ADDRESS TO THE MANAGUA MEETING OF INTERNATIONAL AND REGIONAL COURTS OF JUSTICE OF THE WORLD (2007)

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It is a singular pleasure to be here today on behalf of the International Court of Justice, in a year which marks the 100th anniversary of the establishment of the First Central American Court of Justice. As you well know, for its part, the International Court of Justice celebrated its 60th anniversary last year. In 1946, our Court stood virtually alone as the forum for the resolution of international disputes. Since then, as is evidenced by the bodies represented here today, a plethora of new international courts and tribunals have been established to deal with a variety of international issues, including the law of the sea, international trade, human rights, investment disputes, and the accountability of individuals for international crimes. It is incumbent upon all of our courts and tribunals to forge strong working relationships with one another.

For our part, the International Court of Justice has opened informal channels of exchange whereby we regularly receive and provide summaries or relevant excerpts of cases that address legal questions of relevance to the different institutions involved. This Conference and the proposal to hold it on a bi-annual basis are - and I speak on behalf of the Court's in this regard - very important in beginning to forge the necessary working relationships between the International and Regional Courts of Justice around the world. Members of our Court are carefully following the decisions and judgments of their counterparts on other benches. This is seen not only be seen from the individual opinions of Members of the Court, where such decisions and articles are extensively cited, but also in the decisions and judgments of the Court itself.

With your kind indulgence, I would like to take a brief tangent and refer to some of our recent case law, namely the *LaGrand*[1] and *Avena*[2] cases, in which our Court determined that Article 36, paragraph 1, of the Vienna Convention on Consular Relations contained individual rights.Germany, the Applicant in *LaGrand*, had suggested that these individual rights should be categorized as human rights.[3]

This suggestion was supported by Advisory Opinion 16/99 of the Inter-American Court of Human Rights, which had been requested by the Government of Mexico to pronounce on the 'nature' of the rights contained in the very same provision of the Vienna Convention.[4] In its *dispositif*, the Inter-American Court of Human Rights held that Article 36 of the Vienna Convention on Consular Relations is part of the body of International Human Rights Law.[5]

In the *LaGrand* case, the International Court limited itself to finding that Article 36, paragraph 1, was an individual right but refrained from replying to the claim that it was also a human right.[6] In the *Avena* case, it was Mexico that contended that Article 36, paragraph 1, of the Vienna Convention was to be classified as a human right, again basing itself on the Opinion of the Inter-American Court. Again; the International Court made no determination on this point; instead; stating in *obiter* that neither the text nor the object and purpose of the Convention, nor any indication in the *travaux préparatoires*; appeared to support the conclusion that Mexico drew from its contention in that regard.[7]

More recently, the judgments of two different Latin American courts have been invoked before our Court by different Parties. I am sure that you understand that as these are pending cases I will limit myself to briefly outline how they have been presented to us:

As you know, Nicaragua has instituted proceedings against Honduras with regard to «legal issues subsisting» between the two States «concerning maritime delimitation» in the Caribbean Sea.

In April 2007, in its oral submissions to the Court in the *Case concerning Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea*, Nicaragua invoked the judgment of the Central American Court of Justice in the *Incumplimento o Violación de Normas Comunitarias del Sistema de la Integración Centroamericana*'case, where Honduras was found to have breached its international obligations by concluding a treaty with Colombia concerning maritime delimitation. In its submissions, Nicaragua relied upon the judgment of the Central American Court as evidence before the International Court of Honduras' breach.[8]

Argentina seised the International Court of a dispute between itself and Uruguay concerning alleged breaches by Uruguay of obligations incumbent upon it under the Statute of the River Uruguay, a treaty signed by the two countries. Argentina charges Uruguay with having, "unilaterally authorized... the construction of a pulp mill near the town of Fray Bentos... without complying with the obligatory prior notification and consultation procedure" and thus breaching the Statute. In November 2006, Uruguay filed a claim for provisional measures to require Argentina to remove roadblocks in Argentina territory protesting against the construction of the pulp mill. Uruguay alleged that these roadblocks were seriously inhibiting trade between the two countries.

Argentina, in its defence against this claim, made reference to a Mercosur *ad hoc* Tribunal decision also concerning roadblocks erected in Argentina to protest against the construction of the pulp mill, claiming that this Tribunal's decision was final and binding and constituted *res judicata* between the Parties. The Court took note of the decision of the Mercosur *ad hoc* Tribunal in an Order dated 23 January 2007, although it rejected Uruguay's request for provisional measures for different reasons.[9]

Besides taking note of decisions and judgments of other international judicial bodies, the International Court also takes into consideration the judgments of municipal courts and tribunals. As you might remember, the so-called "Yerodia"--case[10] was an example of this. In its judgment in that case, the Court took note of certain decisions of national courts, and in particular on the judgments rendered by the House of Lords of the United Kingdom and by the Court of Cassation of France in the *Pinochet* and *Qaddafi* cases respectively, and upon which Belgium, the Defendant, relied upon to support its claim that an exception to the immunity rule was accepted in the case of serious crimes in international law. […][11]

However, the Court found that, after careful examination of State practice, including national legislation and those few decisions of national higher courts, it was been unable to deduce from this practice that there exists, under customary international law, any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.

