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WHAT LIES AHEAD FOR THE INTERNATIONAL COURT OF JUSTICE?

SIXTH COMMITTEE OF THE GENERAL ASSEMBLY, 25 OCTOBER 2023

INTRODUCTION

Mr Chair of the Sixth Committee, dear Ambassador Suriya,
Excellencies,
Ladies and Gentlemen,

It is a great honour for me to address the Sixth Committee of the General Assembly for the third and final time as President of the International Court of Justice (ICJ). I welcome this annual occasion to celebrate and strengthen the bonds that unite our two institutions.

As my term on the Bench of the Court approaches its end, it is perhaps only natural to turn my mind to what lies ahead for the principal judicial organ of the United Nations, on which I have had the privilege to serve for over 13 years.

I thus intend to devote my remarks today to the future of the International Court of Justice, touching on three aspects in particular. First, I shall say a few words about certain recent trends in the Court's docket and whether they can be expected to persist in the foreseeable future. Next, in light of those trends, I shall discuss the resources that will need to be made available to the Court to enable it to continue to fulfil its mandate. Finally, I shall share my thoughts on the Court's founding instrument, posing this question: if the ICJ Statute is opened for amendment, what should be retained and what should be changed?

I. RECENT TRENDS IN THE COURT'S DOCKET

Let me start by reflecting on certain trends that can be seen in recent years, both with respect to the composition of the Court's docket and its size. By way of overview, our docket currently comprises 20 cases arising from all regions of the world and involving a wide range of legal issues, including territorial and maritime delimitation, human rights, reparation for internationally wrongful acts, environmental protection, and the jurisdictional immunity of States, as well as the interpretation and application of international treaties concerning a variety of subject-matters.

One recent dimension of our docket that has important implications for the Court's present and future work concerns the jurisdictional basis invoked by applicants.

As members of the Committee know, the jurisdiction of the ICJ in contentious cases derives ultimately from the consent of States, which can be expressed in different forms. For instance, States may consent broadly and prospectively to the Court's jurisdiction, either by depositing a so-called "optional clause" declaration pursuant to Article 36, paragraph 2, of the Statute or through a treaty on the settlement of disputes. Two States may also indicate their consent in a special agreement that asks the Court to adjudicate a defined dispute between them, often referred to as a *compromis*.

In addition, a State may express its consent to the Court's jurisdiction to decide disputes concerning the interpretation or application of a particular treaty, usually through a compromissory clause in that treaty or an optional protocol thereto. One study published in 2014 indicated that international treaties were invoked as the primary title of jurisdiction in approximately 40 per cent of the contentious cases brought before the Court up to that point. If we look at the 18 contentious

cases currently on the Court's General List, we see that this percentage is now much higher: in approximately two-thirds of those cases, the applicants claim that the Court has jurisdiction to settle a dispute arising under a particular treaty on the basis of the relevant compromissory clause or optional protocol.

In those cases, jurisdiction is limited, *ratione materiae*, to disputes concerning the interpretation or application of a particular treaty. It is therefore necessary for the Court to examine the dispute that the applicant seeks to place before the Court in relation to the scope of the treaty in question.

In doing so, the Court often confronts the fact that the application submitted to it presents a particular dispute that arises in the context of broader disagreements between the parties. The Court has made clear that, in such cases, "the fact that a dispute before the Court forms part of a complex situation that includes various matters, however important, over which the States concerned hold opposite views, cannot lead the Court to decline to resolve that dispute, provided that the parties have recognized its jurisdiction to do so and the conditions for the exercise of its jurisdiction are otherwise met".

To give you an idea of the kinds of questions that arise when the Court is asked to determine the scope of its jurisdiction *ratione materiae*, I shall mention the Court's 2021 Judgment in the case instituted against the United Arab Emirates by Qatar on the basis of the compromissory clause in the International Convention on the Elimination of All Forms of Racial Discrimination (commonly called "CERD"). When proceedings in that case were instituted, there was friction between the two States that manifested itself in a variety of ways. In its Application filed in the Court, Qatar complained about measures that the UAE had taken against Qatari nationals. Following preliminary objections filed by the Respondent, the Court was asked to pronounce on the scope of the notion of "racial discrimination" under CERD and the corresponding limits of its jurisdiction *ratione materiae*. In particular, the Court had to decide whether the term "national origin" in the definition of racial discrimination in CERD encompassed current nationality, as the Applicant maintained. The Court found that this was not the case and, consequently, that the measures of which Qatar complained that were based on the current nationality of its citizens did not fall within the scope of the Convention. On this basis, among others, the UAE's objection to jurisdiction was upheld and the case removed from the Court's docket.

