

International Law Commission

Statement by Mr. Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel

Geneva, 6 July 2017

Mr Chairman,

Distinguished members of the International Law Commission,

Ladies and gentlemen,

It is a pleasure to be here with you at this session, at the beginning of the current quinquennium of the International Law Commission.

First and foremost, let me congratulate you all on your election as members of this esteemed body. For almost 70 years, the Commission has been at the centre of the progressive development of international law, and its codification. Its achievements in this field are widely recognized by the various stakeholders, ranging from Governments to the academy. Yet the Commission cannot rest on its laurels, and it should not, particularly with its anniversary session approaching, next year. As Secretary-General António Guterres pointed out upon taking the oath of office, the world is facing a variety of threats to the values enshrined in the Charter of the United Nations: Peace, justice, respect, human rights, tolerance and solidarity. International law lies at the core of each of these values, and the Commission's role in the progressive development of international law and its codification remains indispensable in fulfilling them.

I hope that the new members, constituting over a third of the Commission, bring fresh energy to the codification project; that those re-elected have returned with renewed vigour; and that together, the Commission will maintain its vitality.

The Secretary-General has also repeatedly expressed his concern for gender parity and has placed it top on the agenda of the Organization. According to one metric, the Commission is doing well: compared to the previous quinquennium, the number of women on the Commission has doubled: A 100% increase! In real terms, however, women make up only 4 out of the 34 Members, less than twelve percent of the total membership. As goal 5 of the Sustainable Development goals indicates, gender parity is a necessary foundation for a peaceful, prosperous and sustainable world. It is not only to be attained in the private sphere, but must also be achieved at all levels of public life, be it political, socio- economic, and, I would add, legal decision making. This requires the commitment and participation of all of us, as mentors, educators, advocates, and participants in decision-making processes, so that, by 2030, we might reach equal representation of men and women on the Commission. This is a lofty but realizable goal.

Distinguished Members of the International Law Commission

It has become the tradition to utilize this occasion to provide members with an overview of the activities over the past year of the Office of Legal Affairs, which is the central legal service of the Organization in public and private law, and the ways in which the various units of the Office have played their part in developing and upholding international law. In doing so I am mindful that system-wide the breadth of legal activities is ever expanding.

I will start with the Codification Division, your Secretariat.

[Codification Division]

Given the new membership of the Commission, some background seems appropriate. The Codification Division plays a pivotal role in assisting the General Assembly to fulfil its functions under Article 13, paragraph 1(a), of the Charter, namely to “initiate studies and make recommendations” to encourage “the progressive development of international law and its codification”. The Division’s work can be divided into three interrelated pillars: **(a) Substantive servicing; (b) research and publications; and (c) the wider dissemination of international law.**

First, for many decades the Division has been the silent force behind your Commission and the Sixth (Legal) Committee of the General Assembly and has served as repository of their functioning. The dialogue between the Commission and the Sixth Committee is one of the prime drivers of the progressive development of international law and its codification within the United Nations. This dialogue is maintained through informal consultations between the members of the Sixth Committee and members of the Commission throughout the year; by the Sixth Committee’s consideration of the report of the Commission at its annual session in the Fall, during the “International Law Week”; and through the comments that Governments submit to the output of the Commission at various stages of development of given topics. The Division also assists special or ad hoc bodies established through the Sixth Committee, and has served many diplomatic conferences, including the Vienna Conferences on the Law of Treaties and the Rome Conference on the International Criminal Court.

Second, the Division regularly engages in research activities on matters of public international law at the request of the Commission or the Sixth Committee and issues recurrent and ad hoc publications concerning international law. A tangible example is this year’s Secretariat memorandum on the Provisional application of treaties. You also have before you the ninth edition of “The Work of the International Law Commission”, which serves as a useful reference on your work.

Third, the Division is responsible for the implementation of the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law.

Since its establishment in 1965, the Programme has been instrumental in contributing to better knowledge of international as a means to strengthening peace and security and promoting friendly relations and cooperation among States. Thanks to the decision of the General Assembly to provide funding for the Programme under the regular budget, my Office has been able, in addition to The Hague fellowship in international law, to offer a full range of Regional Courses in international law last year and this year, in the Asia-Pacific region, Africa and Latin America and the Caribbean. We have relied on members of the Commission to teach in some of the courses. The Programme also maintains the Audiovisual Library of International Law, which serves as a virtual training and research centre in international law, with three components: the research library, the historic archive as well as the lecture-series, offering an ever expanding collection of lectures by international law scholars and practitioners from across the globe.

Now, a few additional comments on substantive servicing on aspects that bear on your work. One of the major developments that took place since your last session, apart from the election of the new Commission, has been the work of the Sixth Committee. You will have found details about the session in the background note prepared by the Secretariat. What the note does not mention is that the Sixth Committee had an unusually busy session: During its 33 plenary meetings, held between 3 October and 11 November 2016, the Committee considered a total of 27 agenda items, 24 of which were substantive. It also convened four different working groups, which together met 11 times, and numerous informal consultations on draft resolutions. Upon the recommendation of the Sixth Committee, the General Assembly eventually adopted without a vote 26 resolutions and 4 decisions.

In its omnibus resolution on the work of the Commission, resolution 71/140 of 13 December 2016, the General Assembly took note of the Commission's completion of the first reading of the draft conclusions on the Identification of customary international law and on Subsequent agreements and subsequent practice in relation to the interpretation of treaties and urged the continuation of work on other topics on its programme.

More substantive information on the debate on each topic in the Sixth Committee is available in the topical summary (A/CN.4/703), prepared by the Secretariat. The Assembly also endorsed the recommendation by the Commission that the first part of its seventieth session be held next year in New York. It also noted with appreciation the Commission's plans to commemorate its seventieth anniversary in 2018 with events in New York and in Geneva. Furthermore, by resolution 71/141, the General Assembly took note of the Commission's adoption of the articles on the protection of persons in the event of disasters and decided to include an item in that regard in the provisional agenda of its seventy-third session.

