Judge Joan E. Donoghue
President of the International Court of Justice

CONSENT BY STATES TO THE JURISDICTION OF THE INTERNATIONAL COURT OF JUSTICE

Committee of Legal Advisers on Public International Law of the Council of Europe (CAHDI), 24 September 2021

Thank you, Madam Chair.

I am honoured and pleased to participate in the 61st Meeting of the Committee of Legal Advisers on Public International Law of the Council of Europe (CAHDI). At your request, my remarks will focus on the consent by States to the jurisdiction of the International Court of Justice (ICJ). I also look forward to an informal exchange of views with participants present in Strasbourg and with those who, like me, are joining remotely.

On behalf of the Court, let me begin by welcoming the Committee's commitment to the peaceful settlement of international disputes. Among the members of the Council of Europe and other States represented in the CAHDI are some of the strongest supporters of the ICJ on the international scene. I am grateful to find myself today before an audience that is well-acquainted with the important role of the International Court of Justice in the peaceful settlement of international disputes. Given your familiarity with this topic, I propose only briefly to review the different bases of the Court's jurisdiction, before offering some remarks about its approach to certain jurisdictional issues.

As you are all aware, the jurisdiction of the International Court of Justice in contentious cases derives ultimately from the consent of States, which can be expressed in different forms.

First, States may consent to the Court's jurisdiction in relation to a particular known dispute. This is most commonly accomplished by means of a special agreement – often referred to as a *compromis* – requesting the Court to adjudicate a specific and defined dispute that has

already arisen. This has been the jurisdictional basis adduced in approximately 15% of the contentious cases submitted to the Court to date.

An additional means of consenting to the Court's adjudication of a known dispute is often referred to as *forum prorogatum*. The expression designates cases in which a State files an application to institute proceedings without indicating the basis for the Court's jurisdiction in respect of the respondent State. The respondent may subsequently accept the jurisdiction of the ICJ either by express declaration or by its conduct, for example by filing a written pleading or appearing before the Court.

There are also several ways in which a State can consent to the Court's jurisdiction more generally, in advance of any known dispute. As is well known, pursuant Article 36, paragraph 2, of the Statute, a State may deposit an "optional clause" declaration recognising the Court's jurisdiction as compulsory in relation to any other State accepting the same obligation. During the Court's 75-year history, approximately 30% of the applications in contentious cases have invoked such declarations as the primary title of jurisdiction.

I would also recall, in this respect, that the CAHDI was instrumental to the adoption in July 2008 of the Recommendation of the Committee of Ministers of the Council of Europe to Member States on the Acceptance of the Jurisdiction of the International Court of Justice. In that document, the Committee of Ministers recommended that "the governments of member states that have not yet done so consider accepting the jurisdiction of the ICJ in accordance with Article 36, paragraph 2, of its Statute".[1] Since then, several member States heeded the Committee of Ministers' call by depositing declarations or withdrawing reservations to their earlier acceptance of the Court's jurisdiction. Currently, declarations have been deposited by a total of 74 States, including 28 Council of Europe member States.

In addition, certain treaties on the peaceful settlement of disputes provide for the jurisdiction of the Court over future legal disputes between parties to the treaty, without limitation to a particular dispute or area of law. Examples include the American Treaty on Pacific Settlement (Pact of Bogotá) and the European Convention for the Peaceful Settlement of

[1] Recommendation CM/Rec(2008)8 of the Committee of Ministers to member states on the acceptance of the jurisdiction of the International Court of Justice adopted by the Committee of Ministers on 2 July 2008 at the 1031st meeting of the Ministers' Deputies.

Disputes, which provided the jurisdictional basis for the Court to hear the case concerning *Jurisdictional Immunities of the State* between Germany and Italy, in which it delivered its Judgment in 2012. Given their general scope, consent to jurisdiction pursuant to these treaties may be regarded as similar in some respects to optional clause declarations under Article 36, paragraph 2 of the Statute.

Finally, hundreds of bilateral and multilateral treaties dealing with a specific subject matter – such as diplomatic relations, consular relations or human rights – contain compromissory clauses or other mechanisms, such as optional protocols, that provide a basis for consent to the Court's jurisdiction over disputes concerning the interpretation or application of that treaty. In approximately 40% of the contentious cases submitted to the Court to date, international treaties were invoked as the primary title of jurisdiction.

When a State accepts the Court's jurisdiction with respect to future potential disputes, it acquires the possibility of filing an application in the Court initiating a case against a respondent. This can be a valuable addition to the State's tools for pursuing the peaceful settlement of disputes. At the same time, acceptance of the Court's jurisdiction in advance of a known dispute arising means that the State may find itself as a respondent in a case brought by another State. This possibility naturally raises questions within governments that are considering whether to accept the Court's jurisdiction in relation to a particular treaty or more generally. Concerns may be raised about whether the Court will reach to exercise jurisdiction that goes beyond the consent of that State, exposing it to international adjudication of disputes that it had neither foreseen nor had intended to be decided by the Court.

