

**STATEMENT OF H.E. MR. ABDULQAWI AHMED YUSUF, PRESIDENT OF THE INTERNATIONAL
COURT OF JUSTICE
BEFORE THE SIXTH COMMITTEE OF
THE GENERAL ASSEMBLY**

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The International Court of Justice and unwritten sources of international law

Mr. Chairman,
Ladies and Gentlemen,

Introduction

1. It is a great honour for me to address the Sixth Committee of the General Assembly for the second time as President of the International Court of Justice. I would like to congratulate His Excellency Mr. Michal Mlynár on his election as Chairman of the Sixth Committee for the seventy-fourth session of the General Assembly.

2. Last year was a very productive year for the Court. Between 26 October 2018 — when I last addressed the Sixth Committee — and 1 November 2019, the Court delivered [two] Judgments, [one] Order on a request for the indication of provisional measures and [one] Advisory Opinion. In addition, upon my return to The Hague next week, the Court will deliver its Judgment in one of the cases before it and is also due to hold two further sets of hearings before the end of the year.

3. In total, 16 cases are now pending before the Court. These cases involve 26 countries from all the regions of the world, including five European countries, six African countries, nine Latin and North American countries, as well as six Asian countries.

4. The Court is required to determine the rules of international law applicable to the disputes submitted to it in the many diverse cases before it. To that end, Article 38 of the Statute of the Court, which was drafted in 1920 as part of the Statute of the Permanent Court of International Justice, lists “international conventions”, “international custom, as evidence of a general practice accepted as law” and “the general principles of law recognized by civilized nations” as the primary sources of law applicable in cases before the Court. Doctrine and case law are mentioned as auxiliary sources of international law, while the power of the Court to decide *ex aequo et bono* depends on the consent of the parties to a dispute.

5. Treaties are in written form — at least according to the definition in the 1969 and the 1986 Vienna Conventions on the Law of Treaties. Customary international law and general principles of law are, however, often unwritten, unless they are clearly identified or codified in a specific instrument. In the absence of a written text, the Court must first of all determine the actual existence of these two sources of law and the scope of the norm they contain. The difficulty of the task is magnified by the various theoretical and conceptual debates surrounding their definition and determination, and, oftentimes, how they are distinct from other sources of international law.

6. It is not my intention to address all these issues today. I will limit myself to discussing how the Court has engaged with customary international law and general principles of law over time, since both the International Law Commission and the Sixth Committee have been looking at these questions over the past few years. As international law has evolved and the composition of

international society has been transformed during the last century, the Court has not limited itself to applying Article 38 of the Statute, as if this provision were carved in stone. On the contrary, the Court has shown some ingenuity in taking into account developments in international society when engaging with these sources. I will now examine each of them in turn.

I. Customary international law

7. Let me start with customary international law. In this respect, it must be emphasized that the Court's approach to the determination of what constitutes customary international law has changed over the years as a result of the evolution of international law and the expanded composition of international society. The universalization of international law following the adoption of the Charter of the United Nations, the emergence on the international scene of formerly colonized peoples as Member States of the United Nations, and the process of codification and progressive development of international law through multilateral conventions are some of the important factors that have contributed to this shift in its approach. The Court's Judgment in the *North Sea Continental Shelf* cases, which was delivered in 1969, marks a watershed moment in the Court's approach to customary international law.

8. Prior to that Judgment, the Court's approach to customary international law was characterized by two main elements.

9. *Firstly*, the old approach emphasized repeated usage by States, over a long period of time, in determining the existence of an international custom. For instance, in the *Right of Passage over Indian Territory* case, the Court had to determine whether Portugal was entitled to a right of passage over Indian territory. The Court explained that, with regard to private persons, civil officials and goods in general, during the British and post-British administration period, there existed a "constant and uniform practice" allowing free passage between Portuguese enclaves. The Court emphasized that this practice had continued "over a period extending beyond a century and a quarter" and had remained unaffected by India's accession to independence. On the basis of these elements, which highlighted long-standing practice and usage, the Court held that Portugal had a right of passage in respect of private persons, civil officials and goods as a matter of bilateral customary international law (*Right of Passage over Indian Territory (Portugal v. India), Merits, Judgment, I.C.J. Reports 1960, p. 40*).

