SPEECH OF JUDGE JOAN E. DONOGHUE,
PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE,
AT THE SEVENTY-FOURTH SESSION OF THE INTERNATIONAL LAW COMMISSION

18 July 2023

Madam Chair,
Ladies and gentlemen,
Colleagues and friends,

I am honoured to address the International Law Commission on the occasion of its seventy-fourth session, continuing the long-standing tradition of the annual exchange of views between our two institutions. I welcome this opportunity especially to meet with members of the Commission for the third and last time during my term as President of the Court, and I am delighted to do so in person.

I take this opportunity to congratulate you, Madam Chair, on behalf of the International Court of Justice, and to congratulate the Officers of the Commission as well.

Today, I would like to offer an update on the decisions rendered by the Court and new cases submitted to it since our meeting last year. Given how extremely busy this period has been, I will not be in a position to provide a comprehensive overview of our judicial work. I have tried, instead, to select certain questions and aspects of our work that I hope will be of particular interest to Members of the Commission.

Since our last meeting, in June 2022, the Court has held hearings in five cases, one of which is currently under deliberation, namely the proceedings brought by Ukraine against the Russian Federation in 2017 concerning alleged violations of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (or "CERD"). During the same period, the Court rendered five Judgments, and 25 Orders were issued by the Court or by its President, some dealing with procedural issues, other with substantive matters. I shall provide a brief overview of each of these Judgments, as well as of some of the Orders that have more substantive implications. I will also mention the seven new cases that have been initiated since I last spoke with the Commission.

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So, beginning with the Court's Judgments: on 22 July 2022, the Court issued its Judgment on preliminary objections in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)*. That case was instituted by The Gambia against Myanmar for alleged violations of obligations under the Genocide Convention through acts adopted, taken and condoned by the Myanmar Government against members of the Rohingya group. The Court had indicated provisional measures in this case in 2020.

Myanmar had raised four preliminary objections to jurisdiction and admissibility. In the interest of time, I shall mention only one objection, whereby Myanmar submitted that The Gambia lacked standing to bring the case because it was not, in Myanmar's words, an "injured State" and had failed to demonstrate an individual legal interest.

In its ruling, the Court found that The Gambia, as a State party to the Genocide Convention, had standing to invoke the responsibility of Myanmar for alleged breaches of its obligations

erga omnes partes under that Convention. Recalling its prior jurisprudence, the Court reasoned that all States parties to the Genocide Convention have a common interest in compliance with the relevant obligations under that treaty and thus that any State party is entitled to invoke the responsibility of another State party for an alleged breach of obligations *erga omnes partes*, including by instituting proceedings before the Court.

The Court thus concluded that The Gambia had standing and rejected this preliminary objection, as well as the other objections raised by Myanmar. The proceedings on the merits of this case have accordingly been resumed.

On 1 December 2022, the Court issued its Judgment in the case concerning the *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia)*. In that case, the Court was called to decide certain claims and counter-claims regarding the Silala, a river that has its source in the territory of Bolivia and then flows south-west into Chile. The rights and obligations of the Parties in that regard are governed by customary international law, since neither Chile nor Bolivia is party to any relevant treaties, including the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses. As members of this Commission know, that Convention was negotiated on the basis of draft articles adopted by the Commission in 1994. The Parties made extensive reference, in the course of the proceedings, both to those articles and to the relevant commentaries of the ILC.

In the Judgment, the Court noted that the positions of the Parties had converged in many respects during the course of the proceedings. Accordingly, it found that many of the claims that had been made by Chile and counter-claims made by Bolivia no longer had any object and that, therefore, the Court was not called upon to give a decision thereon.

The Court did, however, pronounce on the merits of one of Chile's submissions, concerning the obligation to notify and consult under the customary international law governing the non-navigational uses of international watercourses. On the law, the Court concluded that each riparian State is required to notify and consult the other riparian State with regard to any planned activity that poses a risk of significant harm to the latter State. On the facts, the Court found that Bolivia had not breached this obligation when planning and carrying out certain activities in the vicinity of the Silala.

On 30 March 2023, the Court issued its Judgment on the merits in the case concerning *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America)*. Following certain legislative and executive measures taken by the United States, a number of default judgments and judgments awarding substantial damages were entered by US courts against the State of Iran and, in some cases, against Iranian State-owned entities. Further, the assets of Iran and certain Iranian entities, including the Central Bank of Iran, which is known as Bank Markazi, were subject to enforcement proceedings in the US or abroad, or had already been distributed to judgment creditors. Iran argued that the United States had thereby violated its obligations under the Treaty of Amity, Economic Relations, and Consular Rights of 15 August 1955.

