office.

I will turn now to the ICC, which of course has the strong support of the UN. However, I take every opportunity to emphasise the role of the States. International criminal justice is based on the principle of complementarity. It is incumbent on 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. The primary role of national jurisdictions, embodied in the principle of complementarity, is the bedrock of international criminal justice. International mechanisms are **not** substitutes for national mechanisms.

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. Currently, the ICC is exercising jurisdiction in respect of seven situations. The Court issued its first judgment on 14 March 2012 (Lubanga case) - a significant milestone.

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.

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.

In addressing the challenge of “operationalizing” R2P, the Secretary-General has identified “three pillars” of action. Pillar I is the enduring responsibility, already well established under customary international law of States to protect their populations from the R2P crimes. 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 premised on the legal framework of 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 atrocity crimes.

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 has been noted that the Universal Declaration of Human Rights did not impose binding

obligations on States, yet it has provided the foundations for international treaties which has radically changed the landscape of human rights protection. Similarly, R2P, by conferring additional moral and political responsibility on States, illustrates a marked shift in perspective, imposing on States a moral responsibility to act. And the rule of law weaves its way through each of the three pillars of R2P, lending the concept further legal and moral authority.

The first two pillars focus on prevention. Prevention is key.

Pillar I requires States to protect their own populations, and to institutionalize and internalize such protection 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. States must manage diversity to promote equality, inclusivity, respect for fundamental rights and observance of democratic values and practices. In this way, States themselves provide the architecture for the prevention of large scale atrocities within their territories.

Through 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, rendering them less susceptible to R2P situations.

The rule of law plays a crucial role in the implementation of Pillar III, which requires that any action by the Security Council must be in conformity with the UN Charter. 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. But I must emphasize: I am not saying that R2P has created any new obligatory legal norms of international law. I am saying that 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, international assistance serves to reinforce, 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, although 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. As I have already explained, impunity is not acceptable.

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 tens of 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. We must all hope that the parties will heed the call of Joint Special Representative Brahimi's for a ceasefire and cessation of violence

during the holiday period of Eid Al Adha, as echoed by the Secretaries-General of the United Nations and the League of Arab States.

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 Syrian authorities have disregarded their responsibilities. The challenge for the international community is to find ways to stop the violence. In this regard the doctrine of R2P is very much engaged. And the moral and political responsibility of the Security Council to take collective action in a timely and decisive manner is an integral part of the doctrine of responsibility to protect.

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. Lawyers and groups like yours can play a very important role *vis-à-vis* capitals and international institutions in support of the principles of R2P.

[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.

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