GLOBAL JUDGES SYMPOSIUM ON

SUSTAINABLE DEVELOPMENT AND

THE ROLE OF LAW

OPENING SESSION

REMARKS

BY

MR. HANS CORELL

UNDER-SECRETARY-GENERAL FOR LEGAL AFFAIRS

THE LEGAL COUNSEL OF THE UNITED NATIONS

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Honourable Minister Maduna
Honourable Chief Justice Chaskalson,
Honourable Deputy Chief Justice Langa,
Honourable Justices and Judges,
Dr Toepfer, my esteemed colleague from the United Nations,
Distinguished Participants,

The theme of this Symposium is “Global Judges Symposium on Sustainable Development and the Role of Law”. The participants are Chief Justices and other senior judges from more than 60 countries around the world. Together, we are well over 100 participants. You come from developing countries and developed countries, including the G-8 countries. You represent different geographical regions and different legal systems. It is an impressive gathering of judges that has come together here in Johannesburg. In a United Nations context, it is probably unprecedented.

I very much appreciated receiving the invitation to participate in this Symposium, both as a guest speaker in this opening session and as chairman of one of the sessions tomorrow. Today, I should like to focus on your work in a broad perspective, national as well as international.

The title of this Symposium mentions specifically the role of law as distinct from the rule of law.

The first concept, the role of law, is of course a general one which points to the contribution that law can make to the efforts to achieve sustainable development in a world whose resources are more and more heavily exploited. Many speakers will address these aspects under the themes in the coming several sessions: Sustainable Development and the Role of Law; National Environmental Governance and the Role of Law; Environmental Justice, Human

Rights and the Rule of Law; The Role of the United Nations and Others in Promoting the Progressive Development and National Implementation of Environmental Law in the Context of Sustainable Development; and Strengthening National Judiciaries to Meet the Challenge of the Twenty-First Century in the Area of Environmental Law in the Context of Sustainable Development. I will not pre-empt these discussions, but look forward to participating in them.

One of the purposes of this Global Judges Symposium is to provide a global perspective to the importance of the role that the judiciary plays in promoting sustainable development through the rule of law at the national level. Therefore, I decided to focus first on that aspect, which is particularly close to my heart. [1] More importantly, the Secretary-General often refers to it, although mainly in the context of the rule of law in international relations. A resounding support for the rule of law can also be found in the Millennium Declaration. [2] After this, I will touch upon some matters with which I am involved in the United Nations.

Rule of Law: Our point of departure must be that, both at the national and the international level, there must be established clear rules by legitimate legislators and that these rules must be applied objectively and impartially by those who are to implement them. I note in this context that the organizers of the Symposium had the kindness of distributing a keynote address that I gave on 10 June 2002, entitled "*Ethical Dimensions of International Jurisprudence and Adjudication*". Let me also refer to the very interesting paper by Judge Weeramantry that has been circulated in advance of the Symposium. It is entitled "*Sustainable Development: An Ancient Concept Recently Revived*", and provides an excellent introduction to our discussions.

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[1] See *inter alia* http://www.un.org/law/counsel/info.htm
[2] GA/RES/55/2, in particular paragraphs 9, 24 and 25.

The requirement of rule of law presents itself in any sector of society where legislation is applied – not only in the field of environmental law. What we are striving for is, in a nutshell, the adoption and the application of rules that are seen as appropriate in the society where they are applied and where the legislator is perceived as legitimate and those who apply the laws are seen as independent and impartial.

Legislation is a sovereign act in any State. Traditionally, laws were enacted in a relatively narrow national perspective. However, this has changed, and today much of the legislation adopted at the national level is governed by norms laid down in international conventions negotiated under the auspices of the United Nations or other intergovernmental organizations.

Two areas subject to such international cooperation will be at the forefront during our Symposium: environmental law and human rights.

Likewise, traditionally, the role of the judge has been viewed in a very national perspective. Conditions and, in particular, sources of law in States are different. Therefore, there has been a tendency in the past to view even with some suspicion the legislation and adjudication in foreign States; traditionally, judges focussed almost entirely on national legislation and the case law of their own country.

Admittedly, those who belong to the Common Law system have probably had a more open attitude, showing greater receptiveness to the influence from other countries within this system. This may be due to the way in which this law is developed and applied, and perhaps also because of the common denominator of the English language. I have certainly noticed a preparedness and an openness on the part of judges from those countries to seek guidance in sources of law from other countries – a habit which I was not familiar with in my own Civil Law system.

