

**INAUGURAL HILDING EEK MEMORIAL LECTURE BY H.E. JUDGE PETER TOMKA, PRESIDENT
OF THE INTERNATIONAL COURT OF JUSTICE, AT THE STOCKHOLM
CENTRE FOR INTERNATIONAL LAW AND JUSTICE**

**The Rule of Law and the Role of the International Court of
Justice in World Affairs**

Monday 2 December 2013

Dear guests and members of the Stockholm
Centre for International Law and Justice,
Ladies and gentlemen,

I am most pleased to be here at the Stockholm Centre for International Law and Justice today, and I am honoured to have been invited to deliver the inaugural Hilding Eek Memorial Lecture. I would like to thank the organizers of today's event, particularly H.E. Ambassador Hans Correll and Professor Pål Wrangé, for extending the invitation and for arranging my visit at the Centre today.

I note the presence today not only of distinguished and eminent jurists but also of members of the new generation of international lawyers, including what I am sure are avid students of the discipline. As we commemorate the legacy of Professor Eek, we must always bear in mind that it is essential that institutions such as the Stockholm Centre for International Law and Justice continue to educate the next generation of international lawyers, who will ultimately take on the task of ensuring the development and application of international law into the future. Indeed, these objectives were very much alive in Professor Eek's own work. For instance, he declared the following in 1969:

“The existence of a knowledgeable and resourceful international legal profession and of high standards in the performance of the varied functions of this profession is a condition, we claim, for achieving what in the United Nations language was called ‘a wider appreciation of international law’ and, therefore, also a prerequisite for preserving stability under law in an expanding world.”¹

Thus, in the same forward-looking spirit, I am happy to continue in this tradition today and follow the path once travelled by Professor Eek, in the hopes of securing a more just future in a safer world.

I. The concept of the “Rule of Law”

Today, my remarks will focus on the “The Rule of Law and the Role of the International Court of Justice in World Affairs”. In particular, I would like to share some thoughts with you about the role of the International Court of Justice (“Court” or “ICJ”) — commonly referred to as the World Court — in promoting and strengthening the rule of law on the international scene. I am particularly pleased to tackle this topic at a time of ever-increasing changes in our interdependent and globalized world. We are today seeing a greater willingness among States to submit their disputes to pacific settlement or adjustment options. This is particularly true as regards the work of

¹Hilding Eek, “The Status of the International Legal Profession and the University Teaching of International Law” in Mogens Blegvad, Max Sørensen and Isi Foighel (eds), *Festschrift til Professor, Dr. Jur. & Phil. Alf Ross* (Juristforbundet, 1969), pp. 93-94.

the Court, as it has delivered more judgments over the last 23 years (63 judgments) than during the first 44 years of its existence (52 judgments).

There have been many academic and political discussions about the content of the concept of the “rule of law”, particularly with respect to the meaning that has become associated with it in domestic settings. One recent and widely read study on the topic proposes that the

“core of the existing principle is . . . that all persons and authorities within the State, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts”².

This study then goes on to include eight principles within this broad conception of the rule of law, namely: accessibility and clarity, constraint of discretion, equality before the law, exercise of powers in good faith and within limits (enforced by judicial review), respect for human rights, availability of dispute resolution procedures, fair trial and compliance with international law³. While these principles are by no means meant to lay down some definite construction of the “rule of law”, based on some exact science, their essence is often found in most legal, political and scholarly iterations of the concept under study.

These considerations can be transposed to the international arena quite readily. For the concept of “rule of law” to be imbued with any kind of meaningful force on the international plane, independent and impartial courts, where disputes can be adjudicated and rights asserted, are absolutely vital. As I will discuss, this role is best reserved for the world’s foremost judicial institution and principal judicial organ of the United Nations, the World Court. Moreover, in their 2012 document titled “Rule of Law: A Guide for Politicians”, the Raoul Wallenberg Institute of Human Rights and Humanitarian Law and The Hague Institute for the Internationalisation of Law rightly concluded that the rule of law at the international level requires that international law be “made public, accessible, clear, and prospective”; that it entails “[a]n independent and impartial judiciary”; and that “[a]dequate enforcement” mechanisms exist to ensure compliance with the law⁴. While international law does create some challenges with respect to this last component, the “Guide for Politicians” rightly asserts that the concept of the “rule of law” should “have the same characteristics at both [domestic and international] levels: that there is an independent and impartial judiciary, that laws are adequately made known, clear and accessible, and are applied equally to all”⁵.

