H.E. Judge Joan E. Donoghue

President of the International Court of Justice

WHAT LIES AHEAD FOR THE INTERNATIONAL COURT OF JUSTICE?

Sixth Committee of the General Assembly, 25 October 2023

Introduction

Mister 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.

One recent dimension of our docket that has important implications for 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 depositing a so- pursuant 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,

to decide disputes concerning the interpretation or application of a particular treaty, usually through a compromissory clause in that treaty

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 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 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 under the CERD and the corresponding limits of its jurisdiction ratione materiaeIn particular, the Court had to decide

definition of racial discrimination in the 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

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 jurisdiction, while, on the other hand, applicant States are entitled to the exercise of such jurisdiction as the Court has.

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 seized with 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

This 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

By contrast
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 was 114. Fast-forward thirteen years, and, as of today, the number of established posts currently approved in the Registry is 117. The
biennium 2010-2011 was approximately USD 46,5m for a two-year period
on a single-year basis, is around USD 29m
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 placed a sustained focus on the review of working methods with a view to efficiency and modernization. Secondly, 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
topic for the Fifth Committee? Yes, of course it is, but the budget of the

Accordingly, while recognising that those of you who represent States in the Sixth Committee would not wish to study the 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 organise a briefing for Sixth Committee experts focused on budgetary mat

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

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.

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 authorised 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 contemporary role of international organizations.

I have not been convinced by suggestions that the Statute should be amended to place international organizations on 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 [I quote]

organization constituted by States 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

[end of quote]. 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 hocnational 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 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

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 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

First, the Statute needs to be stripped of verbiage that suggests that s 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 P3(atin-5(e)-57(m)

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 the support that is needed to allow it to meet is 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.