American Society of International Law

The 2020
Virtual Annual Meeting

June 25-26, 2020

Eighth Annual Charles N. Brower Lecture on International Dispute Resolution

The Greening of International Dispute Settlement?

Stepping Back a Little

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26 June 2020

Thank you, Catherine, for that introduction and welcome. It is a pleasure to be here, most importantly to honour Charles Brower – who I hope and presume is out there, even if he is not immediately visible. I will have more to say about Charlie in just a moment.

It is also an honour to be giving the Brower lecture at this first virtual annual meeting of the Society. I understand that there is record attendance. It is a testimony to the strength of the Society that it has attracted such participation. Catherine, this is your first annual meeting as President. I am delighted to be speaking here under your gavel and wish you much success in your tenure to come.

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I must also recall my predecessors at this rostrum, whose remarks I have had the benefit of reading, starting with Johnny Veeder, of blessed memory, 8 years ago. I am honoured to be joining their ranks.

An additional reason for the pleasure that I take in being here today is that, from my vantage point, we are at a turning point in our shared calling – in the pursuit of law, a just and effective law, to govern our changing international society. Justice Menon, in his 2nd lecture in this series, referenced Thomas Friedman's *The World is Flat*. The theme of that book, the globalisation and individualisation of the world through its connectivity, is an important one for our calling. I addressed this in an article some years ago entitled *The End of Geography*. There are some themes in that article that I would like to tease out a little further today. The point for now is that, at least as I see it, we are at a turning point. It is not a corner or a juddering change of direction. It is more like the slow arc of a super-tanker changing course to adjust to the weather, although without the benefit of a port of destination and the instruments of navigation that allow the captain to set a considered course. Our calling is to stumble into the future, without clear vision, but hopefully with a benign and honest intent. I hope that this sense of a turning point, which informs my remarks today, will become clearer as I go on.

The Brower lecture cannot start in earnest without some words about Charlie. I have had the pleasure of knowing him for approaching three decades. I still bear the scars of his arm twisting, not much resisted on my part, to become a patron of the Society. And a most effective steward of the Society he was, ushering in, as I recall, a period of well-funded ambition to take the Society into a new era. We are all the happy beneficiaries of his efforts, and even more so, of his remarkable personal generosity to the Society.

Charlie the lawyer, the judge, the arbitrator, is well known to us all. I will not dwell on these aspects, and note only that I have had, and have, the honour of appearing in front of him in his capacity as arbitrator and judge. The strength of his spine, the sharpness of his intellect, and the balance of his compass are impeccable. More important still is his generosity of spirit and personal kindness. Charlie, it is an honour to be speaking here today in this lecture series that carries your name.

So, to my topic: *The Greening of International Dispute Settlement? [question mark] Stepping Back a Little*. It is not an obvious title, save perhaps for a post-War American generation who came of age in the 1960s who will recall the publication in October 1970, by a Yale law professor, Charles A. Reich, of a book that was to become an immediate best-seller: *The Greening of America*. Under the bold title of the book, on the front cover, were written the following words: "There is a revolution coming. It will not be like revolutions of the past. It will originate with the individual and with culture, and it will change the political structure only as its final act." Bold words; and a book that captured, and was captured by, popular culture.

I was a boy of 10 at the time of its publication, growing up in the southern tip of Africa in a society that was the antithesis of freedom and equality. I was too young to read the book then. But the idea of the book, brought home by my father from a trip to the U.S., has stuck with me ever since.

In contrast to the book, I am not predicting or proposing revolution. And the greening epithet is not an environmental intonation. What I have taken from the book, however, and from its resonating title, is the idea that there are turning point moments; that there are moments for reviewing and refreshing; that times change; that re-thinking is not repudiation; it is, rather, a recognition that historically rooted institutions may not sufficiently clothe the corners of the society that we have become. It is the possibility of the greening of international dispute settlement that I would like to explore today.

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In a speech to the American Bar Association on 24 January 1982, the sitting Chief Justice of the United States, Warren Burger quoted Abraham Lincoln and Judge Learned Hand. Lincoln, he recalled, had said: "Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often the real loser – in fees, expenses, and waste of time." Learned Hand, Justice Burger recalled, had commented: "I must say that, as a litigant, I should dread a lawsuit beyond almost anything else short of sickness and of death."

