SPEECH BY H.E. JUDGE ROSALYN HIGGINS, PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE, TO THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY

31 October 2008

Mr. Chairman,

Distinguished Delegates,

I congratulate His Excellency Mr. Hamid Al Bayati on his election as Chairman of the Committee for the Sixty-third Session of the General Assembly.

Today I will speak to you about *Jurisdiction at the ICJ* — a familiar theme, but I have some particular thoughts to share that are perhaps not so usual.

Virtually all the great international institutions of the world have, as a concomitant of membership, the obligation to accept the compulsory jurisdiction of the Court of that institution. It is so with the Council of Europe, the European Union, and the World Trade Organization. But membership in the United Nations does not carry this obligation. Referral of disputes to its primary judicial organ is optional, and based upon the consent of both parties. The United Nations stands almost alone in this state of affairs, and in all the many suggestions for Charter reform made in recent years by the Secretary-General, and by Member States, there has not been the faintest suggestion that this should change.

This requirement of mutual consent in each and every case has necessarily meant that the Court is too often examining objections to its own jurisdiction, rather than addressing the serious substantive problems at issue.

Raising preliminary objections under the Rules of Court

The procedure for a Respondent to challenge the jurisdiction of the Court or the admissibility of the application is set out in the Rules of Court. Two important changes have been made to this procedure by the Court during its periodic reform of the Rules.

First, the Rules which were applicable until 1972 gave the Court a wide discretion when treating preliminary objections, providing: "After hearing the parties the Court shall give its decision on the objection or shall join the objection to the merits." (1946 Rules of Court, Article 62 (5)). This resulted in cases with extensive pleadings on the same issue at both the preliminary objections phase and the merits phase. For example, in the *Barcelona Traction* case, the right of diplomatic protection in favour of shareholders in a company incorporated in another State was in issue at the Preliminary Objections phase (1964) and the Second Phase (1970). The repetition of these arguments, six years apart, did not facilitate efficiency in the administration of justice.

During the 1972 revision of the Rules, this concept of "joinder to the merits" was dropped and a new formula was introduced with three options: the Court shall "either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character". This wording appears in the 2001 version of the Rules as Article 79 (9). This reform was directed at avoiding the problem of repetitive pleadings: if an objection does have an exclusively preliminary character, the Court must deal with it immediately.

Until relatively recently, a party could raise preliminary objections up until the date set for the submission of the counter-memorial. In numerous cases, this time frame led to drawn out proceedings. In the *Bosnia* v. *Serbia* case, preliminary objections were raised 14 months after the delivery of the Memorial. In the *Guinea* v. *Congo* case, it was 19 months. In 2000, as one of several efforts in recent years to speed up its throughput, the Court reassessed Article 79 and decided to introduce a strict time-limit, requiring preliminary objections to be made "as soon as possible, and not later than three months after the delivery of the memorial" (Article 79 (1)). The three-month time-limit applies to all cases submitted to the Court after 1 February 2001. This compressing of the timeline of a case further allows the Court swiftly to identify those cases in which issues of jurisdiction and admissibility arise and to factor the additional stage of hearings on preliminary objections into its strategic planning. The Court now holds annual strategic planning meetings.

You also see, now codified in Article 79 (2), a provision that allows the Court when it foresees the inevitable lodging of preliminary objections, not to wait for them to be lodged. The Court can immediately, with the agreement of the parties, organize a special preliminary hearing. This, too, is a measure directed to efficiency and the speeding up of proceedings.

Preliminary objections practice at the ICJ

Due to the absence of a compulsory dispute settlement system and the overriding need for recourse to the ICJ to be based on consent, it is a reality that a sizeable part of the Court's case law is directed to the determination of its own jurisdiction.

Some statistics will help make this point. In its 62 years of existence, 113 contentious cases have been referred to the International Court. In 15 of those cases the so-called optional clause declaration in Article 36 (2) of the Statute was invoked as the sole basis for jurisdiction. In 45 cases jurisdiction has been asserted on the basis of a compromissory clause in a bilateral or multilateral treaty. In 26 cases both the optional clause *and* a treaty have been invoked, either simultaneously or in the alternative. Sixteen cases have come to the Court by Special Agreement, and two have been brought on the basis of *forum prorogatum*. In nine cases back in the 1950s, no basis of jurisdiction was asserted. Incidentally, it is a requirement in the Rules that the Application instituting proceedings before the Court "shall specify as far as possible" the legal grounds for jurisdiction (Article 38 (1)).