This year, the Sixth Committee's agenda included four items relating to outcomes of the Commission in previous years. The Committee established working groups on two of them, namely "Responsibility of States for internationally wrongful acts" and "Diplomatic protection". Two other topics, "Consideration of prevention of transboundary harm from hazardous activities and allocation of loss in the case of such harm" and "The law of transboundary aquifers", were considered in the plenary. While the possibility of a convention on State responsibility seems to have gathered some momentum, the Committee made little concrete progress on any of these topics and pushed forward the debate on all of them by three years, until 2019.

At its session this year, the Sixth Committee will consider once more two items that emanated from the work of the Commission, namely the Responsibility of international organizations, completed in 2011 and; the Expulsion of aliens, completed in 2014.

[Office of the Legal Counsel]

I will now update you on the activities of the Office of the Legal Counsel. It continues to deal with a variety of legal questions. In this statement, I will focus on (a) peacekeeping, (b) procedure, (c) privileges and immunities, and then (d) accountability.

[Peacekeeping]

OLC has been very busy with respect to legal issues arising in the context of the Organization's peacekeeping operations. This is of no surprise, especially given the challenging multidimensional mandates of many of the current operations, as well as the difficult environments in which they are deployed.

Of the 16 peacekeeping operations, the Office has been kept particularly occupied by issues relating to the Multidimensional missions in Mali (MINUSMA), the Central African Republic (CAR) (MINUSCA), the United Nations Mission for the Referendum in Western Sahara (MINURSO) and the UN Mission in South Sudan (UNMISS).

MINUSMA and MINUSCA have mandates to support the reestablishment of State authority and to provide strong protection of civilians. The Missions were established in the context of weak or collapsing State institutions, a significant number of armed groups operating, including terrorist and criminal elements, with some armed groups having effective control over parts of the national territory. Both MINUSMA and MINUSCA were created following international or regional interventions (African Union-led, European Union-led or French) sanctioned by the Council, and deployed in the absence of a peace agreement or cease-fire for the missions to observe and implement.

The latter has effectively marked these missions as “another breed” of UN peacekeeping interventions, whose focus, out of necessity, is to help bring about conditions of peace, rather than monitoring the implementation of a cease fire or a peace agreement. Bringing about stability and preventing the return or advance of armed groups and terrorist elements to population centres have been their main task, but also their principal challenge. As situations remain fragile, grave danger is posed to United Nations personnel and to civilians. By way of tragic example, since the creation of MINUSMA in July 2013, 114 peacekeepers have been killed and nearly 150 have been injured in more than 70 terrorist attacks, including improvised explosive devices, ambushes, suicide and mortar attacks.

To face up to these challenges, the Security Council, in its resolution 2295 (2016) of 29 June 2016, requested MINUSMA to “move to a more proactive and robust posture to carry out its mandate”. The Council emphasized that the Mission in “pursuit of its priorities and active defence of its mandate”, should “anticipate and deter and take robust and active steps to counter asymmetric attacks” against civilians or UN personnel.

This new language does not mean that MINUSMA is mandated to engage in counter-terrorism, which continues to be in the exclusive domain of the State authorities. The criteria triggering a possible use of force remain the existence of serious and credible threats. These adaptations in the Council mandate have, however, been reflected in revised rules of engagement (or ROEs) for the Mission's military contingents, which were prepared in consultation with my Office. The revised MINUSMA ROEs were issued in early March by the Under Secretary General for peacekeeping operations.

Another change provided by resolution 2295 was in the protection of civilians, signified by the removal of the threshold of "imminent" threat to physical violence against civilians to trigger protection. The omission of the word "imminent" in MINUSMA's POC mandate brings it in line with the protection of similar mandates for MINUSCA, UNMISS and the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO).

In South Sudan, some of the recent shortcomings of the United Nations Mission for South Sudan (UNMISS) have highlighted serious challenges in implementing mandates to protect civilians amidst armed conflict, and have called into question the effectiveness of the UN command and control structure *vis-à-vis* States contributing personnel to serve in UN operations.

Last July, three days of intense fighting in Juba resulted in the deaths of many civilians, as well as of two UN peacekeepers. There was also an attack on the "Terrain hotel", a private compound, where UN personnel and other humanitarian personnel were robbed, beaten, raped and killed by Government armed soldiers. Despite repeated calls for help, UNMISS peacekeepers failed to respond, even though the compound was only 1.2 km from UN House.

As a result of the failure, the Secretary-General established an Independent Special Investigation, led by retired Major General Patrick Cammaert of the Netherlands, to submit recommendations, including remedial actions, regarding the under-performance of UNMISS.

The Special Investigation found that although a number of contingents were explicitly tasked to respond to the situation at the Terrain hotel, each turned down the request, indicating that their troops were otherwise engaged. More generally, the Special Investigation established that the military and police components of the mission “displayed a risk averse posture unsuited to protecting civilians from sexual violence and other attacks”. It also found that, instead of conducting foot patrols, soldiers “peer out of tiny windows of armoured personnel carriers, an approach ill-suited to deterring perpetrators of sexual violence and engaging with communities to provide a sense of security”. Its recommendations included: (a) holding troop contributing countries accountable for failures to protect, and (b) entering into a compact with troop contributing countries to the effect that their troops are willing and able to conduct dismounted patrols, to use the rules of engagement to the fullest extent, and to implement their mandate to protect civilians and UN and associated personnel.

I will conclude this section with a few words on MINURSO, established by the Security Council in 1991 for the purpose of holding a referendum in which the people of Western Sahara would choose between independence and integration with Morocco. The UN is still dealing with the effects of the decision by the Government of Morocco to expel a significant proportion of the civilian component, including the Mission’s legal adviser, in March 2016. Such action is unprecedented in UN peacekeeping, and is contrary to the principles of the Charter, as well as the provisions of the status of mission agreement between the UN and Morocco.

Further, increased tensions in the buffer strip in south Western Sahara between the Moroccan berm and the Mauritanian border, in which armed elements of both Morocco and Frente Polisario have remained in close proximity to each other since August 2016, has necessitated increased support of my Office to the Department of Peacekeeping Operations and the Mission, particularly in connection with understanding the ceasefire arrangements between the parties, and the role of MINURSO in monitoring and verifying them.

