

KEYNOTE ADDRESS

Reflections on International Law in Changing Times

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At the outset, I would like to thank the *Harvard International Law Journal* (“HILJ”) team for their kind invitation. I was privileged to have had the chance to twice join this great university, first as a visiting scholar at the Center for International Affairs—now the Weatherhead Center for International Affairs—and later as a member of the LL.M program at the Law School. Today, I also feel privileged to have been given this opportunity to speak before you.

My remarks will of course cover the activities of the International Court of Justice (“ICJ”) but will not be limited to them, as I will try to put the work of the Court in the broader context of challenges facing international law in our changing times. Looking back at some history will help introduce the subject. So, let me start by congratulating the *Harvard International Law Journal* on its sixtieth anniversary and allow me to pay tribute as well to my alma mater’s long history of contributions to the development of contemporary international law.

As a matter of fact, at the time of the Journal’s founding in 1959,¹ international law activities at Harvard Law School (“HLS”) already had a rich history. Some notable members of the faculty in the first half of the twentieth century included Philip C. Jessup, Manley O. Hudson, and Richard R.

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1. See HARVARD INTERNATIONAL LAW JOURNAL, *About* (2019), <https://perma.cc/EK6Q-FEKM>.

Baxter, all of whom served as Judges on the ICJ or its predecessor the Permanent Court of International Justice (“PCIJ”).² In addition, Professor Louis B. Sohn represented the United States in the drafting of the ICJ Statute.³

Beginning in 1929, and continuing through 1961, students—just like yourselves—would participate, under the supervision of the HLS faculty, in elaborating draft conventions on important, yet underdeveloped at the time, areas of international law.⁴ At least thirteen such conventions, aptly known as the Harvard Draft Conventions, were produced; among the first were:

- *Harvard Draft Convention on the Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners* (1929):⁵ This draft dealt with the question of State Responsibility over seventy years before the International Law Commission (“ILC”) eventually adopted its Draft Articles on State Responsibility.⁶
- *Harvard Draft Convention on Jurisdiction with Respect to Crime* (1935):⁷ This draft set forth the territorial and nationality approaches to jurisdiction, which would later be partly adopted in the Rome Statute of the International Criminal Court, sixty-three years later.⁸
- *Harvard Draft Convention on the Law of Treaties* (1935):⁹ This draft predated the Vienna Convention on the Law of Treaties (“VCLT”) by thirty-four years.¹⁰

These draft conventions were met with such success that, in 1956, when the United Nations International Law Commission adopted its first report on State Responsibility, it commended HLS’s role in the following terms:

As the Commission is aware, the Director of the Codification Division of the Office of Legal Affairs of the United Nations suggested to the Harvard Law School that it should revise and bring

2. See International Court of Justice, *The Court: All Members*, <https://perma.cc/UTH8-T3P5> (last visited Apr. 1, 2019) (listing Philip C. Jessup and Richard R. Baxter as ICJ judges); Permanent Court of International Justice, Thirteenth Annual Report of the Permanent Court of International Justice, Series E.—No. 13 (June 15, 1936–June 15, 1937), <https://perma.cc/JU6N-HRY9>, 20 (chronicling Manley O. Hudson’s election as a judge on the PCIJ).

3. See Daniel Barstow Magraw, *Tribute to Louis B. Sohn: Architect of the Modern International Legal System*, 48 HARV. INT’L L.J. 1 (2007).

4. See generally HARVARD RESEARCH IN INTERNATIONAL LAW: CONTEMPORARY ANALYSIS AND APPRAISAL, 433–540 (John P. Grant & J. Craig Barker, eds., 2007).

5. See *id.* at 437–40.

6. See International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001).

7. See HARVARD RESEARCH, *supra* note 4, at 487–92.

8. See Rome Statute of the International Criminal Court, art. 12(2)(a)–(b), July 17, 1998, 2187 U.N.T.S. 3.

9. See HARVARD RESEARCH, *supra* note 4, at 493–502.

10. See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

up to date the draft convention on the responsibility of States which Harvard Research had prepared and published in 1929. The Director of the Codification Division said that the revision of the draft would be of great assistance to the International Law Commission when it came to examine the topic. The Harvard Law School accepted the suggestion and entrusted the organization of the work to the Director of International Legal Studies. In the course of writing his report, the Special Rapporteur visited the Harvard Law School for the purpose of arranging for co-operation, which he considered of great value to the Commission's future work.¹¹

It thus comes as no surprise that it was here at Harvard Law School where the first student-edited journal of international law was founded in 1959. The *HILJ* has since risen to prominence as the *primus inter pares* of international law journals, holding the title of "the most-cited,"¹² and certainly the most prestigious, if I may add, journal of this kind.

HLS continues to play an important role today in international law, particularly in the fields of international human rights law and international humanitarian law. Here, I need not stress the timeliness of the work of the Program on International Law and Armed Conflict and of clinics such as the International Human Rights Clinic and the Immigration and Refugee Clinic.

I still have more to say about our school, but I will leave it to my concluding remarks as I wish to turn now to what I consider the main challenges facing international law in 2019.

