

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

2 November 2007

Mr. Chairman,

Distinguished Delegates,

I am delighted to address your Committee today for the second time as President of the International Court of Justice. I congratulate His Excellency Ambassador Alexei Tulbure on his election as Chairman of the Committee for the Sixty-second Session of the General Assembly.

The Sixth Committee's work on the development and codification of international law is of the highest importance and relevance to the International Court of Justice. We closely follow the Committee's activities.

Since you have perhaps heard my speech to the General Assembly, I will not go over the very same ground with you. I thought rather I would share with you today, as I did last year, some thoughts on a legal issue of interest. I have chosen the topic of the judicial determination of relevant facts.

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There is much current work being done on the topic of evidence issues in international courts and tribunals generally. Several articles have appeared, conferences are being held, books are under preparation. It may be helpful if I explain some issues relating to this so far as the ICJ is concerned.

A couple of preliminary remarks:

Occasionally, the Court finds itself faced with issues of pure law. This was so, for example, in the *Genocide Revision* case (*Bosnia and Herzegovina v. Yugoslavia*) and the *Arrest Warrant* case (*Democratic Republic of the Congo v. Belgium*). Rather more frequently, the Court is faced with the need to determine facts and law: that is true in virtually every case concerning title to territory. And, with increasing frequency, the Court needs to make very heavy findings of fact, these being critical for the legal issues in dispute.

Findings of fact for a *criminal* court will necessarily entail different procedures from those in a civil court. The ICTY, ICTR and the ICC investigate and prosecute persons accused of serious international crimes. They have detailed pre-trial, trial and appeal procedures for determining individual criminal responsibility. By contrast, the ICJ is a court for determining international law, as it applies to States.

How the judicial determination of facts is done

Any practitioner knows that there are “facts” and “facts”. Some classical “legal facts” are said by the parties to flow from the documentation they have produced before us. For example, a certain exchange of correspondence or statements in Parliament may be claimed to show that there was a binding arrangement between States X and Y. This of course requires us to examine all such documentation in meticulous detail. This very often arises in territorial dispute cases, where the two sides have different versions of the history of the relations between them. In the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, for example, we had to determine what exactly had been agreed by whom and in what circumstances. Did the Ruler of Qatar consent to have the question of the Hawar Islands decided by the British Government in an exchange of letters in 1939? Was Janan Island part of the Hawar Island group according to the letters between the British Political Agent in Bahrain to the Rulers of Qatar and Bahrain? In order to answer such questions, the Court examined all the relevant correspondence and archival documents.

In territorial dispute cases, an understanding of the colonial past is invariably necessary. Often, one or both parties will rely on the *uti possidetis juris* principle as the basis of sovereignty over the territory in dispute. As the Chamber of the Court explained in the *Burkina Faso/Mali* case, “the essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved”¹. States invoking the *uti possidetis* principle before us may have on their teams, as relevant, counsel from Germany (for Namibia in the *Kasikili/Sedudu Island* case), France (for Chad in *Libya/Chad*), and Britain (for both parties in *Qatar v. Bahrain*). In the *Nicaragua v. Honduras* case — the Judgment of which was delivered three weeks ago — the “legal fact” of how maritime matters were handled by the Spanish Crown was pleaded by Spanish counsel on the teams of both parties.

The Statute and Rules of Court distinguish between “experts” and “witnesses”. Persons called by the parties as “experts” have to make a special declaration before making any statement (Article 64 of the Rules) and are examined by counsel under the control of the President (Article 65 of the Rules). But, in practice, we find that persons with a particular “expert” knowledge are included as *part of* the teams rather than called as “experts” under these aforementioned provisions. The task of proving historical facts, for example, is usually done as part of the (written and oral) pleadings of the team. It is not presented as “expert testimony” as such and there is therefore no cross-examination. The “expert” lawyer in each team will rather respond to the claimed “evidence of history” of the other in his own submissions. This person is treated by the Rules of Court as “counsel” rather than as “expert”.

We see the same phenomenon of “expert as team member” with respect to a different kind of evidence/proof, not in relation to history or legal facts, but *technical* in nature. One such instance was the expert opinion advanced as to the impact of river meanders on the identification of the main channel in the *Botswana/Namibia* case. We heard experts on both sides in this case — as team members, not as experts called by the Parties under Articles 57 and 63 of the Rules. After examining evidence put forward as to depth, width, flow, visibility, bed profile configuration, and navigability, the Court concluded that the northern channel of the River Chobe around Kasikili/Sedudu Island must be regarded as its main channel.

