

**STATEMENT BY H.E. JUDGE HISASHI OWADA PRESIDENT OF
THE INTERNATIONAL COURT OF JUSTICE,
TO THE SECURITY COUNCIL**

29 October 2009

Mr. President H.E. Ambassador Le Luong Minh, Mr. Secretary-General Ban Ki-moon, distinguished Delegates, Excellencies, Ladies and Gentlemen,

It is a great privilege for me to be with you here today for the first time as President of the International Court of Justice. Since 2000 the President of the International Court of Justice has had the honour of addressing the Security Council; it has since become a regular annual event for almost a decade. I very much appreciate this opportunity to address you on issues of common concern to our two principal organs of the United Nations, that is, the settlement of international disputes under the Charter of the United Nations.

Let me start with the premise that both the Security Council and the International Court of Justice have been provided with important roles under the Charter to work diligently towards the pacific settlement of international disputes. For this purpose, our two institutions are entrusted with separate but clearly linked missions: the Security Council is vested with the primary responsibility for the maintenance of international peace and security in accordance with Article 24, paragraph 1, of the Charter; more specifically it is entrusted to utilize the measures available under Chapters VI and VII of the United Nations Charter, while the International Court of Justice is entrusted with the duty of the judicial settlement of disputes between States parties to the Statute that are referred to it pursuant to Articles 33 and 92 of the Charter. Apart from the Charter provisions on the role of the Security Council in relation to such matters as the election of the judges or accession of a non-Member State of the United Nations to the Statute of the Court, further constitutional connections between the two institutions exist in various phases of the cases, from the inception of the case to compliance with the judgment after it is handed down. Thus, under Article 36, paragraph 3, of the Charter it is provided that the Security Council make recommendations to States in discordant relations that “legal disputes should as a general rule be referred by the parties to the International Court of Justice”. Article 94, paragraph 2, envisages that, in a case of

non-compliance with a Judgment of the Court by one party to a dispute, “the other party may have recourse to the Security Council”, thus giving the latter the authority to take measures to enforce a decision of the Court. From the Court’s perspective, its Statute provides in its Article 41, paragraph 2, that the Court should give notice to the Security Council of the indication of provisional measures. This implies that the Security Council may then take those measures into account in its own actions. As I am going to explain forthwith, in the past ten years, the Court has issued no less than eight orders indicating such provisional measures of protection at the request of one of the parties to a dispute, and has accordingly informed the Security Council of the imposition of such measures.

These links aim to realize the peaceful settlement of disputes through respective actions of our two institutions in an organic fashion, although the respective nature of our activities as well as the way in which we contribute to the maintenance of international peace and security are of course quite different. Our interconnected relationship becomes particularly acute when disputes can lead to a breach of the peace or a threat to international peace and security. One of the overarching objectives of the United Nations as stated under Article 1 of the Charter is to bring about, by peaceful means and in conformity with the principles of justice and international law, the adjustment or settlement of international disputes or situations which might lead to such a breach of the peace.

Despite the silence in the Charter on the relationship between the Security Council and the Court in cases where the same nucleus of facts has given rise to issues before both organs, the practice of our respective institutions shows various points of connection, if not synergetic relations, as regards the maintenance of international peace and security. Through the brief overview of our recent judicial activities which I am going to present today, I would like to shed light on such complementary relations between the two organs.

I. Interface between the activities of the Court and the Security Council in the particular field of international peace and security

I now turn to points of contact in more detail where both organs can complement each other.

A. Contentious cases

First of all come cases focused on the indication of provisional measures pertaining to situations posing an immediate threat to international peace and security at a time when the conflict is ongoing. This is perhaps the most manifest example of the Court and the Security Council dealing with the same set of issues from distinct perspectives.

The Court is dealing with requests for the indication of provisional measures in an increasing number of cases. The most recent example of this was the Court's Order of 15 October 2008 on the request for the indication of provisional measures submitted by Georgia in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*. In its Order, based on its finding of prima facie jurisdiction under Article 22 of the Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD"), the Court considered it appropriate to indicate measures which are addressed to both Parties. It required the Parties to the dispute

"within South Ossetia and Abkhazia and adjacent areas in Georgia, [to] refrain from any act of racial discrimination against persons, groups of persons or institutions, [to] abstain from sponsoring, defending or supporting racial discrimination by any persons or organizations, [to] do all in their power . . . to ensure, without distinction as to national or ethnic origin, [certain rights of persons protected by the CERD, and to] do all in their power to ensure that public authorities and public institutions under their control or influence do not engage in acts of racial discrimination against persons, groups of persons or institutions".