Undoubtedly, the momentum gained by globalization in the post-Cold War era led to an expansion of international law and to enhanced international cooperation, including the creation of many new international organizations. However, the way globalization has developed also generated many forms of discontent and dynamics of backlash, from the promotion of a more sovereignty-focused vision of world order and international law by China and Russia to the resurgence of unilateralism in the United States and the mounting of ultra-nationalist and populist movements, from both the right and the left, in Europe, as well as in other parts of the world. The dangerous, chauvinistic, and racist attitudes that have marked these movements—for example toward migrants and refugees—threaten many of the basic norms and values of contemporary international law. Indeed, the momentum gained by these movements was fueled by the increase of terrorist attacks, but such xenophobic attitudes feed in turn into the propaganda of terrorist groups, such as ISIS and al-Qaeda, and end up being self-defeating.

11. Y.B. I.L.C., Vol. II, A/CN.4/96, (1956), ¶¶ 13–14.

12. HARVARD INTERNATIONAL LAW JOURNAL, *supra* note 1.

A paradox ought to be noted here as well. While international law was expanding in the post-Cold War area, it was nonetheless being undermined by its often double-standard application—or better, non-application—as in the 2003 intervention in Iraq, which lacked the authorization of the Security Council, or actions exceeding the mandate of Security Council resolutions 1970 and 1973 on Libya in 2011.¹³ These are just a few examples of a larger phenomenon.

Indeed, globalization has retreated in a number of ways and multilateralism is under attack. Yet, with the rapid technological progress that we are witnessing the interconnectedness of the world has kept increasing, as best illustrated by the volume and spread of international interactions in an ever-growing number of fields. In turn, this is leading to an increase in what Kofi Annan, the former United Nations Secretary-General, once labeled as “problems without passports,”¹⁴ such as climate change, pandemics, transnational crimes, and terrorism. The main characteristic of these problems is not only that they know no national borders, but also that they cannot be solved by any single State on its own, no matter its power or wealth. Moreover, “problems without passports” are problems that can only be addressed through greater international coordination and cooperation.¹⁵ From developing the norms and rules to building the frameworks and structures needed to tackle these problems, international law will have a critical role to play.

Let me now briefly address two of these “problems”: climate change and cybercrime.

The evidence for climate change is overwhelming. Oceans are warming, the acidity of their waters is increasing, ice sheets are shrinking, glaciers are retreating almost everywhere around the world, snow is melting earlier, and the global sea level rose between five and eight inches in the last century.¹⁶ The planet’s average surface temperature has risen about 0.9 degrees Celsius (1.62 degrees Fahrenheit) since the late nineteenth century.¹⁷ Each of the last three decades has been successively warmer than any preceding decade since 1850, and last year, 2018, was the fourth hottest in recorded history.¹⁸

In its Fifth Assessment Report, the Intergovernmental Panel on Climate Change (“IPCC”), a group of 1,300 independent scientific experts from countries all over the world under the auspices of the United Nations, concluded that there is a better than ninety-five percent probability that human activities over the past fifty years are the primary driver for the warming our

13. See U.N. S.C. Res. 1970 (Feb. 26, 2011); U.N. S.C. Res. 1973 (Mar. 17, 2011).

14. Kofi A. Annan, *Problems Without Passports*, FOREIGN POLICY (Nov. 9, 2009), <https://perma.cc/4997-NVBR>.

15. *Id.*

16. Ocean Portal Team, *Sea Level Rise*, SMITHSONIAN OCEAN (2018), <https://perma.cc/R8FY-YJXU>.

17. European Union Copernicus Climate Change Service, *Last Four Years Have Been the Warmest on Record – and CO₂ Continues to Rise* (Jan. 7, 2019), <https://perma.cc/8L5N-GZ7X>.

18. *Id.*

planet.¹⁹ And a 2013 study showed that over ninety-seven percent of peer-reviewed scientific articles endorsed the consensus that humans are causing global warming.²⁰

According to IPCC, the net damage costs of climate change are likely to be significant and to increase over time. With more extreme weather conditions, including more droughts, heat waves, and hurricanes, the biodiversity of the planet will suffer, and people will risk having their economies disrupted, livelihoods threatened, and health affected.

Rising sea levels will hit the coastal areas of the planet—where eight of the top ten largest cities are located²¹—and will also represent an existential threat to several small island states like Kiribati, the Maldives, Vanuatu, Tuvalu, the Solomon Islands, Samoa, Nauru, Fiji, and the Marshall Islands.

Moreover, the destabilizing impacts of climate change are already contributing to massive movements of population and increased tensions over natural resources in many regions around the world, leading the Security Council to recognize in a presidential statement of August 2018 “the adverse effects of climate change, ecological changes, and natural disasters among other factors on the stability of Central African Region, including through drought, desertification, land degradation, and food insecurity.”²²

The 2015 Paris Agreement was a milestone in international efforts to fight climate change. However, new evidence suggests that the Paris Agreement goal to limit the increase in global temperature to two degrees Celsius above pre-industrial levels may not be ambitious enough to effectively curb the negative impacts of climate change. In fact, the most recent IPCC special report not only shows the “world of a difference” that limiting Global Warming to 1.5 degrees Celsius would make, but that this is still possible.²³

Climate change is indeed humanity’s existential threat of our times. And it is a global challenge par excellence in that it does not respect international borders and can have no national solution. As it has often been emphasized, “emissions anywhere affect people everywhere.”²⁴ Obviously, there is no solution to climate change but through greater international cooperation. A number of recent studies having warned that climate change could accelerate faster than predicted, urgent and better coordinated action at the international level will be required.

