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### Current Developments Concerning the Settlement of Disputes Involving States by Arbitration and the World Court – Remarks by Lori Fisler Damrosch

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roads for which she received last year's ASIL certificate of merit for the book's preeminent contribution to creative scholarship.

REMARKS BY LORI FISLER DAMROSCH\*

Our moderator has asked me to talk about the dialogue between the United States and the Soviet Union. With respect to the general contours of the U.S. proposal, I think it is a very constructive one. I do support it, and I urge you all to study it, comment upon it, and try to improve it to take it a bit further. The main feature of it that I want to mention today is the idea of affirmative enumeration of categories of disputes that would be submitted to the Court for jurisdiction as opposed to the historical approach of accepting everything subject to reservations. Although in an ideal world we might favor general acceptances, if that cannot be obtained then the idea of enumeration of affirmative categories has its attraction. What I would hope, Judge Sofaer, is that you are taking a very long list. I have available at least 290 items that I suggest you put on the list and I will be happy to chat with you about what those should be.

The original Gorbachev idea was that the Permanent Members of the Security Council should accept the jurisdiction of the Court in identical terms. Perhaps that was a cost-free proposal for the Soviet Union if it could assume that China and France would be intransigent; then the Soviet Union could be right there in the middle, somewhere between the United States and the United Kingdom. But I understand that the way things are proceeding both the Soviet and the U.S. sides are not going to wait for other Permanent Members to jump on the band wagon. They will pursue their dialogue and if necessary could go forward in a bilateral fashion. I think that is a constructive approach for both sides to be taking.

About the idea of enumerating affirmative categories of disputes, I want to take as the principal focus of my remarks two categories of disputes that are problematic—human rights and arms control. I am going to start with human rights because the Soviets have placed that on the table. Secretary Gorbachev in his speech to the U.N. General Assembly on December 7, 1988 said, "We believe that the jurisdiction of the International Court of Justice at The Hague as regards the interpretation and implementation of agreements on human rights should be binding on all states." Subsequently the Soviet Union has followed up with a more tangible action in that it has accepted the jurisdiction of the Court as to six human rights treaties. As was noted at one of the panels yesterday, the instrument by which it has done so is reprinted in the April 1989 issue of the *American Journal of International Law*. In the human rights area, as everyone in this audience knows, the U.S.S.R. has long proclaimed its moral superiority over the United States by virtue of its adherence to human rights treaties that the United States has not seen fit to ratify. The recent Soviet action accepting jurisdiction under these six human rights treaties gives the U.S.S.R. an additional public relations point. Not only does the U.S.S.R. accept substantive obligations under these treaties, but, at long last, it seems to accept the principle of third-party dispute settlement as well. It should not escape notice that, as to some of these treaties, the United States is lagging behind, not only in accepting the substantive obligations, but on the dispute-settlement side as well. To take the most prominent example, we finally did ratify the Genocide Convention after many years of delay, but the Senate interposed a reservation to the effect that we would not accept the jurisdiction of the International Court of Justice under the Genocide Convention. The Genocide Con-

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vention is one of the six human rights treaties that are covered by the Soviet acceptance. Another is the Torture Convention. The Torture Convention is before the Senate now with a recommendation from the administration that the Senate give its advice and consent to ratify that treaty but subject to an exclusion of jurisdiction of the International Court of Justice, comparable to the Genocide Convention reservation. So we have to do a little work to catch up with the Soviets with respect to the Genocide and Torture Conventions.

The Soviets have also addressed the Racism Convention, which I will not comment specifically on, but I would like to comment on the remaining three which all happen to be treaties of special interest to women. They are the 1979 Convention on the Elimination of Discrimination Against Women, the 1949 Convention for the Suppression of Traffic in Persons and Prostitution, and the 1952 Convention on the Political Rights of Women. When I teach a unit on human rights in our introductory international law course at Columbia I have recently begun to pay special attention to women's rights. I point out that although the United States is not a party to the Convention on Elimination of All Forms of Discrimination Against Women, it is not totally absent from the human rights scene because we are a party to the Convention on the Political Rights of Women. I tell my students, not facetiously, but quite seriously, that since the U.S. Senate authorized the United States to ratify this treaty, it must not be a very dangerous treaty. If you look at the substantive obligations that we undertook in 1953 under this treaty, you will see we did not take a very big risk: we undertook an international obligation to let women vote. Since that right has been guaranteed by the 19th amendment to the U.S. Constitution since 1920, there is not much risk of discrepancy between our national law and our international obligations. To put it in terms of Tom Franck's recent article on legitimacy which appeared in the *AJIL* a few months ago, this is a determinate commitment and therefore, a legitimate one. Apparently we have a coinciding jurisdictional situation with the U.S.S.R. to the extent that both have now agreed to this no-lose proposition.

