

**SPEECH OF H.E. MR. ABDULQAWI AHMED YUSUF, PRESIDENT OF THE INTERNATIONAL
COURT OF JUSTICE BEFORE THE ROYAL ACADEMY OF BELGIUM**

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**The strengths and challenges for supranational justice: the growing role of
the International Court of Justice**

Your Excellences,
Distinguished Guests,
Ladies and Gentlemen,

I. INTRODUCTION

1. It is a great pleasure to address you today as part of the lecture series “*Visions du Monde. Reading the complexity of the World*”. I would like to take this opportunity to thank the Royal Academy of Belgium for providing the forum to discuss such important issues. Out of this broad and complex theme, I have been invited to talk on a much narrower topic: the strengths and challenges for supranational justice and the growing role of the International Court of Justice (to which I will refer as the ICJ or simply the Court).

2. But before delving into my presentation, please allow me to make an important clarification, which is relevant for my presentation of this evening. Strictly speaking, the ICJ is not a “supranational” court, but rather a court of “international justice”.

3. This is not just a question of semantics. When it comes to “supranationalism”, I cannot help but notice that we meet today in Brussels, the city which hosts the largest supranational organization in the world: the European Union. At the heart of the European integration lie the ideas of a man who is frequently described as one of its “founding fathers”: Jean Monnet, the first President of the “High Authority” of the European Community of Coal and Steel. In the aftermath of the Second World War, Jean Monnet came up with the idea of a European Economic Community, that would ensure long-lasting peace among European nations. In the course of the 1950 negotiations, Jean Monnet explained that his proposals:

“provide a basis for the building of a new Europe through the concrete achievement of a *supranational regime* within a limited but controlling area of economic effort . . . The indispensable first principle of these proposals is the *abnegation of sovereignty in a limited but decisive field*.”¹

4. This “abnegation of sovereignty” is critical to understand the differences between supranational and international law. Supranational law is a law *above* sovereigns; it entails the creation of legal structures above the State, through the transfer of competences to supranational entities that have their own decision-making capacity. These organs, such as the European Commission or Council, act independently of their creators.

5. By contrast, international law is the law *among* the sovereigns. It does not require the abnegation of sovereignty; it directly confirms it. The Permanent Court of International Justice made this clear in its very first case, the *S.S. “Wimbledon”* where it:

¹ Jean Monnet, *Memoirs* (London Collins, 1978) at p. 316.

“decline[d] to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, [...] But the right of entering into international engagements is an attribute of State sovereignty.”²

6. From this perspective, it is clear that the ICJ is not a supranational court of justice. Allow me to highlight two distinguishing factors:

- First of all, a supranational court has compulsory, exclusive jurisdiction to rule upon disputes arising under its constituent instrument, regardless of whether the Member States agree to it or not. As a result, EU Member States have a legal obligation to respect the exclusive competence of the European Court of Justice. For example, in the *MOX Plant* case the ECJ found that Ireland had failed to respect its exclusive jurisdiction by instituting proceedings against the United Kingdom before an arbitral tribunal established under Annex VII of the UN Convention on the Law of the Sea³. The ECJ applied the same principle in 2014 in its Opinion 2/13 on the *Accession of the Union to the ECHR* with respect to the jurisdiction of the European Court of Human Rights⁴, and more recently in the *Achmea case*⁵, with respect to the jurisdiction of tribunals established under intra-EU bilateral investment treaties.

By contrast, the ICJ does not have exclusive jurisdiction over disputes between UN Member States. According to Article 33 of the UN Charter, the Court is only one among the many options for the peaceful settlement of disputes. Under Article 38 of its Statute, the Court is competent only insofar as States have voluntarily submitted their disputes to it. As the Court’s predecessor (the PCIJ) explained in 1928 in the *Mavrommatis* case, “its jurisdiction is . . . invariably based on the consent of the respondent and only exists in so far as this consent has been given”⁶. As far as this Court is concerned, as early as 1954 the Court explained in the *Monetary Gold* case that it is a “well-established principle of international law” that the Court may only exercise jurisdiction over a State with its consent⁷.

- The second critical factor is that disputes before supranational courts involve not only States, but other actors as well. In *van Gend & Loos*, the ECJ explained that EU law produces “direct effect” by creating individual rights which national and supranational courts must protect⁸. Under the Lisbon Treaty, individuals and companies have standing before the Court to challenge certain measures that affect them directly. By contrast, non-State actors such as international organizations, individuals, or corporations have no *locus standi* before the Court. Under Article 34 of its Statute, the Court has jurisdiction only over State-to-State disputes.