The Court stated that "[b]oth Parties shall facilitate, and refrain from placing any impediment to, humanitarian assistance in support of the rights to which the local population are entitled under the International Convention on the Elimination of All Forms of Racial Discrimination". The Court also indicated a provisional measure to the effect that "[e]ach Party shall refrain from any action which might prejudice the rights of the other Party in respect of whatever judgment the Court may render in the case, or which might aggravate or extend the dispute before the Court or make it more difficult to resolve". Finally, the Court ordered each Party to "inform [it] as to its compliance with [those] provisional measures".

The Court also ordered provisional measures at the request of Mexico in the *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)* (*Mexico v. United States of America*) on

16 July 2008, and decided that it was not appropriate to order provisional measures in the matter of *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, a case that I will discuss in greater detail during my time before the General Assembly.

Second, the Court has referred to the work of the Security Council in a number of cases which have come before it, in parallel with situations simultaneously before the Council. The case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of Congo [hereinafter "DRC"] v. Uganda)* was examined by the International Court of Justice at the same time that the Security Council was dealing with the situation. In its Order indicating provisional measures of protection dated 1 July 2000, in addition to ordering both Parties to refrain from any armed action which might prejudice the rights of the other Party in respect of whatever judgment the Court may render in the case, the Court ordered the Parties to comply with all of their obligations under international law, and referred to Security Council resolution 1304 (2000), calling for the implementation of measures to restore stability in the region and the territorial integrity of the DRC. The situation in the DRC continues to be the subject of concern before the two institutions. Thus, on 19 December 2005, the Court delivered its Judgment on the merits of the case before us, making important rulings in relation to, in particular, violations of the principle of non-intervention, obligations under international human rights law and international humanitarian law, obligations under international law not to plunder and exploit natural resources, and obligations under the 1961 Vienna Convention on Diplomatic Relations. We are happy that the Court's ruling helped draw clear lines on the legal issues of the decade-long conflicts on the ground in such a way as to guide the operations led by the Security Council. The Security Council continues to be involved with the still volatile situation in the DRC by extending the mandate of MONUC pursuant to its resolution 1856 in 2008. The Court, for its part, is seised with the progress in the negotiations to be held by the DRC and Uganda for the purpose of settling the question of reparation, as enumerated in points (6) and (14) of the operative clause of its Judgment and explained in paragraphs 260, 261 and 344 of the reasoning therein. There is a possibility that the Court may be required to enter the final stage of the case and determine the appropriate reparations in accordance with the Judgment, as the Judgment required the Court to do in the event that the Parties are unable to come to a negotiated settlement.

The case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* is another example which highlighted the interface between the two organs. Involving massive violations of human rights and humanitarian law, including the crime of genocide, arising out of international and internal armed conflicts which occurred in the former Yugoslavia, the situation gave rise to both political and legal responses from the international community. For the first time in the history of the Security Council, this body took steps in 1993 to create an international judicial organ, the International Criminal Tribunal for the former Yugoslavia (hereinafter "ICTY"), as a subsidiary organ with the powers to determine the individual responsibility for crimes committed during the conflict on the territory of the former Yugoslavia since 1991. It was in that same year (1993) that the applicant State also submitted a case to the International Court of Justice to determine, in accordance with the jurisdiction given to the Court under the Genocide Convention, a different angle of the same situation, focused on the responsibility of the respondent State in relation to the issue of violations of this Convention. The Court ruled in its Judgment of 26 February 2007 that the Respondent had violated the obligation to prevent genocide under the Genocide Convention. The Court further built a bridge between the obligations of the Genocide Convention and the ICTY, by ordering that the Respondent should transfer individuals accused of genocide or any of those other acts of conspiracy, incitement, attempt or complicity in genocide for trial by the ICTY and to fully co-operate with that Tribunal.

The determination of international responsibility of a State under the Convention and that of criminal responsibility of the individual for their acts are two sides of the same coin that contribute to creating the necessary conditions for lasting peace coupled with international justice. The creation of the Tribunal under the authority of the Security Council was an important step in settling the ongoing international dispute by peaceful means, in such a manner that international peace and security, and justice, are not endangered (Article 2, paragraph 3, of the Charter). The resolutions 827 and 955, by which the Council decided to establish, respectively, the *ad hoc* international tribunals for the former Yugoslavia and Rwanda, helped bring in the rapid implementation of individual accountability previously unavailable on the international level.

