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

31 OCTOBER 2001

Mr. Chairman,

Ladies and Gentlemen,

It is a privilege and an honour for me to be given this second opportunity to address your Committee in my capacity as President of the International Court of Justice.

Last year I chose to speak to you about a question of ongoing concern to the international legal community: the proliferation of international judicial bodies and its impact on international law. The extensive reaction to that presentation from diplomats, academics, journalists and legal practitioners shows that this concern is widely shared and is cause for much questioning.

There has been no improvement in the situation in this respect since last year. Quite to the contrary: the risks of forum shopping have worsened, as could be seen in connection with the swordfish stocks dispute between Chile and the European Union and the Bluefin Tuna case in which the International Tribunal for the Law of the Sea found that it had prima facie jurisdiction, but the Arbitral Tribunal set up by Australia, Japan and New Zealand ultimately came to the opposite conclusion.

The risks of conflicting case law have also grown and the International Court of Justice has, for example, recently been seised of an Application by Liechtenstein instituting proceedings against Germany concerning a case certain aspects of which have previously been dealt with by the European Court of Human Rights.

I remain convinced that the proliferation of international judicial bodies could jeopardize the unity of international law. I therefore continue to believe that international lawmakers and courts must in the future exercise great caution in this area. I fear, however, that such caution is not enough and that procedures ought possibly to be established to allow the International Court of

Justice to rule on such preliminary questions as specialized international courts might wish to submit to it. I shall not however return to that point today.

Nor shall I speak to you about the current position of the Court, which was the subject of my presentation to the General Assembly yesterday. Despite our Court's sustained activity, there are still 22 cases on its List. We have thus been obliged to request a modest increase in our budget; we thank the Advisory Committee for Administrative and Budgetary Questions (ACABQ) for the understanding it has shown of our position and hope that its report can be quickly approved by the Fifth Committee and by the General Assembly.

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Mr. Chairman,

The Court handed down several significant judgments last year; notably, on 16 March 2001 it decided a territorial dispute between Qatar and Bahrain concerning sovereignty over certain islands and the maritime delimitation to be established between the two States.

On that occasion it enlarged upon several points of its jurisprudence on the law of the sea, and I therefore thought it worthwhile to speak to you today concerning the contribution made by our Court to this law.

That contribution is both manifold and of long standing; the International Court of Justice has played, and continues to play, a vital role in this domain, having been seised of a total of some 20 international disputes involving this area. Indeed, it is significant that cases involving the law of the sea were the first contentious matters dealt with by both the Permanent Court of International Justice and the International Court of Justice: namely, the *S.S. "Wimbledon"* case[1] for the first and the *Corfu Channel* case[2] for the second.

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[1] *P.C.I.J., Series A/B, No. 5*, 1923.

[2] Judgment of 9 April 1949, *I.C.J. Reports 1949*, p. 4.

The Court's jurisprudence over that long history has concerned a wide range of areas of that law: freedom of the high seas, rights of passage through straits and through the territorial sea[3], nationality of ships[4], jurisdiction over those ships and their crews[5], fishing rights, etc.

But I shall confine myself today to one question alone: the law governing the delimitation of maritime areas.

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Delimitation of those areas was long considered a secondary question, involving the fixing of the boundaries between narrow territorial seas. Extension of State jurisdiction to the high seas and technological developments have made this into one of the main territorial issues of the last 30 years.

From the beginning, two methods were recommended for making these delimitations. Some looked to the "equidistance method", pursuant to which the maritime boundary between States must follow "the median line every point of which is equidistant from the nearest points" on the coasts. Others pointed out that, while the equidistance method appeared generally acceptable for the delimitation of the territorial seas between States with opposite coasts which were comparable in length, it could yield inequitable results in other circumstances. They thus advocated maritime delimitations based on equitable principles or producing equitable results. After a long period of development, in which the Court played a leading role, today's law of the sea distinguishes between the delimitation of territorial seas, on the one hand, and of the continental shelf and fishing zones or exclusive economic zones, on the other. However, the Court has now formulated similar rules applicable to both types of cases.

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[3]In respect of the first, see the *Corfu Channel* case, cited above; in respect of the second, see the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), I.C.J. Reports 1986,* p. 14.

[4]Case concerning *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion of 8 June 1960, I.C.J. Reports 1960,* p. 150.

