SPEECH BY H.E. JUDGE HISASHI OWADA, PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE, TO THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY

30 October 2009

Mr. Chairman, Ambassador Benmehidi,

Distinguished Delegates,

I am delighted to address your Committee today for the first time as President of the International Court of Justice ("ICJ"). The Court greatly appreciates this opportunity which enables us, through an exchange of views, to strengthen our ties to this legal committee of the General Assembly which possesses general authority in matters related to international law within the United Nations.

I congratulate Your Excellency Ambassador Mourad Benmehidi on your election as Chairman of the Committee for the Sixty-fourth Session of the General Assembly.

As Ambassador Benmehidi has just said, I regard my appearance at the Sixth Committee as somewhat of a homecoming journey. Exactly 40 years ago, I was a member of this Committee. With that in mind, I will speak to you in a spirit of friendship. The work of the Court is explained in detail in the Court's annual report, the summary of which I reported yesterday to the General Assembly. Rather than literally reading out my presentation word for word, I hope to engage you in a more informal discussion and focus on salient issues relating to future concerns of the Court. Whether the Court is adequately equipped both legally and institutionally to be able to fulfil the expectations placed upon it is something I would like to draw your attention to today.

I. The implication of the expansion in the number and the field of issues relating to the cases that come before the Court

It is satisfying from the viewpoint of the Court and that of the international community that we have witnessed (1) first, a steady increase in the number of cases and, (2) second, the expanding field of issues that the Court has to deal with.

This new tendency reflects the steadily mounting confidence on the part of each Member State in the work of the Court and the growing conviction of the international community that the rule of law should prevail in the conduct of international relations. This new trend can be attributed in my mind to at least two different changes: first, the sheer increase in the use of the Court from a wide geographical expanse of States on a global basis and, second, the ever more widening range of diversified issues brought before the Court by States in the present globalizing world.

The increase is indeed particularly significant over the last several years. The average number of pending cases each year has increased exponentially over the preceding five decades, from three cases through the 1960s, to less than five through the 1980s, 13 during the 1990s, and an average of over 20 pending cases each year over the last decade. The increase is even more significant in the last few years, making the last five years perhaps the most active in the history of the Court. The Court currently has 14 cases on its docket, none of which are the same in legal or factual terms.

The Court is also faced with the globalization of international relations and the internationalization of many issues which have come into the domain of regulation at an international level by the proliferation of multilateral legislation, for example in such areas as

international human rights law, international humanitarian law, international criminal jurisdiction and international environmental law. This transformation has not been just in name but, more significantly, it reflects the substance of the law that the Court has to deal with. As you will appreciate, even in classical areas of international law in which the Court has long-established jurisprudence, such as the law on the delimitation of land and maritime boundaries, the law of sovereign immunity, the law of international responsibility of States and of diplomatic protection in all traditional fields, the tangible change in the context of the international milieu surrounding the law has made the task of the Court to ascertain the law much more complex. The docket has come to reflect a pressing need of States for the judicial settlement of legal disputes arising as a result of the rapid process of integration of the international community in such spheres where States had previously not tended to submit disagreements to international third-party adjudication.

One component of this expansion relates to the emerging conception of the international community in today's globalizing world as a community of human individuals. This paradigm is reflected in the increasing prominence of the rights of individuals in the cases adjudicated by the Court. In this regard, I would like to refer to the *LaGrand (Germany* v. *United States of America)* and *Avena* (*Avena and Other Mexican Nationals (Mexico* v. *United States of America))* cases in which, unlike the traditional formulation of the diplomatic protection cases, the rights in question were dealt with as direct rights of individuals by the Court. Another more pertinent example in the case of international human rights law would be the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)* case in which the International Court of Justice upheld the importance of the rule of law for the protection of individual rights of private persons emanating from international humanitarian and human rights law. A more recent case, that of the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*, put to the Court the question of an alleged infringement of the rights of individuals. This prominence of the alleged infringements of the rights of individuals in the international adjudication of disputes is to be seen in conjunction with the growing emphasis on issues of public order within the international community. This can be witnessed in the 2007 Judgment in 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)*, in which the Court ruled that Article I of the Genocide Convention imposed on States parties the obligation not to commit acts of genocide, demonstrating a remarkable evolution of the law on the issue of public order in the international community.