10. *Secondly*, the old approach to customary international law emphasized the will of States, and their acceptance, as a factor in the creation of rules of customary international law and as a condition for such rules to be binding on them. This idea was articulated in the Judgment of the Permanent Court of International Justice in the *Lotus* case. The PCIJ stated that "[t]he rules of law binding upon States . . . emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims" ("*Lotus*", *Judgment No. 9, 1927, P.C.I.J., Series A, No. 10, p. 18*).

11. This approach, which equates the emergence of customary norms to a tacit agreement, enabled States which had opposed the existence of a customary rule to declare that they were not bound by it. Two *obiter dicta* of the Court, in the *Asylum* and *Norwegian Fisheries* cases, respectively, are often invoked in legal writings to support what is known as the *persistent objector* doctrine. For instance, in the *Asylum* case, the Court held that even if a local rule of customary international law concerning the qualification of offences in matters of diplomatic asylum did exist between Latin American States, this rule "could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939" (*Asylum (Colombia/Peru), Judgment, I.C.J. Reports 1950, pp. 277-278*).

12. The Court's old approach to customary international law was primarily based on the realities of international society through the nineteenth century, when multilateralism was still in its infancy, when the legal personality of international organizations was yet to be recognized, and when distance was an obstacle to the accessibility of information on State practice. The world in which the Court's 1969 Judgment in the *North Sea Continental Shelf* cases was rendered was quite different. This Judgment was delivered 20 years after the Court recognized the international legal personality of international organizations in the Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations* (*I.C.J. Reports 1949*, pp. 184-185), and about a decade after the emergence of newly independent African and Asian States on the international scene, which led to a substantial change in the composition of the international community. The 1950s and 1960s, and the post-World War II and Charter era in general, was a period in history when multilateralism bore tangible fruits and a wide range of multilateral conventions were concluded. These three factors deeply affected the Court's approach to determining customary international law norms and, in my view, led to the new approach adopted by the Court in the *North Sea Continental Shelf* Judgment, which has turned out to be long lasting.

13. As you may recall, the *North Sea Continental Shelf* cases were between Denmark and the Federal Republic of Germany, on the one hand, and The Netherlands and the Federal Republic of Germany, on the other. In both cases, which were joined, the Court had to identify the principles of international law applicable to the delimitation of the continental shelf in the North Sea. In this context, the Court explained that, for a customary international law rule to exist,

“two conditions must be fulfilled. Not only must the acts [of State practice] concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation” (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 44, para. 77).

14. The Court's approach in the *North Sea Continental Shelf* Judgment differs from its previous approach in three critical respects.

15. *First*, the Court rejected the strong emphasis that the old approach placed on repeated usages in determining the existence of a customary international law rule. On the contrary, here the Court emphasized the importance of *opinio juris*, that is, the legal conviction that the act concerned is prompted by a sense of legal duty. The Court explained that “[t]he frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty” (*ibid.*, p. 44, para. 77). Elaborating further, the Court explained that there was a symbiotic relationship between State practice and *opinio juris*, as the same act could evidence both State practice and *opinio juris*. The States performing the act in question must already feel that they are conforming to what amounts to a legal obligation (*ibid.*). In other words, *opinio juris* may, in some cases, precede or accompany the development of State practice.

16. *Secondly*, the Court clarified that State practice is not only composed of the usages of States, but may also include the rules established in multilateral conventions, as *consuetudo scripta*. Unlike the approach it took in the previously mentioned *Asylum* case, the Court drew a clear distinction between consent to be bound by a conventional norm and *opinio juris*, that is to say, the sense of legal duty compelling the performance of an act. The Court explained that, while a State may opt out of a treaty or certain treaty provisions through reservations, it cannot do the same with customary international law rules. By their very nature, such rules must have equal force for all members of the international community, and therefore cannot be the subject of any right of

unilateral exclusion exercisable at will by a State in its own favour (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, pp. 38-39, para. 63).

17. This finding of the Court took account of a major development in international relations over the last century: the multiplication of multilateral conventions. In areas such as human rights, the law of the sea, the law of treaties, international humanitarian law, and diplomatic and consular relations, multilateral conventions have been concluded to codify and update international law and reflect the diverse membership, interests and legal traditions of the international community. Concepts such as *jus cogens*, the common heritage of mankind and the exclusive economic zone have entered the language and rules of international law through such multilateral instruments, and they have a dual significance and value as both treaty and customary norms (cf. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) Merits, Judgment, I.C.J. Reports 1986*, p. 95, para. 177). In this respect, the Court has considered that the relevant provisions of the United Nations Convention on the Law of the Sea concerning a coastal State's baselines and entitlement to maritime zones, the definition of the continental shelf, and the delimitation of the exclusive economic zone and the continental shelf reflect customary international law. This has allowed the Court to apply these provisions even to States non-parties to UNCLOS (see *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012*, p. 666, para. 114).