Judge Sofaer, if you want to take a symbolic gesture to Moscow I have a suggestion. Both the United States and the U.S.S.R. have agreed that women can vote, that they can be elected to public office, and that the ICJ is a forum for vindicating these rights. Furthermore, under the Charter and the Statute of the Court, the ICJ is to represent the main forms of civilization. I wonder if the time is not ripe for the superpowers to support a woman judge for a forthcoming vacancy?

There are some negative aspects about the ICJ and human rights, but that is too big a topic to be covered in this session. I would say quite frankly that I do not think that the ICJ is going to be the place to resolve most sorts of human rights issues. The largest obstacle, of course, is the fact that under the current constitutive instrument of the Court only states can be parties before the Court, and, therefore, it is not an effective vehicle for resolving the grievances of individuals. For that purpose the right of individual petition before specialized human rights courts or other bodies is essential. In this connection I have been told by several Soviet lawyers who are in a position to know that the issue of Soviet acceptance of a right of individual petition is under active consideration. While consideration is a far cry from action, none of us would have dreamed a year or two ago that the Soviets would have come so far so fast on the subject of third-party dispute settlement or on human rights matters such as the contested elections that were recently held there. Who knows what we might be hearing at this time next year in the way of individual petition.

I have another plea to make to Judge Sofaer. In the U.S. Government's recommendations concerning the Torture Convention the United States has said not only that

we do not want to go to the International Court of Justice, but also that we do not want to recognize the competence of the Committee on Torture as to its several functions: investigation, state-to-state complaint, or individual complaint. The Senate will be taking up this matter shortly, and I would like to put the request to Judge Sofaer that we take advantage of a new administration to reconsider whether those proposed declarations against the competence of the Committee on Torture are really necessary to protect U.S. interests. Could we not recoup some of the public relations detriment by showing that we at least are prepared to expose our own practices to international examination?

To turn to the issue of arms control, it is always a matter of interest to the American Society of International Law when someone other than the Society pays attention to the ICJ. So I was interested to receive in my year-end, fund-raising mail the following communication dated December 28, 1988, from the Lawyers Alliance on Nuclear Arms Control, a group to which I am sure a number of you belong. This letter said, "In describing LANAC's agenda for the forthcoming year we will work jointly with the Soviets in 1989 to find mutually agreed upon terms and conditions that would allow the United States and the Soviet Union to accept the general jurisdiction of the International Court of Justice and eventually permit the Court to interpret disputed provisions of arms control treaties." Naturally I immediately took out my checkbook. I then began thinking about this issue. Judge Sofaer was asked at his Coudert Lecture in New York in December what he thought of ICJ adjudication of arms control disputes, and he had about as much time to think of it as I had on December 31 before the tax deadline came. He said, as I recall, "Personally, I would welcome it. I would get a fairer hearing from the ICJ than from the U.S. Senate." For all the reasons that many in this Society believe that issues concerning armed hostilities would have to be excluded from any future U.S. acceptance of ICJ jurisdiction, the notion of presenting arms control disputes to the ICJ seems unrealistic at the present time. Let me mention a few facts and concerns that would have to be overcome before any such step could be contemplated.

