

**SPEECH OF HIS EXCELLENCY JUDGE ABDULQAWI AHMED YUSUF,
PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE,
TO THE SECURITY COUNCIL**

18 December 2020

**Upholding international law within the context of fostering close
co-operation between the International Court of Justice
and the Security Council**

Mr. President,
Excellencies,
Ladies and Gentlemen,

1. Allow me at the outset to congratulate you, Mr. President, and the Republic of South Africa, for your chairmanship of the Council during the month of December 2020. I am grateful for the opportunity to brief the Council one more time before the end of my term as President of the Court. Among the various questions that were suggested for our discussion today, I wish to examine the leading one, namely “[h]ow can we strengthen the partnership between the Security Council and the Court to uphold the rule of law at the international level”?

2. This partnership is, in my view, already strong, but I have no doubt that it can be further strengthened. As you may recall, in my last speech to the Security Council about a month ago, I referred to the fact that the Council has only once used its powers under Article 36, paragraph 3, of the Charter to recommend to disputing Parties to settle their dispute through the Court. This was in the *Corfu Channel (United Kingdom v. Albania)* case. The Council has also only once requested an advisory opinion, the *Namibia Advisory Opinion*, from the International Court of Justice under Article 96 of the Charter. One may therefore ask: how can the partnership be characterized as strong if the Council has relied so sparingly on its powers under the Charter of the United Nations to make use of the functions of the Court? My answer is that the vitality of the relationship between these two principal organs of the United Nations is to be evaluated not by the quantity but rather by the quality of our collaboration.

3. Let me start with the *Corfu Channel* case. As you may know, the *Corfu Channel* case was the very first case brought before the Court. It could therefore be said that the Council helped to kickstart the judicial activities of the Court in 1947. Moreover, the referral of the *Corfu Channel* case to the Court helped avoid a dispute that could have degenerated into a full-blown war with several protagonists, just a couple of years after the end of the Second World War. This case demonstrated that the Charter’s system of co-operation between the Court and the Council that the drafters had designed in 1945 could produce effective results. It reinforced faith in the Charter framework on the maintenance of international peace as a whole.

4. As far as the contribution of the *Corfu Channel* case to the rule of law at the international level is concerned, the case provided the opportunity for the Court to reaffirm that the “policy of force” has no place whatsoever in the Charter era. The Judgment of the Court also clarified the scope of some of the most fundamental principles of the contemporary legal order. For instance, the Court reaffirmed that between independent States, respect for territorial sovereignty is an essential foundation of international relations (*Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949*, pp. 35-36). The Court also laid down the principles of State responsibility for illegal acts performed on their territory (see *ibid.*, p. 18), a topic that is still very

relevant today, especially in relation to the fight against terrorism, cyber-attacks and trans-border environmental damage.

5. At the same time, the *Corfu Channel* case gave the Court the opportunity to test some of its procedural tools. It was in this case that the Court exercised, for the first time, jurisdiction based on *forum prorogatum*, that is to say consent to the jurisdiction of the Court given by the Respondent after the initiation of the proceedings. This basis of jurisdiction of the Court, which is not mentioned in its Statute, was later codified in Article 38, paragraph 5, of the Rules of Court. In addition, the *Corfu Channel* case remains one of the few instances in which the Court appointed experts under Article 50 of its Statute to provide it with an opinion on issues of a technical or scientific character.

6. The same may be said about the 1971 *Namibia* Advisory Opinion. As you may recall, this case arose from the decision of the apartheid régime in South Africa to maintain its presence and authority in the territory of South West Africa (Namibia), despite the termination of South Africa's mandate by the General Assembly. Like the *Corfu Channel* Judgment, the *Namibia* Advisory Opinion also contributed significantly to the rule of law at the international level. This was the first opinion of the Court that took full account of the fundamental principle of equal rights and self-determination of peoples enshrined in the United Nations Charter. The Court noted, among other things, that an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. It further stated that

“the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, 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).

7. The clarification by the Court of the applicability of the right to self-determination to the people of Namibia, together with the identification of the legal consequences which attached to resolution 276 (1970) of the Security Council, paved the way for concrete actions that later facilitated the accession of Namibia to independence.

Mr. President,

8. There are also less visible ways in which the Court and the Council contribute to each other's work and thus co-operate with each other. This is mainly done through their respective contributions to the development of international law and hence to the strengthening of the international rule of law. It suffices to provide but a few examples here.

9. For instance, the Security Council has increasingly used international law as a parameter to identify threats to international peace and security. This was the case in resolution 1296 (adopted on 19 April 2000), in which the Security Council made a link between violations of international law and threats to international peace and security. You may recall that, in that resolution, the Security Council held that

“the deliberate targeting of civilian populations or other protected persons and the committing of systematic, flagrant and widespread violations of international humanitarian and human rights law in situations of armed conflict may constitute a threat to international peace and security” (Security Council resolution 1296 (2000)).

