

Document:-  
**A/CN.4/SR.2585**

**Summary record of the 2585th meeting**

Topic:  
**<multiple topics>**

Extract from the Yearbook of the International Law Commission:-  
**1999, vol. I**

*Downloaded from the web site of the International Law Commission  
(<http://www.un.org/law/ilc/index.htm>)*

## 2585th MEETING

Thursday, 10 June 1999, at 10 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candiotti, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Tomka, Mr. Yamada.

### Cooperation with other bodies (continued)\*

[Agenda item 11]

#### VISIT BY THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

1. The CHAIRMAN, welcoming the President of the International Court of Justice, Judge Stephen Schwebel, on behalf of the Commission, said that Judge Schwebel was also a distinguished former member of the Commission, who had served as Special Rapporteur on the topic of the law of the non-navigational uses of international watercourses. His presence carried on the tradition of cordial and productive personal relations between the two bodies.

2. Mr. SCHWEBEL (President of the International Court of Justice) said it was a great pleasure to renew contact with the Commission, a body whose important work and distinguished history made it one of the most productive institutions in the history of the United Nations, international law and international relations. The International Court of Justice could happily be described in similarly positive terms today. Its productivity was far greater than at any time since the establishment of its predecessor, the Permanent Court of International Justice, over 75 years previously. A docket of 19 cases was an extraordinary number for a court that could entertain only inter-State disputes and could not be compared with jurisdictions in which the potential number of litigants ran into millions. The diversity of those cases in geographical and cultural terms gave a sense of the breadth of the Court's concerns and on the docket of its constituency.

3. The first case concerned *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*. It was somewhat unusual in that both parties were Gulf States. There had been an intense struggle over jurisdiction and a difference of views between the parties over the authenticity of 72 documents on which one of them had relied

and which had eventually been withdrawn. On the merits, it was a complex case of very great importance to each of the States concerned. The hearings stage would begin in the not too distant future.

4. Next came two cases concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie* brought by the Libyan Arab Jamahiriya against the United Kingdom of Great Britain and Northern Ireland and the United States of America respectively. The Court had declined to issue the order indicating provisional measures sought by the Libyan Arab Jamahiriya in order to forestall the adoption of Security Council resolutions imposing sanctions against the country. It had upheld its jurisdiction to consider the merits and pleadings had recently been filed preparatory thereto. At the same time, the two men accused of carrying out the Lockerbie bombing had been surrendered for trial to a Scottish court sitting in the Netherlands. The interplay between that case and the cases pending on the Court's docket was unclear. The Vice-President of the Court, who was Acting President for those cases, would be meeting the parties shortly to clarify the situation.

5. Another highly charged case was that concerning *Oil Platforms*, which turned on claims that oil platforms belonging to the national Iranian oil company had been destroyed by United States naval forces during the Gulf War. The United States alleged that they were being used to mount terrorist attacks on shipping. The Court had upheld its jurisdiction in the face of a challenge. The United States had sought to bring counterclaims, some of which had been admitted by the Court. The case, which involved important and delicate issues such as neutrality and the use of force in international relations, was also moving towards hearings on the merits of the claims and counterclaims.

6. Next on the list was the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*. The Court had issued two orders indicating provisional measures that had essentially been ignored in the same way as the Security Council resolutions on the same matter. The Court having upheld its jurisdiction, Yugoslavia had brought counterclaims [see page 258, paragraph 35] which the Court had deemed admissible. The hearings on the merits were expected to begin no later than February 2000 and to prove exceptionally difficult and protracted.

7. In the case concerning the *Gabčíkovo-Nagymaros Project*, the Court had rendered a judgment pursuant to a special agreement. It remained on the docket because of the provision in the special agreement to the effect that either party could return to the Court within six months if the judgment was not being implemented to its satisfaction. Slovakia had acted on that provision and the parties had resumed intensive negotiations. It was uncertain whether the Court would be called upon to play a further part.

8. The case concerning the *Land and Maritime Boundary between Cameroon and Nigeria* had originated with a dispute concerning sovereignty over the Bakassi Peninsula. It had subsequently been extended to include the maritime boundary in the seas off the peninsula and the boundary running from Lake Chad to the sea between

\* Resumed from the 2576th meeting.

Cameroon and Nigeria. The Court had issued an order indicating provisional measures (in recent years more and more applicants had tended to seek such measures and respondents had sometimes reacted by seeking counter-provisional measures). The Security Council had also been seized of the dispute<sup>1</sup>—an example of the two bodies acting concurrently and cooperatively. The Court had upheld its jurisdiction in the face of a challenge and Nigeria's request for an interpretation of that judgment had been turned down. The pleadings were proceeding and the merits of the case would eventually be discussed.

9. The case concerning *Kasikili/Sedudu Island* was under active consideration. It had been brought by special agreement and concerned an island marking the boundary between the two States. As there had been no jurisdictional problem or other incidental proceedings, the case had moved fairly swiftly to the hearings stage earlier in 1999. The Court was currently engaged in the process of producing a judgment.

