

Statement of Judge Rosalyn Higgins, President of the International Court of Justice, on the occasion of the tenth anniversary of the Tribunal

Mayor von Beust,
Secretary Hennerkes,
President Wolfrum,
Mr. Michel,
Dear colleagues,
Your Excellencies,
Ladies and Gentlemen,

I greatly appreciate the invitation of President Wolfrum to speak at this celebration of the tenth anniversary of the International Tribunal for the Law of the Sea.

It is a year for anniversaries. As you may know, the International Court marked its sixtieth anniversary this year. Both our institutions are celebrating milestones at a time when the interest in international law is very high. Indeed, we are living in an era characterised by the broadening and deepening of international law. The broadening of international law is reflected in emerging norms on space law, environmental law, trade law, international criminal law, among other examples.

The deepening of international law is reflected in the subject matter served by your Tribunal: the law of the sea. One of the most significant events in the development of international law was the conclusion of the 1982 United Nations Convention on the Law of the Sea. It clarified existing law, progressively developed certain norms whose status was unclear, and introduced important new areas of agreed conduct. It provided a comprehensive legal regime for the use of the world's largest resource, including regulation of use, assignment of maritime zones, and the provision of compulsory dispute settlement procedures.

For a variety of reasons, new courts and tribunals have burgeoned, serving a variety of international needs.

The response of the older members of the judicial club to the arrival of newer members of that club must be a positive one. We are living in a specialized world where particular courts and tribunals have their own important role to play – a role that often envisages flexibility in procedures, adjudicators possessing special expertise, access going beyond state parties, and a necessary speed of decision. The International Tribunal for the Law of the Sea entirely fits this model. It is part of a sophisticated dispute settlement system set out in Part XV of the Convention, under which the particular procedure for parties to settle their disputes is largely a matter of choice. The Tribunal brings together 21 Judges with recognized high competence in the area of the law of the sea. Actors other than States, such as international and non-governmental organisations, are entitled to access the legal procedures. And within a decade, the Tribunal has pronounced interesting law, built a reputation for its efficient

and speedy management of cases and shown innovative use of information technology.

This growth in the number of new courts and tribunals has generated a certain concern about the potential for a lack of consistency in the enunciation of legal norms and the attendant risk of fragmentation. Yet these concerns have not proved significant. The general picture has been one of important courts, like this Tribunal, dealing with specialised legal issues of the first rank of significance, and seeing the necessity of nonetheless locating themselves within the embrace of general international law. Over the past decade, ITLOS has regularly referred to the Judgments of the International Court with respect to questions of international law and procedure. The International Court, for its part, has been following the Tribunal's work closely, and especially its already well-developed jurisprudence on provisional measures. Our Statute clearly states in Article 38 that the Court can look to "judicial decisions" as a subsidiary means for the determination of rules of law and the Judges do familiarise themselves with the jurisprudence of leading international courts, such as ITLOS.

The potential for fragmentation should not be exaggerated. Parties prefer to submit their disputes for settlement to bodies whose decisions are characterised by consistency, both within that body's own jurisprudence and with the decisions of other international bodies confronted with analogous issues of law and fact. There is an incentive for international decision-makers to pay careful attention to the work of their colleagues. Given that the ICJ is a court of general jurisdiction, there is inevitably some overlap in subject matter. What is striking is not the differences between the international courts and tribunals, but the efforts at compliance with general international law, even within the context of specialized institutional treaties. This is as true of the law of the sea as it is of human rights law and environmental law issues: these and other themes may, in today's world, be adjudicated upon in one or more judicial bodies.

The atmosphere of mutual respect that prevails between our two judicial institutions is assisted by Article 4 of the Agreement on Cooperation and Relationship between ITLOS and the United Nations, which facilitates through the UN the regular exchange of information and documents of mutual interest. The better we understand each other, the better we serve our common goal of a mutually reinforcing corpus of international law in the settlement of international legal disputes.

Both the International Court and the Tribunal are committed to resolving disputes by peaceful means, a goal that is enshrined in our constitutive instruments. It should not be thought that disputes over maritime issues are one category of cases, and disputes that endanger the maintenance of international peace and security, in the terms of Article 33 of the UN Charter, are another. Disputes about entitlement to the use of the ocean or the delimitation of a maritime zone are not always peaceful and can cause high tensions, often regional. They can create bitter political relations or be perceived as threatening ways of life that have existed for centuries. Sometimes a judicial institution can, in providing an impartial pronouncement on the underlying claims, defuse these high tensions.

We also share a commitment to keeping sight of human values in our judicial decisions. Recent Judgments on prompt release at this Tribunal have found that: international law does not permit excessive force or wanton violence in stopping, inspecting or arresting vessels at sea (Saiga No. 2); the duty to release arrested crew members promptly on a reasonable bond means that they must be permitted to leave the country (The “Camouco” case); the flag State can make claims not only for direct injuries to its own legal rights but also for injuries to ship, crew and cargo regardless of the nationality of the individuals who have suffered those losses (Saiga No. 2).

