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The Role of the World Court Today

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108TH SIBLEY LECTURE

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The International Court of Justice (ICJ, also known as the World Court) is the principal judicial organ of the United Nations (UN). I have served as a member of the Court for the past two years. During that time, I have had the opportunity to speak about the Court and about international law to a variety of audiences throughout the United States. It is a particular privilege to deliver the Sibley Lecture here at the University of Georgia School of Law, an institution that is known for its commitment to the study of international law and international relations.

The ICJ has its roots in the notion that adjudication in a world court can serve as an alternative to war. In the decades since the Court was established, there have been enormous changes in international law and institutions. In particular, there are now many other international courts and tribunals,[1] and many other institutions contribute to the peaceful resolution of disputes.[2]

In view of these developments, what is the role of the World Court? The ICJ is charged with a powerful combination of functions: the resolution of particular disputes between states; the issuance of advisory opinions requested by the United Nations Security Council and General Assembly; and the development of international law. This combination of functions, vested in a court which can hear cases from any region of the world, which has the scope to consider all substantive aspects of international law, and which is endowed with the stature of the UN's principal judicial organ gives the World Court a unique and potent role in the peaceful resolution of disputes.

I. A BRIEF HISTORY OF INTERNATIONAL ADJUDICATION

The world has been comprised of nation-states for centuries, but it was only at the turn of the twentieth century that the idea of an international court gained traction. Before that, there had been a few situations in which two nations asked arbitrators to settle a specific dispute. At the very end of the nineteenth century,

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[1] In these remarks, I use the terms "court" and "tribunal" interchangeably.

[2] *See infra* text accompanying notes 33–35.

however, there were calls within Europe and the United States for the establishment of an international court with more general jurisdiction.[3]

This led to the first Hague Peace Conference in 1899, where the notion of a World Court was advanced.[4] A primary impetus for a world court was the vision that nations would take their disputes to this court instead of going to war with each other. The breadth and depth of that vision may now seem rather utopian, but the idea of adjudication as a means for nations to resolve their disputes without going to war persists today. Indeed, adjudication is one means of advancing a core goal of international law—the peaceful settlement of disputes between states.[5]

The initiative that took form at the Hague Peace Conference in 1899 eventually led to the creation of the Permanent Court of International Justice (PCIJ) in 1920, established under the auspices of the League of Nations and housed in the Peace Palace in The Hague, which is the seat of government of the Netherlands.[6]

In 1945, when the UN was established, the PCIJ was dissolved and replaced with the International Court of Justice. The UN Charter established the ICJ as the principal judicial organ of the United Nations.[7] Both courts are known as the "World Court," and there is considerable continuity of jurisprudence and procedure.

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[3] Succinct summaries of the origins of the World Court, with particular attention to the evolution of U.S. Government perspectives, can be found in THOMAS M. FRANCK, JUDGING THE WORLD COURT 13–25 (1986) and Sean D. Murphy, *The United States and the International Court of Justice: Coping with Antinomies*, *in* THE SWORD AND THE SCALES: THE UNITED STATES AND INTERNATIONAL COURTS AND TRIBUNALS 46, 58–69 (Cesare P.R. Romano ed., 2009).

[4] David Caron has called the International Court of Justice the "inheritor of the belief that a permanent court occupies a central place in any international system of order." David D. Caron, *War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 AM. J. INT'L L. 4, 5 (2000).

[5] The peaceful settlement of disputes is a central tenet of the Charter of the United Nations. *See* U.N. Charter arts. 1–2, 33–38.

[6] Several documents related to the establishment of the PCIJ are available on the International Court of Justice website. *See Other Documents Concerning the Permanent Court of International Justice*, INT'L COURT OF JUSTICE, http://www.icj-cij.org/pcij/other-documents.php?p1=9&p2=8 (last visited Sept. 11, 2012).

[7] U.N. Charter art. 92.

The PCIJ was innovative in two important respects, and these carry forward to the current World Court. First, the PCIJ was a standing court, not an ad hoc tribunal constituted for a particular case. Second, states could agree in advance to submit future, unknown cases to the World Court and could be held to that decision. Thus, the PCIJ was created by and was accountable to the broader community of nations, not just to the states that were parties to a particular dispute.

From the outset, there were competing views about the goals and desirability of such a world court. The proponents hoped that a world court could serve as an alternative to war. Others were skeptical that a court could achieve this goal and questioned the desirability of a world court.[8] Much of this debate carries over to present-day conversations about the ICJ, particularly within the United States. There continue to be some strong voices in favor of strengthening the mechanisms for international adjudication. Others are critical, taking the view that international courts like the ICJ have been ineffective and arguing that it is unwise for governments to submit to their jurisdiction.[9]

II. THE INTERNATIONAL COURT OF JUSTICE

The ICJ is the principal judicial organ of the United Nations.[10] It is comprised of fifteen judges from around the world, no more

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[8] *See* Murphy, *supra* note 3, at 59–61. Concerns raised by the United States and other states resulted in a conscious effort to balance the objective of "an impartial, permanent judicial forum" with "the desire of states to control their exposure to ICJ decision making." *Id.* at 60–61.