The Court started by considering certain objections raised by the United States. It upheld one such objection, finding that Bank Markazi did not qualify as a "company" entitled to certain protections under the Treaty of Amity and, consequently, that the Court had no jurisdiction to consider claims predicated on the treatment accorded to that entity.

The Court also considered an objection to admissibility based on the alleged failure to exhaust accessible and effective means of redress within the US legal system. The Court concluded that it was not required to rule on the question whether the rule of exhaustion of local remedies applied in the case, since, in any event, the companies had no reasonable possibility of successfully asserting their rights in US court proceedings in the circumstances of the case. Accordingly, the Court did not uphold the objection to admissibility based on failure to exhaust local remedies.

The Court then went on to find that the Respondent had violated its obligations under certain provisions of the Treaty of Amity as a result of the treatment accorded to Iranian companies.

Having found that these violations had occurred, the Court also found that the United States was under an obligation to compensate Iran for the injurious consequences thereof and decided that, failing agreement between the Parties on the question of compensation within 24 months from the date of that Judgment, the matter would be settled by the Court at the request of either Party.

On 6 April 2023, the Court issued its Judgment on the preliminary objection raised by the respondent in the case concerning *Arbitral Award of 3 October 1899 (Guyana* v. *Venezuela)*. You may recall that, when Guyana instituted proceedings in this case in 2018, Venezuela stated it would not be participating in the proceedings, as it considered that the Court lacked jurisdiction. By an Order issued in June 2018, the Court ruled that, in the circumstances of the case, it was necessary first of all to resolve the question of its jurisdiction. Following written and oral pleadings on that question, the Court rendered a Judgment in December 2020, finding that it had jurisdiction to entertain the Application filed by Guyana in so far as it concerned the validity of the Award regarding the Boundary between the Colony of British Guiana and the United States of Venezuela, of 3 October 1899 and the related question of the definitive settlement of the land boundary dispute between Guyana and Venezuela.

After Guyana filed a Memorial on the merits, Venezuela appeared in the case, appointing an agent and raising preliminary objections which it characterized as objections to the admissibility of the Application. In substance, Venezuela argued that the United Kingdom was an indispensable third party without the consent of which the Court could not adjudicate upon the dispute — thus raising an objection based on what is commonly called the "*Monetary Gold* principle". In its Judgment of 6 April 2023, the Court rejected that objection. It considered that, by virtue of being a party to the "Agreement to Resolve the Controversy between Venezuela and the United Kingdom of Great Britain and Northern Ireland over the Frontier between Venezuela and British Guiana" signed at Geneva on 17 February 1966, the United Kingdom had accepted that the dispute between Guyana and Venezuela could be settled by one of the means set out in Article 33 of the Charter of the United Nations, and that it would have no role in that procedure. Under these circumstances, the Court considered that the *Monetary Gold* principle did not come into play in the case.

The last Judgment about which I would like to say a few words was issued just last week and relates to the case concerning the *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia)*. In an earlier case between these two States, the Court had delivered a Judgment in 2012 *inter alia* establishing a single maritime boundary delimiting the continental shelf and the exclusive economic zones of Nicaragua and Colombia up to the 200-nautical-mile limit from the baselines from which the territorial sea of Nicaragua is measured. On 16 September 2013, Nicaragua filed the Application instituting the latest proceedings, requesting the Court to adjudge and declare the precise course of the maritime boundary between it and Colombia in the areas of the continental shelf beyond the boundaries determined by the Court in its 2012 Judgment.

By an Order issued on 4 October 2022, the Court indicated that, in the circumstances of the case, before proceeding to any consideration of technical and scientific questions in relation to the delimitation of the continental shelf between Nicaragua and Colombia beyond 200 nautical miles from the baselines from which the breadth of the territorial sea of Nicaragua is measured (also referred to as "extended continental shelf"), it was necessary to decide on certain questions of law, after hearing the Parties thereon. Accordingly, the Court decided that, at the forthcoming oral proceedings, the Parties were to present their arguments exclusively with regard to two questions.