First, some facts of record. To date, neither the United States nor the U.S.S.R. has shown the slightest disposition to submit arms control disputes to the ICJ or indeed to any form of third-party settlement. None of the bilateral U.S.-Soviet arms control treaties contains any such dispute-settlement provision. We have under the bilateral treaties a standing consultative commission which, as the name implies, is a consultative negotiating forum. It is not a third-party dispute-settlement mechanism. I do not want to minimize the need for third-party settlement of bilateral U.S.-Soviet disputes. There is an urgent need to create some sort of structure that would do that. Perhaps the time is ripe, now that U.S.-Soviet relations seem to be in a very favorable posture, for devoting the ideas and energies of persons interested in this issue toward new and imaginative solutions for resolving arms control disputes. As one step in this direction I would commend to your attention a brief comment by Phil Trimble in the February 1989 issue of the *Harvard Law Review* in which he sketches out a plan for an arms control institute that would serve a sort of third-party dispute-settlement function in the arms control context. That proposal and similar ones take the U.S.-Soviet relationship as a bilateral one, but arms control disputes, of course, are very much a multi-lateral matter. If we could take merely the most recent example, the INF Treaty of last year; it is not just a U.S.-Soviet bilateral agreement, but a very complex multilateral arrangement among the two superpowers and then on the one hand five NATO countries, and on the other hand two Warsaw Pact countries, the respective basing countries for intermediate-range nuclear missiles. If a meaningful arms control struc-

ture were to be developed, it would have to be one that would not be merely bilateral but that could take into account the many other countries involved in arms control matters. In the broadest sense, of course, since the effects of a nuclear catastrophe, if one were ever to occur, would surely cross many national boundaries, this is an interest in which humanity as a whole certainly is concerned.

So in the optimum world we want to look toward a multilateral framework for resolving arms control disputes. As a multilateral institution, the ICJ presents itself as a candidate, but here, of course, several concerns would have to be overcome. The ICJ has been excluded from virtually all of the important multilateral treaties concerning arms control. There are, for example, no ICJ compromissory clauses in the following multilateral treaties that bear on arms matters: the Non-Proliferation Treaty, the Partial Test Ban Treaty, the Outer Space Treaty, the Seabed Treaty, the Latin American nuclear free zone treaty and others. If you really search you can find some hints in patterns of compromissory clauses for suggestions that the ICJ might be appropriate. I will just take one. The Antarctic Treaty prohibits nuclear explosions in Antarctica, as well as measures of a military nature there, and it does have a very weak version of an ICJ dispute-settlement clause requiring the consent of all parties to the disputes, but that is not a terrifically helpful sign.

As far as the Court's own record goes, time does not permit me to go into the 1974 *Nuclear Tests* cases with which you are all fully familiar, so I will move to my concluding comments on why I do not think that the Court in its present composition is the right institution for resolving issues involving nuclear weapons. I say this with some regret because I am both an ardent supporter of the ICJ and a supporter of the Lawyers Alliance for Nuclear Arms Control that has proffered this proposal. I just want to note a fact or two about the views of some of the individual judges who would be deciding a nuclear weapons case if one should arise today. There is a well-publicized document entitled "The Appeal by Lawyers Against Nuclear War": a number in this organization and probably in this audience have subscribed to it. Their right to do so is beyond question. That document declares that the use for whatever reason of nuclear weapons would constitute a violation of international law, a violation of human rights, and a crime against humanity. The signers demand the prohibition of nuclear weapons as a first step towards the ultimate goal of general and complete disarmament. The names of two of the co-sponsors, prominently featured on the petition, are T. O. Elias and Mohammed Bedjaoui; both are identified on the petition as judges at the International Court of Justice at The Hague. I do not criticize them for having signed this document, nor for having signed it in their official capacities. Undoubtedly according to their own consciences they decided that they would have a greater impact by subscribing to this political appeal than by waiting for the millennium—and by that I do not mean the year 2000, I mean the year 3000—when states might bring them a case raising this issue. But I do suggest that in view of their having made this public declaration, it would be impossible for either the United States or the U.S.S.R. or any other nuclear power to have confidence that the Court as presently constituted could judge a nuclear weapons issue impartially. Just consider for example, if a justice of the U.S. Supreme Court acting on his or her conscience were to lend his or her name and title to a declaration on protecting human life from the moment of conception. I am not referring to scholarly writing before or during a judge's tenure that would give clues to how he or she might come out on a legal issue. I am talking about a view on a highly political and politicized issue where political predispositions could interfere with the ability to render an impartial judicial decision.