19. Intergovernmental Panel on Climate Change, *Fifth Assessment Report: Part A*, 5 (2014), <https://perma.cc/J23G-39JF>.

20. John Cook et al., *Quantifying the Consensus on Anthropogenic Global Warming in the Scientific Literature*, 8 ENVTL. RES. LETTERS 1, 3 (2013).

21. See United Nations Atlas of the Oceans, *Human Settlements on the Coast* (2016), <https://perma.cc/7QGE-4WFM>.

22. United Nations Security Council, *Statement by the President of the Security Council*, S/PRST/2018/17 (Aug. 10, 2018).

23. Intergovernmental Panel on Climate Change, *Special Report—Global Warming of 1.5 °C* (2018), <https://perma.cc/2PHQ-WJAA>.

24. United Nations Sustainable Development Goals, *Climate Action*, <https://perma.cc/SF78-X5HC>.

State commitment is indeed the critical factor here. However, rising to this challenge will no less require greater efforts in the development of, both soft and hard, international law, in order to address the wide array of emerging needs in the field, from producing more elaborate guidelines to operationalize the Paris Agreement to devising innovative monitoring frameworks to ensure its implementation and to developing new mechanisms to facilitate its update when the need comes.

The second “problem without passport” that I would like to now address is cybercrime. To a great extent, cyberspace has replaced outer space as the new frontier of international law—which was the frontier during my days at law school. But unlike outer space, activities in cyberspace have become part of the everyday life of an ever-increasing number of people across the globe.

These activities often include interactions between private or public actors in different states and could produce different legal consequences in each of these states. Obviously, this is the case with any of the following activities: voice and data communication through social media, commercial transactions on websites, the use of bitcoins or other forms of cyber “money,” cyber-attacks by private actors, or hackers, operating from one state against targets (such as banks or critical industries) in another state, not to mention the use of cyberspace by states for spying activities and attacks on the military centers—or even civilian infrastructures—of another state.

Such cyber activities have been raising novel and complex legal issues of international law, in many different areas such as governance, jurisdiction, international trade and taxation, in addition to questions related to the role and application of international human rights and international humanitarian law in cyberspace.

Cyberwarfare deserves particular attention. Over the past years, many different actors have utilized cyber weapons in rather high-profile attacks. The specialized literature is vast on the subject. Let me simply recall some of the attacks which I guess we are all quite familiar with due to their wide media coverage: In 2007, Estonian governmental organizations, banks, and media outlets were targeted by a series of cyber-attacks. In 2008, the websites of several Georgian and Russian entities were disabled by cyber-attacks. In 2009, South Korea’s major government, news media, and financial websites were swamped by cyber-attacks. In 2010, Iranian nuclear facilities were targeted by the—now famous—*Stuxnet* worm.²⁵ In 2014, a group operating under the name “Guardians of Peace,” succeeded in hacking major confidential data from Sony Pictures and later demanded that Sony withdraw its

25. See Kim Zetter, COUNTDOWN TO ZERO DAY: STUXNET AND THE LAUNCH OF THE WORLD’S FIRST DIGITAL WEAPON (2015).

film *The Interview*, a comedy about a plot to assassinate North Korean leader Kim Jong-un.²⁶

In light of such events, one can understand why UN Secretary-General António Guterres recently said that he is “absolutely convinced that, differently from the great battles of the past, which opened with a barrage of artillery or aerial bombardment, the next war will begin with a massive cyber-attack to destroy military capacity . . . and paralyze basic infrastructure such as the electric networks.”²⁷ But Guterres also remarked that “[e]pisodes of cyber warfare between states already exist,” and rightly concluded that “what is worse is that there is no regulatory scheme for that type of warfare, it is not clear how the Geneva Convention or international humanitarian law applies to it.”²⁸

Alongside the incredible benefits brought about by the internet in empowering people and accelerating human progress, cybercrime has also massively spread in addition to the already mentioned dangers of cyberwar. (This is to set aside the thorny problem of state attribution.) For example, the anonymity of the internet has been very widely used by terrorist groups for recruiting members, disseminating their propaganda materials, and planning attacks. The so-called *Darknet* also has also been serving as a dynamic platform to traffic women and children, and to sell prohibited weapons, illegal drugs and bogus pharmaceuticals.

Given all of these developments, the need for greater regulation of cyberspace should have become obvious. Here too, international cooperation and coordination is the key factor. The general consensus that international law applies in cyberspace does not seem enough, unless rapidly developed, to deal with the unintended consequences or malicious use of the internet. The High-level Panel on Digital Cooperation established last year by the UN Secretary-General, and co-chaired by Melinda Gates and Jack Ma, considered that the need was for “smart” regulation. By “smart,” they meant “regulation to enable rather than stifle innovation and economic development.”²⁹ The panel also noted that one of the main challenges to developing such regulation was “the speed of technological progress, which outpaces the capacity of governments to regulate.”³⁰ Hence, the urgency for new and dynamic approaches to develop for cyberspace the needed legal norms, frameworks, and regulations to cope with the rapid changes and developments of the field.

