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

24 October 2008

Mr. Secretary-General,

Your Excellencies,

Ladies and Gentlemen,

I am delighted to address the Asian-African Legal Consultative Organization and to provide you with an update on the cases at the International Court of Justice concerning Asia and Africa.

I congratulate Dr. Rahmat Mohamed on his recent appointment as Secretary-General of the Organization. I also congratulate Mr. Narinder Singh on his election as President of the Forty-seventh Session held earlier this year in New Delhi. My special thanks go to Ambassador Yamada for helping to arrange this opportunity to speak to you this afternoon.

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Last year I informed you that the Court had managed to clear its backlog of cases by adopting a heavy schedule of hearings and undertaking measures to improve its efficiency. Last October we had reached the point where we were ready to schedule the oral hearings a short time after the deposit by the parties of the final written pleadings. The International Court of Justice has continued to work hard to maximize its throughput in the past year. The clearing of the backlog has enabled us to respond swiftly to two requests for provisional measures, which we dealt with in addition to our planned schedule of cases. We have had the most productive year in our history. I will be reporting on the various Judgments and Orders that we have issued this past year in my speech to the General Assembly on 30 October. Today I would like to speak to you about the cases involving Asia and Africa.

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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. Three of the cases on the current docket involve African States.

This year we have decided two cases involving Asian and African States. The first involved Malaysia and Singapore, who came to us by special agreement. As I had previously given advice to one of the Parties, I recused myself from the case and it was presided over by the Vice-President, Judge Al-Khasawneh.

The dispute involved sovereignty over maritime features. This type of dispute appears rather regularly before the ICJ and it has developed a strong expertise in this area. In the past 12 months, the Court has also decided questions of sovereignty over maritime features in the *Nicaragua* v. *Honduras* case and the *Nicaragua* v. *Colombia* case (in relation to preliminary objections). In the *Malaysia/Singapore* case, the maritime features in question were Pedra Branca/Pulau Batu Puteh (a

granite island on which Horsburgh lighthouse stands), Middle Rocks (consisting of some rocks that are permanently above water) and South Ledge (a low-tide elevation). This was a very fact-heavy case, with over 4,000 pages of pleadings.

Malaysia contended that it had an original title to Pedra Branca/Pulau Batu Puteh (dating back from the time of its predecessor, the Sultanate of Johor) and that it continued to hold this title, while Singapore claimed that the island was *terra nullius* in the mid-1800s when the United Kingdom (its predecessor) took lawful possession of the island in order to construct a lighthouse. After reviewing the evidence submitted by the Parties, the Court found that the territorial domain of the Sultanate of Johor did cover in principle all the islands and islets within the Straits of Singapore and did thus include Pedra Branca/Pulau Batu Puteh. This possession of the islands by the Sultanate was never challenged by any other Power in the region and therefore satisfied the condition of "continuous and peaceful display of territorial sovereignty". The Court thus concluded that the Sultanate of Johor had original title to Pedra Branca/Pulau Batu Puteh. This ancient title was confirmed by the nature and degree of the Sultan of Johor's authority exercised over the Orang Laut ("the people of the sea", who inhabited or visited the islands in the Straits of Singapore, including Pedra Branca/Pulau Batu Puteh and made this maritime area their habitat).

The Court then looked at whether this title was affected by developments in the period between 1824 and the 1840s, including various treaties and a letter from Sultan Abdul Rahman in which he "donated" certain territories, which were already within the British sphere of influence, to his brother. After careful consideration of the legal effects of these developments, the Court found that none of them brought any change to the original title.

The Court turned next to the legal status of Pedra Branca/Pulau Batu Puteh after the 1840s to determine whether Malaysia and its predecessor retained sovereignty over the island. In this regard, it examined the events surrounding the selection process of the site of the lighthouse, its construction, as well as the conduct of the Parties' predecessors between 1852 and 1952, but was unable to draw any conclusions for the purposes of the case.

The Court placed great emphasis on a letter written on 12 June 1953 to the British Adviser to the Sultan of Johor in which the Colonial Secretary of Singapore asked for information about the status of Pedra Branca/Pulau Batu Puteh in the context of determining the boundaries of the "Colony's territorial waters". In a letter dated 21 September 1953, the Acting State Secretary of Johor replied that the "Johore Government [did] not claim ownership" of the island. The Court found that the reply showed that as of 1953 Johor understood that it did not have sovereignty over Pedra Branca/Pulau Batu Puteh.

