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International Court of Justice, and beyond”**

**“From absence to abundance: Tracing the development and impact  
of international courts”  
*a statement delivered***

**by**

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Dear Dean and Dear Vice-Dean,  
Dear President of the Portuguese Branch of the  
International Law Association,  
Dear Congress Coordinator,  
Distinguished guests,  
Ladies and Gentlemen,

First of all, Professor Moura Ramos, allow me to say that it is an honour to be in this panel chaired by you. I wish to start by conveying my deep gratitude to the organizers of this conference for inviting me. Being here with you today is a moving and special moment for me because I am a proud graduate of this school. Being here today reminds me of when I was sitting in this room for the first time as a first-year-student almost 30 years ago. Allow me to add that I consider it as a noble part of my duties as Legal Counsel of the United Nations to go to universities to discuss with students matters of public international law at

the United Nations. And being able to do so here at my own alma mater is a great pleasure.

The world today presents countless opportunities and challenges in the area of international law and international relations—and in order to live up to our aspirations, the international community will rely on your intellect, hard work and imagination. I wish you all the best and I look forward to speaking with you in the corridors, as they say, throughout the day.

## **Introduction**

With regard to my presentation during this morning's session, as Professor Moura Ramos has so eloquently noted, I will be speaking to the question of the “growing” role of international courts and jurisdictions—which is, I think, an instructive title. There were times in the history of international life when it would have been impractical—perhaps even disingenuous—to speak with a straight-face about a “growing” role for international courts. That is because from the advent of the modern law of nations—which is generally traced to the late-15th or early 16th centuries, although with intellectual roots stemming long before that—up until the early 20th century, the existence of such institutions was largely a figment of the international imagination. That situation changed dramatically with the invention of the Permanent Court of International Justice (PCIJ), as provided for by the Covenant of the League of Nations, and underwent a further evolution with the establishment of the International Court of Justice (ICJ) as the principal judicial organ of the United Nations in June of 1945.

These institutions were premised on a general principle of international law that pre-dated their establishment, specifically, the principle that international disputes between the States shall be settled by peaceful means.

This principle, which in many ways is foundational to the functioning of the international system, is reflected in many international instruments, including in Article 2, paragraph 3 and Article 33 Charter of the United Nations, and in the 1982 Manila Declaration on the Peaceful Settlement of International Disputes.

Such a principle does not necessarily prescribe how international disputes shall be settled, however, and, in fact, the vast majority of disputes are settled by non-judicial means. In accordance with Article 33,

paragraph 1 of the Charter, the parties to an international dispute shall make recourse to a number of non-judicial measures and mechanisms, including negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, and so on.

Just as in the case of the domestic legal system, the spectre of litigation, with all the costs and uncertainties that it entails, keeps most disputes out of the courts. The lack of compulsory jurisdiction in most instances further dissuades States and the governments representing them from submitting their disputes to judicial settlement.

And yet, in the international system today, there is evidence that international courts are exerting an increasingly important impact on relations between States. In most cases, this impact stems not only from the settlement of a particular dispute—which is of course important—but also from what I would view as the signaling effect of judicial decisions. International courts, which are seemingly growing in number and diversity each year, and the jurisprudence that they produce, represent an integral, and often authoritative, assessment of the law. When done well—as it most often is—this assessment becomes the *status quo ante* for States—the *lex lata* upon which future international relations are predicated. Although not formally parties to the dispute, third-states often take account of such interpretations and circumscribe their actions accordingly.

This impact of the decisions of international courts certainly argues in favour of their existence; but as has rightly become a focus in recent years, we should critically examine how the international judicial environment as a whole should operate and be organized. If the object is not only to settle discrete disputes but also to signal the rule on a particular question to other international actors, are more courts better, or should the courts that already exist be better utilized? Should we seek to impose a formal, or perhaps even informal, hierarchy among international courts, such that the system as a whole will serve to self-correct itself, or is better to channel the benefits of diversification by allowing specialized courts to operate in their own semi-autonomous spheres? Does the absence of involuntary compulsory judicial review enable the international system to operate more efficiently, or does it sacrifice international law at the altar of political expediency? Is it possible to knit together a cohesive international judicial system, or is it better to allow for the organic, and sometimes sporadic, development that has characterized the system to date?

