

**50th Annual Session of the
Asian-African Legal Consultative Organization**

“Promoting International Law”

**Remarks by Ms. Patricia O’Brien,
Under-Secretary-General for Legal Affairs, The Legal Counsel
Monday, 31 October 2011, 3.00pm to 4.30pm, Conference Room 2**

Thank you, Mr. Chairman, for giving me the floor.

[Introduction]

Your Excellency, Mr. Rauf Hakeem, Minister of Justice of the Democratic
Socialist Republic of Sri Lanka,
Dr. Rahmat Mohamad, Secretary-General of AALCO,
Ambassador Roy Lee, Permanent Observer of AALCO to the United Nations,
Ambassador Christian Wenaweser, President of the Assembly of States
Parties to the International Criminal Court,
Mr. Maurice Kamto, Chairman of the International Law Commission,
Excellencies,
Distinguished Delegates,
Ladies and Gentlemen,

It is my pleasure to speak to you today about international humanitarian law issues at the United Nations. Allow me to congratulate the AALCO for putting together this interesting programme of presentations, which covers a wide range of highly relevant and cutting edge international law issues.

Allow me also to thank you for inviting me again this year to address you at your annual meeting at the United Nations. Just like my predecessors, I always greatly benefit from these reunions. I consider it an exceptional privilege to address this influential group of lawyers and diplomats.

This afternoon, I wish to focus on the role of the United Nations in protecting civilian populations, preventing violations of international humanitarian law and in promoting the application of IHL.

Many of you will be familiar with the extreme violence that has occurred in very recent times in places as diverse as Afghanistan, Darfur, the Democratic Republic of the Congo, Cote d'Ivoire and Libya. The challenges of protecting civilians, and of ending impunity, have thus become ever more acute. In many of these places and situations, the targeting of civilians, sexual violence, forced displacement and denial of humanitarian access are acts which, more often than not, have been carried out with total impunity.

The UN is well placed to lead the international effort to put an end to such violence. But the response to global violence must, of course, be the joint effort of States, non-State entities, international organizations, both governmental and non-governmental, and civil society at large. The question at the centre of the debate is: how to prevent the violence and to punish those responsible for its consequences. In the practice of the international community, prevention and punishment, which in the words of the ICJ in the Genocide case, are "two distinct yet connected obligations", have too often been seen as "punishment as prevention", with little, if nothing more. While one of the most effective ways of preventing criminal acts, is considered to be providing penalties and imposing them on those responsible, in reality, punishment alone and the prospect of it, seldom prevents. Clearly, prevention requires much more.

I believe the core idea that has inspired the UN action in the field of human rights and humanitarian law is that compliance with relevant rules is a matter of concern to the international community as a whole. Such compliance will prevent these crimes. The UN, through its various different organs, plays an important role in promoting and enforcing international humanitarian law. It works towards preventing violations of human rights, protecting civilians

during armed conflicts, and holding accountable those responsible for violations. The Security Council has called on parties to respect the Geneva Conventions and IHL, and condemned them when they fail to do so. It regularly establishes peacekeeping operations with mandates that include protecting civilians. It has established tribunals to ensure accountability for violations of international humanitarian law. The International Court of Justice, the General Assembly, and the Human Rights Council, in their respective fields, have also contributed their share to the development, promotion and enforcement of IHL.

The UN undertakes a variety of activities designed to prevent conflict, and by implication, to prevent violations of IHL. These range from projects in the field such as promoting the rule of law, fostering development, institution building, training police and monitoring elections. All these activities have the capacity to contribute, in one way or another, to creating more stable societies, governed by the rule of law, and to preventing the outbreak of conflict. The use of “good offices” in times of crisis can help to bring about a political resolution to a matter before conflict breaks out, and of course the establishment of judicial and non-judicial accountability mechanisms such as tribunals and commissions of inquiry to pursue responsibility for past atrocities. These mechanisms are a public demonstration that the international community will no longer tolerate impunity, and in doing so can deter future violations of IHL. Individually and collectively, these are all important prevention activities.

During his recent speech to the General Assembly on the “rule of law and global challenges”, the Secretary-General stated that “we are entering a new age of accountability”, and that thanks “to the work of the International Criminal Court and similar tribunals, crimes against humanity and large scale violations of human rights will no longer go unpunished”.

The Secretary-General further developed this idea in a 4 October lecture in which he concluded – and I quote: “We want to move from retribution to reconciliation, and from punishment to prevention. The trend is clear: we are mobilized against impunity. We are moving with ever greater determination into an age of accountability. I want to see a world where accountability, the rule of law and a culture of prevention work together for sustainable peace.” End of quote.

