

THE RULE OF LAW AT THE INTERNATIONAL LEVEL: EVOLUTION AND CHALLENGES — KEYNOTE REMARKS BY JUDGE ABDULQAWI YUSUF

This keynote speech was convened at 10:00 a.m. on Friday, March 26, 2021 by Catherine Amirfar, president of the American Society of International Law, and the discussant, Patrícia Galvão Teles, Member of the United Nations International Law Commission, who introduced the keynote speaker: Judge Abdulqawi Yusuf of the International Court of Justice.

REMARKS BY JUDGE ABDULQAWI YUSUF*

Distinguished guests, ladies and gentlemen, it is a great honor for me to receive today the 2021 Honorary Member Award of the American Society of International Law (ASIL). I have always admired the work of ASIL in the promotion and dissemination of international law. I have also admired ASIL for serving as a model to other associations and societies of international law around the world.

There are, of course, several examples I could give today to illustrate the role played by ASIL in the field of international law and the contribution its distinguished members have made to the development of international law, as well as the fact that it has served as an inspiration for other societies and associations.

However, I will limit myself to two examples, which are of personal interest to me. The first example concerns the International Court of Justice (ICJ), of which, as you know, I am a member. About one hundred years ago, in 1920, one of the prominent members of the Advisory Committee of Jurists that was tasked to prepare the Statute of the Permanent Court of International Justice was Elihu Root, the first president of the American Society of International Law. As you well know, the Statute of our Court is based on that of the Permanent Court of International Justice. Mr. Root was accompanied by his legal adviser, Mr. James Brown Scott, who was at the time the editor-in-chief of the *American Journal of International Law*, the official publication of ASIL. Both Mr. Root and Mr. Scott were among the founders of ASIL. They promoted the establishment of a permanent judicial body for the settlement of interstate disputes, even at the Second Hague Conference of 1907, when Mr. Root was still the United States' Secretary of State and Mr. Brown Scott was legal advisor of the U.S. State Department and a member of the U.S. delegation to the 1907 Hague Conference.

In 1920, Elihu Root was able to propose to the Advisory Committee of Jurists a formula for the election of judges to the Court. This was one of the thorniest and most difficult issues facing the Committee. The American Society of International Law can be proud of their achievements and of the great contribution they have made to the development of the rule of law at the international level. I say this because there can be no rule of law without a court to apply it. It is thanks to the vision and efforts of people like Elihu Root and James Brown Scott that we have today the International Court of Justice to apply the rule of law among states.

* Judge, International Court of Justice.

The second example concerns the establishment of the first African International Law Association in 1986. We met in Lusaka, Zambia, in 1986 to create an African Association of International Law, a continental association, and of course, we drew inspiration from the American Society of International Law and other national societies that existed at the time. But our aim was to create a much bigger association because there were already some national societies in the African continent, such as those of Egypt and South Africa.

That is why we thought we should not call it an “African society” but an “African Association of International Law.” But there was also another reason why we chose to call it an “association.” This was to avoid having the same acronym as the American Society of International Law. So we went for “AAIL” instead of “ASIL.” However, I can assure you that in many respects, ASIL served as a model for the association we created in Lusaka, Zambia, in 1986.

I would, therefore, like to take this opportunity to thank the members of the American Society of International Law for the great honor bestowed upon me today but also for the contribution that ASIL has made to the promotion and dissemination of international law, which I hope will continue and will also include the defense of the international rule of law which, as you know, now and then, comes under attack in certain quarters.

I thank you.

INTRODUCTORY REMARKS BY CATHERINE AMIRFAR*

Judge Yusuf, thank you so much for your kind remarks and reminding us of the important legacy of the Society and support of the rule of law, and thank you so much for avoiding the acronym ASIL. Much appreciated.

Our distinguished discussant this morning is Professor Patrícia Galvão Teles, a member of the United Nations International Law Commission and professor of international law at the Autonomous University of Lisbon. She serves as Senior Legal Consultant on International Law in the Legal Department of the Portuguese Ministry of Foreign Affairs and is a member of the Permanent Court of Arbitration. She previously served as the Legal Advisor of the Permanent Representation of Portugal to the European Union in Brussels, where she was responsible for overseeing the implementation of the Treaty of Lisbon and other institutional and legal matters. Professor, welcome, and we look forward to your conversation.

