Speech by H.E. Judge Peter Tomka, President of the International Court of Justice, to the Sixth Committee of the General Assembly

1 November 2013

Mr. Chairman,
Distinguished Delegates of the Sixth Committee,

I am pleased to address your Committee today. The Court greatly appreciates this opportunity to further strengthen the bonds of harmony and co-operation which bind our respective institutions. I congratulate His Excellency Ambassador Palitha T. B. Kohona on his election as Chairman of the Sixth Committee for the Sixty-Eighth Session of the General Assembly. Today, rather than going over the ground I already covered in the General Assembly in recounting the work carried out by the Court, I would like to take this opportunity to address you with a more narrow focus on what I consider to be a timely topic. In particular, I propose discussing the question of the jurisdiction of the International Court of Justice (the "Court" or "ICJ"), with particular emphasis on recent efforts to enhance the compulsory jurisdiction of the Court.

The general framework and the mechanism of Article 36 (2)

The Court's jurisdiction to proceed with the peaceful settlement of disputes between States remains subject to the consent of States appearing before it. This idea of subjecting recourse to the judicial settlement of international disputes to State consent is very much in line with the underlying philosophy that led to the inception of the League of Nations and, subsequently, the United Nations. This is particularly important for United Nations Member States, as they are *ipso facto* parties to the Court's Statute and, by virtue of their obligations under the United Nations Charter, have undertaken to peacefully settle their international disputes.

One mechanism offered to them in this regard is adjudication by the ICJ, which is an increasingly attractive option for the pacific resolution of maritime or land boundary disputes, disagreements over treaty interpretation, environmental law, sovereignty over maritime features, and the protection of living resources and human health. On this last point, it should be emphasized that the Court is increasingly turned to by States as a propitious forum to address the pacific settlement of disputes which have potential consequences for the conservation of the natural environment and related issues.

By way of example, the Court delivered its Judgment in the case concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)* in 2010, which had relevant implications in the environmental sector; moreover, its current docket had featured two ongoing cases of environmental relevance until recently, namely the case concerning *Whaling in the Antarctic (Australia* v. *Japan*: *New Zealand intervening)* and the dispute regarding *Aerial Herbicide Spraying (Ecuador* v. *Colombia)*. I should like to recall that the proceedings in this last case (*Ecuador* v. *Colombia)* were recently discontinued given that the Parties reached an agreement to settle their dispute. That said, they both praised the Court for the time, resources and energy it devoted to the case, and acknowledged that reaching a settlement would have been difficult, if not impossible, but for the involvement of the Court. The Court has been deliberating in the case concerning *Whaling in the Antarctic (Australia* v. *Japan*: *New Zealand intervening)*, given that it had held public hearings in late June and July this year.

There are several ways to ground the jurisdiction of the Court over a dispute, one of which is of particular interest in the context of my remarks today. For instance, the Court can secure jurisdiction over certain disputes by way of special agreement — termed *compromis* in French — by which disputing States decide to submit their dispute jointly for adjudication by the Court, thereby also circumscribing the scope of the dispute with respect to both substance and applicable

legal instruments, if need be. The Court handed down its decision in the frontier dispute between Burkina Faso and Niger in April, which had been brought to it by way of *compromis*. The Court's jurisdiction over a dispute can also be triggered by a compromissory clause enshrined in a multilateral convention or in a bilateral treaty, with the consequence that the Court's jurisdiction under these instruments remains confined *ratione materiae* to disputes concerning the interpretation or application of a particular convention or treaty.

More importantly for present purposes, Article 36 (2) of the Court's Statute[1] provides that the Court's compulsory jurisdiction can be accepted under this Optional Clause, by a declaration whereby a State recognizes *ipso facto* and without special agreement in relation to any other State accepting the same obligations the jurisdiction of the Court in all legal disputes. Such a declaration — which engenders reciprocal effects — is to be deposited with the United Nations Secretary-General. Of course, States making such declarations are entirely free to determine the scope of such declarations by excluding certain classes or types of disputes, for example.

The 2005 World Summit Outcome "[r]ecognize[d] the important role of the International Court of Justice . . . in adjudicating disputes among States and the value of its work", thereby also calling "upon States that have not yet done so to consider accepting the jurisdiction of the Court in accordance with its Statute". More recently in 2012, on the occasion of the High Level Event on the Rule of Law, the UN Secretary-General launched a campaign to increase the number of Member States that accept as compulsory the jurisdiction of the International Court of Justice, an initiative that must be commended heartily. Indeed, this campaign further serves to bolster the pre-eminence of the World Court as the principal judicial organ of the United Nations and as the foremost judicial institution entrusted with the peaceful settlement of disputes and the promotion of the international rule of law on the international plane. After all, the Manila Declaration on the Peaceful Settlement of International Disputes, among other documents, tells us that submission of a dispute to the Court should not be construed as an "unfriendly act".