[9] There is an extensive body of literature about adjudication in the ICJ and other international courts and the relative merits of different international judicial bodies. For an introduction to this literature, see, e.g., John B. Bellinger III, *International Courts and Tribunals and the Rule of Law*, *in* THE SWORD AND THE SCALES, *supra* note 3, at 1, 2–6; Cesare P.R. Romano, *The United States and International Courts: Getting the Cost-Benefit Analysis Right*, *in* THE SWORD AND THE SCALES, *supra* note 3, at 419, 442–44; Monroe Leigh & Stephen D. Ramsey, *Confidence in the Court: It Need Not Be a "Hollow Chamber,"* *in* THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS 106 (Lori Fisler Damrosch, ed., 1987); Richard Bilder, *Possibilities for Development of New International Judicial Mechanisms*, 26 STUD. TRANSNAT'L LEGAL POL'Y 317 (1994); Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 800–15 (2012).

[10] U.N. Charter art. 92.

than one from each country.[11] The judges are nominated in their home countries and then are elected by the United Nations Security Council and General Assembly.[12] The members of the Court are required to be independent of their governments.[13]

The ICJ decides two kinds of cases. First, the Court has the authority to issue advisory opinions at the request of UN organs.[14] For example, in 2010, the Court issued an opinion in response to a request from the United Nations General Assembly, which asked the Court whether the Kosovo declaration of independence was in accordance with international law.[15] This advisory function may seem unusual to U.S.-trained lawyers accustomed to the case and controversy requirement in Article III of the U.S. Constitution.[16]

Most of the Court's caseload (about 80 percent), however, has been in a second category—cases between states that are known as "contentious cases," which will be the focus of these remarks. These cases resemble civil cases in U.S. courts, in the sense that one party—always a state[17]—pursues a case against another state. The International Court of Justice does not decide criminal cases involving the prosecution of individual defendants.

Here are some examples of contentious cases, drawn from the Court's current docket:

- In March 2012, the Court held a hearing in a case in which Belgium alleged that Senegal violated its obligation to "extradite or prosecute" the former President of Chad, who allegedly committed numerous crimes while in office.[18]

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[11] Statute of the International Court of Justice art. 3(1), June 26, 1945, 59 STAT. 1055, 3 Bevans 1179 [hereinafter ICJ Statute].

[12] *Id.* art. 4(1).

[13] *Id.* arts. 16, 20.

[14] *Id.* art. 65(1).

[15] Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion (July 22, 2010), *available at* http://www.icj-cij.org/docket/files/141/15987.pdf.

[16] U.S. CONST. art. III, § 2.

[17] ICJ Statute, *supra* note 11, art. 34(1).

[18] Since the delivery of these remarks, the Court has issued a judgment ordering Senegal to submit the case to its authorities for prosecution, if it does not extradite the defendant.

- Australia has brought a case claiming that Japan's program of whaling in the Antarctic violates the International Convention on the Regulation of Whaling.[19]
- We have a number of pending cases in which we are asked to settle boundary disputes.[20] These have been a mainstay of the World Court throughout its history. That is not surprising. Boundary disputes often spark armed conflicts, and disagreements about boundaries often have a large legal component, such as divergent interpretations of a boundary treaty or of the law of the sea.
- Ecuador has brought a case against Colombia alleging that it has been harmed by aerial spraying of herbicides by Colombia, as part of Colombia's anti-coca program.[21]

These examples illustrate that the ICJ is seized with cases on a wide variety of topics within international law, from all regions of the world.

As previously noted, the ICJ was created in the UN Charter and is the UN's principal judicial organ.[22] But the UN Charter does not give the ICJ automatic jurisdiction over contentious cases. Instead, the ICJ has jurisdiction in a contentious case only if a state consents to that jurisdiction. There are two ways for a state to consent to the jurisdiction of the ICJ in advance of a particular dispute.

See Questions Relating to Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment (July 20, 2012), *available at* http://www.icj-cij.org/docket/files/144/17064.pdf.

[19] Whaling in Antarctic (Austl. v. Japan), Application (May 31, 2010), *available at* http://www icj-cij.org/docket/files/148/15951.pdf.

[20] *See, e.g.*, Maritime Dispute (Peru v. Chile), Application (Jan. 16, 2008), *available at* http://www.icj-cij.org/docket/files/137/14385.pdf; Boundary Dispute (Burk. Faso v. Niger), Special Agreement (July 20, 2010), *available at* http://www.icj-cij.org/docket/files/149/5985.pdf.

