

**SPEECH BY H.E. JUDGE ROSALYN HIGGINS, PRESIDENT OF
THE INTERNATIONAL COURT OF JUSTICE, TO THE
GENERAL ASSEMBLY OF THE UNITED NATIONS**

30 October 2008

President d'Escoto,

Excellencies,

Ladies and Gentlemen,

I am pleased to address you today under the presidency of His Excellency Father Miguel d'Escoto Brockmann, Senior Adviser on Foreign Affairs of Nicaragua. I warmly congratulate you, President d'Escoto, on your election as President of the Sixty-third Session of this Assembly and wish you every success in this distinguished office.

This is the third time that I have had the privilege of addressing the General Assembly on the occasion of its examination of the Report of the International Court of Justice (ICJ). The current Report covers the period 1 August 2007 to 31 July 2008 — this has been a period of intense judicial activity.

All 192 United Nations Members are *ipso facto* parties to the Court's Statute. Of those, 66 States have accepted the compulsory jurisdiction of the Court in accordance with Article 36, paragraph 2, of the Statute. In addition, some 128 multilateral conventions and 166 bilateral conventions envisage that the Court will be resorted to for the settlement of disputes arising from their application or interpretation.

For the past two years I have reported to you on the working methods that the Court has been applying to maximize its throughput — dealing with always more than one case at a time, producing judgments in a timely fashion while never sacrificing quality, and clearing the backlog of cases ready for oral hearing.

By applying these working methods, the Court has been able to manage a very full schedule of cases as well as to be in a position to respond swiftly to unanticipated requests for the indication of provisional measures.

Last year I informed you that the Court had had a very productive year. This year the Court has had the most productive year in its history. It has handed down four substantive judgments and one order on a request for the indication of provisional measures. Another order for provisional measures was given just two weeks ago, falling technically outside of the period covered by the Annual Report (but within the calendar year). Further, the Court has in this reporting period held hearings in four cases. First, it heard oral argument on the merits in the case concerning *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* in December, delivering its Judgment in May. Second, the Court completed hearings in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* in January and issued its Judgment in June. Third, the Court heard oral argument on preliminary objections in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* in May. That Judgment is now under preparation. Fourth, in June the Court held hearings on a request for the indication of provisional measures submitted by Mexico within the context of a Request for interpretation of the Judgment in the case concerning *Avena and Other Mexican Nationals (Mexico v. United States of*

America). The Court issued its Order on provisional measures one month later. The Court is currently deliberating on the underlying Request for interpretation.

In addition, in September the Court held hearings on the merits in the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*. That case is under deliberation as well. In August we received a new case submitted by Georgia: *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*. Georgia also requested provisional measures. Since the Court's Statute provides that such requests have priority over all other proceedings, the Court held hearings in September and issued its Order on provisional measures two weeks ago.

The cases we have decided in the past year have involved States from *every* United Nations regional group: Asia, Africa, Western Europe, Eastern Europe, North America and Latin America. The Court thus manifestly remains the court of the entire United Nations. The universal character of the Court is also reflected in the subject-matter of the past year's cases, which has ranged from human rights to territorial sovereignty to mutual legal assistance to maritime delimitation to interpretation of an earlier judgment.

In the past year, five new cases were submitted to the Court: *Maritime Dispute (Peru v. Chile)*; *Aerial Herbicide Spraying (Ecuador v. Colombia)*; the *Request for Interpretation* between Mexico and the United States, the *Georgia v. Russian Federation* case and the Assembly's request for an advisory opinion on the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo. The current number of cases on the docket is 14.

*

Today, as is traditional, I will report on the judgments rendered by the International Court during the reporting period. I will also briefly address the order on provisional measures issued two weeks ago. I shall deal with the decisions in chronological order.

In October 2007 the Court handed down its Judgment in the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, the hearings of which had been held in March 2007. The dispute concerned the maritime boundary between the two countries as well as sovereignty over four cays in the Caribbean Sea. In respect of sovereignty over the islands of Bobel Cay, Savanna Cay, Port Royal Cay and South Cay, located in the area in dispute, the Court concluded that it had not been established that either Honduras or Nicaragua had title to those islands by virtue of *uti possidetis juris*. Having then sought to identify any post-colonial *effectivités*, the Court found that sovereignty over the islands belonged to Honduras, as it had shown that it had applied and enforced its criminal and civil law, had regulated immigration, fisheries activities and building activity and had exercised its authority in respect of public works there.