In recent years, the importance of the rule of law in world affairs has been recognized on an increasingly frequent basis by the international community. For example, in 2005 the United Nations General Assembly adopted the *World Summit Outcome* document, in which States “recogniz[ed] the need for universal adherence to and implementation of the rule of law at both the national and international levels” and reaffirmed their commitment to “an international order based on the rule of law and international law, which is essential for peaceful co-existence and co-operation among States”⁶. Interestingly, this generally accepted conception of the rule of law as an indispensable staple of the international system echoes the remarks made some 46 years earlier by Professor Hilding Eek, when he stressed that “our international society could not have peace,

²Tom Bingham, *The Rule of Law* (Allen Lane, 2010), p. 8.

³*Ibid.*, p. 37 and Chaps. 3-10.

⁴Raoul Wallenberg Institute of Human Rights and Humanitarian Law and The Hague Institute for the Internationalisation of Law, *Rule of Law: A Guide for Politicians* (2012), pp. 26-31.

⁵*Ibid.*, p. 32.

⁶2005 *World Summit Outcome*, General Assembly resolution 60/1, 16 September 2005, *Official Records of the General Assembly, Sixtieth Session, Supplement No. 49 (A/60/49)*, para. 134 (a).

order and security without the rule of law”⁷. 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”⁸. That said, there is no doubt that international law faces singular challenges in meeting some of the features commonly associated with the rule of law in domestic settings. In this regard, Dame Rosalyn Higgins, a former President of the World Court, underscored in a speech on the topic of the rule of law delivered in 2007, that in comparing a domestic conception of the rule of law to an “international rule of law”, “[o]ne has only to state [the] set of propositions to see the problems”⁹.

One such perceived challenge has been associated with the commonly accepted rule of law requirement that the law be general, prospective, clear and stable¹⁰. International law is certainly general, in the sense that it applies on a universal basis, even if some rules are limited in their application to certain States or specific factual contexts¹¹. However, Professor Eek, among others, expressed concerns about certain rules of international law being unclear. For instance, in 1965 Professor Eek cautioned that “the rules of international law, as we know them, often are uncertain, imprecise, not sharply defined or stated”¹². Professor Eek also brought attention to the fact that this perceived imprecision was particularly acute with respect to norms of customary international law, and noted the absence of a process of “legislation” in international law akin to that found in municipal law, though of course there had been development of the law through treaty-making¹³.

Granted, these misgivings were voiced during a period in which several substantive areas of public international law remained uncodified. The achievements in this era of codification and progressive development of international law have since been impressive. For one thing, certain initiatives undertaken under the aegis of the International Law Commission — such as its work on the law of diplomatic and consular relations, law of treaties, law relating to succession of States as well as the fairly recent formulation of Articles on the Responsibility of States for Internationally Wrongful Acts, or its more recent set of Articles on the Responsibility of International Organizations — have undeniably assisted the international community in better defining the contents and contours of customary norms by way of codification. More importantly, the pronouncements of the World Court have also helped clarify the content and scope of customary norms since the 1960s in fields as diverse as State responsibility, the law of the sea, State immunity, humanitarian law, environmental law, and recourse of force and non-intervention in the affairs of other States.

But before delving into other challenges to the sustainability of the rule of law on the international scene, one must first secure a firm grasp of the role of the World Court in the United Nations system, so as to better gauge its potential contributions to the rule of law. Suffice it

⁷Hilding Eek, “International Law in Retrospect and Prospect: Some Observations from the Swedish Point of View” (1959) 29 *Yearbook of the Association of Attenders and Alumni of the Hague Academy of International Law* 237, p. 240.

⁸International Law Commission, *Draft Declaration on Rights and Duties of States*, Annexed to General Assembly Resolution 375 (IV), 6 December 1949, *Official Records of the General Assembly, Fourth Session*.

⁹Rosalyn Higgins, “The Rule of Law: Some Sceptical Thoughts” in *Themes and Theories* (Vol. II, OUP, 2009), p. 1330.

¹⁰See, for example, *Rule of Law: A Guide for Politicians*, above note 4, p. 26; Lon L. Fuller, *The Morality of Law* (Rev. ed. 1969, Yale University Press), 39 and 46ff.

¹¹See Sir Arthur Watts, “The International Rule of Law” (1993) 36 *German Yearbook of International Law* 15, p. 27.

¹²Hilding Eek, “International Law: The First Encounter” (1965) 35 *Nordisk Tidsskrift for International Ret* 81, p. 88.

