THE BROOKINGS INSTITUTION

THE CONTRIBUTION OF THE HAGUE'S INTERNATIONAL COURTS: DISPUTE SETTLEMENT IN COMPLEX CONFLICTS

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Introduction:

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THEODOR MERON
President
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BROOKS DALY
Secretary General
Permanent Court of Arbitration

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P R O C E E D I N G S

MS. FERRIS: ICC's dispute settlement in complex conflicts. That's a lot of Cs. The contributions of The Hague's international courts.

We're very pleased to have all of you, and especially our distinguished visitors from The Hague, and to learning more about the ways in which these international courts are playing a vital role, both in human rights and in foreign policy.

My name is Beth Ferris. I'm a senior fellow here at Brookings, and I work on humanitarian and displacement issues, and I'm here to introduce this program and to moderate the event on behalf of my colleagues in the Managing Global Order project.

We're going to begin this morning with some brief remarks by the Mayor of The Hague, Jozias Van Aartsen. And then we're going to see a short video, which is what the technology people were just doing, maybe two minutes. And then the panelists will come up here, and we'll have a discussion about the role of international courts.

But first, let me briefly introduce the Mayor, Mayor Van Aartsen. You all have the biographical information in your packets, so I won't read it, but he's been Mayor of The Hague since March 2008, and has a very distinguished career in Dutch politics, having served as Dutch Foreign Minister for several years in 1998 to 2002.

We're very delighted to have you here, Mr. Mayor, and to tell us more about the unique contributions the city of Hague makes to the world.

Thanks.

MR. VAN AARTSEN: Madam Chair, thank you very much.

Madam Ambassador, Presidents, ladies and gentlemen, it's a delight to be here at the Brookings Institute. Many thanks to you, to the institute on behalf of the

peace and justice delegation from the city of The Hague.

I stand here today as the Mayor of the city of The Hague, international city of peace and justice, host city to the courts and the tribunals seated here in front of me and before you.

The global commitment to defending justice and human rights is, in fact, headquartered in the Netherlands. The Netherlands is, you could say, home to the world's most important defense system against human rights violations, war crimes, genocide, and other international, commercial, and civilian conflicts.

The Hague is also known as the legal capital of the world, and has over 130 organizations working on the prevention and prosecution of violations of basic human rights, strengthening legal systems in countries where they are weak, and establishing a more peaceful and stable world through international cooperation.

As Mayor and as a Dutch citizen, I'm proud that this commitment to promoting international legal order is enshrined in the Dutch constitution. It's a fundamental part of our identity. It is, so to say, the vocation of Holland, as I coined it yesterday during the meeting in the afternoon.

I'm not a lawyer. Above and beyond the two functions I just mentioned, I speak here as a human being, but with a strong sense of urgency. Our humanity is a real common denominator for us all, what binds us, for instance, in our responsibility to protect -- R2P, in UN speak -- dispute settlements in complex conflicts -- certainly is a matter of law, requiring lawyers and legal specialists, requiring The Hague international courts.

They are incredibly important. I've a great -- and we in the city have a great respect for them. I believe they provide the world with an anchor -- an anchor it needs. But being neither a lawyer nor a legal specialist, I see legal dealings as part of a

broader social and political setting in which accountability and responsibility are called for. Every individual human being carries responsibility.

Take Samantha Power, a leading voice calling for armed intervention in humanitarian crisis situations. And it was she who, as Special Assistant to President Obama, persuaded the President to intervene in Libya. And I quote her: "What we need is the willingness to put something on the line. The real reason the United States and the European states did not what they could and should have done to stop genocide was not lack of knowledge or lack of capacity, but a lack of will."

We are readily moving from an exclusive focus on state sovereignty in a traditional sense, in the way of mind your own business, to a focus where human dignity is leading. And so R2P in my view is also, more importantly, a moral concept for us all.

Libya is a case in point, Syrian situation, as we all know here in this room, is much more difficult, but haven't we here also a moral responsibility or a moral obligation?

The Arab Awakening is also our wakeup call. We are living in a Facebook world. We all know it. And where human rights activists make a difference -- look at what's finally happening in Uganda to stop Joseph Kony. Invisible Children's 30 minute film has been viewed by more than 85 million times on YouTube, and it is a testimony to the power of social media.

Everywhere in our global village, people are worried. They are invoking the national and international responsibility to protect. And as the ICC prosecutor, Moreno-Ocampo, pointed out, stopping Joseph Kony is not just important for the Ugandan people; it's important for everyone.

What, then, is the role of the courts in relationship to this responsibility to protect?

The courts, ladies and gentlemen, are of a major importance. Two weeks ago, you know, there was the verdict on the Congolese warlord, Thomas Lubanga, by the ICC. The President of the ICC will elaborate on it.

The courts and all the other institutions dedicated to international law, they form a crucial network at present in the city of The Hague -- a network that protects our interests and maintains -- we strive for -- they strive for global stability, by preventing and punishing those who disregard the world's fundamental values.

President Franklin Delano Roosevelt was right back in 1941 -- and in my view, he is still today -- freedom from fear; that is what R2P is about. Human security for all. Freedom from fear has everything to do with the delivery of justice, or even with the promise of that delivery.

And The Hague is the place where this justice is felt to be done, and I strongly believe in that purpose and in anything that serves us, including this panel this morning. And again, thanks to the Brookings Institute, and I wish you a perfect discussion with the Presidents this morning.

And I don't know how I have to do it. Technically, I don't know this machine. But there is a short video about The Hague.

SPEAKER: The Netherlands -- this European nation that some know as Holland -- is the leader on peace and justice issues. We promote and defend international law, human rights, and freedom -- a moral obligation that is enshrined in the Dutch constitution.