These recollections were intended to frame Justice Burger's own observations, captured by the title of his speech, "Isn't there a better way?" Opening his remarks, Justice Burger said as follows:

> "The obligation of our profession is, or has long been thought to be, to serve as healers of human conflicts. To fulfil our traditional obligation means that we should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense, and with a minimum of stress on the participants. That is what justice is all about.
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> The law is a tool, not an end in itself. Like any tool, particular judicial mechanisms, procedures, or rules can become obsolete. Just as the carpenter's handsaw was replaced by the power saw and his hammer was replaced by the stapler, we should be alert to the need for better tools to serve our purposes."

It is this enquiry, elevated to international dispute settlement, that I would like to explore.

International dispute settlement, or IDS, has been an extraordinary engine for the development of international law over the past nearly 230 years, and more particularly over the past 120 years or so. I will consider why and how this has been the case as we go along, but for the moment I simply assert the proposition. My "nearly 230 years" is intended to recall the Jay Treaty of 19 November 1794, between Britain and the United States, which, in various of its articles, provided for binding arbitration. It is the Jay Treaty that is frequently considered to be the font of IDS today.

Addressing the arbitrations that subsequently took place pursuant to the Jay Treaty, Georg Schwarzenberger, in a 1978 article, commented that the quality of the awards rendered is impressive, noting further that it was the work of the Commission under Article VII of the Treaty "which produced the Commissions' most remarkable contributions to substantive international law …" It was, though, not only the Commissions' contribution to substantive international law that was notable but also their contribution, and that of the Jay Treaty, to what have since become core procedural tenets of international adjudication.

My reference to the "past 120 years" in particular is intended to recall The Hague Peace Conferences of 1899 and 1907 at which were adopted the successive Hague Conventions No.1 for the Pacific Settlement of International Disputes, one element of which was the establishment of the Permanent Court of Arbitration, the PCA. I will come back to these conventions a little later. For the moment, I note simply that the establishment of the PCA, and its competence in respect of arbitration, saw a steady stream of inter-State arbitral disputes referred for settlement in the period prior to the establishment of the Permanent Court of International Justice in the early 1920s. The PCIJ was, of course, anticipated in the Covenant of the League of Nations. It largely picked up the baton of inter-State dispute settlement in the period 1923 to 1940.

Rooting the narrative in the Jay Treaty commissions, in the Hague Conventions of 1899 and 1907, in the PCA and in the PCIJ leads inescapably to the appreciation that the framework of international dispute settlement with which we live today is largely 19th and early 20th century in origin and structure. There have, of course, been more recent developments – ICSID, UNCLOS dispute settlement, WTO dispute settlement, and more, but key pillars of the contemporary international dispute settlement architecture remain grafted on to 19th and early 20th century roots. The 1899 and 1907 Conventions are still a cornerstone of the contemporary IDS system. The PCA, modernised through the reach of its arbitration, conciliation and other rules, has, since 1996, attracted a resurgence of inter-State cases. The International Court of Justice, while born with and of the United Nations, is heavily anchored, through its Statute and Rules, in its PCIJ predecessor.

And it is not just the institutional roots of IDS that are anchored in the 19th and early 20th centuries. So also are key features of the adjudicatory system. I will develop this idea more fully shortly, but for the moment let me simply note the heavily State-centric nature of IDS today and its opt-in character of consensual jurisdiction. Some steps have been taken to move away from these aspects, with investor-State dispute settlement, through the compulsory settlement commitments of UNCLOS and of the WTO. But the IDS system today, for all its developments, would be recognisable and familiar to Elihu Root, to Charles Evans Hughes and to James Brown Scott, who led this Society from 1906 to 1939.

Let me pause here for a moment to address what I mean, and what I exclude, when I refer to international dispute settlement. I take IDS to mean the settlement of disputes arising from

competing claims of law and legal obligation, and the conduct required thereby, under public international law, whether treaties, custom or some other source of international law. I am not including negotiations or diplomatic mediation. That would broaden my horizon too far. The definition that I take as my starting point is nonetheless at once both broad and narrow. It excludes the resolution of purely contractual claims between non-State litigants, save where the institution of settlement, or the umbrella instrument, is an institution or instrument of international law. It excludes, therefore, very largely many of the claims that are addressed routinely under the aegis of the International Chamber of Commerce, and similar institutions. But what the definition does include is disputes arising from claims rooted in international law before domestic courts, not just those that are heard by international courts and tribunals. This is very deliberate as, as I see it, informed both by my private practice over the past 30 years and by my time as Legal Adviser of the UK Foreign & Commonwealth Office, many disputes which turn on contested claims of obligation under public international law arise before domestic courts and tribunals, or have a hybrid quality in which the same dispute is addressed in both domestic and international fora.

