

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

25 October 2011

Madam President Ambassador Joy Ogwu,

Distinguished delegates,

Excellencies,

Ladies and Gentlemen,

This is my third, indeed the last time to address you as the President of the Court. It is with a renewed sense of appreciation to have this opportunity to reflect upon the organic linkage between our two respective principal organs of the United Nations. We stand together, though in a complementary manner, in our common pursuit of the objectives of maintaining international peace and security and promoting the rule of law in our world.

Article 1, paragraph 1, of the United Nations Charter identifies one of the primary purposes of the United Nations, as consisting in “maintain[ing] international peace and security, and to that end tak[ing] effective collective measures for the prevention and removal of threats to the peace, and for the suppression of aggression or other breaches of the peace . . .”. Over two decades after the demise of the Cold War, we are still confronted with a challenge to bring the ideals of the Charter to fruition.

The mechanism for discharging the responsibility for the maintenance of international peace and security through the peaceful settlement of disputes as well as the collective security system is mainly incorporated in Chapters VI and VII of the Charter. The challenge to this mechanism provided for in the Charter, through threats or use of force, however, seems to be increasing in complexity as a result of diverse developments that have emerged with the demise of the Cold War. These developments sometimes make us query whether the original scheme of the Charter for an effective collective security system based on the assumption that a “unity of purpose” based on the common interest would lead to a “unity in action”, is still valid in the present circumstances. The post-Cold War world has created a new type of asymmetry and disharmony in the international system that could disrupt the proper functioning of this system. Moreover, developments in

humanitarian crises in many parts of the world have brought to our attention a new type of threat born in the context of the emergence of “failed States”. This is a different type of threat to peace and security in the international community which had not been envisaged in 1945 under the collective security system provided for in Chapter VII. The rise of international terrorism by non-State actors has created yet another new type of threat to the security of States, as well as that of the international community as a whole.

The environment surrounding the Court also began to see a new landscape settling in around the period of the 1980s when we saw the Court becoming particularly active with an increasing number of States submitting their disputes to the Court. Those disputes, which do not necessarily relate per se to armed conflicts, nevertheless relate to tensions involving threats or acts of hostilities. The cases before the Court can therefore often present a similar set of factual and legal issues to those situations that the Security Council is seized of.

Against this background, it is my conviction that we must endeavour to strengthen the respective roles of our two principal organs in the field of maintenance of peace and security. Our respective roles for the settlement of international disputes, which may lead to a breach of peace, both form part and parcel of the mechanism established by the Charter to ensure the preservation and maintenance of international peace and security by the Organization. However, the respective roles of our two organs are not the same, as the principles to be applied and the means with which to achieve the common purpose are distinct from each other, depending on the capacity in which the competent United Nations organ is acting, i.e., one as the organ for the peaceful settlement of disputes through judicial means and the other as the organ for maintaining peace and security through political means, including its power of enforcement under Chapter VII of the United Nations Charter. There are thus distinct roles to be played by the two organs. Today I would like to look at the ways in which the Court and the Security Council can complement each other’s roles from two angles.

1. Constitutional links between the Court and the Security Council

There are factors contained in the Charter which merit our careful attention, as creating an organic link between our two organs — the Council and the Court. I would like to mention three points.

First, Article 36, paragraph 3, provides that “in making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred to by parties to the International Court of Justice”. This is an important article, but it has not been utilized by the Security Council since the early days of the United Nations when it was employed in the Corfu Channel case in 1947 to recommend both the United Kingdom and Albania to refer the dispute to the Court. I believe the Security Council could give much more attention to this provision and consider the possibility of much fuller use of the Court in a number of cases which come before the Council.

Secondly, one of the most critical aspects of the judgment of the Court in a contentious case is to ensure the compliance with the judgment by the parties. Article 94, paragraph 2, of the Charter provides for a procedure for resorting to the Security Council to ensure compliance with the judgment: “if any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment”. This admittedly is not a provision for enforcement of a judgment per se. Nevertheless, this is an important provision worth reflecting upon in the context of the promotion of the rule of law. While it is certainly not mandatory upon the Security Council to always take steps in this direction, such an action by the Security Council will be conducive to the restoration of peace and security and justice in relation to the situation in question. I earnestly hope that in such a case the Security Council will give serious consideration to taking steps for making recommendations or for deciding upon measures to give effect to the Judgment. The Judgment is binding upon the parties in accordance with the Charter and the Statute, and its compliance is cardinal for consolidating the rule of law in international relations.

