SPEECH BY H.E. JUDGE HISASHI OWADA, PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE, TO THE SIXTY-FOURTH SESSION OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS

29 October 2009

President Treki,
Excellencies,
Ladies and Gentlemen,

Before I start, I wish to convey, on behalf of the International Court of Justice, our deepest sympathy and condolences to the families of the five United Nations staff members who were killed in the recent shocking and shameless raid by terrorists in Afghanistan.

I join the United Nations Secretary-General in condemning all threats and acts of violence against humanitarian personnel and United Nations personnel. As the principal judicial organ of the United Nations, the ICJ reaffirms the need to hold accountable those responsible for such acts.

It is an honour and privilege for me to address the General Assembly for the first time as the President of the International Court of Justice (ICJ) on the Report of the International Court of Justice for the period from 1 August 2008 to 31 July 2009.

I wish to take this opportunity to congratulate you, Dr. Treki, on your election as President of the Sixty-fourth Session of this Assembly and wish you every success in this distinguished office.

Over the past decade, the trust and respect of the international community for the activities of the Court as the principal judicial organ of the United Nations have been growing. This growth is reflected in the increase in the number and the widening in subject of the cases brought before the Court by Members of the United Nations. The past year was no exception. To give you a schematic view of the judicial activities of the Court over the period under review, the Court had on its docket more than 16 cases and has rendered two judgments on the merits, one judgment in a request for interpretation, one judgment on preliminary objections, and two orders on requests for the indication of provisional measures. What is more remarkable is that these cases before the Court have involved States from all continents, that is, Asia, Europe, North America, Central America, and Africa; the docket of the Court indeed represents the universal character of the principal judicial organ of the United Nations. Their subject-matters have been truly wide-ranging, extending from such classical issues as territorial and maritime delimitation and diplomatic protection, to issues of increasing relevance to the contemporary international community like human rights, the status of individuals, international humanitarian law and environmental issues.

These cases present complicated sets of factual issues that have to be evaluated against diverse social and historical backgrounds, intermingled with the colonial past and in the new light of a legal environment composed of emerging normative challenges faced by the international community. Within such an environment, the Court has to carefully examine these elements of fact and law collectively, as an institution composed of Members who represent diverse historical, social and cultural backgrounds and the major legal systems of the world.

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I would like to turn, as it has become a tradition of the Court, to an overview of the judicial activities of the Court during the past year. Chronologically, first is the Order indicating Provisional Measures issued by the Court on 15 October 2008 in a case between Georgia and the Russian Federation concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*. The case itself was filed by Georgia on 12 August 2008, which alleged violations of the International Convention on the Elimination of All Forms of Racial Discrimination (that is to say "CERD") and founded the Court's jurisdiction in the case on Article 22 of that Convention. Two days later, on 14 August 2008, Georgia followed up this application with a request for the indication of provisional measures, requesting that the Court order the Russian Federation to refrain from any acts of racial discrimination; to prevent groups or individuals from subjecting ethnic Georgians to such acts; to refrain from taking any actions or supporting any measures that obstructs ethnic Georgians' right of return to South Ossetia, Abkhazia, and adjacent regions; and to facilitate the delivery of humanitarian assistance to all individuals in the territory under their control[1].

In compliance with Article 74 of the Rules of Court, before proceeding to the merits in the Application, the Court first took up the request for the indication of provisional measures of protection. The Court found that "the Parties disagree with regard to the applicability of Articles 2 and 5 of CERD in the context of the events in South Ossetia and Abkhazia" and that "there appears to exist a dispute between the Parties as to the interpretation and application of CERD"[2]. It further took the view that the procedural conditions in CERD Article 22 had been met, concluding in particular that while Article 22 requires that some attempt be made to initiate discussions between the parties on issues that would fall under CERD, it does not require the carrying out of formal negotiations[3]. On these grounds, the Court determined that it had *prima facie* jurisdiction to deal with the case. As to the merits of the request, the Court concluded that "the ethnic Georgian population in the areas affected by the recent conflict remains vulnerable" and that there existed an imminent risk that they might suffer irreparable prejudice[4]. The Court therefore indicated provisional measures, ordering both Parties to refrain from any act of racial discrimination, or from sponsoring, defending or supporting racial discrimination; to refrain from placing any impediment to humanitarian assistance to the local population; and to refrain from any action which might prejudice the rights of the other Party or aggravate the dispute[5].