An extensive jurisprudence has developed — and will continue to develop — tackling the question whether the dispute that the applicant asks the Court to resolve is capable of falling within the provisions of the relevant treaty and whether, as a consequence, that dispute is one which the Court has jurisdiction *ratione materiae* to entertain. In the coming years, it will be important for the Court to continue to address questions of jurisdiction *ratione materiae* in a careful and disciplined manner, showing great sensitivity to the boundaries of its jurisdiction. On the one hand, respondent States cannot be required to litigate disputes that lie outside the Court's jurisdiction, while, on the other hand, applicant States are entitled to the exercise of such jurisdiction as the Court has.

As has been noted by commentators, the compromissory clauses of human rights treaties have been invoked as the basis for jurisdiction in quite a few of the cases on the Court's recent and current docket. These cases can give rise to questions about the standing of a particular applicant to institute proceedings. The Court addressed this question in its 2012 Judgment in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, which was brought on the basis of the compromissory clause in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Court had occasion to return to the question of standing in its 2022 Judgment on the preliminary objections raised by Myanmar in the proceedings brought by The Gambia under the Genocide Convention. In that case, The Gambia alleges that Myanmar has violated its obligations under the Convention in relation to the Rohingya group. In one of several preliminary objections, the Respondent asserted, in essence, that The Gambia lacked standing because it was not an injured State and thus did not have an individual legal interest to bring

the case. The Court, recalling its earlier Judgment in *Belgium v. Senegal*, disagreed and held that the Applicant had standing to invoke the responsibility of the Respondent with respect to alleged violations of obligations under the relevant treaty that were owed to all parties to the treaty, in other words, obligations *erga omnes partes*. This case has proceeded to the merits stage.

It has been noted, sometimes with enthusiasm and sometimes with trepidation, that standing based on alleged violations of obligations *erga omnes partes* in certain treaties has the potential, in the future, to expand the range of cases brought before the Court.

Moving from contentious cases to advisory proceedings; as you all know, the Court has recently been seised of two requests for advisory opinions by the General Assembly, both of which raise significant issues of great importance to Member States and to the international community as a whole. The widespread interest in the subject-matter of these advisory proceedings is confirmed by the fact that in July written statements on the questions before the Court in the proceedings concerning *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* were submitted by 53 United Nations Member States, by the observer State of Palestine and by three international organizations. At least as many States are expected to participate in the advisory proceedings concerning *Obligations of States in respect of Climate Change*, and, to date, several international organizations have been authorized to present statements.

These two requests for advisory opinions mean that the Court can expect to devote a significant part of its time and energy to these proceedings over the next two years, while in parallel seeking to maintain its progress on the contentious side of its docket.

Moving from the substantive content of the Court's docket to its size, it is readily apparent that the present workload of the Court is extremely large. The demands on the Court are not fully captured by the fact that there are 20 cases on the General List. Contentious matters before the Court entail, with increasing frequency, incidental proceedings such as requests for the indication of provisional measures, preliminary objections and counter-claims. Applications for permission to intervene or declarations of intervention can also consume the Court's time and attention, as illustrated by one case now pending before the Court. Further, because the ICJ is a court both of last instance and of first instance, cases brought before it routinely involve not only intricate legal issues, but also complex and competing claims as to the facts, often calling for careful analysis of supporting evidence. As one illustration, in a case that is currently before the Court, the Parties' written pleadings, together with annexes, amount to some 41,000 pages.

The combined impact of these factors on the workload of the Court and its small Registry is dramatic. I do not wish to bore the Committee with too many numbers, but a few figures illustrate the extent to which the situation has evolved, even over the relatively short period since I joined the Bench. If we consider the calendar year 2011, my first full year at the Peace Palace, the Court issued two judgments and 11 orders. Compare this to the last full year, 2022, when the ICJ rendered four judgments and some 28 orders — practically doubling its judicial output.

This pronounced increase in the Court's workload brings me to the question of whether the resources available to the Court have increased in parallel with the demands that States have placed on it.

II. LIMITED RESOURCES AVAILABLE TO THE COURT

In contrast to the growth in the size and complexity of the Court's docket and the doubling of its output, the resources made available to the Court have only marginally increased since I joined the Bench. Here are some more numbers: in 2010, the total number of posts in the Registry — the Court's permanent secretariat — was 114. Fast-forward 13 years, and, as of today, the number of

established posts currently approved in the Registry is 117. The Court's budget for the biennium 2010-2011 was approximately US\$46.5 million for a two-year period. Thirteen years later, the Court's approved budget for 2023, now on a single-year basis, is around US\$29 million. It does not take an economics degree to appreciate that, when one accounts for inflation, the resources available to the Court have stagnated, while its workload has increased dramatically.

