SPEECH BY H.E. JUDGE ROSALYN HIGGINS,
PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE,
TO THE ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

5 November 2007

Mr. Secretary-General,

Your Excellencies,

Ladies and Gentlemen,

Although the schedule for my annual visit to New York has not allowed me to address your Organization in person as I did in 2006, I am pleased to be able to meet with your President and to provide you with a written update on cases involving States from Asia and Africa, in particular the Judgment we delivered in May 2007 in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo).*

I take this opportunity to congratulate Her Excellency Ms Brigitte Sylvia Mabandla, Minister for Justice and Constitutional Development in South Africa, on her election as President of the Forty-sixth Session. I also congratulate His Excellency Mr. Eddy Pratomo, Director-General of Legal Affairs and International Treaties in Indonesia, on his election as Vice-President.

*

The International Court of Justice has been working hard to maximize its throughput. From 2002 to the end of 2005, the Court decided 18 cases. Over the same period, eight new contentious cases were filed, along with one request for an Advisory Opinion. In 2006, the Court disposed of one case *(Congo* v. *Rwanda)* and continued deliberations in three other cases. Three new contentious cases were filed with the Court in 2006 (one of which was later withdrawn) as well as two requests for the indication of provisional measures.

This year, we have thus far delivered three judgments in all. We have issued two judgments on the merits: one in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* and the other in the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea.* We have delivered one judgment on preliminary objections (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo).* We have one case on preliminary objections under deliberation (*Territorial and Maritime Dispute (Nicaragua v. Colombia)*). Hearings in the case concerning *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* start on 6 November 2007.

In the past, there was a problem with long gaps between the close of the written proceedings and the opening of the oral hearings; a backlog had built up. We have made a prodigious effort to rectify this situation. We have now reached the point where we are ready to schedule the oral hearings a short time after the deposit by the parties of the final written pleadings. States thinking of coming to the Court can be confident that we will be able to resolve their disputes in a timely fashion.

Since the establishment of the International Court, we have had no fewer than 18 disputes involving African States and 13 involving Asian States submitted to us for resolution. The Court has been particularly gratified to find that in recent years African and Asian States have been turning to us ever more often for judicial settlement of disputes. The Court's current docket contains 12 cases, with five of these involving African or Asian States

The Court had this past year to deal with a case on preliminary objections involving two African countries: the case concerning *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*.

The case concerned the diplomatic protection of a national residing abroad — a classical case, perhaps, in the Western context, but rather unusual for Africa. Mr. Ahmadou Sadio Diallo, a businessman of Guinean nationality, was resident in the Democratic Republic of the Congo (DRC) for 32 years. He founded two companies: an import-export company and a company specializing in the containerized transport of goods. Each company was a *société privée à responsabilité limitée* (private limited liability company) of which Mr. Diallo was the *gérant* (manager) and, in the end, the sole *associé*. Towards the end of the 1980s, the two companies, acting through their *gérant*, initiated various steps, including judicial ones, in an attempt to recover alleged debts from the State and publicly and privately owned companies. On 31 October 1995 the Prime Minister of Zaire (as it then was) issued an expulsion Order against Mr. Diallo and on 31 January 1996 he was deported to Guinea. The deportation was served on Mr. Diallo in the form of a notice of refusal of entry *(refoulement)* on account of "illegal residence" *(séjour irrégulier)*. Guinea argued that those actions by the DRC violated Mr. Diallo's rights and that, according to the law of diplomatic protection, the DRC had committed internationally wrongful acts which engaged its responsibility to Guinea.

The DRC challenged the Court's jurisdiction on two bases: first, that Guinea lacked standing because the rights belonged to the two Congolese companies, not to Mr. Diallo; and second, that neither Mr. Diallo nor the companies have exhausted local remedies. The Court examined whether Guinea had met the requirements for the exercise of diplomatic protection under customary international law in terms of three categories of rights: Mr. Diallo's individual personal rights, his direct rights as *associé* in the two companies and the rights of those companies, by "substitution".

In terms of Mr. Diallo's individual personal rights, the central issue was that of his expulsion and whether local remedies had been exhausted. In considering whether local remedies had been exhausted, or needed to be exhausted, the Court noted that the expulsion was characterized by the Government as a "refusal of entry" when it was carried out. Refusals of entry are not appealable under Congolese law. The DRC contended that the immigration authorities had "inadvertently" used the term "refusal of entry" instead of "expulsion", an error which was not intended to deprive Mr. Diallo of a remedy. (Under Congolese law, an expulsion is subject to appeal.) The Court decided that the DRC could not rely on such an error to claim that Mr. Diallo should have treated the measure taken against him as an expulsion.

