

**SPEECH BY H.E. JUDGE PETER TOMKA, PRESIDENT OF THE INTERNATIONAL COURT
OF JUSTICE, AT THE SIXTY-SIXTH SESSION OF THE INTERNATIONAL LAW
COMMISSION**

22 JULY 2014

Mr. Chairman,
Ladies and Gentlemen,
Colleagues and Friends,

I am pleased to address the International Law Commission ('ILC' or the 'Commission') on the occasion of its Sixty-sixth Session, and for the third time in my capacity as President of the International Court of Justice ('ICJ' or the 'Court'). I would like to take this opportunity to congratulate the Members elected as Officers of the Commission in May, including the Chairman, Mr. Kirill Gevorgian.

For many years now, the Commission has invited the President of the Court to address the plenary meeting and engage in an exchange of views with the Commission. The Court is, of course, privileged to be able to take part in this enriching dialogue and to benefit from the collegiality and exchange of ideas stemming from the collaborative dynamic that characterizes the interactions between our respective institutions. I am most pleased to have the opportunity to continue the tradition today and am very grateful to you for that.

Indeed, it is always a pleasure to celebrate the "personal" link that exists between the Court and the Commission, which is evident in the bonds of harmony that bind our respective institutions. Of the 103 Members of the Court who have to date served as judges, 34 were members of the Commission before their election to the Court, including nine who later became President of the principal judicial organ of the United Nations. In this regard, I am delighted that this "personal" link will be likely further strengthened in short order given that both your Chairman, Mr. Kirill Gevorgian, and Professor James Crawford, a former ILC Member and Special Rapporteur, have been put forward as candidates for the upcoming ICJ election in the context of the renewal of the Court's triennial composition. [Of course, I should stress that they are running for different seats on the Court, and are not in direct competition! If all goes according to plan, I look forward to welcoming them both in The Hague as newly-minted judicial colleagues in February 2015.] Similarly, Judge Patrick Lipton Robinson, who served as a Member of your Commission from 1992-1996, is one of 6 candidates for election to the ICJ this year.

Today, I would like to focus my remarks on the Court's judicial activities over the last year and offer some concluding thoughts on current efforts to strengthen the compulsory jurisdiction of the Court, the latter being a very important topic falling within the broader mission of further bolstering the rule of law on the international plane. Fulfilling its role as the principal judicial organ of the United Nations over the last year, the Court has been particularly instrumental in furthering this objective, having rendered three major decisions on the merits in international disputes. What is more, in handing down its decisions, the Court also contributed to maintaining international peace and security, an absolutely central objective of the UN Charter, primarily by settling longstanding international disputes; and, in one of the cases, by holding that a State's conduct was in contravention of its international obligations, which were intertwined with the protection of the environment and the conservation of living resources.

It is no secret that adjudication by the Court of disagreements between disputing States can assist them in defusing tensions and prevent the escalation of such disagreements into open conflicts. The Court's year in review unquestionably illustrates that judicial body's important role in neutralising such tensions between disputing States, with a view to ultimately normalising the relations between them.

The first case in point arose in the context of the *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*). It should be recalled that in 2011, Cambodia filed an Application instituting proceedings against Thailand, whereby, referring to Article 60 of the Court's Statute and Article 98 of the Rules of Court, it requested the Court to interpret the Judgment delivered by the Court on 15 June 1962 in the case concerning the *Temple of Preah Vihear (Cambodia v Thailand)*. The Temple of Preah Vihear is situated on a promontory of the same name in the eastern part of the Dangrek range of mountains, "which in a general way, constitutes the boundary between the two countries in this region – Cambodia to the south and Thailand to the north". Thailand occupied the Temple in 1954 and negotiations between the Parties were unsuccessful, which prompted Cambodia to seise the Court in 1959. During the proceedings on the merits, Cambodia relied upon the map entitled "Dangrek – Commission of Delimitation between Indo-China and Siam", which was annexed to its pleadings and was referred to as the "Annex I map". In particular, Cambodia argued that this map had been accepted by Thailand and had entered into the treaty settlement, thereby becoming binding on the two States.

In the operative part of its 1962 Judgment, the Court found "that the Temple of Preah Vihear is situated in the territory under the sovereignty of Cambodia". In consequence, the Court found "that Thailand is under an obligation 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" and "that Thailand is under an obligation to restore to Cambodia any objects of the kind specified in Cambodia's fifth Submission [mostly artefacts] which may, since the date of the occupation of the Temple by Thailand in 1954, have been removed from the Temple or the Temple area by the Thai authorities". After the delivery of the Judgment, Thailand withdrew from the Temple buildings but erected a barbed wire fence, which divided the Temple ruins from the rest of the promontory of Preah Vihear. This fence followed the course of a line depicted on the map attached to a resolution, adopted by the Council of Ministers of Thailand on 10 July 1962 but not made public until the proceedings on the interpretation of the 1962 Judgment. By that resolution, the Thai Council of Ministers fixed what it considered to be the limits of the area from which Thailand was required to withdraw.