The city of The Hague, called the legal capital of the world, is home to organizations that make our world safer and more stable. They end seemingly intractable disputes, such as protective battles between states. They curb the proliferation of biological and chemical weapons, and they bring perpetrators of genocide

and other egregious crimes to justice.

SPEAKER: Chamber has reached its decision –-

SPEAKER: The Hague is an icon of hope and opportunity in places like Freetown, Kinshasa, and Beirut.

Together with the United States, we support the institutions that advance our common goals: economic growth, international justice, human rights, opportunity for all.

American icon Andrew Carnegie funded construction of the Peace Palace in The Hague to support this commitment. It now houses the International Court of Justice and the Permanent Court of Arbitration, which President Theodore Roosevelt helped establish.

Because of America's commitment, the Dutch commitment, and that of others, these protections, these rights, and these organizations will continue, safeguarding the world's children, giving voice to the vulnerable, and seeking fairness and justice for all. They help keep the world stable and secure, and they are aligned with American values.

MS. FERRIS: Well, thank you very much. Thank you for that video, which was a wonderful introduction to the topic for our discussion this morning, and thank you, too, for your remarks, Mr. Mayor. It's really an honor to have all of you with us.

We're going to begin this morning by hearing from Peter Tomka, who's been a member of the International Court of Justice since 2003, and has served as President since February of this year. Again, I'm not going to go through the whole biographical information, as you have that in front of you.

But he will be followed then by Sang-Hyun Song, who's been a Judge on the International Criminal Court since 2003, and has served as its President since 2009.

Then we'll hear from Theodor Meron, who's President of the International Criminal Tribunal for former Yugoslavia, and has held many important positions prior to assuming that post.

And finally, we'll hear from Brooks Daly, who's the acting Secretary General for the Permanent Court of Arbitration, which, as we just learned, was set up by our own President Roosevelt.

Thank you all very much. They have the daunting task of presenting complex issues, and an overview of criminal proceedings, and the way in which the courts work in only 10 minutes each. Each of them will speak for 10 minutes, and then we'll have time for questions, and discussion, and comments from all of you.

So thank you for your attention, and welcome. We'll begin with you.

MR. TOMKA: Thank you very much for welcoming, and for this introduction. It's a pleasure for me to talk to you about the principal judicial organ of the United Nations, International Court of Justice, which has been headquartered in The Hague since 1946, formerly being established in 1945; first judges were elected 1946.

But that does not mean that The Hague is a seat of a court dealing with disputes between states only since that period. In fact, International Court of Justice, in its work, continues what has been done since 1922 until 1946 by the Permanent Code of International Justice, first court for disputes between sovereign states established by the League of Nations.

And there is a great American tradition and contribution to establishment of these two courts. In fact, great American lawyer, who used to be Secretary of State, Elihu Root, was member of the committee of jurists, which drafted the statute of the Permanent Code of International Justice.

And on that court, there were four great American judges, including

Charles Evan Hughes, who resigned from that court in order to assume his new position as Chief Justice of the United States Supreme Court.

Well, since 1946, the court has exercised its function in the United Nations architecture, being principal judicial organ in one of the six main organs of United Nations.

Through settlement of dispute between sovereign states, the court contributes to the achievement of primary goals and purpose of United Nations; that is, to maintain international peace and security, to promote justice.

The court can deal with disputes between states only if concern has been expressed by the parties to the dispute. Individuals have no standing before the court. There are situations where individuals can complain about breaches of their rights -- human rights courts -- bring to the attention through appropriate channels violations of international obligations to other institutions.

The concern, though, with jurisdiction of the International Court of Justice can be expressed by states, either by making declaration recognizing jurisdiction of the court on the statute. Currently, there are some 67 declarations in force. That's not so high. It's slightly over 1/3 of membership in the United Nations.

But there is around 300 either multilateral or bilateral conventions which contain a clause which grants jurisdiction to the court to deal with disputes relating to the application or implementation of such conventions or treaties.

And then there are also regional instruments of peaceful settlement of disputes which provide for the jurisdiction. That tradition is strong, in particular in Latin America. There is a Pact of Bogota which confers jurisdiction to the court to adjudicate disputes between parties to the Bogota Pact on any legal matter which may arise between them, or the 1957 convention in the context of Europe -- European Convention

on Peaceful Settlement of Disputes.

There were periods when the court was busy; in particular, the beginning of its existence, then periods when there were either few cases, or there were years when no judgment was rendered. But in last 20 years, due to also some geopolitical changes, the court has been busier than ever, and in the last 20 years, the court has rendered more judgments than during the first 46 years of its existence -- more than 50 judgments. And even currently, the court has in its docket some 13 cases coming from different corners of the world.

Some disputes involve maritime disputes, other boundary disputes. If these issues are not resolved in a peaceful way, there is a risk that they may transform into open conflicts.

While in the ‘80s, there was a boundary dispute between two African countries, Burkina Faso and Mali. There were armed clashes between the two countries. The matter was brought before the court. The court issued order and provision letters, which both countries respected, and then the court, in due procedure, determined the boundary between these two countries.

Currently, there is a dispute between Burkina Faso and Niger about the boundary, although luckily, there has been no open conflict between the two countries. They agreed to bring the matter jointly to the court.

So through this adjudicated work, the court contributes to the overall purpose of the United Nations, as I have mentioned.

You might think that the number of judgments rendered by the court is not so high. But one has also to appreciate that the court is a court of first and last instance. We are not like U.S. Supreme Court, which deals with only legal issues. We have to consider the evidence brought by states before the court. Sometimes this

evidence is voluminous. And then carefully consider arguments of the parties, as the judgment of the court will have a persuasive effect only if they are convincing legal arguments. It is based on a solid legal analysis, and there are reasons provided by the court.

The court consists of 15 members, coming from different corners of the world, representing different legal systems. And as a matter of principle, the court decides all cases in its full composition unless the parties agree that the chamber be formed consisting of five members.