[Procedural matters]

Regarding the institutional law of the Organization, the one development in 2016 that I want to share with you was the conclusion of a Relationship Agreement with the International Organization for Migration (“IOM”), an issue that I also addressed last year.

Two years ago representatives of the IOM, which was established in 1951 and currently has observer status in the General Assembly, informally indicated to the United Nations that they would like to become a member of the United Nations System and have full membership of the Chief Executives Board for coordination (CEB), which brings together Executive Heads of the United Nations and its Funds and Programmes, the Specialized Agencies and related organizations.

In communicating with the IOM, OLA set out three options, through which IOM could be brought into relationship with the United Nations: (a) as a specialized agency; (b) as a related organization; or (c) in a *sui generis* relationship, which by agreement between the United Nations and the IOM would provide membership in key United Nations coordination mechanisms, including the CEB.

The third option was not amenable to the IOM and so the focus was on either becoming a specialized agency or a related organization.

Although the Charter, in Articles 57 and 63, only speaks of specialized agencies, the United Nations also recognizes related organizations, which typically work in areas other than the economic, social, cultural, education, health, and related fields. The difference between the two is one of degree.

The Charter specifically provides that specialized agencies should be brought into relationship with the United Nations by way of an agreement negotiated by the Economic and Social Council and approved by the General Assembly. Once an entity becomes a specialized agency, it is under an obligation to align its activities with the United Nations. Therefore, specialized agencies are typically expected to implement recommendations made by the United Nations and are required to provide necessary information and assistance to the United Nations, as well as to submit reports on their activities and their proposed budgets to the United Nations.

On the other hand, the General Assembly has, as a matter of practice, also brought other international organizations into relationship with the United Nations, as related organizations. Examples include the International Atomic Energy Agency (IAEA), the International Criminal Court and the Organization for the Prohibition of Chemical Weapons. While the obligations to align their activities with the United Nations are less stringent, related organizations are typically allowed to attend meetings of United Nations organs as observers, are permitted to propose items to be included in the agenda of a United Nations organ and are sometimes permitted to participate in UN coordination mechanisms, such as the CEB, as a full member.

In dealing with the IOM, one important factor was time, as it was considered important that any Agreement be signed at the one-day high-level plenary meeting of the General Assembly on large movements of refugees and migrants, which was scheduled for September 2016. At IOM's request, it was agreed to pursue the "related organization" route. After consultation with the President of the General Assembly, a draft resolution was proposed and adopted in April 2016, inviting the Secretary-General to take steps to conclude an agreement concerning the relationship between the United Nations and the IOM and to submit the negotiated draft agreement to the General Assembly for approval.

OLA then presented the initial draft to relevant United Nations Offices, Funds and Programmes. After a broad process of consultation, the draft was agreed with IOM, and was approved by the IOM's Council in June 2016 and by the General Assembly in July 2016. The agreement was then signed on 19 September 2016 upon which the agreement entered into force.

By the terms of the Agreement, the United Nations recognizes the IOM as an organization with *a* global leading role in the field of migration – not "*...the* global leading role...", which was of concern to certain UN entities. IOM's acceptance of this formulation was based on the inclusion of additional language that: "The United Nations recognizes that the Member States of the International Organization for Migration regard it, as per the International Organization for Migration Council Resolution No. 1309, as the global lead agency on migration."

Moreover, according to the Agreement, these two understandings are without prejudice to the mandates and activities of the United Nations, its Offices, Funds and Programmes in the field of migration.

To ensure the complementarity of IOM's work with other UN Offices, Funds and Programmes, IOM undertook to conduct its activities in accordance with the Purposes and Principles of the Charter and with due regard to the policies of the United Nations furthering those Purposes and Principles and to other relevant instruments in the international migration, refugee and human rights fields.

The Agreement also allows the IOM to participate in various UN coordination mechanisms, such as the CEB, the Global Migration Group and the Inter-Agency Standing Committee, as a full member. It also will enable IOM to participate as a full member in UN country teams that are present in more than 131 countries.

[Privileges and immunities]

I would like to now turn to privileges and immunities, a subject on which I had the occasion last year to address the Commission.

I wish to first address the Haiti cholera matter, which as you know, has been going on for years. Since I addressed you last year, an Appeals Court in the U.S. has decided on the issue of the UN's immunity with respect to the claims and another lawsuit is currently being heard by a District Court.

The *Georges, et al. v. UN, et al.* case, instituted before the U.S. District Court for the Southern District of New York, was first dismissed by the District Court on 9 January 2015. In its opinion and order the Court noted that while Section 29(a) of the General Convention uses "mandatory language" (i.e. "shall"), which may suggest that it is "more than merely aspirational—that it is obligatory and perhaps enforceable", it went on to highlight, that "even if that is so, the use of the word 'shall' in section 29 cannot fairly be read to override the clear and specific grant of 'immunity from every form of legal process'—absent an express waiver ... ". The District Court thus confirmed that the UN enjoys absolute immunity from suit absent an express waiver.

Plaintiffs subsequently appealed the Georges case to the U.S. Court of Appeals for the Second Circuit. In its ruling of 18 August 2016, the Court of Appeals unanimously upheld the District Court's order and unambiguously rejected the plaintiffs' argument that the provision by the UN of an appropriate mode of settlement was a condition precedent to its immunity from legal process. The plaintiffs in the Georges case did not file a further appeal and the Second Circuit's decision became final as of 17 January 2017. However, there is another case that is currently ongoing in the District Court for the Eastern District of New York. Those plaintiffs are arguing that the UN has waived its immunity based on reports of the Secretary-General and a General Assembly resolution regarding the liability of the UN for third-party claims which were issued back in the 1990s. It is the UN's position that the statements in these documents, which are from more than 10 years before the cholera outbreak, cannot constitute an express waiver in relation to "any particular case", as required by Section 2. The District Court has already expressed its doubt about the viability of plaintiffs' claims and we expect that in light of the Second Circuit decision in Georges and other precedents, this Court will also uphold the immunity of the UN.