[21] Aerial Herbicide Spraying (Ecuador v. Colom.), Application (Mar. 31, 2008), *available at* http://www.icj-cij.org/docket/files/138/14474.pdf.

[22] *See supra* note 6.

First, some states accept the Court's compulsory jurisdiction as a general matter, meaning that they agree in advance that the Court has jurisdiction over cases against them.[23] At the moment, there are sixty-seven states that have accepted compulsory jurisdiction in this way, under what is often called the "optional clause" of the ICJ's Statute.[24] States have the option of consenting to jurisdiction unconditionally, or they can exclude certain kinds of disputes. The United States accepted the compulsory jurisdiction of the Court in 1946, albeit with a number of significant reservations, but withdrew that form of consent in the mid-1980s, citing its dissatisfaction with the Court's handling of the case that Nicaragua had brought against the United States.[25]

There is a second way for states to accept the Court's jurisdiction in advance. Certain treaties give the Court jurisdiction over categories of disputes. Many treaties contain provisions called compromissory clauses in which the parties to the treaty agree on a mechanism for resolving disputes under that particular treaty.[26] Some of these provisions specify that the ICJ will have jurisdiction to decide those disputes. There are numerous treaties with such provisions. For example, the United States invoked the compromissory clauses of several treaties as the basis for the ICJ's jurisdiction when it brought a successful case against Iran for the holding of U.S. hostages.[27] The United States remains a party to

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[23] ICJ Statute, *supra* note 11, art. 36(2).

[24] For a list of States that have submitted declarations recognizing the jurisdiction of the Court as compulsory, see http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3 (last visited Oct. 11, 2012).

[25] *See* Murphy, *supra* note 3, at 65–68 (citing sources). For an insightful discussion of the implications of the Nicaragua case, see Lori Fisler Damrosch, *The Impact of the* Nicaragua *Case on the Court and Its Role: Harmful, Helpful, or In Between?*, 25 LEIDEN J. INT'L L. 135 (2012).

[26] *See* ICJ Statute, *supra* note 11, art. 36(1). While compromissory clauses only address jurisdiction over disputes arising under the particular treaty, there are other treaties on the resolution of disputes in which parties accept the Court's jurisdiction more broadly. Well-known examples are the American Treaty on Pacific Settlement (Pact of Bogotá), April 30, 1948, 30 U.N.T.S. 55, and the European Convention on the Peaceful Settlement of Disputes, April 29, 1957, 320 U.N.T.S. 243.

[27] United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 24 (May 24), *available at* http://www.icj-cij.org/docket/files/64/6291.pdf; *see also* Application of United States, United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1982

many treaties that provide a basis for ICJ jurisdiction.[28] Since the mid-1980s, however, it largely has avoided compromissory clauses that would make ICJ jurisdiction mandatory.[29]

It is also possible for a state to consent to the Court's jurisdiction with respect to a particular, known dispute. Most frequently, this takes the form of a "special agreement," in which two countries jointly ask the ICJ to settle a dispute.[30]

Because the Court's jurisdiction depends on the consent of the parties to a dispute, the question whether the Court has jurisdiction in a particular case is an important and fundamental one. To remain faithful to its mandate, the Court must hold states to the consent that they have given. It is equally important, however, that the Court not go beyond such consent.

The provisions governing the structure of the ICJ and the basis for its jurisdiction are not easily changed. As is the case for the UN Charter, the procedure to amend the ICJ Statute requires the approval of two-thirds of UN members, including all five permanent members of the Security Council.[31] The various proposals to update and reform the UN have not included a call to change the ICJ into a court that has automatic jurisdiction over all UN member states. The track record as to optional clause jurisdiction suggests that such a proposal would not attract sufficient support to be adopted.

III. CHANGES IN INTERNATIONAL LAW AND INSTITUTIONS

While the basic structural framework for the ICJ has remained constant since its establishment just after World War II, the

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I.C.J. Pleadings 1, 4–5 (Nov. 29, 1979), *available at* http://www.icj-cij.org/docket/files/64/9545 (discussing treaties that vest the ICJ with jurisdiction over the case).

[28] *See* Murphy, *supra* note 3, at 99–111 (listing treaties to which the United States is a party that provide for ICJ jurisdiction); David J. Scheffer, *Non-Judicial State Remedies and the International Court of Justice*, 27 STAN. J. INT'L L. 83, 89–90 (1990) (concluding that the United States remained a party to more than seventy bilateral and multilateral treaties providing for ICJ jurisdiction even after it withdrew its "optional clause" declaration).

[29] *See* Murphy, *supra* note 3, at 65, 67–68 (explaining the decision by the United States to terminate its acceptance of the Court's compulsory jurisdiction in 1985).

[30] ICJ Statute, *supra* note 11, art. 36(2).

[31] *Id.* art. 69; U.N. Charter art. 108.

broader world of international law has changed tremendously during that same period.

