

Alpbach Retreat
**“The UN Security Council and the Protection of Civilians:
Improving Effectiveness and Accountability”**
29-31 August 2009

Working Session III: “Protection of Civilians through Strengthening the Rule of Law”
“Strengthening Respect for International Humanitarian Law
and Human Rights Law”

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

Dear Ambassador Mayr-Harting,
Distinguished Ambassadors,
Colleagues and Friends,

I am honoured to participate in this third Alpbach Retreat and would like, first of all, to express my gratitude to the Austrian Government for this kind invitation. I was invited to address the “strengthening of respect for international humanitarian law and human rights law” from a rule of law perspective.

The discussions we have had over the previous days have been instructive, insightful and provocative. So many of the topics and issues which have been discussed have crossed my table in varying degrees of frequency and intensity since I commenced as Legal Counsel just over one year ago, such as:

- (i) the design and legal implications of mandates and their interpretation;
- (ii) accountability: both the principles and administration of international criminal justice; accountability of UN peacekeeping operations;
- (iii) interaction between R2P and protection of civilians; and

- (iv) the topic itself: respect for international humanitarian law and human rights law, and strengthening the rule of law.

Before moving on to the subject of my presentation, I would like to take this opportunity to address specific aspects of the Secretariat's engagement with mandates. The focus of our work in the past two days has shifted somewhat from the difficulties with the content and design of mandates, or as some call it, the "normative work of the UN", to the problems of managing expectations and implementation of those mandates.

Nevertheless, I would like to briefly touch upon the process involved in the construction of mandates, and to take this opportunity to encourage the Security Council to engage in early and systematic consultation with the Secretariat in order to try to ensure clarity and to reduce the possibility of conflicting mandate provisions. We in the Secretariat, and as Legal Counsel I speak for OLA, are well-placed to foresee potential ambiguities and conflicts. Lack of clarity affects mandates' implementation and we can help to anticipate issues arising in their implementation. Consultation is somewhat *ad hoc*. I am sensitive to the exhortation which we have heard over the past two days that one size does not fit all: I can accept the adage that "consistency is the hobgoblin of small minds".

Nevertheless, I suggest that if consulted at an early stage, the Secretariat can help to identify or highlight inconsistencies which may, in the future, give rise to confusion in the field.

The title of this session provides us with a strong testimonial of the core importance of the issue of strengthening the rule of law. By devoting a special session to this topic, the organisers make the unequivocal statement that the protection of civilians not only is a critical problem to be addressed in the urgency of a humanitarian crisis, but also that it is a long-term endeavour of the United Nations to ensure that such crises be properly addressed and that the law provide the necessary tools to face those crises in the most effective manner.

This conviction underlines the approach that the Security Council has always taken to both thematic issues of the protection of civilians in armed conflict and the rule of law. In the course of the past decade, and in particular in the recent discussion on the topic in June 2009, the Security Council has been faithful to a “comprehensive approach”, adopting measures that address the roots of the problem of the protection of civilians and that include, most importantly for the purposes of my presentation, the strengthening of international humanitarian and human rights law. It is against this background that I am focusing my intervention.

The main question that I intend to address is how international humanitarian law and human rights law can be strengthened to secure the protection of civilians in armed conflict. And, more specifically, what can the United Nations and the Security Council do to achieve this objective?

I propose that we examine these issues under two perspectives, which correspond to the two main fields of the United Nations action in this area, namely: *strengthening the law* and *strengthening compliance with the law*.

Further Strengthening the Law

It is now more than obvious that the contemporary needs of the international community require a strong body of law as a necessary precondition for the maintenance of the rule of law. Strengthening the law itself should therefore be, from a rule of law perspective, the first and obvious step in ensuring the protection of civilians in armed conflict.