10. Digressing for a moment to outline that process, he said that, on completion of the oral hearings, which had been preceded by three rounds of exchanges of written proceedings and three weeks of hearings on the merits, the Court had begun writing its notes. Each judge prepared a preliminary opinion, addressing a list of questions prepared by the Registry and reviewed by the President. The opinions usually ran to between 50 and 100 pages and, following translation from French into English or vice versa, were read by the judges who met for two to three days to discuss them. Each judge, beginning with the most junior in order of precedence, summarized his or her views, taking into account those expressed in the notes prepared by his or her colleagues. Lastly, the President stated his views, by which time it was usually clear in which direction the majority view lay. A secret ballot was then held to select two judges, usually one English-speaking and one French-speaking, to form a drafting committee chaired by the President or by another senior judge if the President's view was not that of the majority. The committee's draft judgment was circulated and written amendments were requested by a given date. A second version, incorporating proposed amendments, was produced and laid before the Court for a first reading. Every word of the proposed judgment was carefully weighed, a process that usually took two to four days, depending on how divided opinions were and on the determination of those holding the minority view to fight every line of the way. After the first reading, the President invited the members of the Court to state whether they contemplated preparing a separate or dissenting opinion. Those who so signified were asked to submit their opinions by a specific date so that they could be taken into account in preparing the draft for the second reading. The decision-making process thus involved the whole of the Court in the sense that the majority view was confronted with the dissenting and separate opinions in the drafting committee, which might adjust the judgment if it saw some merit in the dissenting approach or rewrite it in such a way as to counter the arguments presented. The Court worked as a universal body that sought to take account of the views of judges representing the principal legal systems and civilizations of the world. On second reading, the operational part of

the judgment was put to the vote. Judges were required to vote for or against; abstentions were ruled out. If the Court was evenly divided, which was a rare occurrence, the President or other presiding officer had a casting vote. If the Court's judgment had been modified, for instance to reflect the position of the author of a separate or dissenting opinion, that person could issue a new last-minute version of his or her opinion. Finally, the parties were notified and the judgment was read out in open session.

11. The case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan* had as yet gone no further than the filing stage.

12. In the *Ahmadou Sadio Diallo* case, Guinea was exercising its rights of diplomatic protection on behalf of an individual. It alleged that a Guinean national who had been a long-term resident of the Democratic Republic of the Congo, with large-scale business interests in the country, had been treated in a manner inconsistent with Congolese international obligations, particularly with respect to the expropriation of his property interests. It was hoped that the procedure for the case would be established by the end of June 1999.

13. In the *LaGrand* case, Germany was acting on behalf of a German national who had been raised in the United States and executed for murder in one of its constituent States. On the day before Mr. LaGrand was due to be executed, Germany had petitioned the Court to order provisional measures to stay his execution, alleging that its rights under the Vienna Convention on Consular Relations had been violated by the failure of the local authorities concerned to notify the German consular authorities when Mr. LaGrand and his brother had been arrested and tried. There was no dispute about the fact that Germany's consular authorities had not been so notified. Germany had sought an order indicating provisional measures. The previous year Paraguay had sought a similar order, which the Court had unanimously issued in the case concerning the *Vienna Convention on Consular Relations*. It had also done so in the *LaGrand* case, but the singular aspect of that case was that when moving for the issuance of an order indicating provisional measures, Germany had claimed that the Court could issue such an order *proprio motu* on the basis of a particular provision of the rules of Court. No State had ever made such a claim before. A very substantial majority of the Court had taken the view, in the few minutes it had had to consider the matter, that that provision could properly be employed to issue an order. He himself had taken the view that the provision was not meant to provide authority for the Court to issue an order *proprio motu*—meaning “on its own motion”, rather than the motion of one of the two parties—and that where one of the two parties moved for provisional measures the rules required a hearing of both parties. In his view, to issue an order indicating provisional measures on the basis of the views of one party violated that most fundamental principle of judicial procedure, the right of both parties to a hearing. Nevertheless, he had voted for the order, because he had not objected to its substance.<sup>2</sup> The order had reached the United States just a few hours before the scheduled execution time, in spite of which the

<sup>1</sup> See S/1996/150.

<sup>2</sup> For the separate opinion of President Schwebel, see *LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999*, pp. 21-22.

execution had gone ahead. Germany, however, had indicated that it was disposed to pursue the case through to judgment, unlike Paraguay, which some time after the execution of its national had withdrawn its case. There, the *proprio motu* issue had not arisen because Paraguay had applied to the Court five or six days before the scheduled execution date and there had been time for a hearing of both parties before the order was issued.

14. Earlier in 1999 a request for an advisory opinion had been made by the Economic and Social Council on the question of the immunities of a Special Rapporteur of the Commission on Human Rights on the independence of the judiciary, who had given a press interview to a British publication which had resulted in the bringing of four suits against him for defamation by private parties in Malaysia, the country of which the Special Rapporteur was a national. The Secretary-General had from the outset taken the position that the Special Rapporteur had spoken in his official capacity and that therefore he should be immune from suit<sup>3</sup>—a position not accepted by the Government of Malaysia. There had also been a difference of view as to who was entitled to make the determination of immunity. In response to the request by the Economic and Social Council, the Court had ruled, in its advisory opinion on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, by a very substantial majority, that Mr. Cumaraswamy, the Special Rapporteur, had immunity from suit and that costs levied against him should be repaid.