Let me return to my narrative.

I framed my reference to the Jay Treaty, the Hague Conventions, the PCA and the PCIJ by suggesting that IDS has been an extraordinary engine for the development of international law over the past nearly 230 years. Let me develop this further, both with some numbers and with some reflections on the legal theory informing and driving this development.

Starting with some numbers, the institutional sources of international law adjudicatory decision-making have broadened significantly over the past 75 years. The pre-War institutions and ad hoc fora have been supplemented, as well as by the ICJ, by the panel decisions of the GATT and WTO, and by the WTO's appellate body. The conclusion of the ICSID Convention in 1965 has led to many hundreds of investor-State disputes being addressed under the Centre's auspices, these cases being supplemented by still more investor-State disputes being addressed under the auspices of other settlement mechanisms, notably, the PCA. The Iran-U.S. Claims Tribunal has, in its approaching 40 years of operation, addressed almost 4,000 claims arising out of the events of the Iranian revolution of 1979 and the period immediately following. Adopting a different approach to the settlement of mass claims, the UN Compensation Commission, established to address claims for loss, damage and injury arising out of the Iraqi

invasion of Kuwait in August 1990, received 2.7 million claims. By the time it concluded its work in 2005, 19 panels of commissioners had awarded a total of $52.4 billion in compensation to approximately 1.5 million claimants.

Then there are the various regional human rights courts and commissions, the most active and long-serving of which has been the European Court of Human Rights. Its most recent report states that, since it was established, the Court has decided on the examination of around 882,000 applications through a judgment or decision, or by being struck out of the list. Over 20,000 of these decisions have taken the form of a final judgment on the merits. The growing *acquis* of other regional human rights adjudicative bodies adds to these numbers.

Not to be overlooked are also the judgments and decisions of the international and hybrid international criminal courts and tribunals, of which there have been many hundreds, each developing the body of international criminal law and informing the development of international humanitarian law.

For a more complete picture, we would have to add to these numbers the claims that have been adjudicated before other fora and those more ad hoc in character. Also excluded from this review are countless claims rooted in international law that will have been addressed by municipal courts.

Looking more closely at some of the institutions and mechanisms, we see that the PCA has decided, or currently has pending on its docket, 282 cases. Of these, 44 are inter-State disputes, three of which are pending. These cases have been seminal in interpreting, applying, clarifying and developing the law.

The PCIJ addressed some 57 separate cases, both contentious and advisory. Its jurisprudence is regularly cited to this day. To these we can add 160 cases decided by the ICJ, 133 of which were contentious cases, 27 of which were advisory. This body of jurisprudence is the day-to-day *acquis* of international law, addressing everything from the legal personality of international organisations to responsibility for genocide.

ITLOS, in its 23 years, has addressed 29 inter-State cases, with its judgments and decisions interpreting, applying and developing important aspects of UNCLOS.

The ICSID and WTO case statistics are remarkable. In the 48 years since its first case, ICSID has concluded 519 cases, with a further 266 pending – a total of 785 cases in all. The numbers are similar for the WTO, which, through its ad hoc panels and appellate body has been seised of 595 disputes, giving rise to 350 rulings. Between them, these ICSID and WTO decisions have put flesh on the bones of international investment and trade law.

These numbers are of course pretty raw and one-dimensional, and you should not take me as implying that all these decisions are jurisprudentially weighty or sound. I am being much more prosaic, suggesting only that the many tens of thousands of judgments, awards, decisions and orders rendered over the years have been the lifeblood of the development of international law.

The adjudicatory engine of the development of international law does not, however, stem from the numbers. The numbers are the fuel that generate the principles. They are the how. They are not, however, the why – they are not the legal theory informing and driving this development of the law. For that we have to look elsewhere. And the elsewhere takes us back to some seminal works on international law of the 1920s and 30s which, often now hidden from view by the passage of time, were instrumental in crafting a philosophy of international adjudication that has powered IDS development of the law to this day.

