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Second World Meeting of the Societies for International Law

Plenary Round Table – New Crisis of International Law or Threat of Collapse of the International Legal Order?

Introductory Remarks

by

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Distinguished colleagues,

This is quite a unique gathering, where practitioners and academics can meet, reflect and discuss the challenges that the international legal framework is facing, and I am honored to launch this first plenary roundtable.

I leave the question of the conceptual analysis of the existence of a crisis of international law to the academic world. I do not intend to provide an answer to this question, but to listen, with great interest, to the discussions that will take place during the next two days.

This gathering provides a unique opportunity for me, as a practitioner, and as United Nations Legal Counsel I am directly involved in the Secretary-General's decision-making, to engage with the international law scientific community on important issues concerning international law.

In addition, as a member of two scientific societies, the Portuguese Society of International Law and the American Society of International Law, I follow, as much as I can, these scientific discussions and any potential outcomes.

The round table to which I have been invited has a suggestive title: "New Crisis of International Law or Threat of Collapse of the International Legal Order?"

In this regard, I would like to reflect on such a premise. In other words, I wish to discuss if there is such a crisis or if there is more what we could consider a perception of the existence of a crisis.

There are different indicators of a so-called crisis of international law, which fall into two major categories: (1) States disengagement from the production of norms of international law, in particular multilateral treaties; (2) lack of enforcement mechanisms, in particular when international law obligations are not respected.

I.

Regarding the production of international norms, and because of the time constraints, I will only refer to a couple of very recent examples, which counter the assumption of States disengagement in the production of international norms.

In light of the involvement of my Office in this endeavour, I wish to refer to the process regarding an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ). I had the honour to open in August 2019 the Third Session of the BBNJ Intergovernmental Conference, which discussed the draft text of an agreement, prepared with the assistance of OLA.

The other very recent example is the adoption, on 7 August 2019, of the United Nations Convention on International Settlement Agreements Resulting from Mediation, known as "the Singapore Convention on Mediation", with 46 States signing on the first day. This convention had previously been adopted by consensus by the General Assembly of the United Nations, in December 2018.

And I cannot avoid mentioning the annual Treaty Events which provide special facilities for the Heads of States or Government to sign multilateral conventions, of which the Secretary-General is the depositary, or deposit their instruments of

ratification, accession or through other instruments establishing the consent to be bound. The successive treaty events inspired a renewed enthusiasm for participation in these treaties by a growing majority of States.

These examples show that States production of norms of international law has not stopped. It also counters the idée reçue that States experience difficulties in reaching a consensus on questions of common interest.

I wish to end on this first point related to the production of norms by referring to the development of instruments of soft-law. As a lawyer coming from a civil law tradition, I am reluctant to discussions supporting an evolution from instruments of hard law to instruments of soft law, in light of the impact that such an evolution would have on the (lack of) assumption of new obligations by States.

II.

I mentioned earlier that enforcement was a second indicator of an eventual "crisis" of international law, which would relate this time to the respect of international law, and to eventual reactions to its violation.

The inactivity or paralysis of international jurisdictions, which is often mentioned as an indicator of the lack of appropriate international law enforcement

mechanisms, needs to be reassessed in light of the important increase in the number of cases at the International Court of Justice (ICJ), in the past ten years, with currently 16 pending cases. In addition, I wish to note, as a positive development, the diversification of the cases, which now concern States from all regions of the world and refer to different subject-matters.

In addition, UN-established international criminal tribunals have been finishing their work and closing their doors. There has also been a multiplication of the number of arbitration clauses included in international legal instruments.

Where there are some critical situations in international dispute settlement bodies, it is often due to causes that go beyond the institution itself, as it is currently the case at the WTO or with the International Criminal Court.

There are however some areas where international law is being challenged. In this regard, the incapacity of the Security Council to react in certain situations where, in accordance with the UN Charter, it would be its responsibility to do so, is specially concerning. This is particularly serious when we are referring to situations where violations of international humanitarian law and serious violations of international human rights law occur, as we have seen these last years with regard to the situations in Syria, Yemen and Myanmar.

What is often essentially a political question or dispute should not be automatically translated as an international law crisis. It should be read in political terms, at a time where political organs are not fulfilling their responsibilities.

However, States have also found creative ways of countering political blockades. As an example, we are assisting to a new trend, since December 2016, in the field of international criminal accountability. In contexts where it is difficult to foresee effective judicial accountability in the immediate future, there has been an increasing appetite, at a minimum, for gathering and securing evidence of atrocity crimes. Such evidence could be used in the future by national, regional or international courts that may have jurisdiction. This represents a significant new approach in the field of international criminal accountability, focusing on supporting the prosecution efforts of other stakeholders rather than conducting its own prosecutions. As of today, three mechanisms of this nature have been established, the International, Impartial and Independent Mechanism on Syria (the IIIM), UNITAD, for crimes committed by Daesh in Iraq, and, most recently, an Investigative Mechanism regarding the situation in Myanmar. I am aware that the legal basis of some of these mechanisms, particularly the IIIM, is disputed by some Member States but still, they exist, and they are working.

III.

I will conclude my remarks by addressing another question to be discussed during these two days, which is the role of international law societies and their interaction with practitioners.

In this regard, substantial bridges between Academia and decision-makers in the field of international law should be built. Decision-makers act under pressure, and react to urgent matters which require immediate action. I believe that decision-makers would benefit from the cooperation of academia and scientific societies. In this regard, I would encourage the development of focused discussions, as the American Society of International Law has been organizing lately, which could be useful in decision-making processes.

In order to get there, different channels of communication need to be open, and academic networks and scientific societies should think about using existing fora, in particular within States, which are the ones discussing matters of common interest in intergovernmental meetings. Discussions on frontier issues and in new fields (for example, cyberspace, artificial intelligence) are of special interest. But at the same time, practitioners are constantly discussing and revisiting classical questions of public international law related, for example, to the use of force and

self-defense, legal aspects of peacekeeping operations and interpretation of Charter provisions.

I will conclude these remarks by saying that from my personal experience, international law is still a fundamental component of the international order. It is our collective responsibility to ensure that remains so.

Thank you.