15. Such had been the state of the docket until a few weeks previously, when Yugoslavia had brought 10 cases against 10 members of NATO in regard to NATO bombing of its territory. The Court had entitled those cases collectively *Legality of Use of Force*, thereafter designating each case by the parties thereto. Yugoslavia had urgently sought provisional measures—in short, an order to stop the bombing. Hearings had been held within a matter of days of Yugoslavia's filing its application, which itself had followed by a day its filing of a notice of adherence to the optional clause. That adherence had had various singular features, one of which was to confine jurisdiction to disputes arising after the date of the adherence, namely, 25 April 1999. At the hearings the 10 respondents had uniformly maintained that the Court lacked jurisdiction to issue orders indicating provisional measures. In most of the cases Yugoslavia had cited three grounds, and in two—those against Belgium and the Netherlands—a fourth ground. It had cited *forum prorogatum*, inviting the respondents to accept jurisdiction; the respondents had uniformly refused. It had then relied on its adherence to the optional clause—at any rate as against those States that had themselves adhered; and it had also invoked the Convention on the Prevention and Punishment of the Crime of Genocide, under article IX of which the Court had jurisdiction over disputes relating to the interpretation, application and fulfilment of the Convention.

16. The respondents had argued that there was no jurisdiction under the optional clause—in some cases, because of particular reasons, but in most cases on the grounds that the dispute had arisen not after 25 April, but on 24 March, the date on which the bombing had begun and on which

the Security Council had debated the matter, including the legality of the use of force. The Court had accepted that argument and had therefore found an absence of jurisdiction on that ground. On the ground of the Convention on the Prevention and Punishment of the Crime of Genocide, it had held that a use of force by one State against another could not be equated with genocidal acts, which required intent to destroy a national, ethnic, racial or religious group. It had held that such basis was absent, and that therefore *prime facie* jurisdiction under the Convention could not be justified. Two of the cases, in which there had been no adherence to the optional clause or in which the jurisdiction of the Court under the Convention had been excluded in the absence of special agreement, had been dismissed—those against Spain and the United States. The other eight remained on the docket.

17. Mr. LUKASHUK said it sometimes happened that rules adopted by the Commission in the belief that they were, or should be, part of international law were subsequently recognized by ICJ as norms of positive international law. In that connection, he wished to put two questions. First, did the President of the Court consider that that development constituted a new phenomenon in the formation of customary international law? Secondly, did the President believe that holdings of the Court in such cases constituted *opinio juris* of the international community as a whole?

18. Mr. SCHWEBEL (President of the International Court of Justice) said Mr. Lukashuk had raised two very interesting questions, neither of which he felt able to answer with complete confidence. There were indeed instances in which the Commission had produced draft conventions later adopted by a diplomatic conference—or even draft conventions not yet so adopted—on which the Court had thereafter repeatedly relied in its judgments. The most notable example was the draft articles on State responsibility. The articles of that draft had for some two decades been cited before the Court in various cases as expressing rules of customary international law. On more than one occasion the Court had recognized those draft articles as an authoritative statement of the law, sometimes even citing the commentaries thereto. It had done so on more than one occasion in respect of the 1969 Vienna Convention, stating, even in respect of States not parties to the Convention, that provisions thereof such as article 31 reflected a customary international law.

19. Whether that was a new phenomenon was a moot point. Insofar as the Court had been adopting that approach for some time, it was not so very new. On the other hand, it was new inasmuch as it had become a recurrent practice of the Court, important in that it accelerated the incorporation of the work product of the Commission into the body of customary international law, sometimes before the convention came into force or even before it was considered at a diplomatic conference. Of course, the Court did not adopt that approach lightly, but would consider carefully whether a draft article formulated by the Commission was in fact a reflection of customary international law, or whether it was a development in that law. To date, it had relied on articles it had found to be a reflection of customary international law—notably in the *Gabčíkovo-Nagymaros Project* case in respect of counter-measures and state of necessity. It had also done so more

<sup>3</sup> See E/1998/94 and Add.1.

than once with conventions already in force, as in the case of the somewhat controversial article in the 1969 Vienna Convention referring to methods of interpretation, holding that article 31 did reflect customary international law—a view which would have been widely contested in 1969 but had become less controversial with the passing of time.

20. The question whether those instances of the Court's reliance on the product of the Commission's work constituted *opinio juris* of the international community as a whole was hard to answer. It was generally agreed that the Court's holdings on matters of customary international law carried great authority. He would not himself equate them with *opinio juris*, or claim that they were necessarily and invariably binding on all States. Some of its holdings had certainly been the object of vigorous dissent in the Court and rejected by some States, either expressly or in their practice. The status in international law of such holdings was open to debate. It was clear that the judgment of the Court in its *dispositif* was binding on the parties to the case, but that was not to say that holdings of the Court bound the international community as a whole.

21. Mr. Sreenivasa RAO asked whether other cases had arisen in which a country did not see fit to comply with an order indicating provisional measures, and whether the Court had ever responded by holding it in contempt.

22. Mr. SCHWEBEL (President of the International Court of Justice) said that controversy reigned as to whether provisional measures were binding. The conclusion to be drawn from the Statute of ICJ was that they were not. Provisional measures were measures that ought to be taken to preserve the rights of the parties. The Security Council was to be notified and could consider making recommendations or taking measures to give effect to a judgment. However, it was not bound to give effect even to judgments of the Court, still less to its orders indicating provisional measures. Nonetheless, many judges of the Court and scholars maintained that provisional measures ought to be binding, because otherwise the ultimate judgment of the Court and the integrity of the judicial process might be subverted. Thus, "the jury was still out" on that question.

23. In the history of the Court, there had perhaps been more cases in which a State had not complied with orders indicating provisional measures than cases in which it had. To the best of his recollection, the Court had never pursued the matter either at the instance of a party or *proprio motu*. Nor was there any provision for contempt citations.