In its Judgment on Interpretation, which was rendered on 11 November 2013, the Court pointed out that "by virtue of Article 60 of the Statute, [the Court] may entertain a request for interpretation provided that there is a 'dispute as to the meaning or scope' of any judgment rendered by it". In this regard, the Court recalled that its "jurisdiction on the basis of Article 60 of the Statute is not preconditioned by the existence of any other basis of jurisdiction as between the parties to the original case". Turning to the facts of the case, it was clear to the Court that the various events and statements involving the Parties evidenced the existence of a dispute between them as to the meaning and scope of the 1962 Judgment, which related to three specific aspects thereof: (i) whether the 1962 Judgment decided with binding force or not that the Annex I map line constitutes the frontier between the Parties in the area of the Temple; (ii) the meaning and scope of the phrase "vicinity on Cambodian territory", referred to in the second operative paragraph of the 1962 Judgment; and (iii) the nature of Thailand's obligation to withdraw imposed by the second paragraph of the operative part. Having found that Cambodia's Request is admissible, the Court thus concluded that it had jurisdiction to entertain the Request for Interpretation.

Turning to the merits of the Request for Interpretation, the Court emphasized that its role under Article 60 of its Statute is to clarify the meaning and scope of what the Court decided in the judgment it is called upon to interpret, all within the strict limits of that original judgment. Thus, while the reasoning of the 1962 Judgment was relevant to the extent that it could shed light on the operative clause, the Court's interpretation analysis could not be affected by conduct of the parties having occurred after the judgment had been given, and would rather focus on those facts that were considered in the judgment under interpretation. The Court then proceeded to unpack three important features of the 1962 Judgment: (i) the Court considered that it was dealing with a dispute regarding territorial sovereignty over the area in which the Temple was located and that it was not engaged in delimiting the frontier between the Parties; (ii) the Annex I map played a central role in the reasoning of the Court, its acceptance by the Parties having caused the map to enter the

treaty settlement and to become an integral part of it, thereby prompting the Court to pronounce in favour of the line mapped in the disputed area; and (iii) in defining the dispute, the Court made clear that it was concerned only with sovereignty in the “region of the Temple of Preah Vihear” (incidentally, a rather small disputed area).

Turning to the operative part of the 1962 Judgment, the Court stressed that the three operative paragraphs had to be considered as a whole. The Court concluded that the scope and meaning of the first operative paragraph was clear: it ruled on Cambodia’s principal claim by finding that the Temple was situated in territory under the sovereignty of Cambodia. The Court’s interpretation of the second operative paragraph was lengthier, as this paragraph was the subject of the principal dispute between the Parties. As I quoted it earlier, you will recall that it dealt with the withdrawal of Thai military or police forces, or other guards or keepers stationed at the Temple or in its vicinity. However, as pointed out by the Court, this operative paragraph did not indicate expressly the Cambodian territory from which Thailand was required to withdraw its personnel, nor did it state to where those personnel had to be withdrawn.

In seeking out to clarify the meaning of the term “vicinity” in the 1962 Judgment, the Court began its analysis by examining the evidence that was before the Court in 1962 regarding the locations at which such Thai personnel were stationed. On that basis, the Court concluded that the term “vicinity on Cambodian territory” had to be construed as extending at least to the area where the Thai police detachment was stationed at the time of the original proceedings, in particular in blockhouses at a camp located to the north-east of the Temple, in addition to one solitary Temple guard who lived in a separate house a short distance to the west of the police camp. Since the area identified by the Court lies north of the Thai Council of Ministers’ line, the Court concluded that this line cannot represent the correct interpretation of the territorial scope of the second operative paragraph, which was confirmed by several factors. Thus, in the view of the Court a natural understanding of the concept of the “vicinity” of the Temple would extend to the entirety of the Preah Vihear promontory. What is more, the Court’s reasoning regarding the significance of the Annex I map shows that the Court considered that Cambodia’s territory extended in the north as far as, but no farther than, the Annex I map line.

After canvassing several reasons, the Court rejected Cambodia’s contention that the term “vicinity” also included not only the promontory of Preah Vihear but also the hill of Phnom Trap. In fact, the Court concluded that, in its 1962 Judgment, the Court did not intend the term “vicinity [of the Temple] on Cambodian territory” to encompass territory outside the promontory of Preah Vihear. However, the Court clarified that the 1962 Judgment had not treated Phnom Trap as part of Thailand; rather, the Court did not address the issue of sovereignty over Phnom Trap, or any other area beyond the limits of the promontory. Based upon the whole evidence reviewed by the Court, which included pleadings in the original 1961 proceedings, the following limits of the promontory of Preah Vihear, south of the Annex I map line, were identified by the Court as follows: to the east, south and south-west, the promontory drops in a steep escarpment to the Cambodian plain, leading the Court to consider that the promontory ends at the foot of the hill of Phnom Trap, that is to say where the ground begins to rise from the valley; in the north, the limit of the promontory is the Annex I map line, from a point to the north-east of the Temple where that line abuts the escarpment to a point in the north-west where the ground begins to rise from the valley, at the foot of the hill of Phnom Trap. Consequently, the Court concluded that the second operative paragraph of the 1962 Judgment required Thailand to withdraw any Thai personnel stationed on the promontory from the whole territory of the promontory, thus defined.