The genealogy of State consent and the present-day Court

Even when traced back to the embryonic stages of the current international system, the idea of State consent as a necessary underlying condition for catalysing international dispute resolution mechanisms was very much in the minds of the framers of the 1907 Hague Convention for the Pacific Settlement of International Disputes, though such vision was more closely associated with arbitral decision-making at that time. However, judicial settlement of disputes — as a means to attain the paramount and overarching objective of settling inter-State differences *peacefully* following World War I — acquired traction within the preparatory works of the Permanent Court of International Justice ("PCIJ"). Thus, the Members of the nascent League of Nations committed themselves to the idea of resorting to the *judicial* settlement of their international disagreements.

A proposal that would have instituted the compulsory jurisdiction of the Court's predecessor, the PCIJ, was floated by a Committee of Jurists entrusted by the Council of the League of Nations

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[1]The relevant provisions of Article 36 of the Court's Statute read as follows:

2. The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

   (a) the interpretation of a treaty;

   (b) any question of international law;

   (c) the existence of any fact which, if established, would constitute a breach of an international obligation;

   (d) the nature or extent of the reparation to be made for the breach of an international obligation.

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time.

with elaborating the first draft for the establishment of the PCIJ. While States would have remained unfettered in their choice to adhere to the Statute of that judicial institution or not, the acceptance of this instrument by a State would have been synonymous with both prior determination of the existence of any legal dispute arising subsequently and, when applicable, compulsory adjudication of any legal dispute by the PCIJ. Ultimately, this proposal did not acquire credence in the Council of the League of Nations; rather, the prevailing view was that while adherence to the PCIJ should be actively promoted and enhanced, States should nonetheless retain some degree of discretion in subjecting themselves to the judicial settlement of their disputes.

Thus, the resulting document — the Statute of the PCIJ — contained a provision which was quasi-identical to what is now Article 36 (2) of the present-day Court's Statute. Hence, what became the genesis of the topic of my remarks today — namely compulsory jurisdiction — was actually contained in an "Optional Clause" annexed to a Protocol of Signature, as opposed to requiring States to deposit declarations recognizing the Court's jurisdiction as compulsory under a specific provision of the Statute. The "Optional Clause" read as follows:

> "The undersigned, being duly authorized thereto, further declare, on behalf of their Government, that, from this date, they accept as compulsory *ipso facto* and without special convention, the jurisdiction of the Court in conformity with Article 36, paragraph 2, of the Statute of the Court, under the following conditions."

The debate over whether to grant the PCIJ compulsory jurisdiction or not reared its head once again when the time came to lay down the groundwork for the establishment of the ICJ. While the framers of the present-day Court decided to institute a completely new judicial institution, which would be fully integrated into the UN landscape and architecture, thereby making it the principal judicial organ and a mechanism of the UN Charter, they nonetheless sought inspiration from the PCIJ's experience. Among proposals advanced in the run-up to the San Francisco Conference, two versions of Article 36 of the Statute, which governs the jurisdiction of the Court, were formulated. One proposal deviated squarely from the instrument governing the work of the ICJ's predecessor by providing that UN Members and States parties "to the present Statute recognize as among themselves the jurisdiction of the Court as compulsory *ipso facto* and without special agreement in any legal dispute concerning" the interpretation of a treaty, any question of international law, the existence of any fact which, if established, would constitute a breach of an international obligation, and the nature or extent of the reparation to be made for the breach of an international obligation.

Ultimately, the proposal to espouse a more flexible approach to the Court's jurisdiction was adopted at the San Francisco Conference, as concerns were voiced that too rigid a jurisdictional scheme might deter some States from adhering to both the text of the Court's Statute and the UN Charter. Similarly, anxieties were voiced over whether the imposition of compulsory jurisdiction would unduly restrict the power of States to make reservations *ratione temporis* to their declarations recognizing the Court's jurisdiction as compulsory. At the end of the day, therefore, the resulting text of Article 36 (2) of the ICJ Statute was almost identically modelled after the text governing the jurisdiction of the PCIJ.

The fact that the jurisdictional mechanism for making optional declarations on jurisdiction under the auspices of the PCIJ carried over to the newly-established UN system was very much in line with other features adopted under the UN Charter in 1946. Despite the institutional discontinuity stemming from devising an entirely new Court and governing apparatus, the framers of the Charter nonetheless instituted jurisprudential continuity by modelling the present-day Court's Statute after that of the PCIJ. This drafting innovation ensures that the jurisprudence developed by the PCIJ remains relevant to the work of the ICJ, with the latter having also further developed it through its own work. What is more, when taken together, both institutions share over 90 years of accumulated experience in the peaceful settlement of international disputes, with the

ICJ having also benefited from the important corpus of procedural law elaborated by its predecessor, which is so important for the sound administration of international justice.