It must be acknowledged at the same time that international prosecutions of individual culprits may only be undertaken against a handful of individuals, and they risk leaving the rest of the victimized and victimizing community unaddressed. In this regard, the more general judicial role of the International Court of Justice in the determination of the international responsibility of States, seeking to mend the fracture to the international legal order broken by international wrongs, and thereby restoring international public order, is a necessary component of addressing grave violations of international human rights and humanitarian law.

Third, the States' obligations vis-à-vis the international public order should also constitute an important dimension of this framework, as an area in which all States must not be free to allow core international crimes to take place through their State machinery, or through quasi-State entities or organized groups. It is with respect to these aspects that, in examining the factual details of events pertaining to the case of genocidal acts, the scrupulous findings of the Tribunal in several ICTY cases (such as in *Prosecutor v. Krstic*) provided essential sources of inspiration to the conclusions of the Court. In this sense, the Court's findings became strongly aligned with that of the Tribunal. The Court confirmed that genocide had been committed in Srebrenica, though in a geographically limited scope, clarifying the debate over this element of the crime of genocide.

There is yet another case pending before the Court concerning the application of the Genocide Convention, which is a case brought by Croatia against Serbia. In its Application dated 2 July 1999, Croatia, referring to acts which occurred during the conflict between 1991-1995, claimed that the (then) Federal Republic of Yugoslavia (hereinafter "FRY") had committed violations of the Genocide Convention. The Government of the FRY contested the admissibility of the Application as well as the jurisdiction of the Court under Article IX of the Genocide Convention on several grounds. On 18 November 2008, the Court rendered its Judgment on the preliminary objections to the Court's jurisdiction raised by Serbia and to the admissibility of Croatia's Application. Setting aside Serbia's first preliminary objection related to the capacity of the Respondent to come before the Court and its second objection on the jurisdiction *ratione temporis*, both of which I do not intend to go into, the Court examined Serbia's third objection, which was relevant to the theme discussed today, namely, that

“claims referring to submission to trial of certain persons within the jurisdiction of Serbia, providing information regarding the whereabouts of missing Croatian citizens and return of cultural property [under the Genocide Convention] are beyond the jurisdiction of this Court and inadmissible”.

With regard to this submission of Serbia, Croatia, as the Applicant, accepted that this submission was now moot in so far as, since the presentation of the Memorial, certain indicted persons had been transferred to the ICTY. Croatia however insisted that there continued to be a dispute between Croatia and Serbia regarding persons who had not been submitted to trial either in Croatia or before the ICTY in respect of acts or omissions which were the subject of the proceedings. Serbia, for its part, asserted that Croatia had not shown that there were at that time persons charged with genocide, either by the ICTY or by the courts of Croatia, who were on the territory or within the control of Serbia. When the Court comes to the merits stage, the Court will have to examine whether that assertion is correct; this is a matter to be decided in the future. As to the provision of information on Croatian citizens who have been missing since 1991, and the return of cultural property, the Court noted that the question of whether these might constitute appropriate remedies was dependent upon any findings that the Court might make of breaches of the Convention by Serbia.

There is another case which came before the Court and involves an issue that has come before the Council— a new Application from the former Yugoslav Republic of Macedonia instituting proceedings against Greece. The dispute revolves around compliance with the Interim Accord signed by the two States on 13 September 1995, on which the Applicant’s right to seek membership in international, multilateral, or regional organizations hinges. Article 11 of the said Accord sets out that the Respondent reserves the right to object to any such membership if and to the extent that the Applicant is to be referred to in such an organization or institution differently than in paragraph 2 of Security Council resolution 817 (1993). In line with what has been described in this section, the Security Council called for a speedy settlement of contention on this point in its resolution 845 of 1993.

B. Advisory proceedings

Finally, the interactions and interfaces between the Court and the Security Council are much more direct in advisory proceedings than in contentious cases. A little over a month ago on

24 September 2009, in its historic summit-level meeting, the Security Council unanimously adopted resolution 1887, emphasizing that this body has a primary responsibility to address nuclear threats, and that all situations of non-compliance with nuclear treaties should be brought to its attention, while also establishing a broad framework for reducing global nuclear dangers. In this case the Council came out, in particular, in strong support for the Treaty on the Non-Proliferation of Nuclear Weapons and called on States that were not yet signatories to accede to this agreement. It also called on States parties to comply fully with their obligations and to set realistic goals to strengthen, at the 2010 Review Conference, all three of the Treaty's pillars — disarmament of countries currently possessing nuclear weapons, non-proliferation of countries not yet in possession, and the peaceful use of nuclear energy for all.