INTRODUCTORY REMARKS BY PATRÍCIA GALVÃO TELES**

Thank you so much, Catherine, and thank you to ASIL for once again putting together such a wonderful event under these difficult times. It certainly is not as good as being in Washington, D.C., but this is probably as good as it gets, so thank you again. And congratulations for such a successful event.

I am also very grateful to you, Catherine, and Mark for the invitation to conduct this conversation with Judge Yusuf on the occasion of the attribution of the Honorary Member Awards, and I warmly congratulate Judge Yusuf on receiving this award and on the wonderful remarks that he has just given us from the Great Hall of Justice in The Hague.

* President, American Society of International Law.

** UN International Law Commission.

But now we have the privilege of having him in this virtual room for a conversation on the topic of “The Rule of Law at the International Level: Evolution and Challenges,” and I have to say, as you said in your initial remarks, Catherine, anyone who has seen Judge Yusuf in action can really be only a great admirer of his wisdom, his depth of legal knowledge, and very good common sense and kindness. I am so privileged to be here today with you, Judge Yusuf, to conduct this conversation. I have had the pleasure since I have been a member of the International Law Commission (ILC) of witnessing the remarks that you have given in the framework of the meetings of the Commission. There is a tradition that the president of the International Court of Justice comes on an annual basis to the meetings of the ILC, and the first time that Judge Yusuf as ICJ president came to Geneva to the meeting of the ILC to give your remarks was precisely at the moment when the Commission was celebrating its seventieth anniversary. You gave outstanding remarks on the importance of the role of the Commission that were deeply appreciated. In 2019, we also had the occasion of having you, not last year unfortunately due to the pandemic, but the presence that you marked as president of the court in the dialogue that we have among the Commission and the court has been much appreciated.

I have to say those moments that we spent together in Geneva were also an occasion to reunite with our common mentor, Professor Georges Abi-Saab, who I also take the opportunity to send our best regards. We have both been students of Professor Abi-Saab in Geneva, and as he calls us, we are his children, *ses enfants*, as he normally says. It is really a great honor for me to be here with you to reflect on the rule of law and its evolution and challenges and your experience.

Let me start with asking you a question that has to do with something you said last year, last fall in a panel where we had the occasion of being together on the commemoration of International Law Day at the Sixth Committee of the United Nations General Assembly meeting on the occasion of the seventy-fifth anniversary of United Nations, where you stated that the legal order created under the auspices of the United Nations is the first at the international level to be based on the equal rights of peoples and the sovereign equality of all states. You also spoke of the development of the UN under the UN Charter of an all-inclusive international law. I wanted to ask you to expand a bit on those statements.

JUDGE ABDULQAWI YUSUF

Thank you very much, Patrícia, and it is, of course, my pleasure to be with you today and to have this conversation with you. I also take this opportunity to thank Catherine Amirfar for her kind words.

Yes. Of course, you are quite right. I always try to remind the younger generation that we have not always had the rule of law at the international level. We have not always had an international law that had a universal vocation, that these are actually recent phenomena in the history of human kind. They are things that we should all be proud of and that we should actually try to preserve for humanity in the future and to develop further.

I say this because before the Charter of the United Nations, the legal order which prevailed at the international level was not a legal order which made room and accommodated all cultures, all civilizations, and the legal traditions of the peoples of different continents of the world. We did not also have a rule at the international level because you cannot have the rule of law at the domestic level or at the international level when war and violence are not prohibited, when the subjects of the law are not equal before the law, and when, as far as international law is concerned, the sovereign equality of all states is not recognized.

