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Guardian of International Law

Interview with Professor Dr. Georg Nolte*

This year, the International Court of Justice (ICJ) celebrates its 75th anniversary, making it the oldest permanent international tribunal in existence. Being the principal judicial organ of the United Nations, the ICJ is competent for a great diversity of questions of international law – from border disputes or issues of use of force to the protection of human rights or disputes regarding cross-border environmental pollution. Since February this year, Prof. Dr. Georg Nolte is a member of the "World Court". In the interview, he discusses the nature and function of the ICJ and how it has safeguarded its vitality, even in difficult times.

ZRP: You were elected judge at the International Court of Justice in November. Many congratulations! How have you prepared for your new position?

Nolte: As a university professor, and a member of the UN's International Law Commission for 14 years, I have long been concerned with the work of the ICJ. The judges with whom I now work are well-known among experts, so I did not have to prepare myself for unfamiliar colleagues or material. I have looked at documents and decisions of the Court and I have, in particular, read through the latest cases, their oral pleadings and written memorials. For example, regarding the question of how generously a declaration recognizing the jurisdiction of the Court should be interpreted, the reasoning in a leading case or dissenting opinions indicate how the Court and the individual judges handle this question. My preparation has been facilitated by the fact that the proceedings at the ICJ are very transparent. All written memorials are published when the oral hearings take place and every word from the oral hearings can be read the next day on the ICJ's website.

ZRP: Which cases are you concerned with at present?

Nolte: The two cases Democratic Republic of Congo (DRC) vs Uganda and Somalia vs Kenya are likely to be the first in which I will participate. The first case concerns the question of state responsibility. The DRC is demanding reparations after the ICJ has established, in an earlier phase of the case, that Ugandan troops violated international law when they were involved in fighting on DRC territory in the armed conflict in the Great Lakes region around the turn of the millennium. The dispute involves claims for compensation based on violations of the prohibition on the use of force, human rights and international humanitarian law, as well as regarding the plundering and exploitation of natural resources. The case Somalia vs Kenya concerns maritime delimitation between the two countries. There are valuable natural resources off the coast, which both nations claim for themselves.

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ZRP: The UN say that no other international institution embodies the belief in international law like the ICJ does. Yet only around a third of the UN member states subject themselves to the jurisdiction of the ICJ, and frequently with numerous reservations. It would seem that confidence in the Court is not very great.

Nolte: The jurisdiction of the ICJ can be established in different ways. The unilateral declaration recognizing the jurisdiction of the Court as compulsory to which you are referring is just one of three pillars. This is the ideal case, of course, but there are other options, too: states have concluded a multitude of agreements which include a ICJ dispute resolution clause. Examples are the Vienna Convention on Diplomatic Relations or the International Convention on the Elimination of All Forms of Racial Discrimination. All states that have ratified these treaties recognize the jurisdiction of the ICJ for the areas regulated therein. These are many more than the third of all states you allude to that have signed a general declaration recognizing the jurisdiction of the Court. There are also various special agreements for individual cases. If we look at the number of cases before the Court, more cases are based on a treaty or on an ad hoc agreement than are based on a general declaration recognizing the jurisdiction of the Court.

ZRP: But former President of the ICJ Abdulqawi A. Yusuf recently drew attention to the fact that the willingness to include ICJ dispute resolution clauses is no longer so prevalent in more recent international treaties.

Nolte: That is correct, however there are many treaties today in which dispute resolution clauses pertaining to a specialized international court are included instead. The UN Convention on the Law of the Sea, for example, contains a clause which provides for the choice between the Tribunal for the Law of the Sea in Hamburg and the International Court of Justice in The Hague. Of course, it is a long-held desire that the member states generally recognize the competence of the ICJ, and in any case the number of states willing to do so has never been higher than it is today. Moreover, a unilateral, general declaration recognizing the jurisdiction of the ICJ is much more wide-reaching than the jurisdiction of other international courts, including those of the European Courts, because of the ICJ's universal competence in all international law issues. This is also the reason why reservations are so frequent in these unilateral declarations. There are nations, such as India, which have declared many and extensive reservations, with the result that their declarations recognizing the Court's jurisdiction are not very broad in the end. There are a few states, the Netherlands for example, that have stipulated no or hardly any exceptions.