[5]*"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10.*

The delimitation of territorial seas

The boundary between the territorial sea and the high seas was traditionally fixed at 3 miles from the coast. More often than not, it has now been increased to 12 miles. But which coasts are to be taken into account in fixing this boundary in order to ensure that the subsequent delimitation is appropriate? That is the first problem having confronted the Court.

There are two methods for identifying the starting points of the territorial sea: the normal baseline method and the straight baseline method.

The normal baseline ordinarily used for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.

However, the International Court of Justice, in its Judgment of 18 December 1951 in the case concerning *Anglo-Norwegian Fisheries*[6], preferred another method, that of straight baselines, to the traditional one. True, it noted that the method of normal baselines could be applied "without difficulty to an ordinary coast, which is not too broken"[7]. But it added that where "a coast is deeply indented and cut into, as is that of Eastern Finnmark, or where it is bordered by an archipelago such as the 'skjaergaard' along the western sector of the coast here in question, the base-line becomes independent of the low-water mark, and can only be determined by means of a geometrical construction"[8]. Thus, for those situations the Court adopted the method of straight baselines, which later was to be incorporated into the 1958 Convention on the Territorial Sea and then into Article 7, paragraph 1, of the Montego Bay Convention, providing:

> "1. In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured."

Article 7, paragraph 3, adds:

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[6]In the *Anglo-Norwegian Fisheries* case, the Court handed down an oft-quoted, fundamental dictum concerning the fixing of the seaward boundaries of maritime areas: "The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law". *Fisheries Case (United Kingdom* v. *Norway)*, Judgment of 18 December 1951, *I.C.J. Reports 1951*, p. 132.

[7]*Fisheries Case (United Kingdom* v. *Norway)*, Judgment of 18 December 1951, *I.C.J. Reports 1951*, p. 128. Specifically, this comment concerned the *tracé parallèle* method, based on the normal baselines.

[8]*Fisheries Case (United Kingdom* v. *Norway)*, Judgment of 18 December 1951, *I.C.J. Reports 1951*, p. 129.

> "The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the régime of internal waters."

In its Judgment of 16 March 2001 *(Maritime Delimitation and Territorial Questions between Qatar and Bahrain)*, the Court had its first opportunity to apply these provisions, which it deemed to be a part of customary law.

Bahrain contended that the various maritime features lying off the eastern coast of its main islands "may be assimilated to a fringe of islands which constitute a whole with the mainland". It concluded from this that it was entitled to draw straight baselines connecting these features.

The Court did not agree with Bahrain on this point. While it recognized that the maritime features in question were part of Bahrain's overall geographical configuration, it observed that they were not part of a "deeply indented" coast, that they could not be characterized as a "fringe of islands" and that the situation was therefore different from the one analysed in the case of Norway and described in the United Nations Convention on the Law of the Sea. It added that in the case before it the method of straight baselines would have been applicable only if Bahrain had declared itself to be an archipelagic State under the Montego Bay Convention. That, however, was not the case. Bahrain was therefore not entitled to draw straight baselines. As a result, the equidistance line between Bahrain and Qatar which the Court must use — subject to possible subsequent adjustment — in order to fix the maritime boundary between the two States had to be drawn by reference to normal baselines. Bahrain's internal waters were reduced accordingly and the waters lying between the main islands and the Hawar Islands were territorial waters, in which the right of innocent passage was recognized[9].

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The judgment rendered in that case goes beyond simply clarifying the rules enabling the external limits of territorial seas to be fixed. It also addresses the question of the delimitation of the territorial waters of neighbouring States.

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[9]Case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Judgment of 16 March 2001, paragraphs 210-216 and paragraph 223.

This question is governed by customary law as codified by the Geneva Conventions and the Montego Bay Convention. Article 15 of the latter lays down the principle that territorial seas must be delimited in accordance with the equidistance method. But it adds that:

> "The above provision [on equidistance] does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith."

In actual fact, the delimitation of territorial seas in accordance with this equidistance/special circumstances rule is most often effected through bilateral agreements. For the first time, however, in the case between Qatar and Bahrain, the Court was called upon to rule on such a delimitation and applied the rule of customary law thus enshrined by the United Nations Convention on the Law of the Sea.

It accordingly proceeded in two stages: first, drawing the equidistance line; second, identifying any special circumstances.

As regards the drawing of the equidistance line, the Court, confirming its case law, refused to apply the method of mainland-to-mainland calculation. It identified each of the maritime features having an effect upon the course of the equidistance line and fixed that line by reference to the appropriate baselines and basepoints. To this end, it identified the islands and islets coming within the sovereignty of each of the States.