24. However, that was not necessarily the end of the matter. It was possible that when the Court came to consider the merits of a case, or possibly even the jurisdiction, the outlook of some of its members might be influenced by a party's failure to comply with provisional measures. But if that was so, it was just one of the many subliminal factors that might colour the outlook of individual members of the Court. There might at times be reference to such failures, in Court deliberations or among judges outside deliberations, but he could not recall any case in which the Court, in a subsequent judgment, had referred to the matter. One possible exception might be

the judgment in the case concerning *United States Diplomatic and Consular Staff in Tehran*. He could not offhand recall the Court having taken account of the fact that the hostages had not been released in spite of its order, but his memory might be at fault on that point.

25. Mr. BROWNLIE asked whether the President would care to comment on the effect on the Court's work, as the principal judicial organ of the United Nations, of the financial stringencies imposed within the system as a whole.

26. Mr. SCHWEBEL (President of the International Court of Justice) said that the acute financial difficulties of the United Nations had indeed had an impact on the Court's operations. In 1981 the Court had had just one case on its docket; it currently had 19. After some years of sparse activity in which the Registry had been relatively untested, since 1984 the business of the Court had been mounting, and resources were greatly strained. There had been some expansion of staff and financial resources over the past 15 years, but it had by no means kept pace with the increase in the work. The recent submission of 10 cases by Yugoslavia had stretched the Registry's staff almost to breaking point.

27. The Court had only four permanent translators and brought in temporary translators, at great cost, for particular cases. It had for many years tried to persuade the Secretariat that it would be more economical to expand the number of permanent translators. The Registrar of the Court would soon be taking up that matter with ACABQ, which he hoped would give it favourable consideration for inclusion in the budget of the next biennium.

28. The Court's legal staff was very small; six lawyers handled all matters it required; judges did not have clerks or research assistants and those six lawyers were not in a position to act as such. If the Court required a memorandum on how it had applied a particular rule, the Registry would produce it competently and rapidly, but it was not available to advise on the merits of cases. Judges did all their own work, which he felt was essentially positive: they had not been elected in order to be heavily reliant on young, unelected clerks, which was the case in some national systems. There was, however, room for a middle way. The judges and staff of the International Tribunal for the Former Yugoslavia all had clerks, as did those of the Court of First Instance of the European Communities and the Iran-United States Claims Tribunal, as well as many national jurisdictions. A pool of short-term research assistants chosen by the Registry in accordance with its international standards of recruitment, would speed up the Court's processes, provide valuable training in international law for young lawyers from around the world and contribute modestly to building up an informed constituency for the Court. That idea had been suggested to the United Nations, but the funding had not actually been requested in view of more urgent needs, such as translators. Indeed, the Court came to a halt if translations were not completed, and it had repeatedly come perilously close to that point in recent years. The situation was better than it had been three or four years ago, but there was much room for improvement.

29. Mr. HAFNER asked first, in connection with the point raised by Mr. Brownlie, whether the Court's long docket—19 cases—would have an influence on the duration of cases. Many complaints had been made, unjustifiably he was certain, about the Court's lengthy procedure in dealing with cases. He wondered about the Court's present capacity to handle cases and whether it had considered using other structures, such as the chambers, to alleviate that situation.

30. Secondly, as the principal judicial organ of the United Nations, ICJ was also regarded as the principal judicial organ of the world community, reflecting a universal system of international law. Did the existence of new tribunals and dispute settlement mechanisms, such as the International Tribunal for the Law of the Sea and the Court of Conciliation and Arbitration of OSCE, threaten the unity of international law? Would contacts between ICJ and those new tribunals be desirable in preserving that unity?

31. Thirdly, although the Court's docket essentially concerned boundary issues, in a few cases it was entering the field of what might be called matters of high policy, such as the use of force. He wondered whether the treatment of such cases would have an impact on the willingness of States to accept the Court's jurisdiction, for example by acceding to Article 36, paragraph 6, of the Statute of ICJ.

32. Mr. SCHWEBEL (President of the International Court of Justice) said that the extent of the docket would certainly affect the duration of the procedure. Cases were handled in the order in which they were filed, but the determining factor was whether a case was ready for hearing. The Court had heard the *Kasikili/Sedudu Island* case relatively rapidly, but because the case had been brought pursuant to special agreements, there had been no intervening incidental stages, such as a jurisdictional dispute, and no provisional measures. Also, the pleadings had been ready, the translations fairly advanced and a time slot had been available.

33. There was certainly a limit to the number of cases with which the Court could deal under its current methods. He agreed with Mr. Hafner that the criticism of the Court's slowness was on the whole unjustified. It was nonetheless fair to say that the work methods had been designed for an era of "low intensity" usage, something that was reflected not only in the very small size of the Registry but in the latitude accorded to the parties, who were traditionally permitted to submit written or oral pleadings of any length they wished. That situation could not continue if the work was to be done with reasonable dispatch. Steps had been taken to accelerate the procedure by impressing on the parties that pleadings should be as succinct as possible and exhibits, which required translation, attached only insofar as they were necessary. Thus the Court's ability to move more rapidly would turn substantially on the cooperation of the parties.

34. The essential solution did not lie with chambers. In the four instances where that solution had been chosen, in which five judges of the Court had been working on a particular case, it had not been easy for the whole court to function effectively. The case concerning the *Delimita-*

*tion of the Maritime Boundary in the Gulf of Maine Area* had been in the midst of oral argument when the case concerning the *Military and Paramilitary Activities in and against Nicaragua* had been brought; argument had been suspended and a large number of counsel had waited in The Hague, at considerable expense to the parties, while the Court had dealt with provisional measures in the latter case. The chambers solution had some potential, but it also raised the problems of coordination with the work schedule of the Court as a whole and of ensuring an adequate measure of distribution in the composition of a chamber, which was a delicate issue that had wider reverberations in the Court. Some believed that, with the increase in the Court's business and its attainment of universality in its clientele, it should be bigger in size. In his view, that would be a grave mistake. The Court was already a very ponderous institution and expansion would make it even more so, unless it regularly broke into chambers as did the European Court of Human Rights. That was not desirable for a universal court and he wondered whether the Court's authority would be maintained if work were regularly done by chambers rather than the full court.