18. *Finally*, the Court's new approach has not placed as much emphasis on time as a factor in determining customary international law rules. In the *North Sea Continental Shelf Judgment*, the Court clarified that, even without the passage of any considerable period of time, very widespread and representative participation in a multilateral convention might suffice in itself to generate customary rules, provided that it included that of States whose interests were especially affected (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 42, para. 73).

19. With the technological developments of the last century, both time and space have shrunk as regards the emergence of customary norms. State practice, once difficult to bring to the attention of a wider audience, has become more readily accessible. Faster transportation and improved means of communication have increased opportunities for States to meet and exchange views on the desirability and content of international law rules. International organizations have also provided regular forums, such as General Assembly meetings, which have given States more opportunities to engage directly with each other on these issues. Thus, the development of customary international law is no longer necessarily a slow process.

20. This significant change in approach — which accounted for the role afforded to multilateral conventions in the determination of customary international law, as well as the role assigned to *opinio juris*, in the *North Sea Continental Shelf* cases — paved the way for an additional development in the Court's jurisprudence with regard to customary international law. It provided a stepping stone for the Court to take account of the role of General Assembly resolutions in the formation of customary rules of international law. As you well know, the admission of newly-independent States to membership in the United Nations in the 1960s turned the General Assembly into a world forum where all States could express their views and present their perspectives on the content of rules of international law. This was often done through the adoption of declaratory resolutions of the General Assembly, the legal significance of which became a hotly debated matter in the 1970s and 1980s.

21. The *North Sea Continental Shelf Judgment* played an important role in the settlement of this debate, in at least three ways. *Firstly*, since a single act could be relied on to establish both State practice and *opinio juris*, resolutions adopted by the General Assembly could potentially do the same. *Secondly*, in the absence of any requirement of long-term maturation and repeated practice, a single resolution or succession of resolutions, even if adopted within a short period of time, could also evidence both State practice and *opinio juris* and lead to the emergence of a customary international law rule. *Finally*, through resolutions, an *opinio juris* recognizing the

existence of a rule of international law could be expressed even before the emergence of a corresponding practice.

22. The Court first applied this understanding of how customary international law may emerge through resolutions of the General Assembly in the *Namibia* Advisory Opinion, where it characterized resolution 1514 (XV) as “an important stage” in the subsequent development of international law with regard to non-self-governing territories, as enshrined in the Charter of the United Nations, which made the principle of self-determination applicable to all of them (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 31, para. 52).

23. Subsequently, in the *Nicaragua* case, the Court explained that *opinio juris* may, with all due caution, be deduced from, *inter alia*, the attitude of the parties and the attitude of States towards certain General Assembly resolutions. The effect of consent to the text of such resolutions may be understood as acceptance of the validity of the rule or set of rules declared by the resolution (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 100, para. 188). Consequently, even if General Assembly resolutions are not formally binding, they can, in certain circumstances, provide important evidence of the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 254-255, para. 70).

24. The Court applied these principles in its most recent Advisory Opinion, rendered on 25 February 2019 on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*. The Court explained that resolution 1514 (XV) represented a defining moment in the consolidation of State practice on decolonization, in so far as it clarified the content and scope of the right to self-determination. The Court found, therefore, that resolution 1514 (XV) had a declaratory character with regard to the right to self-determination as a customary norm, in view of its content and the conditions of its adoption. The Court was also of the view that this finding was confirmed by resolution 2625 (XXV), which recognized the right to self-determination as one of the “basic principles of international law” (*ibid.*, p. 37, para. 155).

25. The Court’s approach in the *North Sea Continental Shelf* cases, and its subsequent jurisprudence on General Assembly resolutions, significantly enhanced the identification and determination of customary international law norms. However, this shift in approach did not bring an end to the manner in which certain customary norms had emerged in the past; in other words, rather slowly, and on the basis of long-established usages, outside the framework of General Assembly resolutions or multilateral conventions. The Court analysed the existence of such customary international law rules in the *Arrest Warrant (DRC v. Belgium)* and *Jurisdictional Immunities of the State (Germany v. Italy)* cases. It also examined their existence in the *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* case, where the Court found that Costa Rican riparians of the San Juan River had a customary right to fish in the river for subsistence purposes. Although the Parties agreed that this practice was long established, they disagreed whether it had become binding on Nicaragua as a matter of customary law. For the Court, Nicaragua’s failure to contest the existence of a right arising from a practice which had continued undisturbed and unquestioned over a very long period, was particularly significant (*Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, pp. 265-266, para. 141).