The Court finally examined the conduct of the Parties after 1953 with respect to the island. It found that certain acts, including the investigation of shipwrecks by Singapore within the island's territorial waters and the permission granted or not granted by Singapore to Malaysian officials to survey the waters surrounding the island, may be seen as conduct *à titre de souverain*. The Court also considered that some weight can be given to the conduct of the Parties in support of Singapore's claim. The Court concluded that by 1980 (when the dispute crystallized) sovereignty over Pedra Branca/Pulau Batu Puteh had passed to Singapore and still lay with Singapore.

As for Middle Rocks, the Court observed that the particular circumstances which led it to find that sovereignty over Pedra Branca/Pulau Batu Puteh rested with Singapore did not apply to Middle Rocks. It therefore held that original title to Middle Rocks should remain with Malaysia as the successor to the Sultanate of Johor. As for South Ledge, the Court noted that this low-tide elevation fell within the apparently overlapping territorial waters generated by Pedra Branca/Pulau Batu Puteh and by Middle Rocks. As the Court had not been mandated by the Parties to draw the line of delimitation with respect to their territorial waters, the Court concluded that sovereignty over South Ledge belonged to the State in the territorial waters of which it is located.

Malaysia/Singapore was the second case from Asia concerning sovereignty over maritime features to have come to the Court by joint agreement, the previous one being *Indonesia/Malaysia*.

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Just two weeks after the delivery of the Judgment in the *Malaysia/Singapore* case, the Court gave its decision in a case with an African State as the Applicant: *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)*.

Forming a backdrop to this case was the death of Judge Bernard Borrel, a French national who had been seconded as Technical Adviser to the Ministry of Justice of Djibouti. On 19 October 1995, the body of Judge Borrel was discovered 80 km from the city of Djibouti. Various judicial investigations to determine the cause of Judge Borrel's death were opened in Djibouti and France. The case in France was known as the *Case against X for the murder of Bernard Borrel*. Both Parties agreed that it was not for the International Court to determine the circumstances in which Judge Borrel met his death. Rather, the dispute before the ICJ concerned the resort to bilateral treaty mechanisms that existed between the Parties for mutual assistance in criminal matters.

This was the first occasion it fell to the Court to pronounce on a dispute brought before it by an Application based on *forum prorogatum*. As you might know, a State, when submitting a dispute to the Court, may propose to found the Court's jurisdiction upon a consent yet to be given or manifested by the State against which the Application is made, in reliance on Article 38, paragraph 5, of the Rules of Court. If the latter State expresses its consent, the Court has jurisdiction to decide the case.

In *Djibouti* v. *France*, Djibouti filed an Application against France claiming that the refusal by the French authorities to execute an international letter rogatory regarding the transmission to the judicial authorities in Djibouti of the record relating to the investigation in the *Case against X for the murder of Bernard Borrel* violated two bilateral treaties. The Application further referred to the issuing, by the French judicial authorities, of witness summonses to the Djiboutian Head of State and senior Djiboutian officials, allegedly in breach of the principles and rules governing the diplomatic privileges and immunities.

The French Minister for Foreign Affairs informed the Court in a letter 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.

In its 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 the letter of France. It found that France's letter to the Court did not seek to limit jurisdiction to the refusal to execute the letter rogatory, but accepted jurisdiction over the Application as a whole, including claims relating to summonses. The Court did, however, exclude the arrest warrants issued for senior Djiboutian officials from its jurisdiction. These arrest warrants were issued after the filing of the Application and the Court found France's consent did not go beyond what was visible in that Application.

On the merits, the case raised a number of interesting legal issues including the role of the internal law of a State when there is a dispute as to compliance with a treaty which makes reference

to internal law, the duty to give reasons for refusal to co-operate as envisaged in a treaty, and the immunities of State officials from foreign criminal jurisdiction. I will outline the Court's findings on these issues.

Article 3 of the 1986 Convention on Mutual Assistance in Criminal Matters provided that a State to which a request for mutual assistance had been made "shall execute *in accordance with its law* any letters rogatory relating to a criminal matter and addressed to [them] by the judicial authorities of the requesting State . . .". The Court held that Article 3 did not require France to transmit the Borrel file to Djibouti because, while the obligation to execute international letters rogatory was to be realized in accordance with the procedural law of the requested State and while that State must ensure that the procedure is put in motion, it does not thereby guarantee the outcome.

The Court then considered the nature of the duty to give reasons for refusal of mutual assistance. It 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 entitled the requested State to refuse to execute a letter rogatory if it considered that execution was likely to prejudice its sovereignty, its security, its *ordre public* or other of its essential interests. But the Court did not accept France's argument that the fact that the reasons have come within the knowledge of Djibouti during the proceedings meant that there had been no violation of the duty to give reasons. A legal obligation to notify reasons for refusing to execute a letter rogatory was not fulfilled through the requesting State learning of the relevant documents only in the course of litigation, some long months later. The Court added that the bare reference to the exception contained in the Convention (Article 2 *(c)*) did not satisfy the duty to give reasons; some brief further explanation was called for. This was not only a matter of courtesy, but also allowed the requested State to substantiate its good faith in refusing the request. It may also enable the requesting State to see if its letter rogatory could be modified so as to produce a better outcome.