With respect to the second category of rights — Mr. Diallo's direct rights as *associé* in the two Congolese companies — Guinea referred to the *Barcelona Traction* case and the International Law Commission's (ILC) Articles on Diplomatic Protection. I know that AALCO follows the ILC's work very closely and holds joint AALCO-ILC meetings on a regular basis.

Article 12 of the ILC Articles on Diplomatic Protection provides:

> "To the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals."

After examining the domestic law of the DRC, particularly the Decree of 27 February 1887 on commercial corporations, the Court found that Guinea did have standing as regards Mr. Diallo's direct rights as *associé* of the two companies.

The companies in the *Diallo* case had some special features: they were private limited liability companies whose capital was composed of *parts sociales* (not freely transferable shares); Mr. Diallo was in essence the sole *associé* of both companies. But these features did not have an impact on the Court's finding. It recalled the statement in the *Barcelona Traction* case: "[t]here is . . . no need to investigate the many different forms of legal entity provided for by the municipal laws of States"[1]. What mattered, from the point of view of international law, was to determine whether or not these have a legal personality independent of their members. As the Court explained:

> "The exercise by a State of diplomatic protection on behalf of a natural or legal person, who is *associé* or shareholder, having its nationality, seeks to engage the responsibility of another State for an injury caused to that person by an internationally wrongful act committed by that State. Ultimately, this is no more than the diplomatic protection of a natural or legal person as defined by Article 1 of the ILC draft Articles; what amounts to the internationally wrongful act, in the case of *associés* or shareholders, is the violation by the respondent State of their direct rights in relation to a legal person, direct rights that are defined by the domestic law of that State, as accepted by both Parties, moreover. On this basis, diplomatic protection of the direct rights of *associés* of a SPRL or shareholders of a public limited company is not to be regarded as an exception to the general legal régime of diplomatic protection for natural or legal persons, as derived from customary international law.[2]"

As regards the exhaustion of local remedies rule, the Court found that Mr. Diallo's direct rights as *associé* were allegedly violated as a consequence of his expulsion. As the Court had already held that the DRC had not proved that there were effective remedies, under Congolese law, against the expulsion Order, the local remedies rule was satisfied. Guinea thus had standing to protect Mr. Diallo's direct rights as *associé*. The question of his rights as a *gérant* was more complex and the Court noted that at the merits stage it would have to define the precise nature, content and limits of the rights of the *gérant* under Congolese law.

By far the most complex aspect of the *Diallo* case was the question of whether Guinea could exercise diplomatic protection with respect to Mr. Diallo "by substitution" for the two Congolese companies. Guinea sought to invoke the Court's dictum in the *Barcelona Traction* case where the Court referred to the possibility of an exception, founded on reasons of equity, to the general rule of the protection of a company by its national State, "when the State whose responsibility is invoked is the national State of the company"[3]. In the four decades since *Barcelona Traction*, the Court has not had occasion to rule on whether, in international law, there is indeed an exception to the general rule "that the right of diplomatic protection of a company belongs to its national State", which allows for protection of the shareholders by their own national State "by substitution", and on the reach of any such exception.

---

[1] *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), I.C.J. Reports 1970***,** p. 34, para. 40; *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections*, Judgment of 24 May 2007, para. 61.

[2] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections*, Judgment of 24 May 2007, para. 64.

[3] *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), I.C.J. Reports 1970***,** p. 48, para. 93. *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections*, Judgment of 24 May 2007, para..82.

Guinea pointed to the fact that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, had established special legal régimes governing investment protection, or that provisions in this regard were commonly included in contracts entered into directly between States and foreign investors. But the Court found that this specific treaty practice could not with certainty be said to show that there had been a change in the customary rules of diplomatic protection; it could equally show the contrary[4]. The Court further observed that "the role of diplomatic protection [in this context had] somewhat faded, as in practice recourse is only made to it in rare cases where treaty régimes do not exist or have proved inoperative"[5].

After carefully examining State practice and decisions of international courts and tribunals, the Court was of the opinion that these did not reveal — at least at the present time — an exception in customary international law allowing for protection by substitution, such as is relied on by Guinea.

The Court then considered the separate question whether customary international law contained a more limited rule of protection by substitution, such as that set out by the ILC in Article 11, paragraph *(b)*, of its draft Articles on Diplomatic Protection, which would apply only where a company's incorporation in the State having committed the alleged violation of international law "was required by it as a precondition for doing business there". But that very special case did not seem to correspond to the one before us, as it was not satisfactorily established that the incorporation of Mr. Diallo's two companies in the DRC would have been "required" of their founders to enable them to operate in the economic sectors concerned. Therefore, the question of whether or not the ILC's draft Article 11, paragraph *(b)*, reflects customary international law has been, deliberately, left open. The Court thus found that Guinea's Application was inadmissible in so far as it concerned the protection of Mr. Diallo in respect of alleged violations of the rights of his two companies.