I can give you a few examples which are drawn from my experience as an African international lawyer. What we had before the League of Nations and the gradual emergence of multilateralism

were regional systems of public law. For example, as far as Europe is concerned, where we had the most developed system of public law, European writers referred to it as the “public law of Europe,” but some of them, of course, referred to it as “international law” or the “law of nations.” But the law to which they referred as “international law” or the “law of nations” was not a law which was applicable to all the nations of the world and was not a law which ensured equality before it for all peoples and for all nations. It was a law which discriminated against certain nations and certain states.

I can give you as an example the case of Ethiopia, which was an independent and sovereign state and which luckily escaped colonialization by European powers in the nineteenth century, and actually, defeated one European power which tried to subjugate it in 1896 at the Battle of Adwa when the Ethiopian forces defeated the Italian army.

But Ethiopia was neither a member of the League of Nations nor was it one of the states invited to join the League of Nations, and you ask yourself why. There was a debate after the establishment of the League of Nations when Ethiopia actually applied for membership. It is difficult to imagine for the younger generation today, but the argument of those who were in favor of Ethiopia’s admission to the League was that membership in the League of Nations would actually help Ethiopia become more civilized. For those who were against, Ethiopia was not civilized enough and did not meet the standard of civilization in order to be admitted to the League of Nations. This was the kind of legal system which prevailed at the time. There were neither equal rights of peoples in what was referred to at the time as international law, nor was there sovereign equality.

To give you another example, during the Versailles Conference in which the Covenant of the League of Nations was being elaborated and negotiated, one of the proposals made by the Japanese delegation—and Japan was a newcomer to the legal order at the time because, in the nineteenth century, Japan was not admitted to the magic circle of civilized nations—was the inclusion of a clause in the Covenant on the equality of races, by which I believe they meant equal rights of peoples at the time, but they formulated it otherwise. This was not accepted by the majority of the states participating at the Versailles Conference. They objected to it. For them, equal rights of peoples was something which could not be accepted. The different nations, the different peoples of the world could not have equal rights, and so this was a system which I think one could not characterize as being capable to create a rule of law at the international level, and it was a system which one could not describe as being inclusive. That is what I was trying to allude to when I made my speech, and thank you for reminding me of those remarks before the Sixth Committee of the General Assembly last year.

PATRÍCIA GALVÃO TELES

Thank you, Judge Yusuf. I think those are, indeed, important reminders for all of us but also, of course, in particular for the younger generation that may take certain things for granted. It is always important to remind everyone of this evolution. Indeed, over your lifetime, you have witnessed this great evolution of international law, especially since the creation of the United Nations, which certainly marks a departure from the legal order that you were describing. From your personal point of view, what aspects of such evolution would you highlight? The prohibition of the use of force, the development of a universal system of protection of human rights, the appearance of a significant number of newly independent states due to the principle of self-determination, which in your personal view would be the aspects that you would highlight?

JUDGE ABDULQAWI YUSUF

I always refer to a trinity of principles, which I consider to have revolutionized the legal order at the international level. The first two, which appear as objectives in the Charter of the United

Nations, relate to the prohibition of the use of force in international relations and the principle of equal rights and self-determination of peoples. I think those are two groundbreaking principles.

The principle of equal rights and self-determination of people is for me, to a large extent, the source of human rights and peoples' rights under the Charter of the United Nations.

The third one, which was just mentioned in the preamble but that gradually worked its way out of the preamble and occupied the center of the legal order is the universal protection of human rights and the dignity and worth of the human person. These are actually the three. The latter two, the principle of equal rights and self-determination and the universal protection of human rights are intrinsically linked.

But also the prohibition of the use of force is linked to the others, because finally when we ask what is really the objective of this discipline that we study and exercise as a profession, whether it is law or international law, what is its purpose: the final objective is the human being, and it is the well-being and the protection of the dignity of the human being and of the individual that is the ultimate purpose of establishing the rule of law, be it at the national or international level. Therefore, whether we talk about the prohibition of the use of force, which can actually take away the life and the dignity of human beings, or when we talk about equal rights of peoples, and self-determination of peoples, which removes their oppression, their colonialization, their enslavement, which was the lot of many peoples in the past, or whether we talk about the protection of individual human rights, we are all talking about the same thing. And we are all moving toward the same objective. We all want to ensure the dignity and the well-being of the human person.