The Court further laid emphasis on the fact that the rules governing the jurisdiction of national courts must be carefully distinguished from those governing jurisdictional immunities: jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction. Thus, although various international conventions on the prevention and punishment of certain serious crimes impose on States obligations of prosecution or extradition, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs.

These few examples quite impressively demonstrate that the International Court of Justice, when hearing cases, increasingly needs to deal with decisions and judgments of other judicial bodies, international and municipal, whose determinations or findings were found to be important to the Parties for the settlement of the legal dispute at hand.

The attention demonstrated above that international, regional, but also municipal courts pay towards each other's decisions is crucial in helping to dispel the obvious concern that an increase in the number of judicial bodies might lead to the "fragmentation" of international law. As a matter of fact, all courts and tribunals are given a mission, which is to establish the law, <u>one</u> law. This common purpose, the unity of the law as such, requires a unity of jurisprudence. At the same time, it has to be kept in mind that, quite apart from dealing with different subject matters, not all of the Courts have the same role.

For some, such as the ICJ, the parties who come before them are only States, either on their own behalf or on behalf of their nationals; for others the parties before them are generally individuals, or may be individuals or States. The different categories of parties that come before the Courts ultimately lead to different roles and functions for the Courts.[12]

Now, as I am only representing the ICJ, I will limit myself to presenting you our Court, let me therefore briefly turn to what the distinguished organizers of the present "Encuentro" have kindly asked me to present to you today: the goals, purposes, principles and instruments of action of the ICJ. I will try to follow the proposed structure.

First, let us turn to the goals, purposes and instruments of action of the International Court of Justice. The primary function of the Court is to decide, in conformity and on the basis of international law, on legal disputes submitted by States (contentious cases). The Court can also be requested to give advisory opinions on legal questions referred to it by United Nations organs and specialized agencies (advisory proceedings).

As far as *contentious cases* are concerned, only States (States Members of the United Nations and other States which have become parties to the Statute of the Court or which have accepted its jurisdiction under certain conditions) may be parties to contentious cases. The Court is competent to entertain a dispute only if the States concerned have accepted its jurisdiction in the following ways: a) by entering into a special agreement; b) by virtue of a jurisdictional clause; and c) through the reciprocal effect of declarations made by them under the Statute.

Let me now turn to the instruments of action the Court has in the event that it considers that it has jurisdiction (or *prima facie* jurisdiction). Upon request of the Parties, the Court can indicate provisional measures "if it considers that circumstances so require", in order to 'preserve respective rights and interests of either party.' Orders of the Court indicating provisional measures are binding upon the Parties. The Court, in its judgment in the *LaGrand* case, unambiguously put an end to discussions about the nature of its provisional measures. Until those proceedings, the Court had not been asked to make findings about the binding nature of its provisional measures, but the issue had been discussed in academia.[13]

In *LaGrand*, the Court was confronted with conflicting versions of Article 41 in the two original languages of the Statute and therefore had to turn to examine the object and purpose of the Statute. The Court found that: "The object and purpose of the Statute is to enable the Court to fulfill the functions provided for therein, and in particular, the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute. It follows from that object and purpose, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances cal1 for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court. The contention that provisional measures indicated under Article 41 might not be binding would be contrary to the object and purpose of that Article.[14] The binding nature of provisional measures has been reaffirmed by the Court several times since the LaGrand case.[15]

As you know, the judgments of the Court are final, binding on the parties to a case and without appeal. They may be referred back to the Court for interpretation or revision. Revision is only possible in very limited cases,[16] which explains why requests for revision are hardly ever made before our Court. In the sixty years of the Court's existence only three requests for revision were made, but the Court has never accepted to revise one of its judgments. In each case, the Court found that the requirements of article 61 were not met.[17]

Once the judgment of the Court is rendered, it is binding; however; it is a crucial issue to ensure that the judgment is not only a piece of paper but that it is enforced. How does the Court, or indeed the international legal system ensure compliance? There exist several mechanisms whereby compliance with the judgments of the Court are secured. Pursuant to the Charter, each Member State of the United Nations undertakes to comply with any decision of the Court in a case to which it is a party. Furthermore, a case can only be submitted to the Court and decided by it if the parties have consented to its jurisdiction over the case: thus, it is rare for a decision not to be implemented.

