Address by Shabtai Rosenne*

Mr. Chairman, I want first of all to express my deep appreciation to our hosts, the Faculty of Law of the University of Heidelberg and the Max Planck Institute, and to our friend and colleague Professor Doehring, for organizing this fascinating and important colloquium on the enforcement of international obligations, and for their generosity. I will also take this opportunity of adding my congratulations to the University of Heidelberg on the occasion of its 600th anniversary. Heidelberg has had on its faculty some of the greatest jurists of their generation, and amongst its alumni are some of the greatest statesmen, politicians, jurists, philosophers and diplomats of all generations and of all nations, including my own. Indeed, one of the architects of the reconciliation of our two peoples, alongside Konrad Adenauer, was an alumnus of Heidelberg. I am referring to the late Dr. Nahum Goldmann.

Why do I mention this? If you look at the Luxembourg Agreement of 10 October 1952 between our two countries[1] you will find in it one of the most carefully drafted disputes settlement and enforcement clauses of any treaty to that date, an indication of the political background of that agreement and of anxiety to guarantee performance of all its obligations. I am happy to state here, and place on record, that the onerous obligations which the Federal Republic of Germany took on itself on that occasion have been so honoured in their spirit as much as in their letter, that never in the whole history of that agreement did either party have any occasion so much as to hint at the possible need to invoke those dispute settlement provisions. I wonder if the arbitrators, all of whom were duly appointed at the time, are even mindful today that they were so appointed. *O si sic omnes!*

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[1] BGBl.1953 II, 49.

I do not mention this only to requite an unquantifiable debt of honour. Yesterday, as I walked around Heidelberg, I passed the house in which Bluntschli lived opposite Peterskirche on the corner of the Sandstrasse, and later I passed Bluntschlistrasse. I walked down that street out of curiosity. As it happens, I have just been reading, in Utrecht, in connection with some work I am doing on one of his contemporaries, T.M.C. Asser, Bluntschli's fascinating and learned account of the Congress of Berlin. In its day the General Act of that Congress was, I suppose, as important as the Charter of the United Nations is to us. I was struck by his assessment, published in 1879: «Grande a dû être, après la clôture du Congrès de Berlin, la déception de ceux qui avaient espéré qu'il amènerait d'importants résultats pour le développement des principes du droit international»[2]. Many of us would today say the same thing about the San Francisco Conference of 1945 and of the United Nations Charter (including Art.94). We owe a debt of gratitude to Sir Robert Jennings for his stimulating paper. The bitter fact remains that the enforcement of international obligations, indeed the very content of the rule that an engagement is binding on its parties and must be performed by them in good faith, is, thanks to its very generality and the lapidary quality of its formulation, whether in the Charter or in the Convention on the Law of Treaties and elsewhere, a source of confusion. Sir Robert has put it another way this morning with his references to the *Wimbledon* and the *Haya de la Torre* cases, and he better made the point that I am trying to make. He raised a series of important issues and I welcome his appeal for further detailed research here and elsewhere. A central issue could be, who are the parties to the *res judicata* in an international tribunal.

Walking down Bluntschlistrasse, I was reminded of a curious exchange of correspondance between Bluntschli and Field Marshal Count von Moltke in December of 1880. Bluntschli had sent to the Field Marshal a copy of the «Manuel de lois de la guerre» which had been worked out at the time in the Institute of International Law, partly under the inspiration of Bluntschli and of his friend Franz Lieber whose Code was originally commissioned by President Lincoln for use in the American Civil War and still influences the United States Army's Rules of Land Warfare. Listen to what the Field Marshal had to say about that: »Der ewige Friede ist ein Traum, und nicht einmal ein schöner, und der Krieg ein Glied in Gottes Weltordnung (God forbid, I interject). In ihm entfalten sich die edelsten

[2] Le Congrès de Berlin et sa portée au point de vue du droit international, XI Revue de droit international et de législation comparée, 411 (1879).

Tugenden des Menschen ... Ohne den Krieg würde die Welt im Materialismus versumpfen«. To this Bluntschli replied in a long letter written in Heidelberg during Christmas of 1880. I cannot go into all the details of that letter, but one phrase has, I think, become a classic: »immer wird der militärischen Betrachtung die Rücksicht auf die Sicherheit und den Sieg des Heeres näher liegen als die Sorge für die unkriegerische Bevölkerung, während der Jurist in der Überzeugung, daß das Recht eine Schutzwehr für Alle, auch für die Schwachen wider die Starken sei ...«. Let me stress – Das Recht eine Schutzwehr für Alle, auch für die Schwachen wider die Starken sei[3].

Those were the polarities of the tensions, one hundred and more years ago, in the Eurocentered international community of the Concert of Europe. They are still the polarities of tension as international law, shedding its Eurocentricity, is rapidly moving into the twenty-first century. Now, as then, international law is self-enforcing, and that is its weakness. The materialism of which Field Marshal von Moltke spoke is with us, more than even he could foresee, although not for the reasons he gave. The dream of *ewige Friede*, of eternal peace, which antedates both the Prophets Isaiah and Micah and Immanuel Kant, is still far off. But Europe – East and West – has I think learnt one lesson since von Moltke's day, and it has learnt it at terrible cost. The lesson is that the law cannot continue to be left in this self-enforcing state, that military victories produce transient results, and that peace can only be attained and preserved on the basis of the equality of all nations. I believe that this lesson is slowly reaching other parts of the world, and if so that could be Europe's greatest contribution to the future of mankind. I am not pessimistic about international law today, notwithstanding the widespread tendency to put it on the back burner. Nor am I pessimistic about the role of the international lawyer, but on condition. The condition is that we recognize where we stand today, and why. We are in the eye of a tremendous revolutionary societal storm, without precedent in human history. Decolonization, the freedom and equality of previously colonized peoples, is now the leitmotif of international law and order, and its legitimate demands must be accommodated. This is the human side of the planetary dimension of modern international

[3] J.C. Bluntschli, 2 Gesammelte kleine Schriften: Aufsätze über Politik und Völkerrecht, 271, 274 (1881). F. Münch has since drawn my attention to an earlier, different, view of von Moltke, in his essay »Deutschland und Palästina«, in: 2 Gesammelte Schriften und Denkwürdigkeiten: Vermischte Schriften, 279, 286ff. (1892). That essay was written in 1841!

law, and the question we have to ask ourselves is, is the law giving an adequate response to a challenge which is planetary in its dimensions, and universal in time and in space? I have a feeling that responsible international lawyers are trying to grope their way to an acceptable consensus, although I recognize that the road is long and hazardous and full of unsuspected obstacles. But when that goal is reached, there will be no need to discuss the enforcement of international obligations. I hope that the coming generation of international lawyers will be able to turn its attention to deepening the content of those obligations, taking their enforcement for granted.