Furthermore, environmental issues have also come to take an important place in the portfolio of the Court's jurisprudence. The Court is currently examining the case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*. It is expected to take up another environmental issue in the case concerning *Aerial Herbicide Spraying (Ecuador* v. *Colombia)*.

However, this two-fold expansion has concrete implications.

(1) Expansion in the number of cases

It should be realized that this increase in the number of cases has a practical implication, in that it means a proportional increase in the number of judges *ad hoc*. The number of judges *ad hoc* chosen by States parties in cases during the period under review (1 August 2008 — 31 July 2009) was 25, with the functions being carried out by 20 individuals. And this naturally has budgetary implications. If you look at the budgetary report of the Court for the biennial period of 2010-2011, which is going to be scrutinized this year by the General Assembly through the Fifth Committee, this is readily apparent. The utilization of judges *ad hoc* has increased from an average of less than two each year throughout the 1970s, to over four in the 1980s, 15 in the 1990s, and almost 30 in the last decade. Each additional judge *ad hoc* naturally must be provided with appropriate resources and materials at the Court on an equal footing as the permanent judges, and this has further increased the pressures upon the budgetary and other administrative functioning of the Court. To give you a concrete illustration, the biennial expenditures for judges *ad hoc* have increased quite

dramatically for each of the last three biennial periods, from €349,298 in 2004-2005, to €638,936 in 2006-2007 and, as of 1 October of this year, €678,856, a figure certain to increase once fully adjusted for the entirety of 2009. The Court has thus never before had to deal consistently with the integration of and adequate provision for such a large number of judges *ad hoc*, each of whom are useful contributors to the judicial proceedings in the case or cases for which they are appointed.

(2) The expanding field of international law

Another practical implication of this new development in the activities of the Court is the need for an adequate support system of the Court for such an increase in the Court's workload and the widening subjects it must deal with. In precise terms, there is a corresponding increase in the need for research assistance and services to adequately deal with each phase of a case before the Court, in the face of an ever-increasing volume of documents accompanied by a proliferation of associated annexes.

It goes without saying that the Court itself, of course, has also been continuously undertaking an examination of its judicial process to aid in the rationalization of its procedures for the parties and to improve its internal working methodology in order to cope expeditiously with this new trend. It is doing so through the constant work of its Rules Committee, one of the Court's most important internal committees, that examines the working of the Court in a fair, just and expeditious way. My predecessor took the opportunity to explain these efforts on the part of the Court. I am therefore not going today to delve into the details of this work, which in any case has been set out in our report to the General Assembly. The results of its work are made known in the form of practice directions. These procedural mechanisms are founded on the principle of seeking and securing the proper and fair administration of justice, while balancing the requirement for respect to be accorded to sovereign States set against the objective need to expedite the process of the Court in conducting its work as a judicial organ.

Yesterday, in the discussion that followed my report to the General Assembly, many delegates expressed the need for material support for the Court in this sense. In this new situation, there are limits to what can be achieved exclusively through an internal rationalization of the Court as an institution. Indeed there is a need for adequate external support. Given the ever diversifying field of international law and the ever-increasing volume of literature and materials in the field, greater institutional assistance needs to be given to individual judges to cope with these changes.

This is why the Court has proposed the institution of clerks assigned to individual judges, as is the case with national supreme courts in many countries, as well as in many international judicial institutions like the International Tribunal for the Law of the Sea (ITLOS), the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the International Criminal Court (ICC). Having a pool of Associate Legal Officers at the Department of Legal Matters in the Registry of the Court to offer service to all the judges, as opposed to assigning them to individual judges, as has been suggested as a more efficient way of utilizing internal resources, is in fact clearly not in line with the work of the Court as a judicial institution and does not work. The functioning of the Court is not like the formulation of legal policy or opinions of a government. If the information, materials and viewpoints a judge wishes to pursue are researched by a pool of Legal Officers and co-ordinated with the Department of Legal Matters, this can create an institutional filter before each judge has had the opportunity to develop his or her own views and present them to the full membership of the Court. There are differences between the work of the Court and the formulation of legal policy within the legal departments of a Ministry of Foreign Affairs. An arrangement along this line could pose a barrier to the fairness and impartiality of a judgment.