The starting point is that there now are many more states.[32] International law is no longer largely the province of Europe and the United States. Moreover, the reach of international law is much broader and deeper. Traditionally, international law governed the relations among states. In recent decades, the field has expanded to impose obligations on states to protect the rights of their own people, especially with the development of international human rights law. In addition, national courts interpret and apply international law in various circumstances. And finally, public international law now covers a much broader range of topics—including fields such as international environmental law and international trade law.

Of special relevance to today's topic is another huge change—the emergence of many new international players, including international organizations and a variety of visible and active non-governmental organizations. In particular, there are, today, many international courts. The international adjudication section of the international law textbook from which I studied at Boalt Hall School of Law in 1979 mentioned, in addition to the ICJ, only three other courts—two European courts and another regional court that was already defunct at that time.[33] Things have changed. The count varies, but it is fair to say that there are more than twenty standing international courts and tribunals today. If one includes all of the quasi-judicial and arbitral bodies, the number is closer to ninety.[34]

One important group of courts is the international criminal courts, all created after 1990. These include: the International Criminal Court and the International Tribunal for the Former

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[32] With the admission of South Sudan on July 14, 2011, there are currently 193 Member States of the United Nations. *See* http://www.un.org/en/members/index.shtml (last visited Oct. 11, 2012).

[33] NOYES E. LEECH, COVEY T. OLIVER & JOSEPH MODESTE SWEENEY, CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM 79 (1973).

[34] For a snapshot of this panoply of dispute resolution bodies, see *The International Judiciary in Context*, THE PROJECT ON INTERNATIONAL COURTS AND TRIBUNALS, http://www.pict-pcti.org/publications/synoptic_chart/synop_c4.pdf (Nov. 2004).

Yugoslavia, both of which are based in The Hague, as well as the International Tribunal for Rwanda, based in Tanzania. Two other criminal tribunals based in The Hague are the Special Tribunal for Lebanon and the Special Court for Sierra Leone. In each of these courts, and in contrast to the ICJ, a prosecutor pursues a case against an individual defendant alleged to have committed crimes within the mandate of that particular court.

There are also other courts that, like the ICJ, decide cases in which one state brings a case against another. Two important examples are the Dispute Settlement Body of the World Trade Organization and the International Tribunal for the Law of the Sea. These tribunals and others are specialized by region, by topic, or both. This specialization distinguishes them from the ICJ, which is a global court that has the scope to consider questions on any aspect of international law.

Another important category comprises international courts before which individuals appear to bring cases against states. Notable examples are the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Court of Human and Peoples' Rights. In addition, under treaties such as the North American Free Trade Agreement and numerous bilateral investment treaties, tribunals may be established in order to decide cases brought by an investor against a state.

Finally, the institutional mechanisms for tackling disputes raising questions of international law are not limited to courts and tribunals. For example, in recent decades, other specialized quasi-adjudicatory bodies have appeared, including those in the fields of the environment and human rights, that seek to promote the effectiveness of international norms and adherence to those norms without formal, judicial proceedings.[35]

This overview of judicial and quasi-judicial bodies makes clear that the world community not only continues to find value in judicial resolution of various kinds of disputes but also that we have moved from the idea of a single world court to what might be described as a menu of dispute resolution mechanisms. One might

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[35] *See generally* RUTH MACKENZIE ET AL., MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS 415–60, 501–13 (2010).

suspect that all of these other institutions have crowded out the ICJ. What is interesting, however, is that, in parallel with the creation and development of a considerable number of other courts and quasi-adjudicatory bodies, the docket of the ICJ has not contracted. Instead, in the past decade, the Court has been very active—busier, in fact, than it was at some earlier periods where there were fewer other courts and tribunals available to states. And the list of states accepting the Court's jurisdiction is also not static. The most recent acceptance of the Court's compulsory jurisdiction was that of the Republic of Ireland in 2011.[36]

IV. THE UNIQUE ROLE OF THE WORLD COURT

Keeping in mind the original purposes of the ICJ, the kinds of disputes that the Court decides, and the many courts and tribunals that now exist alongside the ICJ, I turn now to the central question posed by today's lecture: what is the role of the ICJ today?

To this end, I would like to look a bit more closely at two core functions of the World Court. First, the Court decides particular legal disputes between states. Second, the Court's jurisprudence performs a "law-making" function through elaborating and clarifying international law.[37]

I turn first to the role that the Court plays in the resolution of a particular legal dispute. What exactly does the Court do when it decides a contentious case? We can begin to answer this question by enumerating some of the particular features of ICJ adjudication:

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[36] *See supra* note 24.

[37] The fact that these two functions are difficult to disentangle heightens the importance of these dual responsibilities:

> [T]he Court has a particular responsibility to provide clear and detailed reasons for its conclusions . . . . This becomes all the more important where the case it is deciding has important implications in other matters before other courts, whether national or international, and where the Court is assuming a law development function.

