

## **International Court of Justice – A Progress Report with His Excellency Justice James Crawford**

On Monday 25 September 2017 Sydney University hosted His Excellency Justice James Crawford AC SC FBA of the International Court of Justice to deliver an insightful talk on “International Court of Justice – A Progress Report”. His Excellency gave an overview of the Court, current and pending cases and prospects for the future.

### **1. Short Biography**

James Crawford is only the second Australian to hold the prestigious position as a Justice of the ICJ, following in the footsteps of Sir Percy Spender KCVO KBE QC who served from 1964 – 1967. Before joining the Court in 2014, James Crawford’s distinguished legal career includes acting as a barrister, expert and arbitrator in thousands of cases, many of which he was appearing as counsel before the Court. In addition to his advocacy work James Crawford is an eminent academic served as the Whewell Professor in International Law at the University of Cambridge and Challis Professor of International Law and Dean of Law at Sydney University. Judge Crawford was responsible for work on the Draft Statute for an International Criminal Court (ICC) and International Law Commission (ILC) Articles on State Responsibility while serving as a member of the ILC from 1992-2001.<sup>1</sup>

### **Overview: The International Court of Justice (“ICJ”)**

Established in 1946 by the Charter of the United Nations (UN), the Court is located in The Hague, Netherlands at the Peace Palace. The ICJ is the principal judicial organ of the UN, and carries out two main duties. First, to settle disputes submitted to it by states in accordance with international law, these are known as contentious cases. Secondly, to provide advisory opinions to legal questions referred to it by the UN and its agencies.<sup>2</sup>

Only states may be parties to a dispute in contentious cases. The Court’s jurisdiction to hear cases can arise in three main ways.<sup>3</sup> First, by special agreement between the parties to submit to the jurisdiction of the Court. Second, through a jurisdictional clause, typically found in a multinational or bilateral treaty stating a dispute arising over the interpretation or application of the treaty will be submitted to the Court. Finally, through reciprocal declarations made by States under the Court Statute accepting jurisdiction. These declarations are deposited with the UN Secretary-General.

Fifteen judges sit on the Court. The UN General Assembly and Security Council elect the judges for terms of nine years. One third of the court is elected every three years. Candidate selection is a very rigorous process. All states party to the Statute of the Court can propose candidates. Elections are held at the UN in New York, where the General Assembly and Security Council vote separately and simultaneously on the proposed candidates. An absolute majority of the votes must be received in both bodies to be elected. Judges cannot be from the same state and must embody the principal legal systems from around the world. Currently sitting on the Court with His Excellency James Crawford is: President Ronny Abraham (France), Vice-President Abdulqawi Ahmed Yusuf (Somalia), Justices Hisashi Owada (Japan), Peter Tomka (Slovakia), Mohamed Bennouna (Morocco), Antônio Augusto Cançado Trindade (Brazil) Christopher Greenwood (UK), Xue Hanqin (China) Joan E.

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<sup>1</sup> International Court of Justice, *Judge James Richard Crawford, Biography* <[http://www.icj-cij.org/files/members-of-the-court-biographies/crawford\\_en.pdf](http://www.icj-cij.org/files/members-of-the-court-biographies/crawford_en.pdf)>.

<sup>2</sup> International Court of Justice, *How the Court Works*, <<http://www.icj-cij.org/en/how-the-court-works>>.

<sup>3</sup> *Statute of the International Court of Justice*.

Donoghue (USA), Giorgio Gaja (Italy), Dalveer Bhandari (India) Patrick Lipton Robinson (Jamaica) Kirill Gevorgian (Russia) and Registrar Mr Philippe Couvreur (Belgium).<sup>4</sup>

After instigating proceedings parties participate in a written phase, exchanging pleadings on the points of fact and law on which their case relies. Public hearings where agents of the States address the Court will then be held. Judge Crawford noted two main reasons why the oral proceedings are very important at the ICJ. First, its and opportunity for parties to put their best case forward, where in the writing pleadings every possible point on the law is made. Secondly, as counsel is engaged to represent States oral advocacy is an opportunity for states to emphasis points that are important not just legally but politically. In some instances states may even modify their position in oral arguments based on political factors at home. After deliberations the Court will deliver its decision in a public sitting and in written judgment. All judgments of the Court are final and binding on the parties. There is no appellate mechanism of the ICJ.<sup>5</sup>

### **Current and Pending cases**

Judge Crawford highlighted a few cases currently being deliberated and pending before the Court. The Court is currently in deliberations on three cases: *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* (Cost Rica v. Nicaragua), *Land Boundary in the Northern Part of Isla Portillos* (Costa Rica v. Nicaragua) and *Certain Activities carried out by Nicaragua in the Border Area* (Costa Rica v. Nicaragua).<sup>6</sup> There are currently seventeen pending cases before the court.<sup>7</sup> Due to time Mr Crawford was not able to expand on each of the pending cases but a few interesting disputes include the *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination* (Ukraine v. Russian Federation) and *Jadhav Case* (India v. Pakistan).