In summary, the Court continues to consider that making available to each judge a dedicated law clerk is the best method to ensure that the principal judicial organ of the United Nations reflects the independence and individuality of each judge, and helps to guarantee that the main

forms of civilization and the principal legal systems of the world are taken into account in each of its decisions. Furthermore, the Court considers that the request for each judge to receive the assistance of a dedicated legal professional in support of his or her work will allow the Court to enhance the education and experience of a group of talented young lawyers in public international law, creating a body of law clerks, an institution that is highly appreciated in national supreme courts and other international tribunals.

II. The issue of jurisdictional basis of the cases brought before the Court

As recalled in the discussion in the General Assembly yesterday, there is yet another fundamental issue that the Court must meet in order to respond to the contemporary challenges as I have just described them.

It is well established that the International Court of Justice makes decisions according to the rules of international law without regard for any political asymmetries of power.

Historically, it was through the evolution of the development of third-party settlement of international disputes, which started in the form of arbitration, that the international judicial settlement of disputes came to develop on the basis of consensual jurisdiction, as opposed to compulsory jurisdiction. This tendency continued through the time of the establishment of the Permanent Court of International Justice (hereinafter "PCIJ") in 1920 — the first full-fledged permanent court of international justice. In spite of this transformation in outlook, the debate over the character of jurisdiction was still fierce and the compromise formula acceptable to all States was to maintain the voluntary jurisdiction of the Court, while complementing this traditional formula by the ingenious — as of that time — introduction of a system of compulsory jurisdiction through the formula of an optional clause accepted by a declaration of the Court's jurisdiction. In other words, this compromise represented the best way to introduce the compulsory elements in jurisdiction without challenging the traditional system of voluntary jurisdiction. A new attempt at the San Francisco conference was made for the introduction of compulsory jurisdiction for the present Court, as the successor to the Permanent Court of International Justice. This endeavour proved unsuccessful owing to the strong objections by a few major nations despite the great majority of States being in favour of creating a system of compulsory jurisdiction. Thus the optional clause system was maintained in the Statute of the International Court of Justice without change from the old system of the Permanent Court of International Justice.

In light of this background, it is, in my view, high time that we realized that the world and its judicial realities have changed. The Court in the present context of international relations does not meet the requirements of the contemporary world that seeks to establish the rule of law in the international community. This is of course part of a larger picture of the challenges faced by international law in a world animated by the dilemma between the socio-economic reality of the convergence of the international community as against the institutional framework created by the Westphalian legal order.

I wish now to refer, in this context, to recent developments that are conspicuous in the jurisdictional bases of the cases brought before the Court.

(1) The practice of compulsory jurisdiction through a compromissory clause in a treaty

In view of the realities of the consciousness of the international community to reinforce the rule of law in the treaty relations of States, a new trend has been growing to create the compulsory jurisdiction of the Court through the institution of a compromissory clause in a multilateral or bilateral treaty. Some 300 bilateral or multilateral treaties at present provide for compulsory recourse to the International Court of Justice in the resolution of disputes concerning the application and interpretation of the treaty in question. It is also interesting that there is an

increasing number of cases brought before the International Court of Justice based on such compromissory clauses found in multilateral conventions. The increase in the number of pending cases overall has seen a corresponding increase in the average number of cases each year with a jurisdictional basis of one or more compromissory clauses. There has also been an increase in the proportion of cases brought to the International Court of Justice in recent years in this way. The proportion of pending cases brought under a compromissory clause has risen from 15 per cent in the 1980s, to 40 per cent at the end of the last century, to more than 50 per cent in this past decade. This trend seems to point to the fact that including a compromissory clause in a multilateral or a bilateral convention would achieve the same result as acceptance of the optional clause by reinforcing the compulsory jurisdiction of the Court.

