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International Adjudication: Peaks, Valleys, and Rolling Hills

Joan Donoghue

International Court of Justice

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TWENTIETH ANNUAL GROTIUS LECTURE

Judge Joan Donoghue of the International Court of Justice, and discussant Dapo Akande, Professor of Public International Law at Oxford University Faculty of Law, provided the Twentieth Annual Grotius Lecture on Wednesday, April 4, 2018 at 4:30 p.m.*

INTERNATIONAL ADJUDICATION: PEAKS, VALLEYS, AND ROLLING HILLS

JOAN E. DONOGHUE**

I. INTRODUCTION.....	266
II. PEAKS, VALLEYS, AND ROLLING HILLS (THE WORLD COURT).....	267
A. ASPIRATIONS FOR A WORLD COURT	267
B. THE QUALITIES OF ADJUDICATORS	268
C. ADHERENCE AND USE OF THE COURT BY STATES	269
D. THE WORLD COURT “VALLEY”	270
E. THE “ROLLING HILLS” OF THE WORLD COURT	271
III. INVESTOR-STATE DISPUTE SETTLEMENT	275
IV. CONCLUSION	276

This lecture is not styled as a tribute to Professor David Caron, but I shall invoke his scholarship today, not only because this Annual Meeting is dedicated to his memory, but also because of his many insights into dispute settlement.

* This lecture will also be published in the *ASIL Proceedings*, forthcoming 2018. Professor Akande did not contribute remarks for the *Proceedings*.

** Judge, International Court of Justice. The author thanks Cyril Emery, Xavier-Baptiste Ruedin, and Julia Sherman for their research assistance. Any errors, however, are attributable solely to the author.

I. INTRODUCTION

My topic today is the design and operation of mechanisms for the binding settlement of disputes to which at least one party is a state, in particular, adjudication and arbitration. I shall focus on the International Court of Justice (ICJ or Court) and shall speak more briefly about investor-state dispute settlement (ISDS).

There are two limitations on the scope of this lecture. First, the role of the ICJ is broader than the settlement of disputes between states, due to the Court's advisory opinion function, but my interest today is the role of the ICJ in contentious cases. Second, a complete assessment of a mechanism for dispute settlement must take into account an observer's perspective on the substantive outputs from that mechanism. However, I do not attempt to address those outputs in this lecture.

What do I mean when I speak of peaks, valleys, and rolling hills? When explorers embark on a new adventure, public attention is captured by stunning photos of the peaks they seek to scale. At times, our focus shifts to calamities. The explorers are trapped in a valley. Perhaps they will abandon their quest.

What does not attract media attention is the time spent trudging up and down rolling hills, with a mix of progress and setbacks, rechecking the map and adjusting the route. But the choices that individuals make outside of the media spotlight can determine whether the expedition fails or succeeds.

I see similar patterns in the way that our profession approaches international dispute settlement. When new mechanisms are suggested, the objectives are distant peaks to be scaled. The goals are ambitious, and energy is high. Once a mechanism begins to operate, shortcomings can emerge. Criticisms are voiced, sometimes sharply. Some critics are frustrated that the animating aspirations have not been realized. Others are hostile to the particular mechanism and wish to destabilize it. The actual and asserted shortcomings of an international court or tribunal (ICT) can appear as deep valleys.

Many of us who work in the field of dispute settlement find ourselves in the rolling hills, or, to invoke the theme of the 2018 Annual Meeting, in the practice of international dispute settlement.

Day in and day out, we seek to give effect to aspirations and to avoid pitfalls.