ZRP: What is Germany's position?

Nolte: The Federal Republic submitted a declaration recognizing the jurisdiction of the ICJ as compulsory in 2008. Therein lies a recognition of the positive experience that Germany has had with dispute resolution by way of the ICJ. When it comes to the number and scope of the reservations, Germany is somewhere in midfield. The German declaration encompasses disputes "which arise after the date of this declaration concerning situations or facts subsequent to that date". Disputes originating in the past, particularly those dating back to the Nazi time, are thus excluded. Also expressly excepted from the competence of the ICJ are disputes concerning the deployment of German forces abroad as well as the use of

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German territory for military purposes. Such reservations on military issues are relatively common.

ZRP: The ICJ is celebrating its 75th anniversary this year. What has it brought to the international community since its founding?

Nolte: The ICJ is the oldest permanent international court in existence and this year is the 100th anniversary of the Statute of its predecessor, the Permanent Court of International Justice, which had its seat in the Hague from 1922 to 1946. The statute of the ICJ is virtually identical to that of its predecessor. Many statutes of other international courts were developed on the basis of this original, in part because the ICJ has continued to practice successfully with it. One important function of the Court is the peaceful settlement of disputes between states, which it has exercised in many cases. As the principal judicial organ of the United Nations, the Court is not higher hierarchically than other international courts but it is in a central position in the international judiciary. Since the International Court of Justice is not a specialized court but has rather has jurisdiction over international law issues of various kinds, it is making a greater effort to think of international law as a whole and to provide certain impulses to this end. So, we could say that the ICJ has a sort of coordination role in international jurisdiction. Of course, the Court has also made important landmark decisions. In this context, we can mention the Nicaragua case of 1986, for example, which concerned operations of the American military and militias supported by the US, and in which the Court explained the general rules on the use of force. An important example of a case from more recent times, from 2010, is a dispute between Argentina and Uruguay concerning environmental protection. It involved the construction of paper factories in Uruguay near the border between the two countries and which the Argentinian government feared would be the source of pollution. In its judgement, the ICJ developed standards to be upheld in projects that have cross-border environmental relevance: consultation obligations and environmental impact assessments, for example.

ZRP: What role does the jurisprudence of the Court play in the further development of international law?

Nolte: A court is competent to recognize and to apply the law. It may not simply develop new law. There are courts like the European Court of Human Rights that now and then apply an evolutive interpretation. There are other courts, or quasi-judicial institutions, such as the Appellate Body of the World Trade Organization, that shun evolutive approaches altogether or undertake them only in very exceptional cases. Since it handles such a wide variety of cases, the ICJ is very careful about making general statements. In its jurisprudence, the most important example of an evolutive interpretation of certain legal norms is probably the right of all peoples to self-determination. In the Namibia Advisory Opinion of 1971, the Court understood the right to self-determination as being a right to independence for colonized peoples. This jurisprudence highlighted this right as a principle of international law.

ZRP: In 75 years, the ICJ has pronounced around 130 judgements. Even if we add in the approximately thirty advisory ppinions, is this not a rather meagre total?

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Nolte: When you take into consideration the fact that the proceedings at the ICJ involve national governments as the parties, the total is not so meagre at all. We should not forget how complicated and intricate these proceedings are, and the decision process of the Court is accordingly complex. There is an oral hearing in every case. There is no judge-rapporteur: every member of the Court drafts a separate note on the main issues of the case after the oral hearings. There are deliberations before and after formulation of the judgment. A drafting committee then draws up a draft of the judgement, which goes through two readings. Decisions involve all judges, since the Court generally discharges its duties as a full court. Sometimes even disputes concerning questions of admissibility can go on for years. An application by one state for the adjournment of the proceedings can severely delay the delivery of the judgement. Despite this, however, the Court has managed to handle as many cases in the last twenty years as it did in the first 55 years of its existence. A similar situation can be seen in just about all international courts – there has been a general increase in the readiness for international judicial dispute resolution as well as increased confidence in the Court in a wide spectrum of cases, from border disputes and alleged violations of the prohibition of force to questions of the permissibility of closures of airspace, for example.