(2) The practice relating to optional clause acceptance

By contrast the present record of the International Court of Justice, where only 66 States out of 192 have made optional clause declarations accepting as compulsory the jurisdiction of the Court (just over 34 per cent), compares somewhat meagrely with the record of the Permanent Court of International Justice period when no less than 42 out of 58 Member States of the League of Nations (just over 72 per cent) at its peak had accepted the optional clause for compulsory jurisdiction (1934). This is why "the decline of the optional clause" has been talked about both by scholars and practitioners, and mentioned in the General Assembly yesterday by many delegates. This situation stands out in sharp contrast with other international and regional jurisdictions, such as the International Tribunal for the Law of the Sea (ITLOS), the International Criminal Court (ICC), the World Trade Organization (WTO), the European Court of Human Rights (ECHR), and the European Court of Justice (ECJ). I wish to encourage the member States to give more serious thought to the acceptance of the optional clause.

III. The issue of fragmentation of international law

A concern that is frequently expressed about the issue of fragmentation of jurisprudence is of some relevance here, to the extent that a proliferation of newly created international judicial bodies endowed with certain jurisdictional limits is often argued to lead to a fragmentation of jurisprudence and some uncertainty in the law. Past presidents of the ICJ have expressed their views on this issue (for example, Judges Jennings, Guillaume, Higgins). I shall today refrain from expressing my conclusive view on the issue of the fragmentation of jurisprudence. Nevertheless, I am personally inclined to the view that this risk is somewhat exaggerated to the extent that the superficial divergence of views between different fora would seem to arise from a difference in the identifiable objectives to be achieved by different courts, whose assigned tasks are quite varied, as is the legal methodology to be employed for achieving such objectives.

The first point I wish to make is that it is a trite observation that the function of a judge in any jurisdiction, whether domestic or international, is in his or her quest for and realization of "justice" in the context of a concrete case. This is not always an easy task. There are three different dimensions of difficulty inherent in the issue of justice in dealing with international dispute settlement: (1) the difficulty relating to identifying justice in the context of pluralistic values in international society; (2) the difficulty relating to applying justice in the context of a tension between justice and stability in the delivery of international legal judgments, and (3) the difficulty relating to characterizing justice in international relations in its contemporary setting in the context of the dichotomy between justice in human terms and justice in sovereign terms. This task is easier to achieve for judicial institutions with a specifically limited objective to realize. This point may not be so obvious in the international context and especially with a judicial organ with general subject-matter jurisdiction like the International Court of Justice. Judged by this yardstick and based on my personal experience at the International Court of Justice, it is my conviction that our Court with its general jurisdiction is remarkably united in its collegial quest for and realization of "justice" in the concrete context of the cases before it. This is the unique merit of the

International Court of Justice as the principal judicial organ of the international community as represented by the United Nations. I feel we have to promote this matter further in that direction.

The second point I wish to make on this problem lies in the importance of intensifying the implicit dialogue between the judges of different international judicial bodies, an activity that is already taking place. As a result of the fast-growing reality of globalization, a greater convergence of juristic perception of the contemporary world among judges can be seen. In this regard, my impression is that various courts operating in different fields are carefully reading and examining each other's decisions and coming to a largely common understanding of the law in value-specific areas such as human rights law, humanitarian law, or the law of the environment, based on the common understanding of the function of the law to protect and promote the public interest of the world community in any particular area.

In this whole setting, it is my personal view that the International Court of Justice occupies a unique place as the principal judicial organ of the United Nations that represents, for all practical purposes, the international community of the present-day world. The fact that it is the only universal international judiciary with general jurisdiction over the issue of international law is a crucial factor in this respect. In dealing with issues that come before our Court, the International Court of Justice examines and considers the dispute within the overall framework of the general principles of international law. The authority of the International Court of Justice as the court of general jurisdiction that pronounces on issues of international law derives from its comprehensive perspective of the uniformity of international law as the common law of the global community. I believe that this is the most essential factor that gives the jurisprudence of the International Court of Justice a special place of respect, even in the absence of a hierarchical order that can artificially be created from a formal structural point of view.

Thank you very much for your kind attention.

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