United States has been party to a number of disputes before the court. United States sees the court in order to assert rights under international law.

For instance, when United States diplomatic personnel was held hostage after Islamic revolution in Iran, and the court adjudicated that Iran was in breach of provisions of diplomatic law on inviability.

There was another dispute when Canada and United States agreed to bring the maritime boundary problem dispute in the Gulf of Maine, and they asked the court -- and this was for the first time in history -- to form the chambers. And even they agreed on the composition of the chamber. They indicated to the court, to the President of court who should sit, and the court respected the wishes of the states' parties to the dispute, as the court considers itself to be a facility for states to resolve peacefully their disputes, because there is no other legally acceptable way of resolving disputes, either by agreement only, legally, or through adjudication, as international law prohibits recourse to force.

And it was another great American Secretary of State, who later became Judge of the Permanent Court of International Justice, who coauthored the first international convention treaty prohibiting recourse to force. I have in mind 1928 Pact of

Paris, or sometimes referred to as Briand-Kellogg Pact -- Frank Kellogg, who served as Secretary of State.

So this is briefly about the International Court of Justice, and the predecessor of this court. So this year, in fact, we have been celebrating 90 years of international judicial organ in The Hague, settling disputes between sovereign states.

Thank you.

MS. FERRIS: Thank you very much, Mr. President. We'll turn now to the International Criminal Court, and hear from Sang-Hyan Song.

MR. SONG: Okay.

Excellencies, ladies and gentlemen, it is a great pleasure for me to speak today at such a prestigious institution, and offer some brief remarks about the International Criminal Court.

Of the four courts represented here in this panel, the ICC is the youngest one.

In 1998, when the Rome Statute of the International Criminal Court was adopted, many people were doubtful about the prospects of this new institution. In a remarkably short period of time, the requisite number of 60 ratifications was reached, and the ICC was formally born on July 1, 2002.

The ICC is an independent organization, which is not part of the United Nations. Instead, an assembly of states' parties approves the court's budget, provides the management oversight, and acts as the legislator of the ICC's basic legal documents.

The most significant development in relation to the assemblies' legislative role so far took place in June 2010, when the states' parties agreed on agreements to the Rome Statute regarding the crime of aggression. However, these amendments will enter into force in 2017 at the earliest.

In the meantime, the ICC is exercising its jurisdiction with respect to three other categories of international crimes; that is to say, genocide, crimes against humanity, and war crimes.

The ICC has competence if a crime was committed in the territory of, or by a national of a state party, or another state accepting the ICC's jurisdiction. In other words, the Rome Statute draws on the traditional principles of territoriality and active nationality for the exercise of criminal jurisdiction.

The only exception to this is if the U.N. Security Council has referred a situation to the ICC prosecutor, pursuant to Chapter VII of the U.N. Charter, as it did with respect to the Darfur/Sudan and Libya situations.

Today, the ICC is undoubtedly an international organization of major significance. The ICC is currently dealing with international crimes allegedly committed in seven countries.

In addition to Sudan and Libya, these are the Democratic Republic of the Congo, Uganda, the Central African Republic, Kenya, and the Ivory Coast.

Last year, eight new suspects appeared before our judges, more than in all previous years combined.

Two weeks ago, the ICC issued its first judgment, convicting Mr. Thomas Lubanga Dyilo for conscripting and enlisting children under 15 years of age, and using them to participate actively in hostilities in the Democratic Republic of the Congo.

Increasingly, the world is turning its eyes to the ICC when reports of atrocities committed with impunity emerge from any part of the world. The unanimous decision of the U.N. Security Council to refer the Libya situation to the ICC, with the affirmative votes of the U.S., China, Russia, India, was one of the strongest indicators of the growing international confidence in the ICC's role.

Of course, it is a sovereign decision for each state to make, whether to ratify or acceded to the Rome Statute. Thus far, 120 countries have decided to take that step, and to embrace the benefit, as well as responsibilities that it brings.

What I frequently find in my discussions with the senior government officials from various countries is that lack of information and misconceptions are frequently the major obstacles to joining the ICC's system.

One of the key points I always stress is the principle of complementarity; meaning that national jurisdictions always have the primary duty and right to prosecute Rome Statute crimes. In contrast, the ICTY, for instance, has primacy over the national courts in the former Yugoslavia.

In the Rome Statute system, the ICC can only intervene if the domestic jurisdictions do not investigate or prosecute, or unwilling or unable to do so genuinely.

Therefore, each ICC state party is expected to make all ICC crimes punishable under its national laws, and ensure that the country's law enforcement system is fully capable of investigating and prosecuting such offenses.

If this is properly done, the international legal norms of the Rome Statute also becomes domestic norms within each state party. This, particularly with proper awareness raising, will in turn bolster efforts of the civil society to promote adherence to these norms that are of critical value to the protection of human rights and dignity.

The principle of complementarity is also crucial for creating a truly credible and comprehensive system of deterrence and prevention against atrocity crimes.

The domestic justice systems of states should be so well equipped to deal with the Rome Statute crimes that they can serve as the primary deterrent worldwide, while the ICC is a safety net that ensures accountability only when the national jurisdictions fail for whatever reason to carry out this task.

Another crucial aspect of the credibility of the ICC is the cooperation of states with the ICC, and the enforcement of the ICC's orders. The ICC has no police force of its own. We rely entire on states to execute our arrest warrant, to provide evidence, to facilitate the appearance of witnesses, so on, so forth. Without the cooperation of states, the ICC is powerless.

Unfortunately, 10 persons sought by ICC still remain at large. They have successfully evaded arrest for many years. Political will to bring these persons to justice is very crucial.

Finally, I would like to close with a few words on the relationship between the ICC and the United States of America.

The U.S. not being a party to the Rome Statute, of course it cannot nominate candidates for the ICC prosecutor or judge, and it has no vote in the assembly of states' parties.