#### *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Cost Rica v. Nicaragua) and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua).*

Public hearings in both cases were concluded on 13 July 2017.<sup>8</sup> Joined on 2 February 2017, both cases concern boundary lines between Costa Rica and Nicaragua. Costa Rica has asked the Court to determine maritime boundaries in the Pacifica Ocean and Caribbean Sea and declare that a stretch of coast in the Isla Portillos is not Nicaraguan territory. The Court previously made a ruling concerning the Isla Portillos in *Certain activities Carried out by Nicaragua in the Border Area* (Cost Rica v. Nicaragua) in 2015. Costa Rica relies on the *Certain Activities* case to argue that the Nicaraguan claims over the territory are inadmissible as the Court has already made a judgment on the territory. Nicaragua rejects Costa Rica's submission of where the boundary lines lie under international law and has requested the Court reject Costa Rica's claims in their entirety. The Court is currently in deliberations and has yet to announce when a final judgment will be read out in a public hearing.

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<sup>4</sup> International Court of Justice, *Current Members*, <<http://www.icj-cij.org/en/current-members>>.

<sup>5</sup> *Statue of the International Court of Justice*, art. 60.

<sup>6</sup> International Court of Justice, *Pending Cases*, <<http://www.icj-cij.org/en/pending-cases>>.

<sup>7</sup> *Ibid.*

<sup>8</sup> International Court of Justice, '*Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Cost Rica v. Nicaragua) and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua) Conclusion of the public hearings The court to begin its deliberation*' (Press Release, 13 July 2017) <<http://www.icj-cij.org/files/case-related/165/165-20170713-PRE-01-00-E.pdf>>.

*International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*

On 16 January 2017, the Ukraine instituted proceedings against Russia alleging violations of the International Convention for the Suppression of the Financing of Terrorism (ICSFT) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).<sup>9</sup> Following large scale fighting in eastern Ukraine and the downing of Malaysian Airline Flight MH17 the Ukraine alleged Russia was in violation of its obligations under the two treaties by supplying money, weapons, vehicles, equipment, training and personnel to group that were engaging in acts of terrorism against Ukrainian citizens in addition to acts of political and cultural suppression of ethnic Ukraine people in Crimea.

Both conventions have dispute resolution clauses requiring parties to undertake negotiations to settle the dispute. In the case of the ICSFT under Article 24 it goes even further to outline a dispute may be referred to the Court only if the parties are unable to agree on an organisation to conduct an arbitration of the dispute.<sup>10</sup> The parties attempted to set up an arbitration of these matters, including the suggestion that ad hoc chamber consisting of ICJ judges sitting as arbitrators should handle the dispute. However the Parties were unable to reach an agreement.

The Ukraine requested indication of provisional measure to assist in safeguarding its rights and claims under the two conventions. The Court found that under ICSFT the required conditions for provisional matters were not met. However under CERD, the Court found imminent risk that Russian's action could lead to irreparable prejudice to the rights invoked by the Ukraine and ordered Russia to "refrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions...ensure the ability of education in the Ukrainian language...and both parties shall refrain from any action which might aggravate or extend the disputes...or make [it] more difficult to resolve".<sup>11</sup> On 12 May 2017 the President Ronny Abraham fixed the time-limits for the filing of initial pleadings.

*Jadhav Case (India v. Pakistan)*

On 8 May 2017, India initiated proceedings against Pakistan and filed its Request for the indication of provisional measures against Pakistan.<sup>12</sup> The Matter involves the detention and trial Mr. Kulbhushan Sudhir Jadhav, an Indian national sentenced to death by a Pakistani Military Court. India invoked the Court's jurisdiction under the Optional Protocol to the Vienna Convention on Consular Relations (Convention).

The Request for the indication of provisional measures under Article 41 of the Court's Statute is extremely important in this case given the circumstances. India asked the Court to direct that Pakistan must "take all measures necessary to ensure that [Mr. Jadhav] is not executed until the

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<sup>9</sup> 'Application Instituting Proceedings', *Terrorism Financing and Racial Discrimination in Ukraine (Ukraine v. Russian Federation)* International Court of Justice, 16 January 2017.

<sup>10</sup> UN General Assembly, *International Convention for the Suppression of the Financing of Terrorism*, 9 December 1999, No. 38349 art 24.

<sup>11</sup> 'Order on Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all forms of Racial Discrimination' (Ukraine v. Russian Federation), 19 April 2017.

<sup>12</sup> 'Application Instituting Proceedings', *Case Concerning the Vienna Convention on Consular Relations (India v Pakistan)* International Court of Justice, 8 May 2017.

Court's decision on the merits" of the case.<sup>13</sup> If Pakistan were to execute Mr Jadhav India would be deprived of its rights claimed under the Convention.

On 18 May 2017 the Court unanimously granted India's request and ordered not only that Pakistan take all measure to ensure Mr Jadvav would not be executed pending a final judgment from the Court, but in addition that Pakistan must inform the Court all measures taken in the implementation of their order.<sup>14</sup>

### **Conclusion**

Judge Crawford reported overall progress at the Court is slow, however real progress is being made. The Court plays an important role in advancing the rule of law around the globe. These large complex cases can take a very long time to come for a final decision to be rendered. The Court is currently handling a significant number of cases but is aware of the need for expediency. With the proliferation of other international judicial institutions the Court can increasingly rely on decisions and fact findings to assist. The Court continues to be an important place for states to resolve disputes through a transparent judicial process.

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<sup>13</sup> 'Request for the Indication of Provisional Measures of Protection, *Case Concerning the Vienna Convention on Consular Relations (India v Pakistan)* International Court of Justice, 8 May 2017.

<sup>14</sup> 'Order on Request for the Indication of Provisional Measures of Protection', *Jadhav Case (India v Pakistan)* International Court of Justice, 18 May 2017.