II. General principles of law in the jurisprudence of the International Court of Justice

Distinguished Delegates,

26. Let me turn now to general principles. Here also, the Court has shown sound legal creativity. As you may recall, Article 38, paragraph 1 (c), of the ICJ Statute enables the Court to apply “general principles of law recognized by civilized nations” to the disputes submitted to it.

27. Neither the PCIJ nor the ICJ has ever explicitly based a decision on a rule or principle derived from the “general principles of law recognized by civilized nations”. This is, in my view, a result of the use of the expression “civilized nations” in Article 38 and the negative historical connotations associated with it.

28. Following the universalization of international law and the extension of its application to all States, Guatemala and Mexico proposed in 1971 to amend the Statute by deleting the word “civilized”, which, as they put it, was “a verbal relic of the old colonialism”. However, the word may not have much practical significance today. As argued by Judge Fouad Ammoun in his separate opinion in the *North Sea Continental Shelf* cases, in view of the fundamental principles of the Charter, and their universality, the text of Article 38, paragraph 1 (c), of the Statute of the Court cannot be interpreted otherwise than by attributing to it a universal scope involving no discrimination between the members of a single community based upon sovereign equality (*North Sea Continental Shelf cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, separate opinion of Judge Ammoun, p. 134, para. 33).

29. While the Court has wisely steered away from using the phrase “general principles of law recognized by civilized nations”, it has nevertheless invoked and applied general principles of a legal character in a manner which has enriched international law in general.

30. Before examining concretely how the Court has done so, let me first draw a distinction between reference by the Court to general principles and the use of the term “principles” as a convenient shorthand to refer to the rules of international law (see, for instance, “*Lotus*”, *Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 16). In the *Gulf of Maine* case, the Parties called on the Chamber of the Court to decide the question submitted to it [*and I quote*] “in accordance with principles and rules of international law applicable in the matter as between the Parties”. The Chamber explained that the association of the terms “rules” and “principles” was no more than the use of a dual expression to convey one and the same idea, since in this context “principles” clearly meant principles of law (*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, pp. 289-290).

31. Aside from the use of the term “principles” as a synonym of “rules”, one may distinguish three types of general principles identified by the Court.

32. General principles of the first type are inherent to any legal system and are therefore to be found in the international legal system. In all legal systems, participants should be able to expect “good faith” from each other when negotiating, interpreting or applying their agreements. Thus, in the *Nuclear Tests* cases, the Court characterized good faith as “one of the basic principles governing the creation and performance of legal obligations”. On the basis of this general principle, the Court held that unilateral declarations of States were also a formal source of international law, updating and enriching Article 38 of the Statute in the process (cf., *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 268, para. 46).

33. The second type of general principles derives from existing rules of international law. I will refer to them as general principles of international law (*principes généraux du droit international*). Some of these principles, such as those of non-intervention, the prohibition of the use of force, the sovereign equality of States and territorial integrity, which have all been explicitly recognized by the Court as “principles of international law”, are enshrined in the Charter of the United Nations as fundamental principles of the contemporary international legal order.

34. Whereas these general principles of international law have a binding legal character, the Court has also referred to other general principles of a moral and normative character, which reflect values widely shared by the members of the international community and which may generate concrete rules of positive international law. I am thinking here about the Court’s references, in the *Corfu Channel* case, to the “elementary considerations of humanity more exacting in time of peace than in time of war” (*Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22) and, in the Advisory Opinion on *Reservations to the Genocide Convention*, to the “most elementary principles of morality”, and the “moral and humanitarian principles” which the Court characterized as forming the basis of the Genocide Convention (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, pp. 23-24).

35. The third category of general principles referred to by the Court as “general principles of law” is often derived from domestic legal systems. One of the main areas where the Court has recognized such general principles of law is in international procedural law. This is, for instance, the case with evidentiary principles, such as the admissibility of indirect evidence, and other procedural principles such as the principle of the equality of arms of parties, and the principle of *res judicata*. Other general principles of international procedural law include the principle that “no one can be judge in his own cause”, the fundamental principle of the sound administration of justice, and the prohibition of deciding cases *infra* or *ultra petita*.