The U.S. is, however, welcome to participate in the assemblies' meetings as an observer. And I'm glad that it has been doing so since 2009.

The U.S. government has furthermore been increasingly supportive of the ICC's operations as of late. The ICC also has almost 20 staff members of the U.S. nationalities, who are making an important contribution to the ICC's work.

Clearly, the United States is an important player in the field of international law. This year, the ICC is celebrating its milestone 10th anniversary, and some U.S. universities have already announced the ICC focus to conferences and seminars to mark this occasion.

I do hope to see the ties and cooperation between the ICC and the United States deepen, and I believe that this 10th anniversary year of the ICC is a good opportunity to further that particular goal.

Thank you for your attention.

MS. FERRIS: Thank you very much, Mr. President.

We turn now to Theodor Meron, who's President of the International Criminal Tribunal for former Yugoslavia.

Welcome.

MR. MERON: Thank you.

As you may know, the ICTY was the first international criminal tribunal established since the Nuremberg and Tokyo tribunals, which functioned in the wake of the Second World War.

The establishment of the ICTY -- and it's the year 1993 -- and a year later, of the ICTR, its sister institution in Russia -- helped to lead the way to the establishment of other ad hoc tribunals and hybrid tribunals. And by demonstrating that the international community was truly committed to ending impunity for the gravest international crimes, and by making actual cases an international criminal justice reality, the ICTY and the ICTR were important catalysts for the establishment in 1998 of the ICC by the Rome Statute.

Since many of us doubt the potential efficacy of international criminal tribunals, let me add to this one point which may be of interest. All of the 161 entities of the ICTY have been accounted for. We have a 100 percent record of law enforcement, and I think we can envied, not only by international, by also by national tribunals in all the countries.

And we have achieved that thanks to the support of the United States and other countries, and particularly thanks to the support of the Netherlands, which made sure that the EU will not allow total (inaudible) between states of the former Yugoslavia and the European Union until all the fugitives have been arrested and

delivered up to The Hague.

And let me emphasize that the people whom we are trying, whom we have tried, include heads of state, heads of governments, head of secret services, head of police forces, very senior generals. In other words, for the most part, very, very senior leaders.

Now I would like to try to touch on three questions. The first, to what extent do we contribute to peaceful settlement of disputes?

Now we are quite different in that respect from the ICJ or the Permanent Court of Arbitrations, which offers states a venue for resolving disputes between them before they escalate into conflicts, sometimes even violent conflicts. They give states a mechanism for resolution of disputes. It is much harder to assess the role of international criminal courts in this context.

We should also remember in this context that many international criminal tribunals have been established after the events which generated so many war crimes.

On the other hand, the ICTY, over which I preside, was established in May 1993, and was granted open-ended jurisdiction to prosecute persons who have committed crimes in the former Yugoslavia since 1991.

So the tribunal was established after the horrific events of 1991 and '92, but while the wars and the atrocities were continuing. And tragically, the establishment of the ICTY in 1993 did not lead immediately to end of hostilities, as evidenced by the genocide in Srebrenica, committed in 1995.

Now I would not like, by admitting that, by mentioning that, to suggest that we have no influence on behavior of states, or more important even, on the behavior of state leaders.

One of the foundational philosophies underlying the creation of modern

international criminal courts and tribunals is the idea that seeking justice with respect to the gravest of crimes has a material effect, not only by facilitating post-conflict resolution, but also by deterring the commission of international crimes in the future.

And part of this deterrent effect comes from the fact that these courts and tribunals are mandated to try individuals. The ICTY, in essence, pierces the corporate veil. It looks behind the state, to the political, to the military, to other leaders who use unlawful means to attain political or other goals, and by so doing, violate fundamental human rights and humanitarian norms.

And by showing that no state official is above the law, and that the international community is not afraid to act to end impunity when confronted with atrocities, we hopefully help to deter such crimes; perhaps not immediately, but over time. And we help in a way which is immeasurable -- very difficult to measure -- and thus, we encourage peaceful resolution of disputes between states.

The second question I would like briefly to mention is the linkage, the nexus, between national law and international law, and how the courts, especially criminal courts at The Hague, help states fulfill their legal obligations and influence national law.

Now we have something which was formulated jointly by us and the United Nations Security Council. We call it our completion strategy. In that context, we envisage the transfer of lower level and midlevel cases to the region of the former Yugoslavia, and we have become a very important catalyst for building a rule of law system in those countries. And we have tried hard, and with some success, to introduce into the laws of former Yugoslavia norms of international law with regard to genocide, with regard to crimes against humanity, and with regard to war crimes.

And thanks in large part to our work in that context, special mechanisms

have been created in the area for trying war criminals, especially the special war crimes jungle in Sarajevo.

We have transferred expertise, we have transferred knowledge, we have shared training, and what is particularly important, we reached a stage where we have been able to transfer those cases to be tried in the area close to the place of crimes, close to the venue and place of residence of witnesses. And as a result of that, we have obtained much greater resonance in the area itself.

Now the third and last question on which I would like to say something is the dilemma often mentioned of the conflict between peace and justice.

Of course, it is a problem. It's not a new one. Some argue that when achieving peace requires negotiating with the very people who are responsible for crimes, insisting on prosecuting those people can prolong the conflict, resulting in further bloodshed. Others contend that there can be no peace, no true peace without accountability, and that impunity for international crimes is, in itself, illegal.

Some people have criticized our own prosecutors for issuing indictments, for example, against Radovan Karadzic and to Ratko Mladic, two Bosnian-Serb leaders where peace negotiations were continuing.

But other commentators believe that these indictments actually helped make the Dayton Agreements possible.

Similar criticisms have been leveled against the ICC, but I believe that the existence of the ICC may also make peace more likely in some cases by drawing international attention to an ongoing conflict, and by potentially impacting events on the ground as they unfold, and to act as a deterrent to the warring parties.