I would like to now turn to some of the challenges to the status, privileges and immunities that I had brought to your attention last year. I regret to report to you that matters have not improved. For example, in South America, we continue to be severely challenged on matters concerning taxation and social security, the validity of existing bilateral agreements concluded by the UN with the state as well as on the status of the relationship between the UN and the personnel it engages.

Let me elaborate a bit further on this last point. A series of labour claims have been filed against the UN funds and programmes before Mexican courts by former locally recruited personnel. In two cases, Mexican courts have followed the jurisprudence established by the Suprema Corte de Justicia de la Nación and concluded that international organizations in Mexico do not enjoy immunity from legal process in relation to labour claims brought by locally recruited persons.

The Government acknowledges that this is legally incorrect and that the UN enjoys immunity from every form of legal process, including in such matters. While the Government has taken several steps to assert immunity on behalf of the UN, including

writing to the Junta Especial, it has not appeared before the court at any stage of the proceedings. The MFA stated that there is no avenue for the Government, not being a party to the proceedings, to intervene formally. While we have some sympathy for the difficult position the Government finds itself in, we firmly maintain that it remains the Government's duty to do so in order to meet the international legal obligations of the state. I note here that we have clear supporting jurisprudence from the ICJ on this point [the *Cumaraswamy* case]. As I noted last year, the path ahead on these issues is far from easy and I am concerned that we may soon come to a situation where we are compelled to invoke formal dispute resolution measures under the General Convention.

Let me now turn to an unusual case that may well have come to your attention. This concerns the diplomatic immunity of a judge of the International Residual Mechanism for Criminal Tribunals. Judge Akay, a national of Turkey, was accused of alleged crimes related to the attempted coup of July 2016 and was arrested in Turkey in September 2016. At the time of his arrest he was serving as a member of the Appeals Bench in The Prosecutor v. Augustin Ndirabatware, to which he was assigned on 25 July 2016.

On behalf of the Secretary-General, I asserted the judge's immunity as accorded to diplomatic envoys, including immunity from personal arrest and detention and from legal process. I noted that the Security Council had expressly decided in Article 29 paragraph 1 of the Statute of the Mechanism that the General Convention shall apply to the judges of the Mechanism. I then reiterated the long-standing position of the Organization that the diplomatic immunity conferred under the General Convention must be respected by all member states, including the state of nationality and state of residence of the person to whom such privileges and immunities are conferred. In this regard, I recalled that privileges and immunities are conferred solely in the interests of the Organization and are based on the fundamental principle of an independent international civil service established under the UN Charter in which there is no inequality by reason of nationality.

The Government of Turkey took the position that Judge Akay enjoys functional immunity only and that his arrest was not related to his official functions and continued with his criminal prosecution. On 14 June this year, the judge was convicted on a single charge of being a member of a terrorist organization and sentenced to seven years and six

months imprisonment. The judgment is subject to appeal and review proceedings at the national level. The judge has been provisionally released under judicial supervision, with restrictions on his travel, and he would be detained again if the conviction is confirmed by a higher court. While the judge's release is a welcome development from a humanitarian perspective, we are considering how to react to the conviction given its inconsistency with the judge's diplomatic immunity.

Accountability

My final comments on this cluster offer an update on accountability for international crimes.

This is going to be a historical year for international criminal justice. After 24 years of operations, the International Tribunal for the former Yugoslavia is expected to complete its work. It is projected that judgments in the only two remaining cases before the Tribunal, one trial and one appeal, will be delivered by 30 November 2017. There are some legal issues to resolve in the remaining months, such as the question of whether a contempt case can be transferred to the Residual Mechanism under the existing legal framework if the accused persons are not arrested by the time the ICTY finishes its substantive cases.

As the ICTY is closing, the judicial work of the International Residual Mechanism for Criminal Tribunals is increasing. The Mechanism is, for the first time since it commenced functioning, seized simultaneously with a trial and two appeals, all from ICTY cases (the *Stanisic and Simatovic* trial and the *Karadzic* and *Seselj* appeals).

The work of the United Nations-assisted tribunals is also progressing. The trial in absentia in the *Ayyash et al* case before the Special Tribunal for Lebanon is continuing. As I have said before, the work of this unique tribunal is of great importance for the people of Lebanon.

For its part, the Extraordinary Chambers in the Courts of Cambodia (ECCC) delivered an appeal judgment in November last year and has several proceedings at the pre-trial and trial stages. While the General Assembly approved a subvention for the ECCC in December, its financial situation remains precarious.

Similarly, the Residual Special Court for Sierra Leone is also facing funding problems, despite receiving a subvention from the General Assembly. My Office continues to explore – in close consultation with the members of the Oversight Committee – options for a future financing arrangement for the Residual Special Court which would ensure stable and sustainable funding.

The experience of the ECCC and the Residual Special Court, as well as the Special Court for Sierra Leone, has clearly vindicated the Secretariat's long-held view that funding of judicial institutions should not be left to the vagaries of voluntary contributions.

OLA's work on accountability in the past year has gone beyond the traditional areas of ad hoc international criminal tribunals and United Nations assisted tribunals.

We have become more and more involved in supporting regional and domestic accountability efforts in various parts of the globe. In this regard, OLA has been providing technical assistance to the Office of Legal Counsel of the African Union Commission for the establishment of the Hybrid Court for South Sudan. The Court would be established by the African Union, and the United Nations' role is limited to assisting, at the request of the AU, to facilitate the process, drawing from lessons learned from other tribunals.

The United Nations is also increasingly being called upon to help domestic efforts. As part of the final Peace Agreement between the Government of Colombia and the FARC-EP, the Parties agreed on a system of transitional justice and accountability that combines elements of truth, justice, reparations and guarantees of non-repetition. Under the Special Jurisdiction for Peace, which will be composed exclusively of Colombian judges, but allows for the participation of foreign *amicus curiae* lawyers, alleged perpetrators of serious crimes of international concern will be subject to judicial processes and sanction, and there will be no amnesties for war crimes and crimes against humanity.