36. Having briefly outlined the Court’s use of general principles, let me turn to the purpose for which the Court has recourse to such principles and their function in the international legal order. As mentioned above, the Court has relied on the general principle of good faith to update the list of sources of international law provided for in Article 38 of the Statute and to include unilateral declarations of States. The Court tends to use general principles primarily to create coherence in the international legal system.

37. The question of coherence in international law is an existential one. The lack of a centralized legislator at the international level has often triggered fears about the possible effect of contradictions between international legal norms. It has also raised questions about possible lacunae in international law, and its corollary, the potential declaration by the Court of a *non liquet*. General principles have proved effective in helping the Court to address both structural problems of law-making in international society and to promote coherence.

38. The Court has also used general principles of international law to “fill in the gaps”, and to avoid *non liquet* or recourse to the *Lotus* principle of liberty. For example, in the *Norwegian Fisheries* case, the Court noted the absence in international law of technically precise rules governing the choice by a coastal State of its baselines for the delimitation of its territorial sea. For the Court, however, it did not at all follow that the delimitation undertaken by the Norwegian Government in 1935 was not subject to certain principles which make it possible to judge its validity under international law. The Court explained that “certain basic considerations inherent in the nature of the territorial sea, bring to light certain criteria which, though not entirely precise, can provide courts with an adequate basis for their decisions, which can be adapted to the diverse facts in question” (*Fisheries (United Kingdom v. Norway), Judgment, I.C.J. Reports 1951*, p. 132).

39. A third reason why the Court relies on general principles is to ensure that the functioning of the international legal system is consonant with the expectations of the international community as to how a legal system should operate. Regarding, for instance, the principle of *res judicata*, the Court identified in *Bosnia v. Serbia* two purposes underlying this principle both at the domestic and international level. First, the stability of legal relations requires that litigation come to an end. Secondly, it is in the interest of each party that an issue which has already been adjudicated in favour of that party not be argued again. For the Court, depriving a litigant of the benefit of a judgment it has already obtained must in general be seen as a breach of the principles governing the legal settlement of disputes (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, pp. 90-91, paras. 90-91).

Conclusion

Mr. Chairman,
Ladies and Gentlemen,

40. On the basis of the foregoing, please allow me to offer some concluding remarks. Two words seem, in my view, to best define the Court's engagement with so-called unwritten sources of international law: creativity and caution. The Court has shown a high degree of creativity by adapting and updating the sources of international law described in Article 38 of the Statute to reflect the evolution of international law and the realities of international life. Thanks to the jurisprudence of the Court, unilateral acts of States are now well-established sources of international law. In the same vein, the Court has established the important role that multilateral conventions and the resolutions adopted by the General Assembly can play in the emergence of customary rules of international law.

41. It is also worth noting that, almost a century after the adoption of the Statute, fears that unwritten sources might empower the Court to bring subjective considerations to bear in the identification of rules of international law have not materialized. As a result, legal determinations by the Court on the existence and content of customary international law, as well as of general principles, have received wide acceptance in the international legal community.

Mr. Chairman,

42. Some may argue that this widespread appreciation of the work of the Court has not been fully translated into a universal acceptance by States of the compulsory jurisdiction of the Court. It cannot be denied, however, that significant albeit slow progress has been made in this respect. Indeed, I am delighted to report today that, about a month ago, on 24 September 2019, the Republic of Latvia accepted the compulsory jurisdiction of the Court under Article 36, paragraph 2, of the Statute. The number of States having made a declaration under Article 36, paragraph 2, of the Statute now stands at 74. As you know, this does not mean that the Court may exercise its jurisdiction only in respect of these States. In fact, in most of the cases brought before the Court, its jurisdiction is based on compromissory clauses included in either bilateral or multilateral treaties.

43. It is my hope that, in light of the record of the Court and its predecessor over almost a century of adjudication, more States will consider accepting the compulsory jurisdiction of the Court through a declaration under Article 36, paragraph 2, of the Statute. I also hope that there will be a marked return to the use of compromissory clauses referring to settlement by the Court of any disputes arising in the context of bilateral or multilateral treaties.

44. I thank you for your attention and wish you all a very rich and fruitful session.
