SPEECH BY H.E. JUDGE PETER TOMKA, PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE, TO THE SIXTY-EIGHTH SESSION OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS

31 October 2013

Madam President,
Excellencies,
Ladies and Gentlemen,

I would like to thank the General Assembly for continuing the practice of allowing the President of the Court to present a review of its judicial activities for the previous year. This practice reflects the interest in and support for the Court shown by your eminent Assembly. During the last 12 months, the Court has continued to fulfil its role as the forum of choice of the international community of States for the peaceful settlement of every kind of international dispute over which it has jurisdiction. As illustrated in the report that I have the honour to present to you today, the Court has made every effort to meet the expectations of the parties appearing before it in a timely manner. It should be emphasized once again in this regard that, since the Court has been able to clear its backlog of cases, States thinking of submitting cases to the principal judicial organ of the United Nations can be confident that, as soon as they have completed their written exchanges, the Court will move to the hearings stage without delay.

During the period under review, as many as 11 contentious cases were pending before the Court, which held public hearings in turn in the following three cases: the *Maritime Dispute (Peru* v. *Chile)*, 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)* and the case concerning *Whaling in the Antarctic (Australia* v. *Japan*: *New Zealand intervening)*.

The Court is now deliberating in two of these cases and in the third one, having completed its work, will deliver its Judgment in early November.

During the reporting period, the Court also delivered two Judgments — the first in the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)* and the second in the *Frontier Dispute (Burkina Faso/Niger)* — and issued six Orders.

*

As is traditional, I shall now report briefly on the main decisions of the Court during the past year. I shall therefore deal first with the Judgment delivered in the case concerning the *Territorial and Maritime Dispute (Nicaragua* v. *Colombia)*, before turning to the Judgment rendered in the case concerning the *Frontier Dispute (Burkina Faso/Niger)* and then to certain Orders issued in the case concerning *Whaling in the Antarctic (Australia* v. *Japan*: *New Zealand intervening)*, as well as in the cases concerning *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)*. Lastly, I shall refer to an Order made in the case concerning *Aerial Herbicide Spraying (Ecuador* v. *Colombia*).

*

The first Judgment delivered by the Court during the period under review was given on 19 November 2012 in the case concerning the *Territorial and Maritime Dispute (Nicaragua* v.

Colombia). The proceedings had been instituted on 6 December 2001 by Nicaragua against Colombia in respect of a dispute concerning "a group of related legal issues subsisting" between the two States "concerning title to territory and maritime delimitation" in the western Caribbean.

A first decision was adopted in the case on 13 December 2007, since the Court had been called upon to rule on preliminary objections raised by Colombia. At that time, the Court found that the issue of sovereignty over certain islands — namely, those of San Andrés, Providencia and Santa Catalina — had been settled, within the meaning of Article VI of the Pact of Bogotá, by a treaty concluded between Nicaragua and Colombia in 1928, and that, therefore, it had no jurisdiction to rule on that point. However, it considered that it had jurisdiction to adjudicate upon the dispute concerning sovereignty over the other maritime features claimed by the Parties, as well as the dispute concerning the delimitation of the maritime spaces appertaining to each of them in the region. In particular, the Court considered that the 82nd meridian, which under the 1930 Protocol of Exchange of Ratifications of the 1928 Treaty "fixes the western limit of the San Andrés Archipelago", did not mark the maritime boundary between the two States.

In its Judgment of 19 November 2012, the Court first dealt with the question of sovereignty over the maritime features claimed by Nicaragua and Colombia and, after considering not only the 1928 agreement between the two Parties and various historical documents, but also the arguments put forward on the basis of *uti possidetis juris* and *effectivités*, found that for many decades Colombia had acted continuously and consistently *à titre de souverain* in respect of the maritime features in dispute. Also taking into account the practice of third States and the existing maps — while emphasizing that the latter are not evidence of sovereignty — the Court concluded that Colombia, and not Nicaragua, has sovereignty over those features.

