

**THE LONDON CONFERENCE ON INTERNATIONAL LAW:
“ENGAGING WITH INTERNATIONAL LAW”**

**Keynote Speech of Judge Abdulqawi A. Yusuf, President
of the International Court of Justice**

Excellencies,
Distinguished guests,
Ladies and gentlemen,

Introduction

1. I am very grateful to Baroness Hale for her very kind words of introduction. It is a great honour to be introduced by such a distinguished jurist. I am very pleased to be here today and I wish to thank the organizers, who have already been named by Baroness Hale.

2. I must say that I was initially puzzled by the title of the conference, “Engaging with international law”. As you all know, the English language is a very rich language and the phrase “engaging with international law” can have several meanings. I trust that the organizers did not use the phrase in the sense of “attacking or starting to fight an enemy and wrestling it to the ground”, but in the sense of “dealing with or getting involved with something”, in this case international law.

3. Despite this clarification, the title of the conference raises a number of questions and considerations. Should we engage with international law? Why should we engage with international law? Is there any interest in doing so? Who should engage with international law? How should we engage with international law? What does engaging with international law mean, anyway?

4. I cannot, of course, answer all these questions in the brief time allotted to me. I will try to address some of them, in particular, “Why should we engage with international law?”, “Who should engage with international law?” and, finally, “How should we actually engage with international law?” I will address these questions in turn.

I. Why engage with international law?

5. Let me, first of all, turn to the question “Why should we engage with international law?” In this respect, I will give you, first, a very personal answer and will recall in that context the scene in season one of “Game of Thrones” when Ned Stark tells his daughter Arya: “You were born in the long summer, you have never known anything else.”

6. I was born after the Second World War. I am contemporaneous with the United Nations Charter, the establishment of the International Court of Justice, the decolonization of peoples previously under foreign domination, including those of my own country Somalia, and many other African States, and the adoption in 1948 of the Universal Declaration of Human Rights.

7. I was lucky not to have been born when African peoples were being enslaved and placed outside the legal order; when African Empires, Kingdoms and States were not considered to be

subjects of international law, but *terrae nullius* to be conquered and occupied at will, and denied the protection of international law; when war was considered a legitimate tool for the settlement of disputes among States; when the laws and policies of the most powerful nations prevailed at the international level; and when millions of human beings were sent to gas chambers in Europe, and the law had nothing to say in defence of their humanity.

8. For me and, I am quite sure, for many of those who were born in the last seventy years, be it in Africa, Asia, Europe or the Americas, respect for the international rule of law, respect for the principle of equal rights and self-determination of peoples, the prohibition of the use of force among States by the United Nations Charter, the outlawing of genocide and the protection of human rights has meant freedom, independence, prosperity and peace among nations, but also, for many, simply staying alive. That is more than enough reason to engage with international law.

9. This was indeed a very long summer, much longer than the summer of “Game of Thrones”. Our task is to ensure that it will not be followed by a long winter. It is my view that the best way to do that is through a renewed engagement with international law. It is only through a rules-based multilateral system that we can avoid a long winter for humanity, which has already experienced many painful winters in the past.

10. Secondly, and here I turn to the law itself, it should be recalled that in 1945, the States that emerged from the Second World War made a fundamental choice through the United Nations Charter. They chose the rule of law to govern international relations. This choice did not come into existence overnight, nor was it a sudden or abrupt decision. It was a result of the evolution of human civilization. It came out of the realization that the old system which had made war permissible to right wrongs was not only barbaric and brutal, but fundamentally unjust. “Might is right” has never helped humanity to live together in peace or in harmony.

11. President Eisenhower put it very succinctly in his State of the Union Address of January 1959, when he declared that it was the intention of the United States Government to “intensify efforts . . . to the end that the rule of law replace the obsolete rule of force in the affairs of nations”. The obsolete rule of force had to be set aside.

12. The embodiment of the rule of law in the United Nations Charter went hand in hand with a significant increase in the rules applicable to the relations between States. That increase was due to the conclusion of international agreements in a wide range of fields, from aviation to telecommunications, from labour standards to trade and investment, from human rights to humanitarian law, and all the way to environmental law and to the protection of biological diversity. It also gave rise to thousands of treaties establishing co-operation among States both at the bilateral and multilateral level. The old billiard ball model for State coexistence, which consisted in the simple juxtaposition of sovereignties, was replaced by a web of rules protecting common interests and shared values that have given rise to the idea of a “community-based” law of co-operation. This shift was made possible by the robust commitment of States, immediately after the Second World War, to the establishment of a rules-based multilateral system based on the principles of the United Nations Charter.