Over the last 13 years, corresponding to my time on the Bench, the Court has been able to keep pace with the expansion of its docket for two key reasons. First, both the Court and the Registry have had a sustained focus on the review of working methods with a view to efficiency and modernization. Second, as I have had occasion to mention in the past, it is thanks to the exceptional dedication of its small Registry that the Court has been able to keep abreast of its casework.

As my own time at the Court comes to a close, I feel that I owe it to my current and future colleagues on the Bench and in the Registry to call the question of resources to your attention. Some may be wondering why I raise the matter of resources in the Sixth Committee. Isn't that a topic for the Fifth Committee? Yes, of course it is, but the budget of the Court accounts for less than 1 per cent of the Organization's overall budget, so it may not loom large in the priorities of a participant in the work of that Committee. I thus encourage those of you who advise your governments on international law to impress upon your colleagues who specialize in financial matters some of the trends and basic facts that I have touched upon today. As experts in international law, you are in a position to act as the Court's allies and supporters in discussions with colleagues from the Fifth Committee and others, within your respective governments, who participate in budgetary matters.

Accordingly, while recognizing that those of you who represent States in the Sixth Committee would not wish to study the ICJ's budgetary situation at a level of detail comparable to that of your colleagues on the Fifth Committee, the Court hopes to have an opportunity, in the spring of next year, to organize a briefing for Sixth Committee experts, which will focus on budgetary matters that would be relevant to your areas of interest and expertise.

III. THE STATUTE OF THE ICJ: DURABILITY AND POTENTIAL AMENDMENTS

I shall turn now to the question that I posed when I began these remarks. How, if at all, should the Court's Statute be revised? This is a question that I am often asked in conversations with students and practitioners. It is possible to respond simply by recalling that the Statute is an integral part of the Charter to which it is annexed, that any amendments would be subject to the same stringent requirements that apply to the Charter itself, and thus that amendments to the Statute are not likely in the near future.

Eventually, however, the Charter may be opened for amendment. And, looking at the age range of those present in this room, I can say with confidence that, when this takes place, at least some of you will be part of shaping the future of the Charter, including the Court's Statute. When this happens, I hope that you will bear in mind a few reflections made by an outgoing President of the ICJ in 2023.

So, what changes should be made to the Statute? My answer is: very few changes and only after careful consideration.

When I arrived at the Court in 2010, I suspected that the ICJ Statute, which is based largely on the 1920 Statute of the Permanent Court of International Justice, could stand some serious updating. With the benefit of experience in the interpretation and application of the Statute, I have come to the opposite conclusion. I start by mentioning some basic aspects of the Statute that have stood the test of time.

As is well known, in the 1940s, when the Statute of the principal judicial organ of the new organization was being drafted, some participants wanted the jurisdiction of the Court to be compulsory for all UN Member States. That approach failed. I am too much of a realist to predict that there would be sufficient Member State support to make the Court's jurisdiction mandatory during consideration of future amendments. Moreover, I do not think that this prediction should be overly troubling. The Charter established the ICJ as a standing, global forum for the settlement of inter-State disputes on any topic governed by international law and as the principal judicial organ of the Organization. The Statute does not prescribe the content of international law to be applied by the Court, but instead leaves it to be developed elsewhere, for example in treaties. Drawing from the common law and civil law traditions, it sets out the essential infrastructure of the Court, while at the same time allowing sufficient flexibility for adjustment by the Court itself based on experience, through the Rules of Court. So we have in the Statute of the ICJ a well-designed framework for the settlement of disputes and for the rendering of advisory opinions to UN bodies.

I see some virtue in the fact that Member States, as well as UN bodies authorized to request advisory opinions, are in a position to consider, on an ongoing basis, whether they are prepared to have their most pressing issues placed before the Court. The current docket indicates high expectations for, and trust in, the Court. The extent to which this situation will continue will be determined largely by the way that States assess the substantive and procedural decisions of the Court. If the Court demonstrates integrity, independence and impartiality in all of its work, and if the Member States provide the Court with the resources that it needs to meet demand, I consider that the Statute, with only modest changes, will permit the Court to continue to serve the Organization well.

Now I turn to a few specific proposals for amendments that have been made over the years.

I first call attention to remarks that I made before this Committee last year, when I took issue with suggestions that there should be an end to the institution of the judge *ad hoc* that is provided for in Article 31 of the Statute. As I indicated last fall, I consider that there is real value in an institution that strengthens the confidence of every State that its arguments and equities will be fully appreciated and duly considered as part of the Court's deliberations. Elimination of this institution could deter some States from consenting to the Court's jurisdiction.

I shall also touch on the question whether international organizations should be afforded broader scope to participate in proceedings before the Court. At present, under the Statute, international organizations may be involved in ICJ proceedings in various capacities. Most notably, they may be authorized to participate in advisory proceedings on the same terms as States if they are deemed likely to be able to furnish information on the question at hand. However, Article 34, paragraph 1, of the ICJ Statute provides that only States may be parties in contentious cases before the Court.