26. Andrea Peterson, *The Sony Pictures Hack, Explained*, WASH. POST (Dec. 18, 2014), <https://perma.cc/B2W6-DJRS>.

27. Andrei Khalip, *U.N. Chief Urges Global Rules for Cyber Warfare*, REUTERS (Feb. 19, 2018) (quoting António Guterres' speech at the Universidade de Lisboa), <https://perma.cc/PN2Z-B59J>.

28. *Id.*

29. U.N. Secretary-General's High-Level Panel on Digital Cooperation, *Summary Note: First Meeting of the High-level Panel on Digital Cooperation*, (Sept. 24–25, 2018), <https://perma.cc/EL6B-2YW3>.

30. *Id.*

An important question remains unaddressed: Where does international justice stand with respect to all these challenges?

In my opinion, the most significant development in international law since the end of the cold war remains the re-birth (if I may use this term) of international criminal law. When I graduated from HLS, the existence of international criminal law was confined to the legacy of the Nuremberg and Tokyo tribunals, as no progress in this field had since been made. And let me add that while the establishment of these tribunals has indeed represented a historical milestone in the journey of international criminal law by holding individual leaders responsible for their crimes, one should not forget that they had also been criticized as representing “victors’ justice.”

It is only owing to a revitalized Security Council at the end of the Cold War that the idea of resorting anew to international criminal tribunals to address situations of widespread atrocities such as the one that erupted in the former Yugoslavia could materialize. Hence, the International Criminal Tribunal for the former Yugoslavia (“ICTY”) was established in 1993 pursuant to a unanimous Security Council resolution, to be shortly followed in 1994 by another resolution establishing the International Criminal Tribunal for Rwanda (“ICTR”).

In addition to providing a framework for trying the individuals accused of perpetrating atrocities in Rwanda and the former Yugoslavia, the establishment of these two tribunals undoubtedly heralded a new era of putting an end to impunity.

Several international or internationalized tribunals were subsequently created jointly by national governments and the United Nations: The Special Panels and Serious Crimes Unit in East-Timor, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the Regulation 64 Panels in the Courts of Kosovo, and The Special Tribunal for Lebanon.

Moreover, for the first time in human history, a universal criminal court, the International Criminal Court, was created to help end impunity for the perpetrators of the most serious crimes of concern to the international community, namely genocide, crimes against humanity, and war crimes. Established pursuant to the Rome Statute of 1998, which entered into force in 2002, it has now a membership of 122 states.³¹

Let me mention here that, in addition to the three above mentioned crimes, the review conference of the Rome Statute, held in 2010 in Kampala, reached a consensual definition of “the crime of aggression” and decided to include it within the jurisdiction of the court. Later, the Assembly of State Parties, meeting in December 2017, decided to activate the jurisdiction of the Court over this crime as of July 17, 2018.

31. International Criminal Court, The States Parties to the Rome Statute, <https://perma.cc/6DVP-5YAW> (last visited Apr. 1, 2019).

Taking stock of all the developments since the creation of the ICTY, Judge Theodor Meron, the former President of the UN International Residual Mechanism for Criminal Tribunals, referred to these twenty-five years as “an era in which accountability is increasingly the expectation, rather than the exception.”³² Yet, noting that there remains “a huge gap between the actual accountability efforts undertaken on the one hand and the far larger number of individuals who are believed to be responsible for atrocity crimes on the other”³³ he warned that “a failure to close the accountability gap reflects in essence acceptance of selectivity in the enforcement of the law” and rightly stressed that “such selectivity or uneven enforcement of the law is anathema to the rule of law.”³⁴

The ICC turned fifteen in 2017, and last year we celebrated the twentieth anniversary of the Rome Statute. Yet, given the serious failures to prevent grave violations of international human rights and international humanitarian rights in different parts of the globe, and in particular given the atrocities that are being committed in Syria, South Sudan, the Central African Republic, Iraq, or Myanmar, it is only legitimate to ask whether one can be confident that the perpetrators of these crimes will be prosecuted and punished and whether any justice will be rendered to their victims. Doubts in this respect are also supported by the failure of states to enforce some ICC warrants, as in the notorious case of Omar Al-Bashir, the Sudanese President.

These are legitimate concerns and important questions which I shall try to address. However, let me first underscore the importance of what international criminal courts have so far achieved by stressing that twenty-five years ago it was simply unthinkable that heads of states or governments could no longer benefit from the protection and immunity afforded by their status, and could be prosecuted and indicted in such courts.

Not only heads of state (as in Serbia, Liberia, and Sudan) and of governments (as in Rwanda and Cambodia) were prosecuted and indicted, but hundreds of individuals, including senior military and paramilitary commanders, were tried and convicted for war crimes, crimes against humanity and genocide by international criminal courts. For example, in the case of the International Criminal Tribunal for the former Yugoslavia, 161 persons were indicted and ninety convicted for committing such atrocities, including high ranking military officers and political leaders.³⁵

Moreover, whether in the former Yugoslavia, Rwanda, Cambodia or Sierra Leone, investigations and prosecutions helped to confirm and document his-

32. Theodor Meron, *Closing the Accountability Gap: Concrete Steps Toward Ending Impunity for Atrocity Crimes*, 112 AM. J. INT'L L. 433, 433–34 (2018).