Each of these bases of jurisdiction has the potential to give rise to preliminary objections. Consent given under the optional clause is almost invariably accompanied by reservations that need to be interpreted by the Court. It is hardly ever the case that an optional clause case does not require separate hearings on jurisdiction. Where a compromissory clause of a treaty is invoked, there will still be room for denying that the consent applies in the particular case, perhaps because the subject-matter of the dispute is said not to relate to the treaty (e.g., *Oil Platforms, Georgia* v. *Russia*) or because certain preconditions are claimed to be required under the treaty. Even in Special Agreement cases, there is potential for controversy as to the meaning and scope of the Agreement.

Of the 113 contentious cases, some have later been withdrawn. Ninety-seven judgments have been issued since 1946. Among those, 44 — nearly half — have required separate hearings on jurisdictional issues. A high percentage of these have been optional clause cases. This is hardly a model for efficiency in the substantive resolution of disputes.

Optional clause jurisdiction

Having given this "snapshot" of the substantial amount of time and energy devoted to preliminary objections to jurisdiction by the ICJ, I will now turn to specific issues that arise under Article 36 (2) of the Statute — the optional clause.

Sixty-six States have made declarations under this provision, about one third of the Member States of the United Nations. In most instances the declarations have been accompanied by reservations, which often have to be interpreted. For example, in the *Fisheries Jurisdiction* case Spain brought proceedings against Canada following the boarding on the high seas of a fishing boat flying the Spanish flag by officers of a Canadian patrol boat. Canada argued the Court lacked jurisdiction due to the reservation it had made in its Article 36 (2) declaration excluding "disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the [Northwest Atlantic Fisheries Organization's] Regulatory Area". The Court analysed each phrase of the reservation, ultimately agreeing that the dispute came within the terms of the reservation and the Court lacked jurisdiction.

An interesting question that the Court has several times faced with regard to Article 36 (2) is whether other settlement mechanisms operate to "displace" the optional clause. In the preliminary objections phase of the *Cameroon* v. *Nigeria* case, Nigeria argued that the parties' practice over many years indicated that they had accepted a duty to settle all their boundary disputes exclusively through bilateral negotiations. It further drew the Court's attention to the Lake Chad Basin Commission, a regional organization that Nigeria argued had "exclusive power in relation to issues of security and public order in the region of Lake Chad" (para. 66). The Court rejected both arguments by very large majorities. The Court found nothing to indicate that the parties had agreed to forego the use of other procedures and explained that the fact they had undertaken negotiations in boundary matters in the past did not exclude the possibility of referring such disputes to the ICJ. As for the Lake Chad Commission, the Court held it was neither a judicial body intended to displace the Court nor a regional organization for the purposes of Chapter VIII of the Charter. In any event, the existence of regional negotiation mechanisms could not prevent the Court from performing its functions under the Charter and its Statute.

A related question that we have addressed recently is: when confronted with multiple bases for jurisdiction, which should assume priority? In the *Nicaragua* v. *Colombia* case, on which we issued a judgment on preliminary objections last December, Nicaragua invoked both Article XXXI of the Pact of Bogotá and the declarations made by the parties under Article 36 (2) as grounds for the Court's jurisdiction. Why did it matter? While the two clauses were largely similar — indeed Article XXXI of the Pact of Bogotá used the same wording as Article 36 (2) of the Statute — Colombia's declaration under Article 36 (2), unlike the Pact of Bogotá, had a reservation. Furthermore, Colombia stated that its declaration under the optional clause had been withdrawn very shortly before Nicaragua filed its Application. Colombia claimed that jurisdiction under the Pact of Bogotá was governing and hence exclusive. In its view, if the Court found it lacked jurisdiction under the Pact, it must "declare the controversy ended" and not proceed further to consider whether it might have jurisdiction under the optional clause.

The Court acknowledged that in the 1988 *Border and Transborder Armed Actions* case *(Nicaragua* v. *Honduras)*, it had stated that "[s]ince, in relations between the States parties to the Pact of Bogotá, that Pact is governing, the Court will *first* examine the question whether it has jurisdiction under Article XXXI of the Pact" (*Provisional Measures, Order of 31 March 1988, I.C.J. Reports 1988*, p. 82, para. 27). But this could not be interpreted in any way other than that the Court, faced with the two titles of jurisdiction invoked, could not deal with them simultaneously and had decided to proceed from the particular to the more general, without thereby implying that the Pact of Bogotá prevailed over and excluded the optional clause. Similarly, in the

Nicaragua v. *Colombia* case, the Court considered jurisdiction under the Pact first, as this was the first preliminary objection of Colombia, making it clear that the Pact and the optional clause represented two distinct bases of the Court's jurisdiction which were not mutually exclusive.