The Government and the FARC-EP invited the Secretary-General and four entities to designate members of a committee for the selection of Colombian judges and other officials of the justice component of the Final Peace agreement in Colombia, in particular the Special Jurisdiction for Peace. Three of the five members of this selection mechanism have been designated by international institutions. The idea behind this is to give added legitimacy to

the Special Jurisdiction for Peace, which is an important element for the peace process in Colombia. OLA has been advising the Secretary-General and the Department of Political Affairs on this matter.

My Office contributed in a somewhat similar fashion to the Special Criminal Court of the Central African Republic. In this case, the level of international participation is much more pronounced than for Colombia, as the Special Criminal Court includes international judges, an international prosecutor and an international deputy-registrar, who were all selected by an international Selection Committee.

In addition, MINUSCA was mandated by the Security Council to provide technical assistance to the CAR Authorities in partnership with other international partners, to operationalize the Special Criminal Court.

Accountability is, as you well know, not limited to courts and tribunals only, whether international, regional or domestic. In situations where there is no willingness or capacity to prosecute, other efforts may be undertaken to facilitate future prosecutions. This is precisely what is being envisaged in relation to the atrocities committed in Syria. In December 2016, the General Assembly adopted resolution 71/248, establishing an International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011.

The functions of the Mechanism include collecting, consolidating, preserving and analysing evidence of violations of international humanitarian law and human rights violations and abuses; as well as preparing files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes. My Office has been collaborating with the Executive Office of the Secretary-General and the Office of the High Commissioner for Human Rights and providing advice on various legal issues, including the terms of reference of the Mechanism.

The establishment of the Mechanism has not been without controversy. Some Member States are questioning the validity of the General Assembly resolution establishing

the Mechanism, arguing that the Assembly acted *ultra vires*. The arguments are similar to the ones made when the Security Council established the ICTY. Our position is that the General Assembly determines its own competence and that the Secretariat has no authority to review the legality of the actions of the other principal organs. At the time of adoption of the resolution, the General Assembly did consider the question of its competence and decided to adopt the resolution.

The establishment of the Mechanism appears to have inspired a similar idea here in Geneva. In March, the Human Rights Council expanded the mandate of the Commission on Human Rights in South Sudan to include the collection and preservation of evidence and clarifying responsibility for alleged gross violations and abuses of human rights and related crimes. The information is to be made available to transitional justice mechanisms in South Sudan, including the Hybrid Court, with a view to ending impunity and providing accountability.

The scope of the functions of the Syria Investigative Mechanism and of the Commission on Human Rights in South Sudan falls short of what could be considered as the quintessential investigation commission, for example the International Independent Investigative Commission which was established by the Security Council under Chapter VII of the Charter in connection with the assassination of the former Lebanese Prime Minister, Rafik Hariri. But the functions go beyond the typical mandates of commissions of inquiry and fact-finding missions. I expect that, in the years to come, we will see more proposals for the establishment of investigative mechanisms to facilitate accountability efforts, particularly when there is little prospect of perpetrators being brought to justice in the short or medium term.

[General Legal Division]

Continuing on the general theme of accountability, I would like to add a few words about the activities of the General Legal Division (GLD) in the past year.

In December 2015, an independent panel tasked to review sexual exploitation and abuse (SEA) by peacekeeping forces in the Central African Republic recommended a review of UN confidentiality policies. It was considered crucial to determine whether such policies establish a proper balance between safeguarding confidential information about victims of alleged SEA and disclosing such information to national authorities for purposes of holding accountable those responsible for such acts.

As a result of the CAR Panel's recommendation, OLA, GLD in particular, was tasked with: (a) collating UN confidentiality policies that were relevant to the concerns raised by the CAR Panel; and (b) assessing how the balance between confidentiality and accountability was struck in each one of those policies. Having found a significant number of confidentiality policies that did not all adequately address accountability, GLD was then requested to prepare a new uniform policy on handling allegations of SEA by UN personnel that would apply across the Organization. The new uniform policy is currently under consideration by senior management.

I will now turn to the administration of justice within the UN, which is also a matter being considered the Sixth Committee. Since the UN Dispute Tribunal and the UN Appeals Tribunal were established in 2009, they have delivered 1443 and 709 judgments, respectively. GLD represents the Secretary-General in appeals proceedings and plays a key role in the development of policy regarding the administration of justice. During its last session, the General Assembly considered the report by an independent panel assessing the UN system of administration of justice. The panel suggested that access to the system should be extended to non-staff personnel in order to provide them with an effective mode of dispute resolution with the UN. Non-staff personnel are persons who are engaged by the Organization to perform services of a limited nature, such as consultants or individual contractors. Their contracts with the UN are of a commercial nature, involving the provision of personal services to the Organization.

In accordance with the established practice, disputes, controversies or claims arising under such commercial contracts are resolved by amicable settlement and, if necessary, by

arbitration under the UNCITRAL Arbitration Rules. The General Assembly requested information regarding the recourse and the remedies available to non-staff personnel, including the number of disputes brought before the UN and/or national jurisdictions and their outcome. GLD has been assisting the Office of Administration of Justice in preparing the gathering of the requested information, which will be presented to the General Assembly at this year's session.

[ITLD]

Je souhaite à présent vous parler des activités de la Division du Droit commercial international, qui abrite le Secrétariat de la Commission des Nations Unies pour le droit commercial international (CNUDCI) et qui est basée à Vienne. Le programme de travail actuel de la CNUDCI, attribué à ses groupes de travail, comporte notamment des travaux sur des procédures simplifiées de constitution et d'enregistrement des entreprises des micro-, petites et moyennes entreprises, l'exécution des accords issus de la conciliation commerciale, le commerce électronique, le droit de l'insolvabilité et le droit des sûretés.