Although he was not alone in this endeavour, a luminary in the crafting of this philosophy was Hersch Lauterpacht. There are four propositions that I would single out from his writings, propositions that, with the passage of time have come to be regarded as principles. The first is the unity of international law and municipal law. This was a purpose-driven conception of law, born of a sense of the unity of the ultimate focus of all law and the need to constrain the unbridled exercise of sovereign power.

The second proposition is that of the supremacy of international law. Supremacy is the cornerstone of many unifying theories of law. For Lauterpacht, international law, the touchstone of principle establishing standards with which States were required to comply, was also an important safeguard against the abuse of human rights. It is equally important for purposes of addressing issues of minimum standards more generally.

The third proposition is that of the completeness of the rule of law and the principle of *non-liquet*. A judge cannot decline to decide a case on the ground that there is no law. Lauterpacht addressed this issue in his seminal work *The Function of Law in the International Community*, published in 1933. Let me quote briefly from what he said:

> "There may be gaps in a statute or in the statutory law as a whole; there may be gaps in the various manifestations of customary law. There are no gaps in the legal system taken as a whole. … Under the normal rule of law it is inconceivable that a court could pronounce a *non liquet* because of the absence of law."

This is an immensely powerful injunction in the hands of a judge or arbitrator.

The fourth proposition is that it is the responsibility of international tribunals to develop the law. In his equally compelling book *The Development of International Law by the Permanent Court of International Justice*, also published in 1933, and later refreshed in a second addition published in 1957, Lauterpacht addresses this point as follows:

> "The development of international law by international tribunals is, in the long run, one of the important conditions of their continued successful functioning and of their jurisdiction.
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> …
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> While … the codification of international law … must continue to be regarded as a rational and practical object of the collective endeavour of Governments, the achievement of part of that object by other means, and in particular through the activity of the International Court itself, acquires special significance."

Coinciding with the major institutional developments in international dispute settlement, which put arbitration and judicial settlement centre-stage, these four principles articulated and developed by Lauterpacht – the unity of law, the supremacy of international law, the principle of *non-liquet*, and the judicial responsibility to develop the law – [these four principles] form the bedrock of the adjudicatory development of international law that we have witnessed over the past 120 years. It is by operation of these principles that international law has come to

occupy such an important place in the consciousness of the rule of law globally. Armed with an appreciation that their adjudicatory responsibility requires the development of the law, not just the settlement of the dispute of which they are seised, driven by an injunction of *non-liquet*, resting on an appreciation that municipal law and international law are one, and that international law is supreme, the international judge and arbitrator has been able to craft and develop a body of law – through interpretation, through the filing in of gaps, through the articulation of fundamental principles, and even of new rules. This process has made international law what it is today.

To this I would add a further thought, going to the flexibility that the international judge and arbitrator has had, and has, in respect of the sources of international law. With only few limitations, the rules of treaty interpretation allow very wide scope for the interpretation of texts. This is complemented by the almost endlessly discoverable and malleable content of customary international law. And, drawing on Lauterpacht again, this time in his path-breaking *Private Law Sources and Analogies of International Law*, published in 1927, the same flexibility is available with regard to the concept of "general principles of law recognised by civilised nations", expressed most clearly in Article 38(1)(c) of the Statute of the PCIJ, now the ICJ. In Lauterpacht's conception, this contemplates reference to principles of municipal law and other private law sources and analogies for purposes of international adjudication.

Viewed in this light, this edifice of many tens of thousands of judicial and arbitral decisions, each articulating, refining and advancing the principles of international law on which they are based, has been a common law endeavour on a global scale. And it has been an endeavour that has taken place within a framework of only rudimentary hierarchical principles and in the absence of an efficient legislative mechanism capable of acting as counterweight to judicial activism. Seen in these terms, the proposition, expressed in Article 38(1)(d) of the Statute of the PCIJ, and now the ICJ, of judicial decisions "as subsidiary means for the determination of rules of law", seems very far from the true reality of things.

I pause here for an aside. I appreciate, especially with many of you sitting only a stone's throw away from the seat of the Federalist Society, that the picture that I have painted about the responsibility, role and record of the international judge and arbitrator will cause a shudder. Unbridled judicial activism! The worst nightmare!