In the event, the Court found that there was no extant legal dispute between the Parties on the question of sovereignty over three islands and thus it could not have jurisdiction over this question either under the Pact of Bogotá or on the basis of the optional clause declarations.

Treaty-based jurisdiction

As I mentioned earlier, more than one third of cases come to the Court exclusively on the basis of compromissory clauses contained in treaties. Some 300 bilateral or multilateral treaties provide for the Court to have jurisdiction in the resolution of disputes arising out of their application or interpretation. Very occasionally a treaty-based case merges with an advisory opinion when one of the "parties" to a dispute is not a State but an international organization. This situation arises when a clause in a treaty provides that if a difference in interpretation arises, a request shall be made for an advisory opinion and the opinion given shall be accepted as decisive by the parties. This was so in the *Cumaraswamy Advisory Opinion*.

Treaty-based jurisdiction is becoming more and more important. In the past decade, *all but six* of the 40 cases submitted to the Court have been based in whole or in part on jurisdiction under compromissory clauses. It is a reality that Applicants will seek out a treaty that might furnish the grounds to allow a litigation to be launched. This is especially so in the context of requests for the indication of provisional measures — requests which must relate to an Application already placed before the Court. For the purpose of indicating provisional measures, jurisdiction need only be found on a prima facie basis. In the 2002 Order in the *Democratic Republic of the Congo* v. *Rwanda* case, the Court systematically rejected eight treaties as the basis of its jurisdiction and found that it did not even have the prima facie jurisdiction necessary to indicate provisional measures requested by the Congo. Nonetheless, this finding did not of itself prejudge the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application, or relating to the merits themselves. The Court having declined to remove the case from its List on the basis of a manifest lack of jurisdiction, the DRC had another opportunity at the preliminary objections phase to identify the basis of jurisdiction. In the event it was still unable to succeed. It is difficult to explain to the general public why the Court had jurisdiction to hear the *Congo* v. *Uganda* case on the merits, but not *Congo* v. *Rwanda* — a case that related to the same conflict and time period and concerned similar allegations of gross human rights violations. The answer lay of course in the different jurisdictional nexus between the parties in each of the cases. In eight of the *Legality of Use of Force* cases, the Court rejected the requests made in 1999 for provisional measures, but remained seised of the cases. There, too, the cases eventually failed for want of a consensual basis of jurisdiction. The Court had already removed from the General List two other such cases for manifest lack of jurisdiction.

Special Agreements

Special Agreement cases have some features in common with treaty-based jurisdiction cases in that the Court is locked into a specific arrangement between the parties. A case coming by Special Agreement does not however guarantee that there will be no jurisdictional issues for the Court to address. There are questions of applicable law and the scope of the agreement.

The pending case *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)*, while not technically a Special Agreement case, involves determining what the Parties agreed to refer to the Court under a 1997 Agreement. In Romania's view, in addition to UNCLOS, the principles recognized by the Parties in the 1997 Agreement should also be taken into account by the Court in

delimiting the continental shelf and the exclusive economic zone beyond the 12-nautical mile arc around Serpents' Island. According to Ukraine, the 1997 Agreement is an international treaty binding upon the Parties, but its provisions do not embody an agreement which directs the Court as to the applicable law in the present proceedings. Ukraine thus contends that the Court is obliged to decide disputes in accordance with international law, as laid down in Article 38, paragraph 1, of the Statute.

Forum prorogatum

Forum prorogatum, long thought in the textbooks on jurisdiction to be a dead letter, has recently been invoked twice before the Court. Both times it was invoked in cases involving an African State and France.

The recent *Djibouti* v. *France* Judgment was the first time that it fell to the Court to decide on the merits of a dispute brought before it under Article 38 (5) of the Rules of Court (one way to establish *forum prorogatum*). (The history of this provision of the Rules is rather interesting and is elaborated on in our Judgment.) The Court stated that "the consent allowing for the Court to assume jurisdiction must be certain. That is so, no more and no less, for jurisdiction based on *forum prorogatum*." (Para. 62.) It went on to examine the extent of the mutual consent of the Parties, as evidenced by Djibouti's Application and a letter from the French Minister for Foreign Affairs informing the Court that France "consents to the Court's jurisdiction to entertain the Application pursuant to, and solely on the basis of . . . Article 38, paragraph 5", of the Rules of Court, while specifying that this consent was "valid only . . . in respect of the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein" by Djibouti.