In the last portion of its analysis, the Court turned to the relationship between the second paragraph of the *dépôt* of the 1962 Judgment and the rest of the operative part. As I indicated earlier, the second operative paragraph states that “Thailand is under an obligation 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”. The third operative paragraph provides that “Thailand is under an obligation to restore to Cambodia any objects of the kind specified in Cambodia’s fifth Submission [primarily artefacts] which may, since the date of the

occupation of the Temple by Thailand in 1954, have been removed from the Temple or the Temple area by the Thai authorities”. The Court remarked that while the Parties had not entertained a dispute on the third operative paragraph, that provision was nonetheless relevant to the extent that it shed light on the meaning and scope of the rest of the operative part. Ultimately, the Court found that the terms “vicinity [of the Temple] on Cambodian territory”, in the second operative paragraph, and “area of the Temple, in the third operative paragraph, referred to the same small parcel of territory. Consequently, the obligations imposed by the Court in 1962 in respect of that territory were stated to be a consequence of the finding contained in the first operative paragraph (i.e. “the Temple of Preah Vihear is situated in the territory under the sovereignty of Cambodia”). As a corollary, it followed that the obligations imposed by the second and third operative paragraphs would be a logical consequence of the finding of sovereignty in the first operative paragraph only if the territory referred to in the first paragraph corresponded to the territory referred to in the second and third paragraphs.

At the end of the day, therefore, the Court concluded that the territorial scope of the three operative paragraphs was the same and corresponded to the description of the limits of the promontory I indicated earlier. In light of its analysis and for further reasons articulated in its Judgment last fall, the Court declined to pronounce on the question whether the 1962 Judgment determined with binding force the boundary line between Cambodia and Thailand. It found it equally unnecessary to further address the question whether the withdrawal obligation imposed on Thailand by the second operative paragraph was a continuing obligation, in the sense maintained by Cambodia.

Since my last appearance before your august institution, the Court also handed down its judgment on the merits in the *Maritime Dispute* between Peru and Chile –namely on 27 January 2014. This case has further bolstered the rich corpus of World Court jurisprudence involving American States, with many cases having raised questions of maritime delimitation. In many ways, therefore, Latin American States remain faithful clients of the Court and have largely contributed, through bringing and litigating disputes before the Court, to the further clarification and development of the law of the sea and related aspects such as maritime delimitation. As I will mention later on, there is every indication that this trend will continue, as several new cases involving Latin American States have been brought to the Court recently. After all, as is well known, the current law allowing States a 200-nautical mile right to the continental shelf and exclusive economic zone was developed after unilateral declarations were formulated by the United States and several Latin American States.

In fact, the existence of declarations proclaiming certain maritime rights extending out to a distance of 200 nautical miles on the part of the concerned States, and other States in the region, was mentioned by the Court in its recent decision in the *Maritime Dispute* opposing Peru and Chile. That case also presented a novel and peculiar factual scenario in respect of the diametrically opposed theses defended by the Parties regarding their maritime boundary in the Pacific Ocean. Indeed, the Parties advanced opposite – and fundamentally different – views as to how the Court should proceed in respect of the allocation of their respective maritime areas. In particular, Peru argued that no maritime boundary had been earlier agreed between the Parties and relied on the basic maritime delimitation methodology under international law, advocating in favour of a delimitation *de novo* to be carried out by the Court.

It has long been established in the Court’s jurisprudence – and confirmed in 2009 in the *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* case – that the basic maritime delimitation methodology essentially consists of three steps: first, the Court draws a provisional equidistance line in the area to be delimited; next, it examines whether that line needs to be adjusted or shifted in the light of relevant circumstances; finally, the Court subjects the adjusted line to a disproportionality analysis, in order to ascertain whether the maritime areas attributed to each of the parties in the relevant zone are not markedly disproportionate to the length of their respective coasts. In the end, the purpose of maritime delimitation is to achieve an equitable result, as stipulated in Articles 74 and 83 of the UNCLOS.

Therefore, in Peru's view, the Court should effect a maritime delimitation between the Parties in conformity with the usual equidistance/relevant circumstances methodology, emphasizing that no such circumstances justified an adjustment of the equidistance line in the circumstances of the case. For its part, Chile took the view that the entire maritime boundary had already been agreed by the Parties – particularly in the 1952 Santiago Declaration – and that it ran along the parallel of latitude passing through the starting-point of the Peru-Chile land boundary at the coast, extending to a minimum of 200 nautical miles seaward.

Ultimately, on the basis of the evidence submitted to it, the Court found that the Parties had acknowledged in the 1954 Agreement Relating to a Special Maritime Frontier Zone the existence of a maritime boundary, along the parallel of latitude. In canvassing the various agreements that had been struck by the Parties, the Court held specifically that this 1954 Agreement, signed by Chile, Ecuador and Peru, acknowledged that a maritime boundary already existed between Peru and Chile. Such boundary had already been tacitly agreed by the Parties and ran along the parallel of latitude, out to an unspecified distance. After examining the entirety of the evidence presented to it – particularly the fishing practice and activities of the Parties in the early and mid-1950s – the Court concluded that the agreed maritime boundary between the Parties extended to a distance of 80 nautical miles along the parallel from its starting-point. The Court then held that the starting-point of the agreed maritime boundary between the Parties was the intersection of the parallel of latitude passing through Boundary Marker No. 1 with the low-water line.