With that issue resolved, the Court addressed Nicaragua's request asking it to delimit a continental shelf beyond 200 nautical miles [see sketch-map No. 2 of the Judgment: Delimitation claimed by Nicaragua]. After finding that request to be admissible, the Court examined the merits. In that regard, it recalled its statement in its 2007 Judgment in the case concerning the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras)*, namely that "any claim of continental shelf rights beyond 200 miles [by a State party to the 1982 Convention on the Law of the Sea] must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf". The Court made clear that, given the object and purpose of the Convention on the Law of the Sea, as stipulated in its preamble, the fact that Colombia is not a party thereto did not relieve Nicaragua of its obligations under Article 76 of that instrument. The Court noted that Nicaragua had submitted to the Commission only "Preliminary Information" which fell short of meeting the requirements for the Commission to be able to make a recommendation. As the Court was not presented with any further information, it found that, in the case in question, Nicaragua had not established that it had a continental margin that extended far enough to overlap with Colombia's 200-nautical-mile entitlement to the continental shelf, measured from Colombia's mainland coast. The Court thus declared that it was not in a position to delimit the boundary between the extended continental shelf claimed by Nicaragua and the continental shelf of Colombia and therefore concluded that Nicaragua's claim could not be upheld.

In light of that decision, the Court considered what maritime delimitation should be effected. It observed that, in its final submissions, Nicaragua had requested it not only to delimit the continental shelf between the mainland coasts of the two Parties, but also to adjudge and declare that the islands of San Andrés and Providencia and Santa Catalina should be enclaved and accorded a maritime entitlement of 12 nautical miles, and that the equitable solution for any cay that might be found to be Colombian was to delimit a maritime boundary by drawing a 3-nautical-mile enclave around it. The Court also noted that Colombia, for its part, had requested that the delimitation should be effected by a single maritime boundary, constructed as a median line between Nicaraguan fringing islands and the islands of the San Andrés Archipelago [see sketch-map No. 3: Delimitation claimed by Colombia].

The Court concluded that, notwithstanding its above-mentioned decision regarding Nicaragua's request for it to delimit an extended continental shelf, it was still called upon to effect a delimitation between the overlapping maritime entitlements of Colombia, based on its sovereignty over the islands forming the San Andrés Archipelago, and Nicaragua within 200 nautical miles of the Nicaraguan coast. To that end, it applied its standard methodology, a method which it set out clearly in its 2009 Judgment in the case concerning *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)* and which consists of three stages.

The Court first determines base points and constructs a provisional median line between the relevant coasts of the Parties, namely those coasts whose projections overlap. In the case in question, the Court found that, for Nicaragua, the relevant coast was its whole coast that projects into the area where the claims of the two Parties overlap. Since the mainland coast of Colombia does not generate any entitlement in that area, the Court considered that it could not be regarded as part of the relevant coast for the purposes of the case. The Court found that the relevant Colombian coast was confined to the coasts of the islands under Colombian sovereignty. Since the area of the overlapping claims of the Parties extended well to the east of the Colombian islands, the Court considered that it was the entire coastline of those islands, not merely the west-facing coasts, which had to be taken into account [see sketch-map No. 6: The relevant coasts as identified by the Court].

In the second stage, the Court considers whether there are any relevant circumstances which may call for an adjustment or shifting of the provisional line so as to achieve an equitable result. In the present case, the Court noted that the substantial disparity between the relevant Colombian islands' coasts and that of Nicaragua (a ratio of approximately 1:8.2), as well as the need to avoid cutting either Party off from the maritime spaces into which its coasts project, were both relevant circumstances. The Court further observed that, while legitimate security considerations had to be borne in mind in determining what adjustment to make to the provisional line or in what way that line should be shifted, the conduct of the Parties, issues of access to natural resources and delimitations already effected in the area were not relevant circumstances in the case. With respect to the latter two points, the Court first recalled that, although both Parties had raised the question of equitable access to natural resources, neither had offered evidence of particular circumstances that should be treated as relevant; accordingly, it considered that the case did not present issues of access to natural resources so exceptional as to warrant it treating them as a relevant consideration. In respect of delimitations already effected in the area, the Court then indicated that the agreements concluded by Colombia with other States in the region were without legal effect with regard to Nicaragua, in accordance with the well-established principle of *res inter alios acta*. In light of all these findings, the Court proceeded to shift the provisional median line.

In the third stage, the Court ascertains whether the effect of the line, once it has been shifted, is that the maritime areas attributed to each of the Parties in the relevant zone (that is to say, the portion of the maritime area in which the Parties' claims overlap) are markedly disproportionate to their respective relevant coasts. In the case in question, the Court noted that the boundary line had the effect of dividing the relevant zone between the Parties in a ratio of approximately 1:3.44 in Nicaragua's favour. As indicated previously, since the ratio between the relevant coasts was approximately 1:8.2, the question arose as to whether, in the circumstances of the case, that disproportion was so great as to render the result inequitable. The Court concluded that, taking account of all the circumstances of the case, the result achieved by the maritime delimitation did not entail such a disproportionality as to create an inequitable result. Accordingly, it unanimously fixed the definitive course of the boundary between Nicaragua and Colombia, including also the judges *ad hoc* chosen by Nicaragua and Colombia, respectively [see sketch-map No. 11: Course of the maritime boundary].