13. It must, however, be acknowledged that the task remains incomplete. We have not yet achieved a full shift from a “society” to a “community of nations”. Despite the reference in many multilateral instruments to the “common concern” of humanity, we see major initiatives launched by international organizations to address this “common concern” amputated, curtailed, or outright

rejected when they collide with individual State interests (sometimes interests of the moment) of powerful stakeholders. To the extent that each member is prone to pursuing its own interests and State relations are predicated on self-serving reciprocal exchanges and short-term bilateral deals, rather than actions undertaken in the interest of the whole, the expression of “common concern” will remain just an expression. I have in mind here the kind of collective action required to deal with issues such as the protection of the oceans, the preservation of biological diversity and the fight against global warming. These are issues that cannot be solved by the actions of one State, however powerful that State might be. They must be tackled as community problems; they require “community-based” solutions.

14. The third reason why we should engage with international law is that humanity has often experienced in the past the nefarious effects of the use of power unbridled by law. With the growing web of multilateral treaties among nations, which I described above, many of them undergirded by customary norms, and with the establishment of the International Court of Justice and other adjudicatory bodies for the settlement of disputes, international law has become a real legal system, characterized by a high degree of predictability and stability, in which, as observed by Robert Jennings and Arthur Watts, “every international situation is capable of being determined as a matter of law”. For the first time in human history, we have all come to recognize and rely, even in our everyday lives, on a rules-based international system which is universal in scope and around which co-operation among all nations is organized and implemented.

15. This is so despite the fact that there is no central legislator, nor a legislative body strictly speaking, but a decentralized normative production of rules, the sources of which are set out in Article 38, paragraph 1, of the ICJ Statute. However, without the continuous engagement of States to update the system and to ensure that it does not fall out of touch with reality, there is a risk that certain rules may become outmoded or inadequate for their purpose. Consequently, it is only through such engagement that the evolution of the law with changing historical, social and political circumstances can be assured. This was the case immediately after the two world wars. It was also the case in the aftermath of decolonization in the 1950s and 1960s.

16. To conclude on this point, it bears repeating that international law today is a system from which we all benefit on a daily basis, but which is not often visible to most of us, except when some part of it is broken or is breached by the actions of a State or a group of individuals or corporations, particularly when such actions are amplified through the media. Neither everyday compliance with international law and its application by States, international organizations and adjudicatory bodies, nor the benefits derived from it by individuals on a daily basis are publicized or regularly covered by the media. However, compliance with such rules occurs every day in inter-State relations throughout the world. We also see them applied on a daily basis in areas such as international travel and transportation, global telecommunications and trade, trans-border investment and financial transactions, and investor-State dispute settlement, as well as in the actions of intergovernmental and non-governmental organizations relating to human rights and humanitarian and refugee law.

II. Who should engage with international law?

17. Who should engage with international law? My short answer is that those who enjoy rights under international law, those who have obligations under this legal order, those whose legal situations are regulated by international law, and those whose conduct can interfere with the implementation of international legal rules should engage with international law.

18. The list is therefore broad and wide-ranging. It includes the usual suspects: States, their organs and international organizations. But it also covers actors whose subjectivity to international law has long been debated, including non-State armed groups, such as rebels, militias or insurgents, and individuals, corporations, civil society and other non-governmental organizations.

19. It is perhaps superfluous to say that States should engage with international law. They are the primary subjects of international law. However, with the recent rise of “sovereignist” political doctrines, it is important to underline that there is no contradiction between State sovereignty and international law. The obligations assumed by States through international agreements are not incompatible with their sovereignty. As was observed by the Permanent Court of International Justice in the *Wimbledon* case, the conclusion of any treaty by which a State undertakes to perform or refrain from performing a particular act is itself an attribute of State sovereignty (S.S. “*Wimbledon*”, *Judgments, 1923, P.C.I.J., Series A, No. 1*, p. 25).

20. In any case, the sovereignty of States is a sovereignty under, and not above, the international rule of law. All States have to conduct themselves in their relations with each other within a legal framework, which is of course international law. To use the words of Judge Anzilotti,

“[i]ndependence . . . is really no more than the normal condition of States according to international law; it may also be described as sovereignty (*suprema potestas*), or external sovereignty, by which is meant that the State has over it no other authority than that of international law” (*Customs Régime between Germany and Austria, Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 41*, p. 51).