So let me conclude by saying that, in my view at least, the dichotomy between peace and justice, in most cases, is false. Justice is an essential element of

peace and reconciliation.

And may I end with citing Kofi Annan, who said: "There can be no healing without peace. There can be no peace without justice, and there can be no justice without the respect for human rights and the rule of law."

And we are working in that direction.

Thank you.

MS. FERRIS: Thank you very much. Very impressive.

We turn now to the Permanent Court of Arbitration. Brooks Daly, you're the acting Secretary General.

MR. DALY: Thank you very much, and thank you to Brookings and to Mayor Van Aartsen for bringing us to Washington.

The Permanent Court of Arbitration is the oldest of the intergovernmental organizations in The Hague dedicated to the peaceful settlement of disputes, founded in 1899, but is, nevertheless, very different from the other institutions represented here, because it's not really a court. It's actually a permanent administrative framework for arbitral tribunals.

Each dispute brought to the PCA has a new tribunal constituted to hear that dispute. This was a source of criticism for the institution sooner after its founding, that arbitral tribunals constituted for each separate dispute didn't contribute to a coherent development of international law. They were likely to give different sorts of decisions reasoning, whereas a standing court would give coherent decisions, and develop jurisprudence in a more coherent way.

Another disappointment and criticism of the PCA was that it didn't provide compulsory jurisdiction. At the 1899 peace conference, and also at the 1907 peace conference, where the PCA's convention was revised, delegations were

unsuccessful at reaching unanimity on compulsory jurisdiction for the PCA. That would have foreseen a state having the right to bring another state to arbitration, to a binding dispute resolution.

Instead, the states agreed only to create this institution, available for arbitration, but they didn't agree to go there. They would need a separate agreement for any dispute in order to have recourse to the PCA.

The PCA, nevertheless, had some success in its early years. A number of major interstate disputes were heard by arbitral tribunals, but nevertheless, the outbreak of World War I and, later, World War II, showed that there was indeed a weak institution and not capable of preventing those sorts of conflicts.

The institution went into a period of dormancy after World War II, and with the advent of a number of other tribunals in The Hague, seemed to have been forgotten for a number of years.

But in the last 20 years, it's witnessed renewed activity, and it currently is administering six arbitrations between states, 32 between investors and states under treaties for the protection of investment, and 20 cases under contracts between states or state entities and private parties.

The PCA has a very flexible mandate, and there's no real limit to the subject matter that could be submitted to the PCA. You just need consent of the parties to arbitrate.

We do, however, restrict our services to cases involving a state or public entity as an intergovernmental organization. We don't seek to provide our services to purely private disputes.

I thought it would be useful to focus on a specific case for a few minutes, as one of the comments given to us from Brookings about the interest here was in regard

to conflict resolution, conflict prevention, and how to convince parties, including private parties or non-state entities, to use the dispute resolution mechanisms available in The Hague.

And so I'll turn to the Abyei arbitration, which was a dispute between Sudan and the Sudan People's Liberation Movement and Army.

Sudan was the location of the longest running civil conflict in Africa. Two civil wars since independence, estimated over 2 million dead, and with some optimism, a peace agreement was reached in 2005 that, among other things, foresaw an eventual referendum on independence for the south.

There are a number of issues dealt with in that peace agreement, and one sticking point between the two sides was the status of the Abyei region, a small territory on the border of what is now the Republic of South Sudan and Sudan, claimed by both sides, inhabited by nomadic Muslim herders associated with the north, and animist and Christian tribes associated with the south.

A number of steps were foreseen in the 2005 comprehensive peace agreement for dealing with Abyei. It first needed to be delimited. The parties had to agree on what was the territory itself. Once delimited, they could have a referendum in Abyei as well, allowing it to decide whether to join the north or the south, should the south become independent.

An Abyei boundaries commission was established in 2005, and rendered a decision delimiting this territory. The government of Sudan, however, rejected this decision. They considered that these experts who had delimited the territory had exceeded their mandate. They hadn't given proper reasons for the line that they drew in the territory, among other objections to their decision.

There was renewed armed conflict in the area, and a new peace effort

was mounted, and that involved submitting this dispute on Abyei to an arbitral tribunal at the PCA.

The arbitral tribunal had a mandate to decide first whether that Abyei boundaries commission had exceeded its mandate. If it had exceeded its mandate, this tribunal was to proceed to delimit the Abyei region on its own.

The tribunal did find an excessive mandate, and redrew some of the lines of the Abyei region, and this award was rendered in 2009.

This award has been accepted by both sides. The tensions and complicated relationship between the south and the north continue, but the legal basis for this delimitation decided by an arbitral tribunal has still been accepted by both sides.

Now what did we learn from this dispute? What are the factors that could attract parties in these kinds of disputes to use binding legal dispute resolution?

One factor is allowing access to these mechanisms to different sorts of parties than we might traditionally expect. In The Hague, we typically think of interstate disputes. This case was not an interstate dispute. It was a dispute between a state and part of that state. The south was not yet independent, so this didn't really qualify as an international dispute. Could it even be submitted to the PCA if it were not an international dispute?

Thankfully, the PCA, its member states, didn't take a very rigid view of what sorts of disputes could be submitted to arbitration, and this was allowed to proceed.

Then funding was an issue as well. Now whereas most courts and tribunals, the judges are paid by the contributions to those institutions through their member states, the PCA's arbitrators are paid by the parties. So that's an additional cost if you go to arbitration, although in our experience, probably 80 to 90 percent of the costs of an international dispute resolution procedure are the lawyers and not the judges or the

arbitrators. So that's still going to be your biggest cost.

But how do the parties to these disputes deal with the costs, particularly if you're trying to get parties into this procedure who are not states, who do not have access, potentially, to public funds, who may be in an armed conflict, like the Sudan People's Liberation Movement and Army?