The experience of most international courts is to start slowly and steadily build their docket. The most important factor in this formative stage of the life of a new judicial institution is confidence-building — providing that core predictability that distinguishes law from politics, but doing so in a way that is responsive to the legitimate needs and expectations of the international community. Everyone has the greatest respect for the judicial work of this Tribunal. Indeed, multilateral treaties drafted after 1996 have adopted provisions enabling the referral of disputes to the regime established by the UN Convention on the Law of the Sea. We are seeing the development of a multifaceted system for the settlement of law of the sea-related disputes, with ITLOS as an important player.

Interestingly, the very first cases heard by the Permanent Court of International Justice and the International Court of Justice involved the law of the sea: the S.S. Wimbledon case in 1923 and the Corfu Channel case in 1947. Disputes of this nature have regularly appeared on our docket. But the different scopes of the jurisdiction *ratione personae* and *ratione materiae* of the International Court and the Tribunal suggest that our roles are actually quite differentiated, and this will most likely become more striking over time as the Tribunal’s jurisprudence develops. Only States can come before the International Court in contentious disputes. With respect to advisory opinions, United Nations organs and certain specialised agencies may have access to the Court. In contrast, the Tribunal is open to various non-state actors. The European Community is currently a party in a dispute before a special chamber. The Sea-Bed Disputes Chamber has an even broader range of potential parties.

As regards jurisdiction *ratione materiae*, the competence of the International Court is both wider and narrower than that of the Tribunal. On the one hand, the International Court is the only international judicial body to possess general subject matter jurisdiction. On the other hand, in law of the sea matters there are several categories of cases which could be brought to the Tribunal but which could not — or only with difficulty — be brought to the International Court, such as the cases referred to in Article 187, paragraphs (b) to (e) of the UN Convention on the Law of the Sea, which are intended to be resolved by the Seabed Disputes Chamber. Further, even in cases where the International Court could have subject matter jurisdiction, the drafters of the UN Convention clearly expressed a preference for the Tribunal to handle disputes over

the prompt release of vessels or the indication of provisional measures pending the constitution of an arbitral tribunal in Articles 290 and 292.

Cases involving the law of sea continue to come before the International Court, but they are rarely concerned with purely maritime issues. Since the Tribunal started functioning, the International Court has decided several cases where the question of territorial title was anterior to the issue of maritime delimitation, such as Land and Maritime Boundary between Cameroon and Nigeria 1998, Kasiliku/Sedudu Island (Botswana/Namibia) 1999, Maritime Delimitation and Territorial Questions between Qatar and Bahrain 2001, and Frontier Dispute (Benin/Niger) 2005. In the Fisheries Jurisdiction case between Spain and Canada, we had to consider in addition to the general law of jurisdiction on the high seas, the Northwest Atlantic Fisheries Organization's regime and regulations and the law of the European Union. In the event, we found that we did not have jurisdiction in that case because of reservations that had been made. In terms of our current docket, there are two cases concerning a "pure" maritime delimitation: Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea and Maritime Delimitation in the Black Sea (Romania v. Ukraine). There is one case involving a mixture of territorial and maritime issues: Territorial and Maritime Dispute (Nicaragua v Colombia). And there is the Dispute regarding Navigational and Related Rights brought by Costa Rica against Nicaragua regarding the exercise and enjoyment of rights on the San Juan River.

We and our sister Court, the Law of the Sea Tribunal, are both working towards the same goals. Nine years ago, the former Legal Adviser of the United Nations — so closely involved in the establishment of this Tribunal — and eminent German former ICJ Judge, Carl-August Fleischhauer, wrote an article on "The Relationship between the ICJ and the Newly Created ITLOS". He noted the areas of jurisdictional overlap, but also stressed the differences between the judicial institutions. He urged both bodies to be mindful and respectful of each other's jurisprudence., saying: "Of course, where there is an overlapping competence, there is the possibility of conflict; but there also is the possibility of a respectful co-existence".¹ What is already clear is the respect, Mr. President, that your Tribunal has from your international judicial colleagues.

Mayor von Beust,
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Dear colleagues,
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In the name of all the Members of the International Court of Justice, it gives me great pleasure to participate in the celebrations for the tenth anniversary of the International Tribunal for the Law of the Sea. One decade is a relatively short time in

¹ Carl-August Fleischhauer, "The Relationship Between the International Court of Justice and the Newly Created International Tribunal for the Law of the Sea", (1997) 1 *Max Planck Yearbook of United Nations Law* 327, 333.

the life of a new international institution, and the Tribunal is already making its mark. For our part you can be assured we greatly value your work, follow it closely, and look forward to a continuing good relations and cooperation between the Court and the Tribunal.