It is true that international law contains a well-established set of rules on the protection of civilians, which are embodied in the major instruments of international humanitarian law, human rights law, international criminal law and refugee law. It has also been authoritatively recognized that these rules are binding for all – including non-State actors as well as States – even without any conventional obligation. In 1996, the International Court of Justice qualified the protection of the civilian population and civilian objects as

one of the “intransgressible principles of international customary law”¹. The previous year, the ICTY had concluded that customary rules on the protection of civilians from hostilities had developed to govern not only international conflicts, but also internal strife². Whenever the Security Council has expressed its strong condemnation of the deliberate targeting of civilians in situations of armed conflict³, it has therefore acted on secure legal grounds.

While this may be comforting, it is not to say that continued attention to the strengthening of the law is not needed.

First of all, many international instruments in this field have not yet obtained universal participation or their rules are still insufficiently known by those who are called to apply them. We encourage States to (i) ratify those instruments, (ii) to take steps to ensure their implementation and (iii) to ensure their dissemination. This was the first of the Secretary-General’s recommendations for the strengthening of the legal protection of civilians back in 1999⁴ and has been a consistent feature in the resolutions of the Security Council in this field⁵. An appeal for universal adherence was also made in the 2005 World Summit Outcome Document with special emphasis on treaties relating to the protection of civilians⁶.

A second aspect of the strengthening of the law for which continuous action is required relates to peacekeeping mandates. As we have acknowledged over the past few days, much progress has been accomplished in the past decade⁷ and protection activities are today a common feature in the mandates of United Nations peacekeeping operations. Much, however, also remains to be achieved. We should note the value of peacekeeping mandates in which operations are tasked to assist in building rule of law and judicial institutions which increase accountability when crimes are committed against civilians. The key here is resources, targeted mandates and support from the Council once missions have been established.

Last but not least, strengthening the law requires that we remain attentive to possible gaps in existing rules to ensure that international law continues to respond adequately to the changing needs of the international community and of the real environment in which armed conflicts are occurring. But we should be careful in asserting gaps where there are none, or as more frequently occurs, justifying action or inaction on the basis of lack of clarity. As I said: international law contains a well-established set of rules. I also add that these rules are robust. They may, however, also be complex. It is incumbent on us to understand, and as the SG's report sets out, it is for Member States to provide training to combatants and, as a separate but related action, to establish effective disciplinary proceedings where there are violations.

The Security Council is in a privileged position in this regard, given its direct and hands-on involvement in situations where civilians are affected by armed conflict.

I would like to mention in this regard one issue which is of special interest to my office, namely that of the protection of United Nations facilities in times of armed conflict. Experience has shown that civilians often seek to obtain shelter in United Nations premises when they face an imminent peril. This speaks highly of the trust that the common people place in the United Nations and the message of peace and security that it symbolizes. Sadly, however, this trust has sometimes been shattered by attacks to United Nations compounds. In the Security Council debate in January 2009, we proposed the idea of establishing a special "protected status" for United Nations premises and facilities, similar to that granted by international humanitarian law to archaeological, historic, artistic and religious sites. The adoption of clear rules recognizing such status could both contribute, we believe, to prevent attacks against United Nations premises and to ensure their effective protection in times of armed conflict. This is an endeavour in which the Security Council has a role to play. And I would add that any engagement would need to be in cooperation with our expert colleagues at the ICRC.

Strengthening Compliance

I have highlighted the many ways in which the United Nations may contribute to strengthening the law. Strong laws, however, are not enough. The rule of law and the effectiveness of the protection of civilians in armed conflict require that care also be taken to ensure compliance with the law. And, in this field, the challenges are significant.

I would argue that, in the endeavour to protect civilians, some of the most powerful tools to ensure compliance with the law are to be found in the law itself. Indeed, international law contains a set of highly-developed concepts and regimes that are aimed at ensuring compliance with the rules for the protection of civilians in armed conflict.

I will focus, in this perspective, on two propositions, the crucial significance of which goes – I believe – without saying. First, both States and individuals are to be held accountable for serious breaches of international humanitarian law and human rights law committed against civilians. Second, the respect for humanitarian and human rights law is a matter of concern not only for the States directly involved in an armed conflict, but for the international community as a whole.