Twenty years ago, I do not think that many people would have believed it possible that the international community would have established an extensive architecture of international criminal justice, consisting of ad hoc international and hybrid tribunals, and the permanent International Criminal Court. These developments over the last 18 years have not only heralded a new era of accountability for individuals committing serious violations of international criminal law, but importantly, they have taken place on the basis of mandates supported by the international community acting through the United Nations.

My Office has been very engaged in the establishment and operation of each of these international criminal tribunals, and although they have only been able to prosecute a limited number of defendants, I believe they have already achieved a great deal. A number of those who, from high positions, planned and directed the most serious crimes have been brought to justice or are currently facing trial. Heads of State have not been exempted. Ground breaking jurisprudence in the field of international criminal law has been developed. Before the establishment of these mechanisms, impunity was viewed by some perpetrators of terrible crimes as a very likely outcome. This is no longer the case.

The establishment by the Security Council of the international criminal tribunals for the former Yugoslavia and Rwanda were the first ad hoc steps which showed the way, and led eventually to the negotiation of the Rome

Statute establishing the International Criminal Court (ICC). The Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia and the Special Tribunal for Lebanon were each established on the basis of bilateral agreements between the UN and the Governments concerned. All of these developments, and in particular the establishment of the ICC, the only permanent international criminal tribunal, demonstrate a new determination by the international community to address impunity.

Some 17 or 18 years after their establishment, the ICTY and the ICTR are completing their mandates. In December last year, acting under Chapter VII of the Charter, the Security Council requested the ICTY and ICTR to take all possible measures to complete their remaining work expeditiously and no later than 14 December 2014. It also decided to establish the "International Residual Mechanism for Criminal Tribunals", which will continue the jurisdiction and essential "residual" functions of both tribunals, including the trial of fugitives from the tribunals, the ongoing protection of witnesses and the monitoring of the enforcement of prison sentences. The Mechanism will have two branches: one for the ICTR in Arusha, Tanzania, which is to commence functioning in July 2012; and one for the ICTY in The Hague, the Netherlands, which is to commence functioning in July 2013. While the arrests of Hadzic and Mladic mean that all of the ICTY's indictees have been arrested and will be tried by the ICTY, any ICTR fugitives arrested in the future will be tried by the Residual Mechanism. The power to try fugitives sends a clear signal to the fugitives that they cannot "run down the clock" and outlast the international community's will to ensure accountability.

Similarly, in anticipation of the completion of the judicial activities of the Special Court for Sierra Leone, the Government of Sierra Leone and the United Nations have concluded an agreement establishing a Residual Special Court for Sierra Leone. Like the Special Court, the jurisdiction of the Residual Special Court is limited to persons who bear the greatest responsibility for serious violations of international humanitarian law and

Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. Thus, the Residual Special Court will have the power to prosecute the one fugitive if his case has not been referred to a competent national jurisdiction, and to prosecute any cases resulting from review of the Special Court's convictions and acquittals.

The Residual Special Court will start operating immediately upon the closure of the Special Court. It is expected that the trial judgment in the only remaining case at the Special Court, the trial of Mr. Charles Taylor, former President of Liberia, will be delivered at the end of October or in November this year.

Unlike the Special Court for Sierra Leone, and uniquely for a UN-assisted tribunal, the Extraordinary Chambers in the Courts of Cambodia (ECCC) are part of the national judicial system of Cambodia, and accordingly work within, and as part of, Cambodia's national legal system.

As you know, I have just returned from a visit to Cambodia.

The ECCC is required under the Agreement between the UN and the Cambodian Government to function in accordance with international standards of justice, fairness and due process of law. This process of combining Cambodian law and procedure with international standards has been challenging, but has also had successes. Last July, the Court completed its first trial - convicting Kaing Guek Eav, alias Duch, of crimes against humanity, grave breaches of the Geneva Conventions, and serious offences under Cambodian national law. The substantive hearings in the trial in the second case, involving the four surviving senior leaders of the Khmer Rouge regime, will start on 21 November.

My visit to Phnom Penh last week followed the resignation on 9 October 2011 of the international Co-Investigating Judge, Siegfried Blunk. In his statement to the press on 10 October, Judge Blunk linked his resignation to

statements by senior officials of the Cambodian Government opposing the progress of Cases 003 and 004 before the ECCC.