The next case was its judgment delivered on 18 November 2008 on the preliminary objections raised by the Respondent in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, brought before the Court in 1999 by the Republic of Croatia, which alleged that the Republic of Serbia**,** then known as the Federal Republic of Yugoslavia ("FRY"), was responsible for violations of the Genocide Convention on the basis of Article IX of the Convention. Serbia raised a preliminary objection by arguing that the Court lacked jurisdiction, first, because Serbia had lacked *locus standi* before the Court as it was not a member of the United Nations when Croatia filed its application, and, second, because Serbia had not given its consent to the jurisdiction of the Court as it was not a party to the Genocide Convention.

The Court accepted that Serbia had not been a member of the United Nations as of 2 July 1999, the date of the filing of the application by Croatia. Serbia was a member of the United Nations and therefore a party to the Statute of the Court as from 1 November 2000 when it was admitted to the United Nations. The Court accepted that the jurisdiction of the Court is normally

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[1] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures*, Order of 15 October 2008, para. 80.

[2] *Ibid.*, para. 112.

[3] *Ibid.*, para. 114.

[4] *Ibid.*, para. 143.

[5] *Ibid.*, para. 149.

assessed in principle on the date of the filing of the act instituting proceedings, the Court took an exception to this principle on the ground that "realism and flexibility in certain situations in which the conditions governing the Court's jurisdiction were not fully satisfied when proceedings were initiated but were subsequently satisfied, before the Court ruled on its jurisdiction"[6]. In this respect, the Court followed the line enunciated by the 1924 Judgment of the Permanent Court of International Justice in the case concerning *Mavrommatis Palestine Concessions*, in which the Permanent Court held that "[t]he Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law"[7]. The Court in the *Croatia* v. *Serbia* case applied this principle by expanding it to the question of access to the Court, concluding that any initial lack of access can be remedied without violating fundamental principles of proper administration of justice by way of a new subsequent application to submit Croatia's claim.

On the second leg of the preliminary objections of Serbia on whether the Court had jurisdiction under Article IX of the Genocide Convention, the Court held that a declaration and Note of 27 April 1992, in which the Federal Republic of Yugoslavia agreed to "strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally" and "continue to fulfil all . . . obligations assumed by . . . the Socialist Federal Republic of Yugoslavia in international relations, including its . . . participation in international treaties ratified or acceded to by Yugoslavia"[8], "had the effect of a notification of succession by the Federal Republic of Yugoslavia to the Socialist Federal Republic of Yugoslavia in relation to the Genocide Convention" and therefore the Court "had, on the date on which the present proceedings were instituted, jurisdiction to entertain the case on the basis of Article IX of the Genocide Convention"[9].

The case will now move to the merits phase. The Court fixed 22 March 2010 as the time-limit for the filing of a Counter-Memorial by the Republic of Serbia.

The next case turned to the American continent. On 19 January of this year, the Court delivered its judgment on 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)[10]. In this case, Mexico had asked the Court to interpret the earlier judgment of the Court on the same issue of 2004, in particular "to adjudge and declare that the obligation incumbent upon the United States under paragraph 153 (9) of the *Avena* Judgment constitutes an obligation of result"[11] and that, pursuant to that obligation of result, "the United States must take any and all steps necessary to ensure that no Mexican national entitled to review and reconsideration under the *Avena* Judgment is executed unless and until that review and reconsideration is completed and it is determined that no prejudice resulted from the violation"[12].

You might recall that the Court in the indication of provisional measures of protection accompanying the Application for interpretation of the Judgment of 21 March 2004 decided that

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[6] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, Judgment of 18 November 2008, para. 81.

[7] *Ibid.*, para. 82 (citing *Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 34).

[8] *Ibid.*, paras. 98-99.

[9] *Ibid.*, para. 117.

[10] *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)*, Judgment of 19 January 2009.

[11] *Ibid.*, para. 9.

[12] *Ibid.*

> "(a) The United States of America shall take al1 measures necessary to ensure that Mr. César Roberto Fierro Reyna, Mr. Roberto Moreno Ramos and Mr. Osvaldo Torres Aguilera are not executed pending final judgment in these proceedings".