Well, there are a number of ways that this case was funded. One was the PCA's financial assistance fund, which was established precisely for this type of case, to assist the parties in meeting the costs of the proceeding. Donations from the government of the Netherlands, of Norway and France, all helped finance the case, the costs of the arbitrators and the proceedings.

As for counsel, the south relied heavy on pro bono legal services of an international law firm, as well as the public interest law and policy group here in Washington. And that's something where I think we need more development. In the domestic context, we're familiar with legal aid, with either the state or private bodies assisting indigent litigants with their proceedings.

But on the international plane, there's limited access to that sort of assistance, and even if you can find some people willing to provide it, these are highly specialized areas of law practice, and so not all lawyers might be as competent to pursue these sorts of claims.

And in addition to costs, there is the question of transparency, particularly in international arbitration. Modern proceedings are heavily influenced by commercial arbitration, where parties like to keep things secret. If you're in a business dispute, you don't want your business colleagues to know you're in the dispute, whether you're being sued or whether you're bringing a claim. It may not make you look like a good business partner if you have a lot of litigation going on.

With states, however, there's a strong public interest in knowing what's going on, and it may also assist the states in assuring the acceptance of the eventual result of one of these proceedings, if their populations can be kept abreast, and have access to the proceedings and the development.

This was done -- the Abyei arbitration was the high watermark of transparency in international arbitration, where the hearings themselves were broadcast in Sudan. Large delegations from Sudan were present in The Hague to hear the pleadings, and to hear the rendering of the award.

And at least from the public statements, so the leaders of the north and the south, the publicity and transparency of the proceeding was of great assistance in allowing their constituencies to accept this eventual decision.

That is what I would like to share with you, and I look forward to further discussion with you.

MS. FERRIS: Thank you very much, and thanks to all of you, not only for your remarks here today at Brookings, but also for the important work you do on behalf of the world.

We now have time for some questions and comments. I ask you to raise your hand, and a microphone will magically appear in front of you -- and if you could introduce yourselves first.

SPEAKER: Good morning. My name is Jeffrey, and I'm a third year law student. I've been a research assistant for a professor, Nienke Grossman, since May 2011.

I just want to thank you all for coming this morning. It's been a real privilege to hear your comments.

My question deals with the influence of international tribunal decisions on

non-litigants. So for example, before the ICJ, President Tomka, you said that disputes are handled between two states, and the decision is binding on those two states alone. I would like to know if there are certain circumstances or facts surrounding a case where the decision would influence states who are not before the court.

And in reference to the ICC, President Song, you mentioned the verdict two weeks ago, in reference to an individual suspect. I would like to know if that particular decision may have an influence on suspects who are still at large and nations who are part of the International Criminal Court's jurisdiction.

Thank you.

MS. FERRIS: Thank you.

Is it okay with the panelists if we take several questions, and then give you a chance to respond?

Other questions?

Well, maybe we'll let you respond to that one first, then. Who would like to take --?

MR. TOMKA: I'll start, perhaps, because the first part of the question was addressed to me.

You are right that before the court, we have traditionally bilateral state to state disputes, and under the statute of the international Court of Justice, the decision is final and binding for the parties in that particular case.

But the court, when it considers and decides the cases between two states, is to interpret rules of international law.

And I think this interpretation, clarification of public international law has impact on other states. They closely follow the decisions of the court, and in particular, the legal advice of foreign ministries, and they know that in the future, if any matter arises

in their relations with any other state, most likely not just the court, but also any other body which would be dealing with the matter, would apply international law and interpret it in the same way or similar way.

I can mention recently, the court rendered the judgment on jurisdiction immunities of the state between Germany and Italy, in early February this year. Although this was a bilateral dispute, the decision of the court clarified very much on what circumstance the state enjoys immunities from jurisdiction of other courts.

So this decision would be very closely followed, and contributed to clarification of rules of international law on state immunity.

And the other part is for my colleague, Ned Song.

MR. SONG: Well, the main rationale behind the establishment of the ICC is to end the impunity for international crimes -- genocide, crimes against humanity, war crimes, and crime of aggression.

And in the long run, to contribute to the prevention of such crimes -- you see the preamble of the Rome Statute refers to the word prevention -- by prevention in this particular context would mean deterrence.

You see, what the ICC does in the places where it conducts investigations and prosecutions, such as in Uganda or at DRC, is bringing justice to the victims by holding some of the most responsible perpetrators of these international crimes to trial, which would otherwise not be possible in their own country.

Thomas Lubanga's guilty verdict is a trial where the chamber found this particular person guilty of, you know, child soldier and all that.

Actually, all this -- countries on the globe -- well, we all agree that human rights is the most important and most fundamental value that everyone shares. And all the countries have come together and established a permanent means of holding serious

human right violators, abusers, accountable, while providing a fair system of justice.

So the decision itself is a resolution of one particular criminal case, but beyond that, it sends a powerful message to the world in general -- and in particular, would-be perpetrators of these most serious crimes -- that you watch out; you better behave yourself.

So ICC not only investigates past atrocities, but also serves as a deterrent to the occurrence of future crimes.

But it is equally important to note that ICC is not a panacea. You know, first, ICC cannot end the impunity alone. You know, the ICC doesn't supplement national jurisdictions. It simply complements national jurisdictions -- so to speak, fills the gaps when perpetrators would otherwise go free.

But for us to make significant progress toward ending impunity and ultimately achieving prevention, it is imperative that national jurisdictions in each country are strengthened so that they can take the main responsibility for investigating and prosecuting the atrocity crimes.

And secondly, the criminal justice is only one part in the bigger picture of conflict resolution and conflict prevention. Where atrocities have already occurred, a multitude of other transitional justice mechanisms are necessary in addition to criminal justice, such as restitution of property, or finding missing people, sustainable return of refugees, and so on, so forth.