II. PEAKS, VALLEYS, AND ROLLING HILLS (THE WORLD COURT)

A. ASPIRATIONS FOR A WORLD COURT

Stated most ambitiously, some early advocates of a world court hoped that disputing states would adjudicate instead of going to war.¹ More concretely, in the Hague Conferences of 1899 and 1907, the proponents of a world court sought to create a court with six key characteristics:

1. A standing court;
2. Authority to settle the full range of disputes (no subjects excluded as too sensitive);
3. Decisions binding on parties;
4. A court from which jurisprudence would emerge;
5. Independent, authoritative adjudicators; and
6. Widespread adherence and use by states.²

The two Hague Conferences did not produce a world court. However, interest in a world court persisted, eventually resulting in the Permanent Court of International Justice (PCIJ), and later, in the ICJ.³

1. See David D. Caron, *War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 AM. J. INT'L L. 4, 5-6 (2000).

2. See generally *id.*; MANLEY O. HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942: A TREATISE* (1942); DENNA F. FLEMING, *THE UNITED STATES AND THE WORLD COURT, 1920-1966* (rev. ed. 1968); JAMES B. SCOTT, *AN INTERNATIONAL COURT OF JUSTICE* (1916) (giving valuable descriptions of the 1899 and 1907 Hague Peace Conferences).

3. The origins of the PCIJ and the drafting of its Statute, as well as the progression from that Court to the ICJ, are described in Ole Spiermann, *Historical Introduction*, in *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* 47 (Andreas Zimmermann et al. eds., 2d ed. 2012).

The Statute of the ICJ (or the Statute) fulfills the first four of the six aspirations listed above.⁴ The fifth and sixth aspirations require more discussion.

B. THE QUALITIES OF ADJUDICATORS

At the Hague Conferences, competing visions of ideal adjudicators were among the obstacles to the establishment of a world court.⁵ Delegations differed on the qualifications of judges (e.g., whether they should come from the ranks of national courts or from academia). The prospect of truly independent judges was an objective for some and a cause for concern for others.

The Statute of the ICJ attempts to reconcile such differences in perspective. Once elected, the judges of the Court are independent of states.⁶ There are two steps to the process of judicial selection—nomination and election.⁷

Under the Statute, states do not nominate candidates for election to the Court. Instead, the Statute is designed to put nominations in the hands of international law experts who have some distance from governments (the members of the national group of the Permanent Court of Arbitration).⁸ The Statute also specifies the qualifications of candidates: “persons of high moral character” who either are qualified for appointment to the highest judicial offices in their respective states or have “recognized competence in international law.”⁹

Judges are elected by simultaneous secret ballot in the United Nations Security Council and General Assembly.¹⁰ The Statute contains a specific admonition to states that elect judges, calling for a bench that has representative geopolitical distribution.¹¹ In practice, over many decades, this election process has led to traditions of

4. See Statute of the International Court of Justice arts. 2, 36-39, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933.

5. See Caron, *supra* note 1, at 17, 21-22; HUDSON, *supra* note 2, at 145-46; SCOTT, *supra* note 2, at 21.

6. Statute of the International Court of Justice art. 2, *supra* note 4.

7. *Id.* art. 4.

8. *Id.* art. 4(1).

9. *Id.* art. 2.

10. *Id.* art. 8.

11. *Id.* art. 9.

allocating seats among United Nations regions and, with the exception of the 2017 election, to an expectation that the Court will include a judge who is a national of each state that is a permanent member of the United Nations Security Council.¹²

Later, I shall say more about the way in which this process of judicial selection has functioned.

C. ADHERENCE AND USE OF THE COURT BY STATES

The sixth characteristic sought by world court proponents at the Hague Conferences—widespread adherence and use by states—was not achieved in the Statute of the ICJ. The aspiration was for a court with jurisdiction over all states, and one that states would embrace broadly as a place to settle disputes. However, UN member states are not required to accept the Court’s jurisdiction, nor are they required to submit disputes to the Court.¹³

The Statute does not leave states with a binary in-or-out choice.¹⁴ They may accept the Court’s jurisdiction unconditionally or with stated reservations. They may accept jurisdiction in respect of disputes arising under particular treaties. They may accept the Court’s jurisdiction in respect of a particular known dispute. They may modify their consent to jurisdiction over time.