The Judgment rendered last week addresses these matters. By the first question formulated in the aforementioned Order, the Court asked whether, under customary international law, a State's entitlement to an extended continental shelf may extend within 200 nautical miles from the baselines

of another State. It concluded that the question had to be answered in the negative. In answering this question, the Court considered the legal régimes of the exclusive economic zone and continental shelf, as well as the practice of States and international decisions relied on by the Parties.

In light of this conclusion, there was no need for the Court to address the second question, which concerned the criteria under customary international law for the determination of the outer limit of the extended continental shelf.

The Court recalled that, throughout the proceedings, Nicaragua had maintained that the object of its request consisted in the delimitation of the maritime boundary between the Parties in the areas of the continental shelf beyond the boundaries determined in the 2012 Judgment. On that basis, the Court rejected all the requests contained in the submissions made by Nicaragua in its Memorial and Reply.

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Now I move to some of the significant Orders issued by the Court. I will start by mentioning certain Orders concerning provisional measures in two cases involving Armenia and Azerbaijan. As you may recall, in September 2021, two separate proceedings were instituted, one by Armenia against Azerbaijan and a second by Azerbaijan against Armenia, concerning alleged violations of the International Convention on the Elimination of All Forms of Racial Discrimination (or "CERD"). In December 2021, the Court indicated certain provisional measures in each of these cases.

During the past year, the Parties have returned to the Court several times. In each of the two cases, the Applicant filed an additional request for provisional measures. On 22 February 2023, the Court ordered Azerbaijan, pending the final decision in the case instituted by Armenia and in accordance with its obligations under CERD, to take all measures at its disposal to ensure unimpeded movement of persons, vehicles and cargo along the Lachin Corridor in both directions, but declined to indicate certain other provisional measures sought by Armenia. By an Order issued on the same date in the other case, the Court declined to indicate the provisional measures requested by Azerbaijan.

In addition to these decisions, the Court issued two Orders in which it rejected requests by Armenia to modify provisional measures previously indicated by the Court.

I shall now turn to the case *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine* v. *Russian Federation)*. During our meeting last year, I informed the Commission that, following a hearing on Ukraine's request for the indication of provisional measures at which the Russian Federation declined to appear, the Court had indicated provisional measures in that case in March 2022. However, the Russian Federation has participated in subsequent phases of the proceedings. On 3 October 2022, it filed preliminary objections to the jurisdiction of the Court and the admissibility of the Application. These preliminary objections are currently pending before the Court.

Meanwhile, starting on 21 July 2022, the Court began to receive declarations of intervention under Article 63 of the Statute. This Article provides that in cases where the construction of a multilateral convention is in question, every State party to that convention has the right to intervene in the proceedings. Thirty-two declarations of intervention have been filed by 33 States pursuant to this provision.

The Russian Federation objected to the admissibility of all such declarations, so the Court was required, pursuant to its Rules, to hear the Parties and the States seeking to intervene on the

admissibility of the declarations of intervention. It decided to do so by means of a written procedure, which culminated in an Order issued on 5 June 2023.

In that Order, the Court considered the objections raised by the Russian Federation with respect to the admissibility of the declarations. The objections included, *inter alia*, those based on the alleged intention of the declarant States to pursue a joint case with Ukraine, on an alleged infringement of the equality of the Parties and the good administration of justice, on alleged abuse of process, and on the alleged inadmissibility of declarations of intervention at the preliminary objections stage. Each of these objections was rejected by the Court.

The Court upheld, however, an objection raised by the Russian Federation with respect to the declaration filed by the United States. The United States had entered a reservation to Article IX of the Genocide Convention, which is the compromissory clause of the Convention and thus will be interpreted by the Court in the preliminary objections phase of the case. The Court held that the United States may not intervene in relation to the construction of Article IX of the Convention while it is not bound by that provision. Accordingly, the declaration of intervention of the United States was found to be inadmissible in so far as it concerns the preliminary objections stage of the proceedings.

The Court thus concluded that all declarations of intervention, except for that submitted by the United States, were admissible at the preliminary objections stage. It fixed 5 July 2023 as the time-limit for the filing of written observations by the intervening States. States that have filed written observations by that date are also entitled, under the Court's Rules, to submit observations with respect to the subject-matter of the intervention in the course of the forthcoming oral proceedings.

Those of you who are interested might wish to have a look at the text of the Order, which indicates the Court's awareness that oral proceedings in this case, in which 32 States have intervened at the preliminary objections phase, will need to be managed with care.