À sa cinquantième session qui se tient ce mois-ci à Vienne, la CNUDCI sera informée de l'état d'avancement des travaux des groupes de travail, notamment sur les projets de textes législatifs en préparation. Elle sera aussi informée par son secrétariat des questions soulevées par la mise en œuvre de son programme d'assistance technique portant sur l'ensemble des thématiques que j'ai énumérées, mais aussi sur le droit des marchés publics, le droit des contrats internationaux et le droit des transports. La Commission examinera les moyens de promouvoir l'interprétation et l'application uniformes des instruments de la CNUDCI, de faciliter l'adoption effective des textes par les États et d'encourager la coopération et la coordination entre la CNUDCI et les autres organisations internationales actives dans le domaine. Enfin, elle discutera également du rôle de la CNUDCI dans la promotion de l'état de droit aux niveaux national et international.

En outre, la CNUDCI devrait adopter le projet de Loi type sur les documents transférables électroniques. Basée sur les précédents textes de la CNUDCI sur le commerce

électronique et, en particulier, sur le principe d'équivalence fonctionnelle, la Loi type vise à permettre légalement la dématérialisation de documents et d'instruments transférables tels que les connaissements, les billets à ordre, les lettres de change et les reçus d'entrepôt. Les avantages découlant de cette dématérialisation ne concernent pas uniquement les secteurs financier, économique et des transports mais peuvent, de façon plus large, avoir trait à la facilitation du commerce sans papier et à sa mise en conformité réglementaire. En énonçant des normes technologiquement neutres, la Loi type permet de recourir aux nouvelles technologies telles que celles des grands livres distribués en matière comptable.

Pour célébrer le cinquantième anniversaire de la CNUDCI un congrès de trois jours a été organisé cette semaine à Vienne. Il se termine aujourd'hui [4-6 July]. Ce congrès vise à mettre en lumière la manière dont la CNUDCI peut contribuer à répondre aux nouveaux objectifs de développement par la mise en œuvre de son mandat d'harmonisation et de modernisation du droit commercial international. Les nombreuses discussions au programme ont permis d'examiner l'utilisation des textes de la CNUDCI dans la pratique, les avantages de ses méthodes de travail et les défis qui en découlent. Elles ont aussi porté sur des sujets d'actualité tels que l'économie numérique, les systèmes intégrés pour soutenir les échanges transfrontières, les régimes de prêts et d'insolvabilité efficaces et performants et les derniers développements dans le domaine du règlement des différends commerciaux.

Permettez-moi également de rappeler que l'Assemblée Générale avait demandé au Secrétaire Général de mettre en place et d'administrer le service dépositaire des informations publiées en vertu de l'article 8 du Règlement sur la transparence par l'entremise de la division du droit commerce international, initialement en tant que projet pilote intégralement financé par des contributions volontaires. Le service dépositaire est un élément essentiel du Règlement sur la transparence et de la Convention des Nations Unies sur la transparence dans l'arbitrage entre investisseurs et États fondé sur des traités (Convention de Maurice sur la transparence) (Résolution 70/115), puisqu'il constitue une base de données mondiale intégrée, transparente, facilement accessible et répertoriant les arbitrages entre investisseurs et États conduits conformément au Règlement et à la Convention.

Le service dépositaire dispose à présent d'un administrateur et est opérationnel grâce au financement de l'Union Européenne et du Fonds pour le développement international de l'Organisation des pays exportateurs de pétrole (OPEP).

[DOALOS]

J'en viens maintenant aux activités de la Division des affaires maritimes et du droit de la mer (DOALOS).

La Division continue de s'acquitter de ses fonctions de secrétariat de la Convention des Nations Unies sur le droit de la mer et de l'Accord de 1995 sur les stocks de poissons chevauchants et grands migrants.

Cela inclut les fonctions de dépositaire liées aux limites des zones maritimes et de service de séances à la Réunion des États Parties à la Convention ainsi qu'à la Commission des limites du plateau continental. La Division fournit également une assistance substantive à l'Assemblée générale en ce qui concerne les océans et le droit de la mer, de même qu'à ses organes subsidiaires et aux autres processus intergouvernementaux relatifs aux océans.

Parmi ces organes et processus figurent le Processus consultatif informel ouvert à tous sur les océans et le droit de la mer (« Processus consultatif informel »), le Comité préparatoire établi par la résolution 69/292 de l'Assemblée générale concernant l'élaboration d'un instrument international juridiquement contraignant se rapportant à la Convention des Nations Unies sur le droit de la mer et portant sur la conservation et l'utilisation durable de la biodiversité marine des zones ne relevant pas de la juridiction nationale (« Processus BBNJ »), le Mécanisme de notification et d'évaluation systématiques à l'échelle mondiale de l'état du milieu marin, y compris les aspects socioéconomiques, ainsi que la Conférence des Nations Unies pour appuyer la mise en œuvre de l'objectif de développement durable n° 14 : conserver et exploiter de manière durable les océans, les mers et les ressources marines aux fins du développement durable (« Conférence Océan »), qui s'est tenue au siège de l'Organisation des Nations Unies à New York du 5 au 9 juin 2017. Je tiens à souligner que la Division a consacré des efforts considérables à assister cette Conférence sur le fond.

En ce qui concerne la Convention, avec l'adhésion de l'Azerbaïdjan l'an dernier, le nombre de parties a atteint 168, y compris l'Union européenne. La vingt-sixième Réunion des États Parties, qui s'est tenue en juin 2016, a adopté, entre autres, le budget biennal du Tribunal international du droit de la mer. Le mois dernier, la vingt-septième Réunion a élu sept nouveaux membres du Tribunal et les 21 membres de la Commission des limites du plateau continental.

La Commission, quant à elle, a examiné, au cours de son quinquennat qui a expiré le mois dernier, 21 dossiers concernant les limites extérieures du plateau continental au-delà de 200 milles marins. Cela représente une augmentation de 62 % par rapport au quinquennat précédent. L'arriéré des dossiers a donc diminué, mais il reste considérable avec 41 dossiers. Au cours des douze derniers mois, la Commission a émis cinq nouvelles recommandations pour atteindre un total de 29 recommandations. Elle a également reçu un dossier de plus, amenant le total à 82 dossiers, y compris cinq dossiers révisés.

