Human Security Network

Annual Ministerial Meeting

Statement by Ms. Patricia O'Brien

Under-Secretary-General for Legal Affairs, The Legal Counsel

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Permanent Mission of Switzerland to the United Nations, New York

Mr. Chairman,
Distinguished Ministers of Foreign Affairs
of the Members of the Human Security Network,
Excellencies,
Ladies and Gentlemen,

(Introduction)

The Human Security Network was founded to realize a vision which is still a dream for many and should be a reality for all: A humane world where people can live in security and dignity, free from poverty and despair. In such a world, every individual would be guaranteed freedom from fear and freedom from want, with an equal opportunity to fully develop their potential. Building human security is essential to achieving this goal.

I am honoured to have been invited to join you today and to address you on the important and timely subject which you have chosen for your annual meeting: the complementarity of peace and justice in situations of conflict and post-conflict. It is a privilege and a challenge to be here and take the floor.

Before I embark on the substance, I must mention that I will be making the following remarks in my personal capacity.

(The fight against impunity)

Human security and freedom from fear is yearned for by the proud people of Darfur, the innocent children of Northern Uganda and the brave women in the Eastern DRC, just to mention a few places where issues of peace and justice arise. Freedom from fear is what all people in conflict and post-conflict societies around the world long for, from Colombia to Afghanistan, from Sri Lanka to Iraq. They all desire what the United Nations was founded to maintain. It really goes without saying that we all want and they all want peace.

It is less obvious but equally valid that people in conflict and post-conflict societies want more than peace. They also want justice, and deserve accountability.

We know that accountability matters for peace. Therefore, it is our duty to fight impunity. We are seeking to establish and consolidate the emerging culture of accountability which we have been progressively building over

the last two decades. The perpetrators of international crimes, of war crimes, crimes against humanity, and the crime of genocide and serious violations of IHL must be held accountable.

The building of a culture of accountability is a challenge that Secretary-General Ban has vigorously undertaken and I would suggest that under his leadership real progress is being made in this quest to end impunity.

For the sake of completeness, allow me to just mention the Secretary-General's efforts in furtherance of the rule of law and of the Responsibility to Protect. Why? Because this concept also seeks to address fundamental issues in the quest for accountability and the ending of impunity. By addressing so explicitly the crimes of genocide, crimes against humanity, war crimes and ethnic cleansing, R2P and the efforts to operationalize the concept highlight the intolerance of the international community to the perpetuation of impunity for these serious crimes.

(The theoretical relationship between peace and justice)

While many accept that there can be no sustainable peace without justice, it is nevertheless also clear that the relationship between peace and justice is complex and difficult.

With the growing involvement of the United Nations in post-conflict societies - both in facilitating the negotiation of peace agreements and in establishing judicial and non-judicial accountability mechanisms - the

Organization has frequently been called upon to express its position on the relationship between peace and justice.

In the short term, it is easy to understand the temptation to forgo justice in an effort to end armed conflict. But any decision to ignore atrocities and to re-enforce impunity may carry a high price. We should not allow the impact of justice to be undervalued when weighing objectives in resolving a conflict. This temptation to suspend justice in exchange for promises to end a conflict has arisen in a number of situations and threatens to recur as parties and mediators struggle to negotiate peace.

As Secretary-General Ban has said on a number of occasions: "There are no easy answers to this morally and legally charged balancing act. However, the overarching principle is clear: there can be no sustainable peace without justice. Peace and justice, accountability and reconciliation are not mutually exclusive. To the contrary, they go hand in hand."

On the one hand, if we ignore the demand for justice simply in order to reach a peace agreement, the foundations of that agreement will be fragile and possibly unsustainable.

On the other hand, if we insist at all times on a relentless pursuit of justice, a delicate peace may not survive. If we insist in punishing always and everywhere those responsible for serious violations of human rights it may be difficult or even impossible to stop the bloodshed and save lives of innocent civilians. At times, we may need to postpone the day when the guilty are brought to trial.

While we will uphold those principles, the challenge is always to find the right balance in each specific instance where this issue arises. The problem is not one of choosing between peace and justice, but of the best way to interlink one with the other, in the light of specific circumstances, without ever sacrificing the one for the other. Indeed, I firmly believe that peace and justice can and must be pursued in parallel. We should always bear in mind that impunity can be an even more dangerous recipe for sliding back into conflict.

(The policy of the United Nations with regard to peace and justice)

While this theoretical approach is relatively straightforward, the real challenge lies in translating this theory into policy and practice. Every conflict and post-conflict situation is unique and defies a standardized solution. Our challenge is to find the right balance between peace and justice in every situation we are confronted with.

In the practice of the United Nations Secretariat, the "peace and justice" dilemma, in its strict sense, was understood by some as a policy choice between peace and justice at a time of concluding a peace agreement in the aftermath of an armed conflict, in the course of which massive violations of human rights and international humanitarian law have been committed by some or all of the parties to the agreement. In places and situations where the United Nations has been engaged both in facilitating a peace process, and in establishing international criminal jurisdictions, or, in the case of the ICC, assisting in its operations, the dilemma has often been how to end the

fighting without foregoing the prosecution of those responsible for the crimes, whose condition for participation in the peace process has been immunity from prosecution. In this connection, the following specific issues have arisen:

(1) the lawfulness of amnesty for the core international crimes;
(2) the role of the UN Representative in facilitating peace agreements; and
(3) interaction with indictees holding positions of authority.