On major technical questions, often there will be detailed expert reports annexed to the pleadings for our scrutiny. One only has to look at the case file for the *Gabčíkovo-Nagymaros* case to see this in action. It will be a matter for the team concerned whether they then include that expert in their delegation or whether they leave any oral submissions as to that evidence to counsel. Different choices were made on this by Nicaragua and Honduras in the recent case concerning maritime delimitation. On the question whether there was evidence that the King of Spain

¹*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986, p. 566, para. 23.*

attributed maritime spaces to one or other of the provinces of the Captaincy-General of Guatemala, Honduras annexed expert reports to its Rejoinder whereas Nicaragua's counsel analysed historical material during the oral hearings. Parties may even ask the Court to appoint an expert whose report will be officially annexed to the Judgment. In the *Gulf of Maine* case, Canada and the United States requested the Chamber in their Special Agreement to appoint a technical expert nominated jointly by them to assist the Court with, *inter alia*, preparing the description of the maritime boundary and the charts on which its course would be indicated². The Court duly appointed the expert and his Technical Report was annexed to the Judgment.

Expert evidence seems now largely to be assimilated within the submissions of a legal team, but very occasionally *witness* evidence, namely personal testimony as to facts, is still called. The Statute of the Court contains several provisions concerning witnesses: Article 43 (5) provides that witnesses and experts may be part of the oral proceedings; Article 48 permits the Court to "make all arrangements connected with the taking of evidence"; and Article 51 states that during the hearing any relevant questions are to be put to the witnesses and experts under the conditions laid down in the Rules. The Rules, in turn, contain provisions on how parties give notice of their intention to call witnesses, the declarations to be made by a witness or expert, interpretation, and so on.

Only ten cases at the International Court have involved the live testimony of witnesses or experts, and there was a gap of 14 years between the last case in which witnesses were called and the *Bosnia and Herzegovina v. Serbia and Montenegro* case³. There were early suggestions that the parties (or one of the parties) in the *Bosnia v. Serbia* case would want to call *hundreds* of witnesses. This obviously presented problematic issues for the Court, including: how to organize the cross-examination of the witnesses, how to secure the confidentiality of the testimony during the hearings, what type of translation to provide for the witnesses and for the Court, the impact of the length of proceedings, the consequences for the overall throughput of the Court, equality between the parties, and witness protection measures. None of it was insoluble and the Court had provisional plans in place — but in the event, the witness lists of both parties became entirely manageable in number. The Applicant called two experts, and the Respondent called six witnesses and one witness-expert. The category of "witness-expert" is not actually mentioned in the Statute or the Rules, but was recognised in the *Corfu Channel* case and subsequently used in the *Temple of Preah Vihear* case and *South-West Africa* cases. The term refers to a person who can testify both as to knowledge of facts, and also give an opinion on matters upon which he or she has expertise. In the *Bosnia v. Serbia* case, the witnesses and experts were examined and cross-examined in court. We heard testimony as to the structure of the military organizations, the relationship between the army of Republika Srpska and the Yugoslav army, the destruction of cultural heritage, and estimations of the war casualties.

There are exceptional instances of historical testimony which no one would *wish* to challenge. The testimony of the Mayors of Hiroshima and Nagasaki in the advisory proceedings on the *Legality of the Threat or Use of Nuclear Weapons* bore witness to the devastating damage and human misery that befell those cities and their citizens. We were asked to receive the Mayors as experts. The Court suggested that, although not pleading any point of law, they should be included within the delegation of Japan. Not only was this sensible in the particular circumstances of these Mayors; but it also for the time being put to one side another complex issue: can the usual

²*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, I.C.J. Reports 1984, p. 265.

³*Corfu Channel (United Kingdom v. Albania)* case 1949; *Temple of Preah Vihear (Cambodia v. Thailand)* 1962; *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)* 1966; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* 1982; *Gulf of Maine (Canada/United States of America)* 1984; *Continental Shelf (Libyan Arab Jamahiriya/Malta)* 1985; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* 1986; *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)* 1989; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* 1992; *Application of the Genocide Convention (Bosnia Herzegovina v. Serbia and Montenegro)* 2006.

procedures regarding witnesses applicable in contentious cases be applied also in advisory proceedings?

Aside from the witnesses and experts called by the parties, the Court can *itself* call witnesses under Article 62 of the Rules, appoint experts under Article 50 of the Statute, and arrange for an enquiry or expert opinion under Article 67 of the Rules of Court. There has never been a case where witnesses appeared having been called by the Court itself, but it is a possibility that is constantly in its view. There have been two cases where Court-appointed experts have been used: once by the Permanent Court in the *Chorzów Factory* case, and once by the ICJ in the *Corfu Channel* case. In the latter case, the Court appointed a commission of experts under Article 67 of the Rules to make an independent study of facts in dispute between the Parties, which were necessary for the Court to make its decision on the merits. Later, the Court requested from the commission an expert evaluation of the damage sustained by the Applicant in order to assess the quantum of compensation to be paid. In recent years there has been no reliance on such measures. Reviewing evidence presented on technical matters is generally part and parcel of the job of the judge.