7. In sum, the ICJ is primarily concerned with *international* justice, not *supranational* justice. This does not mean, of course, that the Court has no relevance to supranational justice. Quite the opposite, supranational courts frequently refer to the judgments of the ICJ in order to interpret and apply their respective treaties as well as international law in general. For example, in

² *The S.S. “Wimbledon”*, PCIJ Series A/01, 17 August 1923, p. 25.

³ Case C-459/03, *Commission v. Ireland*, Judgment of the Court of 30 May 2006.

⁴ Opinion 2/13, *Accession of the Union to the ECHR* (18 December 2014), paras. 204 *et seq.*

⁵ Case C-284/16, *Slowakische Republik v. Achmea BV* (6 March 2018), paras. 37-60.

⁶ *Mavrommatis Palestine Concessions*, Judgment of 30 August 1924, P.C.I.J. Series A No. 2, p. 16.

⁷ *Case of the monetary gold removed from Rome in 1943 (Preliminary Question)*, Judgment of June 15th 1954, I.C.J. Reports 1954, p. 32.

⁸ Case 26-62, *van Gend & Loos*, 5 February 1963.

the *Front Polisario* case of 2016, the European Court of Justice heavily relied on the Court's Advisory Opinion on *Western Sahara* in order to assess the legality of the EU-Morocco fisheries agreement⁹. In the *Kadi* case, the European Court of Justice also relied on the ICJ's interpretation of Article 103 of the UN Charter in order to review sanctions imposed against persons associated with terrorist groups under the EU's human rights norms¹⁰. The ECJ, as well as several General Advocates of the ECJ also have relied on the jurisprudence of the Court in several cases, such as *Air Transport Association of America* [on the current state of customary international maritime and air law]¹¹, *Weber* [on the rights of a coastal State in the continental shelf]¹², and *Anastasiou* [on the non-recognition of the entity in the northern part of the island of Cyprus]¹³. This judicial cross-fertilization is a testament to the growing role of the Court's jurisprudence for supranational disputes.

8. With these observations in mind, the remainder of my presentation tonight will focus on two main perspectives. *First*, I will explain the key strengths of the ICJ that have contributed to its growing role in the settlement of international disputes. *Second*, I will address the key challenges that the Court is currently facing.

III. KEY STRENGTHS IN THE GROWING ROLE OF THE COURT

9. Turning to the first part of my presentation, the past two decades have been marked by a remarkable increase of the number of cases brought before the Court. This growing trend that remains unabated today, has brought to the fore three critical qualities of the Court.

1. The transformation of the ICJ into a "World Court"

10. The first quality is the progressive transformation of the Court from a Court dealing mostly with European and American cases in the 1940s-1950s, to a truly "World Court" today entrusted with the settlement of disputes from all the continents of the world. Since 1923, the Court's predecessor, the PCIJ, dealt predominantly with disputes involving European or North American States. Even those cases involving regions outside these States were brought by the colonial powers administering these territories, such as the *Phosphates in Morocco* or the *Nationality Decrees Issued in Tunis and Morocco*, involving France and Great Britain. The early days of the ICJ continued this type of largely "Euro-centric" disputes. For example, between 1945 and 1960, the Court dealt with several contentious and advisory cases pertaining to the African continent. Unsurprisingly, very few African States (and in some cases, none) did appear. At the relevant time, non-self-governing territories were not subjects of international law and could not therefore address the Court as "parties". It was the colonial Powers which appeared and litigated over their respective interests over those territories before the Court.

11. This phenomenon began to fade as the process of decolonization gathered momentum. As the Court explained in the *Kosovo* advisory opinion, "during the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to

⁹ Case C-104/16 P, *Front Polisario v. Council and others*, Judgment, 21 December 2016.

¹⁰ Case T-306/01, *Ahmed Ali Yusuf and others v. Council and Commission*, Judgment of 21 September 2005.

¹¹ Case C-366/10, *ATAA and others v. Secretary of State for Energy and Climate Change*, Judgment of 21 December 2011, para. 104.

¹² Case C-37/00, *Herbert Weber*, Judgment of 27 February 2002, para. 34.

¹³ Case C-432/92, *The Queen v Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd and others*, Judgment of the Court of 5 July 1994, paras. 35 and 49.

independence for the peoples of non-self-governing territories” leading to the creation of “[a] great many new States”¹⁴.