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Since I spoke to the Commission last summer, seven new cases have been submitted to the Court — five concerning contentious proceedings and two requests for advisory opinions — bringing the total number of cases currently on the Court's docket to 20.

On 30 September 2022, Equatorial Guinea instituted proceedings against France with regard to the alleged violation by the latter of its obligations under the United Nations Convention against Corruption of 31 October 2003, invoking as jurisdictional basis the compromissory clause in that convention. The Applicant contends, among other things, that France is under an obligation to return to Equatorial Guinea certain property which constitutes the proceeds of a crime of misappropriation of public funds committed against it, including a building located at 40-42 Avenue Foch in Paris.

On 16 November 2022, Belize instituted proceedings against Honduras with regard to a dispute concerning sovereignty over the Sapodilla Cayes, which it describes as a group of cayes lying in the Gulf of Honduras at the southern tip of the Belize Barrier Reef. According to Belize, "[t]he Honduran claim to the Sapodilla Cayes, articulated in its 1982 Constitution, which remains in force as a matter of the internal law of Honduras, has no basis in international law". Belize seeks to found the jurisdiction of the Court in this case on Article XXXI of the Pact of Bogotá, to which both it and Honduras are parties.

On 8 June 2023, Canada and the Netherlands filed a joint application instituting proceedings against the Syrian Arab Republic concerning alleged violations of the Convention against Torture

and Other Cruel, Inhuman or Degrading Treatment or Punishment. Canada and the Netherlands seek to found the Court's jurisdiction on Article 30, paragraph 1, of that Convention and contend that Syria has committed "countless violations of international law, beginning at least in 2011, with its violent repression of civilian demonstrations, and continuing as the situation in Syria devolved into a protracted armed conflict". Together with the Application, Canada and the Netherlands filed a request for the indication of provisional measures which is currently pending before the Court. Oral proceedings on that request were scheduled to open tomorrow morning, but have been postponed until October 2023.

On 27 June 2023, the Islamic Republic of Iran instituted proceedings against Canada. Iran contends that certain legislative, executive and judicial measures adopted and implemented by Canada against Iran and its property abrogated the immunities to which Iran is entitled under international law. Iran seeks to found the jurisdiction of the Court on Article 36, paragraph 2, of the Statute of the Court, stating that both Canada and Iran have accepted the compulsory jurisdiction of the Court on 10 May 1994 and 26 June 2023 respectively.

On 4 July 2023, a joint application was filed by Canada, Sweden, Ukraine and the United Kingdom instituting proceedings against the Islamic Republic of Iran. The Applicants' allegations concern events surrounding the downing of Ukrainian International Airlines Flight 752 on 8 January 2020 which, they contend, give rise to violations of obligations under the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971 (also known as the "Montreal Convention"). The Applicants invoke, as a basis of the Court's jurisdiction, the compromissory clause at Article 14, paragraph 1, of that Convention.

As is well known, during the period under consideration, two advisory opinions were also requested from the Court by the General Assembly. On 20 January 2023, the Assembly adopted a resolution *inter alia* requesting the International Court of Justice to render an advisory opinion on certain questions concerning the legal consequences arising from the policies and practices of Israel in the Occupied Palestinian Territory, including East Jerusalem. On 29 March 2023, the Assembly requested a further advisory opinion on certain questions concerning the obligation of States in respect of climate change.

In each of these advisory proceedings, the Court has identified States and international organizations considered likely to be able to furnish information on the questions before the Court and fixed time-limits first for their written statements and thereafter for their comments on the written statements made by other States and organizations, in accordance with Article 66 of the Statute. In the meantime, the Secretariat is preparing, in each case, a Dossier containing a collection of all documents that are likely to throw light upon the relevant questions before the Court, pursuant to Article 65, paragraph 2, of its Statute. The Court will be in a position to hold oral proceedings with regard to the first request for an advisory opinion, *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, in early 2024.

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The summary that I have presented today has allowed me to touch very lightly on many noteworthy aspects of the Court's recent work and its current docket. The large and varied docket demonstrates the strong interest of States in placing matters in the hands of the Court. It is also clear that the Court will remain very busy in the coming years.

With this, Madam Chair, I propose to conclude my remarks. I look forward to a fruitful discussion with the members of the Commission. I am aware that a number of you are involved as counsel before the Court and I am confident that you will be careful not to raise questions about

pending matters. With that exception, I am open to a discussion of whatever topics interest the members of the Commission.

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