As for the delimitation of the maritime areas between the two States, the Court found that no established boundary existed along the 15th parallel on the basis of either *uti possidetis juris* or a tacit agreement between the Parties. It therefore determined the delimitation itself. In view of the particular geographical circumstances of the area, it was impossible for the Court to follow the preferred practice of establishing an equidistance line. The Court thus drew a bisector (that is to say the line formed by bisecting the angle created by the linear approximations of the coastlines). The bisector method provided the delimitation line with greater stability as it was less affected by the changing nature of the coastline. It also greatly reduced the risk of error. The Court adjusted the course of the line to take account of the territorial seas accorded to the islands. The Court fixed the starting-point of the bisector at a distance of 3 nautical miles out to sea from an agreed point.

The Court instructed the Parties to negotiate in good faith with a view to agreeing on the course of a line between the present endpoint of the land boundary and the starting-point of the maritime boundary thus determined. In respect of the endpoint of the maritime boundary, the Court stated that the line which it had drawn continued until it reached the area where the rights of certain third States might be affected.

In December 2007, the Court decided another case involving Nicaragua: *Territorial and Maritime Dispute (Nicaragua v. Colombia)*. This time the case was at the stage of preliminary objections. After careful consideration of the Parties' arguments, the Court found that the Treaty signed by Colombia and Nicaragua in 1928 settled the issue of sovereignty over the islands of San Andrés, Providencia and Santa Catalina within the meaning of the Pact of Bogotá (invoked by Nicaragua as a basis of jurisdiction in the case). There was no extant legal dispute between the Parties on this question and the Court could not therefore have jurisdiction on that point. On the other hand, as regards the question of the scope and composition of the rest of the San Andrés Archipelago, the Court considered that the 1928 Treaty failed to provide answers as to which other maritime features formed part of the Archipelago. The Court thus held that it had jurisdiction, under the Pact of Bogotá, to adjudicate on the dispute regarding sovereignty over those other maritime features. As for its jurisdiction with respect to the maritime delimitation issue, the Court concluded that the 1928 Treaty and its 1930 Protocol had not effected a general delimitation of the maritime boundary between Colombia and Nicaragua and that, as the dispute had not been settled within the meaning of the Pact of Bogotá, the Court had jurisdiction to adjudicate upon it. The Court thus upheld Colombia's preliminary objections to its jurisdiction only in so far as they concerned sovereignty over the islands of San Andrés, Providencia and Santa Catalina. The Court has now set time-limits for the filing of the written pleadings on the merits.

In May 2008, the Court delivered its Judgment in a further case involving sovereignty over maritime features — this time involving two States from Asia which had come to the Court by special agreement: *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*. The Court first indicated that the Sultanate of Johor (Malaysia's predecessor) had had original title to Pedra Branca/Pulau Batu Puteh, a granite island on which Horsburgh lighthouse stands. It concluded however that, by the date when the dispute crystallized (1980), title had passed to Singapore, as attested to by the conduct of the Parties (in particular certain acts performed by Singapore *à titre de souverain* and Malaysia's failure to react to Singapore's conduct). The Court consequently awarded sovereignty over Pedra Branca/Pulau Batu Puteh to Singapore. As for Middle Rocks, a maritime feature consisting of several rocks that are permanently above water, the Court observed that the particular circumstances which had led it to find that sovereignty over Pedra Branca/Pulau Batu Puteh rested with Singapore clearly did not apply to Middle Rocks. It therefore found that Malaysia, as successor to the Sultan of Johor, should be considered to have retained original title to Middle Rocks. Finally, with respect to the low-tide elevation South Ledge, the Court noted that it fell within the apparently overlapping territorial waters generated by Pedra Branca/Pulau Batu Puteh and by Middle Rocks. Recalling that it had not been mandated by the Parties to delimit their territorial waters, the Court concluded that sovereignty over South Ledge belonged to the State in whose territorial waters it lies.