The Court thus found that France's reasons for refusing to transfer the record of the investigation in the *Borrel* case to the Djiboutian authorities were in good faith and fell within the provisions of the 1986 Convention; but France did violate its obligation under the 1986 Convention to give reasons for its refusal to execute the letter rogatory. Since these reasons had, in the meantime, entered the public domain, the Court determined that "its finding of this violation constitute[d] appropriate satisfaction" — there was no point in ordering their publication.

In addition to the claims regarding the letter rogatory, the Court considered Djibouti's claims that the immunities of Djibouti's Head of State and two senior State officials had been violated by France through the issuance of witness summonses. As regards the Head of State, the Court held that the summonses issued to the Head of State were not associated with measures of constraint; they were merely invitations to testify which the Head of State could freely accept or decline. Consequently, there was no attack by France on the immunities from criminal jurisdiction enjoyed by the Head of State. The Court nonetheless noted that the summons of 17 May 2005 was not issued in a manner consistent with the courtesies due to a foreign Head of State and for that "an apology would have been due".

In terms of the immunities of State officials, Djibouti claimed that the issuing of summonses as *témoins assistés* (legally represented witnesses) to the *procureur de la République* of Djibouti and the Head of National Security violated their immunities. Djibouti submitted that these senior officials were entitled to functional immunities. This was, in essence, a claim of immunity for the Djiboutian State, from which the *procureur de la République* and the Head of National Security would be said to benefit. France pointed out that the two senior officials never raised before the French criminal courts the immunities which Djibouti now claimed on their behalf. The Court observed that it had never been verified before it that the acts which were the subject of the summonses were indeed acts within the scope of the officials' duties as organs of State. It added that these various claims regarding immunity were not made known to France, whether through

diplomatic exchanges or before any French judicial organ, as a ground for objecting to the issuance of the summonses in question. At no stage were the French courts (before which the challenge to jurisdiction would normally be expected to be made), nor indeed the International Court, informed by the Government of Djibouti that the acts complained of by France were its *own* acts, and that the *procureur de la République* and the Head of National Security were its organs, agencies or instrumentalities in carrying them out. The Court therefore rejected Djibouti's claims regarding the alleged violation of immunities.

We have another case on our docket, also involving an African State, that concerns the immunities of public officials. 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. The final written pleadings have just been filed and the case will soon be scheduled for hearing. Interestingly, this case has also come to the Court on the basis of *forum prorogatum.*

There is another point I would like to tell you about. In the *Djibouti* v. *France* case, the judge *ad hoc* nominated by Djibouti, Mr. Yusuf of Somali nationality, was appointed after the passage of General Assembly resolution 61/262. This resolution amended the conditions of service for international judges and would have required that Judge Yusuf be paid a salary that would, pro rata, be less than that of the sitting Members of the Court and indeed that of the judge *ad hoc* of France, who had been appointed before the adoption of that resolution. The resolution clearly contradicted Article 31 (6) of the Statute of the Court, which states that judges *ad hoc* shall be "on terms of complete equality with their colleagues". The Court was thus put in the unenviable position of either not conforming with the resolution, not conforming with the Charter and its own Statute, or declining to proceed with the case. I wrote to the Secretary-General to inform him that as the Charter and the Statute of the Court are our governing instruments, and as our role under the Charter is to settle legal disputes brought to us, the Court would proceed with the case and pay Judge Yusuf on an equal basis with all other judges. The Court was grateful for the decision of the General Assembly in April of this year to amend resolution 61/262 to ensure that the principle of equality among judges is respected. We feel it has been realized that the position we took regarding Judge Yusuf was the correct one.

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The regions that AALCO represents are of great importance to the International Court, and I am pleased to contribute to the good relations between our two institutions. In the past year, I have undertaken official visits to Morocco and the United Arab Emirates where I gave a number of lectures. We have also welcomed delegations of judges and lawyers from China, India and Thailand to the Peace Palace for presentations on the work of the Court.

The Court is aware of the important issues being considered by AALCO. I note that at your Forty-seventh Annual Session, AALCO held a special one-day meeting on "Contemporary Issues in International Humanitarian Law" and also adopted numerous resolutions on substantive matters, including the United Nations Convention against Corruption, Terrorism, and Climate Change.

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 important role in the Asian and African regions.

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