As a result, under the Statute, fulfillment of the aspiration that states would be subject to the Court’s jurisdiction and would take disputes to the Court depends on future decisions of states. Therefore, we must ask about the extent to which states have demonstrated their trust in the Court, both by consenting to its jurisdiction and by taking cases to it. The answer to this question brings me to what might be seen as a “valley” in which the world court has found itself.

12. Manfred Lachs, *Some Reflections on the Nationality of Judges of the International Court of Justice*, 4 PACE INT’L L. REV. 49, 59 (1992).

13. See *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, ICJ, <https://www.icj-cij.org/en/declarations> (last visited Sept. 28, 2018) (stating that there are currently seventy-three states that have accepted the compulsory jurisdiction of the Court under Article 36(2) of the Statute).

14. See Statute of the International Court of Justice art. 36, *supra* note 4.

D. THE WORLD COURT “VALLEY”

In comparison to the aspirations of the proponents of a world court, state embrace of the ICJ has fallen short. The number of optional clause declarations has been disappointing.¹⁵ In certain periods, the docket of the Court has been small. Some powerful states have been hesitant to submit disputes to the Court. At times, states have reacted to disappointment in the Court by distancing themselves from it.

Those who are critical of international adjudication,¹⁶ and especially of a world court, would describe the level of state engagement as a deep valley. Speaking to my imaginary band of explorers, these critics would say, “see, we told you it was impossible to scale that peak.”

The situation of the ICJ need not be described as bleakly as these naysayers would have it. Nonetheless, those of us who support the idea of international adjudication must acknowledge shortcomings that may deter states from exposing themselves to the Court’s jurisdiction. Today I shall say a bit about two of these shortcomings: the working methods of the Court and the process of judicial selection.

I recognize, of course, that the procedures of the Court and the composition of its bench are not the only considerations bearing on a state’s decision about whether to put its trust in the Court. However, as David Caron said in his 2000 *American Journal of International Law* article on the Hague Conferences: “The quality of the judges as individuals and the process by which they collectively reach a judgment reside at the core of both the respect accorded the Court and the willingness of states to consent to its jurisdiction.”¹⁷

As to working methods, the Court is often criticized, for example, as too slow, too passive, and not amenable to change and adaptation. It is confident in its own traditions and has been disinclined to borrow innovations from newer courts and tribunals.¹⁸

15. See *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, *supra* note 13.

16. See, e.g., ARTHUR MARK WEISBURD, *FAILINGS OF THE INTERNATIONAL COURT OF JUSTICE* 4 (2016); ERIC A. POSNER, *THE PERILS OF GLOBAL LEGALISM* 149 (2009).

17. Caron, *supra* note 1, at 26.

18. See John R. Crook, *The International Court of Justice and Human Rights*, 1 NW. U. J. INT’L HUM. RTS. 2, 6-7 (2004) (addressing the slow pace of the ICJ litigation and “rudimentary procedures” that persist in the Court).

The process of selecting international judges, including those of the ICJ, has been the subject of extensive study and has faced justifiable criticism.¹⁹ It was perhaps unrealistic to expect that national group nominations would insulate the ICJ nomination process from politics, but that is not the only disappointment. Few national groups have serious processes for vetting the qualifications of candidates.²⁰ The number of candidates nominated in each election is usually small.

In the election process at the United Nations, states have been attentive to geopolitical representation, as they should be. However, my impression, having campaigned for election in New York and having observed elections for the ICJ, is that the nationality of candidates overtakes all other considerations. The focus on nationality in New York offers fuel for some of the Court's harshest critics, who claim that nationality is the key determinant in the way that ICJ judges vote.²¹

Both in respect of the working methods of the Court and the process of selecting judges, there are opportunities for practicing international lawyers—those of us in this room—to make improvements that can contribute to fulfilling the aspirations of the original proponents of a world court.