De plus, l'année dernière a vu le lancement du deuxième cycle du Mécanisme de notification et d'évaluation systématiques à l'échelle mondiale de l'état du milieu marin, y compris les aspects socioéconomiques (le « Mécanisme »). Alors que le premier cycle s'est concentré sur l'établissement d'une base de référence, le second cycle, courant de 2016 à 2020, évaluera les tendances et identifiera les lacunes.

Les résultats escomptés du nouveau cycle comprennent une deuxième évaluation mondiale des océans et un soutien du Mécanisme aux autres processus intergouvernementaux relatifs aux océans.

Ce soutien a, d'ores et déjà, compris la préparation de trois résumés techniques, basés sur la première Évaluation mondiale intégrée du milieu marin et spécifiquement adaptés aux demandes et aux besoins du Processus consultatif informel, du processus BBNJ, du Programme de développement durable à l'horizon 2030, et de la Convention-cadre des Nations Unies sur les changements climatiques.

En effet, l'information fournie par l'Évaluation a appuyé l'examen des « Effets du changement climatique sur les océans », sujet considéré par le Processus consultatif

informel en mai de cette année. Les trois résumés techniques, avec la première Évaluation mondiale des océans, ont été officiellement lancés au cours de la Conférence Océan.

Par ailleurs, les deuxième et troisième sessions du Comité préparatoire établi dans le cadre du processus BBNJ ont eu lieu, respectivement, aux mois d'août-septembre de l'an dernier et mars-avril de cette année, avec l'assistance considérable de DOALOS.

Le Comité préparatoire a considéré les questions relatives aux ressources génétiques marines, y compris les questions sur le partage des avantages ; les mesures telles que les outils de gestion par zone, y compris les aires marines protégées ; les études d'impact sur l'environnement ; ainsi que le renforcement des capacités et le transfert des technologies marines. Le Comité préparatoire a aussi traité d'un certain nombre de questions transversales relatives à la portée d'un instrument, à sa relation avec la Convention et d'autres instruments, les approches et principes directeurs, les arrangements institutionnels, le règlement des différends et la responsabilité. À sa quatrième session, qui aura lieu en juillet, le Comité préparatoire examinera le rapport qu'il doit effectuer à l'Assemblée générale, y compris un projet de recommandations.

Enfin, la Conférence d'examen sur l'Accord de 1995 sur les stocks de poissons chevauchants et grands migrants a repris ses travaux en mai de l'année dernière. Dans son document final (A/CONF.210/2016/5, annexe), la Conférence fait des recommandations sur 42 sujets différents, fournissant ainsi une feuille de route pour améliorer la gestion des pêches en haute mer par une meilleure mise en œuvre de l'Accord. La Conférence a également convenu de poursuivre les consultations officielles des États parties à l'Accord et de garder l'Accord sous examen en continuant la Conférence d'examen au plus tôt en 2020, à une date à déterminer lors d'un prochain cycle de consultations officielles. L'Assemblée générale, dans sa résolution 71/123, a fait siennes ces recommandations. Par ailleurs, en novembre 2016, l'Assemblée générale a examiné l'impact de la pêche de grand fond sur les écosystèmes marins vulnérables et la viabilité à long terme des stocks de poissons d'eaux profondes.

Dans le futur, l'attention des États membres se portera de plus en plus sur les questions relatives aux changements climatiques et aux océans, notamment la façon dont ces questions se rapportent aux droits et obligations en vertu de la Convention. Dans le cadre de la récente Conférence Océan, ainsi qu'au cours de la dix-huitième réunion du Processus consultatif informel sur les océans et le droit de la mer, certaines délégations ont demandé un examen approfondi des conséquences de l'élévation du niveau des mers au regard du droit international, notamment en ce qui concerne les limites des zones maritimes. Je dois remarquer, à cet égard, que plusieurs délégations ont souligné le besoin de continuer à discuter de ces questions.

Pour conclure sur ces sujets, la Division continue de satisfaire aux demandes croissantes des États en ce qui concerne la coopération technique et le renforcement des capacités, par le biais de divers programmes d'assistance, d'activités de formation, de programmes de bourses et de fonds d'affectation spéciale.

Si l'on regarde vers l'avenir, les États membres s'intéressent chaque fois plus aux questions relatives au changement climatique et aux océans ainsi qu'à leur relation avec les droits et obligations qui découlent de la Convention de l'ONU sur le droit de la mer. Dans le cadre de la Conférence sur les océans qui a eu lieu récemment ainsi que de la dix-huitième réunion du Processus consultatif officiel sur les océans et le droit de la mer, certaines délégations ont demandé que les répercussions de la montée du niveau de la mer sur le droit international soient discutées, y compris en ce qui concerne les limites maritimes. Je souhaite souligner que la nécessité de poursuivre les discussions sur ces questions a également été soulignée par plusieurs délégations.

[Treaty Section]

Pour terminer, je voudrais vous parler du travail de la Section des traités qui, comme vous le savez, exerce les fonctions dépositaires du Secrétaire général et est également en charge de l'enregistrement et de la publication des traités et accords internationaux conformément à l'article 102 de la Charte.

Dans mon intervention de l'année dernière, je vous avais informé que la cérémonie de signature de l'Accord de Paris, tenue le 22 avril 2016, avait rencontré un franc succès, permettant de recueillir, en un jour seulement, 175 signatures et 15 ratifications. Dans le courant de l'année, de nombreuses ratifications ont continué à être déposées auprès du Secrétaire général.

Le 21 septembre, celui-ci a organisé une cérémonie de ratification en marge du débat général annuel de l'Assemblée générale, qui a permis de rassembler 31 ratifications supplémentaires et d'approcher le seuil requis pour l'entrée en vigueur de l'Accord de Paris, à savoir le dépôt des instruments de ratification de 55 États représentant au moins 55% du total des émissions mondiales de gaz à effet de serre. C'est ainsi que l'Accord de Paris a pu entrer en vigueur le 4 novembre 2016, peu avant la 22^{ème} Conférence des États Parties de la Convention cadre sur les changements climatiques, qui a dès lors pu tenir la première réunion des Parties à l'Accord.