ZRP: The list of proceedings pending before the Court include the dispute over the relocation of the American embassy to Jerusalem, the conflict concerning American sanctions against Iran or the charges of genocide of the Rohingyas by the Myanmar military. Has the ICJ seen an increase in complex, highly political cases?

Nolte: I do not wish to discuss pending cases. Throughout its history, the Court has always dealt with cases involving complex political contexts: the so-called Tehran hostage case at the end of the 1970s or proceedings around the turn of the millennium between the successor states to the former Yugoslavia on the basis of the Genocide Convention, for example. The prevailing view is that the Court has brought these cases to a satisfactory conclusion. I do not see any increase in complex, highly political cases, but we can probably say that human rights issues have come to play a greater role.

ZRP: The Court's role is to contribute to dispute solution between states but there is a growing number of asymmetric conflicts involving terrorist groups and warlords. How does the ICJ face up to this challenge?

Nolte: At the beginning, I mentioned the dispute between the Democratic Republic of Congo and Uganda. In this regard the Court established in 2005 that this was a mixed conflict, a mix of intergovernmental use of force and violence by gangs and militias. The Court applied the general rules on state responsibility and set out the circumstances under which a state is responsible for non-governmental actors who use violence. The amount of the reparation due has still to be clarified in this case, based both on the governmental responsibility of Uganda for the actions of its own armed forces and on state responsibility for the actions of gangs and militias. Irrespective of these pending proceedings, we should bear in mind that the Court is structured in such a way that only states can litigate against each other. The extension of international law to include litigation against private persons is accomplished in the form of international criminal jurisdiction, for example.

ZRP: The ICJ not only decides on contentious cases but also writes advisory opinions. What political significance do these opinions have? The fact that, in the mid-1990s, the ICJ declared not only the use but also the threat of using nuclear weapons to be contrary to international law does not seem to have had much impact.

Nolte: We should start by saying that the advisory opinions have no binding character under international law. However, when the principal judicial organ of the UN renders an advisory opinion on an issue, this assessment not only carries considerable weight in discourse on international law but also usually has a political impact – even if it may take some time before this impact is felt. The Namibia Advisory Opinion of 1971, for example, contributed to the international community of states agreeing that Namibia was entitled to independence. These days, we might take some things for granted, such as the deployment of UN peacekeeping forces. The Court declared this measure to be legal in an advisory opinion in 1962. The 1996 opinion on the legality of the use or threat of use of nuclear weapons is more complicated than your question would suggest. The Court did not declare the mere possession of nuclear weapons to be a prohibited threat of the use of force, for example. The question of the permissibility of using nuclear weapons was also left open for a narrowly defined extreme case.

ZRP: Death sentences have been carried out in the US despite opposing decisions of the ICJ, in the case of the German Walter LaGrand in 1999, for example. Is the "World Court", as the ICJ is sometimes called, not in the position of being able to protect human lives?

Nolte: Here, too, we must look closer at what the case was actually about. It was not the permissibility of the death sentence that was at issue but rather the claim of the convicted German citizens to consular assistance. The ICJ was competent only on this point. The US government in Washington wanted to abide by the provisional order of the ICJ, which ruled for the temporary suspension of the execution of the death sentence, until the central question was clarified. However, the State of Arizona went its own way. Following the execution, the US government made efforts to ensure that such a case would not be repeated.