The founders of the United Nations system confirmed that State consent should remain sacrosanct when electing potential avenues for the peaceful resolution of international disputes. This undoubtedly prompted the framers of the Charter to reflect this wide margin of choice afforded States in selecting settlement mechanisms with a view to resolving their differences. In this regard, the first paragraph of Article 33 of the Charter provides that

> "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

The role of the Court in the international community

While the UN Charter — and, by way of integration, the Statute of the Court — both maintain the jurisdictional system that had been erected under the aegis of the PCIJ, the essence of the UN Charter nonetheless hinges on a broader conception of the international community, with both States and international institutions being committed to fundamental human rights standards, human dignity and equality, and to the fate of the individuals committed to their charge. Equally paramount in this broader conception of the international community is that very community's commitment to the international rule of law. One has to look no further than the preamble of the Charter to see that this instrument strives "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained" and "to promote social progress and better standards of life in larger freedom". As a result, the inclusion of the international rule of law as an undeniable component of the UN landscape and architecture, coupled with the maintenance of international peace and security, have paved the way for the evolution of an international community composed of various actors, all commonly invested in bettering the lives of peoples throughout the world.

There is no question that further strengthening these objectives can be partly achieved through enhancing the role of international law — and the international rule of law, more broadly — on the international scene. More importantly, this approach — which undoubtedly follows from the establishment of the pre-eminence of law under the UN Charter as a cornerstone of the modern international system — ensures the transition to more just and equitable societies. The International Law Commission similarly, and aptly, encapsulated this commitment to the international rule of law in Article 14 of its 1949 Declaration on Rights and Duties of States: "[e]very State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law".

Against this backdrop, the Court has been entrusted with a singular mandate under the UN Charter as the principal judicial organ of the United Nations. In particular, it remains vested with the primordial responsibility of delivering international justice in the international community by peacefully settling bilateral disputes submitted to it by States. Weighing the evidence submitted to it, the legal arguments advanced by parties appearing before it, and the relevant rules and principles of international law, the Court always strives to deliver well-reasoned and just decisions in the spirit of its unique mandate under the UN system. The Court's judicial mandate is no doubt informed by the role carved out for it in the Charter, which requires it "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace".

More importantly, this overarching objective in the UN Charter system is inextricably tied to the obligation incumbent upon all UN Member States to "settle their international disputes by

peaceful means in such a manner that international peace and security, and justice, are not endangered". Increasingly, the Court is turned to as a reliable an efficient dispute resolution institution, with parties putting their confidence in the Court and in the prospect that it will reach a well-reasoned and just outcome. Indeed, the Court has been consistently effective in assisting States settle their bilateral disputes since 1945, particularly over the last quarter century. The statistics are eloquent: over the last 23 years, the Court has delivered more judgments than during the first 44 years of its existence. The Court carries out its judicial function against the background of a highly diversified docket, handling disputes over competing claims to maritime zones, sovereignty or islands, frontier delimitations — both in maritime and land contexts — and the interpretation and application of multilateral conventions and bilateral treaties.

By way of example, the Court has developed a solid reputation for its work concerning the delimitation of maritime boundaries, with some 15 cases involving maritime delimitation having been submitted to the Court for adjudication to date. These disputes pertained to maritime spaces located in Western and Eastern Europe, North and South America, including the Caribbean, the Middle East and Africa. The Court's decision in the case concerning the *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine)*, which is known very well to all of you present today, not only had the merit of attracting unanimity on the Bench, but it is the only judgment in the Court's history to have been adopted without any individual opinions or declarations by specific judges being appended to the decision. What is more, that Judgment succinctly explained and distilled maritime delimitation principles and jurisprudential developments in a cogent fashion, thereby consecrating the basic delimitation methodology under international law.

This decision, like all others rendered by the Court, was meticulously studied by States, legal scholars, legal advisers to foreign ministries and other courts and tribunals. Unsurprisingly, the Court again relied on the methodology developed in this 2009 case in its subsequent jurisprudence, most recently in its Judgment in the *Territorial and Maritime Dispute* opposing Nicaragua and Colombia. It is also telling that the International Tribunal for the Law of the Sea, in its first decision on maritime delimitation rendered on 14 March 2012, also relied on the Court's decision in the *Maritime Delimitation in the Black Sea*, applying the delimitation methodology articulated by the Court with respect to the contentious boundary to be determined in the Bay of Bengal between Bangladesh and Myanmar.