The Court found that France's letter to the Court did not seek to limit jurisdiction to the main claim — France's refusal to execute a letter rogatory — but accepted jurisdiction over the Application as a whole, including claims relating to summonses sent to the Djiboutian President and other Djiboutian officials. The Court did, however, exclude from its jurisdiction the claims relating to arrest warrants issued for senior Djiboutian officials. These arrest warrants were issued in the period *after* the filing of the Application. The Court found that it was clear from France's letter that its consent did not go beyond what was visible in that Application. Although the arrest warrants could be perceived as a method of enforcing the summonses (which were within the Court's jurisdiction), they represented new legal acts in respect of which France could not be considered as having implicitly accepted the Court's jurisdiction. In past cases based on the optional clause or a treaty clause, when the Court has examined its jurisdiction over facts or events *subsequent* to the filing of the Application, it has emphasized the need to determine whether consideration of those later facts or events would transform the "nature of the dispute"[1]. But in a *forum prorogatum* case this is *not* the test. Here, where so much turns upon the consent expressed at the very moment by the Respondent, the question was rather whether the subsequent events were visible to France at the time it consented by letter to jurisdiction under Article 38 (5).

What can be determined at the jurisdictional phase

I conclude with some words on the absorbing question of whether only procedural matters may be disposed of at the jurisdiction phase. Does every substantive matter raised in pleadings in a jurisdictional hearing have to be declared "not exclusively preliminary in character"? This is a

[1] *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 203, para. 72; *LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, pp. 483-484, para. 45; see also *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 264-267, paras. 69-70; and *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 16, para. 36.

recurring issue for the Court. As I mentioned earlier, Article 79 (9) gives three ways in which the Court may dispose of a preliminary objection: uphold, reject, or declare that the objection does not possess an exclusively preliminary character. In the *Nuclear Tests* cases (albeit in slightly different circumstances), the Court emphasized that while examining questions of jurisdiction and admissibility, it was entitled — and in some circumstances may be required — to go into other questions which may not be strictly capable of classification as matters of jurisdiction or admissibility but are of such a nature as to require examination before those matters.

In the recent *Nicaragua* v. *Colombia* case, the Court stated its belief that:

> "it is not in the interest of the good administration of justice for it to limit itself at the present juncture to stating merely that there is a disagreement between the Parties as to whether the 1928 Treaty and 1930 Protocol settled the matters which are the subject of the present controversy within the meaning of Article VI of the Pact of Bogotá, leaving every aspect thereof to be resolved on the merits.
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> In principle, a party raising preliminary objections is entitled to have these objections answered at the preliminary stage of the proceedings unless the Court does not have before it all facts necessary to decide the questions raised or if answering the preliminary objection would determine the dispute, or some elements thereof, on the merits. The Court finds itself in neither of these situations in the present case. The determination by the Court of its jurisdiction may touch upon certain aspects of the merits of the case . . ." (Paras. 50-51.)

The Court went on to hold that the 1928 Treaty was valid and in force at the date of the conclusion of the Pact of Bogotá in 1948. It was then able to proceed to decide what, if anything, had been settled by the 1928 Treaty. Three specific islands had been named in the 1928 Treaty as belonging to Colombia. The Court found that the question of their sovereignty had been settled by the Treaty within the meaning of Article VI of the Pact of Bogotá and thus upheld Colombia's first preliminary objection in this respect. This was a finding that the Court needed to and could make at the preliminary objections stage. However, various other questions before the Court — the scope and composition of an archipelago, sovereignty over certain cays, and the question of maritime delimitation — were held not to have been settled by the 1928 Treaty and thus the Court had jurisdiction to decide them, but only at the merits stage of proceedings.

Mr. Chairman,

Distinguished Delegates,

Experience shows that cases brought on the basis of Article 36 (2) are very likely to occasion extended controversy as to the Court's jurisdiction. Cases coming on the basis of a compromissory clause in a treaty are less so. As to cases coming by Special Agreement, they are not immune from that possibility — but jurisdictional matters play a much smaller role. The Court is more rapidly able to proceed to assisting in the resolution of the dispute.

An increased number of States making the declarations under the optional clause would of course be welcome. But I hope from what I had to say that it is evident that, so far as the contribution that the Court can make to the resolution of international disputes, the answer cannot lie in States, or groups of States, depositing optional clause declarations which have within their terms reservations and conditions, carefully worded with so much legal skill, so as to render almost nil the scope of the apparent acceptance of the Court's jurisdiction. That simply adds to the days and weeks that the Court will spend on objections to jurisdiction, and diminishes the time it has for resolving major substantive disputes.

It is time for some thinking “outside the box” on this question of the Court’s jurisdiction.

In the name of all Members of the International Court of Justice, I express my best wishes to the Committee for the success of its work this session.