

COMMISSION DU DROIT INTERNATIONAL

**Déclaration par Mme Patricia O'Brien
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Conseiller juridique des Nations Unies**

Le 13 mai 2009

Monsieur le Président,

Mesdames et Messieurs les membres de la Commission du droit international,

C'est un honneur et un grand plaisir pour moi de m'adresser à vous pour la première fois en ma qualité de Conseiller juridique des Nations Unies. Lorsque, l'année dernière, dans cette même salle, j'ai participé à la célébration du soixantième anniversaire de la Commission, j'ai pris la pleine mesure de l'importance que la communauté internationale attache à vos travaux. Les débats enrichissants que nous avons eus hier encore en portent un autre témoignage.

Plus que jamais sans doute, la Commission traite de questions et de thèmes d'une très grande importance pour la codification et le développement progressif du droit international contemporain. Avant de poursuivre mon exposé en anglais, je tiens à vous dire, en bon français je l'espère, que, dans l'accomplissement de votre tâche, vous pouvez compter sur mon soutien et celui de la Division de la Codification.

Ladies and Gentlemen,

Let me first congratulate Sir Michael Wood and Mr. Shinya Murase on their recent election following the resignation of Mr. Ian Brownlie and Mr. Chusei Yamada, after many years of dedicated service to the Commission. The Commission will undoubtedly benefit greatly from the experience and well-known expertise of Sir Michael Wood and Mr. Murase.

Following the tradition established by my predecessors, I will address a number of issues which, I believe, are worth being brought to your attention, as they bear on your work and professional activities. I will first offer an update on the work of the General Assembly, through the work of the Sixth Committee and its Ad Hoc Committees. I will then turn to the current work of

the Office of Legal Affairs. In this context, I will give an overview of the activities of the Office of the Legal Counsel, the Division for Oceans and the Law of the Sea and the International Trade Law Division. I will continue with some remarks on the efforts made by the Codification Division and the Treaty Section to enhance the dissemination of international law. I will then conclude with some brief observations regarding budgetary issues.

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General Assembly and Ad Hoc Committees

A number of significant developments have taken place during the 63rd session of the General Assembly in the context of the Sixth Committee. The General Assembly, in its resolution 63/120, has expressed its appreciation to the **Commission** for the work accomplished at its sixtieth session. It has particularly emphasized the completion of the first reading of the draft articles on the “Effects of armed conflicts on treaties” and of the second reading of the draft articles on the law of transboundary aquifers. At this stage, the latter articles have been taken note of, without prejudice to the question of their future adoption. The General Assembly will come back to this item at its 66th session.

Meanwhile, States have been requested to take into account the principles embodied in the articles in their interactions.

The General Assembly has also taken note of your decision to include the topics “Treaties over time” and “The Most-Favoured-Nation Clause” in your programme of work. In addition, it has requested the Secretary-General to prepare a report “on the assistance currently provided to Special Rapporteurs and options regarding additional support of the work of Special Rapporteurs”.

Additionally, the General Assembly adopted resolution 63/118 relating to “Nationality of natural persons in relation to the succession of States”, a subject of previous consideration by the Commission. Deciding to revert to this item in 2011, the General Assembly has invited Governments to submit comments concerning the advisability of elaborating a legal instrument on the question.

The **promotion of the rule of law at the national and international levels** remains one of the most salient items on the UN agenda. In the Sixth Committee, delegations appreciated the useful contribution made by the Commission on this topic in its last year’s report. In its resolution 63/128, the General Assembly

reaffirms its role in encouraging the progressive development of international law and its codification; it also, *inter alia*, invites the Commission to continue to comment in its report on its current role in promoting the rule of law. For the next three sessions to come, the Sixth Committee has selected some specific sub-topics for its debate: this year's focus will be on "Promoting the rule of law at the international level"; in 2010, the debate will deal with "Laws and practices of Member States in implementing international law". In 2011, the "Rule of Law and transitional justice in conflict and post-conflict situations" will be the main focus. Throughout the UN system, the rule of law has now become an issue of utmost importance, and efforts are being made to improve the coordination, coherence and effectiveness of rule of law activities within the UN system.