21. International organizations are also portrayed nowadays as potential threats to national sovereignty. This is certainly a mistake. When the Court acknowledged in the Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations* that international organizations enjoyed international legal personality (*Advisory Opinion, I.C.J. Reports 1949*, pp. 184-185), it took the time to clarify that this statement did not mean that an international organization is a “State”, nor “a super-State”, whatever that expression may mean (*ibid.*, p. 179).

22. In reality, the scope of engagement and the powers of international organizations are dependent on their Member States. International organizations are governed by the “principle of speciality”, that is to say, they are invested by the States which create them with limited powers in their areas of competence (*Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 78, para. 25).

23. If I may take as an example the Universal Postal Union (UPU) — and you may have read about this organization recently in the press — it is one of the oldest international organizations, having been created in the nineteenth century. It was established by the Berne Postal Convention of 1874 concluded among 22 nations. According to the UPU, the Convention “succeeded in unifying a confusing international maze of postal services and regulations into a single postal territory for the reciprocal exchange of letters. The barriers and frontiers that had impeded the free flow and growth of international mail had finally been pulled down.” Far from being a threat to national sovereignty, the UPU offers a helping hand to sovereignty and to fruitful co-operation among nations. It was in that spirit that an agreement was reached on 26 September 2019 on the recent controversy regarding its rules. This agreement will seemingly enable the United States of America to remain a member of the UPU and to continue to benefit from its services.

24. It is also in that spirit that intergovernmental organizations have contributed and continue to contribute to the development of international law. They are not only the guardians of internationally agreed standards in their area of specialty, but have also been delegated by States certain standard-setting powers to further advance and update the rules applicable to their activities. Thus, unless their actions are undermined by the assertion of individual interests of States, particularly the most powerful ones, the engagement of these multilateral institutions with international law to foster their objectives and their consequent contribution to its development is part and parcel of their mission and of their *raison d'être*.

25. Turning now to human rights and the position of the individual in international law, it is worth recalling that international law rules, even if they were primarily conceived for relations among States, are ultimately concerned with the individual human being, the ultimate addressee of all legal rules. Thanks to the large number of treaties concluded both at the regional and international level, the question of the protection of fundamental human rights no longer falls under the *domaine réservé* of States.

26. If I take the example of African States, there was a period, immediately after independence, when the violation of human rights was exclusively viewed through the prism of colonial domination, foreign aggression or apartheid in South Africa, while the acts of home-grown dictatorial and oppressive régimes were overlooked by African intergovernmental organizations such as the Organization of African Unity, the predecessor of the African Union. However, following the entry into force of the African Charter on Human and Peoples' Rights in 1986, the African Commission on Human and Peoples' Rights was able to make the following powerful statement in the context of a case concerning the people of Darfur in Sudan:

“There is a school of thought . . . which believes that the ‘right of a people’ in Africa can be asserted only vis-à-vis external aggression, oppression or colonization. The Commission holds a different view, that the African Charter was enacted by African States to protect human and peoples’ rights of the African peoples against both external and internal abuse.” (*Sudan Human Rights Organisation, Centre on Housing Rights and Evictions v. Sudan*, Communication No. 279/03, 296/05, [27 May 2009], para. 222).

27. The development of international law in the area of human rights over the last century has not only conferred rights on individuals. Rights have also come with responsibility and obligations, especially international criminal responsibility. One may recall the famous statement of the Nuremberg Tribunal, according to which:

“Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.” (*The United States of America, The French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics v. Hermann Wilhelm Göring et al., Judgment of 1 October 1946*, in *Trial of the Major War Criminals before the International Military Tribunal*, Vol. I, Nuremberg 1947, p. 223.)

28. Based on this principle of international criminal responsibility, international law has witnessed first *ad hoc* criminal tribunals, such as the Nuremberg and Tokyo Tribunals and, more recently, the ICTY and the ICTR, before the adoption in 1998 of the Rome Statute establishing the International Criminal Court. At the same time, the number of international crimes has expanded,

adding to the classical prohibitions of piracy and slavery crimes such as crimes against humanity, the crime of genocide, war crimes and the crime of aggression.

