SPEECH BY HIS EXCELLENCY JUDGE GILBERT GUILLAUME,
PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE,
TO THE SIXTH COMMITTEE OF THE GENERAL ASSEMBLY
OF THE UNITED NATIONS
30 OCTOBER 2002

_____

Mr. Chairman, Ladies and Gentlemen,

1. It is with great pleasure that, under your honourable chairmanship, I find myself today addressing this Sixth Committee of the General Assembly of the United Nations for the third time. I am most grateful for your invitation and trust that I shall be able to fulfil the expectations that you have been kind enough to place in me.

On Monday I presented the Court's Annual Report to the General Assembly, from which it can be seen that in the year 2002 we will have handed down three major substantive judgments, as well as several procedural decisions. It is also apparent that our case-load remains a particularly heavy one: despite sustained judicial activity, we still have 24 cases pending at the Peace Palace. We welcome the confidence which States continue to place in us and will pursue our efforts to respond to it.

As a result of this growth in our activities, we have found ourselves developing our jurisprudence in an increasingly wide variety of fields. I spoke to you last year about one of those areas — indeed a classic one — that of maritime delimitation. Today I should like to call your attention to other, less well-known aspects of our case law: they concern two fields too often regarded as the province of specialists, namely human rights and environmental law.

*

* *

2. Already in the period between the two World Wars, the Permanent Court of International Justice was having to address matters of human rights over an issue which has again become highly relevant to us today: namely, the rights of minorities.

In its Advisory Opinion of 10 September 1923 in the case of *German Settlers in Poland* the Permanent Court held that the equality guaranteed by the relevant treaties implied not only "absence of discrimination in the words of the law", but also no discrimination in fact where the law ostensibly prescribed equality. The Court accordingly condemned a Polish law of 1920 which, while drafted in ostensibly neutral terms, was in fact directed solely at German farmers who had settled in Poland before the First World War under leases granted by the Prussian State[1].

On 4 February 1932 the Permanent Court took a similar line in its Advisory Opinion on the *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig*

[1] *German Settlers in Poland, P.C.I.J., Series C, No. 3, Advisory Opinion No. 6*, Vols. I, III (1) and III (2), p. 24.

Territory. The Court thus condemned a measure "which in terms [was] of general application, but in fact [was] directed against Polish nationals and other persons of Polish origin or speech"[2].

The Permanent Court took this approach a stage further with its decision in the case of the *Minority Schools in Albania*. In its Advisory Opinion of 6 April 1935 the Court, while confirming its prior jurisprudence condemning laws drawn in ostensibly neutral terms but discriminating in practice against minorities, went further, holding that: "Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations."[3]

In so deciding, the Court laid the foundation for what would become some decades later the policy of positive discrimination in favour of minorities, thus paving the way for the famous "affirmative action", so dear to American liberals in the 1970s.

Finally, the Permanent Court's Opinion of 4 December 1935 regarding the *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City* afforded the Court the opportunity solemnly to affirm certain fundamental principles of criminal law which remain relevant today. Taking its cue from Nazi legislation of the period, the city of Danzig had amended its criminal code so as to provide that:

> "Where there is no legal provision expressly applicable, a person may . . . be punished provided that two conditions are fulfilled: *(a)* the act must deserve punishment according to the fundamental idea of a penal law; and *(b)* the act must deserve punishment according to sound popular feeling."

The Court observed that these provisions allowed prosecutor and court to prosecute and punish by analogy and that they were thus in breach of the principle "*nullum crimen, nulla poena sine lege*". Noting that the Constitution of Danzig took as its starting-point the fundamental rights of the individual, the Court emphasized that it must be possible for the latter "to know, beforehand, whether his acts are lawful or liable to punishment". It therefore condemned the penal legislation in question as incompatible with the principles laid down by that Constitution[4].

3. For its part, the International Court of Justice has had to address a greater number and variety of issues relating to human rights.

First, the Court has had to rule on a number of occasions on the substance and scope of the United Nations Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide. In response to a request from the General Assembly regarding the conditions under which States might make reservations to that Convention, the Court stated in its Opinion of 28 May 1951

> "it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations"[5].

---

[2] *P.C.I.J., Series A/B, No. 44*, p. 28.

[3] *P.C.I.J., Series A/B, No. 64*, p. 19.

[4] *P.C.I.J., Series A/B, No. 65*, pp. 45-57.

[5] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of 28 May 1951, I.C.J. Reports 1951*, p. 23.

It accordingly followed in the Court's view that "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation"[6].

More recently, the Court had for the second time to interpret the Genocide Convention, in proceedings brought by Bosnia and Herzegovina against Yugoslavia. In response to requests from the Sarajevo Government for the indication of provisional measures, the Court had twice indicated such measures, in Orders of 8 April and 13 September 1993[7]. Then, in a Judgment of 11 July 1996, it held that it had jurisdiction to rule on Bosnia and Herzegovina's Application. In its decision the Court held that, where the Genocide Convention is applicable, it is unnecessary to seek to ascertain whether or not the acts complained of were committed in the course of an armed conflict, whether domestic or international. The Court further stated that the obligations incumbent upon each State under the Convention to prevent and punish the crime of genocide are not territorially limited, although the Convention restricts jurisdiction to try the alleged perpetrators of such crimes to the courts of the State in whose territory the act was committed[8]. Finally, the Court made it clear that the Convention envisaged State responsibility not only where that State had failed in its obligations of prevention and punishment as contemplated by the text, but also where it had itself committed the crime of genocide[9]. However, in 2001 Yugoslavia submitted a request for revision of that Judgment, on which the Court will shortly have to rule before it can address the merits.