¹³*Ibid.*, pp. 88-89. See similarly Watts, above note 11, p. 28.

to say, for now, that the “rule of law” is not just some fashionable buzzword that has seeped its way into the vernacular of international lawyers. Quite to the contrary, it epitomizes all that is noble about the mission statement of international law, and encapsulates that discipline’s profound commitment to core values that are often mirrored in domestic conceptions of the rule of law. It goes without saying that the “rule of law” not only constitutes the backdrop against which the edifice of the United Nations was erected, but it is also its principal linchpin. In his report of 23 August 2004 to the Security Council, entitled “The rule of law and transitional justice in conflict and post-conflict societies”, the Secretary-General of the United Nations echoed these views:

“The ‘rule of law’ is a concept at the very heart of the Organization’s mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”¹⁴

II. The place and role of the World Court in the United Nations system

The Court is one of the six main organs of the United Nations and its principal judicial organ under the Charter of the United Nations. It is the only principal organ of that organization to have its seat outside New York City, as the Court sits in The Hague, in the Netherlands. The present Court was created in 1945 (and has been in operation since 1946) and succeeded the Permanent Court of International Justice (“PCIJ”), which was instituted in 1922. A great Swedish lawyer, Åke Hammarskjöld, as the first Registrar of the latter institution, greatly contributed to its development during its formative period. Prior to the inception of the World Court, the League of Nations had instituted the Permanent Court of International Justice, which was not legally a part of that entity. By contrast, the ICJ was fully integrated into the institutional architecture of the United Nations in 1945. That said, the framers of the United Nations were nonetheless conscious of the need to ensure jurisprudential continuity and evolution despite the institutional discontinuity that occurred because of the transition between both Courts in The Hague.

The relevant provision of the Charter states that the ICJ “shall function in accordance with the annexed Statute” — meaning the Court’s Statute — “which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter”¹⁵. As a result, the ICJ may rely on the jurisprudence developed by its predecessor, the Permanent Court of International Justice, and in fact often does so; similarly, counsel and parties appearing before the present-day Court also often rely on the jurisprudence of its predecessor in crafting their arguments. What is more, while the Permanent Court’s jurisprudence was instrumental in articulating applicable rules of international law at a time when the discipline was largely uncodified, the ICJ has also considerably developed that jurisprudence subsequently. It should be mentioned that the Court’s predecessor formulated an important corpus of procedural law, which still assists the ICJ and other international tribunals in the sound administration of international justice. Taken together, both institutions count over 90 years of accumulated experience in the pacific settlement of international disputes. Since its inception, a key and vital function has been

¹⁴*The rule of law and transitional justice in conflict and post-conflict societies*, Report of the Secretary-General, (UN Doc. S/2004/616), 23 August 2004, para. 6.

¹⁵Article 92 of the United Nations Charter states that: “The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.”

conferred upon the World Court in furthering the promotion of the international rule of law through the pacific settlement of disputes, which constitutes one of the ideals underpinning the UN system.

In a nutshell, the ICJ's principal role within the United Nations framework is to settle peacefully international/bilateral disputes between States submitted to it within the confines of its jurisdiction — on which I will say a few words a bit later — and in accordance with international law. In so doing, the Court supports the workings of the rule of law: in the words of former President Higgins, in hearing and settling bilateral disputes the Court is “both independent and representative” and “applies the law consistently and impartially”, thus “personify[ing] ‘the rule of law’”¹⁶. It is no surprise, therefore, that the *2005 World Summit Outcome* document lauded “the important role of the International Court of Justice . . . in adjudicating disputes among States and the value of its work”¹⁷.

Another less frequently exercised — but nonetheless valid — function of the Court is that of delivering advisory opinions upon the request of international organizations. In such instances, one of the organs of the United Nations — or some other authorized international organization — requests the Court to provide an advisory opinion on a legal question in the hope that the Court's opinion will illuminate its future work. Aside from UN organs (e.g., General Assembly, Security Council, Economic and Social Council, Trusteeship Council and Interim Committee of the General Assembly), specialized agencies authorized to request an advisory opinion from the Court include the International Labour Organization (ILO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Health Organization (WHO), the International Monetary Fund (IMF), and the World Intellectual Property Organization (WIPO).

Interestingly, Professor Eek himself advocated greater use of the Court's advisory jurisdiction as potentially a “modest, but in the long run very useful, way of clarifying points of international law”¹⁸. In 1959, he alluded to a seemingly prophetic proposal by another author, Dr. Georg Schwarzenberger, to seek an advisory opinion from the Court on the legality of the use, manufacture, possession and testing of nuclear weapons¹⁹, a request that was of course ultimately formulated by the UN General Assembly and answered by the Court in 1996 in its Advisory Opinion concerning the *Legality of the Threat or Use of Nuclear Weapons*. Through both its contentious and advisory jurisdiction, the Court therefore provides what Professor Eek called “a means by which the law is authoritatively stated”, a mechanism which he regarded as more important than “the effectiveness of the machinery of sanctions”²⁰.

The complete integration of the ICJ within the United Nations system entails two important consequences: first, when carrying out its judicial functions — whether in the context of contentious or advisory proceedings — the Court remains guided by the principles enshrined in the United Nations Charter. For example, a key principle is laid down in Article 1 of that instrument and remains intimately tied to the Court's function, in that the principal judicial organ of the United Nations must “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”.