Thirdly, the Court has often been involved in the unique function of giving an advisory opinion at the request of an organ of the United Nations, such as the Security Council or the

General Assembly. This function is conceived as an important aspect of collaboration between other principal organs of the United Nations and the Court. The aim of the advisory function of the Court may not consist in directly resolving concrete disputes between States, and its opinions are not, in principle, binding. Nevertheless, the legal advice to organs competent to request the Court will give an elucidation on points of law involved in many of the situations which could lead to discordance and even disruption in relations between States in the present day world, and thus contribute to the maintenance of peace and security in a given situation. I suggest more use of this venue could be considered in this regard.

2. The issue of substantive links between the two organs

Apart from these constitutional links between the two organs that can be made more effective, the recent jurisprudence of the Court also shows how the two organs, the Security Council and the Court, are inter-connected on a substantive level. In this connection, I would like to draw your attention to three recent instances where the link between the two institutions has contributed to the maintenance of international peace and security. The degree of involvement of the two organs in these cases varies from one another, but they all demonstrate the relevance and the importance of the respective roles of each of us in performing its own functions.

A. Situation involving *Georgia v. Russia*

Earlier this year, on 1 April 2011, the Court rendered a judgment, at its preliminary objections phase, on a dispute which also had been a subject of active discussion before this Council. It is the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*. Needless to say, the angles from which the two organs looked at the issues involved were different, one being concerned strictly with the international legal perspective of the situation, while the other looking at the situation in a much broader political context. The consequences of such examination of the case by the Court at its phase of preliminary objection have revealed interesting legal elements involved in the case. The judgment of the Court at this phase is to be contrasted with an earlier phase of the examination of the same issue i.e., at the stage of the indication of provisional

measures by the Court. As you are aware, the Court had already dealt with a Georgian request for the indication of provisional measures of protection on this subject in its Order of 15 October 2008, by which it ordered certain measures of protection to both parties, based on *prima facie* jurisdiction. At that point in time in 2008, barely two months after the outbreak of armed hostilities the ongoing link that could exist between the work of the respective organs in a mutually supportive and complementary way was much less readily discernable. The examination of the situation by the Court at the more recent preliminary objection phase in 2010 was different. This was the stage at which the Court was to examine the challenge by the Respondent to the jurisdiction of the Court. It was alleged by Georgia that the Russian Federation had violated the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter "CERD"). In order to establish the jurisdiction of the Court, Georgia relied on the compromissory clause in Article 22 of that Convention.

I would not repeat what I will present in this case in my address to the General Assembly. The Court dealt with the first two preliminary objections, namely the existence of a dispute and the procedural requirements of Article 22 of the CERD. The conclusion reached by the Court was that it recognized that there was a dispute between the two parties which fell within the scope of the CERD. This was demonstrated, *inter alia*, by the decision of the Security Council in relation to the events which had taken place after the armed hostilities in South Ossetia that had begun during the night of 7 to 8 August 2008. However, based on an analysis of the events that evolved, including before the Security Council, the Court found that the conditions required for the application of Article 22 were not fulfilled, during the period of August 2008, when the dispute took a concrete form. To reach this conclusion, the Court had to look into the situation more closely in order to analyze and determine how much negotiations had been going on at the political level, including the discussions of the situation in the Security Council. Thus, the case was dismissed on the ground that the Court has no jurisdiction to deal with it, without further examination of its merits phase.

It is true that the *Georgia v. Russia* case provides an example of a situation in which the participation of the Court had to stop short of acting in a concrete manner to contribute to the peaceful settlement of disputes. Nevertheless, this case illustrates the institutional framework in

which the Court examines whether it is empowered to resolve the dispute of which it is seized through judicial means, in contrast to the more plenary powers granted to the Security Council under the Charter.

B. The situation involving *Costa Rica v. Nicaragua*

In the past year, the Court has dealt with two cases in which requests for interim measures of protection were submitted. Given the fact that the procedures on the merits can take on average a few years since the filing of the Application, the provisional measures phase — which takes precedence over all other cases under deliberation — may be the one in which the Court can contribute to the attenuation of a conflict situation on a fast-track basis.

The two cases I will refer to relate to transborder security matters between neighbouring States. The first one is the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*. Following the alleged dredging operation and other works conducted by Nicaragua on the San Juan River in October 2010, Costa Rica filed an Application on 18 November 2010 in regard to an alleged “incursion into, occupation of and use by Nicaragua’s Army of Costa Rican territory as well as breaches of Nicaragua’s obligations towards Costa Rica”. The Parties to the conflict both claim territorial sovereignty over the same area. According to the Applicant, Costa Rica, Nicaragua occupied the territory of Costa Rica on two separate occasions in connection with the construction of a canal across what it alleged was the north-east end of the Costa Rican territory, as well as certain dredging works conducted on the San Juan River. For Nicaragua, the Respondent, the activities it is accused of by Costa Rica took place on Nicaraguan territory and they did not cause, nor did they risk causing, irreparable harm to the Applicant. These activities involved Nicaraguan military personnel. Costa Rica brought this matter to a regional organization, the Organization of American States, of which both States are parties, while reserving that, should it not be solved, it shall be submitted to the Security Council.