This, though, I believe, is far from the reality. International adjudicatory decision-making has very largely been measured, considered and sound. The requirement to give reasons; the transparency, stability and consistency of the law; its small "c" conservatism; the need for the judicial college to remain in step with the society in which it operates; these all push in the direction of considered and calibrated judgments and awards, and only very seldom of juridical revolution.

More important is that the development of international law through the adjudicatory process has by-and-large served the U.S. and its long-term strategic interest well – whatever the outcome of individual decisions. And the U.S., typically, does law very well. It is part of your constitutional culture, whether on the conservative or the liberal end of the spectrum.

Returning to my narrative, I must stress that it is no part of my remarks to take issue with the legal theory that has informed the developments about which I have spoken. Through Lauterpacht's four principles, and through the adjudicatory decision-making of courts and tribunals, we have an international legal system. Through this endeavour, we have moved beyond a Hobbesian state of nature. It is true, of course, that challenges remain. But international society today rests on a firm edifice of law.

So where does all this lead? Why the question of the greening of international dispute settlement? Where does Justice Burger's enquiry of a better way take us?

IDS, in its various forms, is facing considerable challenges at present. The WTO appellate body has been shuttered in consequence of U.S. objections to what are claimed to be judicial overreach. Investor-State dispute settlement is similarly challenged, for its ad hoc character, for reasons of procedural and other objections, and more. Less than 40% of the UN membership has accepted the compulsory jurisdiction of the ICJ by depositing declarations under Article 36(2) of the Court's Statute. Hardly a case goes by in which jurisdiction is not challenged. There is a growing trend of domestic courts questioning international human rights judgments, rather than acting as enforcers of international law. Many are concerned, with some justification, with what is often described as "lawfare". There is a sense in some quarters that international dispute settlement has become a second front – not a genuine attempt to resolve disputes but simply another forum in which to assail an adversary.

These are not the hallmarks of a healthy system, at ease with the community that it is supposed to serve. Something has gone wrong, and it feels like more than just another cyclical trough. We should take it seriously.

There is also a wider perspective. For all the developments in IDS, it has not kept up with dispute settlement innovation in municipal legal systems. And it has notable shortcomings, beyond the headline critiques of the moment. Adjudication is quintessentially backward looking, addressing the rights and wrongs of what has happened, rather than focusing on rebuilding the relationship for the future. While individual cases may be concluded by a judgment or award, it is less often that the dispute between the parties is brought to an end. Adjudicatory jurisdiction is limited *ratione voluntatis*, *ratione personae*, *ratione materiae*, *ratione temporis*. It is constrained by the *petitum* of the case. In the case of the ICJ, ITLOS and the WTO, access is restricted to States. There is no systemic integration of dispute settlement mechanisms. This has lead to forum shopping, to fragmentation and, at times, to an inconsistency of principles and outcomes. There are real systemic shortcomings that flow from ad hoc decision-making by tribunals that become *functus* the moment they render their award. There is no unifying theory encapsulating the roles and responsibilities both of international courts and tribunals and of their national counterparts.

More important, perhaps, is that, although the availability of alternative mechanisms of dispute settlement features in various instruments, including in Article 33 of the UN Charter, resort to conciliation and a more systematic use of other methods of settlement is rare. Of the 785 ICSID cases, only 12 are conciliation cases. The WTO Dispute Settlement Understanding provides for consultations, good offices, conciliation and mediation, and some disputes are resolved in this way, but the majority are funnelled through the adjudicatory process. UNCLOS Annex V conciliation has only been used once, in the case of the maritime delimitation dispute between Timor Leste and Australia. For those who have not read the report that followed that process, I commend it to you. As someone who saw that process first-hand, I can attest to its effectiveness and rigour, and the likely enduringly positive outcome, more so than any adjudicatory decision could possibly have achieved. There are now two conciliation commission proceedings pending under the International Convention on the Elimination of All Forms of Racial Discrimination. It will be interesting to see how they play out. This, though, is almost the sum total of the universe of international conciliation, a tiny fraction of the cases that go to arbitration or judicial settlement.

We are therefore, and this is where I began, we are therefore still in the harness of 19th and early 20th century IDS modalities. IDS has not become more sophisticated with the times. Rules of procedure have been amended, codes of conduct have been produced, but this is all tinkering. There has not been any serious attempt to re-think, to refresh, the system of international dispute settlement beyond adding a patchwork of different forms of adjudicatory mechanisms to address particular circumstances. The last attempt at a new approach, notable but self-contained, was 40 years ago, in Part XV of UNCLOS, with its range of dispute settlement mechanisms. This is laudable, but the *Timor Leste / Australia* conciliation is so far an outlier.