Second, the importance of the Court's noble mission is also mirrored in the obligations incumbent upon United Nations Member States under the Charter. In particular, Article 2 (3) of that instrument requires that UN Members States “settle their international disputes by peaceful

¹⁶Higgins, “The Rule of Law”, above note 9, pp. 1331-32.

¹⁷*2005 World Summit Outcome*, above note 6, para. 134 (f).

¹⁸Eek, “International Law in Retrospect”, above note 7, pp. 241-42.

¹⁹*Ibid.*, p. 241

²⁰*Ibid.*, p. 238.

means in such a manner that international peace and security, and justice, are not endangered". Similarly, Article 33 of the Charter provides that

“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, mediations, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice”.

Even in 1959, Professor Eek equated the development of means of dispute resolution on the international plane with an “important trend towards a system of law” instead of power politics²¹.

The Court’s handling of disputes susceptible of endangering the maintenance of international peace and security can sometimes assist parties in defusing tensions or in restoring harmonious relations. Moreover, Article 36 of the United Nations Charter vests the Security Council with the power to recommend appropriate procedures or methods of adjustment to States parties to an international dispute, the extension or aggravation of which are susceptible of jeopardizing international peace and security. Paragraph 3 of that article states the following:

“In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.”

However, the Security Council has rarely used its power to recommend to the parties that they refer their dispute to the ICJ; the best known example arose in the very first contentious case adjudicated by the Court concerning the *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*. The Court remains an important agent for strengthening and upholding the rule of law on the international plane, particularly in the context of inter-State relations. In sum, the Court fulfils its noble and vital function of determining international law applicable to a dispute submitted to it and rendering justice between disputing States within the United Nations system, but the impact of its work can have much broader implications for the international community.

III. Some perceived dissimilarities between the Court and domestic tribunals

I should now like to point out that the World Court and its procedure differ from municipal courts and domestic judicial proceedings in several respects. For one thing, it is probably fair to assert that domestic law is largely concerned with the relationship between individuals and their governments, or with the relationship between individuals. As a result, there is a vertical relationship between the domestic decision-making body and the persons or institutions subject to its authority and jurisdiction. A binding judicial decision is handed down by that court, which then governs and adjudicates the relationship between the individual(s) and the government, or between disputing individuals. By contrast, international law — the law applied and developed by the World Court — rather focuses on the horizontal relationship between two sovereign States, which is typically brought into relief before the Court by way of a bilateral dispute²².

In the domestic law scenario, the judgment handed down by a court is ultimately enforced against individuals and institutions through coercive means. This marks a key difference with international law, a system under which — as the Raoul Wallenberg Institute and The Hague

²¹*Ibid.*, p. 240.

²²On the vertical/horizontal relationship distinction between municipal and international law, see, for example, Simon Chesterman, “An International Rule of Law?” (2008) 56(2) *American Journal of Comparative Law* 331, p. 333.

Institute for the Internationalisation of Law's "Guide for Politicians" indicates — "there is no central legislator who is or can be held responsible for the accessibility, clarity and certainty of international law"²³. Similarly, to further contrast potential dissimilarities with domestic law, there is no central government under international law. Consequently, international law is endowed with limited means to enforce legal rules against recalcitrant States. This no doubt prompted Professor Eek, some 48 years ago, to underscore that international law lacked, among other things, a "machinery of compulsion . . . for the enforcement of judgments or other legal commands"²⁴.

As a result, the concept of *stare decisis*, or binding precedent, that typically attaches to the decisions of common law courts, for instance, is — strictly speaking — absent from international judicial decision-making. In this regard, Article 59 of the Court's Statute provides that "[t]he decision of the Court has no binding force except between the parties and in respect of a particular case". In fact, in 1965 Professor Eek equated the lack of *stare decisis* in the Court's case law as undermining the development of a clear body of law: in short, at that time he considered it "extremely difficult" to cite a decision "as authority for interpretations of the law binding *erga omnes*" because parties "may stipulate the law to be applied, and may reach an understanding with respect to the content of the applicable law contrary to the views held by other states"²⁵. However, the world has changed considerably in the ensuing decades. While it is true in principle that the Court's jurisprudence is not imbued with the force of *stare decisis*, I should stress that the judgments of the World Court are highly regarded and carefully studied by States, legal advisers to foreign ministries, international lawyers, States and legal scholars. Furthermore, the Court's decisions often illuminate the work of other international decision-making bodies, such as the Tribunal for the Law of the Sea and arbitral tribunals. The Court itself relies rather liberally on its own jurisprudence when adjudicating disputes and formulating its judgments. However, there is also a new trend whereby the World Court seeks inspiration from the decisions of other tribunals²⁶.