In what follows I will attempt to touch on these and related questions by **first** briefly tracing the history of international courts. The object will be to identify the sources of the international judicial system that we see today. Given their impact on the development of the modern system, I will pay particular attention to the creation and experience of the Permanent Court of International Justice and its successor, the International Court of Justice.

The **second** stage in my analysis will be to examine the current context and, specifically, the so-called proliferation of international courts. In the course of this discussion, I will seek to critically examine the effect of such proliferation, taking into account both the history and the current use and impact of international courts. I will also focus on the unique role of the ICJ as the judicial environment as a whole has become more crowded and examine how, in the absence of a formal, uniform hierarchy among international courts, the ICJ seemingly continues to exert a preeminent jurisprudential influence.

**Finally**, I will look forward, and put forth what I view as the future logical development of the international judicial system. Looking forward is always a risk—I will be the first to admit that—and chances are that there are developments that will occur in both the near and distant future that no one will have foreseen; however, based on the international community's collective experience over the last 100 or so years I think it is possible to make some defensible hypotheses on where the arc of development of the international judicial system may be leading.

## **I. A brief history of international courts**

As I noted in my introduction, for much of its existence, modern international law was characterized by its lack of international judicial institutions. That does not mean, however, that the ideas underlying the current system were absent. To the contrary, the idea of engaging third parties for the impartial adjudication of disputes between nations—as well as peoples—traces back to the early records of human existence, reflected in the Christian, Islamic, Judaic and other religious texts, as well as the records of the Egyptian, Babylonian, Persian, Hellenic and Roman civilizations.

However, it is true, I think, that these ideas about the adjudication of international disputes and, particularly, the submission of international

disputes to binding judicial adjudication, were not realized in what could rightly be called a generally applicable and institutionalized way, until the creation of the Permanent Court of International Justice in 1922.

Given its novelty as the first standing international tribunal with general jurisdiction, the PCIJ was, perhaps surprisingly, quite effective. Over the course of its 24 or so years of existence, five of which were stricken by the Second World War, the PCIJ dealt with 29 contentious issues between States, and delivered 27 advisory opinions. In its jurisprudence, we see some fundamental early opinions that have shaped the current judicial environment—*Wimbledon*, *Lotus*, *Mavrommatis*, *Factory at Chorzów*, *Free City of Upper Savoy* and *the District of Gex*, *Free City of Danzig*, to name a few.

Another important indicator of the PCIJ's success was how its decisions were taken by the parties appearing before it. As you can imagine, it was quite a shift in the attitude of States and governments at the time to submit their disputes to judicial adjudication—still further was resolve necessary to take the decision—favourable or unfavourable—and implement it; and yet one of the legacies of the PCIJ is that its decisions were largely followed.

Part of this success is owed, I think, to the way in which the institution was created. As many of you are no doubt aware, the PCIJ was not formally an organ of the League of Nations. Rather, while the Covenant, in its Articles 13 and 14, provided for the establishment of the PCIJ, its Statute was an independent international instrument. This made the PCIJ available to States even if they were not Members of the League. Moreover, in certain circumstance, States that were not parties to its Statute could also appear before the Court. In this sense, even though the PCIJ was comprised largely of European States with shared values and approaches to international law, it was the first truly international judicial forum serving all nations—it had, in effect, the *imprimatur* of openness and inclusivity.

In addition, I believe another part of the PCIJ's success can be tied to the independent quality of its opinions and the excellence of its judges. If you have a chance to go back and read some of the jurisprudence of the Court, you will see the attention to detail and devotion to their craft that these judges practiced. In today's 140-character Twitter-verse, I really think there is something to be said for the kind of rigorous judicial examination that was undertaken at the PCIJ.

Another element that no doubt led to its success was the balance struck with regard to the Court's jurisdiction—while the Optional Clause in its Statute allowed for States to accept compulsory jurisdiction, and the Court had similar mandatory jurisdiction for disputes falling under certain of the Peace Treaties of Versailles and other international agreements, some of the tension that might have accompanied *ipso facto* compulsory jurisdiction for all States Parties to the Statute, was released by the fundamentally voluntary nature of the Court's jurisdiction.