35. As to Mr. Hafner's second question, the proliferation of tribunals should not necessarily threaten the unity of international law. It was in some respects quite desirable because it showed that the international community was willing to back its international obligations with authoritative means for settling disputes arising in the course of the performance of those obligations. In addition, various types of cases, for example trade disputes, could not be handled by a court of general jurisdiction and competence such as ICJ. The wisdom of establishing the International Tribunal for the Law of the Sea might be debated, but the Tribunal existed and should therefore be developed into a vigorous and productive court. The number of international disputes arising was sufficient to keep more than one court busy. He hoped there would be frequent resort to the Tribunal.

36. It was not infrequent for the decisions of various international courts and arbitral tribunals to reflect those of other courts. That was the essential way forward, as the practical possibilities of introducing a uniform hierarchical system of international courts were virtually nil. Theoretically ICJ should be the supreme arbiter, but as there was no sign of that happening, the world must be dealt with as it was. It would be juvenile for one court to try to "trump" the decisions of another; that was sometimes seen, but he hoped it would not become characteristic on the international scene.

37. Again, he did not know whether "high policy" cases were likely to have an adverse impact on the Court's jurisdiction, which had not fared well even in the decades when it had not heard such cases. A markedly higher proportion of States had adhered to the jurisdiction of PCIJ than adhered to ICJ at the current time or at any point in its history. Only one of the five permanent members of the Security Council adhered to the Court's compulsory jurisdiction under the optional clause; two had withdrawn. It might be said the two had withdrawn because high policy disputes had been brought before the Court, which had responded in ways not pleasing to them, and that the more

that happened, the less jurisdiction the Court would have. On the other hand, the involvement of the Court in such cases might enhance its attraction, if not to those States, then to others. Since those cases had been brought in the 1970s and 1980s the Court's docket had grown rather than shrunk. In any event, it was not the Court's role to speculate about its caseload; it had simply to get on with its work.

38. The CHAIRMAN thanked Judge Schwebel for an extremely interesting statement and for his very useful information about the Court's complex work. The fact that the Commission and Court both worked in the field of international law, provided a point of departure for fruitful relations between them. The importance of the Court's jurisprudence for the Commission's work could not be overestimated, and he hoped the Commission's work was also useful to the Court.

**Reservations to treaties<sup>4</sup> (continued) (A/CN.4/491 and Add.1-6,<sup>5</sup> A/CN.4/496, sect. F, A/CN.4/499 and A/CN.4/478/Rev.1,<sup>6</sup> A/CN.4/L.575)**

[Agenda item 5]

THIRD AND FOURTH REPORTS OF THE SPECIAL RAPPOREUR  
(continued)

39. Mr. PELLET (Special Rapporteur), referring to Judge Schwebel's visit, said that it was gratifying to see that the excellent tradition inaugurated in 1997 was continuing and that the links between the Court, as the principal judicial organ of the United Nations, and the General Assembly, as the principal subsidiary organ in charge of the progressive development and codification of international law, would be reinforced.

GUIDELINE 1.1.9<sup>7</sup>

40. Draft guideline 1.1.9 ("Reservations" to bilateral treaties), was largely an American one in the sense that reservations to bilateral treaties were something of a specialty of the United States. To his knowledge, that country had been the first to make or claim to have made a reservation to a bilateral treaty, perhaps as early as 1778, but certainly in 1795, when a "reservation" had been made to

the Jay Treaty.<sup>8</sup> Since then, the United States had been the main source of examples of reservations to bilateral treaties. According to credible statistics, it had formulated a good hundred in the past two centuries. The United States was not alone in so doing, but curiously most of the other examples that could be cited came from contracting parties in their relations with the United States.

41. One explanation for the practice was the American political system and the role of the Senate in ratifying treaties: American "reservations" were always imposed by the Senate, which made it a condition for its consent to ratification. It was not an entirely convincing explanation, at any rate from the legal point of view. To take another example, since 1875 the French Parliament had also had to authorize the ratification of most treaties and agreements, yet he had only found one example of an attempt by the French Parliament to try and force the Executive to set certain conditions for France's conclusion of a bilateral treaty. It was the Washington Agreement<sup>9</sup> concluded with the United States on the reimbursement of the debt contracted by France during the First World War. The attempt to introduce conditions had failed,<sup>10</sup> for the United States had refused the reservation,<sup>11</sup> and the Agreement had therefore entered into force in its initial version. It was an interesting situation: France had wanted to make a reservation, the United States had been opposed to it, and ultimately the Agreement went on to bind the two countries without the reservation. Two other outcomes could have been possible. The Agreement might not have entered into force because France could have refused to ratify it, assuming that it had had the political capacity to do so, which he doubted. That had been the fate of the Convention between Great Britain and the United States of America, in 1900,<sup>12</sup> Great Britain having rejected the reservation made by the American Senate.<sup>13</sup> Alternatively, the United States could have accepted the French reservation, and then the modified treaty would have entered into force. What those three situations showed was that the treaty did not enter into force, whether with or without reservation, unless the two parties were in agreement on the totality of the text. That was in contradiction with the very idea of a reservation. By its very nature, a reservation constituted a unilateral excep-

<sup>8</sup> Treaty of Amity, Commerce and Navigation between the United States of America and Great Britain (London, 19 November 1794), *Treaties and Other International Acts of the United States of America* (Washington, D.C., U.S. Government Printing Office, 1931), vol. 2, document No. 16, p. 245. For the reservation, see page 271.

