

Statement by Ms. Patricia O'Brien,  
Under-Secretary-General for Legal Affairs, The Legal Counsel  
**Seminar on the International Court Justice**  
Informal Meeting of Legal Advisers, New York, 25 October 2011

President Owada,  
Registrar Couvreur,  
Our distinguished Academic Speaker, Mr. Dapo Akande  
Distinguished Legal Advisers,  
Ladies and Gentlemen,

**[Introduction]**

I am delighted to be here today addressing you at the second in the series of seminars on the International Court of Justice. This initiative was launched last year as part of a broader programme on the Rule of Law. My office felt that it was important to look at the work of the ICJ as a principal organ of the United Nations and to engender a better understanding of its work.

I am grateful to President Owada for his very informative and engaging presentation on the development of the Court's Advisory Jurisprudence

I will speak briefly about the United Nations and how the advisory opinions of the International Court of Justice have played a key role in the development of the Organization. I will pay particular attention to the Organization's legal personality and the doctrine of implied powers.

**[The Legal Personality of the United Nations]**

Nowadays, we take the Court's advisory opinion in the Reparations case very much for granted and, with it, the notion, upheld by the Court, that the United Nations enjoys its own legal personality under international law, separate from those of its Member States. Yet we should remember how doubtful even some of the original Member States were in 1945 about the project of the United Nations. At that time, conceptions of State sovereignty in many quarters verged on the absolute, and there were accompanying doubts and fears lest the new international organization become something more than the sum of its parts and develop into some kind of

Super State. To recognize it as having its own international legal personality would be a first step down that path.

The robust affirmation of the International Court of Justice — that the United Nations was intended to exercise and enjoy, and was already in fact exercising and enjoying, functions and rights which could only be explained on the basis of the possession of a large measure of international personality and the capacity to act upon an international plane — definitively put an end to any doubts on this score and provided a rock solid, incontrovertible foundation for the Organization's future action. The Court's lapidary statement that the United Nations is an international person is now a commonplace. A vast, rich practice has developed on the basis of it. The Organization has concluded thousands of treaties with its Member States, ranging from simple conference agreements to complex status-of-forces agreements, and it routinely intercedes with Member States to afford protection for its personnel. It is perhaps a measure of how far we have come that the International Law Commission has just concluded its consideration of the subject of the responsibility of international organizations.

### **[The doctrine of implied powers]**

In the same vein, there was resistance in some quarters to the idea that the Charter had some kind of special nature as a constitutional document.

It was generally accepted that the Organization of course had more powers than were spelled out in the express terms of the Charter. How could it be otherwise? Nevertheless, many took a conservative view of what those powers might be: they had to be necessarily implied by, or inferred from, the express powers in the Charter. If, for example, the Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security, as Article 99 provides, then he must necessarily be able to investigate that "matter" first. Therefore, Article 99 of the Charter implicitly confers on the Secretary-General certain powers of fact-finding.

Others took a less restrictive, but still essentially conservative, line: that, in addition to the powers expressly conferred by the Charter, the Organization also

must be deemed to have those implied powers that are necessary or essential for it to be able to fulfil its purposes and functions.

From the first, the Court has taken a more liberal — I would prefer to say, more constructive — approach.

In the Reparations case itself, the majority took the view that the Organization had the power to bring a claim in respect of the damage done, not only to the Organization itself, but also to its agents or to persons entitled through them — affirming that the existence of such a power was necessary for the effective performance of the Organization's functions.

The Court confirmed this approach in its 1954 **Advisory Opinion on the Effect of Awards of Compensation made by the Administrative Tribunal**. In that opinion, the Court advised that the Organization had the power to establish a judicial tribunal to adjudicate disputes between the Organization and its staff. No such power is mentioned in the Charter. However, such a power was essential, in the opinion of the Court, in order to ensure the efficient working of the Organization and to secure the highest standards of efficiency, competence and integrity among its staff.

Some Governments appearing before the Court argued, however, that this did not mean that the General Assembly had the power to establish a tribunal with the authority to make decisions binding on the General Assembly itself. "[A]n implied power", they contended, "can only be exercised to the extent that the particular measure under consideration can be regarded as absolutely essential"; and it was not "absolutely essential" that any tribunal be able to issue final judgments, binding upon the General Assembly itself

The Court accepted that this was so — it was not absolutely essential that the tribunal be able to issue judgments that were binding upon the General Assembly. But, crucially, it said, this missed the point. It was for the General Assembly to decide how best to exercise its power to establish a tribunal — how to ensure the efficient working of the Organization —, and, to that end, it had decided to establish

one with the power to render judgments that would be “final and without appeal” and binding upon the United Nations.

Subsequent advisory opinions of the International Court of Justice have taken a similarly liberal or constructive approach. Thus, in its advisory opinion in the *Certain Expenses* case, the Court famously and robustly affirmed that when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization. Nine years later, in its advisory opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (the Namibia case), the Court affirmed that the Security Council had powers that went beyond those spelled out in the express provisions of the Charter, relying in part, for such an important proposition, on what some have viewed as a rather weak textual implication from Article 24, paragraph 2, of the Charter. Indeed, the Court cited with approval the words of the Secretary-General that “the powers of the Council under Article 24 are not restricted to the specific grants of authority contained in Chapters VI, VII, VIII and XII [of the Charter]. . . the Members of the United Nations have conferred upon the Security Council powers commensurate with its responsibility for the maintenance of peace and security. The only limitations are the fundamental principles and purposes found in Chapter I of the Charter.”

Perhaps even more than their contribution to the jurisprudence on implied powers, these last two advisory opinions are noteworthy, together with the Court's advisory opinion in the second *Admissions* case, for their recognition that the practice of the organs of the Organization is a source of the Organization's law. Thus, in the second *Admissions* and the *Expenses* cases, the Court looked to the practice of the Security Council and of the General Assembly to confirm the interpretations that it had reached on the basis of the text of the Charter; while, more dramatically, in the Namibia case, the Court relied upon the consistent and uniform practice of the Security Council in order to justify its reading of the Charter. The role that the practice of an international organization enjoys as a source of its rules was subsequently codified in the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations and in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations.

## **Conclusion**

Ladies and gentlemen,

The International Court has, of course, made signal contributions to the law of the United Nations in other fields, beyond the ones I have mentioned: most notably, perhaps, the law of the Organization's privileges and immunities . But I hope that, with these few remarks, I have succeeded in giving you a sense of the immense contribution that the International Court of Justice has made, through its advisory opinions, to the development of the law of the United Nations and of how the Court's jurisprudence has placed the Organization's work on a solid legal footing.

Please allow me to introduce our distinguished Academic Speaker, Mr. Dapo Akande.

Mr. Akande is Director of the Oxford Institute for Ethics, Law and Armed Conflict at Oxford University. He has published articles on aspects of the law of international organizations, international dispute settlement, international criminal law and the law of armed conflict. He has advised States and international organizations on matters of international law and has also advised and assisted counsel or provided expert opinions in cases before the International Court of Justice.

I'm sure Mr. Akande's presentation will be both informative and thought-provoking.

Thank you.