Philippe Sands, *What is the ICJ For?*, 35 REVUE BELGE DE DROIT INT'L 537, 544–45 (2002).

- The Court issues a legal decision. If the disagreement between the parties is not a legal dispute, the Court has no jurisdiction.
- The Court's judgment, including the remedy that it imposes, is binding on the parties.
- The decision of the ICJ is not subject to appeal.
- The resolution of a dispute in the ICJ is highly structured and often is quite slow. The pace can be frustrating in some cases, but at times it can contribute to resolution of the underlying dispute.
- Adjudication in the ICJ provides a public setting in which to air the state's legal and factual case. By contrast, arbitration is sometimes private. For some, but not all, disputes, a public forum may advance the resolution of the dispute.[38]

I will not attempt here a comprehensive comparison between ICJ dispute resolution and dispute settlement in other settings, such as arbitration.[39] Rather, I ask you to reflect on the dominant image that emerges from the features of ICJ adjudication that I just reviewed—a picture of a tripartite relationship comprised of the two states that are parties to a legal dispute and a third party that is settling the dispute. To gain a fuller appreciation of the role of the ICJ in resolving a particular legal dispute, however, we need to look beyond this triangle and leave the confines of the Peace Palace.

The ICJ must be seen as one component of a larger international legal system, one that is loosely integrated, complex, and sometimes bewildering and that differs markedly from national legal systems. In many situations, the role of the ICJ in settling specific disputes is best understood when the Court is seen as one actor within a set of nested and overlapping institutions

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[38] *See* Richard Bilder, *International Dispute Settlement and the Role of International Adjudication*, 1 EMORY J. INT'L DISP. RESOL. 131, 146–65 (1987) (enumerating the characteristics of international adjudication).

[39] For such a discussion, see Loretta Malintoppi, *Methods of Dispute Resolution in Inter-State Litigation: When States Go To Arbitration Rather Than Adjudication*, 5 L. & PRAC. INT'L COURTS AND TRIBUNALS 133 (2006).

comprising the international legal system. After all, the UN Charter not only established a principal judicial organ, but it also set up other UN organs, including the Security Council and the General Assembly. And as we have just seen, many new institutions have blossomed in the intervening decades—both inside and outside of the UN system. Some have been comprised of governments, while others have been independent of them. National courts can also play an important role in addressing some disputes arising under international law.

Thus, the contribution of the World Court to the peaceful resolution of particular disputes is measured not by considering it in isolation from other institutions, or in competition with them, but rather by evaluating it as a part of a larger web of institutions.

To illustrate this point, I want to focus on what happens after the ICJ renders a judgment. Often, that question is framed in a binary manner: did the losing state comply or not? The answer is not always straightforward. There can be differing views, for example, about what the judgment requires and the time frame for compliance.[40] More importantly, I am convinced that we do not get a complete picture of the role of an ICJ judgment in the settlement of a dispute if we focus solely on compliance. For a more robust understanding of the Court's contribution, we must ask a more open-ended question: what role does the judgment of the ICJ play in the peaceful resolution of a particular dispute between two parties?

By looking beyond compliance, we more accurately reflect the fact that the parties in cases before the ICJ are states represented

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[40] Scholars who have studied compliance with judgments of the World Court have used varied approaches and methodologies—and have reached disparate conclusions. *See, e.g.*, CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 6–17 (2004); Jonathan I. Charney, *Disputes Implicating the Institutional Credibility of the Court: Problems of Non-Appearance, Non-Participation, and Non-Performance*, *in* THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS, *supra* note 9, at 288, 293–302; Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229 (2004); Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987*, 98 AM. J. INT'L L. 434, 436–56, 460 (2004); Aloysius P. Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18 EUR. J. INT'L L. 815, 822–23, 844–46 (2007).

by national governments.[41] The litigators standing before the Court in the Peace Palace might define their goal as winning a court case, but governments are not law firm litigation departments. A government's response to a judgment takes into account a broad range of factors.[42] These might include, for example: the overall relationship between the two disputing parties; constraints that flow from a party's national legal system (e.g., the need to enact new laws in order to give effect to an ICJ judgment); domestic political sensitivities; and resource considerations. Even before a judgment of the ICJ, third states and international institutions may have had an interest or role in the resolution of the underlying dispute. The judgment provides an opportunity for such institutions to engage with the disputants on the basis of the Court's binding pronouncements about the legal issues, rather than the parties' disparate contentions.