The Court took the position that paragraph 153 (9) did not decide on the question most clearly in dispute in the application on interpretation — that is, whether this obligation of result contained in paragraph 153 (9) was directly enforceable in the United States. It held that because this latter question was not decided in the original judgment, it could not be submitted in the application for interpretation under Article 60 of the Statute[13]. In effect, what the Court found was that Mexico's request for interpretation dealt, not with the "meaning or scope" of the *Avena* Judgment as Article 60 of the Statute requires, but rather with "the general question of the effects of a judgment of the Court in the domestic legal order of the States parties to the case in which the judgment was delivered"[14].

Fourthly, on 3 February this year, the Court delivered its Judgment in the *Maritime Delimitation in the Black Sea* case between Romania and Ukraine. This was the first case in which these two States came to settle their dispute before the International Court of Justice. In this case, the Court was requested to draw a single maritime boundary delimiting the continental shelf and exclusive economic zones between Romania and Ukraine in the Black Sea. The issue of the maritime delimitation, especially relating to the delimitation of the continental shelf and exclusive economic zone, has been the subject of many disputes which have come before the Court, since the 1969 *North Sea Continental Shelf* cases. Since this 1969 Judgment, the jurisprudence of the Court on this issue has gone through a considerable evolution, against the background of entry into force of the United Nations Convention on the Law of the Sea in 1982. One significant element in the *Black Sea* Judgment, therefore, is that it set out the present state of the law on the issue of maritime delimitation in a structured way. On the basis of established State practice and in particular its jurisprudence, the Court stated that the law in the area of maritime delimitations has developed into a three-step approach which the Court has to follow: first, establishing a provisional equidistance line; second, considering factors which may call for an adjustment of that line and adjusting it accordingly; and, third, confirming that the line thus adjusted will not lead to an inequitable result by comparing such factors as the ratio of coastal lengths[15].

Another interesting new development of the law came up in relation to another case which came before the Court. The case opposes Belgium and Senegal and involves a new point of law in the field of international humanitarian law based on a multilateral convention. The Court issued an Order on Provisional Measures in the case between Belgium against Senegal entitled *Questions relating to the Obligation to Prosecute or Extradite.* Belgium filed an application on 19 February 2009 in relation to Mr. Hissène Habré, the former President of Chad, who has been present on Senegalese territory since 1990. Belgium submitted that by failing to prosecute or extradite Mr. Habré for certain acts he is alleged to have committed during his presidency, including crimes of torture and crimes against humanity, Senegal had violated the obligation *aut dedere aut judicare* contained in Article 7 of the Convention against Torture and in customary international law.

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[13] *Ibid.*, para. 44.

[14] *Ibid.*, para. 45.

[15] *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)*, Judgment of 3 February 2009, paras. 118-122.

On the same day, Belgium filed a request for the indication of provisional measures, asking the Court to require "Senegal to take all the steps within its power to keep Mr. H. Habré under the control and surveillance of the judicial authorities of Senegal so that the rules of international law with which Belgium requests compliance may be correctly applied"[16].

In the course of the oral hearings, Senegal confirmed its position, in the form of a formal declaration, that it would not allow Mr. Habré to leave its territory while the case was pending before the Court[17]. Under these circumstances, the Court held that there was no risk of irreparable prejudice to the rights claimed by Belgium and that no urgency existed which justified the indication of provisional measures[18]. On this ground, the Court declined to exercise its power under Article 41 to indicate provisional measures.

Finally, on 13 July 2009, the Court rendered its Judgment in a case between Costa Rica and Nicaragua[19]. This dispute concerned the navigational and related rights of Costa Rica on a section of the San Juan River, the southern bank of which forms the boundary between the two States provided for by the 1858 bilateral Treaty. While it was not contested that, according to that treaty, the relevant section of the river belongs to Nicaragua, the Parties differed as to the nature of the legal régime under the Treaty and the precise scope of Costa Rica's navigational rights on the river and the prerogatives of Nicaragua in respect of navigation. The Court had to assess in particular the meaning and scope of the expression *"libre navegación . . . con objetos de comercio"* in the 1858 Treaty, a question which deeply divided the Parties. The Court found that this right of free navigation applied to the transport of persons as well as to the transport of goods, as the activity of transporting persons — including tourists — can be commercial in nature nowadays, if a price (other than a token price) is paid to the carrier by the passengers or on their behalf[20].