I will now turn to **Criminal accountability of UN officials and experts on mission**, an item which has been on the agenda of the Assembly since 2006. To supplement resolution 62/63, which strongly urged all States to consider establishing jurisdiction, particularly over crimes of a serious nature, as known in their existing domestic criminal laws, committed by their nationals while serving as UN officials or experts on mission, in 2008, the General Assembly adopted resolution 63/119, aimed at enhancing

international cooperation to ensure the criminal accountability of UN officials and experts on mission. The new elements concern, *inter alia*, mutual assistance in criminal investigations and criminal or extradition proceedings, including with regard to evidence; the facilitation of the possible use, in criminal proceedings, of information and material obtained from the UN; effective protection to witnesses; as well as the enhancement of the investigative capacity of the host State. The General Assembly decided that work on this topic should continue in 2009 in the framework of a working group of the Sixth Committee. The possibility of elaborating a legally binding instrument on the matter remains one of the open questions.

The reform of the system of **administration of justice at the UN** is another salient issue, on the agenda of both the Sixth and the Fifth Committees. The adoption of resolution 63/253, last December marks significant progress in this reform. By that resolution, in particular, the Assembly adopted the statutes of the new UN Dispute Tribunal and the UN Appeals Tribunal, which shall become operational as of 1 July 2009. The judges of both Tribunals, as well as three *ad litem* judges appointed for one year to the Dispute Tribunal, were elected by the Assembly in the course of March. As a consequence of this reform, the current

joint appeals boards and disciplinary committees, as well as the UN Administrative Tribunal, will be abolished in the course of this year. A number of legal aspects of this reform, however, are outstanding. These include the issue of ensuring that effective remedies are available to the various categories of non-staff personnel of the UN, and questions of legal assistance to staff and of the possibility of staff associations filing applications before the Dispute Tribunal. These outstanding issues were addressed by the Ad Hoc Committee on the Administration of Justice at the UN, which met at the end of April, and will continue to be discussed in the upcoming session of the General Assembly.

“Measures to eliminate international terrorism” has been, for a number of years, a major item on the agenda of the General Assembly. Since 2001, a Working Group of the Sixth Committee and an Ad Hoc Committee on the subject have been exploring ways of resolving outstanding issues in the elaboration of the draft comprehensive convention against international terrorism, relating essentially to the exclusionary elements of the scope of application of the convention. In resolution 63/129 of 11 December 2008, the General Assembly decided that the Ad Hoc Committee shall meet from 29 June to 2 July 2009 in order to fulfill its mandate.

To conclude this cluster of issues let me briefly turn to the February session of the **Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization**. The Special Committee has now completed its consideration of the working paper submitted by the Russian Federation, on “**Introduction and Implementation of Sanctions Imposed by the United Nations**”. The document will now be submitted to the General Assembly for consideration with a view to its adoption.

Ladies and Gentlemen,

I wish now to share with you some information on issues related to other activities of the Office of Legal Affairs.

I will begin with recent issues relating to international justice, including; some observations on the ICJ and the “peace and justice” dilemma

International Court of Justice (ICJ)

With regard to the International Court of Justice (ICJ), several developments have occurred during the past year. Regular

elections for 5 Members of the Court were held on 6 November 2008, whereby 3 Members of the Court were re-elected and 2 Members were newly appointed. Following the regular elections and the retirement of the Court's former President, Judge Rosalyn Higgins, the new President Judge Hisashi Owada of Japan was kind enough to prioritise a visit to UN Headquarters last month. During his visit, President Owada met with the Secretary-General, the President of the General Assembly, the Chairman of the Fifth Committee, the Chairperson of the ACABQ, as well as myself.

In October 2008, the General Assembly requested an Advisory Opinion on whether “the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo [is] in accordance with international law”. As part of Secretary-General's statutory duties under the Statute of the Court, the Secretariat has submitted a voluminous Dossier for the Court's consideration on the matter. This Dossier may be viewed on the Court's website.

INTERNATIONAL CRIMINAL JUSTICE

(International Criminal Court)

The establishment of the International Criminal Court capped the efforts of the international community to enforce the applicability

of international humanitarian law, and advance the cause of justice and the rule of law on a universal scale. 108 States are now Parties to the Statute, and 139 are signatories.

The Court has been active on a number of cases.

In the Democratic Republic of the Congo, where the Court relies heavily on cooperation from the UN, former Ituri warlords Germain Katanga and Mathieu Chui have been surrendered to the Court and the arrest warrant against Bosco Ntaganda has been unsealed. The charges against Katanga and Chui have now been confirmed, and the case is being prepared for trial. In January, the Prosecutor's case against Thomas Lubanga Dyilo entered the trial phase. The Lubanga trial, the first in the short history of the ICC, has been widely hailed as a historic event, which probably would not have been possible without the committed support of the UN, including the Office of Legal Affairs.