After this series of territorial and maritime disputes, the Court delivered a Judgment in June in a completely different type of case: *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*. This was the first occasion it fell to the Court to pronounce on a dispute brought before it by an application based on Article 38, paragraph 5, of the Rules of Court (*forum prorogatum*). This is when a State submits a dispute to the Court, proposing to found the Court's jurisdiction upon a consent yet to be given or manifested by the State against which the application is made. So it will attract much attention in the world of international law for that reason alone.

In this case, France did give its consent in a letter to the Court, specifying that this consent was "valid only for the purposes of the case, within the meaning of Article 38, paragraph 5, i.e. in respect of the dispute forming the subject of the Application and strictly within the limits of the

claims formulated therein” by Djibouti. The Parties disagreed as to exactly what France had agreed to. Reading Djibouti’s Application together with France’s letter, the Court determined the extent of the mutual consent of the Parties and resolved this problem.

The dispute before the Court concerned whether France had violated its obligations under the 1986 Convention on Mutual Assistance in Criminal Matters. In that Convention, judicial co-operation is envisaged, including the requesting and granting of “letters rogatory” (usually the passing, for judicial purposes, of information held by a party). The Convention also provided exceptions to this envisaged co-operation. A key question was — given that at the end of the day the French judicial authorities refused to pass the requested case file — whether that refusal fell within the permitted exceptions. Also at issue was whether France had in other regards complied with different provisions in the 1986 Convention. The Court held that the reasons given by the French investigating judge for refusing the request for mutual assistance fell within the scope of Article 2 (c) of the Convention, which entitles the requested State to refuse to execute a letter rogatory if it considers that execution is likely to prejudice its sovereignty, its security, its *ordre public* or other of its essential interests. The Court did however conclude that, as no reasons were given in the letter whereby France informed Djibouti of its refusal to execute the letter rogatory, France had failed to comply with its international obligation under Article 17 of the 1986 Convention to provide reasons.

In addition to these substantive judgments, the Court has pronounced on two requests for provisional measures. In July, the Court ruled on a request for the indication of provisional measures submitted by Mexico against the United States in connection with its Request for interpretation of the 2004 *Avena* Judgment. In its Order, the Court stated that the United States was to take “all measures necessary” to ensure that five Mexican nationals “are not executed pending judgment on the Request for interpretation” submitted by Mexico, “unless and until [they] receive review and reconsideration consistent with paragraphs 138 to 141 of the Court’s [*Avena*] Judgment”. The Court also held that the United States was to inform it of “the measures taken in implementation” of the Order. The underlying Request for interpretation is under deliberation and the Court will be issuing a decision in the near future.

A further request for an order on provisional measures came to the Court on 14 August in connection with the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*. The next day, acting in accordance with the powers conferred by Article 74, paragraph 4, of the Rules of Court, I addressed an urgent communication to the Parties, calling upon them “to act in such a way as will enable any order the Court may take on the request for provisional measures to have its appropriate effects”. The Court held three days of hearings in September and issued its Order two weeks ago, requiring both Parties to, *inter alia*, do all in their power to ensure the security of persons, the right of persons to freedom of movement and residence, and the protection of property of displaced persons and of refugees. The Parties are also called upon to facilitate humanitarian assistance.

*

In February 2009 the Court’s composition will change when the new Members, elected by the General Assembly and Security Council voting simultaneously, take their place on the Bench. Until that time we are working hard on the preparation of our judgments in the *Croatia v. Serbia*, *Mexico v. United States of America* and the *Romania v. Ukraine* cases. I am also glad to let you know that the Court has decided to open hearings in early March 2009 in the *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*. Later in the year, we will hold hearings in the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*. We will certainly be giving appropriate attention to the Assembly’s recent request for an advisory opinion

on whether the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo was in accordance with international law. We have already on 17 October issued an Order relating to procedural steps in this case.

You will remember that last year I informed you that due to a prodigious effort we had cleared the backlog of cases that had built up over the years. I am pleased to report that the backlog remains clear. States thinking of coming to the ICJ can be confident that as soon as they have finished their written exchanges, we will be able to move to the oral stage in a timely manner.