<sup>9</sup> Agreement regarding the Consolidation of the Debt of France to the United States (Washington, 29 April 1926), League of Nations, *Treaty Series*, vol. C, p. 27.

<sup>10</sup> See A.C. Kiss, *Répertoire de la pratique française en matière de droit international public* (Paris, C.N.R.S., 1962), vol. I, pp. 284-285.

<sup>11</sup> See C. Rousseau, *Droit international public*, vol. I, *Introduction et sources* (Paris, Sirey, 1970), p. 120.

<sup>12</sup> Convention between Great Britain and the United States of America, supplementary to the Convention of April 19, 1850, relative to the Establishment of a Communication by Ship-Canal between the Atlantic and Pacific Oceans (Washington, 5 February 1900), *British and Foreign State Papers, 1900-1901*, vol. XCIV (London, H.M. Stationery Office, 1904), p. 468.

<sup>13</sup> *Ibid.*, pp. 473 et seq. The convention was not ratified and was replaced by the Treaty between Great Britain and the United States, relative to the Establishment of a Communication by Ship Canal between the Atlantic and Pacific Oceans (Washington, 18 November 1901), *ibid.*, p. 46.

<sup>4</sup> For the text of the draft guidelines provisionally adopted by the Commission on first reading at its fiftieth session, see *Yearbook ... 1998*, vol. II (Part Two), p. 99, chap. IX, sect. C.

<sup>5</sup> See *Yearbook ... 1998*, vol. II (Part One).

<sup>6</sup> Reproduced in *Yearbook ... 1999*, vol. II (Part One).

<sup>7</sup> The draft guideline read:

"A unilateral statement formulated by a State or an international organization after signature but prior to entry into force of a bilateral treaty, by which that State or that organization purports to obtain from the other party a modification of the provisions of the treaty in respect of which it is subordinating the expression of its final consent to be bound, does not constitute a reservation, however phrased or named.

"The express acceptance of the content of that statement by the other party takes the form of an amendment to the treaty, and both parties are bound by the new text once they have expressed their final consent to be bound."

tion to a treaty whose text was not modified. A reservation was not an amendment to a treaty, but an exception to an existing treaty. As clearly stated in the definition of reservations in the 1969 Vienna Convention, which had been reproduced in draft guideline 1.1 (Definition of reservations), a reservation was above all a unilateral statement. That statement did not modify the treaty, and did not even purport to do so: it merely modified the legal effects of some of the provisions of the treaty for the State that made the reservation. But the treaty itself remained unchanged.

42. In other words, reservations to multilateral treaties had a “subjective” effect: they were at the origin of a modification of the legal effect of the provisions to which they referred, and therefore with regard to the party formulating them, whereas reservations to bilateral treaties had an objective effect. If they were accepted, they could and must enter into force and they modified the treaty itself.

43. It emerged clearly from those essential differences that “reservations” to bilateral treaties were not reservations within the usual meaning of the term in international law as defined in draft guideline 1.1. That conclusion, which could be deduced very simply from practice, was contrary neither to the text of the Vienna Conventions nor to their *travaux préparatoires*.

44. The 1969 Vienna Convention had taken little interest in bilateral treaties as such. The word appeared only once, in article 60, paragraph 1, on the consequences of a material breach of a bilateral treaty. As for the provisions on reservations (arts. 19-23) of the 1969 and 1986 Vienna Conventions, they evoked treaties during whose negotiation a limited number of States had participated, but it would be very risky and artificial to include bilateral treaties therein, especially as the special rapporteurs on the law of treaties had at first contemplated the specific problem of reservations to bilateral treaties, but eventually decided against asking the Commission to include the question in its draft, because, as stated in the reports of the Commission to the General Assembly on the work of its fourteenth session (1962) and the second part of its seventeenth session and of its eighteenth session (1966), “a reservation to a bilateral treaty presents no problem, because it amounts to a new proposal reopening the negotiations between the two States concerning the terms of the treaty. If they arrive at an agreement—either adopting or rejecting the reservation—the treaty will be concluded; if not, it will fall to the ground”.<sup>14</sup>

45. As a result, the Commission had entitled the section of its draft on reservations “Reservations to multilateral treaties”. That reference to multilateral treaties had disappeared at the United Nations Conference on the Law of Treaties following a Hungarian proposal<sup>15</sup> which had given rise to a rather curious and interesting exchange of views between the President of the Conference, Roberto

Ago, and the Chairman of the Drafting Committee, Kamil Yasseen,<sup>16</sup> which was reproduced in paragraph 428 of the third report (A/CN.4/491 and Add.1-6) and from which it was very difficult to draw firm conclusions. Both of those jurists had considered that bilateral treaties could not be the subject of reservations in the strict sense. However, that had not been the unanimous opinion of the participants in the Conference. The *travaux préparatoires* of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations<sup>17</sup> had not dispelled the ambiguity. Initially, the Commission had contemplated the possibility of reservations to bilateral treaties between two international organizations. That possibility had later been abandoned after a rather confused discussion in 1981. To some extent, it was perhaps the 1978 Vienna Convention which had given the clearest indication, because the sole provision it contained on reservations, namely article 20, was applicable only to multilateral treaties. But, once again, that did not necessarily mean reservations to bilateral treaties could not exist.

