SPEECH BY H.E. JUDGE ROSALYN HIGGINS,
PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE,

AT THE MEETING OF
LEGAL ADVISERS OF THE MINISTRIES OF FOREIGN AFFAIRS

29 October 2007

Mr. Chairman,

Ladies and Gentlemen,

I am pleased to be invited once again to address the Legal Advisers of the Ministries of Foreign Affairs. The Court appreciates the ongoing interest shown by the Legal Advisers in its work and welcomes this annual exchange. I thank Ambassador Henczel for arranging my visit.

In my address to the General Assembly this Thursday, I will — as is traditional — report on the judgments rendered by the International Court over the past year. We have had a very productive year, with three judgments already rendered, another under preparation, an Order on provisional measures, and a new case opening next week. Today, I will focus, in more depth than is there possible, on those aspects of very recent ICJ decisions that are directly relevant to the issue of diplomatic protection and to the overlapping jurisdictions of international courts and tribunals — two topics that I know are on your substantive agenda for this session. Indeed, I will be highlighting some aspects of our case law that perhaps are not so visible from the text of the judgments themselves, in the hope that this may be of interest for your own agenda themes.

The issue of diplomatic protection came before the International Court in the case concerning *Ahmadou Sadio Diallo (Guinea* v. *Democratic Republic of the Congo)*. The Judgment on preliminary objections was delivered at the end of May.

Mr. Diallo, a Guinean citizen, resided in the DRC for 32 years, founding 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* 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)*.

Mr. Diallo's case came to us by virtue of Guinea seeking to exercise diplomatic protection of Mr. Diallo's rights. The Court recalled that under customary international law, as reflected in Article 1 of the International Law Commission's draft Articles on Diplomatic Protection:

> "diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal

> person that is a national of the former State with a view to the implementation of such responsibility".

The Court further observed that:

> "owing to the substantive development of international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, *inter alia*, internationally guaranteed human rights".

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 had exhausted local remedies. The Court examined separately 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". I will focus on the first category, as your agenda item specifically concerns the issue of diplomatic protection seen from human rights perspectives.

In terms of Mr. Diallo's individual personal rights, the central issue was that of his expulsion and whether local remedies had been exhausted. As you know, the ILC is currently examining the topic of "The expulsion of aliens". The most recent report of the Special Rapporteur, Mr. Maurice Kamto, states that a study of national and international treaty practice and case law reveals several general principles that are applicable to the expulsion of aliens, including "the principle of non-discrimination, the principle of respect for the fundamental rights of the expelled person, the principle of prohibition of arbitrary expulsion, the duty to inform and the duty of the expelling State to respect its own law . . . and the procedure prescribed by the law in force". Such principles were indeed the backdrop to the Court's consideration of whether local remedies had in the *Diallo* case been exhausted, or needed to be exhausted, when the expulsion was characterized by the Government in the relevant document as a "refusal of entry" *(refoulement)* when it was carried out. Refusals of entry are not appealable under Congolese law, whereas expulsion orders are. 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. The Court decided that the DRC could not rely on its own error, if it was such, to claim that Mr. Diallo should have treated the measure taken against him as an expulsion. The DRC maintained that even if the expulsion was treated as a "refusal of entry", Mr. Diallo could have asked the competent authorities to reconsider their position and that such a request "would have had a good chance of success". The Court held that such administrative remedies could only be taken into consideration for purposes of the local remedies rule if they were aimed at vindicating a right and not at obtaining a favour. Nor do local remedies include remedies of grace unless they constitute an essential prerequisite for the admissibility of subsequent contentious proceedings. On the facts of this case, these conditions were not met.

The *Diallo* case illustrates that, notwithstanding the plethora of judicial and quasi-judicial bodies that now operate in the field of human rights — including regional human rights courts and treaty monitoring bodies — there may still be issues for which the International Court remains the forum of choice even in *this* field of law. As Professor Dugard has stated in the Commentary to the ILC's draft Articles on Diplomatic Protection: "[t]he individual may have rights under international law but remedies are few. Diplomatic protection conducted by a State at inter-State

level remains an important remedy for the protection of persons whose . . . rights have been violated abroad"[1].

With respect to the second category of rights — Mr. Diallo's direct rights as *associé* in the two Congolese companies — the Court found that Guinea could exercise diplomatic protection in respect of Mr. Diallo because there had been direct injury to Mr. Diallo's rights as such, as distinct from those of the corporation itself.

Up until that point, the *Diallo* case was a fairly straightforward diplomatic protection case. But there was another aspect that made it more complicated. Guinea argued that it 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 in 1970 where the Court had 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". 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". 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. I pause there to say that one of the most difficult issues in contemporary international law is to know when a perceptible treaty practice suggests a change in customary international law, or whether it rather reflects that customary international law is still unchanged, and if different practices are required, a treaty is needed. In the event, 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. The Court further observed that "the role of diplomatic protection [in the context of investment protection 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". The *Barcelona Traction dictum* does not today represent an individual's best guarantee against the power of government.

Ultimately, the *Diallo* case was not *Barcelona Traction Mark II*. 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 was relied on by Guinea. As for whether there existed a more limited rule of protection by substitution as set out by the ILC in Article 11, paragraph *(b)*, of its draft Articles on Diplomatic Protection, the Court left this question open, not needing to decide it for the purposes of that case.

*

I now turn to another topic on your current agenda: overlapping jurisdictions between international courts and tribunals.

I remain convinced that so-called "fragmentation of international law" is best avoided by regular dialogue between courts and exchanges of information. A detailed programme of co-operation between the ICJ and other international judicial bodies is now in place. We have an

[1] *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), Chap. IV, Commentary to the draft Articles on Diplomatic Protection adopted on second reading (2006), p. 26.

especially advanced programme of co-operation with the International Criminal Tribunal for the former Yugoslavia (ICTY).