Finally, the Court considered that Nicaragua's request asking it to adjudge and declare that "Colombia [wa]s not acting in accordance with her obligations under international law by stopping and otherwise hindering [it] from accessing and disposing of her natural resources to the east of the

82nd meridian" was unfounded in the context of proceedings regarding a maritime boundary which had not been settled prior to the decision of the Court.

It should be stressed that, in accordance with Article 59 of the Statute of the Court, the Court's Judgment in the case "has no binding force except between the parties and in respect of that particular case". This Judgment addresses only Nicaragua's rights as against Colombia and vice versa; it is without prejudice to any claim of a third State or any claim which either Party may have against a third State [Judgment, paragraph 228]. Moreover, as it expressly recalled in this decision and in the Judgments rendered on 4 May 2011 in respect of the Applications by Costa Rica and Honduras for Permission to Intervene, the Court always takes care not to draw a boundary line which extends into areas where the rights of third States may be affected.

*

During the reporting period, the Court delivered a second Judgment, on 16 April 2013, concerning a frontier dispute between Burkina Faso and Niger (*Frontier Dispute (Burkina Faso/Niger)*). The proceedings had been instituted in July 2010 by a Special Agreement under which the two Parties agreed to submit to the Court the frontier dispute between them concerning a section of their common boundary. The frontier between Burkina Faso and Niger consists of three main sectors. The northern sector (which runs from the heights of N'Gouma to the astronomic marker of Tong-Tong) and the southern sector (which runs from the beginning of the Botou bend to the River Mekrou) had been demarcated by a joint commission before the case was brought. There only remained to be delimited the central sector, running from the Tong-Tong astronomic marker to the beginning of the Botou bend. However, under the Special Agreement, the Court was asked not only to determine the course of the frontier between Burkina Faso and Niger in the central sector, but also to place on record the Parties' agreement on the results of the work of the Joint Technical Commission on Demarcation [see sketch-map No. 1: Parties' claims and line depicted on the 1960 IGN map].

In its Judgment of 16 April 2013, the Court examined, as a preliminary issue, a request by Burkina Faso regarding the two sectors of the frontier that were already demarcated. In particular, Burkina Faso asked the Court to include their course in the operative part of its Judgment, so that the Parties would be bound in that respect, in the same way that they would be bound with regard to the frontier line in the central sector. The Court first recalled that, when it is seised on the basis of a special agreement, any request made by a party in its final submissions can fall within the jurisdiction of the Court only if it remains within the limits defined by the provisions of that special agreement. In this case, however, the Court considered that the request made by Burkina Faso did not exactly correspond to the terms of the Special Agreement, since Burkina Faso was not requesting it to "place on record the Parties' agreement" ("*leur entente*") regarding the delimitation of the frontier in the two demarcated sectors, but rather to delimit itself the frontier according to a line that corresponded to the conclusions of the Joint Technical Commission. The Court pointed out that, while it has the power to interpret the final submissions of the Parties in such a way as to maintain them within the limits of its jurisdiction, that is not sufficient for it to entertain such a request; it would still have to be verified that the object of that request falls within the Court's judicial function, which is to decide in accordance with international law such disputes as are submitted to it. In this case, neither of the Parties had ever claimed that a dispute continued to exist between them concerning the delimitation of the frontier in the two sectors in question on the date when the proceedings were instituted — nor that such a dispute had subsequently arisen. Accordingly, the Court considered that Burkina Faso's request exceeded the limits of its judicial function.

That being established, the Court addressed the question of the course of the section of the frontier remaining in dispute. To that end, it first determined the applicable law. After recalling

that Article 6 of the Special Agreement highlighted "the principle of the intangibility of boundaries inherited from colonization and the Agreement [between the two States] of 28 March 1987", the Court noted that the latter instrument specified the acts and documents of the French colonial administration which must be used to determine the delimitation line that existed when the two countries gained independence. Those acts and documents were the *Arrêté* of 31 August 1927 adopted by the Governor-General *ad interim* of French West Africa with a view to "fixing the boundaries of the colonies of Upper Volta and Niger", as clarified by its Erratum of 5 October 1927. The Court further observed that the 1987 Agreement provided for the possibility of "the *Arrêté* and Erratum not suffic[ing]" and established that, in that event, "the course sh[ould] be that shown on the 1:200,000-scale map of the *Institut géographique national de France*, 1960 edition". It was therefore in the light of those elements that the Court determined the course of the frontier between the Tong-Tong astronomic marker and the beginning of the Botou bend [see sketch-map No. 4: Course of the frontier as decided by the Court]. I should like to point out that this Judgment was adopted unanimously, including also the Judges *ad hoc* chosen by Burkina Faso and Niger, respectively.

