

**KEYNOTE ADDRESS BY H.E. JUDGE ROSALYN HIGGINS, PRESIDENT OF THE
INTERNATIONAL COURT OF JUSTICE, AT THE SIXTIETH ANNIVERSARY
OF THE INTERNATIONAL LAW COMMISSION**

19 May 2008

Director-General,

Federal Counselor Calmy-Rey,

Mr. Michel,

Mr. Chairman,

Excellencies,

Ladies and Gentlemen,

I am delighted to be invited to speak at the sixtieth anniversary of the International Law Commission (ILC), an institution for which I have the greatest admiration.

The ICJ and the ILC are both fully engaged in the interpretation and development of international law, while each performing rather different functions. The International Court pursues the purpose laid down in Article 1 of the United Nations Charter: the maintenance of international peace and security. Its particular contribution to this goal is the judicial settlement of international disputes. The Court can only address those legal issues brought before it by States under its contentious jurisdiction or by United Nations organs or authorized agencies seeking an advisory opinion. The Commission finds its purpose in Article 13 (1) (a) of the Charter, which mandates the General Assembly to “initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification”. The Commission is free to choose the legal topics of its study, subject to giving priority to any request made by the General Assembly.

What can the members of such an institution reasonably hope for when celebrating a landmark anniversary? They can surely wish that all the heavy work they have engaged in will have been for some tangible purpose and that their labours will be held in high regard.

Over the past six decades the ILC has dealt with some hugely challenging themes — and everyone of us in international law is indebted to the Commission for taking them on. The ILC is entitled to feel that its work has had a significant impact. This impact is not only measured by the extent to which draft Articles have been formally accepted by Governments or indeed passed into treaty mode. The work of the ILC in all its forms — the reports of Special Rapporteurs, draft articles, commentaries, guiding principles, analytical studies — is a rich source of scholarly analysis as to the practice of States and the often problematic underlying issues.

Whether a text prepared by the ILC represents customary international law, whether in its commentaries or Yearbooks it elucidates divergent viewpoints on difficult points, the ILC, through its endeavours, makes a major contribution to international law. The evidence, if evidence be needed, is that we all — including the International Court of Justice — have frequently had occasion to turn to ILC studies on particular matters.

In many cases before the International Court the parties have relied upon — and the Court has carefully considered — the work of the ILC, which thus makes its indirect contribution also to international dispute settlement.

If we look at cases decided by the Court over the past three years, it is remarkable to note the high percentage in which reference has been made to the work of the ILC. The Court has referred in its reasoning to the ILC Articles on Responsibility of States for Internationally Wrongful Acts in its Judgment on the merits in the *Congo v. Uganda* case, its Order on the Request for the Indication of Provisional Measures in the *Argentina v. Uruguay* case, and, most notably, in its Judgment in the *Genocide* case (*Bosnia and Herzegovina v. Serbia and Montenegro*). In this last case, the Court also shared the view of the ILC's State Responsibility Articles on the correct legal test for the attribution of responsibility to a State of the conduct of non-State entities, and concurred with the ILC's definition of genocide in customary international law expressed in its Commentary to its Articles in the Draft Code of Crimes Against the Peace and Security of Mankind.

The Vienna Convention on Diplomatic Relations 1961, an instrument concluded on the basis of prior drafts prepared by the ILC, was in issue in the *Congo v. Uganda* case, while the ILC draft Articles on Diplomatic Protection 2006 made their appearance in several aspects of the Judgment on preliminary objections in the *Guinea v. Congo* case. And, in the Judgment on the merits in the *Nicaragua v. Honduras* case, the Court even had occasion to refer to the early work of the ILC as regards the 1958 Convention on the Territorial Sea and Contiguous Zone.

Conversely, the case law of the Court manifestly has relevance for the work of the ILC. Among the recent jurisprudence of the Court, the Judgment in the *Guinea v. Congo* case touches on the same theme as the ongoing work of the Commission on the "expulsion of aliens". The forthcoming Judgment in the *Djibouti v. France* case is being watched for what it may say on the topic of "immunity of State officials from foreign criminal jurisdiction" and of "Head of State immunity".

The International Court is mindful of its two-way relationship with the ILC and takes every opportunity to foster mutual respect. To take a recent example: when a question arose in the *Guinea v. Congo* case regarding the status in customary international law of a rule contained in the ILC draft Articles on Diplomatic Protection, the Court found that the facts before it did not seem to correspond to the scenario envisaged in the draft Article. The question of whether or not the ILC's draft Article reflected customary international law was therefore carefully and deliberately left open. For its part, the ILC has on occasion paused in its work on specific topics, including the final formulation of your views on guarantees and promises of non-repetition, until the ICJ had pronounced in certain pending cases.