Last year, the Office of the Prosecutor opened a formal investigation in the Central African Republic, in particular into allegations of rape and other acts of sexual violence against women. The arrest and surrender to the seat of the Court of Jean-

Pierre Bemba Gombo by Belgian law enforcement authorities on 3 July 2008 has been a major success of the Court.

There have been important developments also with regard to the situation in Northern Uganda - a case of self-referral to the ICC. Within the framework of the so-called “Juba Peace Process”, the Lord’s Resistance Army (LRA) and the Government of Uganda have concluded a series of agreements with a view to ending a far-reaching two-decade conflict. While the framework “Final Peace Agreement” has not yet been signed by the LRA leader, the Juba process has not failed. Following the military campaign mounted by the armed forces of Uganda, the DRC and Southern Sudan, the Juba process has taken centre stage again. Beyond the fate of the surviving LRA leaders and their surrender or otherwise to the ICC, the question facing Uganda is ultimately how to reconcile sustainable peace and its people’s desire for justice.

With regard to the situation in Darfur referred to the ICC by the Security Council, an arrest warrant was issued against the President of Sudan on 4 March – the third individual against whom an arrest warrant has been issued in the case of Darfur. As you will understand, I do not wish to comment any further on this sensitive matter.

A few years only into its existence, the International Criminal Court has emerged as the centrepiece of our international system of criminal justice. As it advances in its judicial mission, the UN will accompany and support it in every respect.

(Peace and Justice)

At the heart of many of the judicial and non-judicial accountability mechanisms lies the dilemma of peace and justice. With the growing involvement of the UN in post-conflict societies – both in facilitating the negotiations of peace agreements and in establishing judicial and non-judicial accountability mechanisms – the Organization has frequently been called upon to express its position on the relationship between peace and justice, on the validity and lawful contours of amnesty, on the relationship between the ICC and other judicial accountability mechanisms - notably national ones - and on the interaction between UN representatives and persons indicted by international and UN-based tribunals who continue to hold positions of authority in their respective countries.

In the last decade, post-conflict societies emerging from years of internal conflicts and large scale violations of international

humanitarian law were caught in the dilemma between peace and justice. Faced with the choice of granting sweeping amnesties to combatants as a condition for laying down their arms, peacemakers have opted for large-scale amnesties, for the urgent need for peace has overridden, for a while at least, the need for justice.

In paving the way for holding to account those responsible for genocide, crimes against humanity and war crimes, the UN has redefined the lawful contours of amnesty. In Sierra Leone, Cambodia, Angola, Burundi, and Sudan, amnesty for genocide, crimes against humanity and war crimes has been rejected, invalidated or otherwise declared not to constitute a bar to prosecution. Justice has thus become a component of peace, although in the sequence of events it has sometimes ranked second in time.

After a decade-long debate over how to reconcile peace and justice, and whether to pursue them simultaneously or sequentially, the debate, it now seems, is no longer simply between “peace and justice” but between “peace and what kind of justice”.

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I will now talk about matters concerning **oceans and the law of the sea**, in particular current tasks performed by the Division for Ocean Affairs and the Law of the Sea. As you are aware, one of the major issues regulated by the 1982 Convention on the Law of the Sea is the activities relating to the continental shelf.

During its twenty-second and twenty-third sessions, the Commission on the Limits of the Continental Shelf adopted recommendations regarding the submissions made, respectively, by New Zealand, Norway, Mexico and the joint partial submission made by France, Ireland, Spain and the United Kingdom of Great Britain and Northern Ireland. For many States parties to the Convention, the time-period for making such submissions expired yesterday, 12 May 2009. As at that date, the Secretary-General has received a total of 50 submissions made by coastal States, individually or jointly, to the Commission on the Limits of the Continental Shelf, pursuant to article 76, paragraph 8, of the United Nations Convention on the Law of the Sea, 38 of them since November 2008. In addition, the Secretary-General has received 39 sets of preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles from States which decided to avail themselves of this option offered by decision SPLOS/183 of the Meeting of States parties in order to

fulfil the time-limit requirements set out by the Convention, as well as by the decision of the Meeting contained in the SPLOS/72.

In September 2008, the Division completed its three-year cycle of training to assist developing States in the preparation of submissions to the Commission. As a result of this cycle of courses, the Division has trained 299 scientific and technical experts from 53 developing States.

