

**STATEMENT BY H.E. JUDGE HISASHI OWADA, PRESIDENT OF THE INTERNATIONAL
COURT OF JUSTICE, TO THE SECURITY COUNCIL**

27 October 2010

Mr. President, Your Excellency Ambassador Ruhakana Rugunda, Distinguished delegates, Excellencies, Ladies and Gentlemen,

It has become a tradition by now since 2000 that the President of the International Court of Justice is given the opportunity of addressing the Security Council on issues of common interest. It is with a renewed sense of appreciation that I have this opportunity today to address you as the President of the Court.

Some two decades have passed since the end of the Cold War. In this new world of restored unity, expectations are running high for the rejuvenated United Nations as the centre of activities for the mainstream of international peace and security. It is opportune at this juncture for us to pause together for a moment to reflect upon where we, the Security Council and the International Court of Justice, two principal organs of the United Nations, stand in our pursuit of the maintenance of international peace and security, and to ponder over what possibilities there are for enhancing our common efforts for the promotion of the rule of law of our world. The Charter of the United Nations declares in Article 1 that the purposes of the United Nations are

“To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace”.

Both the Security Council and the International Court of Justice, as principal organs of the United Nations, can play our respective roles and strengthen our co-operation in the promotion of the rule of law as the basic premise for securing peace and stability in the present day world.

I regret that I was unable to attend, due to the heavy work schedule of the Court, an open debate held at the 6347th Meeting of the Security Council under the agenda item, “The promotion and strengthening of the rule of law in the maintenance of international peace and security”, held on 29 June 2010. The Court appreciates the discussions you had on that occasion especially on the issue of international justice and the peaceful settlement of disputes as the important element of the rule of law at the international level. In particular, the International Court of Justice is gratified to see the reference to the importance of the role of the Court in the statement of the President of the Security Council, issued at the end of this open debate, in the following way:

“The Security Council is committed to and actively supports the peaceful settlement of disputes and reiterates its call upon Member States to settle their disputes by peaceful means as set forth in Chapter VI of the Charter of the United Nations. The Council emphasizes 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 and calls upon States that have not yet done so to consider accepting the jurisdiction of the Court in accordance with its Statute.”

The agenda of promotion and strengthening the Rule of Law through the activities of the United Nations is a most welcome initiative that signifies sustained and concerted efforts on the part of the organization since it was placed on the agenda of the Security Council in 2004. This initiative has gone beyond the stage of a theoretical discussion and has come to the stage of

embracing its institutional as well as financial dimensions, including the creation of the Office of Rule of Law and Security Institutions in 2006 within the United Nations system. A great number of United Nations resolutions as well as statements have come to flourish both within and outside the United Nations system on this topic of the Rule of Law as the key element for achieving sustainable peace and prosperity in the present day world.

This reflects a shared awareness in the international community that the promotion of the rule of law lies at the heart of the major problems that the world faces at present, i.e., human rights protection, environmental preservation, sustainable development, and peace and security. It should constitute the key concept in our efforts to reinvigorate and strengthen the United Nations activities. In other words, endeavours for the advancement of the rule of law have been prompted in one way or the other by the observation, widely shared over the past decade, that its disregard has been the cause of disintegration of social fabrics in many parts of the world, creating a risk of leaving the United Nations sidelined especially in the domain of international peace and security.

Taking this opportunity to address the Security Council, I would like to build on the discussion in the Security Council on the Rule of Law at the national and international level and emphasize the importance of the interplay between the Court and the Security Council in exercising their respective functions for the establishment of the rule of law at the international level.

Link between the rule of law at national and international levels

Let me start by stating the obvious. The biggest challenge of our time regarding international peace and security is a gap between a host of disparate threats and the means we have at our disposal to deal with them.

In this sense we have to start from the premise that issues relating to the rule of law at the national and at the international level are closely linked with each other. We live in an increasingly globalized world where international law, as the unifying theme of this globalizing international community, has come to permeate into the traditional domain of domestic legal orders. We realize that the situations ranging from the strike of a natural disaster to civil unrest and internal conflicts caused by the prevalence of structural poverty and the absence of good governance in society can create a hotbed for the prolonged conflicts that tend to invite external intervention including acts of non-State entities, thus leading to the situation of threat to international peace and security. In order to cope with these situations, the establishment of the rule of law at the national level is essential.