What is more, the Court's decisions have generated a strong record of compliance by parties having appeared before the principal judicial organ of the United Nations. In fact, the Court does not concern itself with enforcing its own judgments, as parties to disputes before it undertake to comply with its decision by virtue of the Charter of the United Nations. In practice, this obligation has been almost consistently fulfilled. In the rare event of non-compliance by one party to the dispute with the Court's judgment, the other party may seek to enforce that decision by seising the Security Council of the matter. But again, it should be emphasized that this power has seldom been used because of the pervasive authority exerted by the Court's decisions.

Thus, it is unsurprising that States increasingly put their trust in the Court, given that its judicial process invariably culminates into impartial judgments that are grounded in the legal arguments and the evidence presented by both parties to a dispute, in accordance with applicable rules and principles of international law. At the end of the day, by carrying out its judicial function with a view to reaching a well-reasoned outcome and the peaceful settlement of a dispute, the Court contributes both to maintaining good relations between States and to furthering and strengthening the international rule of law.

²³*Rule of Law: A Guide for Politicians*, above note 4, pp. 26-27.

²⁴Eek, "International Law: The First Encounter", above note 12, p. 82.

²⁵*Ibid.*, p. 89.

²⁶For instance, Professor Murphy, noting that the World Court had to rely on the practice of a number of international courts and tribunals when dealing with the question of compensation in *Ahmadou Sadio Diallo (Guinea v. Democratic Republic of Congo)*, declares that "[t]he Court's reliance on such a wide range of jurisprudence from other tribunals might be viewed as a counter-argument to concerns about the 'fragmentation' of international law, demonstrating the ability of international courts to engage in a co-operative trans-institutional dialogue"; references omitted: Sean D. Murphy, "What a Difference a Year Makes: The International Court of Justice's 2012 Jurisprudence" (2013) *Journal of International Dispute Settlement* 539, p. 540.

The major difference between domestic tribunals and the World Court can be best explained by the fact that, at its core, public international law remains a consent-based system. As I indicated earlier, no international court or tribunal can be pointed to as exercising automatic or compulsory jurisdiction over a dispute in the absence of consent or agreement by the States concerned. It is no surprise, therefore, that several commentators have equated this feature of the international legal system with its Achilles heel which, in turn, has implications for the enforceability of the rule of law. For instance, as former President Higgins noted, “the absence of a compulsory recourse to the Court falls short of a recognizable ‘rule of law’ model”²⁷. Indeed, the consensual basis of the Court’s jurisdiction is, as one author puts it in a recent and authoritative account on the rule of law, one of the “most serious deficiencies of the rule of law in the international order”²⁸. According to this view, it follows that, to be “truly effective”, the rule of law would require “routine and obligatory recourse to the Court”²⁹. That said, one must be careful not to overstate the problems here; while recourse to the Court is by no means an obligatory avenue under international law, the level of compliance with international legal obligations is generally high. In this respect, one need only recall the famous words written by a famous international lawyer, Louis Henkin, in 1968: “It is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”³⁰

There is no question that negotiation and, ultimately, agreement between disputing States is the most efficient and direct way to resolve their differences. However, there are instances in which no agreement can be reached between the parties, in which case the involvement of the Court can help defuse tensions so as to avoid the prospect of those disagreements escalating into open conflicts. This is particularly true in situations where disputes arise with respect to competing claims to sovereignty over certain land territory or maritime features, or in scenarios involving equally clashing claims over maritime zones. It may well be that parties to such disputes find a mutually agreeable solution or some other creative arrangement, such as joint management and exploitation régimes, through mediation or negotiation. However, when such attempts fall short, the Court is available to assist the parties in attaining a peaceful settlement in a timely and just fashion.

It is often preferable — when confronted with such delicate inter-State disagreements — to have the underlying legal dispute adjudicated by an impartial, third-party institution, such as the Court. While arbitral proceedings are available these days, as a flexible and time-efficient mode of dispute resolution, they are also costly. Under the United Nations Convention on the Law of the Sea, when the States involved in a dispute have not accepted the jurisdiction of the World Court or ITLOS, an *ad hoc* arbitral tribunal becomes competent to hear the case. However, recourse to the Court often provides States parties to an international dispute with a less cost-prohibitive mode of settlement. On an equally pragmatic level, the prospect that a dispute will be submitted to the Court for adjudication may prompt disputing States to work together so as to identify mutually agreeable solutions before seising the Court, as opposed to pursuing blindly their own positions at the detriment of more promising and constructive negotiations. After all, in its seminal judgment in the *North Sea Continental Shelf* cases and in subsequent decisions, the World Court insisted that parties “are under an obligation so to conduct themselves that negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it”³¹.

²⁷Higgins, “The Rule of Law”, above note 9, p. 1333.