E. THE “ROLLING HILLS” OF THE WORLD COURT

In my brief summary of aspirations and disappointments, I have emphasized criticisms of the ICJ, depicting the level of state embrace of the Court as a “valley.” However, the record of the world court can be cast in a far more favorable light than some critics have suggested. Both the PCIJ and the ICJ have made important decisions. There have been luminaries of international law on both courts. In recent years, the ICJ has been busy.

19. See, e.g., MICHAEL BOBEK, *SELECTING EUROPE'S JUDGES: A CRITICAL REVIEW OF THE APPOINTMENT PROCEDURES TO THE EUROPEAN COURTS* 5 (2015); RUTH MACKENZIE ET AL., *SELECTING INTERNATIONAL JUDGES: PRINCIPLE, PROCESS, AND POLITICS* 1-2 (2010); Kenneth J. Keith, *International Court of Justice: Reflections on the Electoral Process*, 9 CHINESE J. INT'L L. 49, 49 (2010).

20. See generally MACKENZIE ET AL., *supra* note 19.

21. See Eric A. Posner & Miguel de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599, 599 (2005) (arguing that there is evidence that ICJ judges vote in the interests of their countries of nationality).

States now have multiple options for settling disputes in a courtroom. Talented individuals within the Permanent Court of Arbitration have reinvented that organization. New ICTs, some development that calls for a recalibration of aspirations for international dispute settlement. Our goal should be to make the ICTs, collectively and individually, attractive as venues for dispute settlement, in healthy competition with each other.

We must also reexamine our aspirations for the ICJ. The drafters of the UN Charter assigned to the Court the function of deciding contentious cases (as well as rendering advisory opinions).²² They envisioned that the Court's decisions would also have an impact on states not parties to particular cases through its publicly available jurisprudence.

The Court can meet the objectives of settling disputes and developing a robust body of jurisprudence only if it has a full and diverse docket.²³ Thus, to be faithful to the core aspirations for a world court, states must see the Court as a forum in which they are prepared to initiate cases and in which they will consent to be respondents. How can those of us assembled here today contribute? I offer four suggestions.

First, we should focus on improvements that do not require changes to the ICJ Statute. It cannot be amended except by the same process that applies to amendment of the UN Charter, and there is no reason to expect such amendment any time soon.

Second, we must not overload the ICJ with expectations for which it was not designed. Commentary on ICJ judgments frequently reveals a hunger for more judicial lawmaking. The appetite for more development of law is understandable, in the absence of an international legislative apparatus. However, an overestimation of the capacity of courts poses risks, which David Caron vividly described in his Brower Lecture at the 2017 Annual Meeting. Professor Caron observed that international courts are “the only tool available; they are screwdrivers that have been asked not only to place screws but also to

22. Statute of the International Court of Justice arts. 36, 65, *supra* note 4.

23. *See id.* (setting out the court's jurisdiction in respect of contentious cases and advisory opinions, respectively).

hammer nails.”²⁴ He cautioned that, if courts are used excessively as hammers, they will cease to function well as screwdrivers.²⁵

The ICJ has scope to develop international law and to develop jurisprudence that influences the behavior of states that are not parties to a given case, but it should do so only in the course of performing its assigned functions of settling disputes and issuing advisory opinions. By operating within those limitations, the Court can contribute to the confidence of states, putting it in a better position to fulfill the aspirations that drove the idea of a world court.

Third, the ICJ must be more energetic in improving its working methods, drawing from and adapting procedures that have been successful in other settings. In 2006 and again in 2016, the ICJ held conferences at which participants offered ideas on how to improve the operation of the Court. The outcomes of both conferences were memorialized.²⁶ However, the Court’s Rules were last amended in 2005. Even outside of these formal Rules, there have been only a few modest changes in the way the Court operates.

Seven members of the ICJ serve on its Rules Committee, on which I sit. This is the forum in which ideas for procedural improvements can be developed for consideration by the full Court. The current chairman of the Rules Committee is former President Peter Tomka, and he and several other members are keen to make progress. Under the guidance of President Abdulqawi Ahmed Yusuf and Vice-President Xue Hanqin, I am hopeful that the Court will act on some of the ideas presented in 2006 and 2016.