There is a great deal of thoughtful scholarship pressing the boundaries in this area. As I was preparing my remarks for this lecture, I came across many thought provoking pieces by members of the Society. I commend them all. I am only scratching the surface. My point is simple. IDS has been the engine of the development of international law for the past 120 years. It has been cosseted and informed by a systemic and strategic conception of the law. It has brought us to where we now find ourselves. But, it is also now facing challenges. And while some of these are ill-informed or lack *bona fide* intent, they cannot all be easily dismissed. More importantly, quite apart from the challenges, there is the question of whether we can do better; whether IDS today is sufficiently sophisticated, sufficiently attuned to the changing nature of international society.

My answer to this question is that it is not. IDS has not kept pace with developments in dispute settlement in municipal settings. While this may be for understandable reasons, the shortcomings are evident. IDS has not kept pace with the changing character of international society. We can do better.

This is not a call to sweep away what we have had until now, much less to repudiate what has gone before. It is simply a call for some fresh thinking, to see if there is something to be done today, as there was a century ago, to conceive of a system of international dispute settlement that is more nimble and more in tune with the society it is designed to serve.

So, how do we do this, and where should we start?

It needs no saying, but just in case – we are not in a legislative moment. This is not a moment for grand conferences, for fast track negotiating authority, for expectations of widespread multilateral buy-in to some new instrument. Politicians are distracted elsewhere and we are far from the spirit of The Hague, Versailles, Bretton Woods or San Francisco. So, this is not the route. Nor, I think, can it be a matter for itinerant discussions in a forum such as the 6th Committee, the Legal Committee, of the UN General Assembly. That may have a part to play, but something more is required.

There is, I believe, an avenue of endeavour for the invisible hand of our college of law to examine with renewed interest and focus certain propositions and principles that inform the system of international dispute settlement. The issue of the supremacy of international law, and the relationship between national and international law and adjudication, is ripe for review, and there have already been many interesting scholarly contributions to this discussion. I have added my few pennies worth in a 2016 published lecture entitled "The Supremacy of International Law?" [question mark]

I will return to the issue of who and how in just a moment. Let me say something, first, about the elements of an agenda – a theory of change – that I think would merit discussion.

The leitmotif of late 19th and early- to mid-20th century dispute settlement was the preservation of peace and the avoidance of recourse to force. We see this expressed in Article 1 of the Hague Conventions. It was the corner stone of the Covenant of the League of Nations. It is the centre-piece of the UN Charter. We do not, however, I believe, have a more all-embracing sense of the purpose of international dispute settlement. If we are to move to a more variegated dispute settlement approach, it would assist if we could better articulate a sense of purpose that is properly in tune with a wider ambition.

Beyond this, amongst the issues that might be placed on the agenda, I would put the following:

1st – we need a more sophisticated and contemporary sense of the interaction between international law and municipal law, and of what the relationship ought to be between dispute settlement at the municipal and international levels. Where is competence properly rooted? How do the courts in one sphere engage with those in another? The unity of law and the supremacy of international law would benefit from a little more contemporary prodding.

General principles of supremacy, subsidiarity and margin of appreciation can only take us so far.

2nd – I would be inclined to look again at the principle of *non-liquet*, not to question its place in the firmament to this point. The issue is, rather, given how far we have come since Lauterpacht's *Function of Law*, whether we need to maintain a systemic antipathy towards gaps in what Lauterpacht termed "positive law". There are such gaps. The question is who should fill them and how parties should proceed in the face of such gaps. The *Lotus* principle, that everything is permitted unless it is proscribed, need not be the controlling hand on the tiller. Silence in the law may speak in many different ways. Ours is not an Aristotelian discipline. A vacuum, a gap, is not something to be abhorred and plugged whenever there is contention.

There is another reason for looking again at *non-liquet*. It is that, while findings of law may be central to the adjudicatory determination of disputes, they are not necessarily central to other forms of dispute settlement. The Report of the *Timor Leste / Australia* Conciliation Commission addressed this issue in the following terms:

> "… there is a question regarding the extent to which a conciliation commission should engage with the parties concerning questions of international law. …
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> … The function of a commission is to assist the parties to reach an amicable settlement, not to pronounce for its own sake on questions of international law … It follows, for the Commission, that a conciliation commission need not as a matter of course engage with the parties on their legal positions, but may engage with these matters to the extent that so doing will likely facilitate the achievement of an amicable settlement."