The only way to cope with this situation has to start with the recognition that the devastation as a result of non-respect of the rule of law is cataclysmal in the long run not only to the societies (abandoned or otherwise) immediately affected by the crises, but also to the world at large. The acknowledgement of this boomerang effect should lead one to go beyond the short-sighted view of immediate interests. It should also provide hope for bringing the collective mechanism in line with the fundamental principles of the rule of law, a task that the demise of the structure of the Cold War should have provided us with opportunities to tackle. Two decades later, and especially in the aftermath of a decade-long approach that confronted us with fundamental difficulties, we are standing at a watershed moment for consolidated efforts to promote the rule of law.

The rule of law at the international level may be understood as the application of the rule of law principles to relations governed by international law. Consequently, as the domain which contemporary international law regulates has expanded to areas which traditionally used to belong to the regulatory régimes of the domestic legal order — such as the protection of human rights, preservation of environment, and even some aspects of the system of good governance — the rule of law at the international level can only be achieved in parallel with the realization of the rule of law at the national level.

On this basis, there is room for improvement in each of the following three elements as the composite elements of the rule of law both at the national and international levels: (1) non-arbitrariness in the exercise of power; (2) supremacy of the law; and (3) equality before the law. While in my view these three elements are all relevant to the work of the Security Council as the organ endowed with the primary responsibility for the maintenance of international peace and security, the International Court of Justice has a special role to play in parallel, in order to bring about by peaceful means, and in conformity with the principle of justice and international law, settlement of international disputes or situations which might lead to a breach of the peace.

The Role of the International Court of Justice in promoting the rule of law as seen in the recent jurisprudence of the Court

Last year in this forum, I canvassed the concrete aspects of this interface between the activities of the Court and the Security Council in the field of international peace and security. Indeed, the constitutional links as envisaged by the United Nations Charter aim to realize peaceful settlement of disputes through respective actions of our two institutions. Let me start with the Advisory function of the Court. It goes without saying that the interactions and interfaces between the Court and the Security Council are much more direct in advisory proceedings of the Court than in contentious cases. As Ms Migiro, Deputy Secretary-General of the United Nations, stated at the Security Council open debate on 29 June 2010, there is no question that “strengthening the relationship between the Security Council and the Court will fortify the rule of law”¹.

It was in this spirit that the Court delivered its advisory opinion on 22 July this year in the case concerning *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*.

On 8 October 2008, the request for an Advisory Opinion on this question was submitted to the Court by the General Assembly, pursuant to its resolution 63/3. The request for an advisory opinion attracted considerable attention from the international community, as reflected in the participation of a great number of Member States in the different phases of the proceedings. Thirty-six Member States of the United Nations had filed written statements, in addition to the authors of the unilateral declaration of independence who filed a written contribution. Fourteen Member States of the United Nations have also submitted written comments on the written statements by other members and the written contribution of the authors of the unilateral declaration of independence. The authors of the declaration also submitted a written contribution regarding the written statements. The Court held the oral proceedings from 1 to 11 December 2009 in which 28 States as well as the authors of the unilateral declaration of independence participated. The procedure was thus truly a global one and represented an important form of interaction between the General Assembly and the Court. Incidentally, it was also the first case in which all five permanent members of the Security Council appeared before the Court.

The first issue that the Court had to decide was the question of whether it possessed jurisdiction to give the advisory opinion requested by the General Assembly. In as much as the question asked was referred to the Court by the General Assembly, an organ of the United Nations authorized to request the Court to give an advisory opinion on any legal question under Article 96, paragraph 1, of the Charter, and as that question was a “legal question” within the meaning of Article 96 of the Charter and Article 65 of its Statute, the Court had no difficulty in deciding that it had jurisdiction to give an advisory opinion. A more delicate question, which was raised by a

¹S/PV.6347 (Statement of Ms Migiro, Deputy Secretary-General).

number of participants on various grounds, was whether the Court should nonetheless decline to exercise its jurisdiction to give an advisory opinion. After detailed examination of various aspects of the issues involved in this question, the Court concluded that there were “no compelling reasons for it to decline to exercise its jurisdiction” — a criterion that has consistently been applied in the jurisprudence of the Court for advisory opinions.

It is to be noted that it is up to the Court to exercise its discretion to decide in each advisory case whether the Court should respond to the request. The Court gave careful attention to the dual need of protecting the integrity of the Court as a judicial institution and of considering its special character as the principal judicial organ of the United Nations. Respecting the powers of the General Assembly and the Security Council under the Charter, the Court has carefully examined this issue, constantly taking into account the work of the Security Council as the primary organ charged with the task of bringing about peace and stability in the region and more specifically in relation to Kosovo.