The International Court has not failed to note that the newer courts and tribunals have regularly referred, often in a manner essential to their legal reasoning, to judgments of the ICJ. Indeed, in the first major decision of the ICC — the decision on the confirmation of charges in the case of the *Prosecutor* v. *Thomas Lubanga Dyilo* — particular reference is made to the ICJ's *Congo* v. *Uganda* Judgment of 2005.

Sometimes issues decided by other international or regional judicial bodies arise in a small but significant way in our own cases. In the *Nicaragua* v. *Honduras* case, the Court had occasion to study carefully a judgment of the Central American Court of Justice. And in connection with the provisional measures requested by Uruguay in the case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, the Court has needed, in applying its own test for the granting of provisional measures, to study what issues relating to this dispute are (or are not) in front of Mercosur.

At other times, the judicial work of other international courts and tribunals have a more direct relevance to our own findings. In February the Court delivered its Judgment in the *Bosnia and Herzegovina* v. *Serbia and Montenegro* case. This was the first legal case dealing with allegations of genocide by one State against another, but of course it was not the first time that the events in the Balkans had been considered by an international court or tribunal. The ICTY has been examining the same events for 13 years, but through the lens of individual criminal responsibility.

Both the Parties made great use of the judgments of the ICTY and the question of how to treat these judgments was thus squarely before the ICJ. The ICJ's *Bosnia* v. *Serbia* Judgment contains long and detailed findings of fact based on the Court's own analysis of the evidence, but with extensive reference also to relevant findings of the ICTY. The Court termed the working methods of the ICTY as rigorous and open, allowing it to treat ICTY findings of fact as "highly persuasive". The findings reached by the International Court through its independent analysis, including the key finding that the killings in Srebrenica in July 1995 were acts of genocide, were consistent with the jurisprudence of the ICTY.

Apart from findings of fact, the Court was aware of the relevant legal findings established by the ICTY's jurisprudence. The International Court's Judgment in the *Bosnia* case addressed what is perhaps the most cited example of "the fragmentation of international law" — the test for control of irregular forces for purposes of responsibility adopted by the ICTY in the *Tadić* case[2]. In 1999, the ICTY Appeals Chamber decided not to follow the "effective control" test that had been elaborated by the International Court in the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* case, choosing instead to create an "overall control" test that required a lower threshold[3]. In the *Bosnia* v. *Serbia* case, the International Court clearly addressed this perceived fracture in the jurisprudence and demonstrated that its significance should not be inflated. It observed that the ICTY was not called upon in the *Tadić* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only. The International Court explained that logic does not require the same test to be adopted in resolving: *(a)* the degree and nature of a State's involvement in an armed conflict on another State's territory which is required for the conflict to be characterized as international; and *(b)* the degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict. Only the former was the question which the ICTY Appeals Chamber was called upon to decide.

---

[2] *Prosecutor* v. *Tadić*, case No. IT-94-1-A, Appeals Chamber, Judgment of 15 July 1999.

[3] *Id.*, para. 137.

The International Court found that the "overall control" test was unsuitable for determining when a State was responsible for acts committed by paramilitary units. It broadened the scope of State responsibility well beyond the fundamental principle that a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. The International Court therefore continued to apply the stricter "effective control" test articulated in the *Military and Paramilitary Activities* case, and reflecting general international law, as perceived also by the ILC in its Commentary[4] to Article 8 of its Articles on State Responsibility.

Thus, some differences of perception between the ICJ and the ICTY exist on this control test for purposes of responsibility, but given the different relevant contexts, they are readily understandable and hardly constitute a drama. Rather, we have an emerging sense of the United Nations principal judicial organ, and the Security Council's special Tribunal for the former Yugoslavia, working in parallel in harmony to achieve our respective tasks.

*

Before I conclude I am obliged briefly to refer to a matter in which the International Court has unfortunately been caught up. I am referring to the adoption of General Assembly resolution 61/262 on "Conditions of service and compensation for officials other than Secretariat officials: Members of the International Court of Justice and judges and *ad litem* judges of the ICTY and the ICTR". As you know, this resolution raises grave constitutional issues for the International Court. This matter will be addressed in the forthcoming Secretary-General's Report. A memorandum we produced in July to assist the Office of the Secretary-General in the preparation of this Report clearly lays out the serious legal consequences arising out of resolution 61/262, including the fact that it establishes a transitional measure that draws a distinction between current judges of the Court and those judges elected after 1 January 2007. It would be the first time in the history of the International Court of Justice that judges on the same Bench would receive different salaries. Equality between the judges of the ICJ is one of the fundamental principles underlying the Statute of the Court, which is an integral part of the United Nations Charter. The deep irony is that paragraph 7 of resolution 61/262, the purpose of which was officially to address certain budgetary matters related to the ICTY and ICTR, in fact has its impact *only* on the ICJ, as no further elections are envisaged for the ICTY and ICTR (unless, of course, the ICTY were to be extended by a later decision). So it would seem that the resolution does not in fact achieve its intended purpose at all, although it will have very problematic effects on the ICJ, and the ICJ alone. We are now seeking to find a solution to these problems during this session of the General Assembly and ask for your assistance in this regard.

On behalf of the International Court, I express our appreciation for your strong interest in our work and wish you the best for these two days of meetings.

_____

[4]International Law Commission, 200l, Report of the International Law Commission. United Nations, *General Assembly Official Records, Fifty-sixth Session, Supplement No. 10*, United Nations doc. A/56/10, pp. 104-105.