²⁸Bingham, *The Rule of Law*, above note 2, p. 128, noting the same statement by President Higgins on the issue.

²⁹*Ibid.*

³⁰Louis Henkin, *How Nations Behave* (Frederick A. Praeger, 1968), p. 42.

³¹*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 47, para. 85. See also *Gabčíkovo–Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 78, para. 141.

IV. The consensual nature of the international legal system and its implications for the Court's jurisdiction

Thus, the Court's jurisdiction on contentious matters is primarily based on State consent. Simply put, parties appearing before the Court must consent to granting it jurisdiction over the dispute. In that regard, a dispute may be brought to the Court in four different ways. First, a State may make a unilateral declaration which enables it to recognize as compulsory the jurisdiction of the Court, with reciprocal effect on other States. That said, such declarations may be "tailored" to fit the needs and interests of those States making them, in particular by determining the scope of the acceptance of the Court's jurisdiction or determining the classes or categories of disputes falling within such jurisdiction.

Efforts are currently being deployed to increase the number of States having subscribed to this jurisdictional avenue. At present, only slightly over a third of the United Nations membership — namely 70 States out of 193 — have made such declarations, including only one Permanent Member of the Security Council, as when compared to 59 per cent of the Organization in 1948 (34 States out of 58 Member States), which included four of the five Permanent Members of the Security Council. In his Report of 2012, the UN Secretary-General called again on Member States and encouraged them to make declarations recognizing the jurisdiction of the Court as compulsory³², an initiative that should be commended heartily. Moreover, some seven years earlier, the *World Summit Outcome* document had similarly called "upon States that have not yet done so to consider accepting the jurisdiction of the Court in accordance with its Statute"³³. Since 2006, six such declarations have been made by States (Dominica, Germany, Ireland, Timor-Leste, Lithuania, and Marshall Islands).

In this respect, it is worth pointing out that Professor Eek had noted in his work a Swedish initiative to encourage greater acceptance of the Court's jurisdiction, and thereby to strengthen the Court's role. In a contribution published in 1959, he outlined an initiative spearheaded by Sweden to encourage bilateral agreements with other countries which had not accepted the optional clause to agree to settle disputes with Sweden through the Court, highlighting that this constituted an "interesting new device" for strengthening the Court's role³⁴. I think we should rejoice that the concerns initially voiced by Professor Eek were partly alleviated by placing greater emphasis on encouraging States to consider adhering to the compulsory jurisdiction of the Court, including at the highest echelons of the United Nations. That said, considerable work remains to be done on this front. In fact, we are far from realizing the hope, which the very first President of the United Nations General Assembly, Minister Spaak, expressed on 18 April 1946 when he represented the Assembly at the solemn inaugural sitting of the then newly established World Court. He wished that "one day [the Court's] jurisdiction may become compulsory for all countries and for all disputes without exception"³⁵.

With respect to the jurisdiction of the World Court, 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

³²*Delivering justice: programme of action to strengthen the rule of law at the national and international levels*, Report of the Secretary-General (UN Doc. A/66/749), 16 March 2012, para. 15.

³³2005 *World Summit Outcome*, above note 6, para. 134 (f).

³⁴Eek, "International Law in Retrospect", above note 7, p. 241.

³⁵See *Yearbook of the International Court of Justice*, 1946-1947, p. 31.

Pacific Settlement (commonly termed the “Pact of Bogotá”), which also confers jurisdiction upon the principal judicial organ of the United Nations, totals 14 at present.

Second, a special provision — commonly termed “compromissory clause” — granting jurisdiction to the Court in respect of disputes over the interpretation or application of a bilateral treaty or multilateral convention, in which such clause is enshrined, may be invoked by a party to submit a dispute to the Court. Prior to the merits phase, however, the Court often has to hear the parties regarding preliminary objections formulated by the respondent State to the jurisdiction of the Court, or to the admissibility of the Applicant’s claims, or both. Since the end of the Cold War, we have witnessed a growing number of such compromissory clauses in bilateral treaties and multilateral conventions granting jurisdiction to the Court, with over 300 such instruments currently in force³⁶. In other instances, the Court is invited to deal with objections to its jurisdiction and/or to the admissibility of the Applicant’s claims at the same time as the merits of the case, thereby resulting in a single final judgment. An example of one such decision is the case concerning the *Application of the Interim Accord of 13 September 1995* opposing the former Yugoslav Republic of Macedonia and Greece, which culminated in the Court’s Judgment on 5 December 2011, and in which the jurisdiction of the Court was established on the basis of a compromissory clause contained in a bilateral treaty.