ZRP: John Bolton, former national security advisor to former US president Trump, declared after a US defeat before the Court: "We will let the ICC [International Criminal Court] die on its own. For all intents and purposes, the ICC is already dead to us." Do you expect a revitalization under the presidency of Joe Biden?

Nolte: There are courts that, because of intermittent deteriorations of the international situation, are under considerably more pressure than the ICJ. In any case, the Court is not in a danger which the Appellate Body of the WTO found itself in, with individual nations being able to block the appointment of new judges and thus the activities of the court altogether. The right of veto is not applicable to the election of judges to the ICJ. This means that an individual state is unable to prevent new members of the ICJ from being elected. In addition, the Court is financed from the general UN budget. It is also quite difficult to be generally critical of the ICJ's jurisprudence, since the cases are so different. I do not have the impression that the United States has since 2018 moved in the direction of the quoted opinion. If a state does not cooperate in an individual case, it is not a systemic problem. For

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this reason, I do not see a “revitalization” of the Court as being an issue either. The Court is and remains vital. But of course, it is always gratifying when a state improves the political atmosphere vis-à-vis the Court.

ZRP: The UN Security Council has the possibility to recommend the referral of legal disputes to the ICJ. Until now, it has done this only once – in 1947. So far it has also required an advisoryopinion from the ICJ only once. The Security Council has so far never imposed coercive measures to enforce a judgment by the ICJ. Why is the Council not more cooperative?

Nolte: That is a difficult question. Perhaps the Security Council is reluctant to recommend the referral of proceedings to the ICJ because in this area it can only suggest and not instruct. If it were to recommend the referral of proceedings and the parties did not follow the recommendation, its reputation might be damaged. As far as advisory opinions are concerned, the possibility also exists for the General Assembly to make this sort of application, and this has indeed happened several times. With regard to coercive measures, a closer look is required. In most cases decided by the Court, enforcing the measures has not been necessary; in other cases, questions may have been raised that went beyond the legal issues decided upon. However, it is important that the President of the Court makes the UN Security Council aware of the options foreseen in the UN Charter for the interaction between the two institutions.

ZRP: Alongside the ICJ, other international and regional courts have emerged that are much more active – the European Court of Human Rights in Strasbourg, for example. Is the ICJ being weakened by the competition?

Nolte: The international courts, including the regional courts, cannot be compared simply on the basis of the number of their cases, especially since the number of cases, as already mentioned, has risen altogether. More important is a distinction according to the type of dispute: until recently, the European Court of Human Rights had made rendered any decisions on intergovernmental proceedings. Some types of dispute can be decided well if not better by a specialized court – think of international maritime, criminal or commercial jurisdiction, for example. However, many important questions and disputes remain for the ICJ. Together, the international courts work to ensure that the law is complied with.

ZRP: The ICJ has 15 judges with different nationalities. As a member of the UN International Law Commission for many years, you have extensive experience in international law discourse in international committees. How strongly do predispositions from one’s own legal system and culture color the interpretation of international law?

Nolte: National predispositions certainly play a role, but they should not be overestimated. Like many international lawyers, the practice and training of the judges of the ICJ has not been restricted to the legal systems of their home nation, rather they have also studied or taught at universities abroad and with international reputations. In addition, the body of international jurisprudence has in the meantime developed to such an extent that it has real impact in legal education. Differences in the perception of certain fundamental questions – for example, how certain human rights or the principle of state sovereignty are to be

understood in the case at hand – are certainly relevant. Nevertheless, broadly accepted solutions can be found, as can be seen from the jurisprudence of the Court. Many judgements can also be read as the formulations of commonalities, leaving out differences.

ZRP: Your term of office is nine years. What would you wish for the ICJ by 2030?

Nolte: Faithful compliance with its decisions, the taking into account of its advisory opinions, and a commitment of states to the International Court of Justice. I would be happy if the Court could be spared the challenges that some other international courts have faced. At the moment, the Court is in good shape. On this basis, I hope that further cases will be brought before it, the judgments having a pacifying effect between the parties, and serving as orientation for the international community.

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