The evolution over the last seventy-five years of international law has actually been marked by this trinity of principles and rules, and it is through these principles that humanity has, to a large extent, avoided large-scale use of force in international relations. Unfortunately, we have, here and there, instances of use of force, but we have not had a third world war which could be much more destructive than the first two World Wars.

What is actually much more important is that there are certain areas around the world that have lived in relative peace over the last seventy years and have, as a result, experienced an incredible growth and progress in both social and economic terms.

The other example that you mentioned, the emergence at the international level of newly independent states, which is, to a large extent, thanks to the principle of equal rights and self-determination of peoples that later became a right of peoples to self-determination, a right recognized today as a rule of customary international law, has marked for me the history of the last seventy-five years of humanity and has contributed substantively not only to the development and evolution of international law but actually to the reconceptualization of international law. As I said before, international law was in the past, most of the time, some sort of a regional legal system. We have borrowed the techniques, some of the principles, some rules from those regional systems, and also from the legal traditions of the member states of the United Nations in order to reconceptualize and develop the international legal system. That is one of the things that I addressed during my speech to the seventieth anniversary of the International Law Commission because the International Law Commission played a very important role, together with the international codification conferences that have been convened by the United Nations in the last seventy years, but so did our Court. I feel proud when I read some of the judgments of the Court and some of its advisory opinions, particularly after the late 1960s and early 1970s, with *Barcelona Traction*, the first advisory opinion on *Namibia*, and the advisory opinion on *Western Sahara*. They all contributed to the consolidation of the right to self-determination of peoples in international law. We have seen a lot of developments, and I think that there has been a positive evolution of international law in the last seventy years.

PATRÍCIA GALVÃO TELES

Thank you, Judge Yusuf. We will come back to the court and especially to current issues in the court and the future of the court in a moment, but let me just follow up. The UN, the Charter, and all the principles that flowed from the Charter and the practice of the UN really changed the face of international law and even the international map in terms of the appearance of number of independent countries. I fully agree with you, with the tripartite principles that are at the intersection and centered around the protection of the dignity of the human being. A lot has been done, certainly, and we have a much more complete, robust and, as you said, inclusive international law.

But in spite of such evolution, there remain challenges to the rule of law at the international level at present and also for the future. Which do you think are the greatest challenges in the present and for the future? Are those challenges mostly related to the maintenance of international peace and security and to the protection of human rights and sustainable development, to the protection of the environment, or perhaps to all of them?

JUDGE ABDULQAWI YUSUF

I would say all the above, but I think that they are all interrelated because the maintenance of peace and security and the protection of human rights encompass sustainable development and the protection of the environment. Unless we protect our environment and engage in sustainable development, we might not be able to maintain peace and security on this planet. Of course, unless we protect the environment and deal with the challenges that will arise from climate change, human rights will suffer, and we will not be able to protect human rights the way we would like to protect them. They are all interrelated, and I think that we have to deal with all of them.

I am, of course, an optimist because that is, I think, a professional defect of many international lawyers; otherwise, we would not be in international law. Therefore, I think that we can meet those challenges, but we have to prepare ourselves. We have some procedures, mechanisms, and processes, and we have to make the best use of them. But the earlier we act the better because we cannot wait for a very long time. We have some legal frameworks. We have mechanisms. I think we can, by extension or by analogy, use the principles which are already in our toolbox to address some of the legal challenges that may arise from, for example, climate change, or which may arise from environmental degradation. I think that at the same time we need to act more forcefully on the protection of human rights.

We can also be proud of the fact that we have commissions and courts for the protection of human rights in three continents today. We have a Commission and a Court in Africa dealing with humans' and peoples' rights. We have the European Court of Human Rights, and we have a Commission and a Court in the Americas. I think that this is major progress and a big advance. I would even characterize it as an *acquis* of human civilization because there was some debate when the Permanent Court of International Justice was being created whether individuals should actually be given access to the Permanent Court of International Justice, but finally, that did not go through. Of course, the idea was that individual rights could always be protected through diplomatic protection, especially the rights of foreigners in other countries; and therefore, their governments could always take their grievances to the International Court of Justice.