Such a balance reflected the evolving nature of international relations at the time—on the one hand States guarded their sovereignty, while, on the other, steps were being taken toward a greater international cooperation on issues of mutual concern. Such a balance between State interest and a sort of international conscience remains equally valid today. States' voluntary acceptance of the jurisdiction of the various international courts continues to represent a core trait of the international judicial system.

While we could spend many hours digging into the jurisprudence and institutional underpinnings of the PCIJ—the aspect that can be gleaned from the foregoing that I think is most instructive, at least for the purposes of today's discussion, is that it put the Court in a position to be successful. That the institution did, in fact, succeed served as proof that a permanent, universal judicial mechanism could exist and function effectively. What had started as an experiment gradually evolved into a viable and important institution.

Of course, international events conspired to spur further evolutions in the international judicial system. In the wake of the Second World War, which the mutual security system envisioned by the Covenant of the League of Nations had failed to prevent, the international community deemed it necessary to bring into being a new international organization. The United Nations, as you all know, was the result—and the International Court of Justice was created to serve its principal judicial organ.

It is interesting to note, I think, that while the United Nations as a whole differed quite drastically from the League of Nations—there was no reasonable analogue to the United Nations Security Council, for instance, in the League—the Charter itself notes that the Statute of the ICJ “is based upon the Statute of the [PCIJ]”. Given the relative success of the PCIJ, the drafters of the UN Charter clearly faced a question of whether to simply update the existing working

model or create a new one. In the end, the decision to build the Court *de novo*, which was taken by the four Sponsoring Powers—China, the Soviet Union, the United Kingdom and the United States—in the Dumbarton Oaks proposals was made largely on the basis that the dissolution of the League rendered similar action necessary with respect to the closely-linked PCIJ. Underlying these justifications there seemed to be a feeling that the post-Second World War era necessitated a clean break from the inter-War institutions that had not been effective enough to save the world from the scourge of war.

In its form and functions, however, the ICJ clearly benefited from the rich practice and established procedures of the PCIJ, and there are obvious similarities in the foundational instruments of the two institutions. Importantly, like the PCIJ, the ICJ's compulsory jurisdiction was the subject of an optional clause. However, as in all cases of succession, the ICJ also acquired a distinct international personality. Many of its founding principles are novel. Unlike the PCIJ, for instance, which had been linked to the League, but not nested within it, the new Court was established as an integral part of the United Nations. The Charter of the United Nations lists the International Court of Justice among the principal organs of the United Nations, together with the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council and the Secretariat. Moreover, the Statute of the Court was annexed to the Charter to further emphasize and secure the special place of the new judicial body in the United Nations system.

The Charter also drew clear intra-organizational linkages between the Court and the other principal organs. Article 96 of the Charter, for instance, granted both the General Assembly and the Security Council the power to request advisory opinions on “any legal question”. United Nations specialized agencies were also given the ability to request advisory opinions on “legal questions arising within the scope of their activities”. Moreover, in accordance with Article 94, if any party to a case fails to perform the obligations under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment. Any action by the Security Council in this regard is, of course, subject to the veto, and in the *Nicaragua* case the limits of this enforcement power came into stark relief. Nonetheless, it is possible to see the clear evolution in the institutional foundations from the PCIJ to the ICJ. The ambitions of the United Nations as a whole were reflected as well in this new judicial institution.

## **II. The current context—the proliferation of international courts and the role of the ICJ**

Despite the energy that accompanied its creation, and an active first few years, over the course of its first few decades as a whole, the ICJ was not a particularly busy institution. While its early cases were integral—*Corfu Channel* as well its advisory opinions in *Reparations* and the *Reservations to the Convention on the Prevention and Punishment of Genocide* cases, to name a few—and its jurisprudence in the 1960s and 1970s—think of the *Certain Expenses* and *South West Africa* advisory opinions, and the contentious proceedings in the *North Sea Continental Shelf* and *Fisheries Jurisdiction* cases—laid some of the jurisprudential foundations for its decisions that would come later, there were entire years during the 1950s and 1960s where the Court laid essentially dormant, devoid of a serious caseload.