Costa Rica at the same time filed the case with the Court, and requested the Court to order provisional measures to the effect that: (i) Nicaragua not station troops or other personnel, engage in construction or enlargement of a canal, fell trees, remove vegetation, or dump sediment in the

area concerned; (ii) Nicaragua suspend its dredging programme; and (iii) Nicaragua refrain from any other action which might prejudice the rights of Costa Rica.

In its Order on indication of provisional measures of protection of 8 March 2011, the Court determined that there existed *prima facie* jurisdiction to rule on the merits of the case relating to the claimed right of sovereignty over the disputed territory, and that a link existed between the rights to be protected and the provisional measures requested. On this basis, the Court held that it had the power to indicate provisional measures if the circumstances so required. The Court gave an Order indicating Provisional Measures of Protection on the ground that a tangible risk of irreparable prejudice to Costa Rica's claimed right of sovereignty over the said territory did exist and that the risk was imminent.

In indicating provisional measures to both of the Parties, the Court was mindful not to encroach upon the issues that were to be determined at the merits stage, namely the attribution of sovereignty over the area disputed between the parties. The Court ordered that each Party refrain from sending to, or maintaining in the disputed territory any personnel, whether civilian, police or security, until such time as the dispute on the merits had been decided or the Parties had come to an agreement on the subject; at the same time it indicated that, on the basis that the area in question belonged to the wetland registered as Costa Rican in the framework of the Ramsar Convention on Wetlands, Costa Rica might despatch civilian personnel charged with the protection of the environment of the disputed territory, in so far as it was necessary to avoid irreparable prejudice being caused to the part of the wetland where that territory is situated, subject to prior consultation with the Secretariat of the Ramsar Convention in regard to these actions as well as prior notice to be given to Nicaragua. This point in the Order, it may be suggested, is reminiscent of the function of the Security Council under Article 40 of the Charter, by which the Security Council, in order to prevent an aggravation of the situation, may "call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable". The Court also ordered that each Party refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve, and that each Party inform the Court as to its compliance with the provisional measures. Here again, one can discern common, though complementary, roles that the

Security Council and the International Court of Justice can play with a view to preventing aggravation of the situation, so that eventual restoration of peace may come about.

It is hoped that a judgment of the Court will have the effect of resolving the parties' competing claims over a portion of a territory that formed the subject of an arbitration award rendered over 100 years ago. The return of such disagreements to the fore emphasizes the necessity of the Court as a body to which the parties may submit matters still in controversy.

C. The case of *Cambodia v. Thailand*

Another case by which I wish to illustrate the parallel role of the Court and the Security Council relates to the recent indication by the Court of provisional measures in a context involving armed hostilities between the Parties, Cambodia and Thailand. The area of the Temple of Preah Vihear had long been the subject of competing claims of territorial sovereignty between the two States before the International Court of Justice rendered its Judgment in 1962 on the dispute brought by Cambodia. In that Judgment, the Court decided that the Temple of Preah Vihear was situated in territory under the sovereignty of Cambodia. In spite of this Judgment, tensions began flaring up again in the border region especially since 2008, resulting in armed clashes starting from around October 2008. The matter, as you recall, was brought to the Security Council and the Council issued a press statement on the subject ("on Cambodia-Thailand Border Situation") in February 2011. It may be useful to recall the salient points of the statement, which called on the two sides: (1) to display maximum restraint and avoid any action that may aggravate the situation; (2) to establish a permanent ceasefire; and (3) to implement it fully and resolve the situation peacefully and through effective dialogue. It is to be noted that the Security Council also expressed support for ASEAN's active efforts in this matter and encouraged the parties to continue to cooperate with the regional organization in this regard.

Two months later, however, armed clashes did not subside and one of the parties to the conflict, i.e., Cambodia, decided to bring the case before the International Court of Justice. Admittedly, the case was then approached from a different angle, i.e., from the legal point of view. The request by Cambodia was to ask the Court to engage in the clarification of the legal basis on which the respective position of the parties rested, in the form of a "*Request for Interpretation of*

the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand)". At the same time, the Applicant also filed a request for the urgent indication of provisional measures.