After stating the basic principles governing the régime established by the 1858 Treaty, the Court went on to examine the specific scope of the Nicaraguan regulatory measures, which were accepted as a matter of principle as pertaining to Nicaragua as part of this régime. The Court held that some of the measures taken by Nicaragua were in conformity with the 1858 Treaty, while others were not in conformity[21].

Furthermore, the Court found that, although not covered by the treaty itself, the issue of "fishing by the inhabitants of the Costa Rican bank of the San Juan river for subsistence purposes from that bank is to be respected by Nicaragua as a customary right"[22].

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Several new contentious cases were filed with the Court in the past year. First, in August of 2008 Georgia instituted proceedings against the Russian Federation. As I mentioned above, the Court has so far dealt with its request for the indication of provisional measures. Second, in

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[16] *Obligation to Extradite or Prosecute (Belgium* v. *Senegal)*, Request for the Indication of Provisional Measures, Order of 28 May 2009, para. 15.

[17] *Ibid.*, para. 38.

[18] *Ibid.*, paras. 72-73.

[19] *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)*, Judgment of 13 July 2009.

[20] *Ibid.*, para. 71.

[21] *Ibid.*, paras. 102-133.

[22] *Ibid.*, para. 144.

November 2008, the Former Yugoslav Republic of Macedonia instituted proceedings against Greece, contending that the latter violated its rights established under an interim accord agreed by the two States by objecting to its application to join NATO. Third, in December 2008, Germany instituted proceedings against Italy, contending that Italy had violated German sovereign immunity by allowing several civil claims in Italian courts concerning violations of international humanitarian law by the German Reich during World War II. Fourth, in February 2009, Belgium instituted proceedings against Senegal relating to the obligation to extradite or prosecute the former President of Chad. On this case also the Court has disposed of Belgium's request for the indication of provisional measures. In addition, the Registry of the Court only yesterday received an "Application instituting proceedings by the Republic of Honduras against the Federative Republic of Brazil". The Court heard arguments on the merits in a case between Argentina and Uruguay in *Pulp Mills on the River Uruguay* from 14 September to 2 October 2009. A final judgment is expected in due course in the near future.

In addition to these new contentious cases, there also was a new development in the advisory proceedings before the Court. In October 2008 the Court received a request from this Assembly for an advisory opinion on the *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*. Thirty-six Member States of the United Nations filed written statements on the question. In addition, the authors of the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo filed a written contribution. We have received written comments from 14 States and a further written contribution from the authors of the declaration of independence commenting on the written statements. Thirty States and the authors of the unilateral declaration have indicated their intention to take part in the oral proceedings that will take place from 1 to 11 December this year.

Mr. President,
Distinguished delegates,
Ladies and Gentlemen,

As I stated at the beginning of this presentation, the increased recourse to the International Court of Justice by States for the judicial settlement of their disputes points to the consciousness among political leaders of the importance of the rule of law in the international community. The importance of the rule of law is crucial against the backdrop of the deepening process of globalization. Law does not replace politics or economics, but without it we cannot construct anything that will last in the international community. Only 66 States have now made declarations (many with reservations) recognizing as compulsory the jurisdiction of the Court, as contemplated by Article 36, paragraphs 2 and 5, of the Statute. In other words, this basis of jurisdiction can only be utilized in cases where it is accepted by both parties to a given dispute. It is therefore desirable to broaden this particular basis of jurisdiction through wider acceptance by States of the Optional Clause.

The Court greatly appreciates the trust that Member States have continued to place in what the International Court of Justice is doing as the principal judicial organ of the United Nations. I pledge that the Court will do its utmost to achieve our mandate as set out under the Charter, and to assist parties in the pacific settlement of their disputes. In doing so, I wish to request the Member States to strengthen their support and assistance through enhancing the capacity of the Court in carrying out its task of the peaceful resolution of disputes.

I assure you that the Court will continue to dedicate its fullest efforts to the peaceful settlement of disputes as well as to the promotion of the rule of international law with integrity and impartiality in order to meet the expectations of the United Nations and of the international community.

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