

**Informal Meeting of Legal Advisers of Ministries of Foreign Affairs
26 October 2009, 3 pm, Trusteeship Council Chamber**

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

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

(Introduction)

Mr. Chairman,
Ladies and Gentlemen Legal Advisers from capitals and from the missions,
Dear colleagues and friends,

It is a great pleasure to address you for the second time as Legal Counsel of the UN. I have been looking forward to this opportunity and have enjoyed the contemplation of this speech. I would like to express my gratitude to the convenors of this meeting, especially to the Mexican delegation, for their kind invitation.

It is slightly more than one year since I joined the UN as Legal Counsel. I must admit: when I took up this job, I was curious as to how centrally international law would figure among UN priorities during my tenure. The UN has seen periods of great advancement in international jurisprudence, just as there have been times when our function as guardian of the global legal architecture has seemed more peripheral. After this year, I believe that we live in times where international law - and the role of the UN as its champion - is absolutely central to the Secretary-General and his team.

Almost daily, I have witnessed the global challenges with which the UN is asked to grapple: some are predictable and perennial; many are unforeseeable. Time and again, I have seen that international law was not the inconvenient "tap on the shoulder" for a UN focused elsewhere. It was and is a central pillar of what this UN administration is seeking to accomplish. We lawyers know the look of a client who views our

inconvenient truths with an impatient desire to turn to other things. But most of us have also worked with those who view the law as an end in itself, as an integral element of building the world we want to live in. I have to say I have had *that* privilege this past year - with this Secretary General and his team.

I have seen the UN grapple with rising tensions between the pursuit of peace and the quest for justice around the world. I witness on a constant basis the Secretary-General's commitment to the strengthening of the rule of law, the pursuit of justice and the determination to end impunity for war crimes, crimes against humanity, genocide and other serious violations of international human rights law. He has consistently supported the strengthening of accountability mechanisms: most importantly of course, the ICC, but also including the ICTY and ICTR tribunals, the winding down of the IIC in Lebanon and the commencement of the Special Tribunal for Lebanon in March of this year and of course, the continuing support for the Special Court for Sierra Leone and the Extraordinary Chambers of the Court in Cambodia. These are amongst the issues which we in OLA are dealing with on a daily basis.

I should also say that the centrality of international law to the Secretary-General sees the Office of Legal Affairs engaging very broadly throughout the Organisation.

I mention this here only to highlight to you – as Legal Advisers of member States - that OLA's horizons, and the expectations of OLA from within the Organisation, run very wide. We, like any Department, are making a contribution – and are expected to make a contribution – to the management of the wider Organisation.

Just to give you a sense of this: In my capacity as Legal Counsel, I participate in the Secretary-General's Policy Committee which meets frequently to develop common UN approaches to major global issues which present the UN with some of its most urgent and sensitive challenges. I am also a member of the [Secretary-General's] Senior Management Group. Additionally, OLA is an active participant in the Deputy Secretary-General's

Management Committee and I have also been appointed to the Management Performance Board which is responsible for overseeing the senior managers' compact process.

Of course, as you will know, OLA also carries out vital work which by its nature does not ordinarily command the attention of Member States. Nor does this work develop the sort of profile taken on by the highly visible aspects of our work. In this regard, I think, for instance, of the work undertaken on peacekeeping and procurement where the Organisation's interests must be protected. I also think of the work undertaken on personnel issues or administration of justice and on privileges and immunities – both of which I will address in more detail later.

In touching on a variety of issues here today, I hope to convey to you a range of issues which might be of interest to you and which reflect the diverse nature of the engagement undertaken by OLA with the rest of the Secretariat and beyond. I hope that our discussion on these issues, including the rule of law, the administration of justice and the responsibility of international organisations will help to shape the central agenda of the UN in the years to come. I will also take the irresistible liberty of touching very briefly on a few other issues. These will include a topic of ongoing concern to the UN and OLA in particular, namely: privileges and immunities of the UN.

(Peace and Justice)

It won't surprise you to hear that the delicate relationship between peace and justice is a central part as mentioned, of our day-to-day work. This is currently very much on the minds of UN senior management. In a recent statement - which I had the honour of delivering - the Secretary-General has described this issue in the following terms:

“As we fight against impunity and seek to strengthen accountability, the relationship between peace and justice has been a frequent point of contention. After a decade-long debate on how to “reconcile” peace and justice or how to “sequence” them, the debate is no longer between peace and justice but between peace and what kind of justice. Voices that denied

the need for justice seem to have disappeared. There is now growing support for the idea that every comprehensive conflict settlement should include elements of justice.