Article 66 of the Rules of Court (added in 1978) introduced the possibility of “visits *in situ*” by the Court, either *proprio motu* or at the request of its party. It was originally intended that these visits would be to collect evidence, but on the one occasion a visit has been undertaken, it was rather for information purposes. In the *Gabčíkovo-Nagymaros* case, Slovakia invited the Court to visit the site on the Danube River where the system of locks to which the case related were located. Hungary agreed to the proposal and the Court visited a number of sites along the Danube River, taking note of the technical explanations given by the representatives designated by the Parties.

The question of the burden of proof

The Court has always said that a party alleging a fact bears the burden to prove it. Sometimes each party will bear that burden, albeit in relation to different claims made. The Court explained in the *Guinea v. Congo* case, which concerned diplomatic protection, that it is incumbent on the applicant to prove that local remedies were indeed exhausted or to establish that exceptional circumstances relieved the allegedly injured person whom the applicant seeks to protect of the obligation to exhaust available local remedies. It was for the respondent to convince the Court that there were effective remedies in its domestic legal system that were not exhausted⁴.

The question of the standard of proof

The Court’s prime objective as to standard of proof appears to have been to retain a freedom in evaluating the evidence, relying on the facts and circumstances of each case⁵. The Court made some observations on the standard of proof in the *Corfu Channel* case of 1949 where it simultaneously rejected evidence “falling short of conclusive evidence” and referred to the need for a “degree of certainty”⁶. But the Court has since then been reluctant to specify the standard of proof, even for a particular case. In the *Oil Platforms* case, the Court did not explain the standard of proof to be met; it satisfied itself with saying that it did not have to decide “on the basis of a balance of evidence” by whom the missile that struck the *Sea Isle City* was fired. It simply noted that the United States had not discharged the necessary burden of proof because “the evidence available [was] insufficient, without specifying by which criteria sufficiency/insufficiency was

⁴*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Preliminary Objections, Judgment of 24 May 2007, para. 44.*

⁵Kazazi, *Burden of Proof and Related Issues: A Study of Evidence before International Tribunals*, 1996, p. 323.

⁶*Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), Merits, Judgment, I.C.J. Reports 1949, p. 17.*

being tested⁷. Part of this reluctance to be specific is caused by the gap between the explicit standard-setting approach of the common law and the “*intime conviction du juge*” familiar under civil law; the ICJ naturally has judges from both of these traditions on its Bench.

When dealing with genocide claims in the recent *Bosnia and Herzegovina v. Serbia and Montenegro* case, the Parties wanted to know whether the criminal standard of proof was applicable. The Applicant argued that the matter before the Court was not one of criminal law and that the appropriate standard was therefore the balance of probabilities, inasmuch as what was alleged was breach of treaty obligations. The Respondent, on the other hand, contended that a charge of such exceptional gravity against a State required “a proper degree of certainty” and the standard should leave no room for reasonable doubt⁸.

In the circumstances of this case, the Court *did* find it necessary to specify a standard of proof to be met. It stated:

“The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive (cf. *Corfu Channel (United Kingdom v. Albania)*, Judgment, *I.C.J. Reports 1949*, p. 17). The Court requires that it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts.”⁹

There have been some curious comments by observers as to this being a “higher” or “lower” standard than “beyond reasonable doubt”. It is simply a *comparable* standard, but employing terminology more appropriate to a civil, international law case.

Value as proof

By contrast to its general reluctance to specify a standard of proof, the Court has been, over a series of cases, systematically establishing what types of evidence it has or has not found weighty. The evidence it has had occasion to remark on has naturally depended upon the particular case.

In the *Congo v. Uganda* case, the Court was faced with a very complex set of facts and vast amount of documentation provided by both Parties. It undertook a detailed evaluation of the evidence, examining the origin, authenticity and reliability of each source in addition to its substantive content. The Court stated that it would treat with caution evidentiary materials specially prepared for this case and also materials emanating from a single source. It would prefer contemporaneous evidence from persons with direct knowledge and give particular attention to reliable evidence acknowledging facts or conduct unfavourable to the State represented by the person making them¹⁰.