This did not mean, however, that the international judicial system as a whole was not undergoing some rather radical changes. The creation and early stages of development of the ICJ coincided with a new trend in international relations—exemplified by a general increase in global, regional and sub-regional cooperation. States, whether firmly established or newly created, gave substance to their desire for closer relations and mutually beneficial alliances through the creation of a number of new organizations including, and perhaps most interestingly given the relative lack of such institutions previously—courts.

Part of the force driving the development of these new courts was, I think, a feeling on a part of the founders of the various cooperative alliances and other regional and international organisations that judicial authority and, in some cases, judicial review, as well as the legitimacy that came along with it, was a necessary part of the overall package of incentives and assurances that States needed in order to comfortably enter into cooperative arrangements.

Accordingly, the so-called “proliferation” of international courts finds its roots in the creation institutions such as the European Court of Human Rights, which was created in 1950; the European Court of Justice, which was created in 1957; the Inter-American Court of Human Rights, the African Court on Human and People’s Rights and so on.

Over the ensuing decades a number of other specialized courts emerged. The far-reaching International Tribunal for the Law of the Sea began its work to adjudicate disputes falling under the UNCLOS regime. The WTO and GATT gave rise to their own dispute settlement regimes. ICSID came forward as an especially prolific venue for the settlement of investment disputes. The list goes on from there.

Perhaps no single area of the law has seen as much proliferation and development as international criminal law. On the shoulders of the Nuremburg and Tokyo tribunals, a whole range of international and hybrid criminal courts and tribunals were formed to establish individual international criminal responsibility. From the ICTY and the ICTR, to the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the Special Tribunal for Lebanon, and, importantly, the International Criminal Court.

In a certain sense, these international criminal tribunals were experimental, ambitious projects. However, they proved to be serviceable and, to a large extent, effective—building a basis for delivering international criminal justice and eliminating impunity both outside, during, and in the aftermath of conflict. The ICC was a natural continuation of the accumulated experience that had started in the late 1940s and regained momentum in the early 1990s. The impressive membership of 122 States Parties clearly demonstrates the commitment on the part of the international community to make international justice and the elimination of impunity a reality.

Despite the achievements of these new international courts, the proliferation of international courts in general has been criticized by many. The multiplication of such mechanisms results, I think, in two separate but related phenomena—first, so-called “forum-shopping” on the part of States, and second, the possibility of overlapping and/or incompatible decisions. The former feeds into the fear that States only use international courts when they are reasonably certain that they will receive a positive decision—allowing them, to some extent, to escape what may be difficult decisions of policy by hiding behind the judicial process—while the latter gives weight to the tendency toward the fragmentation of international law, an issue which has been percolating for some time, and which gives international lawyers some pause as they critically examine their system as a whole.

To a certain extent, however, I think these criticisms, and the reasons that lay behind them, are over-emphasized in the discourse.

Forum-shopping, to the extent that it exists, is not without its positive effects. Competition among the courts may have the effect of stimulating their development. As they say, necessity is the mother of invention—and when international courts compete for cases, it may not necessarily be a race to the bottom. Rather, those courts that can put forth a sustainable and reliable jurisprudence—getting the legal answers themselves right, rather than placating to particular parties—may, in fact, be the most effective over the longer-term.

More recent international instruments even incorporate forum-shopping possibilities into their dispute settlement provisions. For instance, a unique and unprecedented system was introduced in the United Nations Convention on the Law of the Sea, which provides for four dispute settlement forums including, ITLOS, the ICJ and two other binding forms of arbitration under Annexes VII and VIII of the Convention.

I would suggest that the most effective way to engage with such “cafeteria-style” adjudication, as it has also been called, is to remain optimistic, while also keeping a critical eye on how the system functions. It may indeed be the case that such structures serve to undermine the integrity of the international legal system, and that it will inevitably lead to a politicization of the legal field. However, that kind of outcome is not predetermined and, I think, it sells some of the States that are using these mechanisms short if we assume only the worst possible scenarios.