However, I believe that this situation is now rapidly changing. One of the main reasons for this is the increasing extent to which national laws are based on international instruments negotiated by Governments and, eventually, translated by national parliaments into national law. The driving force, I would suggest, is necessity. There are so many phenomena in the world today that transgress borders which makes it imperative that States join hands across these borders in order to assist one another in dealing with the various aspects of contemporary life.

Obviously, one of the most prominent examples of this is environment. Nature does not recognize borders drawn by human beings, and the effects of our activities on the globe do not stop at national borders. Gradually, we have come to realize that activities somewhere on the globe can have repercussions at distances far from those activities. One particular area of concern, which comes under my responsibility as Head of the Office of Legal Affairs of the United Nations Secretariat, is the Law of the Sea. I will revert to this later.

Gradually, and following the 1972 Stockholm Declaration on the Human Environment, Member States of the United Nations have negotiated agreements that address environmental concerns. These Conventions have also resulted in major legislative activities at the national level in Member States. These laws are applied by many branches of the executive, but ultimately, it may be for the courts to decide on how this legislation should be applied in a particular case, be it in a situation where an assessment has to be made as to whether a particular enterprise should be permitted or in adjudicating the consequences of a violation of existing rules.

It is in these instances that judges will be called upon to exercise jurisdiction. To be able to do this, they need to be familiar with this particular field of law at the junction between development, necessary for the well-being of the

people, and the need to protect the environment in the interest of present and future generations.

It is comforting to note that you do not come to this seminar unprepared. Through five regional symposia sponsored by UNEP you have been able to review the aspects of the judicial work in the field of environment and to identify aspects that you will continue to discuss here.

There are several aspects, some of which have been highlighted in the material disseminated before the Symposium. This material is founded mainly on the information sharing during the previous discussions and the conclusions drawn from the information. Allow me, therefore, to contribute to this exercise some personal reflections, based on my own experiences, although by now they are somewhat aged.

In the 1960s and 1970s, I had the privilege of serving in the judiciary of my own country, Sweden. One of the lasting impressions from that period is the seriousness with which my senior colleagues approached their work. Many times, I was deeply impressed by their wisdom and experience. Looking now at our gathering here in Johannesburg, I can only translate my prior experience in the following way: You all represent the highest instances of your countries, your experience must be vast, and your knowledge and insight in the judicial work of your respective countries is at the very highest level. If you add to this the fact that you represent so many countries, so many regions and so many different systems, the gathering that has come together here in Johannesburg is truly unique.

This is an opportunity for all of us, who are together here to deepen our knowledge and to make further contacts. But it is also a responsibility. Of great importance is that the knowledge and the experience that you have acquired and will acquire be transferred within your own national systems – down the line, as it

were. As we all know, the main part of the work in any judicial system is done in the first instances. It is inconceivable that every case should rise to the level of the Supreme Court.

Incidentally, a senior judge in a Circuit Court in which I served, Judge Gerhard Möller, once jokingly suggested to me: it is important to deliver a correct judgement in the first instance, because the Courts of Appeal are weak instances and the Supreme Court could make a mistake!

The challenge before us is therefore formidable. At the same time, we all know that legal systems develop gradually through the efforts of many. The work undertaken both at the international and national level since 1972 is a testimony to this fact. But, hopefully, with every new generation the level of entry is at a higher level and, no doubt – with efforts like the present – we will see a positive trend in the future.

Another experience that I should like to share with you is one that I had serving in a Court of Appeal in 1973 that dealt exclusively with matters relating to water and construction in water, such as damming of water, in particular for hydroelectric schemes, irrigation, building of harbours, etc. The composition of this Court was different from other courts in the sense that not only lawyers sat on the bench but also technical experts. The main task of this court was actually to strike a balance between the interests of development and environment. In many instances, the judges had to assess whether the advantages of a particular enterprise would outweigh the damages that are almost inevitable in any interference with nature. There were several elements in this kind of adjudication that I saw as new and different from what I had been experiencing in other courts of law. Of course, this is 30 years ago, and much has happened since then. But I have no doubt that the task of adjudicating cases where you have to weigh these different interests against each other is a tremendous challenge in any court of law in any country.

A particular feature here is that it may not be possible for the court to dispense immediately with the case. In many instances, it was not possible for our court to make a final ruling on the issue of damages until after a very long period of monitoring the effects of the activities on the environment.

Another interesting factor was that a complete copy of the court's file was entrusted to an agency, or even a person in the region from where the case emanated, so as to allow interested parties, including the general public, to have access to the material in the case that obviously affected them all. As pointed out in the material disseminated before the Symposium, these cases are really not only *inter partes.*

Ladies and gentlemen,

One of the conclusions drawn in the regional symposia sponsored by UNEP is that the judiciary is a crucial partner in bringing about a judicious balance between environmental and developmental considerations. Another conclusion is the important role of the judiciary in promoting compliance and enforcement of environmental legislation. Allow me two brief comments on those two aspects.