Third, two disputing States can conclude a “Special Agreement” — commonly referred to as *compromis* in French — with the stated purpose of submitting their dispute to the Court. This is by far the most efficient and direct route for electing recourse to the Court. To date, some 17 cases have been brought to the Court by way of special agreement. A recent example of the role played by the Court in ensuring the peaceful settlement of disputes, with the effect of further strengthening relations between the parties, arose in the *Frontier Dispute (Burkina Faso/Niger)* case, which resulted in the Court delivering a unanimous judgment on the merits on 16 April 2013. That case was brought to the Court by way of Special Agreement between Burkina Faso and Niger, whereby the parties agreed to submit their frontier dispute to the Court regarding a section of their common frontier. There is every indication that the Court’s Judgment contributed to further strengthening the mutually respectful and harmonious relations between Burkina Faso and Niger, as both Parties have openly praised the outcome attained by the Court in its decision.

That case undoubtedly demonstrated the utility of submitting disputes to the Court by way of special agreement. Such agreements afford parties a large degree of latitude in fashioning the litigation modalities suitable for their own purposes, such as identifying the applicable legal instruments. For one thing, the Court is not typically called upon to pronounce on preliminary objections to its jurisdiction or the admissibility of the Applicant’s claims when a case is brought to it by special agreement. Moreover, many cases brought by way of special agreement have become leading decisions, particularly in the area of maritime delimitation and land frontier disputes, thereby informing the further development of relevant international legal principles. These decisions are frequently invoked by States appearing before the Court and also provide support to the work of other international tribunals. One may think of the following cases: *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* brought by Malaysia and Singapore; *Frontier Dispute* submitted by Benin and Niger; *Sovereignty over Pulau Ligitan and Pulau Sipadan* brought by Indonesia and Malaysia; *Kasikili/Sedudu Island* submitted by Botswana and Namibia; *Gabčíkovo–Nagymaros Project* submitted by Hungary and Slovakia; *Territorial Dispute* brought by Libya and Chad; *Frontier Dispute* submitted by Burkina Faso and Mali; and *Continental Shelf* brought to the Court by Tunisia and Libya.

Fourth, by way of *forum prorogatum* a State may refer a dispute to the Court, over which it does not have jurisdiction initially, and invite the other State to accept the Court’s jurisdiction in that specific case. Should this second State consent to such arrangement, the Court is then able to consider the matter. Two cases have been brought to the Court by way of *forum prorogatum*,

³⁶See Higgins, “The Rule of Law”, above note 9, p. 1333.

namely the cases concerning *Certain Criminal Proceedings in France (Republic of Congo v. France)* and *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*. In short, this option enables a State which did not recognize the jurisdiction of the Court at the moment when the application instituting proceedings against it was filed to nonetheless accept such jurisdiction subsequently, so that the Court may decide the case.

By contrast, 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 the European Court of Justice in Luxembourg and the European Court of Human Rights in Strasbourg.

V. The role of the World Court in strengthening the international rule of law

Despite the differences that I have pointed out earlier between domestic tribunals and the World Court, their end goals converge in at least one key respect: namely, the promotion of the rule of law, be it in municipal settings or on the international plane. The famous Professor of English Law at Oxford University, A. V. Dicey, wrote extensively on the concept of the rule of law, underscoring that such concept entails “that no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land”³⁷. He further observed that

“when we speak of the ‘rule of law’ as a characteristic of our country, not only that with us no man is above the law, but (which is a different thing) that here, every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals”³⁸.

Much of the essence of Professor Dicey’s remarks is directly transposable to the work of the ICJ, which invariably strives to promote and further strengthen the international rule of law when it adjudicates disputes and hands down judgments. The Charter of the United Nations unquestionably 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 profound attachment 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.

As the principal judicial organ under this system, the ICJ has continuously contributed to this objective and is increasingly turned to by States as an efficient institution geared towards the pacific settlement of disputes and the promotion of the rule of law. Over the years, a number of disputes have been submitted to the Court, resulting in an eloquent docket and a diversified case-load: the Court has ensured the pacific settlement of disputes involving competing claims to maritime zones, sovereignty or islands, frontier delimitations — both with respect to land boundaries and maritime delimitation — and has settled disputes in areas as diverse as State

³⁷A. V. Dicey, *An Introduction to the Study of the Law of the Constitution* (1885: 9th ed. Macmillan, 1945), p. 188.