Once that course had been established, the Court was lastly required to rule on one final request of the Parties, who had asked it to nominate three experts to assist them in the demarcation of their frontier in the area in dispute. The Court did so by means of an Order dated 12 July 2013.

*

As I have already mentioned, during the period under review the Court also made five other Orders. I shall now consider them briefly in chronological order.

The first Order was made on 6 February 2013 in the case concerning *Whaling in the Antarctic (Australia* v. *Japan*: *New Zealand intervening)*. That Order followed a declaration whereby New Zealand availed itself of the right conferred on it by Article 63, paragraph 2, of the Statute to intervene as a non-party in the proceedings before the Court. According to that provision, whenever the construction of a convention is in question, States that are not parties to the proceedings, but are parties to that convention, may intervene for the sole purpose of addressing to the Court their observations on the construction of the said convention; the construction given by the Court is then binding upon them. New Zealand's Declaration of Intervention was directed to questions of construction arising in the case, relating in particular to Article VIII of the International Convention for the Regulation of Whaling, the convention that lies at the heart of the dispute between Australia and Japan.

In its decision, the Court pointed out that the fact that intervention under Article 63 of the Statute is of right is not sufficient for the submission of a "declaration" to that end to confer *ipso facto* on the declarant State the status of intervener, and that such right to intervene exists only when the declaration concerned falls within the provisions of Article 63 of the Statute. After considering whether it fell within those provisions and whether it met the requirements set out in Article 82 of the Rules of Court, the Court concluded that New Zealand's Declaration of Intervention was admissible.

Accordingly, the Court authorized New Zealand to submit written and oral observations on the subject-matter of its intervention, and the Parties to comment on those observations. New Zealand participated in the hearings on the merits held in the case by the Court between 26 June and 16 July 2013.

*

Subsequently, the Court made four Orders in two cases between Costa Rica and Nicaragua, namely the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua*) and the case concerning the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*.

First of all, the Court, in conformity with the principle of the sound administration of justice and with the need for judicial economy, considered it appropriate to join the proceedings in the two cases by two separate Orders dated 17 April 2013.

The Court then made an Order on 18 April 2013 regarding four counter-claims submitted by Nicaragua in its Counter-Memorial filed in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua*). The Court first found, unanimously, that there was no need for it to adjudicate on the admissibility of Nicaragua's first counter-claim, which concerned the construction of a road along the San Juan River, since that claim had become without object by reason of the fact that the proceedings in the *Costa Rica* v. *Nicaragua* and *Nicaragua* v. *Costa Rica* cases had been joined by the above-mentioned Order of 17 April 2013. It further found, unanimously, that the second and third counter-claims, which concerned respectively the status of the Bay of San Juan del Norte and the right to free navigation on the Colorado River, were inadmissible as such and did not form part of the current proceedings, since there was no direct connection, either in fact or in law, between those claims and the principal claims of Costa Rica. The Court lastly found, unanimously, that there was no need for it to entertain the fourth counter-claim, which related to alleged breaches of the Order indicating provisional measures made by the Court on 8 March 2011; it stated that the question of compliance by both Parties with the provisional measures indicated in the case might be considered by the Court in the principal proceedings, irrespective of whether or not the respondent State raised that issue by way of a counter-claim.

In the same cases, which are now joined, the Court was lastly called upon to rule on two requests, submitted respectively by Costa Rica (in late May 2013) and Nicaragua (in mid-June 2013), for the modification of the Order of 8 March 2011 indicating provisional measures in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua*). By an Order dated 16 July 2013, the Court stated that the same general conditions governed the modification and indication of provisional measures, and that the circumstances, as they then presented themselves to the Court, were not such as to require the exercise of its power to modify the measures indicated in its Order of 8 March 2011. It nevertheless reaffirmed those measures, and in particular the requirement that the Parties "sh[ould] refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve", noting that the actions thus referred to could consist of either acts or omissions.