Turning to the determination of the course of the undefined maritime boundary from the endpoint of the agreed maritime frontier, the Court proceeded on the basis of Articles 74(1) and 83(1) of UNCLOS which, as confirmed by the Court's jurisprudence, reflect customary international law. The Court then pointed out that the delimitation of the unallocated maritime spaces would begin at the endpoint of the agreed maritime boundary, recalling that in practice some delimitations had been carried out from starting-points not located at the low-water line, but further seaward. In support of this last statement, the Court invoked some of its most famous cases on maritime delimitation, namely: *Delimitation of the Maritime Boundary in the Gulf of Maine (Canada/United States of America)*; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)*; and *Maritime Delimitation in the Black Sea (Romania v Ukraine)*. By contrast, however, the Court underscored that in the *Maritime Dispute* between Peru and Chile, "[t]he situation the Court face[d] [was] ... unusual in that the starting-point for the delimitation in this case [was] much further from the coast: 80 nautical miles from the closest point on the Chilean coast and about 45 nautical miles from the closest point on the Peruvian coast".

In any event, the Court then proceeded to apply the usual three-step methodology in delimiting the area of overlapping entitlements situated beyond the terminal point of the agreed maritime boundary; first, by plotting a provisional equidistance line, then by turning to the assessment of any relevant circumstances calling for an adjustment of that line, and ultimately by applying the "disproportionality" test, all with the aim of achieving an equitable solution. In this particular case, the Court noted that no relevant circumstances appeared in the record before it and, accordingly, there was no basis for adjusting or shifting the provisional equidistance line. Similarly, given the unusual circumstances of the case before it, the Court concluded that no significant disproportion was evident, such as would call into question the equitable nature of the provisional equidistance line. I wish to commend both Parties, and their leaders, for having within two months from the rendering of the Judgement agreed on the precise geographic coordinates of their maritime boundary on the basis of its description in the Court's Judgement.

The third major judgment on the merits rendered during the period under study resulted from the case concerning *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)*. In that case, Australia complained that Japan's continued pursuit of a large-scale programme of whaling under the Second Phase of its Japanese Whale Research Program under Special Permit in the Antarctic ("JARPA II") was in breach of obligations assumed by Japan under the International Convention for the Regulation of Whaling ("Convention"). In its Judgment of 31 March 2014, the Court found that it had jurisdiction to hear the case pursuant to the declarations made by both Parties under Article 36, paragraph 2, of the Court's Statute. At

the jurisdictional phase of its analysis, the Court rejected Japan's objection to the Court's jurisdiction based on a reservation contained in Australia's own Article 36(2) declaration, as argued by Japan, which the Court deemed inapplicable in the present case.

In this case, Australia alleged that because JARPA II was not a programme for purposes of scientific research within the meaning of Article VIII of the Convention, Japan had breached and continued to breach three substantive obligations under the Schedule to the Convention: the obligation to respect the moratorium setting zero catch limits for the killing of whales from all stocks for commercial purposes (para. 10 (e)), the obligation not to undertake commercial whaling of fin whales in the Southern Ocean Sanctuary (para. 7 (b)), and the obligation to observe the moratorium on the taking, killing or treating of whales, except minke whales, by factory ships or whale catchers attached to factory ships (para. 10 (d)). Australia further alleged that Japan had violated procedural requirements for proposed scientific permits set out in paragraph 30 of the Schedule. Japan contested all of these allegations arguing, in respect of the substantive obligations, that its JARPA II programme had been undertaken for purposes of scientific research and was therefore covered by the exemptions provided for in Article VIII, paragraph 1, of the Convention.

The Court first embarked upon an interpretation of Article VIII, paragraph 1, of the Convention, which provides as follows:

“Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted.”

The Court first noted that this provision is an integral part of the Convention and, therefore, has to be interpreted in the light of its object and purpose, taking into account its other provisions, including the Schedule. Relying on the specific wording of the provision, the Court concluded that whaling conducted under a special permit which meets the conditions of Article VIII is not subject to the obligations under paragraphs 10(e), 7(b) and 10(d) of the Schedule. In concrete terms, the Court pronounced on the relationship between Article VIII and the object and purpose of the Convention, underscoring that neither a restrictive nor an expansive interpretation of that provision was justified. It went on to point out that the programmes for purposes of scientific research should foster scientific knowledge; they may pursue an aim other than either conservation or sustainable exploitation of whale stocks.

The Court considered that Article VIII provides discretion to a State party to the Convention to reject the request for a special permit or to specify the conditions under which a permit will be granted; but that the question whether the killing, taking and treating of whales pursuant to a requested special permit is for purposes of scientific research cannot depend simply on that State's perception. The Court then proceeded to set out the standard of review it will apply when examining the grant of a special permit authorizing the killing, taking and treating of whales on the basis of Article VIII, paragraph 1, of the Convention: the Court will first assess whether the programme under which these activities occur involves scientific research; and, secondly, whether, in the use of lethal methods, the programme's design and implementation are reasonable in relation to achieving its stated objectives. In applying this standard of review, the Court continued, it is not called upon to resolve matters of scientific or whaling policy.