C'est là un succès remarquable. L'Accord de Paris a pu entrer en vigueur moins d'un an après son adoption, et le nombre des Parties continue d'augmenter. À ce jour, l'Accord compte 152 Parties résultat duquel on ne peut que se féliciter.

L'entrée en vigueur de l'Accord de Paris n'est cependant pas la seule nouveauté à signaler en matière de traités. Au cours de cette dernière année, de nouveaux traités ont été conclus et confiés au Secrétaire général en sa qualité de dépositaire.

Toujours dans le domaine de la protection de l'environnement, l'année 2016 a vu, le 15 octobre, l'adoption de l'Amendement de Kigali au Protocole de Montréal relatif à des substances qui appauvrissent la couche d'ozone, lors de la 28^{ème} réunion des parties. Comme vous le savez, cet Amendement contribue, lui aussi, aux efforts mondiaux contre les changements climatiques, en prenant des mesures visant à l'élimination progressives des gaz HFC (hydrofluorocarbones).

Le Secrétaire général s'est également vu confier, en tant que dépositaire, un Accord-cadre conclu le 16 mai 2016 dans le cadre de la Commission économique et sociale des Nations Unies pour l'Asie et le Pacifique, qui a pour but de faciliter le commerce sans frontière sans papier dans cette région du monde. Cet accord est ouvert à la signature depuis le 1^{er} octobre 2016 et le restera jusqu'au 30 septembre prochain.

Les derniers mois ont par ailleurs vu l'entrée en vigueur, le 8 mars 2017, de la Convention de l'Afrique centrale pour le contrôle des armes légères et de petit calibre, de leurs munitions et de toutes pièces et composantes pouvant servir à leur fabrication, réparation et assemblage, conclue à Kinshasa le 30 avril 2010. Le 1^{er} janvier de cette année, l'Accord international sur l'huile d'olive et les olives de table, adopté ici-même à Genève le 9 octobre 2015, est également entré en vigueur de manière provisoire, conformément à ses dispositions.

Les conventions que je viens de mentionner ne représentant qu'une fraction des quelques 560 traités multilatéraux déposés auprès du Secrétaire général. Comme vous pouvez l'imaginer au vu de la diversité des sujets traités même dans ce petit échantillon, la Section des traités se trouve chaque jour confrontée à une grande variété de questions juridiques.

La Section a d'ailleurs récemment été amenée à traiter d'un sujet inédit dans la pratique dépositaire du Secrétaire général. Comme vous le savez, l'automne 2016 avait vu le retrait de trois États parties du Statut de Rome de la Cour pénale internationale. Depuis lors, cependant, deux de ces États—la Gambie et l'Afrique du Sud—ont informé le Secrétaire général de leur décision de retirer leur notification de retrait du Statut, actions qui sont intervenues avant que lesdits retraits n'aient pris effet (un an après leur dépôt). Il s'agit là d'un développement dont on peut se réjouir.

Enfin, je tiens à souligner que, cette année encore, l'Assemblée générale a continué de s'intéresser aux questions relatives aux traités dans le cadre de son examen du point de l'ordre du jour relatif à « L'état de droit aux niveaux national et international ». Dans sa

résolution 71/148, l'Assemblée a exprimé son soutien résolu aux activités de la Section des traités, mettant l'accent non seulement sur les fonctions dépositaires, d'enregistrement et de publication des traités, mais signalant également l'importance que revêtent la base de données électronique de l'Organisation des Nations Unies relative aux traités, les publications juridiques et les ateliers organisés par la Section des traités.

L'Assemblée générale a également réaffirmé son soutien à la cérémonie des traités, organisée annuellement par le Secrétaire général en marge du débat général. Cette cérémonie continue de promouvoir de manière efficace la participation des États aux traités multilatéraux déposés auprès du Secrétaire général : en 2016, cette cérémonie a accueilli pas moins de 56 États, souvent représentés au plus haut niveau, qui ont effectué 79 actions relatives aux traités, portant ainsi au-delà de 2.000 le nombre des actions effectuées dans ce cadre depuis le début de cette initiative, en l'année 2000.

Il est enfin à noter que, par cette même résolution, l'Assemblée générale a aussi invité le Secrétaire général à lui soumettre, pour sa prochaine session, un rapport sur les dispositions réglementaires donnant effet à l'Article 102 de la Charte des Nations Unies. Comme vous le savez, le Secrétariat exerce ses fonctions d'enregistrement et de publication des traités conformément à un Règlement qui a été adopté par l'Assemblée générale en 1946. Ce Règlement a, depuis lors, été amendé seulement trois fois, sa dernière révision ayant été faite il y a presque quarante ans, en 1978.

On peut dès lors s'attendre que, dans la session prochaine, l'Assemblée générale soit amenée à considérer une nouvelle fois ce Règlement, afin de codifier les évolutions récentes de la pratique du Secrétariat en matière d'enregistrement et de publication, mais également de permettre le développement progressif de cette pratique, pour tirer profit des technologies modernes d'information et répondre aux besoins de la communauté internationale en la matière.

[Conclusion]

Distinguished Members of the International Law Commission

As you commence your mandate, the eyes of the international legal community will be upon the Commission. Governments, scholars and the public at large rely on your expertise and dedication to the object of the Commission, the progressive development of international law and its codification. This requires a focus on the substance of your work, but also critical reflection on the working methods of the Commission, particularly in light of the increasing demand on United Nations bodies to do more with less.

Next year the Commission will celebrate its seventieth anniversary, which offers a moment for further reflection. Preparations for the commemoration are already underway and the Secretariat looks forward to being your hosts in New York, where the Commission last held a session in 1998.

I wish you an insightful and productive session. The Office of Legal Affairs will continue to serve the Commission with the highest standards of diligence, professionalism and dedication. Thank you very much.