In the case of ongoing or imminent conflicts and atrocities, justice can rarely act alone, and diplomacy is usually the main international tool of rapid reaction to prevent escalation of violence. Likewise, political solutions are necessary to end conflicts. Where long-term prevention is concerned, education, democracy, and developments are at least as important as a credible system of criminal justice.

These are not merely theoretical considerations in my view. A realistic understanding of the possibilities and limitations of international justice is a prerequisite to its success.

MS. FERRIS: Thank you.

President Meron, you wanted to comment?

MR. MERON: Yes, I would like to, if I may, add a few words.

I completely agree with what my colleague has just now said.

What I would like to emphasize is that decisions of international criminal courts and tribunals are, of course, rendered in individual cases. But the ripple effect of those decisions is far broader. Because we construe and apply basic provisions of international customary humanitarian law, we clarify the law, generally applicable with regard to genocide, crimes against humanity, and war crimes. And we clarify and establish the obligations of individuals, and, indirectly, of states who take part in armed hostilities.

So we establish, we clarify the general law, which must act in the reality as a sort of deterrent for potential war criminals in other countries.

I have no doubt whatsoever that our jurisprudence is very carefully studied in the Pentagons of the world -- to deal, for example, with questions of targeting. What targeting respects the fundamental rule that you can only target military objectives?

I am, myself, sitting on an appeal at The Hague now, which deals with the legality of artillery bombardment, to an extent such in those circumstances the shelling was legitimate in focusing only on military objectives, to what extent it respected principles of proportionality and distinction between military objectives and civilians or civilian objects, and so on.

Sometime ago, we sat on a case pertaining to prisoners of war. And the

question was -- it was a terrible massacre committed during the conflict in Yugoslavia, where Croatian POWs were abandoned by units of Serb forces, who protected them, in a way, and they were left unprotected, to be slaughtered to the very last man of those nearly 200 POWs by paramilitaries who were only waiting to take their vengeance.

And by dealing with that case, we established clear parameters of obligations of armies who take captured POWs -- that they may not abandon them. They must continue either themselves to protect them, or they can only pass custody, transfer custody to armies or entities which are capable of protecting those POWs.

So we are establishing the sort of clarifying general law, which anyone who's completely unrelated to those cases would necessarily take into account in making sure that he himself would not one day be tried for war crimes.

MS. FERRIS: Thank you.

Mr. Daly, and then we'll turn back to the audience.

MR. DALY: Yes.

Regarding the potential for affecting non-litigants, as President Meron has said, there's no stare decisis in international law, but the decisions may have an influence, a ripple effect in other cases.

An example in the sorts of cases administered by the PCA -- it makes me think of the investor state arbitrations under treaties for the protection of investment -- which this sort of protection also exists in free trade agreements such as NAFTA, to bring it home to the U.S. NAFTA countries, Canada, U.S., and Mexico -- investors from the U.S. say in Canada, if their investment, they feel, is treated unfairly, they may be able to bring an arbitration claim directly against the government of Canada. The PCA's administering a couple of these sorts of claims at present.

An arbitral tribunal deciding on whether Canada has breached its

international obligations under NAFTA -- that decision wouldn't be binding on future tribunals or litigants, but it would be very influential.

NAFTA provides mechanisms for the other states to comment in those proceedings, even when not a party, and there's also a mechanism within NAFTA for the three governments to agree on interpretations of NAFTA. So that assists them in avoiding something they didn't expect.

But many of these mechanisms and treaties do not provide for that sort of intervention from non-litigants, and so there is a greater risk that you will see your future legal standing altered by an ongoing proceeding where you have no ability to intervene.

MS. FERRIS: Thank you.

We have a question back here. If you could wait for the microphone, we have one, two, three. Okay.

MR. VAN GENUGTEN: My name is Willem van Genugten. I am the dean of The Hague Institute for Global Justice, and I am a member of the delegation, and I thought there might not be too many questions.

I have one for Ted Meron. You touched upon the nexus between peace and justice, which is, to my mind, the core issue we should discuss in much more detail, and you made some very nuanced remarks on that. It most cases it works, as you said, if I quote you correctly. Most cases doing justice or going after the perpetrators might contribute to peace.

And I would like to hear a bit more about it, in terms of short-term and longer term -- what is happening, going after people on short notice, and what will it do to, let's say, sustainable peace relations and building up sustainable institutions?

And I will skip my other questions, because I saw several other fingers.

MS. FERRIS: Thank you very much.

We have the gentleman right here.

MR. BLASE: Yes, my name's Rich Blase, environmental journalist, but I have a law background.

And thanks for this very excellent panel discussion.

I have a question. You talked about the relationship between human rights and national law. If you could reflect, all the panelists, on human rights and constitutions. These human rights treaties are often mentioned in constitutions. Even the Universal Declaration of Human Rights is included. Does that mean it's a binding law?

And I think this is apropos, because we might be entering an era of constitution drafting.

MS. FERRIS: Thank you.

And we have the gentleman back here.

Yes, if you'll stand up, they'll find you.

MR. SIMON: Hi. I'm John Simon. I'm a student.

And I was wondering how international courts respond to questions about their independence, specifically in the case of the special tribunal in Lebanon, where the tribunals may not have popular support due to larger regional issues, in the case of Hezbollah. And just basically, what jurisdiction will it have, and how will it treat those accusations?

MS. FERRIS: Thank you.

And the last question, right here.

MR. RAMEY: My name's Jim Ramey. I'm a professor of international law and criminal law.

And I've been doing research on a topic called world peace through law. And I'm sure some of you are perhaps familiar with that, although it's not in common discourse, at least in this country. But it used to be a very popular concept, and basically, the idea is to have a comprehensive regime of international dispute settlement, starting with compulsory negotiations, and compulsory mediation, and followed by compulsory arbitration, and backed up by compulsory adjudication.