12. With the enlargement of the UN family, the Court progressively acquired a truly universal character. This was done in two ways. First, States from the four corners of the world began submitting their disputes to the Court. From 1960 to 1961, three African States brought cases before the Court. First, Ethiopia and Liberia against South Africa in 1960 with regard to South-West Africa, and secondly, the Republic of Cameroon against the UK in 1961 on the Northern Cameroons. The initial enthusiasm of the African States for the Court was, however, dampened by the controversial judgment of the Court on *South West Africa* in 1966. After almost 15 years of absence, they resumed their use of the jurisdiction of the Court in the 1980s. Since then, African States have been parties to 25 contentious cases, in addition to several advisory proceedings which were initiated by them.

13. The 21st century has seen great use of the Court by Latin American States, such as Costa Rica, Nicaragua, Honduras, Peru, Chile and Colombia on the basis of the Pact of Bogotá. Since the early 2000s, Latin American States have appeared before the Court in no less than 20 contentious and advisory proceedings. Similarly, the use of the Court by States in the Asia-Pacific region as well as in the Middle East has significantly increased in the past two decades.

14. Second, the enlargement of the UN family brought about the diversification of the Bench. According to Article 9 of the Statute, the General Assembly and the Security Council shall bear in mind “that in the body as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured”. Despite this, during the initial period of the Court, from 1946 to 1964, Judge Badawi from Egypt was the only African member of the Bench¹⁵, whereas judges from permanent Security Council members or European and North-American States occupied no less than ten seats¹⁶. As more States began to emerge, newly independent States in Africa and Asia expressed strong dissatisfaction with this regional imbalance, and claimed more representation; a claim that reached its highest peak after the controversial judgment on the *South West Africa* cases in 1966¹⁷.

2. The diversification of the subject-matter of disputes

15. The second quality I would like to highlight is the progressive diversification of the subject-matter of the Court’s judicial work. The International Court of Justice is the only international court vested with general subject-matter jurisdiction. Traditionally, disputes before the Court included territorial and boundaries disputes, maritime disputes, diplomatic and consular relations or sovereign immunities.

16. This has now undergone a significant change. It is largely due also to the fact that international law has now expanded its reach well beyond the scope of delimitation of boundaries or the treatment of diplomatic agents. It has transcended the borders of States to regulate matters traditionally falling within the domestic domain of States or touching upon transnational issues. As

¹⁴ *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 436, para. 79.

¹⁵ Manfred Lachs, *Some Reflections on the Nationality of Judges of the International Court of Justice*, PACE Y.B. INT’L L, Vol. 4:49, p. 54.

¹⁶ Fassbender, *Article 9* in A. Zimmermann *et al.*, *The Statute of the ICJ: A Commentary*, p. 305.

¹⁷ Fassbender, *Article 9* in A. Zimmermann *et al.*, *The Statute of the ICJ: A Commentary*, p. 304.

a result of these developments, the Court has been called upon to address disputes related to human rights (*Diallo*; *Qatar v. UAE*; *Ukraine v. Russia*); the treatment of foreign nationals and investments (*Barcelona Traction, ELSI*); matters of national security and allegations of terrorism (*Certain Iranian Assets, ICAO Council*); or questions of scientific research and environmental disputes (*Pulp Mills*; *Whaling*; *Aerial Herbicide Spraying*). More recently, the Court has dealt with claims for environmental compensation, in cases involving complex questions of fact and law (such as *Certain Activities Carried Out By Nicaragua In the Border Area*).

17. This large variety of disputes has come before the Court thanks to compromissory clauses that provide for the jurisdiction of the Court *before* a dispute arises. On the one hand, States have concluded specialized treaties to address issues of dispute settlement, such as the 1957 European Dispute Settlement Convention¹⁸ or the Pact of Bogota¹⁹, which provide for the jurisdiction of the Court on certain cases. On the other hand, States have inserted compromissory clauses in major bilateral and multilateral treaties regulating a number of areas, such as human rights, civil aviation, diplomatic or consular relations. Indeed, the numbers speak for themselves: out of the 148 contentious cases brought to the Court since its inception, 82 applications (more than 50%) sought to establish the Court's jurisdiction on the basis of compromissory clauses in bilateral or multilateral treaties²⁰. Thus, the Court has gained a prominent role in the settlement of disputes which touch upon sensitive issues in the internal domain of States.