We are working hard to ensure that the judicial process is enabled to take its course and that the reserve Co-Investigating Judge will be able to assume the position of international Co-Investigating Judge as soon as possible, and hopefully within a matter of weeks.

Immediately following these recent events, the Deputy Spokesperson of the Secretary-General underlined that the United Nations has consistently called upon all persons to refrain from interfering with the work of the ECCC. He also reiterated that the United Nations would continue to monitor the situation closely, including in consultation with the Royal Government of Cambodia.

In Phnom Penh, I met with H.E. Deputy Prime Minister, H.E. Sok An, with senior officials of the ECCC and with the NGO community. I emphasized our consistent message that the ECCC must be permitted to proceed with its work without any interference whatsoever. I also reiterated the need to fully respect judicial independence and to co-operate fully with the Court during my meeting with Deputy Prime Minister, H.E. Sok An.

Recently, there has also been some significant development at the newest United Nations-assisted tribunal, the Special Tribunal for Lebanon. The mandate of the Special Tribunal is to prosecute persons responsible for the attack of 14 February 2005 resulting in the death of former Prime Minister Rafiq Hariri and in the death or injury of other persons. On 28 June this year, the Pre-Trial Judge confirmed the confidential indictment relating to the assassination of Rafiq Hariri and others. Since then, the indictment has been transmitted to the Lebanese authorities and an international arrest warrant has been issued through Interpol for the four accused. We have no certainty, but our best estimate is that a trial might commence around summer 2012. A week ago, the pre-trial judge asked the trial chamber to determine whether proceedings "in absentia" should be initiated. A hearing

on this question is scheduled for 11 November. We therefore now need to look at the issue of renewing the mandate of the Special Tribunal, which runs in the first instance until the end of February 2012. The President is recommending a three-year extension.

Today it is the Rome Statute, which gave rise to the International Criminal Court, that is at the centre of our system of international criminal justice. And at its core is the principle of complementarity. Under the principle of complementarity, it falls first and foremost to States to prosecute international crimes within their jurisdictions. 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 and the quest to end impunity for grave violations of international humanitarian law and human rights law. International justice mechanisms, whether permanent or ad hoc, are not intended to supplant States where they have organized criminal justice systems which are willing and able to ensure that there is accountability for the crimes concerned. International mechanisms are not substitutes for national mechanisms.

I now want to turn your attention to the application of IHL in UN peacekeeping operations. Peacekeeping is a critical avenue to ensure respect for IHL. Experience has shown that the very presence of peacekeeping troops can be a deterrent to violations of IHL. Even a small operation can make a big difference.

Traditionally, the UN was reluctant to allow the use of force in peacekeeping operations. Peacekeepers would undertake specific activities such as monitoring buffer zones and would only use force in self-defence. Today the Security Council is increasingly giving peacekeeping operations much more complex, multidimensional mandates, and is authorizing them, under Chapter VII of the Charter, to use force in implementing their mandates. A

very important development is that the Security Council is now mandating operations to protect civilians under imminent threat of violence. Currently, peacekeeping operations in the DRC, Liberia, Côte d'Ivoire, and Darfur all have this mandate. Although these mandates are restricted in scope in that they are subject to the availability of resources, and geographically limited to areas where peacekeepers are deployed, they provide a crucial means to prevent violations of IHL against civilian populations.

Currently, there are almost 100,000 troops from 114 States serving in 15 different peacekeeping operations around the world. As an actor in conflict zones, we want to ensure that our troops comply with the rules of IHL when they are engaged as combatants, and to ensure that others respect the same rules *vis-à-vis* our troops. Already in 1999 (the 50th Anniversary of the 1949 Geneva Conventions), the Secretary-General recognized this and promulgated a *Bulletin on Observance by United Nations Forces of International Humanitarian Law*. The Bulletin sets out the principles and rules of IHL applicable to UN forces conducting operations under UN command and control. It is designed to apply to UN forces when they are actively engaged as combatants in situations of armed conflict. It applies in both enforcement actions and in peacekeeping operations when force is used in self-defence.

While the Bulletin is a binding legal instrument in the internal law of the Organization, the rules confirmed in the Bulletin are already binding upon members of UN operations under their respective national laws. Overall the Bulletin reflects the undertaking set out in the UN's standard status of forces agreements (SOFAs) entered into with host Governments since 1993. This undertaking provides that (i) the UN shall ensure that its peacekeeping operation shall conduct its operation in the host country with full respect for the principles and rules of IHL; and (ii) that the Government undertakes to treat at all times the military personnel of the peacekeeping operation with full respect for the same principles and rules.