My fourth and final suggestion is directed at some of you in this

24. David D. Caron, *Fifth Annual Charles N. Brower Lecture on International Dispute Resolution: The Multiple Functions of International Courts and the Singular Task of the Adjudicator*, 111 AM. SOC’Y INT’L L. PROC. 231, 236 (2017).

25. *See id.* at 239 (“[I]f one uses a screwdriver as a hammer, not only does one hammer inefficiently, but eventually the tool turns into a hammer.”).

26. REGISTRY OF THE COURT, INT’L COURT OF JUSTICE, A DIALOGUE AT THE COURT: PROCEEDINGS OF THE ICJ/UNITAR COLLOQUIUM HELD ON THE OCCASION OF THE SIXTIETH ANNIVERSARY OF THE INTERNATIONAL COURT OF JUSTICE, AT THE PEACE PALACE ON 10 AND 11 APRIL 2006 1 (2006) (summarizing the 2006 colloquium); James Crawford & Amelia Keene, *Editorial*, 7 J. INT’L DISP. SETTLEMENT 225, 227-230 (2016) (containing a record of the proceedings of the 2016 Seminar, including an enumeration of the main proposals for reform of the Court’s rules and procedures).

room. About half of the members of the American Society of International Law are not from the United States, so I speak today to an international audience. My suggestion is that you take a more active role in improving the process of nominating and electing ICJ judges.

The capacity of the Court to fulfill the responsibilities given to it in the UN Charter depends on the individual qualities of each judge, including expertise in international law and dispute settlement, an appetite to wade through evidence, and the energy and rigor that is needed to draft the Court's judgments. The busier the Court, the more important it is that each judge has these qualities.

In many states, the process of nominating candidates for election to the ICJ reportedly falls short of the letter and spirit of the ICJ Statute, frequently giving insufficient weight to the candidates' substantive merit.²⁷ We cannot expect the nomination process to be hermetically sealed from national politics. After all, a candidate must count on the support of his or her government in the UN election process. Without suggesting that every nomination process must be the same, I hope that members of this audience will look for opportunities to increase the focus on merit within national nomination processes.

Turning to the election process, geopolitical balance is vital both to the legitimacy of the Court and to its internal operations. There will continue to be debates about how to strike the right balance, but balance there must be.

In other respects, however, the election process needs improvement so that considerations other than nationality are not overlooked. It is unlikely that formal mechanisms for screening candidates for international courts will take hold in respect of ICJ elections.²⁸ Of course, I do not expect the people in this room to eliminate practices such as vote trading in the UN. However, you can contribute to the process of judicial selection by engaging informally yet seriously with candidates, by making your assessments of their capabilities known to

27. See MACKENZIE ET AL., *supra* note 19, at 98-99 (asserting that to open and transparent processes for nomination to the ICJ lead to a greater focus on the merit of candidates than do closed processes).

28. See BOBEK, *supra* note 19, at 33-34; see also MACKENZIE ET AL., *supra* note 19, at 158-59 (asserting that formal screening mechanisms are comparatively "developed and credible" in the context of so-called full-representation courts in which each state is entitled to have a judge of its nationality on the bench).

the representatives of UN member states, and by stressing to your respective governments that the output of the Court inevitably depends on the individuals who sit on it.

III. INVESTOR-STATE DISPUTE SETTLEMENT

I turn briefly to the peaks, valleys, and rolling hills associated with ISDS, drawing on my observations about the ICJ.

Before investor-state arbitration came into existence, the mechanisms for addressing investor-state disputes were reliance on local courts and diplomatic protection by the investor's state of nationality.²⁹ The inadequacy of these mechanisms can leave investors without adequate remedies and can lead to state-to-state conflict, at times including so-called gunboat diplomacy.