46. Nevertheless, he firmly believed that there could be no reservations to bilateral treaties because, logically, the very institution of reservations was incompatible with bilateralism in spirit, functioning and legal regime. For a State or international organization to be able to make a reservation to a treaty, the treaty must exist and must be in force or be in a position to enter into force independently of the State making the reservation. That was possible once three States involved were, but not if there were only two—something that was mathematically nonsensical. Such was the position of virtually all States which had replied to the questionnaires on reservations to treaties sent through the Secretariat to States and international organizations at the forty-seventh session of the Commission, in 1995.<sup>18</sup> Some States had simply reported that they did not make reservations to bilateral treaties, while others explained why. For example, Germany, Italy and the United Kingdom had indicated in similar language that, in actual fact, a reservation to a bilateral treaty constituted an offer to renegotiate. That was consistent with the opinion of the Commission in 1962 and 1966, the position of Ago and Yasseen in 1969, and also the view of the vast majority of legal experts who had addressed the question, of which he had given a number of examples in paragraphs 468 et seq. of his third report. Those experts included a number of eminent American internationalists. It was revealing that the United States itself, although the champion in making reservations to bilateral treaties, had never pressed for the concept to be enshrined at international level, notably during the negotiations of the Vienna Conventions. In his opinion, it was a sign that the United States itself considered that, in the final analysis, such

<sup>16</sup> *Ibid.*, 11th plenary meeting, p. 37, paras. 19-24.

<sup>17</sup> See *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, Vienna, 18 February-21 March 1986*, vol. I, *Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.94.V.5); and vol. II, *Documents of the Conference* (*ibid.*).

<sup>18</sup> The questionnaires are reproduced as annexes II and III to the second report of the Special Rapporteur (*Yearbook ... 1996*, vol. II (Part One), document A/CN.4/477 and Add.1 and A/CN.4/478).

<sup>14</sup> *Yearbook ... 1962*, vol. II, pp. 176-177, document A/5209, and *Yearbook ... 1966*, vol. II, p. 203, document A/6309/Rev.1 (part II).

<sup>15</sup> See *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Vienna, 9 April-22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), 10th plenary meeting, p. 28, para. 23.

“reservations” were actually based on a logic different from that of real reservations to treaties, a contractual logic, whereas reservations were an element of unilateralism which burst into the law of treaties.

47. The practice of the United States and the small number of other States which had made use of the same technique in their relations with the United States was not free of a certain terminological ambiguity. The conditions set by the United States Senate for the ratification of both multilateral and bilateral treaties had various names, including “reservations”, “amendments”, “declarations”, “understandings” and “conditions”, but the distinction between those terms was not very clear. While “amendments” and “reservations” were more pertinent to the present subject matter, “declarations” and “understandings” were more a matter for interpretative declarations.

48. Perhaps members had comments to make at the current time on his introductory remarks and on draft guideline 1.1.9.

49. Mr. KATEKA said that he had in the past expressed doubts about the advisability of dealing with reservations to bilateral treaties. He continued to believe that bilateral treaties could not and should not be subject to unilateral modification, regardless of the terminology used to describe the change. The Special Rapporteur was right to conclude that the Vienna regime was not applicable to reservations to bilateral treaties.

50. If it was true, as noted in paragraph 437 of the third report, that the practice of unilateral statements which some States called “reservations” in respect of bilateral treaties was geographically circumscribed, then why universalize the practice? Paragraph 432 said that the practice would provide useful safeguards with respect to undertakings signed too hastily. Was that really the case? Should uncertainty be introduced in treaty relations just because some official had negotiated a less than satisfactory bilateral treaty? The implication of reservations to bilateral treaties was that they could introduce bad faith in bilateral relations. For example, a provision of the Constitution of the United Republic of Tanzania empowered Parliament to ratify all treaties and agreements to which the United Republic of Tanzania was party and the provisions of which required such ratification. If the Tanzanian Parliament were to ratify a bilateral treaty which the Government had signed with State X and State X were then to submit an amendment under the guise of a reservation, was the Tanzanian Government expected to return to Parliament to say that State X had forgotten to include a provision in the treaty and that the treaty had to be renegotiated and resubmitted for ratification? That might give the impression of lack of seriousness in the treatment of one sovereign State by another. It would be better if State X sorted out its internal mechanisms and presented Tanzania with a clear-cut position prior to the ratification process. The impression might be created that one was dealing with two competing arms of the Government of State X. In that connection, he would point out that the forms of government, whether presidential or parliamentary, were irrelevant in the treaty-making process. Otherwise, article 27 of the 1969 Vienna Convention would be rendered meaningless.

51. In paragraph 461 of the third report, the Special Rapporteur expressed doubt as to whether a newly independent State could formulate a reservation to a bilateral treaty because of the principle of rupture. Personally, although opposed to the idea of reservations to bilateral treaties, he was of the view that, if a predecessor State could formulate a reservation upon notification of succession, a newly independent State could do the same. That would be in keeping with equality of treatment. In fact, it was because of such pitfalls that some newly independent countries had adopted innovative and radical doctrines of State succession in the 1960s.

52. Paragraph 480 of the third report referred to the practice of only one State. He would have preferred a more general discussion of State practice.