But, now we have all these human rights courts and commissions to which individuals can go in order to have their rights protected and to make sure that governments are held accountable if their rights are breached.

We need to develop the system of protection of the environment in a similar way in order to be able to deal with the future challenges arising from environmental degradation and climate change,

and I think that can be done. We are already on the way, and I feel that our Court has actually contributed, to a certain extent, to the development of the law in that field, and I am very happy with that.

PATRÍCIA GALVÃO TELES

Judge Yusuf, I fully share your position as an optimist. I normally say that I am an optimist by default and a realist by experience, but I fully agree that in this profession, but also as a human being, we have to be optimistic and think that things will get better and we have the tools to do it. Some of the challenges that you have identified and how they are interlinked certainly are ones that make us be worried but at the same time optimistic that the international community will find ways and solutions to make progress in all these areas.

But now that you have mentioned the role of the court, let us turn to your experience as judge of the ICJ, where, as Catherine said in her initial remarks, during your time at the ICJ, the court has been busier than ever. It has rendered a number of important judgments and advisory opinions, and it also has been challenged with the unprecedented situation of the COVID-19 pandemic that made the court under your guidance as president adapt very quickly to the new formats and keep its important work going.

I have a few questions about the court and your experience. First, what balance do you make of your years at the ICJ so far, and how do you see the evolution of the court in the medium- and long-term perspective? Second, at the same time, you started to address it a little bit already, but perhaps you could develop more on how has the court contributed to the affirmation of the rule of law at the international level, and how can it continue to do so?

JUDGE ABDULQAWI YUSUF

Thank you very much. You are right that the Court has been busier than ever before in the last two decades. In the last twenty years, the Court has received and dealt with as many cases as it did during its first fifty years of existence, so you can see how things have actually evolved.

I think this is due to the trust and confidence placed in the Court by the member states of the United Nations. This trust and confidence has been growing over the years, and I feel personally very fortunate that my term of office has coincided with this trend. I do not think I would have enjoyed my work as much if I came to the Court in the 1970s or even in the 1980s. I remember coming to The Hague as a student and meeting the President at the time of the International Court of Justice, and we asked him how many cases they had in the general role of the Court, and he said, "We only have one case pending." So that was not a good situation for the Court, and it is a totally different Court that we are dealing with today.

I think it is not by accident that we have this confidence and trust in the work of the Court. It is because of the manner in which the Court has acquitted itself of its judicial function as the principal judicial organ of the United Nations. It is due to the quality of the jurisprudence that the Court has built over the years, the reliability of its jurisprudence, the manner in which this jurisprudence has also contributed to the progressive development of international law.

Today, for example, we have fourteen cases pending before the Court, and during my first two years as President of the Court in 2018 and 2019, we received eight cases at the Court. Last year was marked by COVID-19. It was a year in which we all experienced this health crisis and this pandemic. No new cases were received last year by the Court, but this year, we have already received one new case. So we have fourteen cases pending before the Court, and they come from all the continents and regions of the world. It is remarkable, the sheer breadth and diversity of

the cases that are brought to the Court and the importance of the legal issues lying at the heart of these cases.

I have been on the bench now for twelve years, but I can tell you I do not feel that I have been here for more than three or four years. I have not seen the years pass. Absolutely not. I have not felt them, and that is because of the interest of the work, the challenges that the work actually produces, and of course, it is an extremely rewarding work. You do not really feel that you are too busy, but we have been quite busy.

We had to deal in the last twelve months with this issue of the pandemic, and we were taken by surprise like all other domestic and international institutions. But, of course, we were determined to ensure that international justice and the judicial settlement of disputes would not come to a halt and would not be suspended by any health crisis or any type of crisis because it is now more than ever that states want to see their cases and disputes before the Court resolved as quickly as possible. We could not simply cross our arms and say, "Okay. We will wait until the end of COVID-19, and then we will continue because we cannot hold hearings or deliberations, et cetera." We immediately embarked on changing our methods of work, and we started with remote judicial and administrative meetings in which all judges participate. We tried to master the technologies necessary for such remote meetings, and we also adopted internal protocols for remote meetings, video links, videoconferences, et cetera. We also prepared guidelines for remote hearings, and we amended our rules in order to reassure those who would appear before the Court and tell them that we were not simply interpreting our rules, but we wanted to make clear to them that we were actually basing our decisions on new rules of the Court, which were meant to respond to the new situation with which we were faced.