On the substance of the question, the Court strictly circumscribed the precise scope of the question submitted to it. As for the phrase “Provisional Institutions of Self-government of Kosovo” employed in the request by the General Assembly, the Court determined, as part of its judicial function, *proprio motu*, that it had to examine whether the declaration of independence had been promulgated by a body of that designation or not. Thus, the Court determined that the sole question posed to it was a strictly circumscribed one of whether any rule of international law prohibited a declaration of independence by its authorities.

The Court assessed this question both from the viewpoint of general international law and of Security Council resolution 1244 of 10 June 1999.

By examining State practice during the eighteenth, nineteenth, and early twentieth centuries, the Court came to the conclusion that general “international law contained no prohibition of declarations of independence”. It further analysed three relevant Security Council resolutions, for the purpose of examining whether they prohibited the declaration of independence in question. It determined that the object and purpose of resolution 1244 was to form “a temporary, exceptional legal régime which . . . superseded the Serbian legal order . . . on an interim basis”. The question thus to be examined was whether the authors of the declaration of independence could act outside this framework. In this context, the Court carefully analysed whether the authors of the declaration of independence were the “Provisional Institutions of Self-Government of Kosovo”, and came to the conclusion that the authors of the Declaration of Independence were not the “Provisional Institutions of Self-Government” “but rather . . . persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration”. Thus, the Court came to the conclusion that the declaration of independence of Kosovo did not violate resolution 1244, on the following grounds. First, resolution 1244 remained silent as to the final status of Kosovo, whereas the declaration of independence, “operat[ing] on a different level”, was an attempt to determine that final status. Second, obligations imposed by resolution 1244 contained no general prohibition on Kosovo to declare independence. Since the authors of the declaration of independence were not the Provisional Institutions of Self-Government of Kosovo, the authors of the declaration of independence were not bound by the Constitutional Framework established under resolution 1244 and thus their declaration of independence had not violated that framework.

The final conclusion that the Court reached therefore was that the adoption of the declaration of independence by its authors did not violate any applicable rule of international law.

Complementary roles that the two organs play

Despite the relative silence in the Charter on the relationship between the Security Council and the Court, there are nevertheless factors contained in the Charter which require careful attention on the part of this Council and the Court. First, Article 36, paragraph 3, provides that “[i]n making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by parties to the International Court of Justice”. This is an important article, but has not been fully utilized in the past, since the early practice of the United Nations; it was once used in the *Corfu Channel* case before the Court. I believe the Security Council could give much more attention to this provision and consider the possibility of much further utilization of the Court in many cases which come before the Council. Second, one of the most critical aspects of the Judgment of the Court in a contentious case is the issue of compliance with the judgment. Article 94, paragraph 2, of the Charter provides for a procedure for resorting to the Security Council for enforcement of or compliance with a judgment:

“If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.”

This admittedly is not a provision for enforcement of a judgment per se. Nevertheless, this is an important provision worth reflecting upon in the context of the promotion of the rule of law. Under this Article the Security Council is given the power to “make recommendations or decide upon measures to be taken to give effect to the judgment”.

Finally, when we enlarge the scope of our *tour d’horizon* to the issue of the complementary roles that the two organs play, there are a number of cases where a similar set of issues, although not entirely the same, relating to these cases can be brought both before the Court and the Security Council. Such cases include: *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*.

It may also be added that the Court recently held oral proceedings on a case — though at its preliminary objections phase — relating to a situation, some aspects of which also had been a subject of active discussion before this Council, that is, the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*.

Although in such a case the angles from which the two organs look at the matter can be quite different, one concerned strictly with the international legal perspective of the dispute, while the other looking at it in the much broader comprehensive context of peaceful dispute settlement, the consequences of such examination by different organs can be mutually supportive and complementary to the work of the respective organs.

Conclusion

By way of conclusion, it is important to recall the important functional link that exists between the Court and the Security Council in the United Nations Charter. I already cited Article 36, paragraph 3, of the United Nations Charter whereby the Security Council may recommend reference of legal disputes to the International Court of Justice in accordance with the Statute of the Court, as well as Article 94, paragraph 3, whereby the possibility is provided for the Security Council, upon the request by one party, to make recommendations or decide upon measures to be taken to give effect to a judgment in case of failure of compliance by the other party. Thus the Security Council can be engaged in a number of interactive ways to promote the

rule of law, in the areas of peaceful settlement of disputes, including by judicial means, both at the beginning and the end of such a process. It is my hope that the Security Council and the Court will continue to fortify their close co-operative relationship and to reinforce our work in a mutually supportive manner for years to come.

Thank you very much for your attention.