Turning to the meaning of the phrase “for purposes of scientific research”, the Court opined that the two elements of this phrase – “scientific research” and “for purposes of” – are cumulative. It follows that even if a whaling programme involves scientific research, the killing, taking and treating of whales pursuant to

such a programme does not fall within Article VIII unless these activities are “for purposes of” scientific research. In order to ascertain whether a programme’s use of lethal methods is for purposes of scientific research, the Court will consider whether the elements of a programme’s design and implementation are reasonable in relation to its stated scientific objectives. Such elements may include: decisions regarding the use of lethal methods; the scale of the programme’s use of lethal sampling; the methodology used to select sample sizes; a comparison of the target sample sizes and the actual take; the time frame associated with a programme; the programme’s scientific output; and the degree to which a programme co-ordinates its activities with related research projects.

In the Court’s view, the fact that a programme involves the sale of whale meat and the use of proceeds to fund research is not sufficient, taken alone, to cause a special permit to fall outside Article VIII. Other elements would have to be examined, such as the scale of a programme’s use of lethal sampling, which might suggest that the whaling is for purposes other than scientific research. For instance, a State party may not, in order to fund the research for which a special permit has been granted, use lethal sampling on a greater scale than is otherwise reasonable in relation to achieving the programme’s stated objectives. The Court recalled that a State often seeks to accomplish more than one goal when it pursues a particular policy.

Furthermore, an objective test of whether a programme is for purposes of scientific research does not hinge on the intentions of individual government officials, but rather on whether the design and implementation of a programme are reasonable in relation to achieving the stated research objectives. As a corollary, in the eyes of the Court it followed that whether particular government officials may have motivations extending beyond scientific research does not preclude a conclusion that a programme is for purposes of scientific research within the meaning of Article VIII. That said, such motivations cannot justify the granting of a special permit for a programme that uses lethal sampling on a larger scale than is reasonable in relation to achieving the programme’s stated research objectives. Consequently, the research objectives alone must be sufficient to justify the programme as designed and implemented.

Moving on to the specific assessment of the design and implementation of JARPA II in light of Article VIII of the Convention, the Court reviewed the evidence and observed that more than 6,700 Antarctic minke whales were killed over the course of the programme’s 18-year history. After canvassing the design of JARPA II, the Court considered that the evidence showed that, at least for some of the data sought by the programme’s researchers, non-lethal methods were not feasible. Consequently, and given that the value and reliability of data collected are a matter of scientific opinion, the Court remained unpersuaded that the use of lethal methods was per se unreasonable in the context of JARPA II. Rather, the Court looked more closely at the details of Japan’s decisions regarding the use of lethal methods in JARPA II and the scale of their use in the programme.

For reasons articulated in the Judgment, the Court considered that Japan’s whaling programme should have included some analysis of the feasibility of non-lethal methods as a means of reducing the planned scale of lethal sampling in the programme. Ultimately, the Court found no evidence of studies by Japan of the feasibility or practicability of non-lethal methods, either in setting the JARPA II sample sizes or in later years in which the programme had maintained the same sample size targets, or of any examination by Japan whether it would be feasible to combine a smaller lethal take and an increase in non-lethal sampling as a means to achieve JARPA II’s research objectives.

The Court then embarked upon an assessment of the scale of the use of lethal methods in JARPA II and made a number of findings about this broader aspect of the design and implementation of the whaling programme; in so doing, it also addressed the determination of species-specific sample sizes and formulated a comparison between the sample size and actual take under the programme. Ultimately, the Court observed that, despite the number of years in which the implementation of JARPA II had differed significantly from the design of the programme, Japan had not made any changes to the JARPA II objectives and target sample size, which were reproduced in the special permits granted annually. In the Court’s view, Japan’s continued

reliance on the first two JARPA II objectives to justify the target sample sizes, despite the discrepancy between the actual take and those targets, coupled with its statement that JARPA II can obtain meaningful scientific results based on a far more limited actual take, cast further doubt on the characterization of JARPA II as a programme for purposes of scientific research.

This evidence suggested that the targeted sample sizes were larger than are reasonable in relation to achieving JARPA II's stated objectives. The fact that the actual take of fin and humpback whales was largely, if not entirely, a function of political and logistical considerations, further weakened the purported relationship between JARPA II's research objectives and the specific sample size targets for each species –in particular, the decision to engage in the lethal sample of minke whales on a relatively large scale. The Court also examined additional aspects of the design and implementation of JARPA II, remarking, *inter alia*, that the scientific output to date was limited and that further evidence of cooperation between JARPA II and other domestic and international research institutions could have been expected in light of the programme's focus on the Antarctic ecosystem and environmental changes in the region.