Accountability constitutes in itself a means to deter violations of international humanitarian and human rights law, and fighting impunity is therefore a core challenge in this field. As the Secretary-General stated in his recent report on the protection of civilians in armed conflict, “in many conflicts, it is to a large degree the absence of accountability and, worse still, the lack in many instances of any expectation thereof that allows violations to thrive.”

Firstly, regarding accountability of States: whenever these violations are attributable to the State, the State should be held accountable for the consequences that ensue.

International lawyers are very familiar with the legal regime of the responsibility of States for internationally wrongful acts, which is today codified in an authoritative set of articles adopted by the International Law Commission⁸ and has often been applied by the

International Court of Justice and other dispute settlement bodies. Unfortunately, this regime remains largely unknown beyond the legal field, despite its potential contribution to furthering the rule of law at the international level. I refer, for instance, to the Eritrea-Ethiopia Claims Commission in The Hague, which issued its Final Awards on Damages two weeks ago. Since the peace agreement between Eritrea and Ethiopia of 2000, that Commission has reviewed a large number of claims for violations of international humanitarian law and international law more generally that occurred during their 1998-2000 border war. The Commission examined claims related to, among others, the treatment of Prisoners of War, the treatment of civilians and their property, including rape, environmental damage, diplomatic immunity and the economic impact of the conflict. On 17 August 2009, the Commission awarded Ethiopia US \$174 million and Eritrea over US \$161 million in damages.

Serious violations of international human rights and humanitarian law also, of course, trigger individual criminal responsibility at the international level. In these times in which our minds are focused on complex exit strategies, it is worthwhile recalling the reasons that motivated the creation of accountability and justice mechanisms. The most immediate reason is strengthening compliance with international humanitarian and human rights law. In the famous words of the Nuremberg Tribunal, “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”⁹. The role of international criminal justice, however, goes well beyond the legal field: as noted by the Security Council, justice and reconciliation mechanisms “can promote not only individual responsibility for serious crimes, but also peace, truth, reconciliation and the rights of the victims”¹⁰. Criminal justice, in other terms, contributes to a wider purpose and should be one element in a comprehensive strategy aimed at creating what the Secretary-General has called a “climate of compliance”¹¹ by addressing the deepest roots of the problem. This is what the Security Council has done in the context of the protection of civilians in armed conflict and in its resolutions on specific situations. This is what it shall continue to do.

Let me now turn to what will be my last point. All things considered, I think that the core idea that has inspired the Security Council in addressing the issue of the protection of civilians in armed conflict is that compliance with international humanitarian and human rights law is a matter of concern to the international community as a whole.

International law powerfully mirrors this idea. The most patent illustration is Common Article 1 of the 1949 Geneva Conventions, which provides that the Parties “undertake to respect and to ensure respect” for their provisions in all circumstances. In the interpretation given by the International Court of Justice, this article entails that “every State. . ., whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with”¹².

In other words, international law clearly embodies the idea that, while the primary responsibility for complying with international humanitarian and human rights law falls upon the State directly involved, the international community also has a role to play *to ensure respect* for the law. This is the same conviction that brought the 2005 World Summit, and subsequently the Security Council¹³, to proclaim the concept of the responsibility to protect¹⁴. Our collective reflection on this concept is still developing and I should recall the importance of the Secretary-General’s recent concrete proposals on how to implement it¹⁵. From my perspective as the Legal Counsel, I feel it is my duty to emphasize the role that international law should be called to play in this endeavour.

Discussions over the past days have raised the possibility of damage resulting from the clash of the concepts of R2P and the protection of civilians. We should bear in their R2P is limited to dealing with genocide, war crimes, crimes against humanity and ethnic cleansing. Protection of civilians involves much more than prevention of these crimes. I would also stress that R2P is inextricably linked to rules and regimes long established in international law, and is not an attempt to create new law. R2P does not modify existing rules but rather reinforces them within a unifying concept. Furthermore, contrary to what is asserted from time to time, it does not provide any additional basis for the use of force under international law. The goal of R2P is not to add a new layer of bureaucracy but to

incorporate R2P as a perspective into ongoing efforts. It is a prism through which to see the protection of civilians.