Last year the Court requested the creation of nine law clerk posts, a post for a senior legal officer in the Department of Legal Matters and a temporary post of indexer/bibliographer in the Library for the 2008-2009 biennium. While the latter two posts were granted, for which the Court is grateful to the General Assembly, only three of the nine law clerk posts were approved. Yet they remain as necessary as ever in order to enable each judge to benefit from personalized legal support for research, fact analysis and management of the case file. The situation remains that the International Court of Justice is the *only* major international court or tribunal which does not have one law clerk assigned to each judge. The pace of work of the Court, which has made it possible to ensure that States obtain justice without unreasonable delay, cannot be sustained without such assistance. In its budget submission for the 2010-2011 biennium, the Court will therefore reiterate its request for the creation of the six law clerk posts that have yet to be granted to it. Further, the Court would note that the General Assembly has unfortunately not provided it with the means to create an effective Documents Division by merging the Library and the Archives Division, as we had been advised to. It will therefore resubmit the request for a post reclassification, which, by itself, would enable the Court to implement the merger for the sake of greater productivity.

The Court will also be requesting certain additional new posts. It will also seek funds for the replacement and modernization of the conference systems and audio-visual equipment in its historic courtroom, the Great Hall of Justice, which will be renovated in co-operation with the Carnegie Foundation, the owner of the Peace Palace. The amount requested will also cover the installation of the most up-to-date information technology on the judges' Bench and the tables occupied by the parties to cases. This technology is essential to enhancing communication among the judges and the parties during the oral hearings. It will facilitate the immediate sharing of data and documents and the clear display of maps and images relevant to the case. The objective is to make the Great Hall of Justice a courtroom that serves the professional needs of those who use it, Bench and Bar. No court today can operate without these electronic facilities. The principal judicial organ of the United Nations cannot work as a court with archaic facilities. It is all part and parcel of greater efficiency.

Under Article 31 of the Statute, a party to a dispute before the Court, when no judge of that nationality is sitting on the Bench, is entitled to nominate a judge *ad hoc* to serve in full equality for the duration of that case.

Our heavy docket combined with the wide array of States using the Court, means there has been a very substantial take up of that possibility. In relation to its current docket the Court has 20 judges *ad hoc*. Over the past six years we have had 40 judges *ad hoc*.

Of course, they perform admirable service while at the Court. They receive the comparable daily rate of a regular judge for all work done together with travel and lodging. Judges *ad hoc* now represent 2 per cent of the Court's annual budget — and offices and secretarial support are also required for them.

In the *Botswana/Namibia* case (1999), neither Party had a national on the Bench. They informed the Court that they had jointly agreed not to appoint a judge *ad hoc* each, both having full confidence in the Court as constituted in its regular membership. Given the increasing percentage of ICJ costs associated with judges *ad hoc*, the ICJ believes that where two States appear before it,

neither of whom having a national on the Bench, they might want to give very careful consideration to what I will term the *Botswana/Namibia* model.

I take this opportunity to note with appreciation the decision of the General Assembly to meet the concerns expressed by the Court during the year under review with regard to resolution 61/262. The Court is grateful to the Assembly for having resolved this matter by its decision 62/547 of 3 April 2008. The principle of equality among judges, which is enshrined in our Statute, which is annexed to the United Nations Charter, is central to our function as the principal judicial organ of the United Nations and we are pleased to see that it has been reaffirmed.

The Court finds it of great importance that the proposed pension scheme for judges in service and for retired judges and their dependents should not lead to a decrease in real terms. If, without further adjustments being in place, the pension would be calculated on the basis of the annual net base salary excluding post adjustment a decrease in real terms would ensue. In addition, the Court notes that, notwithstanding its repeated requests on this point, no mechanism is yet in operation to adjust effectively for cost-of-living increases and fluctuations in the value of the United States dollar. It therefore foresees the possibility of a further significant decline in the years ahead in the purchasing power of retired judges and their surviving spouses, in particular those residing in the euro zone. The Court is counting on the understanding of the General Assembly as to these points.

President d'Escoto,

Excellencies,

Ladies and Gentlemen,

The sheer number and variety of cases that have been entrusted to the International Court during the period under review affirms its role as the Court of the United Nations. Whether it is a complex case on maritime delimitation with thousands of pages of pleadings or an urgent request for provisional measures concerning an ongoing conflict, States are turning to the ICJ for the peaceful settlement of their disputes. The Court greatly values the trust placed in it by the Members of the United Nations and, as always, stands ready to play its role in attaining the cardinal principle of the Charter, the maintenance of international peace and security.