Having now spent eleven years on the Court, I would like to share my own impression that the Court takes great care in assessing the existence of its jurisdiction in a given case. Since the ICJ Statute made consent a cornerstone of the jurisdictional framework, the Court is mindful that its authority hinges, among other things, on the unwavering respect for the boundaries of its jurisdiction. Both the Court's procedural framework and its substantive approach to jurisdictional issues reflect this priority.

Procedurally, jurisdictional issues are commonly addressed on the basis of preliminary objections by the respondent State. But in each case, and irrespective of whether the

respondent raises a preliminary objection, the Court must satisfy itself that the case falls within its jurisdiction.[2] The Court may decide, on its own initiative, that it is necessary to determine questions of jurisdiction and admissibility separately from and before any proceedings on the merits. In a few recent cases, the Court on its own initiative has ordered an initial round of written pleadings dealing with jurisdiction and admissibility, and has directed the applicant to address these issues before the respondent does so.

The Court recently adopted amendments to its Rules of Court to clarify the procedural framework concerning preliminary objections. In October 2019, Article 79 of the Rules of Court was revised to distinguish more clearly between the procedure applicable to preliminary objections raised by a party and that concerning preliminary questions of jurisdiction or admissibility identified by the Court.

Substantively, the Court's attention to the limits of its jurisdiction *ratione materiae* is illustrated by its judgment in the *Jadhav* case issued in 2019. That case concerned the treatment of an Indian national, Mr. Jadhav, who had been detained, tried and sentenced to death by a military court in Pakistan. India argued that Pakistan had failed to provide consular notice and consular access in violation of the 1963 Vienna Convention on Consular Relations. It invoked, as the basis for the Court's jurisdiction, Article I of the Optional Protocol to the Vienna Convention, concerning the compulsory settlement of disputes arising out of the interpretation or application of that Convention.

In addition to its arguments based on the Vienna Convention, India also asked the Court to declare that the death sentence against Mr. Jadhav violated his "elementary human rights" as set out in the International Covenant on Civil and Political Rights. Pakistan did not raise a jurisdictional objection in this respect, either as a preliminary matter or during the proceedings on the merits. Nevertheless, in its Judgment of 17 July 2019, the Court found that its jurisdiction in the case arose exclusively from Article I of the Optional Protocol to the Vienna Convention, and thus covered only India's claims based on alleged violations of that Convention, and not alleged breaches of international obligations under the ICCPR.[3]

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[2] The Court "must . . . always be satisfied that it has jurisdiction, and must if necessary, go into that matter *proprio motu*". See *Appeal relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, I.C.J. Reports 1972, p. 52, para. 13; *Jurisdictional Immunities of the State (Germany v. Italy)*, Judgment, I.C.J. Reports 2012, pp. 117-118, para. 40.

[3] *Jadhav (India v. Pakistan)*, Judgment, I.C.J. Reports 2019, pp. 430-431, para. 36.

On the merits, the Court ultimately found that Pakistan had breached certain obligations under the Vienna Convention relating to consular notification and consular access.

Applicant States and observers may, at times, be frustrated by the limitations of the Court's jurisdiction *ratione materiae*. The two cases concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* in the context of the former Yugoslavia are particularly instructive in this respect.

The first case, instituted by Bosnia and Herzegovina in 1993, concerned Serbia's responsibility for atrocities committed during the 1992-95 Bosnian War. Bosnia had originally alleged violations of various conventions and of customary international law. In its 1996 Judgment on preliminary objections, the Court rejected several grounds for jurisdiction invoked by Bosnia and found that the sole valid basis of jurisdiction was Article IX of the Genocide Convention. As a result, in its subsequent Judgment on the merits, the Court held that it had "no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict, […] even if the alleged breaches [were] of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed *erga omnes*".[4]

Because of the applicable jurisdictional constraints, even if the evidence established that atrocities had been committed, the Court had scope to consider *only* whether those acts amounted to genocide. The Court's judgment in that case, as well as the subsequent case brough by Croatia against Serbia under Article IX (and Serbia's counter-claim in that case), was therefore limited to the interpretation and application of the Genocide Convention.

In response to these cases, commentators have pointed out that "because ICJ jurisdiction was based on a compromissory clause in the Genocide Convention, the Court's discussion […]

[4] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 104, para. 147; confirmed in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, pp. 45-46, para. 85.

missed the point" and that the cases "evidenced the difficulty created by the gaps in state responsibility for the commission of crimes against humanity".[5]

Such observations about the limits faced by the Court are fair. There are gaps in the codification of the primary rules of international law, as well as in the scope of the Court's jurisdiction. It is not, however, the role of the Court to fill these gaps. On the contrary, I am convinced that the credibility of the International Court of Justice would be undermined if it succumbed to the temptation to extend its jurisdiction beyond the limits of the consent expressed by States. Other avenues are more appropriately available to the international community to address gaps in the codification of international law or in possible bases for the Court's jurisdiction. The Draft Articles on Prevention and Punishment of Crimes Against Humanity elaborated by the International Law Commission, for instance, constitute a laudable effort to fill the above-mentioned gap in relation to certain categories of atrocities.