In addition, the rules of engagement (ROE) of peacekeeping operations also require that military personnel comply with the law of armed conflict and IHL, and to apply the rules of engagement in accordance with these laws.

This now brings me to make a few points about the ILC's draft articles on the Responsibility of International Organizations, which as you may know were recently adopted by the ILC on second reading, and submitted to the Sixth Committee. I won't go into much detail on the draft articles as I see that you will have the Special Rapporteur, Professor Gaja, himself address you on this very topic later this evening. I only mention it as a number of the draft articles have particular relevance to the UN's challenge of respecting, and ensuring respect for IHL, particularly in relation to its peacekeeping operations.

Two areas of the draft articles are of particular interest for the United Nations with respect to the conduct of peacekeeping operations. They concern the rules of attribution and the rule concerning "Aid or assistance in the commission of an internationally wrongful act".

The principle of attribution contained in Article 6 reflects the customary international law rule that "[T]he conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an act of that organization under international law". Had it not been for the jurisprudence of the European Court of Human Rights, in the *Behrami and Saramati cases*, attributing responsibility to the United Nations for acts of Security Council authorized operations conducted under national or regional command and control, this Article would not have called for any comment.

We appreciated the work of the Commission in clarifying the issue of attribution of conduct to an international organization. In its commentary on the draft articles, the ILC has re-affirmed the principle – long established in

UN practice – that military operations conducted under national or regional command and control – rather than under UN command and control – do not entail the responsibility of the Organization, the authorization of the Security Council notwithstanding.

In draft Article 7, the Commission established the test of “effective control”, which is applicable “vertically” in the relationship between the United Nations and an organ put at its disposal, or as in the practice of UN operations, between the UN and the troop contributing countries. It conditions the responsibility of the Organization on the extent of its effective control over the conduct of the troops in question. In the Secretariat’s comments to the ILC on the draft article, we expressed the view that for a number of reasons, the UN’s practice of maintaining the principle of UN responsibility *vis-à-vis* third parties in connection with peacekeeping operations and reverting as appropriate to the lending State is likely to continue, but that the Secretariat nevertheless supported the inclusion of the draft article as a guiding principle in the determination of responsibilities between the UN and its member States.

Draft Article 14 on “Aid or assistance in the commission of an internationally wrongful act” is of direct relevance to the experience of the United Nations peacekeeping operation in the Democratic Republic of the Congo (MONUC – now MONUSCO). Under its mandate from the Security Council, MONUC provided support to the national army (FARDC) to disarm foreign and Congolese armed groups. Following reports by NGOs and the media that members of the FARDC, who were provided with logistical supplies by the UN, were committing human rights and IHL violations against the very population that they were supposed to be protecting, a policy was devised by the Secretariat, which was subsequently endorsed by the Security Council, to prevent any perception of association by MONUC with such violations. The policy specified that MONUC would not participate in, or support operations with FARDC units if there were substantial grounds to believe that there was

a real risk that such units would violate international humanitarian, human rights or refugee law in the course of the operation. The policy now applies across the board where the UN is considering providing some form of support to non-UN security forces, and is an example of a policy decision taken by the Organization to avoid being implicated, or being perceived as implicated in facilitating the commission of a wrongful act.

To conclude, the UN is highly engaged on many fronts to respect and ensure respect for IHL. The Security Council is increasingly focused on the need to protect civilians in conflict situations. The laws are in place. The challenge remains their effective implementation. A major achievement of the last 17 years has been the international community's willingness to insist on individual criminal accountability for those committing mass atrocities. While the UN is actively working to promote the rule of law to try to prevent and respond to conflict, primary responsibility lies with States. States have acknowledged their responsibility to protect their populations. The challenge now, both for the UN and its Member States, is to translate those words into actions.

Before I conclude, allow me seize the opportunity I have in speaking to you to raise some other issues with you that are not related to IHL but might be of interest to you.

The Codification Division organized a regional course in international law in English for lawyers from Africa for the first time in a decade this year. This course was held at the Economic Commission for Africa and included a study visit to the African Union. There are plans to conduct a similar course in French next year if there is sufficient funding.

The United Nations Audiovisual Library of International Law has become a major source of high quality international law training and research materials for lawyers around the world, including in Africa and Asia. The Codification

Division also provided a special presentation of the AVL at the African Union in Ethiopia and at the Asian Society of International Law which was held in Beijing last August. The number of AVL users in these regions has significantly increased in recent years particularly following these presentations.