3. Compliance with the judgments of the Court

18. The third quality I would like to highlight is the notable record in the enforcement of the Court's judgments. Compliance with the Court's judgments is not only satisfactory, but nearly total, even though there might exist certain delays. To give but a recent example, in 2018 the Court found Nicaragua liable to pay monetary compensation to Costa Rica for environmental damage caused in the border area between them following certain military activities. Just a few months after the judgment, Nicaragua informed the Registry that on 8 March 2018, it had transferred to Costa Rica the total amount of compensation²¹. By the same token, in the *Diallo Case* the Court found that the DRC had infringed the rights of Mr. Diallo, a Guinean national, under the ICCPR, the African Charter and the Vienna Convention on Consular Relations through his unlawful arrest, detention and expulsion; the Court further ordered compensation of USD 95,000²². A few months later, the DRC notified the Court that it had paid the compensation due.

19. In certain instances, States have availed themselves of regional organizations or international specialized agencies as *fora* for the implementation of ICJ judgments. For instance, the Organization of American States played a pivotal role in the implementation of the judgments in *Haya de la Torre* and *Honduras v. Nicaragua*.²³

¹⁸ 329 UNTS 243.

¹⁹ 30 UNTS 55.

²⁰ See *I.C.J. Yearbook 2015-2016* (No. 70), Annex 7, pp. 117-131 (counting 74 applications instituted on the basis of a compromissory clause in bilateral or multilateral treaties). In addition to these cases, there were eight new applications filed with the Court relying on a compromissory clause as of 8 November 2018.

²¹ *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Press release 2018/15, available [here](#).

²² *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, *I.C.J. Reports 2012*, p. 324; *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, *I.C.J. Reports 2010 (II)*, p. 692, para. 165, subpara. (2).

²³ Amuda-Kannike Abiodun *et al.*, *An Examination of the Enforcement of ICJ Decisions Through Regional Organizations and Specialized Agencies*, *Journal of Law, Policy and Globalization*, Vol. 59, 2017, available [here](#), p. 27.

20. In other cases, due to the sensitivity of the matter, UN organs have facilitated the implementation of ICJ judgements. An illustrative example is *Cameroon v. Nigeria*, where the Court found that the sovereignty over the Bakassi Peninsula lay with Cameroon. Despite initial controversies over the implementation of the judgment, Nigeria and Cameroon signed the 2006 Greentree Agreement— thanks to the mediation of former UN Secretary-General Kofi Annan. In effect, Nigeria recognized Cameroonian sovereignty over the Bakassi Peninsula and agreed on a mechanism for the implementation of the judgment. Following a transitional regime, the judgment was fully implemented in 2013, through the valuable contribution of the United Nations.

21. Perhaps more importantly, the judicial pronouncements of the Court have, to a considerable extent, influenced State behaviour outside the four corners of the hall of justice. Even though the Court's judgments are binding only between the disputing Parties, States take into account its rulings when shaping their international relations. The Court's judgments also serve to clarify and elucidate the state of the law and enhance predictability in international affairs.

IV. KEY CHALLENGES IN THE GROWING ROLE OF THE COURT

22. Let me now turn to the final part of my presentation: the key challenges of the Court. The turn of the millennium has found the Court dealing with an unprecedented number of cases. This increasing docket has brought to the fore certain challenges. In the remaining minutes, I will focus on two of them.

1. The limited jurisdictional bases of the Court

23. The first challenge relates to the limited jurisdictional bases for the Court's adjudicatory function. As I mentioned previously, the Court cannot under its Statute exercise its jurisdiction with respect to a State without the consent of the latter. This stands in stark contrast to the Court's role as the "principal organ" of the United Nations. As a result, the Court is often given a very narrow jurisdictional margin in which it has to form its decisions on very broad and controversial disputes. In turn, this may lead to a fragmented system of adjudication, where the Court does not have a sufficient jurisdictional basis to address the dispute in its entirety. This may create an impression of weakness or impotence in the eyes of the public with respect to the capacity of the Court to deal with international disputes.

24. In order to address this situation, it is of paramount importance that States provide their consent to the jurisdiction of the Court. There are three main ways to give consent to the Court's contentious jurisdiction. The first way is by virtue of a unilateral declaration, as contemplated by Article 36, paragraphs (2) and (5) of the Statute. At the moment, 73 of the States parties to the Statute have made a declaration recognizing as compulsory the jurisdiction of the Court. Unfortunately, however, the majority of these declarations are clouded by reservations, which by virtue of the principle of reciprocity, restrict to a certain extent the scope of the jurisdiction of the Court under their terms.