However, it was faced with a new difficulty, as a result of the presence in the area of low-tide elevations.

You will recall that, under the relevant provisions of the Conventions on the Law of the Sea, which reflect customary international law, "a low-tide elevation" is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide[10].

According to these provisions, when a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line of that elevation may be used as the baseline for measuring the breadth of the territorial sea. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea, it has no territorial sea of its own.

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[10] Art. 11, para. 1, of the Convention of 1958 on the Territorial Sea and Contiguous Zone, Art. 13, para. 1, of the 1982 Convention on the Law of the Sea.

The case between Qatar and Bahrain, however, raised a particular problem, in so far as certain low-tide elevations were situated in the area where the territorial seas of the two States overlapped. In principle, therefore, each of them had a right to use the low-water line of these low-tide elevations for measuring the breadth of its territorial sea. For the purposes of delimitation, the competing rights of both States appeared to cancel each other out.

Nevertheless, Bahrain contended that it had taken possession of the majority of these low-tide elevations, which accordingly came within its sovereignty, and that it alone was permitted to take them into account for purposes of fixing the equidistance line.

The Court did not accept that argument. It held that the law of the sea distinguished in a number of respects between islands and low-tide elevations and that a State could not acquire sovereignty by appropriation over a low-tide elevation situated within the limits of its territorial sea where the same low-tide elevation was also situated within the limits of the territorial sea of another State[11]. It accordingly concluded that these low-tide elevations could not be used for determining the basepoints and drawing the equidistance line[12].

Once this line has been determined, in accordance with the rules as thus stated, it remains to investigate in each particular case the existence of historic title or other special circumstances. In this respect, the Court held that a disproportionate effect should not be attributed to certain insignificant maritime features[13]. In the past, it had already, for these reasons, discounted any influence of the deserted islet of Filfla on the maritime delimitation to be effected between Libya and Malta[14]. Further, in the instant case, it noted that Qit'at Jaradah was a very small island, uninhabited and totally devoid of vegetation. It did recognize Bahrain's sovereignty over this minute feature, 12 by 4 metres, with an altitude of 0.4 metres at high tide[15], but it considered that there is "a special circumstance in this case warranting the choice of a delimitation line passing

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[11]Case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain)*, Judgment of 16 March 2001, paras. 200-209.

[12]Conversely, the Court held that in such cases sovereignty over the territorial sea determined sovereignty over low-tide elevations. In other words, the delimitation of territorial waters must be effected without regard to low-tide elevations and each State has sovereignty over the low-tide elevations located in the zone attributed to it, *ibid*, para. 210.

[13]*Ibid*., para. 215.

[14]Case concerning *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports* 1985, p. 43, para. 54.

[15]*Ibid*., para 197.

immediately to the east of Qit'at Jaradah"[16] and thus conferring upon it a modest influence only on the delimitation of the territorial seas.

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The delimitation of the continental shelf and the exclusive economic zone

As regards the delimitation of the continental shelf and the exclusive economic zone, the Court has also gradually established a case law which is now authoritative, and to which it put the definitive touches in the case between Qatar and Bahrain.

As you know, in 1969, in the *North Sea Continental Shelf* case, the Court initially inclined towards a delimitation of that shelf in accordance with "equitable principles, and taking account of all the relevant circumstances"[17]. Next, in the case between Tunisia and Libya concerning a similar delimitation, it recalled that the delimitation must be achieved on the basis of equitable principles[18]. The same approach was adopted in the *Gulf of Maine* case[19]. These decisions were not without influence on the solution adopted by the Conference on the Law of the Sea. Thus, the Montego Bay Convention, in Articles 74 and 83, provides for "States to effect delimitation by agreement on the basis of international law . . . in order to achieve an equitable solution".

At this stage, case law and treaty law had become so unpredictable that there was extensive debate within the doctrine on whether there still existed a law of delimitations or whether, in the name of equity, we were not ending up with arbitrary solutions. Sensitive to these criticisms, in subsequent years the Court proceeded to develop its case law in the direction of greater certainty.

That development was begun in the *Continental Shelf* case between the Libyan Arab Jamahiriya and Malta, in which the Court took the equidistance line as the point of departure for

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[16]*Ibid*., para. 219.

[17]Case concerning the *North Sea Continental Shelf (Federal Republic of Germany* v. *Denmark and The Netherlands)*, Judgment of 20 February 1969, p. 53, para. 101.