The Court gave substantial weight to the Report of the Judicial Commission set up by the Ugandan Government and headed by Justice David Porter (“the Porter Report”). The Court noted

⁷See *Oil Platforms (Islamic Republic of Iran v. United States of America)*, *I.C.J. Reports 2003*; separate opinion of Judge Higgins, p. 234.

⁸*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, para. 208.

⁹*Ibid*, para. 209.

¹⁰*Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *I.C.J. Reports 2005*, p. 201, para. 61.

“that evidence obtained by examination of persons directly involved, and who were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information, some of it of a technical nature, merits special attention”¹¹.

The Court further observed that, since its publication, there had been no challenge to the credibility of the Porter Report, which had been accepted by both Parties. This so-called “Porter Test” has since played its part in the case brought by Bosnia and Herzegovina against Serbia and Montenegro, where the Court held that the fact-finding process of the International Criminal Tribunal for the former Yugoslavia (ICTY) fell within this “Porter” formulation¹².

In the same way as the *Congo v. Uganda* case, *Bosnia v. Serbia* was a fact-intensive case for the Court. The oral hearings lasted for two and half months, witnesses were examined and cross-examined, and thousands of pages of documentary evidence were submitted. A substantial portion of the Judgment is devoted to analysing this evidence and making detailed findings as to whether alleged atrocities occurred and, if so, whether the perpetrators possessed the specific genocidal intent. We made our own determinations of fact based on the evidence before us, but we also greatly benefited from the findings of fact that had been made by the ICTY when it was dealing with accused individuals. We distinguished between decisions taken at various stages of the ICTY processes. For example, as a general proposition the inclusion of charges in an indictment cannot be given weight, nor can judgments on motions for acquittal made by the defence at the end of the prosecution’s case. By contrast, the Court found that it should in principle accept as “highly persuasive” relevant findings of fact made by the ICTY at trial, unless of course they had been upset on appeal.

Our most recent Judgment on the merits in the *Nicaragua v. Honduras* case addressed the specific evidentiary issue of affidavits. This arose because Honduras had produced sworn statements by a number of fishermen attesting to their belief that the 15th parallel represented and continued to represent the maritime boundary between Honduras and Nicaragua. The Court noted that witness statements produced in the form of affidavits should be treated with caution:

“In assessing such affidavits the Court must take into account a number of factors. These would include whether they were made by State officials or by private persons not interested in the outcome of the proceedings and whether a particular affidavit attests to the existence of facts or represents only an opinion as regards certain events. The Court notes that in some cases evidence which is contemporaneous with the period concerned may be of special value. Affidavits sworn later by a State official for purposes of litigation as to earlier facts will carry less weight than affidavits sworn at the time when the relevant facts occurred. In other circumstances, where there would have been no reason for private persons to offer testimony earlier, affidavits prepared even for the purposes of litigation will be scrutinized by the Court both to see whether what has been testified to has been influenced by those taking the deposition and for the utility of what is said. Thus, the Court will not find it inappropriate as such to receive affidavits produced for the purposes of a litigation if they attest to personal knowledge of facts by a particular individual. The Court will also take into account a witness’s capacity to attest to certain facts, for example, a statement of a competent governmental official with

¹¹*Ibid.*

¹²*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, para. 214.

regard to the boundary lines may have greater weight than sworn statements of a private person.”¹³

These criteria are designed to provide guidance to future parties who seek to produce affidavits before the Court.

Mr. Chairman,

Distinguished Delegates,

Recent cases such as *Congo v. Uganda* and *Bosnia v. Serbia* have been particularly fact-heavy, with hundreds of pieces of evidence annexed to the written pleadings of the parties. And the *Malaysia/Singapore* case, in which hearings will open next week, involves around 4,000 pages of annexes. The judicial determination of relevant facts will be an ever more important task for the Court.

I may add that this task explains the continuing need for each judge to have a law clerk. The ICJ remains *alone* among senior international courts in not having such assistance in the marshalling and collating and checking of evidence.

I will not repeat my speech to the General Assembly, but I do ask that you take special note of what I said there regarding resolution 61/262. You will understand that the Statute of the Court governs us, that we have to sit in equality, and that we cannot have judges on the same Bench receiving different salaries. Nor should the ICJ stand alone as the only judicial body bearing the negative impact of this resolution at the present time. Throughout the United Nations rule of law issues are on the agenda. There is a real rule of law issue right here, and we will appreciate your following matters. What the Court seeks now to do is to find a solution to these problems and we have some concrete proposals contained in the document which will be annexed to the Secretary-General’s forthcoming Report on “Conditions of Service and Compensation for Officials other than Secretariat Officials”.

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

¹³*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment of 8 October 2007, para. 244.