In the context of fisheries governance, the Division continues to monitor and report to the General Assembly on issues relating to illegal, unreported and unregulated (IUU) fishing, and impacts of bottom fisheries on vulnerable marine ecosystems. On the basis of a report to be prepared in cooperation with the FAO, later this year the General Assembly will conduct a review of actions taken by States and regional fisheries management organizations and arrangements to regulate bottom fishing activities and protect vulnerable marine ecosystems, with a view to further recommendations, where necessary. The Division has also begun preparations for the resumption, in 2010, of the Review Conference on the UN Fish Stocks Agreement, convened by the Secretary-General with a view to assessing the effectiveness of the

Agreement in securing the conservation and management of straddling fish stocks and highly migratory fish stocks.

With regard to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction, the Division is currently preparing the third meeting of the Ad Hoc Open-ended Informal Working Group, which will be held in 2010 and will provide recommendations to the General Assembly.

In order to assist States in the implementation of the provisions in the Convention on marine scientific research, the Division has prepared a draft revision of its earlier publication on this subject with the assistance of a Group of Experts, which met in April.

The Division has also developed a comprehensive training manual and delivered a training course on the implementation of ecosystem approaches to ocean management.

Let me also note that as of 2009, the UN has designated 8 June as World Oceans Day. Preparations are currently underway to mark the inaugural event this year, which will include a high-level

panel to discuss topical oceans issues, in particular, challenges in fully utilizing the benefits and opportunities of the oceans.

The work of the Division has also increasingly focused on activities taking place in areas beyond national jurisdiction. Incidents of piracy off the coast of Somalia have raised a number of legal issues relating, *inter alia*, to the exercise of jurisdiction, use of force, international human rights, and prosecution of alleged offenders. The Division monitors and provides reports to the General Assembly on relevant developments at global and regional levels. In addition, it provides advice and assistance to States and intergovernmental organizations on the uniform and consistent application of the provisions of the Convention relating to piracy, including by reference to the commentary on the draft articles relating to piracy that were adopted by the International Law Commission in 1956. For its part, the Office of the Legal Counsel has been monitoring proposals for an international judicial response to incidents of piracy.

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The International Trade Law Division (ITLD) is the substantive secretariat of the United Nations Commission on International Trade Law (UNCITRAL). UNCITRAL's mandate

includes the enhancement of international trade and development by the promotion of certainty in international commercial transactions, in particular through the promulgation and dissemination of international norms and standards. In this regard, UNCITRAL addresses both relevant aspects of public sector governance and private international commercial transactions. As regards public sector governance, UNCITRAL is engaged in public procurement law reform at the national level, and is scheduled to discuss revisions to its Model Law on Procurement of Goods, Construction and Services at its June-July 2009 session.

As regards private international commercial transactions, a notable recent achievement is the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (to be known as "the Rotterdam Rules"), adopted by the General Assembly last year on the basis of the text prepared and approved by UNCITRAL. This instrument aims at creating a contemporary and uniform law for modern door-to-door container transport. Also in this commercial area, UNCITRAL is currently revising one of the most successful international instruments of a contractual nature in the field of arbitration, the UNCITRAL Arbitration Rules, so as to take account of developments in the arbitration practice over the past years. In the area of electronic commerce, it

is in the process of developing standards applicable to single window facilities. In the area of insolvency, UNCITRAL is promoting cooperation and coordination between courts, and courts and insolvency representatives, including the use of cross-border agreements, and promulgating standards with respect to the treatment of enterprise groups in insolvency). And finally in the area of security interests, UNCITRAL is harmonizing and modernizing secured financing law through the UNCITRAL Legislative Guide on Secured Transactions which is being broadened to include security over intellectual property assets.

In addition to assisting UNCITRAL with fulfilling its legislative mandate, ITLD is carrying out technical assistance and cooperation activities to enable wider acceptance, the effective implementation and uniform implementation of UNCITRAL texts, coordinating activities in related fields among international organizations, and is assisting the Commission in undertaking a comprehensive review of its working methods.