This position of the Council is in line with the legal conclusion reached by the Court as early as 1996, when the Court examined the question of nuclear weapons in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*. In that case, the Court, as a preliminary issue, confirmed the position that the fact that a legal question also has political aspects “does not suffice to deprive it of its character as a legal question” and it does not “deprive the Court of a competence expressly conferred on it by its Statute”, a point which could have important implications for the interface between the Court and the Security Council. At the end of the operative paragraphs of the 1996 Advisory Opinion, the Court concluded by unanimously stating that “[t]here exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control”. It is noteworthy that this finding of the Court is a legal extension of what Article VI of the Treaty on Non-Proliferation of Nuclear Weapons provides, that

“each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control”.

Another important advisory opinion is that which was requested by the General Assembly pursuant to its resolution ES-10/14. In this case, the Court gave an Advisory Opinion in July 2004 on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. The Security Council continues to be actively seized with the general Israeli-Palestinian peace

process. In this context, it is hoped that the Court's legal findings, though confined to the question directly put to it, provide the parties involved with relevant legal standards in their negotiations of the dispute (as the General Assembly resolution 63/98 recalled quite pertinently).

On 8 October last year, a new request for an advisory opinion was submitted to the Court by the General Assembly, pursuant to its resolution 63/3, on the question of the *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*. While the Security Council continues to be engaged in the administration of Kosovo through the presence of UNMIK in accordance with its resolution 1244 adopted in 1999, the Court's response to the request will strictly concentrate on the question submitted to it by the General Assembly. This request is notable in the sense that a situation which has been a subject of constant attention of the Security Council may come up as an object of an advisory proceeding requested by the General Assembly, which has the power to seek guidance on international legal questions which come under the purview of the Court. Some thirty States, together with the authors of the unilateral declaration of independence, have expressed their intention of participating in the oral proceedings before the Court. Previously, 36 Member States of the United Nations had filed written statements, in addition to the authors of the unilateral declaration of independence who filed a written contribution. Fourteen Member States of the United Nations have also submitted written comments on the written statements by other fellow Members, coupled with the written contribution of the authors of the unilateral declaration of independence containing their comments on the written statements. The Court is planning to hold the oral proceedings in this matter from 1 to 11 December.

II. Towards a broader conception of international peace and security

Before concluding, I would like to mention a few words regarding what I would call a new possibility of interaction between the Security Council and the Court in the context of a new development of international relations, in an age where notions of security can no longer be solely encompassed by the traditional, strictly military sense of the term. Experiences over the past decades in grappling with various issues that the Security Council has been required to deal with has made it abundantly clear that security cannot be guaranteed simply by means of an effective

national defence policy. Individuals facing civil war, famine, and contagious disease within sovereign borders often remained unprotected, and yet outside of the traditional concept of security. The successful defending of the territory of a State does not necessarily mean that citizens were secure. Indeed, since its introduction in the 1994 Human Development Report of the United Nations Development Program, the concept of “human security” has gained wide support, in which long-term threats such as hunger and disease are considered in conjunction with traditional threats to international peace and security. A new case submitted to the Court on 31 March last year, *Aerial Herbicide Spraying (Ecuador v. Colombia)*, might point to areas in which such wider notions of security would have to be examined in the context of this changing environment of international law. The challenge seems to be with the methods with which to combat security issues triggered by the production of illicit drugs, a challenge that falls not only on the States concerned but on the international community as a whole, whose interest is in the maintenance of international peace and security guided by clearly identifiable and acceptable international legal principles.

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Conclusion

To structure a system of values and to make accountable those who break it, we need the rule of law in our international community. Law does not replace politics or economics, but without the legal framework in which political and economic activities can take place, these activities cannot be secure within the changing global environment that both organs must contribute to. This also applies to the specific field of the maintenance of international peace and security. As rightly recalled by the statement of the President of the Security Council on the occasion of its consideration of the item “Strengthening international law: rule of law and maintenance of international peace and security”, a “commitment to the Charter of the United Nations and international law . . . are indispensable foundations of a more peaceful, prosperous and just world”. The Court could not concur more strongly with this view.

I need not emphasize the crucial importance of this aspect against the backdrop of the deepening process of globalization. In the face of a new societal reality of an integrated international community, global security issues urgently require actions based on an adequate international legal framework. To that end, the Court will continue to strive to resolve the disputes put to it with impartiality and judicial vigour.

Thank you very much for your kind attention.