However constructed, there seems to be a consensus that justice must be factored into post-conflict strategies in order for peace to be sustainable. This is a major achievement for international criminal justice.”

The growing consensus - that elements of justice **must** be factored into every post-conflict strategy in order for peace to be sustainable - is a major conceptual breakthrough. It should guide us in our common fight against impunity, in particular on the way to upcoming landmark events such as the first review conference of the Rome Statute of the ICC next year in Kampala.

In the past year we have faced many challenges in the area of International Humanitarian Law and the protection of civilians. Humanitarian crises have wreaked local havoc and have challenged the international legal order. I am conscious that these crises have coincided with the 60th anniversary of the Geneva Conventions. Our legal advice is constantly sought on these situations. I hold the view that the law is in place and the legal tools are available. Of course, there is room and need for development, but the immediate legal tools are available. The challenge and the obligation we face is to implement and enforce this law. It is to live up to the words of Common Article 1 to the Geneva Conventions “to respect and ensure respect” for international humanitarian law.

Many of you will also be aware that, at the Security Council earlier this year, we proposed the idea of establishing special “protected status for UN premises and facilities” which could help prevent further attacks against our premises and ensure their effective protection in armed conflicts. This is an idea for states to consider in close cooperation with the ICRC.

(Rule of law)

Mr. Chairman,

Let me now focus on developments relating to the rule of law. Since I took office as the Under-Secretary-General for Legal Affairs, I have come to realize how much the rule of law is, rather than a specific area of interest for the UN, a central feature of its contemporary priorities and concerns. This is not to say, obviously, that the rule of law is a new concept for the Organization. Although not expressly referred to in the Charter, this overarching theme lies at the very heart of our constitutive act. Let me only point out that, without respect for the rule of law, the purposes and principles enshrined in Articles 1 and 2 of the Charter cannot be properly understood. This “demand of the Charter for the rule of law”, to quote the words used by Secretary-General Hammarskjöld, has been echoed in several landmark documents.

However, it does not seem an unfair assessment to me to refer to a “renaissance” of the rule of law at the UN in recent times. This has especially been the case since the 1990s, something which shows the vitality of the concept in the context of the UN. The Millennium Declaration and the Outcome Document bear testimony to the importance of this evolution. They do so in that they reflect the resolve of Heads of State and Government to strengthen the universal adherence to and implementation of the rule of law at both the national and international levels, a need which has been echoed on several occasions by the Secretary-General.

Today, the promotion of the rule of law is extensively discussed in different fora within the UN. It has been the subject of focused discussions within the Security Council and it is annually dealt with by the Sixth Committee.

As the Legal Counsel, I attach much significance to the Sixth Committee’s decision to focus its debate under the agenda item at the present session on the sub-topic of “Promoting the rule of law at the international level”. This focus shows the resolve of Member States to explore further the link

between normative and operational aspects of the promotion of the rule of law – a priority which I fully share. I am also pleased to inform you that a guidance note on the rule of law at the international level is currently being prepared under the leadership of the Office of Legal Affairs. It is my hope that this guidance note will significantly contribute to the Joint Strategic Plan of the Rule of Law Coordination and Resource Group. This Group, under the chairmanship of the Deputy Secretary-General, strives to ensure the overall coordination of the Organization’s rule of law work. You may rest assured that I am totally committed to the realization of the rule of law goals we all have in common.

(Administration of Justice)

Mr. Chairman,

As the Secretary-General has underlined, the UN, as an organization involved in setting norms and standards and advocating for the rule of law, must itself “practice what it preaches”. This includes with respect to the treatment and management of its own personnel.

As you are all well aware, following the decision of the General Assembly in 2007 to strengthen both the informal and the formal system of administration of justice, and the adoption of the statutes of the two new tribunals at the end of 2008, the judges have been appointed by the General Assembly. As of 1 July 2009, the formal system has become operational.

I have little doubt that this reform is by itself an important step forward in ensuring fair and just treatment to UN staff. Some issues, such as the position of non-staff personnel – who, at least for the time being, do not have access to the formal system – remain however unresolved at this stage. We are all mindful of the need to ensure that the new system will function efficiently. We also want it to constitute an adequate response to the various concerns that led to the reform. This is why I attach much importance to the review of the statutes of the two Tribunals that the Assembly will undertake in 2010, in the light of experiences gained, including on the efficiency of the overall functioning of the tribunals.