Away from arbitration and judicial settlement, therefore, *non-liquet* has much less, if any, relevance.

3rd – subject to the controlling caveat that this enquiry cannot give cover for the reduction of minimum standards, there is scope for fresh thinking about the proper role and content of the principles of exhaustion of local remedies and denial of justice. These principles stand at the intersection of the relationship between dispute settlement in the international sphere and the

national sphere. Although there is a great deal of contemporary writing and arbitral analysis on these issues, the principles are deeply rooted in a bygone age. I don't rule out that a review may conclude that the role and content of these principles are where they should be, and that no refresh is warranted, but I suspect that there will be more to say.

4th – I would also like to see some further thinking on the issues of a system of reference and remand jurisdiction, with a view to developing a more institutionally integrated system of international dispute settlement. With greater institutional integration, even if only loosely achieved, is likely to come greater substantive cohesion of law.

5th – related to the issues of the relationship between international law and national law, and between international courts and national courts, there would be merit in exploring further the so-called "solange" principle expressed in the context of EU competence disputes. In essence, this postulates that "as long as" one system of law or court respects (in this case) fundamental rights, the other system of law or court will defer to the first. As cast, this is a protection lock, guaranteeing minimum treatment. But the concept could be readily developed further in the international space, with a rachet in both directions, to foster more cohesive engagement between national and international courts.

6th – associated with the preceding, there may also be scope for further work to be done on agreed minimum standards – of treatment, of conduct, of review, and more. If agreement can be reached on core elements, the debate will become more productive – about the interpretation and application of such standards and less about their existence.

7th – with the limited exceptions of Part XV of UNCLOS, and perhaps of the WTO, there is lacking today in the international space a clear articulation of the relationship and interaction between different modalities of dispute settlement. In the municipal sphere, much effort and analysis has been devoted to the interactive use of multiple methods of settlement to achieve the resolution of a given dispute. Some rules of procedure in the international sphere contemplate this possibility, but only rarely, and it is very seldom that such approaches are used. This is ripe for review.

8th – (at least) two other big issues remain. The first is how better to address the reality of non-State actor participation in a refreshed IDS system. Investor-State dispute settlement and

human rights proceedings accommodate this. Big issues remain, however, not simply in an institutional context, with regard to ICJ or WTO proceedings, but also more widely with regard to long-settled principles of diplomatic protection. This, too, might be usefully revisited.

The second point is the thorny question of consent, notably as regards ICJ jurisdiction. While, however, this is a real issue with regard to the ICJ, it is less pressing in other contexts. Given the obstacles to the revision of the ICJ Statute, this would not be at the top of my list of priorities, but the issue of jurisdiction *ratione voluntatis* would clearly be an important consideration in the context of any institutional innovation.

I come to my concluding remarks.

Although there was some discussion in the mid-1990s, in the context of a Steering Committee set up by the Secretary General of the PCA, of whether to revise the 1899 and 1907 Conventions, nothing came of this. The stumbling block, it appears, was scepticism about the political will of States to accomplish such a task.

I began this part of my discussion by saying that this was not a legislative moment. Now is not the time to think of revising the Conventions. But taking a fresh look at them is not the sole preserve of States. And a fresh look does not mean revision. New instruments and new ideas can take many forms.

These conventions on pacific settlement are the standard bearers that still guide our way today. But they are from a different age. Why not look again at the template that they have bequeathed us to see whether some form of strategic refresh may usefully be captured in an elegant instrument of contemporary voice and vantage point?

Here is a task for the Society, together with the PCA Secretariat, and alongside the Society's national and regional counterparts. Why not take forward such a refresh? Why not explore whether a new, elegant, text, fit for the next 120 years, can be crafted. Standard setting endeavours, both binding and non-binding, are often taken forward through non-governmental endeavour. We should not wait for legislative moments. This is an initiative for our college of international law today.

Catherine, invisible friends and colleagues, it has been a pleasure to be virtually with you for the past hour or so. I hope I have given some food for thought. Charlie, it was a pleasure to speak in your honour.

Thank you!