The records also show that a high percentage of disputes brought to the Court have been satisfactorily resolved and implemented. In a case where a State contends that the other side has failed to perform the obligations incumbent upon it under a judgment rendered by the Court, that State may lay the matter before the Security Council, which is empowered to recommend or decide upon the measures to be taken to give effect to the judgment. This procedure clearly shows the complementarity of roles of the Court and the Security Council in ensuring peace and security between States.

In practice, legal questions may arise under the auspices of the United Nations, that are

not susceptible of resolution through contentious proceedings, which being adversarial in nature require two or more States involved in a dispute to consent to bring that dispute before the ICJ. It is in such cases that advisory proceedings might be considered more suitable. Let me thus briefly outline the advisory jurisdiction of the Court.

Advisory opinions can be requested solely by five organs of the United Nations and by sixteen Specialized Agencies.[18] Distinguished authors have criticized these limitations, and some have proposed amendments to the statute in order to allow other international organizations, individual States or even non-state actors to file requests for advisory opinions.[19] So far, no serious attempt has been made to amend the Statute of the Court.

The United Nations General Assembly and Security Council may request advisory opinions on "any legal question". Other United Nations organs and specialized agencies which have been authorized to seek advisory opinions can only do so with respect to "legal questions arising within the scope of their activities". The Court is empowered to hold written and oral proceedings, certain aspects of which recall the proceedings in contentious cases. In theory, the Court may do without such proceedings, but it has never dispensed with them entirely.

It is not usual, however, for the ICJ to allow international organizations other than the one having requested the opinion to participate in advisory proceedings. With respect to non-governmental international organizations, the only one ever authorized by the ICJ to provide information did not in the end do so (*International Status of South West Africa*)[20]. The Court has rejected all other such requests by private parties.

The written proceedings are shorter but as flexible as in contentious proceedings between States. Participants may file written statements, which are regarded as confidential, but are generally made available to the public at the beginning of the oral proceedings. States are then usually invited to present oral statements at public sittings.

It is the essence of such opinions that they are advisory, i.e., that, unlike the Court's judgments, they have no binding effect. The requesting organ, agency or organization remains free to give effect to the opinion by any means open to it, or refrain from doing so. Certain instruments or regulations can, however, provide beforehand that an advisory opinion by the Court shall have binding force (e.g., conventions on the privileges and immunities of the United Nations). It remains nevertheless that, to some extent, the authority and prestige of the Court might contribute to the acceptance of its advisory opinions and that sometimes States or organs endorse that opinion.

The recent advisory opinion of the Court was given in 2004 on the "Legal Consequences of the Construction of the Wall in the occupied Palestinian territory". The Court by 14 votes against 1, *inter alia*, found that "The construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated régime, are contrary to international law."

You all know that the reactions to the advisory opinion have been, to put it delicately, divergent: they were either harsh or laudatory, with little in between. The sensitivity of the issues at stake certainly contributed to these reactions, but they also demonstrate that the findings of the Court, whether made in contentious cases or in advisory proceedings, are certainly of note for both the general public and political circles.[21]

In conclusion, it is today undisputable that the International Court of Justice plays an important role in the peaceful settlement of disputes; but the Court is not alone it is joined in its endeavors by other international or regional judicial bodies playing a determining role in the judicial settlement of disputes within the limits of their jurisdiction. I mentioned in the introduction that members of the Court study with great interest the decisions and judgments of other judicial organs. The Court notes with great satisfaction that its jurisprudence is also taken into consideration by other judicial bodies.

It might be useful to recall that the role of the ICJ is not only to *settle a determined dispute* but also *to declare the law* (*juris dicere/juris diction*) within its jurisdiction. The ICJ is the only *universal* judicial body with *general jurisdiction*. The Court is not only universal by its composition, but also the Parties coming from all the corners of the world before it reflect the universality of the Courts mission. The Court has been asked to make findings on very different legal issues: boundary delimitation, human rights, environmental law, law of armed conflicts and state responsibility for genocide, to name just a few. When sitting in those cases, the Court never forgets the origins of international adjudication. The Peace Conferences of The Hague led to the creation of the Permanent Court of Arbitration believing that wars and armed conflicts could be prevented by judicial settlement. The ideal of peace through

justice proved to be a well intended but ultimately utopian rather than a realistic political goal. The First and Second World Wars could not be prevented.

The Court as the principal judicial organ of the United Nations, the International Court also seeks to contribute to the goal enshrined in Article 1 of the Charter and shared by the other organs of the United Nations: the maintenance of international peace and security through the settlement of disputes in conformity with principles of justice and international law (which are not always equivalent). Whether the Court has been successful in meeting the expectations laid in it is not up to me to decide. Recently, the docket of the Court showed cases in which international armed conflicts were at stake. The damage had already been done. The Court's role then is a limited but not less important one: make findings about the lawfulness of the conduct of the respective parties and eventually grant reparation for it.[22]

It is difficult to ascertain whether the Court, by its decisions and judgments has ever contributed to prevent armed conflicts, but I believe that there are elements indicating that the Court contributes to a climate which encourages States to enter into a dialogue and to eventually facilitate peaceful settlement of disputes.