To illustrate this more robust framework for evaluation of the effects of a judgment on a particular dispute, I'd like to offer one example. In 2002, the ICJ issued a judgment that defined maritime and land boundaries between Nigeria and Cameroon. At issue were important and large areas of territory and waters. Armed conflict in the disputed areas had caused a number of deaths.[43]

In its 2002 judgment, the ICJ awarded significant areas of land to Cameroon, including an area called the Bakassi Peninsula

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[41] This broader inquiry is sometimes described as a question of "effectiveness," introducing a useful concept, albeit one that invites another set of doctrinal and methodological debates, including, for example, the need to specify the goals as to which the institution is judged as being effective. *See generally* Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AM. J. INT'L L. 225 (2012).

[42] As Harold Hongju Koh has observed, the reason why nations obey international law "remains among the most perplexing questions in international relations." Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2599 (1997). Koh's essay provides a comprehensive overview of the vast literature related to this question.

[43] Land and Maritime Boundary Between Cameroon and Nigeria, 2002 I.C.J. 303, 312 (Oct. 10), *available at* http://www.icj-cij.org/docket/files/94/7453.pdf. Professor Malcolm Shaw called attention to this case and its aftermath in the inaugural Shabtai Rosenne Memorial Lecture given in The Hague on November 24, 2011. *See* Malcolm Shaw, QC, Inaugural Shabtai Rosenne Memorial Lecture: Peaceful Settlement of Disputes: Paradigms, Plurality and Policy (Nov. 24, 2011).

where a large number of Nigerians lived.[44] The Court ordered each party to withdraw from territory that the ICJ had assigned to the other party and to withdraw its military, police, and administrative personnel "expeditiously and without condition."[45] Soon thereafter, Nigeria's President made worrisome statements, implying that Nigeria "neither accepts nor rejects" the judgment, invoking federalism concerns that resonate in the United States.[46] Two years later, one study of compliance with ICJ decisions declined to put this case in the "compliance" category because Nigeria had not relinquished control of territory, including the Bakassi Peninsula.[47] The formal transfer of authority over Bakassi began in 2006 and was completed in 2008.[48] And only now in 2012, ten years after the judgment, are the parties finishing the work of demarcating the boundary.[49]

Some would look at this sequence of events and say, "that's obviously non-compliance with an order to withdraw expeditiously." But let's look at the situation not through the narrow lens of compliance with a decision, but in a broader context that includes the active engagement of various institutions and international actors. Even before the ICJ rendered its judgment, for example, the United Nations Secretary–General convened the heads of states of the two parties to encourage them to organize a commission to implement the ICJ's judgment. Soon after the ICJ's judgment, the parties set up an ad hoc mixed commission, under the leadership of a representative of the Secretary–General, that gave rise to a series of bilateral agreements that set the timetable for the turnover of land to Cameroon and also included pledges by Cameroon to treat Nigerians fairly.[50] The parties agreed on

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[44] *Id.* at 455.

[45] *Id.* at 451–52.

[46] Llamzon, *supra* note 40, at 836.

[47] *See* Ginsburg & McAdams, *supra* note 40, at 1310, 1337.

[48] *See* Press Release, Secretary–General, Agreement Transferring Authority Over Bakassi Peninsula from Nigeria to Cameroon "Triumph for the Rule of Law," Secretary–General Says in Message for Ceremony, U.N. Press Release SG/SM/11745 (Aug. 14, 2008), *available at* http://www.un.org/News/Press/docs/2008/sgsm11745.doc.htm.

[49] U.N. Secretary–General, *Report of the Secretary–General on the Activities of the United Nations Office for West Africa*, ¶ 45, U.N. Doc. S/2012/510 (June 29, 2012).

[50] *See* Press Release, Secretary–General, Nigeria, Cameroon Sign Agreement Ending

detailed monitoring mechanisms. The various stages of the transition to Cameroonian sovereignty proceeded slowly, but they proceeded peacefully.[51]

To me, this is not a disappointing story about non-compliance, but rather is an encouraging story that demonstrates the inter-linkages among international processes and institutions, all contributing to the peaceful resolution of a dispute. The binding pronouncements of the UN's principal judicial organ on the legal aspects of the dispute gave substantive direction to the parties, while other institutions worked with the parties on political and technical aspects of the dispute.[52]

So, bearing in mind this broader conception of the role of the Court in settling a particular dispute, I'd like to turn next to the ICJ's role of clarifying and developing substantive international law. The Court has exercised this function not only when it decides contentious cases but also in its advisory opinions. Indeed, some of the Court's most controversial pronouncements on international law have appeared in advisory opinions.[53]

This law-developing function of the World Court is one of the most important consequences of the move from ad hoc tribunals accountable to the disputing states to a standing, community court

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Decades-Old Border Dispute; Sets Procedures for Nigerian Withdrawal from Bakassi Peninsula, U.N. Press Release AFR/1397 (June 12, 2006), *available at* http://www.un.org/News/Press/docs/2006/afr1397.doc.htm.

[51] For a description of the mandate and activities of the Cameroon–Nigeria Mixed Commission, see *Cameroon/Nigeria Mixed Commission*, http://unowa.unmissions.org/Default.aspx?tabid=804 (last visited Sept. 11, 2012).