Conclusion

I started my presentation by pointing out that the strengthening of international humanitarian and human rights law was to be placed in the framework of a “comprehensive approach” in addressing the protection of civilians in armed conflict. This, as I hope to have shown, goes in two ways. The strengthening of the law and strengthening compliance with the law requires measures that take into consideration the broader needs of the international community and that create a general “climate of compliance”. A stronger law, however, will carry benefits that exceed the legal order and that will contribute to reconciliation, prosperity, peace and security. This is, after all, what lies at the core of the concept of the “rule of law”: a call for society, for the United Nations and the Security Council, for all of us, to consider the law in its environment and to value its crucial contribution to the attainment of the principles enshrined in the Charter.

FOOTNOTES:

¹ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 257, paras. 78 and 79.

² *The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, IT-94-1-AR72, 2 October 1995, paras. 100-127.

³ See, in particular, the resolution adopted under the item “Protection of civilians in armed conflict”: resolution 1265 (1999), operative paragraph 2; resolution 1296 (2000) of 19 April 2000, operative paragraph 2; resolution 1674 (2006), operative paragraph 5; resolution 1738 (2006), operative paragraph 4. Numerous resolutions adopted by the Council in specific situations contain similar formulations.

⁴ *Report of the Secretary-General to the Security Council on the protection of civilians in armed conflict*, UN Doc. S/1999/957, 8 September 1999, para. 36.

⁵ See, for instance: resolution 1265 (2000), operative paragraph 5; resolution 1674 (2006), operative paragraph 9; resolution 1738 (2006), operative paragraph 10.

⁶ General Assembly resolution 60/1 of 16 September 2005 (2005 World Summit Outcome), paragraph 134 (c).

⁷ Security Council’s resolutions on the “Protection of civilians in armed conflict” use increasingly determined language in this regard and reveal greater awareness and sensitivity to the specific problems arising in the field. See, for instance, resolution 1296 (2000), operative paragraph 9 (“*Reaffirms* its grave concern at the harmful and widespread impact of armed conflict on civilians, including the particular impact that armed conflict has on women, children and other vulnerable groups, and *further reaffirms* in this regard the importance of fully addressing their special protection and assistance needs in the mandates of peacemaking, peacekeeping and peace-building operations”), and resolution 1674 (2006), operative paragraph 16 (“*Reaffirms* its practice of ensuring that the mandates of United Nations peacekeeping, political and peacebuilding missions include, where appropriate and on a case-by-case basis, provisions regarding: (i) the protection of civilians, particularly those under imminent threat of physical danger within their zones of operation, (ii) the facilitation of the provision of humanitarian assistance, and (iii) the creation of conditions conducive to the voluntary, safe, dignified and sustainable return of refugees and internally displaced persons, and *expresses its intention* of ensuring that (i) such mandates include clear guidelines as to what missions can and should do to achieve those goals, (ii) the protection of civilians is given priority in decisions about the use of available capacity and resources, including information and intelligence resources, in the implementation of the mandates, and (iii) that protection mandates are implemented”).

⁸ See resolution 56/83 of 12 December 2001, by which the General Assembly took note of the articles presented by the Commission, the text of which was annexed to the resolution. For the commentary to the articles, see *Yearbook of the International Law Commission, 2001, Vol. II (Part Two)*, p. 30-143.

⁹ Judgment, *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946*, at 223.

¹⁰ Resolution 1674 (2006), operative paragraph 7.

¹¹ S/1999/957, para. 36.

¹² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 199-200, para. 158.

¹³ Resolution 1674 (2006), operative paragraph 4.

¹⁴ General Assembly resolution 60/1, paras 138 and 139.

¹⁵ Report of the Secretary-General, Implementing the responsibility to protect, UN Doc. A/63/677, 12 January 2009.