The other main aspect of the new system that I think bears particular attention is, as I mentioned, the prospect of overlapping or incompatible decisions on cases with similar subject matter. If such decisions were to occur on a large scale, it may result in the general breaking down of the integrity of the international judicial system. Parties appearing before the various courts may receive conflicting signals about what the law actually *is*—which, in a fundamental way, represents the task of the judicial institutions.

A classic example of what might be categorized as an overlapping decision is that which was reached in the *Tadic* case before the ICTY. In *Tadic*, the Appeals Chamber of the ICTY deviated from the well-established “effective control” standard of State responsibility applied by the ICJ since the *Nicaragua* case and replaced it with the principle of “overall control”. While no State was a party before the ICTY—that decision was focused, you will recall, on individual criminal responsibility—this decision brought some uncertainty to the important

sphere of State responsibility. Since both the ICJ and the ICTY are considered by States to be highly authoritative sources of the interpretation of the law, the decisions created a gray area; where previously States had been presented with a more unified interpretation of the law, there was now some doubt.

These two aspects of the new international judicial system give rise, I think, to an important question about the lack of a formal hierarchy. In most domestic systems, for instance, forum-shopping and overlapping decisions are ironed out through a formal process of appeals accompanied by the principle of *stare decisis*. In the international system, no such formal review process or principle exists across the various courts.

Despite the lack of formal hierarchy among the international courts and tribunals, there is a general consensus, I think, that the ICJ is the informal “leader of the pack”. This is evidenced, I believe, in the Court’s experience over the course of its existence, both in terms of the cases that have come before it and how those cases have been interpreted by other courts and by the international community writ large.

As I have mentioned, in its first few years of existence the years the Court was relatively active. At that point States were curious about the new judicial mechanism and optimistic about the development of international justice. This phase in the work of the Court was a part of the global post-war commitment to international law and judicial settlement of disputes that seemed to spread across the continents.

In the early cases of the Court, with the exception of a few outliers brought by the main protagonists of the Cold War, States brought cases of genuine legal, rather than political, disputes. Those included the *Corfu Channel* case, the *Fisheries* case, the *Asylum* case, the *Haya De La Torre* case and others. States’ compliance with the judgments of the ICJ was also extremely high at this point—leaving aside, for the sake of argument, the refusal of Albania to pay damages to the UK in the *Corfu Channel* case.

After this early rush, however, the Court’s workload began to wane considerably. Much of this can probably be traced to the larger political dynamics of the period. As the Cold War intensified, the number of cases brought before the Court dropped precipitously. The gaps in submissions in this period are striking—on occasion the Court went three or four years without receiving any new cases. When the Court did receive new cases, it often took long periods for an opinion or decision to be reached. This,

combined with the feeling among developing States that the Court was acting to carry out more powerful interests, served to limit the Court's docket.

Of course the Court then undertook what was perhaps its most controversial case, first finding that it had jurisdiction, and then issuing its judgment against the United States in the *Nicaragua* case.

*Nicaragua* was notable for many reasons, but for the purposes of this discussion, I will say only that it showed both the potential and the limits of the ICJ. By engaging in a politically-charged issue and finding against one of the world's superpowers, the ICJ asserted for itself a main role in international affairs. At the same time, the ICJ's decision was not without negative effects in terms of the power of the institution—the US rescinded its acceptance of compulsory jurisdiction, and other States followed suit, either removing or limiting their acceptance to exclude certain categories of politically sensitive disputes.

Whatever the precise impact of *Nicaragua* may have been, and I will leave that to others to hash out more conclusively, over the last two-plus decades, we have nonetheless seen a dramatic increase in the ICJ's docket, as well as a rather dramatic shift in perception of the Court by States. As a result, not only is the Court busy, but it is also increasingly looked to for the final word on legal issues—both by the parties who are subject to the dispute in question and to other States who may be seized with similar concerns. What are the reasons for such success? In my view, several factors are particularly relevant.

First and foremost, despite the proliferation of the international courts that I have noted, only the ICJ has general jurisdiction. As specified in its Statute, the unique mandate of the Court “comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force”. This gives the Court the opportunity to opine on a wide-range of issues, which the other, more specialized courts, are not necessarily at liberty to do.