33. *Id.*, at 434.

34. *Id.*, at 435.

35. Marlise Simons, *Yugoslavia Tribunal Leaves Rich Legacy, but 'Immense' Challenges Remain*, N.Y. TIMES (Dec. 23, 2017), <https://perma.cc/Q5JG-6QDT>.

torical facts in an independent and impartial manner, and many victims were as a result able to receive some measure of justice. It is also important to note here that, under the ICC statute, and for the first time in international criminal justice, victims have the possibility to share their views and concerns, through their legal counsel, who advocate on their behalf in the courtroom and can claim reparations in case the proceedings lead to a conviction.

Let me now turn to three important contributions of the jurisprudence of these tribunals to the development of international criminal law:

One: In the *Tadić* case, the ICTY held that the notion of “war crimes” also applied to serious violations of international humanitarian law rules in *internal* armed conflict and so was not limited to inter-state conflicts.³⁶ Likewise, in the 2003 *Hadžibasanović & Kubura* case, it held that the notion of “command responsibility” also applied in time of *internal* armed conflict.³⁷

Two: International criminal tribunals developed an important body of case law regarding sexual violence in situations of armed conflict. For example, while the crimes of rape were not prosecuted and punished at the Nuremberg and Tokyo Trials, the ICTY was the first international criminal tribunal to enter convictions for acts of rape as constituting a form of “torture,” and for sexual enslavement as a “crime against humanity.”³⁸ In a number of cases it also examined charges of sexual assault against men.³⁹ As to the ICTR, it held that rape can be an underlying act of genocide in the famous *Akayesu* case.⁴⁰

The ICC handed down its first conviction for rape as a war crime and as a crime against humanity in March 2016 in the *Bemba* case, based on Bemba’s failure to exercise control properly over the militia he commanded.⁴¹ Here, let us note that the ICC had included in its definition of “crimes against humanity” under Article 7 of its Statute, “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity,” when such acts are “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”⁴²

36. See *Prosecutor v. Tadić* (IT-94-1-AR72), ICTY Appeals Chamber, Interlocutory Decision on Jurisdiction (Oct. 2, 1995).

37. See *Prosecutor v. Hadžibasanović & Kubura* (IT-01-47), ICTY Appeals Chamber, Judgment (Apr. 22, 2008).

38. See ICTY, *Crimes of Sexual Violence*, <https://perma.cc/Y5ZT-LQVR> (last visited Apr. 3, 2019).

39. See *Prosecutor v. Tadić* (IT-94-1), ICTY Trial Chamber, Decision on the Defence Motion on Jurisdiction (Aug. 10, 1995); *Prosecutor v. Brđanin* (IT-99-36), ICTY Appeals Chamber, Judgment (Apr. 3, 2007); *Prosecutor v. Todorović* (IT-96-9/1), ICTY Trial Chamber, Decision on Prosecution Motion to Withdraw Counts of the Indictment and Defence Motion to Withdraw Pending Motions (Feb. 26, 2001).

40. See *Prosecutor v. Akayesu* (ICTR-96-4), ICTR Appeals Chamber, Judgment (June 1, 2001).

41. *Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/05-01/08-3343), ICC Trial Chamber III, Judgment pursuant to Article 74 of the Statute (Mar. 21, 2016).

42. Rome Statute of the International Criminal Court, art. 7(1)(g), July 17, 1998, 2187 U.N.T.S. 3.

Three: Based on the doctrine of command responsibility, a superior may be convicted not only for crimes that he ordered, but for crimes committed by his subordinates which he either failed to prevent or failed to punish after they had occurred. The jurisprudence of the international criminal courts and tribunals contributed to clarify and develop this important doctrine, by applying it not only to military actors, but also to paramilitary actors and civilians in positions of command, whether *de jure* or *de facto*.

This said, I would now like to address certain limitations and criticisms facing the ICC and international criminal justice more generally.

The main limitation of the ICC is that it has jurisdiction only over crimes committed on the territory of or by nationals of state parties. For this reason, the ISIS/Da'esh criminals operating in Iraq have, for example, remained out of the reach of the Court. An exception to this rule is the authority of the Security Council to refer cases to the Court. However, this possibility has also its own limitations, owing to the political nature of this body and the effect the veto power of its permanent members has on its decision making. Hence, the Security Council has failed, for example, to refer to the Court the situation in Syria, where the worst atrocities have been committed over the past eight years. The ICC is also constrained by the principle of complementarity, according to which it is competent to conduct investigations only when states are unable or unwilling to prosecute the crimes themselves. Moreover, from the initial request for cooperation, at the investigation stage, to the implementation of its arrest warrants, the ICC remains entirely dependent on its member states. When the latter do not enforce the Court's decisions, they help perpetuate impunity, underlying the accountability gap, which I mentioned earlier.