[18]Case concerning *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment of 24 February 1982, *I.C.J. Reports* 1982, p. 4.

[19]Case concerning the *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, 12 October 1984, *I.C.J. Reports* 1984, p. 300, para. 112.

delimitation and moved it northwards, having regard to the equitable principles to be applied in the case, namely, the general configuration of the coasts and their different lengths. Thus, equidistance was reinstated as a provisional line open to possible correction in order to achieve an equitable result[20].

A new stage was then reached with the Judgment delivered on 14 June 1993 in the case between Denmark and Norway concerning the maritime delimitation in the area between Greenland and Jan Mayen.

In that case, the delimitation of the continental shelf fell to be effected in accordance with the 1958 Geneva Convention (equidistance/special circumstances), whereas the fishing zones were to be effected in accordance with customary law (equitable solution, having regard to relevant factors). The Court stressed that, in both cases, an equitable result must be reached. It added that, as regards the fishing zones, delimitation had to proceed on the basis of equitable principles. In order to achieve this, it held that it was appropriate to start from the equidistance line, subsequently making all the necessary corrections to it, having regard to the relevant factors. Finally, it stated that these factors were comparable to the special circumstances envisaged by the 1958 Convention. On that basis, the Court, with a view in particular to taking account of the length of the coasts of both parties and of the zone's fishery resources, arrived at a single delimitation line for the continental shelf and the fishing zone and drew this line to the east of the median line.

Thus, the law on maritime delimitations was completely reunified. Whether it be for the territorial sea, the continental shelf or the fishing zone, it is an equitable result that must be achieved. Such a result may be achieved by first identifying the equidistance line, then correcting that line to take into account special circumstances or relevant factors, which are both essentially geographical in nature.

This solution of principle, arrived at in the case concerning Jan Mayen/Greenland, was applicable thenceforth with regard to the delimitation of the continental shelf and the fishing zones of States with opposite coasts. It remained to be seen whether the same applied in the case of adjacent coasts.

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[20]Case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment of 3 June 1985, *I.C.J. Reports* 1985, p. 13.

The Court ruled affirmatively on the matter in the case between Qatar and Bahrain. In that case, the parties had conferred on the Court the task of drawing a single maritime line simultaneously dividing both the continental shelf and the exclusive economic zone. In order to do so, but on this occasion dealing with adjacent rather than opposite coasts, the Court again decided that an equidistance line should first be provisionally drawn, consideration then being given as to whether there were relevant circumstances leading to an adjustment of that line[21].

In the event, it ruled out a number of circumstances invoked by the parties and retained one only, concerning a maritime feature known as Fasht al Jarim, which constituted a "projection of Bahrain's coastline in the Gulf area, which, if given full effect, would distort the boundary and have disproportionate effects". "In the view of the Court, such a distortion, due to a maritime feature located well out to sea and of which at most a minute part is above water at high tide, would not lead to an equitable solution which would be in accord with all other relevant factors." Consequently, "in the circumstances of the case considerations of equity require that Fasht al Jarim should have no effect in determining the boundary line"[22].

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Mr. President, Ladies and Gentlemen,

We are all aware that international law is constantly developing, and the law of the sea is not immune in this regard.

However, it is encouraging to note that the law of maritime delimitations, by means of these developments in the Court's case law, has reached a new level of unity and certainty, whilst conserving the necessary flexibility.

Thus, the Court declared in its recent Judgment: "the equidistance/special circumstances rule" applicable to the delimitation of the territorial sea and "the equitable principles/relevant circumstances rule, as it has been developed since 1958 in case law and State practice with regard

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[21]Case concerning the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain)*, Judgment of 16 March 2001, para. 230.

[22]*Ibid.*, paras. 247 to 249.

to the delimitation of the continental shelf and the exclusive economic zone, are closely interrelated"[23].

In all cases, the Court, as States also do, must first determine provisionally the equidistance line. It must then ask itself whether there are special or relevant circumstances requiring this line to be adjusted with a view to achieving equitable results.

The legal rule is now clear. However, each case nonetheless remains an individual one, in which the different circumstances invoked by the parties must be weighed with care.

As a result of these developments, the Court has, in my opinion, managed to reconcile law and equity. In the case between Qatar and Bahrain, the parties thanked us for achieving this and that was most welcome to us.

The Court still has before it other cases of the same type, notably between Cameroon and Nigeria and between Honduras and Nicaragua. The international community may rest assured that those cases will be adjudicated in the same spirit.

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[23] *Ibid.*, para. 231.