Second, the bench of the Court, as well as the counsel for the parties appearing before it, has shown exceptional legal expertise, resulting in decisions of a high caliber and authoritative value. This is a legacy that began with the PCIJ and I think continues today, both in the minds of jurists and in the perceptions of governments submitting their disputes to the Court.

Third, many recent judgments and opinions of the Court provided long-awaited answers to complex politically-laden cases. In this sense, I am thinking of, among others, the *Kosovo*, *Wall* and *Legality of the Threat or Use Nuclear Weapons* advisory opinions, as well as the array of contentious cases that touched on sensitive issues for the States involved, such as the *Armed Activities* and *Jurisdictional Immunities*, to name a few salient examples.

Fourth, the Court has become increasingly “client-oriented”, offering convenient and effective means for the peaceful resolution of the differences between the States. A main part of this client-orientation is the speed with which decisions are delivered. In its early years, cases before the ICJ lasted for many years. However, through improvements in its case-management techniques, the Court has managed to speed-up proceedings significantly. This has made recourse to the Court much more palatable for parties who need answers to pressing questions. It is a practical, operational aspect of the Court that has, I think, had a substantial effect on its success.

Fifth, the Court has experienced a steady increase in the volume of its cases where the legal principles are relatively well-established, particularly with regard to territorial and maritime delimitation cases. Over the history of international law, border disputes were a major cause of political tensions in bilateral relations, costing States significant resources to resolve. The ICJ has expertly moved to afford an important service to States in this regard—providing highly beneficial, and cost-effective, delimitation solutions.

Along with this increase in caseload and appeal of the Court, we have seen a larger number of States, particularly developing States, accepting—or openly considering to accept—the jurisdiction of the Court. To further boost this momentum and encourage Member States to refer their legal disputes to the Court, the Secretary-General launched a campaign in 2013, aimed at increasing the number of States that recognize the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Court’s Statute. Advocating for the withdrawal of the reservations that States may have to compromissory clauses in multilateral treaties to which they are a party is also been a focus. Such campaigns carried out by the United Nations and supported by its Member States are essential to further promote the status of the Court and highlight the importance of the peaceful settlement of international disputes more generally.

Other inspiring trends include the growing compliance of the States with the judgments of the Court—here I am thinking of the recent *Maritime Dispute* case between Peru and Chile, where the preparatory measures taken by the parties prior to the issuance of the final judgment represents a sort of template for compliance—as well as the significant number of citations of ICJ judgments and opinions by both other judicial institutions and political actors. On this latter point, while I do not have the empirical analysis, as a participant in the discourse surrounding many politically sensitive issues, I can tell you that I am increasingly seeing the influence of the work of the ICJ—and the influence of legal analysis in general—on how the international community approaches issues of mutual concern.

### **III. Looking forward**

Over the course of these remarks, I have tried to give an overview of what I see as the past and current context of the international judicial system. With your indulgence, I would now like to put forward a few thoughts on what we may see in the future.

In my view, what we will likely see is a settling in among the various judicial institutions; those that are “successful”, defined as being both practically useful and substantively respected, will gain influence, while other institutions, either through mistakes in their creation, or through poor practice and implementation, will fade or lose influence. The various courts will compete, and some will win out over others.

I also think we will continue to see courts relying on each other’s jurisprudence, not because of formal rules on hierarchy, but because it is a natural part of the judicial process to be aware and use the determinations of other judicial actors. For those empirically-minded among the audience, I think it will remain important to track such citations, drawing inferences along the way about the impact of particular institutions, including the ICJ.

Going a step further, and perhaps more optimistically, I think we will also see courts formally relying on the ICJ for authoritative assessments of the law, either through the request for advisory opinions or some other formal means of inter-court cooperation.

I also think it's possible that political actors, such as the organs of the United Nations, may request more advisory opinions from the ICJ on politically sensitive issues. The arc we are seeing is bending toward a greater judicialization of complex political questions, and I think that trend is likely to continue, with States relying more and more on the clear answers that the law often provides (and politics often does not).

Whether we see such practices materialize in the future is not for me or any single person to decide, but I think it will be extremely interesting to watch as the story of the international judicial system continues to unfold.

Thank you everyone for your attention. I will look forward to today's discussion.