25. The second way is by means of compromissory clauses in international treaties, as I previously explained. Currently, more than 300 bilateral or multilateral treaties or conventions provide for the Court to have jurisdiction *ratione materiae* in the resolution of various types of disputes between States. Here again, we see an increasing reluctance on the part of States to accept compromissory clauses designating the Court for the settlement of disputes in bilateral and multilateral treaties, or a tendency to place reservations excluding the jurisdiction of the Court

where such compromissory clauses exist or decisions to denounce the treaty because of such clauses.

26. The third way is the conclusion of a special agreement or a *compromis*; while a much less known and more exceptional method is that of the *forum prorogatum*, which has developed as part of the practice of the Court, and has so far been used in three cases: the first was *Corfu Channel*, the very first case brought to the Court, following a recommendation from the UN Security Council to “immediately refer” the dispute to the Court²⁴. The other two cases involved France and two African States, namely *Congo v. France* and *Djibouti v. France*, in which France consented to jurisdiction²⁵.

27. The limited jurisdiction of the Court is a problem when compared to the importance of the common values that certain rules of international law are destined to protect.

2. The limited resources allocated to the Court

28. The second challenge I would like to address is rather prosaic: it relates to the limited resources allocated to the Court. It would not be a hyperbole to say that the Court is a victim of its own success. The exponential increase in the caseload has placed considerable pressure on the Court’s resources and its administrative support, which is limited by modest financial means.

29. In accordance with the UN Financial Regulations and Rules, the Court regularly submits its budgetary proposals to the General Assembly. The approved budget does not, however, evolve at the same pace as the increase in the case load of the Court, nor does it reflect it.

30. Overall, it is regrettable that the resources of the Court have to remain so small and limited, particularly when compared with other international courts and tribunals or the highest national courts, in view of the role that it plays in the maintenance of international peace and security and the advancement of the international rule of law.

31. Proposals for increasing the resources of the Court have been made since a long time ago. The Court itself has made direct requests to the UNGA. As States continue to refer their disputes to the Court, it is inevitable that the need for additional administrative support will continue to increase.

V. CONCLUSION

32. Allow me to conclude by referring very briefly to an emerging phenomenon which takes me back to my initial observations on the distinction between supranational and international justice and which might be viewed both as a challenge and as an opportunity for the Court. This is the increasing assertion of unilateralism and emphasis on national sovereignty in certain parts of the world. It stands, of course, in stark contrast to Jean Monnet’s “abnegation of sovereignty”. However, with regard to international justice, the Court’s jurisdiction has always been and

²⁴ C.f. UN Security Council resolution 22 (1947) of 9 April 1947; *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgment on Preliminary Objection: I.C.J. Reports 1948, p. 27.

²⁵ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, p. 203, para. 60; *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Order of 16 November 2010, I.C.J. Reports 2010, p. 635.

continues to be based on the consent of States. Thus, resort to the Court is a manifestation and expression of their sovereignty.

33. Despite their notable differences, international and supranational law share a common objective: the maintenance of peace and the prevention of conflict. They aim at a community of interests that brings States together in the discharge of their day-to-day affairs. Just as the UN Charter was aimed at saving future generations from the scourge of war²⁶, the European Coal and Steel Community was established as “the basis for a broader and deeper community among peoples long divided by bloody conflicts”²⁷.

34. But as States come closer, which is inevitable nowadays due to communication and transportation technologies, tensions from the exercise of sovereignties may inevitably occur. The dispute settlement function of the Court stands at the intersection of sovereignties and is designed to resolve frictions and tensions at that intersection through the application of the principles and rules of international law. However, the effect of an increased emphasis on “sovereignty” depends on the notion of “sovereignty” that is being asserted, and whether it is the old billiard ball type of sovereignty of the 19th century Europe and beyond, or whether it is a UN Charter type of sovereignty susceptible to co-operation among independent States. The extent to which it is more of a challenge or an opportunity for the Court is contingent upon that determination in the future.

35. Whatever may be the case, the International Court of Justice remains ready and is uniquely placed to contribute to universal peace and justice as well as to the advancement of the rule of law among nations, as long as it is allowed to do so.

36. Thank you for your kind attention.

²⁶ See Charter of the United Nations of 1945, Preamble, 1st recital.

²⁷ See Treaty Establishing the European Coal and Steel Community, 18 April 1951, Preamble, 5th recital.