A further example of the Court's attention to the boundaries of its jurisdiction *ratione materiae* can be seen in its Judgment in a recent case in which the applicant State invoked the compromissory clause in the International Convention on the Elimination of All Forms of Racial Discrimination (the "CERD") as the applicable title of jurisdiction.

As you are aware, the definition of "racial discrimination" under that Convention is wide-ranging, covering instances of "distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin".[6] In a recent case instituted against the United Arab Emirates, Qatar invoked the compromissory clause in Article 22 of the CERD as the basis for jurisdiction. The Court was asked to pronounce on the scope of the notion of "racial discrimination", and the corresponding limits of its jurisdiction *ratione materiae*. Qatar's application concerned a series of measures taken by the UAE, including what Qatar characterised as "travel bans" imposed on Qatari nationals, which allegedly violated the respondent State's obligations under the CERD. A central question for the Court was whether the term "national origin" in the definition of racial discrimination in the CERD encompasses current nationality. The Court found that that was not the case and,

[5] L N Sadat & D J Pivnichny, 'Towards a New Global Treaty on Crimes Against Humanity' (*EJIL: Talk!*, 5 August 2014), <https://www.ejiltalk.org/towards-a-new-global-treaty-on-crimes-against-humanity/> accessed on 24 September 2021.

[6] International Convention on the Elimination of All Forms of Racial Discrimination, Article 1 (1).

consequently, that the measures complained of by Qatar that were based on the current nationality of its citizens did not fall within the scope of the Convention. On this basis, among others, the UAE's objection to the ICJ's jurisdiction was upheld and the case removed from the Court's docket.

Finally, I would note that the Court's commitment to respect the limits of the jurisdiction conferred to it by States does not mean that it must interpret or apply a given international instrument – a bilateral treaty including a compromissory clause, for instance – in a vacuum.

In any given case, and irrespective of the jurisdictional title invoked by the Parties, the Court may apply, on an incidental basis, certain fundamental rules of international law, such as the law of treaties or State responsibility. The Court has stated that, in order to determine whether an obligation under a given convention has been breached, it "will have recourse not only to the Convention itself, but also to the rules of general international law on treaty interpretation and on responsibility of States for internationally wrongful acts".[7]

The rules of treaty interpretation were applied, for instance, in the case concerning *Pulp Mills on the River Uruguay*, where Argentina had instituted proceedings against Uruguay with respect to alleged breaches of a 1975 bilateral treaty on the utilization of a watercourse, relying on a compromissory clause in that treaty as the basis of the Court's jurisdiction.[8]

Similarly, the Court has consistently applied the general law of state responsibility, including for instance the rules on the attribution of conduct to a State[9] and on the consequences of internationally wrongful acts,[10] including in cases where its jurisdiction was limited *ratione materiae*, such as those instituted on the basis of compromissory clauses in treaties.

To conclude, while taking full advantage of well-established rules of general international law in its interpretation and application of the legal regimes it is called to apply, the ICJ

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[7] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 105, para. 149.

[8] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, pp. 46-47, para. 66.

[9] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 202, para. 385.

[10] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 461, para. 121.

strives to respect the limits of the jurisdiction bestowed upon it by States. At the same time, the Court also pays due attention to applicant States' equities and to their entitlement to take advantage of mechanisms for the peaceful settlement of international disputes, where such mechanisms are available. While respondent States should not be required to litigate international disputes on the merits where there is no valid jurisdictional basis to do so, the Court also owes it to applicant States to hear and adjudicate all cases fully where jurisdiction *does* exist.

It is hoped that the ICJ's attention to these competing and complementary imperatives and to the complex jurisdictional issues that may arise in proceedings before it, together with the high quality of the Court's judgments and the fairness and transparency of its procedures, will contribute to maintaining and enhancing member States' confidence in the Court.

On this note, Madam Chair, I propose to conclude my remarks. I would like to thank participants for their attention and I look forward to a fruitful exchange of views. In my former role as a foreign ministry lawyer, I have had the privilege of participating in CAHDI meetings and very much enjoyed the opportunity to chat with such a large and distinguished group of public international lawyers.

I am aware that some of the States participating today are involved in cases before the Court and I am confident that participants will be careful not to raise questions about pending cases or about issues presented to the Court in those cases. On this basis, I am open to a discussion of whatever topics interest the members of the Committee.