³⁸*Ibid.*, p. 193.

responsibility, environmental law, the interpretation of bilateral treaties and multilateral conventions, diplomatic protection and human rights. For instance, the Court has established a solid reputation in adjudication of land frontier disputes and cases of maritime delimitation. In matters of maritime boundaries alone, some 15 cases involving maritime delimitation issues have been submitted to the Court for adjudication concerning maritime areas situated 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*, in which the Court proceeded to delimit the maritime boundary between Romania and Ukraine in the Black Sea, 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 explained and distilled maritime delimitation principles and jurisprudential developments in a cogent fashion, thereby consecrating the basic delimitation methodology under international law. Unsurprisingly, the Court again relied on the methodology developed in this 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 Myanmar³⁹. In this regard, the Court's decision in the *Maritime Delimitation in the Black Sea* — which is emblematic of the reach and influence of most of its jurisprudence — aligns with the conclusion reached by the Raoul Wallenberg Institute and The Hague Institute for the Internationalisation of Law in their "Guide for Politicians" on the rule of law, to the effect that "the rule of law at the international level promotes predictability and equality in the relations between states and other subjects of international law and restricts the use of arbitrary power"⁴⁰. There is no doubt that the Court's rich jurisprudence, particularly in the field of land frontier and maritime delimitation disputes, has contributed greatly to ensuring predictability, fairness and stability in inter-State relations and, in many instances, has facilitated dealings between neighbouring States.

Increasingly, the Court is also turned to for the purpose of adjudicating disputes that have potentially significant repercussions on the environment, human health and living resources, often involving complex facts, testimonial evidence and technical, scientific or expert considerations. By way of example, the Court delivered its Judgment in the case concerning *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* in 2010; 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)*. The Court has been deliberating in the case concerning *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, given that it held public hearings in late June and July this year. I should like to recall that the proceedings in the case concerning *Aerial Herbicide Spraying (Ecuador v. Colombia)* were recently discontinued given that the parties reached an agreement to settle their dispute, just three weeks prior to the date on which the hearings before the Court on the merits were scheduled to commence. That said, both parties praised the Court for the time, resources and energy it had devoted to the case, and acknowledged that reaching a settlement would have been difficult, if not impossible, but for the involvement of the Court. Thus, the Court's contributions to the promotion of the international rule of law and peaceful inter-State relations do not only stem from the judgments it renders; the Court can also play an important role to that end even before the parties are heard, simply by engaging its

³⁹*Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012.

⁴⁰*Rule of Law: A Guide for Politicians*, above note 4 at 31.

amicable judicial process and being a conduit for their peaceful negotiations and, ultimately, for the resolution of their differences. 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”⁴¹.

Dear guests and members of the Stockholm
Centre for International Law and Justice,
Ladies and Gentlemen,

While the Court’s judgments are not formally binding on the larger international community, they always receive the imprimatur of binding force as between the immediate parties to the dispute, which means they are binding not only on their governments but also on all State organs including the judiciary. As I have shown, the Court’s decisions also exert a great deal of influence on the development of public international law and are generally taken very seriously, chiefly because they emanate from the principal judicial organ of the United Nations. Judgments of the Court, which may contain its interpretation of a particular international convention or its ascertainment of relevant principles or rules of customary international law in a given dispute, are studied meticulously by legal scholars, counsel and legal advisers of foreign ministries of other States.

The reach and influence of the Court’s work has been equally pervasive in other international judicial settings, as international judges and arbitrators are also avid students of the Court’s jurisprudence. As such, it is not uncommon to see references to the Court’s decisions in the judgments of other tribunals and courts for support of the existence of an applicable legal principle or customary norm, for determining what maritime delimitation methodology should be applied in a particular case, or for the purpose of ascertaining the correct interpretation of an international treaty, to list a few examples. The Court’s work has also played a central role in informing the codification projects of the International Law Commission, with that body citing liberally from the Court’s jurisprudence in developing its own texts and documents on a wide array of international legal topics. Finally, the Court’s jurisprudence has also provided considerable inspiration for the programme of work of certain high-profile and high-level learned societies active in the field of international law, such as the International Law Institute.

But perhaps most importantly, as I have illustrated, the Court’s jurisprudence has consistently promoted the rule of law and vindicated the ideals underpinning the Charter of the United Nations. After all, the remarks of former President Higgins ring true to this day: “the best way for the International Court to protect and promote the rule of law” is to continue doing what it does, “namely meticulously apply international law in an impartial manner to the disputes before [it]”⁴². Moving forward, there is no doubt that the Court will continue adjudicating disputes submitted to it with dedication, in utmost impartiality, independence, and in accordance with international law, always within the limits of the jurisdiction conferred upon it. It is to be hoped that, in so doing, the Court will again be able to contribute to strengthening the international rule of law and promote the advancement of peaceful dispute resolution in the future.

I thank you for the opportunity to address you today and I look forward to the exchanges that will follow.

⁴¹*Manila Declaration on the Peaceful Settlement of Disputes between States*, Annexed to General Assembly Resolution 37/10, 15 November 1982, *Official Records of the General Assembly, Thirty-Seventh Session, Supplement No. 51 (A/37/51)*, para II (5).

⁴²Higgins, “The Rule of Law”, above note 9, p. 1339.