The mutual influence between the ICJ and ILC has been apparent since the inception of these institutions. In fields such as the law of treaties, the law of the sea, the law of the non-navigable uses of international watercourses, State responsibility and State succession, the two institutions have for many decades found inspiration in each other's work.

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Over and above the strong interest that the ICJ and ILC each take in the substantive work of the other, we also maintain significant personal links. For over a decade now the ILC has invited the President of the International Court of Justice to come to Geneva to address the plenary meeting and engage in an exchange of views. These exchanges are greatly appreciated by the Court.

Thirty-three judges of the Court have previously served as members of the Commission¹. Many of them were elected to the Court during their term on the Commission or immediately after the expiration of their term. Eight of these judges subsequently served as President of the Court. Currently, seven judges (or nearly half the Bench) are former members of the Commission: Vice-President Al-Khasawneh, Judge Shi, Judge Koroma, Judge Simma, Judge Tomka, Judge Sepulveda, and Judge Bennouna. I can assure you that they ensure that the work of the ILC is always in the Court's sights.

The ILC has been a forum for some of the "greats" in international law. It would be invidious for me to single out present members of the Commission, who most certainly *will* be in the pantheon of the great international lawyers. But I can with more safety make reference to some names of the past, who sadly are no longer with us. Some of their work may have been controversial, but even today who can doubt the tremendous contribution to the field of public international law made, while at the ILC, by such as Ago, Jiménez de Aréchaga, Reuter, Thiam, Tunkin, and Waldock.

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The sixtieth anniversary of the International Law Commission is an occasion for reflection on past achievements, but also for looking ahead. We are now living in an era in which international law is longer the exclusive domain of international courts and institutions—international law issues are increasingly being considered by national and regional courts.

I note that the ILC has established co-operative relationships with the Asian-African Legal Consultative Organization, the European Committee on Legal Co-operation and the Committee of Legal Advisers on Public International Law, the Inter-American Juridical Committee, and other regional and inter-regional organizations. Article 26 of the ILC Statute provides for the distribution of the Commission's documents to national organizations concerned with international law.

National courts increasingly see their role not as endeavouring to keep international law at arm's length, but as deciding issues before them, which task now often entails an incidental determination of points of international law.

As I read the various important judgments of different national courts, I see frequent reliance by Bar and Bench alike on the work of the ILC. The reports, draft Articles, and commentaries are cited and appreciated for their systematic analysis of State practice, jurisprudence and doctrine. It seems that the ILC has attracted a significant new audience of national lawyers and judges.

It is fitting that today's solemn meeting will be followed by a seminar on with national Legal Advisers. I am impressed by the hard-headed and realistic nature of the topics that have been chosen for discussion. While we all recognise that important work is being done by ILC, it is also true that it exists in a world of States, with their own interests. The challenge of, among other

¹R. Ago, B. A. Ajibola, A. S. Al-Khasawneh, M. Bedjaoui, M. Bennouna, R. Córdova, A. El-Erian, T. O. Elias, J. Evensen, L. Ferrari Bravo, N. Elaraby, Sir Gerald Fitzmaurice, A. Gros, L. Ignacio-Pinto, E. Jiménez de Aréchaga, V. M. Koretsky, A. G. Koroma, M. Lachs, Sir Hersch Lauterpacht, Nagendra Singh, Ni Zhengyu, L. Padilla Nervo, Sir Benegal Rau, J. M. Ruda, S. M. Schwebel, B. Sepúlveda-Amor, J. Sette-Camara, Shi Jiuyong, B. Simma, J. Spiropoulos, P. Tomka, V. S. Vereshchetin, Sir Humphrey Waldock.

things, improving the interaction between the Commission and Governments is a very real one. And, as ever, the ILC will continue to need top level members, prepared fully to commit their time and expertise to the service of the ILC.

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On behalf of all the Members of the International Court of Justice, it gives me great pleasure to participate in this solemn meeting to mark the sixtieth anniversary of the International Law Commission. In the past decades, the ILC has provided the expertise necessary to codify complex areas of international law and displayed the creativity required for the progressive development of international law. It has played the role of both expert and pioneer. We wish you every success in your mandate, and in developing and appraising the methods of work, for the continuing benefit of international law as a whole.