At the end of the day, the Court provided several reasons in support of its conclusion that the target sample sizes in JARPA II are not reasonable in relation to achieving the programme's objectives; similarly, the Court drew attention to the fact that these various problems with the design of the programme also had to be considered in the light of its implementation. Taken as a whole, the Court considered that JARPA II involved activities that could broadly be characterized as scientific research, but that the evidence fell short in establishing that the programme's design and implementation were reasonable in relation to achieving its stated objectives. Consequently, the Court held that the special permits granted by Japan for the killing, taking and treating of whales in connection with JARPA II were not "for purposes of scientific research" pursuant to Article VIII, paragraph 1, of the Convention. This prompted the Court to conclude the following in respect of the alleged violations of the Schedule to the Convention: (i) Japan had not acted in conformity with its obligations from 2005 to the present under paragraph 10(e), concerning the moratorium on commercial whaling, because the permits granted had set catch limits higher than zero; (ii) Japan had not acted in conformity with its obligations under paragraph 10(d), concerning the factory ship moratorium, in each of the seasons during which fin whales were taken, killed and treated in JARPA II; and (iii) in respect of the Southern Ocean Sanctuary established by paragraph 7(b) of the Schedule, the Court observed that this provision did not apply to minke whales in relation to Japan and concluded that Japan had not acted in conformity with its obligations under paragraph 7(b) in each of the seasons of JARPA II during which fin whales had been taken.

Conversely, and for reasons unpacked in its Judgment, the Court did not heed Australia's argument that Japan had violated its obligations under paragraph 30 of the Schedule, judging that both procedural and substantive requirements of that scheme had been satisfied as far as JARPA II was concerned, and that Japan's approach thus accorded with the practice of the Scientific Committee under the International Whaling Commission. When addressing the question of appropriate remedies, the Court observed that, because JARPA II was an ongoing programme, measures that went beyond declaratory relief were warranted. The Court ordered that Japan revoke any extant authorization, permit or licence to kill, take or treat whales in relation to JARPA II, and refrain from granting any further permits under Article VIII, paragraph 1, of the Convention, in pursuance of that programme.

In my view, this decision very aptly demonstrated the Court's ability to address an extremely intricate factual complex, digest a fact-heavy record and, most importantly, handle highly scientific evidence. Indeed, this Judgment is a fitting response to some criticisms voiced in certain scholarly circles and elsewhere [–particularly in the wake of the 2010 *Pulp Mills* decision, which also elicited critiques on this front by a few (two) dissenting Members of Court –] that the Court is ill-equipped to handle fact-intensive, science-heavy cases. Quite to the contrary, the Court's able and extensive treatment of the highly scientific and technical facts, evidence and information in the *Whaling in the Antarctic* case rather points to an eminently educated,

sophisticated and science-friendly judicial organ. In future cases involving scientific and/or technical facts, therefore, the Court will invariably endeavour to deliver comprehensive factual and legal analyses.

I can point to another illustration – taken from the reporting period – of the Court’s role as a viable forum for adjudicating disputes that have potentially significant repercussions on the environment, human health and living resources, thereby involving complex facts, testimonial evidence and technical, scientific or expert considerations. Up until September 2013, the case concerning *Aerial Herbicide Spraying (Ecuador v Colombia)* had featured on the Court’s General List. The proceedings were instituted by Ecuador in 2008. The Court had already invested considerable energy in preparing for the case, in particular as regards the processing and assessment of the voluminous evidentiary record and the procedure regarding the deposition of witnesses. Those proceedings were ultimately discontinued given that the Parties reached an agreement to settle their dispute, just three weeks prior to the date on which the hearings before the Court on the merits were scheduled to commence. That said, both Parties praised the Court for the time, resources and energy it had devoted to the case, and acknowledged that reaching a settlement would have been difficult, if not impossible, but for the involvement of the Court.

Over the last year, the Court has remained also very much engaged in the drafting and deliberative process in a few other matters. Earlier this spring, the Court held public hearings on the merits in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*. In that case, Croatia complains that Serbia allegedly committed violations of the Genocide Convention between 1991-95 while Serbia, by way of counterclaim, alleges similar violations in respect of acts carried out by Croatia in 1995. The Court has now concluded its formal deliberation in that case and the drafting committee is hard at work on the preliminary draft judgment. Indeed, this case involves a great deal of work: since Croatia alleges violations of the Genocide Convention spanning the period I have indicated earlier, the case raises very challenging jurisdictional questions as the FRY became party to the Convention only on 27 April 1992, along with difficult questions on the merits of both the main claim and the counterclaim. It is to be hoped that the judgment in that case will bring some closure to the Parties in the final chapter of the Balkan Wars, as far as litigation before the World Court is concerned. In fact, this is the case that has featured the longest on the docket in the Court’s history: in the coming months, the Court will remain very much immersed in the consideration of the draft judgment, continue constructing its judgment meticulously and make every effort to render it before the renewal of the Court’s triennial composition in February 2015.