According to the Application of Cambodia, the question put to the Court was confined to one legal issue — the interpretation of the operative paragraph (2) of the 1962 Judgment to the effect that "[t]he obligation incumbent upon Thailand to 'withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory'" be considered as "a particular consequence of the general and continuing obligation to respect the territorial integrity of Cambodia", and that, in accordance with the 1962 Judgment, the Court should declare that Cambodia's territory had been delimited in the area of the Temple and its vicinity in accordance with a map referred to on page 21 of that Judgment. In its request for indication of provisional measures, Cambodia further asked the Court to order (1) an immediate and unconditional withdrawal of all Thai forces from those parts of Cambodian territory situated in the area of the Temple to preserve the rights of Cambodia as claimed by it under the Judgment; (2) a ban on all Thai military activity in the area; and (3) that Thailand refrain from any act or action which could interfere with the rights of Cambodia or aggravate the dispute in the principal proceedings.

The Court, in considering the request for the indication of provisional measures, had to ensure that its decision would not encroach upon the questions belonging to the merits phase, especially the issue of the territorial delimitation in relation to the interpretation of the operative paragraph 2 of the 1962 Judgment. The Court, after having found that it had *prima facie* jurisdiction to deal with the request for interpretation of Cambodia on the basis of Article 60 of the Statute in as much as a dispute appeared to exist between the parties as to the meaning or scope of the 1962 Judgment, and after having satisfied itself that the other conditions for the indication of provisional measures were met (in particular those relating to the irreparable prejudice) ordered both parties: (1) to immediately withdraw their military forces from a zone as delimited by the Court in the present Order as a "provisional demilitarized zone"; (2) to refrain from any military presence within that zone or from any armed activities directed at that zone; and (3) for Thailand not to obstruct Cambodia's free access to the Temple of Preah Vihear (which the Court had already

determined as belonging to Cambodia in its 1962 Judgment as *res judicata*) or Cambodia's provision of fresh supplies to its non-military personnel in the Temple. Moreover, in relation to efforts made within the framework of the ASEAN, with which the Security Council had also encouraged the Parties to co-operate, the Court called on both parties to continue the co-operation with ASEAN and, in particular, to allow the observers appointed by that organization to have access to the provisional demilitarized zone.

It should be stated that this is the first time that the International Court of Justice, in an Order for provisional measures of protection, has set up a provisional demilitarized zone going beyond the disputed area between the Parties, in order to ensure the recurrence and aggravation of the conflict be avoided pending the final outcome of the Judgment on the merits. While this is of course a provisional measure indicated without prejudice to a subsequent decision by the Court on the principal request for interpretation, it is interesting to observe the parallel approaches adopted both by the Security Council and by the International Court of Justice, with a view to achieving a common, if separate, objective of restoring and maintaining peace and security in the context of an ongoing armed conflict. It is noteworthy also that both the Security Council and the Court drew the particular attention of the Parties to the important function played by a regional organization such as ASEAN under Chapter VIII of the Charter in the field of maintenance of peace and security in the region and encouraged the Parties to co-operate with that organization for the prompt settlement of their dispute. Notwithstanding the difference in the actions taken by the two organs due to the different functions to be played by them respectively, the case demonstrates the importance of maintaining an organic link of co-ordination and co-operation between us the two principal organs of the United Nations, working in the field of preservation of peace and stability. A greater understanding by the Security Council of the potential of the International Court of Justice and a greater degree of such organic co-operation in this field, including an effective use of Article 36, paragraph 3 and Article 94, paragraph 2, of the Charter will, in my humble submission, prove to be extremely useful. This would contribute greatly in enabling the Court to carry out its effective judicial resolution of the disputes in international relations.

Madam President, Distinguished delegates, Ladies and Gentlemen,

By way of conclusion, I would like to reassure you again that the Court will continue to work vigorously with a view to resolving the disputes put to it with impartiality and judicial rigour in its effort to bring the rule of law at the international level. It is, of course, a truism that States are given free choice of means for the purposes of peaceful settlement of disputes and that disputes often cannot be resolved by a single means but by a combination of means. Judicial settlement of disputes is but one of those means for putting an end to a given conflict. Nevertheless, it provides an important legal framework by which to clarify the rights and the wrongs of different claims of the parties in dispute. It goes without saying that, if the Court is to make a meaningful contribution in this process, the unreserved acceptance by the States involved of the authority of the International Court of Justice as a concrete embodiment of impartial justice is essential. The increasing burden upon the Court resulting from the growing number of cases that have come before it in recent years is a real challenge that the Court has to meet; this is a burden that the Court is more than willing to assume for the good of the world. By contrast, the international community should not lose the opportunity for the timely resolution of disputes by failing to entrust the Court with the adjudication of disputes. It is my hope that an implicit understanding between the Bench and the Security Council, through the development of the principle of mutual complementarity between the Court and the Council will help further to enhance the confidence and effectiveness in our ability to resolve recurring conflicts in this troubled world.

I thank you for your kind attention.