I would also like to mention that, by an Order which I made on 13 September 2013, the case concerning *Aerial Herbicide Spraying (Ecuador* v. *Colombia*) was removed from the Court's List at the request of Ecuador. The hearings in that case were scheduled to take place between 30 September and 18 October of this year. By a letter dated 12 September 2013, Ecuador, referring to Article 89 of the Rules of Court and to an Agreement between the Parties dated 9 September 2013, notified the Court that it wished to discontinue the proceedings in the case. By a letter of the same day, Colombia then informed the Court, pursuant to Article 89, paragraph 2, of the Rules of Court, that it made no objection to that discontinuance.

The agreement in question fully and finally resolves all of Ecuador's claims against Colombia in the dispute concerning Colombia's aerial spraying of toxic herbicides at locations near its border with Ecuador, in order to eradicate coca plantations. It establishes, *inter alia*, an exclusion zone, in which Colombia will not conduct aerial spraying operations, creates a Joint Commission to ensure that spraying operations outside that zone have not caused herbicides to drift into Ecuador and, so long as they have not, provides a mechanism for the gradual reduction in the

width of the said zone. The agreement sets out operational parameters for Colombia's spraying programme, records the agreement of the two Governments to ongoing exchanges of information in that regard, and establishes a dispute settlement mechanism. The agreement also stipulates that Colombia will provide a financial contribution to Ecuador for the economic and social development of its provinces located near the northern border.

I would add that both Parties expressed their gratitude to the Court for its efforts and praised the role it had played in enabling them to achieve a settlement.

*

Having thus recalled the principal decisions rendered by the International Court of Justice during the past year, I shall now turn to two new cases that have been submitted to it.

The first case was brought before it on 24 April 2013 by the Plurinational State of Bolivia, which instituted proceedings against the Republic of Chile concerning a dispute in relation to "[the latter]'s obligation to negotiate in good faith and effectively with Bolivia in order to reach an agreement granting Bolivia a fully sovereign access to the Pacific Ocean".

The second case was brought on 16 September 2013. Nicaragua seised the Court of a dispute with Colombia concerning "the delimitation of the boundaries between, on the one hand, the continental shelf of Nicaragua beyond the 200-nautical-mile limit from the baselines from which the breadth of the territorial sea of Nicaragua is measured, and on the other hand, the continental shelf of Colombia".

There are therefore currently ten cases on the Court's General List. On 11 November 2013, the Court will deliver its Judgment in the case concerning 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)*.

*

Finally, I would like to point out that the Court held public hearings in mid-October on a new request for the indication of provisional measures submitted by Costa Rica in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)*. As this is an urgent procedure, the Court will make its Order on this request as soon as possible. The Court has also decided to hold hearings next week on the request for the indication of provisional measures submitted by Nicaragua in the case concerning the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*.

*

I should also like to mention that the Court now carries out its mandate in the renovated and modernized Great Hall of Justice due, in large part, to the contributions provided by the General Assembly of the United Nations and the Carnegie Foundation. This ambitious renovation project, which coincided with the centenary of the Peace Palace, was unparalleled in the history of the Peace Palace; while minor refurbishment works had been done in the past, such as extending the bench in view of the enlarged composition of the Court's predecessor, no major reconfiguration of this magnitude had been carried out in the Great Hall. The Court met for the first time in the renovated Great Hall on 15 April, and now enjoys improved technical facilities offering a wide

range of possibilities. Therefore, the Court will be able to hear the cases submitted to it faithfully and impartially — as it always does by virtue of its noble judicial mission — but it will do so in a modern setting.

In fact, this Great Hall of Justice was the venue for a number of distinguished guests on the occasion of a recent conference organized by the Court to celebrate the centenary of the Peace Palace on 23 September. In that context, the Court hosted eminent guests and brought together panels of very distinguished speakers. This resulted in a conference programme that was as equally rich as it was balanced in engaging the past and present of international justice, while also addressing the future prospects and challenges for the work of the Court.

*

Madam President,
Excellencies,
Ladies and Gentlemen,

By way of conclusion, I should like to recall that the Court must do its utmost to serve the noble purposes and goals of the United Nations using modest resources, since the Member States award it less than 1 per cent of the Organization's regular budget. Nevertheless, I hope that I have shown that the recent contributions of the Court are not to be measured in terms of its financial resources, but against the great progress made by it in the advancement of international justice and the peaceful settlement of disputes between States.

I would like to thank you for this opportunity to address you today. May I wish you every success for this Sixty-eighth Session of the Assembly.

_____