Needless to say, one of the features of the role of a judge is that he or she has to be familiar, or be prepared to familiarize himself or herself, with any matter of substance that comes before the Court. Certainly, the parties will bring this substance before the Court. But I would suggest that, in particular in the field of environmental law, it is crucial that the judges have a general understanding of the whole area within which the issue before the Court is identified.

When it comes to penal aspects of environmental law, this is certainly of importance. However, I suggest that the application of standards set and the

question whether these standards have been violated to the extent that criminal responsibility is engaged is a matter that may not always be of such a complex nature. To the contrary, the balancing of environmental and developmental considerations present far more delicate issues. In adopting legislation in this field it goes without saying that policy considerations, based on norms set at the international level, come to the forefront. However, it is difficult to elaborate legislation in this field that is so precise that one can rule without the judicial instances developing methods that later would form a practice that these instances would apply as a matter of principle. It will be interesting to see whether within this very complex area we will see the development of standards or formulae that could be applied by courts regardless of where they are situated.

Ladies and gentlemen,

Let me now focus on some aspects of environmental law in which my own Office in the United Nations Secretariat is involved.

As I mentioned a while ago, one of the responsibilities of the United Nations Office of Legal Affairs is the Law of the Sea. In this respect we provide to States and intergovernmental organizations a range of legal and technical services, such as information, advice and assistance as well as conducting research and preparing studies, relating to the United Nations Convention on the Law of the Sea,[3] adopted in 1982. All this is done with a view to promoting a better understanding of the Convention, its wider acceptance, uniform and consistent application and effective implementation. The Office also provides substantive servicing to the General Assembly on the law of the sea and ocean affairs. In this latter respect, every year, it is the responsibility of my Office to compile through the Division of Ocean Affairs and the Law of the Sea a report to the General Assembly addressing inter alia various aspects of the marine

[3] United Nations, *Treaty Series*, vol.1833, p. 3.

environment. It is interesting to review this yearly report – but it is also frightening when marine degradation is reported.

The Convention on the Law of the Sea contains an extremely important set of provisions related to the marine environment. These provisions should be seen against the backdrop of the 1972 Stockholm Declaration on the Human Environment.

Of the twenty-six principles contained in the Stockholm Declaration, three are of particular relevance to the marine environment. These principles refer, inter alia, to the duty of States to prevent marine pollution and their responsibility to ensure that their activities do not cause transboundary environmental damage.

These principles had an immediate and direct impact on the work of the Seabed Committee, the predecessor of the Third United Nations Conference on the Law of the Sea, and, on the Conference itself. The process culminated in the formulation of a comprehensive international regime for the protection and preservation of the marine environment in the Convention, which is often referred to as the Constitution of the Oceans. Nearly 140 States and one Organization have ratified the Convention. The regime put in place an overarching framework for further development to be carried out by competent international organizations in dealing with specific aspects of the degradation of the marine environment.

The 1982 Convention represents a concrete application of the integrated approach to the human environment that permeated the Stockholm Declaration. Marine environmental law cannot be developed and implemented in isolation from the political, economic, social, scientific and technological aspects of marine affairs. Environmental law in one marine sector cannot be developed and implemented in isolation from that in other marine sectors. Furthermore, marine

environmental law cannot be developed and implemented in isolation from terrestrial and atmospheric environmental law.

The Convention strikes a basic balance between the protection and preservation of the marine environment and the well being of nations through the use of the oceans and their resources. One important component of the balance achieved in the Convention is to provide for the rational exploitation, on one hand, and sound conservation, on the other, of the resources of the oceans, especially the living resources. The Convention thus foreshadows the concept of sustainable development as was later developed in the Rio Declaration in 1992.

Ladies and gentlemen,

The International Law Commission (ILC), which is serviced by the Office of Legal Affairs, has on a number of occasions worked on topics relating to the codification and progressive development of international law in the field of the environment and sustainable development. Most recently, in 1997 the General Assembly adopted the Convention on the Law of Non-Navigational Uses of International Watercourses, which was based on draft articles prepared by the Commission. [4]

The Watercourses Convention is essentially a framework treaty, the aim of which is to encourage States Parties to enter into agreements on shared watercourses, and in doing so to apply and adjust, as required, the provisions of the Convention to the characteristics and uses of those watercourses. The Convention espouses a number of important principles to guide States. In particular, the principle of equitable utilization of the watercourses and the obligation not to cause significant harm, form the core of the Convention. The Convention also establishes a consultative procedure for planned new activities

[4] GA/Res/51/229 of 21 May 1997.

that may have a significant adverse effect on the other States sharing the same watercourse, and includes provisions specifically addressing the preservation and protection of watercourses from pollution. Presently, there are 16 signatories and 12 Parties. However, already now the text of the Convention should be of guidance to States and to those who apply environmental laws at the national level.