4. The International Court of Justice has also had occasion to rule on the rights of peoples as such. It was the Namibia cases that provided it with its first opportunity to do so. Thus in 1950 the Court held that the mandate over South-West Africa conferred on South Africa by the League of Nations had been given in the interests of the inhabitants of the territory and of humanity in general, and was an international institution having an international aim: "a sacred trust of civilization"[10]. Then, in 1971, the Court held that South Africa had pledged itself in Namibia "to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race"[11]. The Court found that the policy of *apartheid* as then applied by South Africa constituted "a flagrant violation of the purposes and principles of the Charter", and accordingly concluded that South Africa's presence in Namibia was illegal.

That Opinion concerned only the particular case of the rights of peoples in mandated territories. Subsequently, in the *Western Sahara* case, the Court had the occasion to rule more generally on the right of peoples to self-determination under Article 1, paragraph 2, of the United Nations Charter. The Court analysed this right in light not only of the Charter, but also of "the subsequent development of international law in regard to non-self-governing territories"[12], whose application it then clarified, concluding that the decolonization of western Sahara must be carried out in accordance with the "principle of self-determination through the free and genuine expression of the will of the peoples of the Territory"[13].

---

[6] *Ibid.*

[7] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993,* p. 3 and *Order of 13 September 1993, ibid.,* p. 325.

[8] *Judgment of 11 July 1996, I.C.J. Reports 1996*, p. 340, para. 31.

[9] *Ibid.*, para. 32.

[10] *International Status of South West Africa, Advisory Opinion of 11 July 1950, I.C.J. Reports 1950*, p. 131.

[11] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 11 June 1971, I.C.J. Reports 1971*, p. 57.

[12] *Western Sahara, Advisory Opinion of 16 October 1975, I.C.J. Reports 1975*, pp. 30 *et seq.*

[13] *Ibid.*

5. The Court has also given a number of rulings in the field of humanitarian law.

For the first time, in the *Corfu Channel* case, the Court held that States could be bound by certain obligations not only under conventional texts but also pursuant to "certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war"[14]. It accordingly found that Albania ought to have publicized the existence of a minefield in the Corfu Channel and "warn[ed] the approaching British warships of the imminent danger to which the minefield exposed them"[15].

The elementary considerations of humanity cited in that decision would again be invoked in a number of the Court's subsequent decisions, for example its Judgment of 24 May 1980 regarding *United States Diplomatic and Consular Staff in Tehran*[16], or in relation to the mining of Nicaraguan ports by the United States[17].

In this latter case the Court further clarified its position. Thus it held that not only must the conduct of States "be judged according to the fundamental general principles of humanitarian law"[18], but also that "Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character"[19]. The Court further stated that "these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts"[20].

Finally, in its Advisory Opinion of 8 July 1996 on the *Legality of the Use or Threat of Nuclear Weapons*, given at the request of the General Assembly, the Court carried out a lengthy analysis of the humanitarian law applicable in armed conflicts, concluding that the use of nuclear weapons would generally be contrary to that law, but that, in view of the current state of international law and of the elements of fact at its disposal, it could not conclude definitively whether the use of such weapons would be lawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.

6. In all of these cases that I have cited the Court took a position on various questions concerning human rights which were put to it more or less directly. But there are also cases where the Court took a stance without being asked to do so. The most typical example of this was in the *Barcelona Traction* case, where the Court stated, without any need to do so:

> "[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; their obligations are *erga omnes*."[21]

---

[14] *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 22.

[15] *Idem.*

[16] *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, Judgment of 24 May 1980*, pp. 42 and 43.

[17] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment of 27 June 1986, I.C.J. Reports 1986*, p. 112.

[18] *Ibid.*, pp. 129 and 148.

[19] *Ibid.*

[20] *Ibid.*

[21] *Barcelona Traction, Light and Power Company, Limited, Judgment of 5 February 1970, I.C.J. Reports 1970*, p. 32, para. 33.

This applies for example to the "outlawing of acts of aggression, and of genocide, as also [to obligations deriving] from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination"[22]. The right of peoples to self-determination is likewise a right opposable *erga omnes*, as the Court held in the *East Timor* case[23].

7. Finally, in 2001, in the *LaGrand* case between Germany and the United States the Court had occasion to rule on the precise scope of Article 36 of the Vienna Convention of 24 April 1963 on Consular Relations. It recalled that, under subparagraph 1 *(b)* of that Article, the receiving State must, where a detained person so requests, inform the consular post of the sending State of such detention "without delay". This subparagraph further provides that any communication addressed to the consular post by the detainee shall be forwarded by the authorities of the receiving State "without delay". Finally, those authorities "shall inform the person concerned without delay of his rights under this subparagraph". However the detained person is entitled expressly to oppose consular assistance by the sending State.