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Let me now turn to the **dissemination of international law**, in particular via the websites developed by the Codification Division and the Treaty Section. During the last year, the

Codification Division has continued to expand its various **websites dedicated to international law**, including through the establishment of three new websites. In particular, I am pleased to recall the launch, last October, of a major new website for the **UN Audiovisual Library of International Law**. The new site represents a conscious decision by the Secretariat to revive the Audiovisual Library as an important tool for disseminating information on international law, especially to developing countries. The new website has three main components: (i) the *Lecture Series* which provides video lectures by eminent international law scholars and practitioners from different countries on virtually every subject of international law; (ii) the *Historic Archives* containing introductory notes prepared by internationally recognized experts, audiovisual materials recording the history of the negotiation and adoption of significant legal instruments, the procedural history as well as the text of the legal instruments and other key documents; and (iii) the *Research Library* which provides an extensive online library of international law materials, including treaties, jurisprudence, UN documents, yearbooks and legal publications as well as scholarly writings. Thanks to a generous contribution from Germany, the Codification Division has initiated a pilot project providing for the interpretation of the lectures into all official languages of the UN.

All of these materials are available for free to any user of the website. The website has already been accessed by thousands of students and practitioners of international law in over 150 countries representing 61 different languages. The website will continue to be updated and expanded in the coming years.

Furthermore, the Codification Division has established a **new website for the UN Juridical Yearbook**. It has also digitized and placed on the Internet almost all the official records of the various **major diplomatic conferences** which resulted in the adoption of international conventions, in particular those based on the work of the Commission. In addition, it is now possible to not only search the full text of individual serials, such as the Yearbook of the International Law Commission, but also to search across all the legal publications that the Division has placed on the Internet.

Lastly, the Secretariat has negotiated an agreement with “HeinOnline”, a major Internet distributor of legal materials available in most regions of the world, whereby a number of the Organization’s publications, including the Yearbook of the Commission, have been made available to its subscribers. This is in addition to the free access that users of the Commission’s website have to the Yearbook.

The Division has also continued to prepare ad hoc and regular mandated publications. Most recently, a new edition in English of the *Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice*, covering the period 2003-2007, has been issued.

Let me now say a few words about the new and substantially enhanced website launched in September 2008 by the Treaty Section both in English and French. The **UN Treaty Collection (UNTC)** website, is the authoritative source of information on multilateral treaties deposited with the Secretary-General and treaties registered with the Secretariat. The user registration requirement was discontinued and the UNTC is now completely free for all categories of users.

The new website offers expanded possibilities for legal research and training. Among its features are:

- Convenient and timely access to the world's largest database of treaties deposited or registered with the Secretary-General;
- Daily updates on the participation status of over 500 multilateral treaties deposited with the UN Secretary-General (openings for signature, signatories, parties, reservations, declarations);

- Full text search capability for treaties registered with and published by the UN Secretariat online in the UN Treaty Series, monthly statements of treaties and international agreements registered with the Secretariat;
- Automated subscription to the latest depositary notifications;
- Latest treaty texts in their authentic languages and related information made available online shortly after registration by the Secretariat.

The “2009 Treaty Event: Towards Universal Participation and Implementation” will be held from 23 to 25 and 28 to 29 September in the Treaty Signing area in the General Assembly Building in New York. The event will coincide with the General Debate of the sixty-fourth session of the General Assembly. As in previous years, this occasion provides a distinct opportunity for States to demonstrate their continuing commitment to the central role of the rule of law.

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I would like to address briefly the issue of funding related to the work of the Commission. These are times of dwindling resources. The UN has been proceeding on a zero growth budget

for some time now, and this has been posing budgetary constraints on programmes, and the Commission's activities have not been insulated by these developments. Creative ways of meeting Commission objectives have to be found if we are to continue to operate within the available budgetary constraints.

Members of the Commission are aware that during the past several biennia there have been limitations on budgetary growth at the UN. This has meant that the funding for travel and Daily Subsistence Allowance for members has not been able to grow to meet the increasing costs in other areas. In other words, it has been costing more and more US dollars to make payments in Swiss Francs in respect of ILC expenditures. In recent years it has been possible to overcome such shortfalls by identifying other available funds within the overall budgetary allocations made to the Office of Legal Affairs. However, the scope to alleviate any such short fall in the future with other funds is likely to be much reduced.

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Ladies and gentlemen,

The work of the International Law Commission exemplifies the important work that the General Assembly has done in encouraging the progressive development of international law and its codification. The sixtieth anniversary celebrations last year demonstrated the continuing relevance of the Commission. The Commission can count on my continuing and concerted support as it continues to discharge its important mandate, at the time when the reaffirmation of the rule of law in international relations has become so essential.

I look forward to our continuing collaboration in the period ahead.

Thank you very much.