Moreover, I wish to brief you on some developments at UNCITRAL, the United Nations Commission on International Trade Law. As you know, the Vienna-based International Trade Law Division of my Office serves as the substantive secretariat of UNCITRAL. As you are aware, the report of the Commission session is considered at the annual session of AALCO when considering the work of international organizations in the field of international trade law.

One particularly noteworthy development is the establishment of a new UNCITRAL Regional Centre. At this year's annual session, the Commission approved the establishment of the "UNCITRAL Regional Centre for Asia and the Pacific" in Incheon (Republic of Korea) based on an offer from the Government of the Republic of Korea. The main objective of the Regional Centre will be to enhance international trade and development by promoting certainty in international commercial transactions through the dissemination of international trade norms and standards, in particular those elaborated by UNCITRAL. The "UNCITRAL Regional Centre for Asia and the Pacific" will aim at facilitating the provision of technical assistance to States in the Asian-Pacific region with respect to the use and adoption of Commission texts, which remained at a minimal level due to limited resources for such technical assistance activities. While the launch of the UNCITRAL Regional Centre for Asia and the Pacific is scheduled to take place next January, regional centres devoted to other parts of the world, including Africa, are also being sought.

I would also like to note that UNCITRAL will be holding a joint workshop with AALCO and the Kuala Lumpur Regional Centre for Arbitration (KLRCA) next

March in Kuala Lumpur (Malaysia), focusing on the issues and challenges for Asian-African States in adopting UNCITRAL texts. The workshop, currently scheduled for 6 and 7 March 2012, will discuss the significance of UNCITRAL texts for Asian-African States, UNCITRAL texts on international sale of goods and arbitration as well as recent developments in the fields of electronic commerce and online dispute resolution.

And finally, I wish to brief you on a matter which has been brought to my attention by our Division for Ocean Affairs and the Law of the Sea. The issue here is capacity-building. As you know, my Office is engaged in creating and facilitating capacity for all developing States and has a number of tools at its disposal for that purpose. These include courses, briefings, internships and trust funds. In this connection, I consider the Hamilton Shirley Amerasinghe Memorial Fellowship on the Law of the Sea to be a uniquely important tool for capacity-building. It is also a living testimonial to an outstanding diplomat and pivotal negotiator of the United Nations Convention on the Law of the Sea or UNCLOS. Owing to his contribution towards the adoption of UNCLOS, the General Assembly in 1981 established the Fellowship to honour the memory of the late Ambassador Amerasinghe from Sri Lanka.

As you will note, the Fellowship is targeted primarily for Government officials, research fellows or lecturers involved in ocean law or maritime affairs, or related disciplines. The purpose of the Fellowship is to assist candidates to acquire additional knowledge of the United Nations Convention on the Law of the Sea. This is a way of promoting a wider appreciation and application of the Convention. The selected fellows are provided with facilities to undertake research and study at one of the participating institutions for up to six months; then, commence a practicum for up to three months at the Division for Ocean Affairs and the Law of the Sea of my Office. Certainly, special consideration is given to persons who may not have the means or facilities for further studies, training or experience in their own or other countries. The Fellowship is intended to further the selected fellows in their vocations and

thus to benefit their countries. Thus far, 28 recipients, including special awards, from developing States have benefited from the Fellowship. The 24th Award was made in June of this year to an Indonesian national.

At present, the Fellowship balance is at a very low point, less than US \$8,000.00. I, therefore, urge States in a position to do so, to consider making a contribution to the HSA Fellowship. For this purpose, you may contact the Director of the Division for Ocean Affairs and the Law of the Sea.

I should also like to mention that next year, 2012, will mark the thirtieth anniversary of the opening for signature of the United Nations Convention on the Law of the Sea or UNCLOS. It will be a time to commemorate the adoption of UNCLOS and to assess the status of its implementation, bearing in mind the challenges in its application, at the national and regional levels. The overarching significance of UNCLOS for the strengthening of international peace and security as well as for concerted action towards sustainable development of the oceans and seas should not be underestimated. My Office, through the Division for Ocean Affairs and the Law of the Sea, is considering a number of activities to mark the occasion in 2012. We will strive to reach out to and to collaborate with delegations to make the celebration a memorable one

[Conclusion]

This brings me to the end of my introductory presentation. I apologize for being a bit longer than foreseen and I look forward to discussing with you.

Thank you very much for your kind attention.