The situation today: enhancing the compulsory jurisdiction of the Court

As a corollary to the broader conception of the international community, it follows that the concept of "rule of law" — to be imbued with any kind of meaningful force — must translate into the existence and availability of independent and impartial courts, where disputes can be adjudicated and rights asserted. On the international plane, this role is best reserved for the world's foremost international judicial institution and principal judicial organ of the United Nations. Consequently, it is high time to consider the ways in which the role of the Court as the principal judicial organ of the United Nations may be enhanced so as to further bolster the international rule of law and provide broader access to the peaceful settlement of international disputes.

One way to achieve this objective is to enhance the compulsory jurisdiction of the Court by encouraging more States to recognize such jurisdiction under the Optional Clause, which forms the basis of the campaign launched by the UN Secretary-General and the very purpose of my remarks today. Of course, for some courts, jurisdiction is an automatic feature resulting from membership in an international or regional organization of which the judicial institution is an organ. Such is the case of signatory States to the constituent treaties of the European Court in Luxembourg or the European Court of Human Rights. With respect to the jurisdiction of the ICJ, some regional conventions provide for compulsory jurisdiction, which signatory States must accept when adhering to the relevant conventional scheme. For instance, the European Convention for the Peaceful Settlement of Disputes enshrines such a jurisdictional mechanism. In fact, it was invoked — and accepted by the Court — as the jurisdictional basis to hear and decide the case

concerning *Jurisdictional Immunities of the State* between Germany and Italy. The number of ratifications and accessions under that Convention now totals only 14 out of 47 Member States of the Council of Europe. Similarly, the number of ratifications and accessions made by States under the American Treaty on Pacific Settlement (the "Pact of Bogotá"), which also confers jurisdiction upon the principal judicial organ of the United Nations, totals 14 at present.

However, UN membership does not inherently carry with it recognition by States parties of the jurisdiction of the ICJ as compulsory; rather, consent must be expressed in the form of a unilateral declaration made pursuant to Article 36 (2) of the Court's Statute. At this time, 70 States out of 193 Members of the United Nations have made or maintained such declarations, which is slightly over a third of the UN membership. This figure stands in contrast with those States that had Article 36 (2) declarations in force in 1948, which represented 59 per cent of the Organization's membership at that time.

Granted, negotiation between disputing States is by far the best means to resolve any differences, provided such course of action ultimately leads to an agreement between the parties. Yet, on some occasions no such agreement can be attained and the disputing parties are confronted with a stalemate in negotiations. Such situations can be particularly volatile in the context of disputes concerning competing claims to sovereignty over certain land territory or maritime features, or in situations involving competing claims over maritime zones. In some instances, the parties may be able to identify mutually agreeable solutions through negotiation or some other creative arrangement, such as joint management and exploitation regimes.

When such attempts fall short, however, the Court becomes the focal point of international adjudication and remains available to assist States in resolving their disagreements. The possibility of resorting to the Court in the case of an impasse may also encourage disputing States to work resolutely, and in concert, so as to achieve a mutually agreeable outcome before seising the Court, as opposed to espousing a blind pursuit of their own positions to the detriment of more conciliatory or constructive solutions. As the Court declared in its seminal Judgment in the *North Sea Continental Shelf* cases, and recalled in the *Gabčíkovo Nagymaros Project* decision, parties "are under an obligation so to conduct themselves that negotiations are meaningful, which will not be the case when either of them insists on its own position without contemplating any modification of it". Should negotiations fail, seising the Court may actually contribute to defusing tensions between those disputing States and ultimately help normalize the relations between them. This is particularly true given that the Court will hand down a just decision — in full impartiality — on the basis of the evidence and legal arguments submitted to it.

While the Court remains seised of a case, the parties to that dispute remain free to pursue negotiations. In fact, the prospect of the Court adjudicating the case may positively encourage the disputing States to come to a friendly settlement, as demonstrated most recently by Ecuador and Colombia in the case that I mentioned yesterday in the General Assembly.

Mr. Chairman,
Distinguished Delegates of the Sixth Committee,

There is no doubt that the ICJ remains an important agent for strengthening and upholding the rule of law on the international plane, mainly in the context of inter-State relations. In particular, the Court fulfils its noble and vital function of determining international law applicable to a case and rendering justice between disputing States. Yet, it is high time to issue a call for greater recognition of the Court's jurisdiction so as to further strengthen its role in vindicating the ideals enshrined in the UN Charter, which echoes the UN Secretary-General's own invitation to States to do so. As eminent and privileged counsel and advisers working specifically in the field of public international law, you are particularly well situated when advising your respective Ministers on international affairs. I also appeal to you to promote both dispute settlement by the Court and

greater adherence to its compulsory jurisdiction as ways to achieve peaceful conflict resolution and more harmonious inter-State relations.

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