By contrast, while the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* has been the longest in the Court’s history, the Court is gearing up to hold public hearings on the merits this fall in the case concerning *Question relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*. I should like to point out that this case was brought to the Court on 17 December 2013, which further illustrates both that the Court can deliver a timely and efficient dispute resolution model, and that any eventual delays in proceedings before the Court are almost invariably dependent on the conduct of parties. In that case, Timor-Leste complains of the “seizure on or about 3 December 2013 ... and the subsequent detention ... by agents of Australia of documents, data and other property which belongs to Timor-Leste and/or which Timor-Leste has the right to protect under international law”. In its Application, Timor-Leste also called attention to the fact that “[t]he documents and data were held at the time of the seizure by legal advisers to Timor-Lest in Australia”.

The Court held public hearings last January to hear oral argument pertaining to Timor-Leste’s request for provisional measures. In an Order dated 3 March 2014, the Court indicated provisional measures that enjoined Australia to: (i) “ensure that the content of the seize material is not in any way or at any time used by any person or persons to the disadvantage of Timor-Leste until the present case has been concluded”; (ii) “keep under seal the seized documents and electronic data and any copies thereof until further decision of the Court”; and (iii) refrain from interfering “in any way in communications between Timor-Leste and its legal advisers in connection with the pending Arbitration under the Timor Sea Treaty of 20 May 2002 between

Timor-Leste and Australia, with any future bilateral negotiations concerning maritime delimitation, or with any other related procedure between the two States, including the present case before the Court”.

As they say: history often repeats itself. I am afraid that, in the light of my briefing to your distinguished Commission last year, I shall again tread well-known territory. I am speaking about the fact that, again during this last year, the Court has been kept busy with two cases with identical Parties, namely *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*. As you know, the Court joined the proceedings by way of two separate orders dated 17 April 2013. After holding public hearings, the Court also rendered an Order on provisional measures on 22 November 2013, in which it indicated a number of provisional measures enjoining Nicaragua to carry out certain actions. Nicaragua had also submitted a request for provisional measures to the Court against Costa Rica, which had been litigated in the context of the earlier public hearings. By an Order dated 13 December 2013, the Court unanimously found that the circumstances, as they then presented themselves to it, were not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures. I should also like to point out that the Court will hold public hearings in the spring of 2015 to hear both Parties on the merits in these joined proceedings.

The Court’s recent activities undoubtedly show that the principal judicial organ of the United Nations is increasingly turned to by States as a propitious forum to address the pacific settlement of disputes which have potential consequences for the conservation of the natural environment and related issues, in addition to more traditional types of disagreements. Indeed, since my visit at the Commission last year, several news proceedings have been instituted before the Court; I have already spoken about the case between Timor-Leste and Australia. In September 2013, Nicaragua introduced new proceedings before the Court against Colombia and formulated two requests to the Court: (i) that it determine the “precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them beyond the boundaries determined by the Court in its Judgment of 19 November 2012”; and (ii) that it indicate the “principles and rules of international law that determine the rights and duties of the two States in relation to the area of overlapping continental shelf claims and the use of its resources, pending the delimitation of the maritime boundary between them beyond 200 nautical miles from Nicaragua’s coast”. Moreover, in November 2013 Nicaragua instituted distinct proceedings against Colombia in which it alleges that Colombia has violated several international legal obligations regarding Nicaragua’s sovereign rights and maritime zones declared by the Court’s Judgment of November 2012 in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*.

In February 2014, in view of the fact that the Parties’ coasts generate overlapping entitlements to maritime areas in both the Caribbean Sea and the Pacific Ocean, Costa Rica instituted proceedings against Nicaragua before the Court. In that context, Costa Rica asks the Court “to determine the complete course of a single maritime boundary between all the maritime areas appertaining, respectively, to Costa Rica and to Nicaragua in the Caribbean Sea and in the Pacific Ocean, on the basis of international law”. These new proceedings instituted by Costa Rica against Nicaragua are historically significant: they constitute the first time ever a State has requested that the Court effect a maritime delimitation in areas lying seaward of both extremities of the shared land frontier between the relevant States, in this case in maritime areas lying in the Caribbean Sea and in the Pacific Ocean.

Most recently, in April 2014, the Marshall Islands instituted three distinct proceedings, against India, Pakistan and the United Kingdom. In its applications to the Court, the Marshall Islands complains that the United Kingdom has failed 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”, as enshrined in the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (commonly termed the “NPT Treaty”); the Marshall Islands levels similar charges in its cases against India and Pakistan but on the basis of customary international law, as those respondent States are not parties to the NPT Treaty. In those three proceedings, the Marshall Islands

invokes as jurisdictional basis the reciprocal declarations recognizing the Court's jurisdiction as compulsory, made by the Parties pursuant to Article 36(2) of the Court's Statute.

The Marshall Islands have also filed applications against six other nuclear powers – be they self-declared or assumed nuclear States – in which case no Article 36(2) declarations have been made by the would-be respondent States. In those instances, the Marshall Islands has invited the would-be respondent States to consent to the Court's jurisdiction, by way of the doctrine of *forum prorogatum*. In this light, those applications have thus not been entered into the Court's General List. I should like to recall that Article 38(5) of the Rules of Court provides the following: "When the applicant State proposes to found the jurisdiction of the Court upon a consent thereto yet to be given or manifested by the State against which such application is made, the application shall be transmitted to that State. It shall not however be entered in the General List, nor any action be taken in the proceedings, unless and until the State against which such application is made consents to the Court's jurisdiction for the purposes of the case."