For decades, there have been calls to revise the Statute so as to permit international organizations to be parties in contentious proceedings. Proponents of an expansion of Article 34 consider that this would align the scope of the Court's jurisdiction with the contemporary role of international organizations.

I have not been convinced by suggestions that the Statute should be amended to place international organizations on an equal footing with States in their access to the Court in contentious cases. It would be difficult, in my view, to transpose much of the jurisprudence that has developed under the Statute to disputes involving international organizations.

One more modest amendment, however, could be inspired by the UN Convention on the Law of the Sea. The Convention is open for signature or accession by any intergovernmental organization to which its member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of those matters. The Statute of the International Tribunal for the Law of the Sea provides, accordingly, that the Tribunal shall be open

to these organizations. In a similar vein, an amendment to the ICJ Statute could permit regional integration organizations to appear as parties in contentious proceedings before the Court in respect of matters for which their member States have transferred competence to them.

Another aspect of the Statute that is sometimes put forward as a candidate for broad reforms is the procedure for the nomination and election of judges. The Statute of the ICJ, like that of its predecessor, provides for a system of indirect nomination whereby Members of the Court are elected by the General Assembly and Security Council from a list of persons nominated by national groups of the Permanent Court of Arbitration or *ad hoc* national groups — a procedure that was intended to provide an element of independence from national governments. The authors of various books and articles have lamented the fact that, in many States, the drafters' goal of insulating the nomination process from domestic politics has not been realized. Scholars have also observed the limited fidelity, in practice, to Article 6 of the Statute, which recommends broad consultations by national groups before making nominations. Still, even if the advantages of the current nomination system have not been realized, it is difficult to see its disadvantages.

As to the election process, the primary criticisms point not to the provisions of the Statute, but rather to the fact that vote-trading and other practices that feature generally in UN elections have taken hold in ICJ elections as well. Whatever one's views may be on those practices, it does not seem like an amendment of the Statute would have the potential to change them.

There is, however, one limited proposal involving the election of judges that does deserve serious future consideration. I refer to the fact that judges of the ICJ can be elected for successive terms. As you know, under the current system, one third of the Bench is elected by the General Assembly and Security Council every three years, and judges serve for renewable terms of nine years. For decades, experts and close observers of the Courts have noted that it could be desirable to eliminate the possibility of re-election, as a further demonstration of the independence and impartiality of Members of the Court. This idea of non-renewability, which has been adopted for judges of certain other international and regional courts, is often accompanied by a proposal to lengthen the tenure of judges, so as to ensure sufficient stability and continuity in the ICJ's work. A possibility could be a single twelve-year term. Provision would also need to be made for filling occasional vacancies resulting from the death or resignation of a judge, as is done in the Rome Statute.

Finally, I call attention to two categories of amendments that seem essential if the Court is to deserve its nickname of the "World Court". First, the Statute needs to be stripped of verbiage that suggests that some States are "civilized" while others are not, as is implied by the current wording of Article 38. Second, it is time to redraft the Statute and, indeed, the entire Charter, in a gender-inclusive manner. In fact, the Court itself has just completed the process of updating the Rules of Court, the Resolution concerning the Internal Judicial Practice of the Court and the Practice Directions to use gender-inclusive formulations in both of our official languages, French and English. Our efforts in this regard could serve as a model for similar amendments of the Statute itself.

I recognize that there have been other proposals for revisions to the Statute and that these, as well as those that may arise in the future, merit further reflection. More importantly, any serious consideration of possible amendments to the Statute should be based on a structured, comprehensive and inclusive process that begins with a clear-eyed identification of the role of and expectations for the Court. My main objective today has been to share the perspective that the structural provisions that are foundational to the Court should only be revamped if there is a compelling reason to do so. It is to be hoped that Member States, in the context of a possible revision of the Statute, will give priority to the imperative of maintaining the ICJ as a credible, independent and authoritative forum both for the judicial settlement of disputes between States that consent thereto and for the rendering of advisory opinions to the General Assembly, the Security Council and other organs and specialized agencies.

CONCLUSION

To conclude, Mr Chair, since my election in 2010, the International Court of Justice has had before it 58 cases, and 116 States, well over half of the UN membership, have participated in proceedings before it. I have been very fortunate to serve on the Court over a period with such a large and diverse docket. It is to be hoped that the exposure that so many States have had to the Court will lead them to continue to show their trust in the Court and to provide the Court with the support that is needed to allow it to meet its mandate.

On this note, Mr Chair, I would like to thank participants for their attention. If you so wish, Mr Chair, I am open to a discussion of whatever topics interest the members of the Sixth Committee.

Thank you, Mr Chair.