We did all of this in about forty-five days, and we were prepared for holding remote hearings by the end of May 2021. We have so far held four hybrid hearings, because we do not want to hold virtual hearings. For us the presence of the Court in the Great Hall of Justice and the fact that the parties can address the Court in its usual setting and the symbolism which that represents for the public with the judges of the Court sitting at the Great Hall is extremely important.

We also did not want to exclude the possibility for the parties to address in person the judges of the Court, and so we allow parties, if they so wish, to come to the Great Hall of Justice, not in great numbers but in a limited number of advocates, agents, and counsel to address the Court in person. We wanted to make sure that we could continue operating and working, but at the same time, we would not actually alter the nature of the Court, and we would not have a Court which appears only on video and on screens and which does not have a physical presence in the premises of the Court itself. We have succeeded in doing that, and we are very happy with the outcome because we have not missed a beat. We have continued with our work, whether it is hearings, deliberations, or judicial decisions, and we have issued several judgments since COVID-19 started, and so we continue with our work.

How do I see the evolution of the Court in a medium- and long-term perspective? I am confident that the trust in the work of the Court will continue because I see how this trust is expressed and how it keeps growing. I think that it will continue to play an extremely important role in the peaceful settlement of disputes. I do not think that thirty or forty years ago we expected the judicial settlement of disputes to be as much at the center of the peaceful settlement of disputes among states as it is today. We thought that political means of dispute settlement would continue to prevail, but today the judicial settlement of disputes is playing an increasingly important role in international relations. I think it is because of this growing trust and confidence in the work of the ICJ.

The contribution of the Court to the affirmation of the rule of law at the international level is important. I have already said a few words about self-determination, and I think that the last

advisory opinion of the Court on the *Chagos Archipelago* has actually contributed to the development of the law of self-determination of peoples at the international level.

But we cannot have the rule of law at the international level without a court which interprets the law and applies the rule of law, and this is the role that the Court has been playing, despite both judicial constraints and administrative constraints. Judicial constraints in the sense that the jurisdiction of the Court is based on the consent of states. We would have liked more states to accept and make a declaration of acceptance of the compulsory jurisdiction of the Court. But what happens is that even those who accepted the compulsory jurisdiction of the Court include and insert a lot of reservations to their declarations, which act as restraints on the jurisdiction of the Court.

Then, of course, on the other hand, we have the compromissory clauses in multilateral and bilateral conventions and treaties, and most of the cases that are now brought before the Court are based on those compromissory clauses. However, now there is a growing trend not to include compromissory clauses on judicial settlement of disputes in multilateral conventions, so that is also a constraint.

Administratively, just to say a few words, this is one of the least expensive international institutions in the world and the least expensive tribunal or court that has ever been established by the United Nations. We have only one hundred staff members, and therefore, we actually function with an extremely light structure. Of course, this can act also as a constraint.

PATRÍCIA GALVÃO TELES

Thank you, Judge Yusuf. Unfortunately, I think our time is up; otherwise, we could have continued this conversation. I am extremely privileged to have been able to conduct this conversation with you. I thank you and for your important personal testimony regarding the rule of law at the international level, its evolution and challenges, and all that is left for me to do is turn to our dear president of ASIL, Catherine, for the closing of the session. Thank you very much.

JUDGE ABDULQAWI YUSUF

I thank you.

CATHERINE AMIRFAR

Thank you both. I cannot tell you how inspiring it has been to be a part of this conversation. Thank you to you, Judge Yusuf, and as you say, as international lawyers, what can we be but optimists? Congratulations again, and from all of us, thank you for everything that you have done in promotion of the rule of law.