The Court has now fixed 27 March 2008 as the time-limit for the filing of the Counter-Memorial on the merits by the DRC.

*

Following the *Diallo* case, the International Court has been deliberating on two cases involving territorial and maritime disputes between Latin American countries (*Nicaragua* v. *Honduras* and *Nicaragua* v. *Colombia*). In November, our attention turns to Asia as we begin hearings in the case concerning *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*.

This is the second delimitation case from Asia to have come to the Court by joint agreement, the previous one being the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*.

*

[4] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Preliminary Objections*, Judgment of 24 May 2007, para. 90.

[5] *Ibid.*, para. 88.

Guinea v. *Congo* and *Malaysia/Singapore* represent two types of disputes that have long been submitted to the International Court: diplomatic protection and territorial sovereignty. We have developed a strong expertise in these areas. At the same time, the International Court has increasingly been seised of cases involving a range of contemporary and interesting legal questions. For instance, two cases involving African States on our current docket concern mutual legal assistance.

In recent years, there has been a rising interest among States in the investigation and prosecution of individuals outside of national borders for crimes such as crimes against humanity, torture, terrorism, trafficking of people and narcotics, smuggling, cyber crime, and organized crime. This has resulted in some legal disputes that have come to the International Court. In the case concerning *Certain Criminal Proceedings in France*, the Republic of the Congo seeks the annulment of the investigation and prosecution measures taken by French judicial authorities in response to a complaint of crimes against humanity and torture filed against, *inter alia*, the President of the Congo, the Congolese Minister of the Interior and the Inspector-General of the Congolese Army. Then, we have the proceedings instituted by Djibouti against France in which Djibouti claims that the refusal of French authorities to execute an international letter rogatory regarding the transmission of the record relating to a certain murder investigation violates obligations under treaties in force between the two countries. In both of these cases France has consented to the Court's jurisdiction pursuant to Article 38, paragraph 5, of the Rules of Court.

In April, Rwanda filed an Application with the Court claiming, *inter alia*, that international arrest warrants issued by French judicial authorities against three Rwandan officials for crimes connected with the Rwandan genocide violated international law with regard to immunities. Rwanda seeks to found the jurisdiction of the Court on Article 38, paragraph 5, of the Rules which means that no action will be taken in the proceedings unless and until France consents to the Court's jurisdiction in the case.

*

Upon my return to the Court after I addressed your Organization last October, the International Court was honoured to receive Their Majesties, King Abdullah II and Queen Rania of Jordan. A solemn sitting was held in which judges of the International Court, the Diplomatic Corps and representatives of the Dutch authorities and other international institutions located in The Hague gathered in the Great Hall of Justice to welcome Their Majesties. It was a very special occasion. As I said in my speech, the presence of Their Majesties

> "bears witness to your country's attachment to the cause of international law and to the supreme values of peace and justice. This visit also reflects your personal commitment to justice, freedom and mutual understanding among nations."

This year, I have made two official visits to Asia and Africa in my capacity as President of the Court.

In April I attended the inaugural conference of the Asian Society of International Law hosted by the National University of Singapore. In my speech I observed that:

> "t]his Asia-wide Society is ripe for its launch in every way. Anyone who lives in the world of international law knows that there are Asian intellectual leaders who have helped shape the law in various areas, Asian Statesmen who have made tremendous contributions to the progressive codification of international law, and marvellous

Asian scholars, including the younger generation who fearlessly speak their mind, and engage in research of a high order."

I then paid an official visit to Japan, accompanied by Judge Owada. There I spoke at the Ministry of Foreign Affairs, Kyoto and Hiroshima Universities, and participated in a conference on the Rule of Law convened by the United Nations University in Tokyo.

In September, I travelled to the African continent to join the celebrations for the fiftieth anniversary of the Supreme Court of Morocco. While I was there I participated in a judicial seminar on international treaties and domestic law. I was honoured to be the first President of the International Court of Justice to visit Morocco in an official capacity, and was accompanied by Judge Bennouna.

*

The two regions that AALCO represents are of great importance to the International Court, and I am pleased to contribute to the continuing good relations between our two institutions.

Regional inter-governmental organizations like AALCO play a critical role. Your current work programme contains important legal issues and closely tracks the items on the agendas of the International Law Commission and the Sixth Committee of the General Assembly. I note that at your Forty-sixth Annual Session, AALCO adopted numerous resolutions on substantive matters, ranging from the law of the sea to the status and treatment of refugees to the establishing co-operation against trafficking in women and children.

On behalf of all the Members of the International Court of Justice, I wish you every success in pursuing your work programme and in performing your vital role in the Asian and African regions.