The Court has also been very much involved in non-judicial matters over the last year. One particularly noteworthy milestone was the conference held by the Court on 23 September 2013 to celebrate the centenary of the Peace Palace. On that occasion, the Court was pleased to welcome eminent guests and brought together a roster of very distinguished speakers in a series of thematic panels. The conference was a resounding success and paved the way for thought-provoking and lively exchanges and dialogue. H.E. Judge Giorgio Gaja, who presided the final panel of the conference, which featured younger scholars who had been selected on the basis of a call for papers, has kindly taken the lead on publishing the conference proceedings upon my request. In this regard, the various speakers' revised contributions will appear shortly in a forthcoming volume published by Martinus Nijhoff and titled *Enhancing the Rule of Law through the International Court of Justice*, which has been edited by Judge Gaja and his Associate Legal Officer.

I hope to have reminded you aptly that adjudication of international disputes by the ICJ remains an exceedingly attractive option for the pacific resolution of maritime or land boundary disputes, disagreements over treaty interpretation, environmental law, sovereignty over maritime features, and the protection of living resources and human health. The statistics are eloquent: over the last 23-24 years, the Court has delivered more judgments, some 65 of them, than during the first 45 years of its existence, some 52 judgments. These rising figures are no doubt prompted by the fact that the Court always strives to attain well-reasoned and just outcomes. Yet, like all international adjudicative models, the Court's jurisdiction to proceed with the peaceful settlement of disputes between States remains subject to the consent of parties appearing before it. This is particularly important for United Nations Member States, as they are *ipso facto* parties to the Court's Statute and, by virtue of their obligations under the UN Charter, have undertaken to peacefully settle their international disputes. While I have highlighted some of the successes of the last year, there is clearly room for improvement in strengthening the Court's compulsory jurisdiction.

[Article 36(2) of the Court's Statute provides that the Court's compulsory jurisdiction can be accepted under the 'Optional Clause', by a declaration whereby a State recognises *ipso facto* and without special agreement in relation to any other State accepting the same obligations the jurisdiction of the Court in all legal disputes. Such a declaration – which typically engenders reciprocal effects – is to be deposited with the UN Secretary-General. Of course, States making such declarations are entirely free to limit the scope of such declarations by excluding certain classes or types of disputes, for example.

It is fitting that the United Nations' 2005 World Summit Outcome "[r]ecognize[d] the important role of the International Court of Justice ... in adjudicating disputes among States and the value of its work", thereby also calling "upon States that have not yet done so to consider accepting the jurisdiction of the Court in accordance with its Statute". In 2012, the UN Secretary-General launched "a campaign to increase the number of Member States that accept as compulsory the jurisdiction of the International Court of Justice", an initiative that must be commended heartily. This campaign further serves to bolster the pre-eminence of the World Court as the principal judicial organ of the UN and as the foremost judicial institution entrusted with

the peaceful settlement of disputes and the promotion of the rule of law on the international plane. After all, the Manila Declaration on the Peaceful Settlement of International Disputes, among other documents, tells us that the submission of a dispute to the Court should not be construed as a hostile or unfriendly act.]

The picture that emerges is far from encouraging: since I last appeared before your august institution, not a single new Article 36(2) declaration has been filed. For one thing, UN membership does not inherently carry with it recognition by States parties of the jurisdiction of the Court as compulsory; rather, as I indicated earlier, consent must be given by States and, in the case of compulsory jurisdiction, such consent may be expressed in the form of a unilateral declaration made pursuant to Article 36(2) of the Court's Statute. Today, 70 States out of 193 Members of the United Nations have made or maintained such declarations, which is slightly over a third of UN membership. This figure stands in contrast with those States that had Article 36(2) declarations in force in 1948, which represented 59 per cent of the Organisation's membership (34 out of 58 Member States) and included four out of the five permanent Members of the Security Council.

Mr. Chairman,
Ladies and Gentlemen,

For the concept of 'rule of law' to be imbued with any kind of meaningful force on the international plane, independent and impartial courts, where disputes can be adjudicated and rights asserted, are absolutely vital. This role is best reserved for the world's foremost judicial institution and principal judicial organ of the United Nations. Thus, it is high time to consider the ways in which the role of the Court may be enhanced so as to further bolster the international rule of law and provide broader access to the peaceful settlement of international disputes. In fact, it is time to reassert the singular role devolved to the Court by the UN Charter, as it is vested with the primary responsibility of delivering justice in the international community by peacefully settling bilateral disputes submitted to it by States. We must look for ways to further strengthen the objectives and ideals enshrined in the UN Charter, with a view to buttressing both the role of international law and the rule of law in the international arena, a mission that undoubtedly stems from the establishment of the pre-eminence of law under the UN system. This, in turn, will ensure the transition to more just and equitable societies. The International Law Commission aptly encapsulated this commitment to the international rule of law in Article 14 of its 1949 Declaration on Rights and Duties of States: "[e]very State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law".