[52] Regarding the Cameroon–Nigeria border dispute, there is considerable material that one can examine to understand what has taken place since the ICJ's judgment. Often, however, it is difficult to find complete and reliable information about what happens after the ICJ or another international court renders a decision. What institutions and factors play a role in implementing a particular decision or impeding compliance? Can we draw any conclusions about the kinds of remedies that are either effective or ineffective? More scholarly work and information-sharing is needed on such topics.

[53] *See, e.g.*, Legal Consequences of Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9), *available at* http://www.icj-cij.org/docket/files/131/1671.pdf; Legality of Threat of Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8), *available at* http://www.icj-cij.org/docket/files/95/7495.pdf.

with a prospective and open-ended docket. It is also an especially delicate element of the ICJ's role.[54]

International law, like domestic law, is not always precise and clear, so the need for interpretation and elaboration by the ICJ is inevitable. In many cases, the Court faces sensitive questions about whether to address legal questions narrowly or broadly. As with the decisions the Court makes on jurisdiction, the Court's substantive pronouncements on the meaning and content of international law, the quality and clarity of its reasoning, and the procedures it follows influence the way that members of the world community view the World Court.[55]

A judgment of the ICJ does not bind anyone other than the parties to a case,[56] but the impact within the community of international lawyers is profound. And reactions to the Court's judgments are also varied. Those who dislike a particular result, or the Court's approach more generally, sometimes seek to discredit a judgment or the Court itself. Within the United States, there is a strain of scholarship that paints an unfavorable picture of the ICJ, arguing, for example, that its judgments are a product of national bias by judges.[57]

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[54] See, e.g., William H. Taft, IV, *Self-Defense and the* Oil Platforms *Decision*, 29 YALE J. INT'L L. 295, 306 (2004), in which the Legal Adviser of the U.S. State Department criticizes the Court's judgment in the *Oil Platforms* case [Oil Platforms (Iran v. U.S.) 2003 I.C.J. 161 (Nov. 6)] for addressing the law of self-defense, although it was not necessary to the resolution of the dispute, and asserts that the Court's judgment "suggest[s] new and unsupported limitations on the ability of States to defend themselves from armed attacks."

[55] *See generally* Christopher G. Weeramantry, *Constitutional and Institutional Developments: The Function of the International Court of Justice in the Development of International Law*, 10 LEIDEN J. INT'L L. 309 (1997).

[56] ICJ Statute, *supra* note 11, art. 59.

[57] On the question of impartiality, compare Eric A. Posner, *The International Court of Justice: Voting and Usage Statistics*, 99 AM. SOC'Y INT'L L. PROC. 130, 131 (2005) (citing Eric A. Posner & Miguel F. P. de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599 (2005)) (asserting that statistical analysis reveals national biases among ICJ judges and may explain an alleged decline in recourse to the ICJ) and Eric A. Posner, *The Decline of the International Court of Justice* 10–11 (Univ. of Chi. John M. Olin Law & Econ. Working Paper No. 233, 2004), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=629341 (attributing a "decline" in the Court's output to the alleged impartiality of its judges) with Rosalyn Higgins, *Remarks by Rosalyn Higgins*, 99 AM. SOC. INT'L L. PROC. 135 (2005) (pointing to factual errors, methodological shortcomings, and misunderstandings about the Court's work in the statistical analysis by Posner and de

The law-shaping function of the ICJ is not limited to the specific pronouncements about international law that appear in its judgments and opinions. The existence of the Court also percolates in the background of national decision-making. The prospect of adjudication in the ICJ might at times constrain behavior, but it also might strengthen the confidence of a leader who concludes that a proposed course of action would receive a favorable reaction in the ICJ. Moreover, this influence on national decision-making is not limited to disputes as to which a state has accepted ICJ jurisdiction. Although a state may be convinced that the ICJ would not have jurisdiction over a particular dispute, its officials know that many observers will give great weight—perhaps even dispositive weight—to relevant ICJ jurisprudence. Thus, even if a state does not appear before the ICJ to address a particular legal issue, it can be expected to defend and explain its conduct with reference to the ICJ's jurisprudence. In a world in which all but a few international legal disputes are debated and resolved outside of a courtroom, this widespread practice of measuring the legality of state conduct with reference to ICJ jurisprudence gives the Court's judgments especially long tentacles.