The Court is conscious of the fact that the maintenance of peace and security (perpetual peace) is an ongoing challenge; but in all fairness one cannot but acknowledge that the Court has made a considerable contribution to the development of international law and to the promotion of the rule of law in international relations.

NOTES

1. LaGrand, 2001 I.C.J. Rec. p. 466.
2. Avena and Other Mexican Nationals, 2004 I.C.J. Rec. p. 12
3. LaGrand, 2001 I.C.J. Rec. p. 494, para. 78.
4. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99 of October 1, 1999.
5. Avena, 2004, ICJ Rec. at para. 141(2).
6. LaGrand, 2001 I.C.J. Rec. at p. 494, paras. 77-78.
7. Id. at para. 124.
8. Case concerning Maritime delimitation between Nicaragua and Honduras in the Caribbean Sea, CR 2007/5para. 65e
9. Case concerning Pulp Mills on the River Uruguay, (Argentinia v. Uruguay), Order of 23 January 2003, at para 21
10. Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)
11. ICJ Rep. 2000, p. 23.
12. See in particular the discussions about the Tadic-test v Nicaragua-test in the Case Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)
13. See for example: Thirlway, The indication of provisional measures by the International Court of Justice 1994 In: Bernhardt (ed) Interim measures indicated by international courts, p. 1-26; Frowein, Provisional measures by the International Court of Justice - the LaGrand Case, In: Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV), vol. 62, issue 1-2, p. 55-60
14. LaGrand, 2001, ICJ Rec.
15. Avena (Mexico v. USA), 2004, Armed activities on the territory of the Congo (Democratic Republic of Congo v. Uganda) 2005; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia-and-Montenegro) 2007.
16. Article 61 of the Statute reads as follows:

    1. An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.
    2. The proceedings for revision shall be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.
    3. The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.
    4. The application for revision must be made at latest within six months of the discovery of the new fact.
    5. No application for revision may be made after the lapse of ten years from the date of the judgment.
17. Land, Island and Maritime Frontier Dispute (El Salvador/Honduras) El Salvador/Honduras, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Tunesia/Lybia, (Continental Shelf)
18. Article 96 of the Charter
    1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.
    2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.
19. G. Guillaume, "La CIJ, Cour suprême mondiale?" in R. Chemain and A. Pellet, La Charte des Nations Unies, Constitution Mondiale? (Pedone: Paris, 2006) 189, 193; L. Gross, "The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order", in L Gross (ed.), Future of the ICJ, vol. I, 22-104; I. Seidl-Hohenveldern, "Access of international organizations to the International Court of Justice" in A.S Muller, D. Raiæ and J.M. Thuránszky, The International Court of Justice: its future role after fifty years (Martinus Nijhoff: Leiden, 1997). C.

Romano, "International Organisations and the International Judicial Process: An Overview", in L. Boisson de Chazournes, C. Romano & R. Mackenzie (eds), International Organisations and International Dispute Settlement–Trends and Prospects (Ardsley, Transnational Publishers Inc.: New York, 2002).

20. There is considerable debate on this question, as the precise sequence of events was not recorded. However, the International League for the Rights of Man, a non-governmental organisation, upon learning that the South West Africa case was pending before the Court, requested in writing that the League be permitted to participate by oral or written statement in the proceedings. The Registrar's response via telegram is reproduced below:
Your letter March 7 readvisory opinion South--West Africa stop Am instructed to let you know that International court Justice is prepared to receive from you before April 10 1950 a written statement of the information likely to assist Court in its examination of legal questions put to it in Assembly request concerning South-West Africa stop This information confined to legal questions must not include any statement of facts which Court has not been asked to appreciate stop Court does not contemplate resorting further to League for Rights of Man in present case.

21. The League failed to meet the 10 April deadline, but submitted a statement on 9 May. The Deputy Registrar wrote the League on 12 May 1950 to inform them that their failure to meet the prescribed time-limit prevented their statement from being included in the proceedings.
Notwithstanding Practice Direction XII, recently enacted by the Court, this is the only recorded instance of an NGO being requested to submit a written statement to the Court, and the only instance in which the Court has publicly acknowledged having recourse to such statements.
See A. Paulus, "Article 66", in A. Zimmerman, C. Tomuschat and K. Oellers-Frahm, The Statute of the International Court of Justice: A Commentary (Oxford: Oxford University Press, 2006) 1427, 1439

22. See also R. Ago, "Binding" Advisory Opinions of the International Court of Justice, (1991) 85(3) American Journal of International Law 439-451.

23. Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)