29. Now you may ask: how about other non-State actors? How about corporations? How about insurgents and rebels? How about civil society and non-governmental organizations? I do not think that we have enough time for all of them this morning. But let me say a few words on corporations. I think that the case of corporations is an area where there is a mismatch between rights and obligations under international law. Over the last century, international law has increasingly granted rights to corporations, ranging from certain rights similar to “human rights” to a variety of rights under bilateral and multilateral investment treaties. This has not been followed, however, by a clarification of their obligations, and even less so by the establishment of remedies in case of violations of international law.

30. It might be time to take a closer look at this, at least for two reasons. One is climate change. It is impossible to fight global warming successfully without the involvement of major corporations, particularly those active in fossil fuel production linked to greenhouse gas emissions. The second is the current inability of international law to grapple with the impact of rapid technological advances on human rights and freedoms. Today, individual freedoms, individuality and privacy are at risk of being affected or even manipulated by technological tools and social media platforms. Human rights and freedoms are not at risk here because of the State, but because of private entities.

31. In Europe, there are rigorous new privacy rights now, thanks to the General Data Protection Regulation adopted by the European Union. But how about the rest of the world? How do we protect personal data from being commoditized and traded every day without informed consent? How can we protect individuals against the dark side of technology? In my view, it can only be done through the rule of law. Legal defences need to be built against abusive behaviour arising from the use of such technological tools.

III. How to engage with international law?

32. Finally, I turn to “How to engage with international law?” I do not think that there is a better illustration for this than the recent debate in the United Kingdom’s House of Commons on the Vienna Convention on the Law of Treaties and the *clausula rebus sic stantibus*. It was fascinating for me to watch that debate on television. It is this kind of debate in national parliaments that can bring to life the importance of international law.

33. International law, as a horizontal system of co-operation, depends on the reliability of commitments undertaken by States. First and foremost, obligations have to be complied with. Secondly, free consent, *pacta sunt servanda* and good faith are essential to the integrity of the law. In its comments on the final draft of the Vienna Convention on the Law of Treaties, the United States of America observed that the *pacta sunt servanda* rule was “the keystone that supports the towering arch of confidence among States”. This basic rule of general international law requires that treaties are performed in good faith. However, confidence and good faith must be shown not only in the interpretation and application of treaties, but also in their negotiation and conclusion. It does not help confidence in the system if a State negotiates in earnest with all others, but afterwards either refuses to sign the resulting agreement or withdraws from such agreements before the ink has dried on its signature. As the Court pointed out in the *Nuclear Tests* cases, trust and confidence remain indispensable in international relations, in particular in this age when

co-operation in many fields is becoming increasingly essential (*Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 268, para. 46).

34. Today we see a disquieting return to unilateralism in world affairs. Unilateralism is the complete antithesis of a culture of multilateralism and a meaningful engagement with international law, even more so when unilateralism is invoked to justify the adoption of coercive measures or to forcefully request other States to change their conduct.

35. Bilateralism is certainly better than full blown unilateralism. Nonetheless, it still remains a very primitive manner of engaging with international law. Regulating global issues through a web of bilateral agreements has been tried in the past; it failed. At best, bilateralism leads to a fragmented legal order composed of contradictory international legal obligations. The difficulties experienced by the Tokyo codes to regulate international trade through bilateral agreements should serve as a lesson in this regard. Predictability, stability and certainty of the rule of law cannot be promoted through a web of bilateral treaties.

36. A second manner by which States can engage with international law is through a firm commitment to binding international dispute settlement. International tribunals and courts are the pillars of the rule-of-law edifice at the international level. It is of course not possible to have a rule of law without courts. International courts and arbitral tribunals have acquired a proven track record in the settlement of disputes and in the development of the law.

37. It is a great honour for the United Kingdom to be the only Permanent Member of the United Nations Security Council that has consistently maintained and continues to maintain its acceptance of the compulsory jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute. Of course, it would be much better if the declaration of acceptance was not riddled with so many reservations. Yet, this declaration testifies to the United Kingdom Government's commitment to the international rule of law, of which it has historically been one of the tireless architects.

38. Commitment to the judicial settlement of international disputes needs to be reaffirmed and strengthened. I am delighted to report that the confidence of States in the work of the Court has been steadily increasing in the last decade. Today, we have 16 cases pending before the Court. These cases involve 26 nations from all parts of the world: five European countries, six African countries, nine Latin and North American countries, and six Asian countries. The last case to be submitted to the Court concerned the dispute between Guatemala and Belize concerning *Guatemala's Territorial, Insular and Maritime Claim*. What is unique about this case is that the two governments decided to consult their respective populations through referendums on whether or not their 200-year-old territorial and maritime dispute should be submitted to the Court for settlement. The great news is that the peoples of both countries have overwhelmingly expressed their confidence in the Court and approved the submission of the case to it, which occurred in May this year.