Of course, pronouncements by the World Court are not the only means by which international law is refined and developed. States and other actors interpret and apply international law every day and, in so doing, shape the content of customary international law in particular. Treaties are constantly being negotiated. And the UN's International Law Commission makes valuable contributions

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Figueiredo). On the more general question whether the ICJ and other international courts are effective, compare Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 34–41 (2005) (asserting that usage of the ICJ "has never reached a significant level" and that the Court suffers from chronic non-compliance, except where jurisdiction is based on special agreement) with Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899, 955 (2005) (finding that empirical evidence does not support the conclusion that "independent" international courts and tribunals are less effective than "dependent" tribunals, where judges are closely controlled by the governments appearing before them). *See also* Eric A. Posner & John C. Yoo, *Reply to Helfer and Slaughter*, 93 CAL. L. REV. 957, 972 (2005) (concluding that the ICJ at least has been "a failure" because judges have pursued "agendas different from those of the states that set up and use the ICJ").

through its studies and draft articles. In addition, international courts and tribunals other than the ICJ also develop the law, within their particular mandates. Nonetheless, in the words of one commentator: "[A]s the judicial wing of the United Nations, the Court stands as the most authoritative Court for the interpretation of general rules of international law, with its decisions regularly cited by other global, regional, and national courts."[58]

One recent case illustrates the broad reach of the ICJ's law-developing function. In February, the Court issued a decision that held that judgments rendered by Italian courts against Germany violated Germany's sovereign immunity. There was no applicable treaty, so the Court reached this conclusion by interpreting and applying customary international law.[59] As the Court noted, ten states have legislation governing this issue.[60] In almost all states, therefore, national courts decide whether a foreign state is immune from suit by applying customary international law. (For example, the United States regularly invokes customary international law to assert immunity when it is sued in foreign courts.[61]) After the Court's decision in *Germany v. Italy*, we can expect the Court's statements regarding the scope and content of customary international law governing foreign sovereign immunity to be a key starting point for national courts.

In this single judgment of the Court, then, one can see the two functions of the ICJ on which I have focused in these remarks: the Court settled a specific dispute between Germany and Italy and, in so doing, made pronouncements about customary international law that will have global implications.

As I indicated at the beginning of this lecture, much of the initial impetus for the creation of a world court was the desire to establish a forum for the resolution of specific disputes. When the

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[58] Sean D. Murphy, *The International Court of Justice*, *in* THE RULES, PRACTICE, AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS 11, 35 (Chiara Giorgetti ed., 2012).

[59] Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), Judgment (Feb. 3, 2012), *available at* http://www.icj-cij.org/docket/files/143/16883.pdf.

[60] *Id.* ¶ 70.

[61] The ICJ referred to such evidence of U.S. practice in the *Jurisdictional Immunities* case. *See* Jurisdictional Immunities of the State, *supra* note 59, ¶ 72.

Court settles those disputes, however, as when it renders advisory opinions, the Court shapes international law more broadly. It is through this combination of functions that the ICJ acquires potency as a force in international law.

The World Court is unique because it has the scope to perform these functions with respect to all substantive aspects of international law, in cases arising in all regions of the world, and in response to requests from the Security Council and General Assembly. In addition, this broad mandate resides in a body that is the principal judicial organ of the United Nations. All members of the United Nations elect the judges of the World Court, and those judges are accountable to the world community, not to the particular disputants or to their home countries. Because the Court is the UN's principal judicial organ, its judgments have a special stature. We saw in the Cameroon–Nigeria example how the parties and other international actors can make use of such a judgment to bring about the peaceful resolution of a particular dispute. And we saw in the *Germany v. Italy* case how a judgment also can have a broader law-making function. No other court combines the mandate and the institutional position enjoyed by the World Court.

I have referred here to the "potency" of the ICJ, and I chose that word deliberately because a medicine can be potent, but so can a poison. There are observers who would label the Court as one or the other. As I mentioned earlier, some U.S. scholars are highly critical of the Court, charging it with bias and ineffectiveness. I contrast this perspective with that of a young Bosnian who once described to me in a very moving way the importance to her country of the Court's 2007 decision that the former Yugoslavia had violated international law by failing to prevent acts of genocide in Srebrenica.[62] I hope that this lecture has provided a foundation for each member of the audience to begin to formulate his or her own views regarding the role of the World Court.

When members of the audience consider the work of the ICJ, I urge you to keep in mind the framework for evaluation that I have

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[62] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 43, 238 (Feb. 26), *available at* http://www.icj-cij.org/docket/files/91/13685.pdf.

suggested today, taking account of the combination of functions reposed in the Court, as well as the Court's position within an international legal system that is very different from national legal systems. As I mentioned earlier, international law has changed enormously in the thirty years since I graduated from law school.[63] Nonetheless, the field remains a decentralized and rather disorderly system of norms and institutions. I do not mean this as a criticism. To the contrary, this decentralization and diffusion creates the opportunity for those of us who work as international lawyers—whether as judges, government lawyers, representatives of non-governmental organizations, professors, or counsel to international investors. We are not astronomers studying stars through a telescope; we are active participants in the shaping of the field. I hope that each of you will bear this in mind as you pursue your own interest in the field.

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[63] *See supra* notes 32–36 and accompanying text.