The Court held that these provisions of Article 36, paragraph 1, create not only rights on the part of the sending State but also "individual rights" for the detainee. It reached the same conclusion in regard to Article 36, paragraph 2, of the Convention.

In the proceedings before it, the Court found that the LaGrand brothers had not been informed after their arrest of their rights under the Convention on Consular Relations. The Court further found that, after becoming aware of that violation, they had been unable to have their conviction reconsidered or reviewed. The Court accordingly concluded that the United States had breached its obligations to the Federal Republic of Germany and to the LaGrand brothers[24].

8. In sum, the jurisprudence of the International Court of Justice, like that of its predecessor the Permanent Court, has made a substantial contribution to the progress of human rights in the course of the twentieth century. Thus the positions taken by the Court in regard to the scope of reservations to the Genocide Convention influenced the drafting of Articles 19 *et seq.* of the Vienna Convention on the Law of Treaties of 23 May 1969. The Court's Opinions on *apartheid* in the Namibia cases, or on the right of peoples to self-determination in the *Western Sahara* case, have finally been universally accepted. The concept of an obligation *"erga omnes"* formulated in the *Barcelona Traction* Judgment is now part of positive law. It is today largely accepted that the common Article 3 of the four Geneva Conventions lays down elementary rules of humanity applicable in all armed conflicts, whoever the protagonists.

In short, the Court, by characterizing certain conventional obligations as customary ones and then treating such obligations as obligations *erga omnes*, has sought to impose on all States minimum norms deriving from the elementary considerations of humanity already invoked by it in the *Corfu Channel* case. It has thus given those considerations a specific content. In so doing, it

---

[22] *Ibid.*, p. 33, para. 34.

[23] *East Timor (Portugal* v. *Australia), Judgment of 30 June 1995, I.C.J. Reports 1995*, p. 102.

[24] *LaGrand (Germany* v. *United States of America), Judgment of 27 June 2001*, paras. 77, 78 and 128.

has laid the foundations for a universal customary law which, without challenging conventional law, is binding on all.

*

* *

9. This analysis shows how progress in the law can be secured in a specific domain by the application within that field of more general concepts. This has been strikingly demonstrated in the case of human rights, but a start can also be made in a more recent area of the law, environmental law.

The principles laid down by the Court in the *Corfu Channel* case — a case which I have already cited — were applicable not just in the field of human rights. Already, in 1949, the Court was able to infer from them "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States"[25], an obligation which would acquire particular relevance in environmental matters.

The same goes for the Court's *obiter dictum* in 1970 in the *Barcelona Traction* case — another case to which I have already referred — inasmuch as certain obligations regarding the preservation of the environment would probably constitute "obligations of States towards the international community as a whole".

10. Having thus formulated some very promising concepts, the Court has more recently had the opportunity to develop its position in detail.

As I have already said, in 1996, in response to a request for an advisory opinion from the United Nations General Assembly, the Court addressed the issue of the legality of the threat or use of nuclear weapons. In their written statements certain States had argued that such threat or use must be regarded as illegal in view of the limits imposed by current norms in regard to the safeguard and protection of the environment. Noting that such norms did not specifically prohibit the use of nuclear weapons, the Court nonetheless stressed that current international law places particular emphasis on important considerations of an ecological nature which are relevant to issues involving the law governing armed conflicts or to a consideration of the legality of self-defence. In this regard the Court stated *inter alia*:

> "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment"[26].

11. Barely a year later the Court had occasion to refer to this statement in the context of a dispute between Hungary and Slovakia, reiterating "the great significance that it attaches to respect

---

[25] *Corfu Channel, Merits, Judgment of 9 April 1949, I.C.J. Reports 1949*, p. 22.

[26] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996*, pp. 241-242, para. 29.

for the environment, not only for States but also for the whole of mankind"[27]. The Court further noted the emergence of new norms in environmental law which the parties could agree to take into account in applying the Treaty relating to the Gabèíkovo-Nagymaros Project. In this regard the Court made the following general statement:

> "[I]n the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.
>
> Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development."[28]

Mr. President, Ladies and Gentlemen,

12. Law and justice have made immense progress over the century which has just ended. New branches of international law have sprung up and there has been a proliferation of specialized international courts. These developments correspond to those in society as a whole and in international relations. In this new scenario the International Court of Justice, principal judicial organ of the United Nations, retains an essential role. It alone can address all areas of the law and accord them their proper place within an overall scheme. Its jurisprudence in the fields of human rights and environmental law seems to me to show that it has so far achieved this. You may rest assured that it will pursue its efforts in this regard with the renewed confidence of States.

---

[27] *Gabèíkovo-Nagymaros Project (Hungary/Slovakia), Judgment of 25 September 1997, I.C.J. Reports 1997*, p. 41, para. 53.

[28] *Ibid.*, p. 78, para. 140.