And the key problem that has arisen is that out of the P5, only one member has currently agreed, in general, to the compulsory jurisdiction of the ICJ.

I wonder if any of you, actually, had any ideas on how the countries might be encouraged to agree to compulsory jurisdiction -- which, P.S., contrary to what the perception is in this country, the neo-cons said the Soviet Union would never agree to it. Mikhail Gorbachev did agree to it in 1987.

MS. FERRIS: Thank you very much.

Then we have questions on the relationship of peace and justice, human rights and constitutions, international courts and independence, and how to encourage support for compulsory jurisdiction -- all big questions, but we don't have much time, so who would like to jump in first?

MR. TOMKA: I'll start with the question of human rights treaties and constitution.

International Court of Justice is a court for disputes between states, so individuals cannot bring cases against governments, either their own or foreign governments, if they are mistreated in foreign countries, directly to the court, as they have no standing before the International Court of Justice.

There are regional human rights courts, like the European Court of Human Rights in Strasbourg, Inter-American Court of Human Rights in Costa Rica, in

San Jose. And a couple of years ago, such a court was established in Africa.

The only region of the world, the continent without human rights court is Asia. I think Asia has a little bit particular approach and traditions to human rights treaties, and even to adjudication.

That's my first remark.

Of course, there is the possibility that a state takes up a case of its national, and brings a case against another state before the International Court of Justice. We have had a few cases when this happened recently.

And the court has dealt with a case Guinea brought against Democratic Republic of Congo for alleged mistreatment, and the court found that there was a breach of international covenant on civil and political rights, certain obligations under that, and also under the African charter -- mistreatment of a Guinean national who had been living in Democratic Republic of Congo for some 32 years, involved in business activities, and then was arbitrarily arrested and detained for some 72 days, and expelled from the country.

So there is a possibility, but not directly, individual but through the government, to bring a claim of human rights violations.

Well, you are right that of the five permanent members, only one has currently enforced a declaration recognizing jurisdiction of the International Court of Justice.

Two other permanent members had a declaration enforcing in the past, but when disputes were brought against them, and they didn't like these disputes, they terminated the declaration. It was in 1974 when Australia and New Zealand brought cases against France relating to atmospheric nuclear tests being conducted by France. France terminated its declaration.

Nevertheless, France also made a declaration that it would not continue in these tests, and in bringing, I think, the case to the court, had some impact on the policy of French government.

United States declaration was terminated three days -- or a notification, rather, to be legally more precise. Notification was sent three days before Nicaragua brought the case, but the court upheld its jurisdiction on the basis that the U.S. declaration contained a clause providing for six months' notification for termination, so that the application was brought in this period of six months, and still there was jurisdiction of the International Court of Justice to hear and adjudicate the case.

But this does not mean that four other permanent members do not accept jurisdiction of the court. They accept it, but in a much more limited way, because either they are parties to a number of international conventions, or even bilateral treaties, which contain clauses providing for jurisdiction of the court to adjudicate disputes relating to the interpretation and application of the particular case.

Even the United States has commitments on the international multilateral conventions or bilateral treaties, for instance, of friendship commerce and navigation.

So these days, occasionally, I even -- some of them, not all -- I mean, United States and France agreed in particular situations to bring a bilateral dispute before the International Court of Justice.

You mentioned that the Soviet Union, in the past, made reservations through international conventions, but then at least this country withdrew some reservations to human rights treaties, and this was on the basis of one of the conventions that Georgia brought a case against Russian Federation in 2008, although at the end, the court decided that the conditions for jurisdiction were not met, as the clause provides for some efforts first to negotiate, and then efforts to arbitrate.

Well, it is not for the court to put some pressure or influence on member states to make these declarations, but the court, I think, through its work, can demonstrate to states that it acts in an independent and impartial way, even when it considers issues of jurisdiction, that there is no tendency to enlarge jurisdiction, to respect the provisions of treaties and declarations states have made.

And I think in this way -- in particular, nowadays, when there is much talk about rule of law -- not just rule of law domestically, but also on international scene -- that other governments may follow.

I am not as optimistic as expecting that within 10 or 15 years, all member states of the United Nations are going to make declaration under Article 36 of the statute, but recently, a few declarations have been made, the latest one being by Ireland.

Personally, I do not understand why some European countries can be parties to the European convention on peaceful settlement of disputes, providing for jurisdiction of the court in general for any kind of legal disputes, and not having made the declaration under Article 36 -- whether they are concerned that they may have a dispute with a non-European state.

MS. FERRIS: There's many unanswered questions.

Listen, we're out of time, but I wondered if you want to say just a sentence or two about peace and justice and independence.

MR. TOMKA: That's what I would like to do --

MS. FERRIS: Yes.

MR. TOMKA: -- very briefly.

Of course, it's an extremely complex set of issues, and we can only very superficially touch on that.

What I meant to say is that in the long run, you distinguish between

short-term and long run. In the long term, I'm convinced that if we have a political settlement in a country which does not take into account the need of accomplishing at least major part of accountability, we are really on very shaky ground.

And at the same time, I recognize that the timing may be of importance -- that in the short term, the relationship or the sequencing between prosecutions and other options or modalities might be appropriate.

We all remember that in South Africa, a commission of reconciliation and justice and truth was of quite pivotal importance for the maintenance of peace in a very fragile situation.

You can have situations in which the first option would be prosecution, because there is not enough give and take to cooperate in a truce commission and reconciliation commission, but eventually you may move to the other modality, and vice versa.

So also the timing may be important sometimes. You have to postpone prosecutions for a certain time, to enable some modalities, elements of peace to come into being. But there is no question in my mind that in the long term, this is quite essential, or the peace would not last very long.

MS. FERRIS: Thank you very much.

Thanks to all of you for coming, and please join me in thanking our panelists.

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