By creating in the International Convention for the Settlement of Investment Disputes (ICSID Convention) a mechanism for direct settlement of investor-state disputes in a neutral forum, the World Bank sought to overcome these difficulties and thus to increase capital flows to developing countries.³⁰ However, just as the ICJ Statute does not require UN member states to accept the Court's jurisdiction, the ICSID Convention leaves states parties and investors free to use ISDS or not.³¹ The mechanism of investor-state arbitration (whether pursuant to the ICSID Convention or another instrument) can only meet aspirations if states agree to it and if investors use it.

States have widely embraced investor-state arbitration, which features in about 3,000 treaties, and investors have made use of the mechanism in hundreds of cases. At present, however, it could be said that investor-state arbitration is in a valley of doubt. The most fundamental attack on investor-state arbitration is part of broader invocation of "sovereignty," which is used to condemn not only international courts and tribunals, but also international agreements.

29. Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 RECUEIL DES COURS 331, 344 (1972).

30. *See id.* at 342-43.

31. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 25, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966).

For those who hold these views, the path out of the valley of doubt is to abandon the expedition and to head back to base camp.

Those of us who remain convinced of the need for an international mechanism for settling investor-state disputes find ourselves in the rolling hills. The field of investment has consistently proven itself to be adaptable. Examples today include the evolution of ideas about transparency and confidentiality, as well as ICSID's ongoing Rules Amendment project.³²

There are also proposals to replace investor-state arbitration with an investment court.³³ This is not the place to debate the pros and cons of these proposals, but my observations about the ICJ lead me to two cautions. First, if adjudicators are to be selected only by states, there is a significant risk that the process will be dominated by political considerations, with insufficient attention to the qualifications of candidates. Second, just as the ICJ can only meet aspirations if states embrace it, both as potential applicants and as potential respondents, any mechanism for the settlement of investor-state disputes must meet the interests both of states as respondents and investors as claimants. If that is not the case, disputes will not be brought to the mechanism. We could find ourselves back in the days of gunboat diplomacy.

IV. CONCLUSION

When we reflect on the quest for a world court at the Hague Conferences and the proposal within the World Bank to create a new international mechanism for settling investor-state disputes, we can appreciate that both of these were big and bold ideas. They remain bold today.

32. See generally *ICSID Rules and Regulations Amendment Process*, ICSID, <https://icsid.worldbank.org/en/Pages/about/Amendment-of-ICSID-Rules-and-Regulations.aspx> (last visited Oct. 27, 2018).

33. See, e.g., Gabrielle Kaufmann-Kohler & Michele Potestà, *The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards*, CTR. INT'L DISP. SETTLEMENT (Nov. 15, 2017), http://www.uncitral.org/pdf/english/workinggroups/wg_3/CIDS_Supplemental_Report.pdf; *CETA Explained*, EUR. COMM'N DIRECTORATE-GEN. FOR TRADE (Sept. 21, 2017), http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-explained/index_en.htm; *The Multilateral Investment Court Project*, EUR. COMM'N DIRECTORATE-GEN. FOR TRADE (Dec. 21, 2016), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608>.

Third-party dispute settlement asks a great deal of states. They are expected to place their trust in international adjudicators and international institutions whose decisions are binding on them. They are expected to maintain that trust when, as is inevitable, they disagree with the certain conclusions of a court or tribunal, even when they lose a case. States must therefore be confident both in the adjudicators and the procedures that they follow.

Today more than ever, powerful voices launch strident attacks on international agreements and international institutions, including those involved in the peaceful settlement of disputes. Those of us engaged in the practice of international law must fight back, both by countering exaggerated criticisms and by being open-minded about how we can improve institutions and mechanisms.

There are days, to be sure, when we feel that we are at the bottom of valleys in which lofty aspirations seem unattainable. However, we should not abandon our pursuit of the peaceful settlement of disputes. Instead, we should pull out our compasses, make some course adjustments, and continue to work our way forward through the rolling hills.