10. In addition to using international law as a parameter for determining the existence of threats to peace, the Council has already used it to address such threats. For instance, the Security Council expanded the scope of rules of international law to non-State actors to maintain international peace and security.

11. The Court, for its part, has constantly supported the Security Council's mission of maintaining international peace and security. I will mention here only a few examples, starting with the confirmation by the Court, in the *Certain Expenses* Advisory Opinion, that the Security Council could establish peacekeeping forces which were to be funded by the general budget of the Organization as part of the "expenses of the Organization", under Article 17, paragraph 2, of the United Nations Charter (*Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, *Advisory Opinion*, *I.C.J. Reports 1962*, p. 179). Similarly, the Court has clarified how to interpret and determine the binding character of the resolutions of the Security Council in the *Kosovo* and *Namibia* Advisory Opinions, respectively. These two opinions have contributed to the effectiveness of the resolutions of the Security Council by removing any doubts that the addressees of such resolutions may have had on their legal value or their interpretation, which are prior steps to their appropriate implementation.

Mr. President,
Distinguished Delegates,

12. I would now like, in this second part of my statement, to make some specific suggestions that could further reinforce the co-operation between our two organs.

13. I will start with the appeal I made to the Council at the end of my last speech on 26 October 2020. As you may recall, I made an appeal to the Security Council to resume its past tradition of recommending the referral of legal disputes to the Court, and to make use again of the advisory function of the Court on legal questions. I said that the United Nations Charter allows you to do so. That is true. However, allow me to make a distinction between the two possibilities.

14. I can understand the reluctance of the Council to recommend the referral of a dispute to the Court, by the Parties concerned, unless it is clear that both Parties are ready for such a step. After all, the wording of Article 36, paragraph 3, refers to a "recommendation" by the Council, which is legally non-binding and cannot, therefore, establish the jurisdiction of the Court over a dispute without the consent of the Parties. Thus, without first ascertaining the consent of the Parties to the jurisdiction of the Court, it might be difficult for the Council to make such a recommendation.

15. However, the request for an advisory opinion is a different matter. Such an advisory opinion would not be binding and would not be addressed directly to States, but rendered for the benefit of the Council to clarify a specific legal issue. The Security Council would then be free to do whatever it wishes with such an opinion.

16. The General Assembly, in its resolution 43/51 of 1988 entitled "Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security", called upon the Security Council, "if it is appropriate for promoting the prevention and removal of disputes or situations", to consider requesting the Court, at an early stage, to give an advisory opinion on any relevant legal question.

17. Much has been said since then by UN organs, including the Security Council, about preventive diplomacy and the need to resolve disputes or diffuse situations at an early stage. The General Assembly was of the view that a request for an advisory opinion from the Court could play an important role in the Council's work to prevent situations or disputes from becoming a threat to international peace and security. I share that view, and I believe that the Council could consider that possibility more often.

18. My second suggestion relates to the possibility of an expanded dialogue between the Court and the Security Council. Thus, I wish to suggest that, in addition to the annual briefing of the President of the Court to the Security Council, the Security Council could include in its schedule a visit to the Court once every three years, following the triennial renewal of the composition of the Court, in which the Council participates through the election or the re-election of judges. This would allow the Council to see first-hand the work of the Court and discuss with all 15 Members of the Court issues of common interest. In this regard, I wish to recall that the last visit of the Council to the Court took place on 11 August 2014, six years ago.

19. My third and last suggestion concerns the jurisdiction of the Court. The Security Council issued presidential statements in 2006, 2010 and 2012, in which it called upon States to consider accepting the jurisdiction of the Court in accordance with its Statute. In its statement of 19 January 2012, the Council emphasized "the key role of the International Court of Justice, the principal judicial organ of the United Nations, in adjudicating disputes among States and the value of its work". To this end, the Council "call[ed] upon States that have not yet done so to consider accepting the jurisdiction of the Court in accordance with its Statute" (S/PRST/2012/1).

20. However, in the last eight years no such statement has been issued by the Council. We believe that such statements by the Council contribute to the strengthening of the relationship between our two organs, as well as the international rule of law. They could be made periodically (perhaps once every three to five years) starting with today's sitting. As you are all aware, there are, at present, only 74 Member States of the United Nations that have made declarations accepting the compulsory jurisdiction of the Court. It is my view that accepting the jurisdiction of the Court means adhering to and strengthening the rule of law at the international level. Without a court of law to which disputes can be referred for peaceful resolution, the existence of a rule of law at the international level may be doubted.

Mr. President,

21. I submit these three modest suggestions for the consideration of the Council, and I remain at your disposal for any questions or clarifications.