I am pleased to note that work went smoothly in the Sixth Committee, in particular regarding the rules of procedure of the two tribunals. These rules, which were established, in accordance with the statutes, by the respective judges of the two tribunals in July 2009, will be soon before the General Assembly for approval. I will continue to follow closely the developments relating to the new system, which is, in my view, emblematic of the commitment of the Organization to the rule of law, justice and accountability.

(Responsibility of international organizations)

Finally, I wish to pay tribute to the work of the International Law Commission, before its President, by drawing your attention to the study on the responsibility of international organizations. I am encouraged to come back to this issue both by the significant progress achieved by the Commission and by the continued relevance of the topic for the UN and its Members. Having had the opportunity to directly discuss the matter with the Commission and legal advisers of organizations within the UN system, I feel entitled to convey the sense of importance which we attach to this crucial issue for the Organization and its members.

Given the complexity of the issues involved, the adoption of the articles on responsibility of international organizations on first reading is a very significant achievement. Certainly, these articles raise important questions, on which a wide variety of views has already been expressed by States and international organizations. Let me only mention a few issues which should deserve, in my opinion, careful consideration.

The first relates to the scope of the draft, which includes, e. g., the responsibility of a member State for the act of an organization, when the State seeks to take advantage of the competence of the organization. The articles, on the other hand, do not cover the possibility for an organization to invoke the responsibility of a State or the responsibility of an organization towards individuals – neither of which are so rare an occurrence in practice.

A second issue of note is that of attribution. With the developments in the case-law since the 2007 *Behrami* decision of the European Court of Human Rights, this issue has attracted a lot of comments. I wish only to point out that the ILC, while duly taking note of the position adopted by the Court, reasserted its earlier view as to the right criterion to be used for attribution. This will also provide food for thought for all of us.

Lastly, the articles contain a provision giving priority to special rules of international law, including those of the organization concerned, over the general rules embodied in the draft. We will have to consider whether this classical *lex specialis* clause is sufficient to take into account the very diverse nature and mandates of international organizations.

There are obviously many other noteworthy issues in this text. This illustrates the importance for all of us to provide comments to the ILC before January 2011. Let me assure you that we will provide the Commission with our own assessment of the most significant aspects of this topic, based on a thorough ongoing review of the UN practice in that field.

(Privileges and Immunities)

I would also like to touch on the issue of privileges and immunities. As you are aware, the Organization conducts various programme activities in almost all of its Member States. In doing so, it is crucial for the Organization to ensure that the appropriate privileges and immunities are extended to its personnel and property. For this reason, we seek to conclude appropriate Conference, Office and Headquarters Agreements, among others, with the Governments concerned. In doing so, we seek to minimize the potential costs and administrative burden to the Organization. In doing so, we also aim to ensure that the resources provided by Member States are focused on programme delivery rather than being used to meet legal expenses, taxes, fees, insurance and the like which could arise were these Agreements not concluded, or if they are concluded without the essential provisions, such as those on privileges and immunities. I am taking this opportunity to emphasize the extent to which we must and do rely on your support to explain in your capitals the rationale and basis for such Agreements. I also

call on your support to assist in clarifying the legal implications and the importance of these Agreements to the ongoing work of the UN. For our part, we fully recognize that different national systems may require adjustments to our proposed texts. I and my colleagues are committed to finding solutions that meet those requirements.

In closing, I want to thank you for your attention to these important issues. Who knows what each of us will have to deal with before I have the privilege of meeting you again. I am pleased to have this opportunity to express my respect for the challenging work which each of you do and to reassure you of the support and friendship which we in the OLA have towards you.

On a practical note, I would never have thought, one year ago, that I would oversee a move of OLA from this beloved building to Madison Avenue. We are learning to compete at lunchtime for sandwiches with lawyers from the private commercial world. And this I do know - we have a *lot* to learn.....I hope that you know that our new door is open and I would be honoured to welcome you.

A final word - if I may: I know this Secretary General wants the world's most senior public international lawyers to affirm the centrality of the law in global affairs in the difficult issues which we will all have to face. I wish you all the best in your efforts, and I look forward to working with you too.

On this note, I wish you fruitful discussions and a successful meeting.

Thank you.