Of particular importance here is to note that first, the Court's effectiveness has been seriously limited by the refusal of major powers such as the United States, China, and Russia to join it, and second, the Court's legitimacy has been challenged by African critics who reproach to the Court its bias against African states in the choice of its investigations, calling it "a European Court for Africa," leading some of its states parties to threaten to leave the Court.⁴³

In addition, the work of the ICC has also faced severe criticisms ranging from the activation of its jurisdiction to the conduct of its trials. Each of the different ways of activating its jurisdiction has found its own critics: "self-referrals," when a state refers the situation on its territory to the ICC, have been criticized as often being an attempt to instrumentalize the Court in a domestic conflict between the government and its opposition. Referrals from the U.N. Security Council have been criticized as highly political ones with the ICC being used as a tool in the maneuvering and counter-maneuvering

43. See Franck Kuwonu, *ICC: Beyond the Threats of Withdrawal*, UNITED NATIONS AFRICA RENEWAL (May-July 2017), <https://perma.cc/RR25-68WZ>.

of the permanent members of the Council. And *proprio motu* invitations by the prosecutor have been considered by some critics as an unwelcome form of foreign intervention lacking local support, and hence, legitimacy.

As to the work proper of the Court, many have underlined the excessive length and high costs of the ICC proceedings and of those of international criminal courts in general. A major problem which has affected the ICC's perception and efficiency is the question of witness interference in many of its trials. For example, in its first case, *Lubanga*, all the former child soldiers, but one, who were invited by the prosecution to testify against the indicted ultimately proved to be unreliable (according to the judgment of the Trial Chamber itself), having been influenced or manipulated.⁴⁴

The main lesson to draw from all these shortcomings is that in addition to emphasizing the critical importance of greater international cooperation to end impunity, the ICC and the other criminal tribunals also need to enhance their credibility and efficiency by improving their methods of work and by addressing more effectively the problems of costs and length of their proceedings.

Those of us who wish to see the international rule of law prevail should continue aiming at the universal ratification of the Rome Statute. Let us, however, recall that the cornerstone of this statute is the complementarity principle, which gives priority to accountability and justice at the national level. Ending impunity thus requires both international and national prosecutions. And from a very practical standpoint, we ought to recognize that the numbers of suspected perpetrators who must be investigated and potentially prosecuted for atrocities, far exceeds the capacity of international courts. Serge Brammertz, the prosecutor of the International Residual Mechanism for Criminal Tribunals, rightly reminds us that notwithstanding the fact that the ICTY's 161 indictments and ninety convictions were the highest numbers of all international tribunals, "this is only a fraction of the justice that is needed. In Bosnia and Herzegovina alone, there are more than 3,500 suspected perpetrators who still remain to be investigated and potentially prosecuted."⁴⁵

I find no better words to conclude this part of my talk than those of wisdom one finds in the very last paragraph of Antonio Cassese's classic book on international criminal justice:

Some international criminal tribunals suffer from the "Nuremberg syndrome," the tendency to try the "vanquished," while the "victors" remain sheltered from any judicial scrutiny. It is a fact that the accusations widely made against some members of the

44. See Prosecutor v. Thomas Lubanga Dyilo (ICC-01/04-01/06-2842), ICC Trial Chamber, Judgment (Apr. 5, 2012).

45. Serge Brammertz, *International Criminal Justice: The Beginning of the End or the End of the Beginning?*, Keynote Address at the Women's International Forum (Dec. 7, 2018).

Tutsi leadership for the 1994 genocide have never been verified through judicial inquiry. However, the way the ICC has been structured entails that in principle it should not be tainted by that notable drawback.⁴⁶

Let me finally turn to the International Court of Justice. When I was admitted in 1990 to Harvard Law School as an LL.M student, in that year only one new case was filed with the ICJ, only one order of provisional measures and one advisory opinion were rendered, but no judgment. The number of cases on the docket of the Court was six. In contrast, in 2018, the year I joined the Court, six new cases were filed, four judgments were rendered as well as two orders of provisional measures, and the number of cases on its docket rose to twenty-one.⁴⁷

These are very revealing numbers about the growing activity of the Court. As a matter of fact, the Court is more utilized today than it has ever been, and this notwithstanding that only seventy-three states have subscribed to the optional clause granting *ipso facto* compulsory jurisdiction to the Court, under article 36(2) of its Statute.⁴⁸ This is an issue that has often been presented as a major sign of weakness of the Court given that the fundamental requirement regarding its jurisdiction is the consent of the parties. In this respect, I would like to make the following remarks:

One: True that the number of states that have chosen to accept the compulsory jurisdiction of the Court, pursuant to the optional clause, does not represent a majority of the United Nations membership. However, let me on the one hand remind that the number of these states has increased from twenty-three in 1945, to forty-six in 1970, to sixty in 2000, and up to seventy-three at the present time. But on the other hand, these declarations of acceptance of the Court's jurisdiction are much too often accompanied by reservations and conditions which are, in the words of Judge Rosalyn Higgins, a former President of the Court, "carefully worded, with so much legal skill, so as to render almost nil the scope of the apparent acceptance of the Court's jurisdiction," thereby simply adding to "the days and weeks that the Court will spend on objections to jurisdiction, and diminishes the time it has for resolving major substantive disputes."⁴⁹

Two: In addition to filing a declaration of acceptance under the optional clause, let us recall that states have always had three other ways to manifest their consent, namely (a) by concluding between or among themselves a special agreement to submit a given dispute to the Court, (b) by informal or implied acceptance of jurisdiction pursuant to the principle of *forum proro-*

46. ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW*, 444 (2d ed., 2008).