(The lawful contours of amnesty)

The context of amnesty discussions is now very different from several years ago. Voices are amplifying in support of the developing legal trend opposing amnesty for genocide, crimes against humanity, war crimes and other serious violations of IHL, in particular for those bearing the greatest responsibility.

The trend in international law is that State amnesty provisions should be considered questionable if they attempt to amnesty the most serious crimes because such provisions are contrary to a growing expectation for States to eradicate impunity for serious violations. It is now becoming clear that International Tribunals and national courts applying universal jurisdiction are likely to reject *de jure* amnesties for most serious human rights abuses.

The UN has repeatedly reflected this position against amnesties in respect of the most serious crimes. The question of the lawful contours of amnesty

was for the first time raised in connection with the 2000 Lomé Peace Agreement between the Government of Sierra Leone and the RUF. The Agreement granted a sweeping amnesty to Foday Sankoh and the RUF combatants of all levels and for all crimes committed throughout the conflict. Asked to witness the Agreement on behalf of the United Nations, and precluded at that point from proposing amendments to the amnesty clause, the UN Representative appended to his signature the following disclaimer "The United Nations does not recognize amnesty for genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law". Since then, the UN position has been consistently upheld in Angola, Sudan, Uganda, Burundi and elsewhere. It is important to bear in mind also that the expectations of victims for justice have changed in this enduring context.

(The role of the UN Representative in facilitating peace agreements)

By the late 1990s, the need to provide UN Representatives with guidelines in their efforts to facilitate a negotiated resolution of conflicts and to better address the tension between stopping the fighting and punishing human rights violations, had become acute. In 1999, the Guidelines for United Nations Representatives in Certain Aspects of Negotiations for Conflict Resolution were adopted by the Secretary-General. They were, in the words of the Secretary-General, "a useful tool with which the United Nations can assist in brokering agreements in conformity with law and in a manner which may provide the basis for lasting peace… [and] a significant step in the direction of mainstreaming human rights". The Guidelines were subsequently revised. They require the UN Representative to seek guidance

from Headquarters when demands for amnesty are made and recalls that the UN cannot condone amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights.

(Interaction with indictees holding positions of authority)

While the question of interacting with indictees has arisen on a number of occasions since the mid 1990s - notably in the case of Karadžić at the time of the Dayton peace negotiations - it was in the early 2000s, with the growing involvement of the United Nations in countries and situations subject to investigation by the ICC, that a policy on interaction with indictees had to be devised. The position adopted balanced the moral authority of the Secretary-General, the Organization's obligation to uphold the principle of accountability and not to undermine the authority of any of the international criminal jurisdictions, the responsibility of the Secretariat to implement mandates established by the Organization's political organs and the practical constraints of UN presences in the field. It prescribed, in essence, that contacts between UN Representatives and persons indicted by international criminal jurisdictions be limited to what is required for carrying out essential UN mandated activities, and that their presence, for example, in any ceremonial or similar occasion with such individuals be avoided. In this connection, essential UN mandated activities are activities that concern fundamental key mandates, the implementation of which is vital for the functioning and the success of a UN operation as a whole.

(An emerging culture of accountability)

After a decade-long debate on how to reconcile peace and justice or sequence them in time, it now seems that the debate is no longer between "peace and justice" but between "peace and what kind of justice". Voices that denied the need for justice seem to have disappeared and there is now a strong opinion which articulates the vital need in every comprehensive conflict settlement for elements of justice to be present which might include:

- international accountability mechanisms;
- hybrid accountability mechanisms;
- strengthened national accountability mechanisms;
- national, international or hybrid accountability mechanisms which are not strictly judicial, such as Truth and Reconciliation Commissions.

However constructed, there seems to be a consensus that justice must be factored into post-conflict strategies in order for peace to be sustainable. In an era of accountability ushered in with the establishment of the two ad-hoc tribunals and followed by the establishment of hybrid tribunals and the ICC, few countries would now claim that there should be peace without any kind of justice. Rather, discussions revolve around the extent to which national jurisdictions have the ability and will to bring the alleged perpetrators of these international crimes to justice. Determining in any given case whether a national accountability mechanism is a genuine assertion of a nation's ownership of the judicial process or a shield from international prosecution is one of the greatest challenges. However, in situations where the ICC has

jurisdiction, the Court, as a judicial body, has the authority to rule on issues of complementarity. Having assumed this role, the ICC also provides significant incentives to develop national capacity for the administration of criminal justice in accordance with international standards.

(Conclusion)

Distinguished Ministers of Foreign Affairs
of the Members of the Human Security Network,
Ladies and Gentlemen,

I have studied with great interest the draft "Ministerial Declaration of the Human Security Network on Peace and Justice" that has been circulated prior to this meeting. In my opinion, this document is an excellent basis for your deliberations.

Let me finally reiterate how deeply honoured I feel having had the opportunity to share some of my thoughts with you today. Thank you very much for your attention and please accept my best wishes for a successful outcome of your meeting.

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