The International Law Commission is also presently considering a topic entitled "International Liability for Injurious Consequences Arising Out of Acts not Prohibited by International Law", and has so far completed the first part of the study which focuses on the prevention of transboundary damage from hazardous activities. At its session last year, the Commission adopted a set of 19 draft articles and commentaries to them on the issue of prevention of transboundary harm.[5] The focus of the draft articles is on cooperation amongst neighbouring States to work towards preventing transboundary harm that may result from engaging in risky activities. The draft articles envisage a system of prior authorization, assessment of risk, notification, information sharing and consultation on preventive measures.

The draft articles as adopted so far do not deal with the issue of liability and compensation for the resulting damage to the environment. However, the Commission has this year begun its consideration of this complex and contentious issue of international liability for transboundary damage arising from hazardous activities.

Yesterday, the Honourable vice-President of South Africa referred to the entry into force of the Rome Statute of the International Criminal Court on 1 July this year. He then went on to suggest that, perhaps, the time has come when we should create an international environmental court. Since I have been deeply

[5] General Assembly Official Records, fifty-sixth session, Supplement No. 10 (A/56/10) pp. 366 – 436.

involved in the question of international courts for some years, let me strike a note of caution here. There is already concern that there is a proliferation of international courts. The International Criminal Court is a different matter. That Court represents a link that was missing in the international legal system. However, when we come to environmental matters, we have the International Court of Justice, the principal judicial organ of the United Nations. This Court can deal with environmental matters and has in the past demonstrated that it is competent to do this. With respect to marine matters, we also have the International Tribunal for the Law of the Sea in Hamburg, established in 1996. I feel confident that, presently, these two institutions will be able to assist States as and when the need arises in the field of environmental law.

Let me finally mention an initiative by the Secretary-General that has attracted considerable attention since the Millennium Assembly in 2000. In that year the Organization initiated a programme to encourage wider participation in the treaty framework. The Secretary-General of the United Nations is the depositary of over 500 multilateral treaties, focussing on variety of topics that have been regulated through international conventions and agreements. In this context treaty events were organized both in 2000 and 2001 in order to encourage a wider participation in these multilateral treaties.

Also this year, there is a treaty event connected to the forthcoming World Summit on Sustainable Development to be held in Johannesburg from 26 August to 4 September. At this Summit the international community will take stock of the progress made in the 10 years since the Earth Summit in Rio de Janeiro and seek to reach agreement on further concrete steps to implement sustainable development. The Secretary-General considered that the Summit will also provide a unique opportunity for States to reaffirm their commitment to the principles of sustainable development reflected in Agenda 21 and a range of carefully negotiated multilateral treaties.

Therefore, the Secretary-General has invited all Member States to participate during the Summit in a treaty event called “Focus 2002: Sustainable Development” by signing, ratifying or acceding to those treaties pertaining to sustainable development to which Member States are not yet signatory or party. The treaty event will be held in two locations. Signatures and the deposit of instruments will be undertaken in New York at the United Nations Headquarters. After these actions have been formally undertaken in New York, they will be ceremonially announced in Johannesburg.

A list of 25 core treaties that represent the major principles of sustainable development, and information indicating their present status, has been circulated. It is the Secretary-General’s hope that the opportunity presented by the World Summit on Sustainable Development will inspire a renewed enthusiasm for participation in these treaties by more States and thereby advance the reach of the framework of treaties on sustainable development.

Ladies and gentlemen,

These were some general reflections that I wanted to share with you before we embark upon our work. Clearly the interrelationship between the requirements for the protection of the environment and the need for sustainable development is multifaceted and requires continuous policy adjustments taking into account technological developments and the competition to use the same environment for different purposes. In addition, the absence of case law as well clearly defined legislation at the international level in this field makes that task of judges more difficult and at the same time more important. That is precisely why gatherings of the kind that we are having now are so important in informing and sensitizing the judges to the issues that are involved and providing them with an opportunity to evaluate the options and their possible consequences with their colleagues.

I look forward to the coming sessions with great interest and expectations and wish you a successful Symposium.

Thank you for your attention!