47. See International Court of Justice, *List of All Cases*, <https://perma.cc/5N8Y-YZPG>.

48. See International Court of Justice, *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, <https://perma.cc/9Z36-MNA5> (last visited Apr. 2, 2019).

49. PHILIPPE COUVREUR, *THE INTERNATIONAL COURT OF JUSTICE AND THE EFFECTIVENESS OF INTERNATIONAL LAW* 57 (2016).

gatum, or (c) by entering into a treaty with a compromissory clause granting the Court jurisdiction over any dispute that may arise between or among the parties regarding the interpretation or application of the treaty. The fact that over 300 treaties contain such clauses led the current President of the Court, Judge Abdulqawi Yusuf, to affirm, rightly so, that “contrary to conventional wisdom, optional clause declarations are not the be-all-and-end-all of jurisdiction; instead compromissory clauses play a significantly more important role in establishing the jurisdiction of the Court.”⁵⁰

To illustrate the importance of the role played by such compromissory clauses, let me remind you of the following: in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, once the Court found that it had jurisdiction to deal with it, the United States decided first to no longer appear before the Court, and later to withdraw its declaration of acceptance of the Court’s jurisdiction.⁵¹ Likewise, following the Court’s judgment in the case concerning *Nuclear Tests*, France also decided to withdraw its declaration of acceptance of the Court’s jurisdiction.⁵² However, notwithstanding such withdrawals both the United States and France are still a party to more than one contentious case before the Court. Contrary to appearances, there is no paradox or contradiction in the matter because such cases were brought before the Court based on compromissory clauses in treaties to which the United States and France are parties.

Again, those of us who wish to see international rule of law prevail should continue to aim to establish a system of universal compulsory jurisdiction to cure the limitations of the present system of consensual jurisdiction. However, pending the fulfilment of the conditions that would allow the realization of such a radical change, let us not disregard the realistic advantage that the consensual principle still offers. This is well illustrated in the words of Robert Kolb, one of the leading scholars on the International Court of Justice, who writes:

[B]y limiting its [that is, the Court’s] jurisdiction to cases which states have agreed to submit to it, the chances of an execution of the judgment are greatly increased. In fact, there are very few judgments which have not been fully executed (none at all at the PCIJ, and around five at the ICJ . . .).⁵³

50. Abdulqawi Ahmed Yusuf, *Compulsory Jurisdiction of the Court under the Optional Clause*, in *NEW CHALLENGES TO INTERNATIONAL LAW – A VIEW FROM THE HAGUE*, 8–9 (Steven van Hoogstraten, ed., 2018).

51. *See* *Military and Paramilitary Activities in and against Nicaragua (Nic. v. U.S.)*, Judgment, 1986 I.C.J. Rep 14 (June 27). *See also* Termination, Declaration Recognizing a Compulsory the Jurisdiction of the Court, in Conformity with Article 36, Paragraph 2, of the Statute of the International Court of Justice, 1985 U.N.T.S. 270, Annex A.

52. *See* *Nuclear Tests (N.Z. v. Fr.)*, Judgment, 1974 I.C.J. Rep. 457 (Dec. 20). *See also* Letter of Jan. 10, 1974, 907 U.N.T.S. 129.

53. Robert Kolb, *ELGAR COMPANION TO THE INTERNATIONAL COURT OF JUSTICE*, 186 (2014).

Beyond the growing activity of the International Court of Justice over the past years, I would also like to underline the importance of the steady trend in the Court's jurisprudence towards a greater recognition of the rights and interests of the individual under international law, even though it remains true that only states can appear before the Court.

In its very first case, the *Corfu Channel* case decided in 1949, the Court had already made reference to "elementary considerations of humanity" and to the customary nature of humanitarian law treaties.⁵⁴ Later, in its 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, it had underlined the complementarity of humanitarian law and human rights affirming that "the International Covenant on Civil and Political Rights does not cease in times of war."⁵⁵

The Court had also stated in the 1970 *Barcelona Traction* judgment that "rules concerning the basic rights of the human person, including protection from slavery and racial discrimination" are *erga omnes* obligations.⁵⁶ And in the 1981 *Tebran Hostages* case, the ICJ expressly referred to the Universal Declaration of Human Rights, considering that the treatment of the detained U.S. diplomatic and consular personnel was incompatible, *inter alia*, "with the fundamental principles" enunciated in the Declaration.⁵⁷ Furthermore, in the *Congo v. Uganda* judgment of 2005 there is a mention, for the first time in the *dispositif*, of findings of violations of human rights, associated with violations of international humanitarian law.⁵⁸

Another milestone in this trend is the *Diallo* case of 2012. In this case, the ICJ not only made cross-references to the relevant case-law of the Inter-American and European Courts of Human Rights—which is a *première* in itself—it also stated in a clear recognition of the individual's interests under international law that "the sum awarded to Guinea in the exercise of diplomatic protection of Mr. Diallo is intended to provide reparation for the latter's injury."⁵⁹

Indeed, before *Diallo*, the Court had already addressed many situations concerning the interests of individuals or groups of individuals, such as the *Nottebohm* case concerning the issue of nationality, the cases of the *Trial of Pakistani Prisoners of War*, the *U.S. Diplomatic and Consular Staff* case concerning the U.S. hostages in Tehran, which I have already mentioned, the case on the *Application of the Convention on the Prevention and Punishment of the*

54. *Corfu Channel* (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 4 (Apr. 9), 22, 28.

55. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226 (July 8), ¶ 25.

56. *Barcelona Traction, Light and Power Company, Limited* (Belg. v. Spain), Judgment, 1970 I.C.J. Rep. 3 (Feb. 5), ¶ 34.

57. *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), Judgment, 1980 I.C.J. Rep. 3 (May 24), ¶ 91.

58. *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168 (Dec. 19), ¶ 345(3).

59. *Ahmadou Sadio Diallo* (Republic of Guinea v. Dem. Rep. Congo), Compensation, Judgment, 2012 I.C.J. Rep. 324, (June 19), ¶ 57.

Crime of Genocide, the *Frontier Dispute* between Burkina Faso and Mali case, and the *LaGrand* and *Avena* cases concerning consular assistance.⁶⁰

However, the novelty of *Diallo* lies in the Court's acknowledgment of the individual's interests under international law in a manner that departs from the traditional doctrine of diplomatic protection under which the state plays an exclusive role, as best illustrated by the PCIJ affirming in the *Mavrommatis* case that:

By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law . . . Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant.⁶¹

And quite recently, the protection of the interests of individual Qataris was at the core of the ICJ order of July 2018, on provisional measures in the case Qatar brought against the United Arab Emirates (“UAE”) under the Convention on the Elimination of All Forms of Racial Discrimination.⁶² Although I said in a dissenting opinion that the Court should have found that it lacked *prima facie* jurisdiction, for the situation did not qualify as one of “racial” discrimination, I also added that, taking account of the claim that Qataris residing in the UAE have been in a vulnerable situation, this would not have prevented the Court from underlining, in its reasoning, the need for the parties to ensure the prevention of any human rights violations.

Let me conclude now my remarks on the ICJ by advancing that in tune with the increasing openness on the part of the Court to address individual interests and human rights issues, the time seems ripe for the Court to start allowing individuals to be heard in its judicial proceedings of direct concern to them. The idea is not to open the Court to individual applicants, but rather to give individuals *locus standi* before it when their interests are at stake. And let us not lose sight of the fact, that beyond states, the ultimate concern of international law should always be human beings.

60. See *Nottebohm* (second phase) (*Liech. v. Guat.*), Judgment, 1955 I.C.J. Rep. 4 (Apr. 6); *Trial of Pakistani Prisoners of War* (*Pak. v. India*), Interim Protection Order, 1973 I.C.J. Rep. 328 (July 13); *United States Diplomatic and Consular Staff in Tehran*, *supra* note 57; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, 2007 I.C.J. Rep. 43 (Feb. 26); *Frontier Dispute* (*Burk. Faso v. Mali*), Judgment, 1986 I.C.J. Rep. 544; *LaGrand* (*Ger. v. U.S.*), Judgment, 2001 I.C.J. Rep. 466 (June 27); *Avena and Other Mexican Nationals* (*Mex. v. U.S.*), Judgment, 2004 I.C.J. Rep. 12 (Mar. 31).

61. *Mavrommatis Palestine Concessions* (*Greece v. U.K.*), 1924 P.C.I.J., (ser. A) No. 2, at 12 (Aug. 30).

62. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Qatar v. U.A.E.*), Provisional Measures, Order, (July 23, 2018).

“Restyling the respected Old Lady,” as the editor of *Realizing Utopia* commenting on the future of the Court elegantly puts it, would also require the ICJ to open up its contentious jurisdiction to intergovernmental organizations in view of the increasing role they play in the world today.

Finally, given that the General Assembly and Security Council may request advisory opinions from the Court on “any legal question” and that other United Nations organs and specialized agencies may also do so with respect to “legal questions arising within the scope of their activities,” isn’t it high time to revive the proposal of granting the Secretary-General of the United Nations such authority as well, especially now that the idea of “preventive diplomacy” seems to be gaining momentum?

I told you earlier that I would like to leave what I still had to say about HLS to my concluding remarks. I guess this time has come. I know this is not a commencement speech, but I would still like to take this opportunity to call on HLS students to turn to the challenges of the future that I have tried to outline in my remarks today. “Problems without passports” will require forward-looking solutions, and enhancing the international judicial system will require innovative approaches. I encourage you to explore ways in which international legal solutions can be developed to confront these crucial issues of tomorrow.

Also, while it is important to dig deep into specific sub-regimes of international law, it is also vital to always keep in mind that rules of general public international law serve as the scaffolding on which new legal solutions are to be built.

What problems of tomorrow will you choose to tackle?

What would the next *Harvard Draft Convention* address?

I do not know. But I would like to remain confident that you will live up to the pioneering role of your predecessors in the development of international law and to the progressive spirit that animated them.