39. Allow me now to say a few words on how non-State actors, including private individuals, rebel groups, corporations and non-governmental organizations, may engage with international law.

40. The manner in which a non-State actor engages with international law will largely depend on its sphere of action. Drawing inspiration from categories that have been developed in the

field of human rights law, I would say that all of us should, individually or collectively, promote, uphold and respect international law to the extent of our sphere of action.

41. The majority of the situations where non-State actors can engage with international law is through upholding and promoting international law. Upholding international law makes sense when legal obligations are not formally applicable to a given entity, natural or legal person, but are somehow relevant to its conduct. It means that such entities should align their conduct with the substantive and procedural guarantees contained in those treaties, even if formally they are not bound by human rights treaties.

42. This idea was well captured in the United Kingdom's Civil Service Act of 1996, which provided that:

“Civil servants should serve their Administration in accordance with the principles set out in this Code and recognising . . . the duty to comply with the law, including international law and treaty obligations, and to uphold the administration of justice”.

43. I am aware that this provision is no longer part of the law, as the reference to “international law and treaty obligations” has been withdrawn from the Code. It was also withdrawn from the Ministerial Code of Conduct in 2015, and domestic litigation to have it reinstated was not successful. I am, however, convinced that this does not mean that civil servants and ministers of the United Kingdom are not required to uphold international law. Those who organized this conference did so, I believe, with a view to upholding international law.

44. History teaches us that the manner in which humanity engages with international law depends on the nature and scale of the challenges that it faces. When faced with the cruelty and inhumanity of slavery in the nineteenth century, States adopted in 1890 and 1926 binding legal instruments to prohibit slavery and to co-operate with a view to its suppression. When faced with the death of 75 million civilians during the Second World War, States adopted the Fourth Geneva Convention in 1949 devoted to the protection of civilians in times of international armed conflicts. When faced with the uprising, opposition and rebellion of peoples all over the world against colonialism, States established the right of peoples to self-determination, which enabled colonial peoples to accede to independence and facilitated the process of decolonization. When non-international armed conflicts became the leading type of conflicts, they adopted Additional Protocol II, which extends to these types of conflicts the elementary considerations of humanity.

45. We need to act in the same way today against climate change and the erosion of biodiversity. These growing challenges facing today's international community are well known. We need to act to adopt multilateral rules to counter them. There is no other way to tackle them, except through multilateral co-operation and through the adoption of multilateral rules, not unilateral actions. It is through such multilateral rules that we can at least address in part challenges of this kind, be they climate change, extreme poverty, global terrorism or the erosion of biodiversity. In this regard, we also need more education and training in the field of international law, and particularly humanitarian and human rights law. If we observe today the conflicts around the world, we see that there are increasing violations of humanitarian law and human rights law in such conflicts. As stated in the UNESCO Constitution “since wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed”. It is in the minds of men and women that the defences of peace through international law must be erected. Today, not enough resources are devoted to such education. Imagine if those who sell weapons could include in each

package a manual on the laws of war or train the acquiring party in humanitarian and human rights law. I am quite confident that it would make a lot of difference.

Conclusion

Ladies and Gentlemen,

46. To conclude, let me say that engaging with international law does not necessarily mean promoting the status quo. Similarly to many other human endeavours, international law is perfectible and some of the criticisms against international law might even be well founded. The rules-based international system may need improvement in certain aspects and, perhaps, to see its coverage expanded in order to address efficiently some of the common concerns of humanity. A legal system cannot be better than the social consciousness that it reflects. However, international law is an essential part of the progress of humanity. We owe much of the “long summer” of the last 70 years to its development. International law gives us a shared lexicon accepted by States and other actors in the international system. It offers us, for the first time in human history, a stable and predictable system of settling disputes between States without having to have recourse to violence and brutality. It is a framework through which rational people can find innovative ways to tackle our common challenges. It can help us avoid the future “winters”, if we all commit to engage with it.

47. The United Kingdom, as a nation founded on laws, has been in the past, and continues to be today, at the heart of developing an appropriate infrastructure for the international rule of law; and one can only hope that it will continue to do so even after 31 October 2019, whatever happens on that fateful day.

48. I thank you for your attention.