53. If it would help to lay the ghost of bilateral treaties to rest, he was prepared to endorse draft guideline 1.1.9, despite his misgivings about reservations to bilateral treaties.

54. Mr. BROWNLIE said that the difficulty he had with Mr. Kateka’s warnings was the sort of problem he had with those who wanted to delete references to general declarations of policy. At issue was a guide to State practice, and it was useful to know what was the wrong side of the line, so to speak. Hence, although reservations to bilateral treaties were a contradiction in terms, for present purposes he preferred a useful inclusion of problems rather than exclusion of guidelines which actually indicated what existed.

55. He did not object to the general conclusion that such reservations were counterproposals or amendments and that they had to be treated legally as such. The problem was with polarity. He sought assurance from the Special Rapporteur that the appropriate polarity was not between bilateral treaties and multilateral treaties, but between bilateral and plurilateral treaties on the one hand and multilateral treaties on the other. The particular characteristic of multilateral treaties was not the number of parties, but the treaties’ nature: they were nearly always standard-setting instruments, whereas many plurilateral agreements were essentially the same as bilateral treaties.

56. Mr. ROSENSTOCK said that the Special Rapporteur’s analysis of reservations to bilateral treaties was perceptive and accurate. Perhaps Governments which had a parliamentary system capable of disagreeing with the Executive would eventually have to deal with such issues. In the event of a disagreement, there would be some response by the parliamentary body which would lead to a situation in which the bilateral treaty had to some extent to be renegotiated. That was a legitimate problem, and he saw no difficulty if someone wanted to use the term “reservation” in that context. It just was not a reservation as the term was used in the Commission’s present exercise. Hence, it would be necessary to specify that “reservation” was used within the meaning of that term as found in the 1969 Vienna Convention. That would solve the problem and recognize that the term was employed in a different sense in a different context and not in a completely absurd manner. As for plurilateral circumstances, it seemed to him that there were differences between a reservation to a plurilateral treaty and a multilateral treaty, which was

found in the Convention but which did not necessarily affect the question as to whether or not it was meaningful to speak of reservation in a bilateral context. There might be different rules as to what the consequences of the reservation were, but its character as a reservation was the same, whether in a plurilateral or a multilateral treaty. That was not true in the case of a bilateral treaty, and it therefore had to be said either that the term had been wrongly used by, for example, the United States and others, or more appropriately, that it was used differently from the way it was employed in the draft guideline 1.1.9 or in the Vienna Conventions. It was a simple approach to finding the right answer and was consistent with the position of Ago and Yasseen and with the previous activities of the Commission.

*The meeting rose at 12.55 p.m.*

## 2586th MEETING

*Friday, 11 June 1999, at 10.05 a.m.*

*Chairman:* Mr. Zdzislaw GALICKI

*Present:* Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Economides, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rosenstock, Mr. Tomka, Mr. Yamada.

**Reservations to treaties<sup>1</sup> (continued) (A/CN.4/491 and Add.1-6,<sup>2</sup> A/CN.4/496, sect. F, A/CN.4/499 and A/CN.4/478/Rev.1,<sup>3</sup> A/CN.4/L.575)**

[Agenda item 5]

THIRD AND FOURTH REPORTS OF THE SPECIAL RAPPORTEUR  
(concluded)

GUIDELINE 1.1.9 (concluded)

1. Mr. PELLET (Special Rapporteur) said that, although he had read out only the first paragraph of draft guideline 1.1.9 ("Reservations" to bilateral treaties) at the preceding meeting, the Commission was being asked to consider both paragraphs of the provision.

<sup>1</sup> For the text of the draft guidelines provisionally adopted by the Commission on first reading at its fiftieth session, see *Yearbook ... 1998*, vol. II (Part Two), p. 99, chap. IX, sect. C.

<sup>2</sup> See *Yearbook ... 1998*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook ... 1999*, vol. II (Part One).

2. Mr. HAFNER said that he shared the Special Rapporteur's opinion on the two paragraphs of draft guideline 1.1.9. He did not, however, interpret Mr. Brownlie's observations (2585th meeting) in the same way as Mr. Rosenstock. In his view, what Mr. Brownlie had meant was that the problem lay not in "reservations" to bilateral treaties, but in the definition of a bilateral treaty. It could happen that certain multilateral treaties were in reality bilateral inasmuch as they established bilateral relations. Jurists had attempted to draw a distinction in legal literature by using the terms "bipartite" and "multipartite" instead of the terms "bilateral" and "multilateral" to reflect such distinctions.

3. For example, the peace treaties concluded at the end of the First World War (the treaties of Versailles, Trianon, Sèvres and Saint-Germain-en-Laye) were clearly multilateral treaties, but they established bilateral relations. He submitted that the idea of Germany being authorized to enter a reservation to the Treaty of Versailles or Austria to the Peace Treaty of Saint-Germain-en-Laye was inconceivable. It could, of course, be argued that such a step would be incompatible with the object and purpose of the treaty and that a reservation would be inadmissible on that ground, but the question was in fact whether the treaties in question were not, in reality, bilateral treaties, in which case reservations would be excluded. The same applied to the State Treaty for the Re-establishment of an Independent and Democratic Austria, which also established a certain category of bilateral relations. Another significant example was the bilateral treaty concluded between Austria and Germany on economic problems and transboundary water management. The European Economic Community had seen fit to associate itself with the treaty, at which point it had ceased to be bilateral and had become trilateral or multilateral.<sup>4</sup> He wished to know whether a treaty of that kind, although it involved more than two parties, could still be viewed as multilateral for the purpose of reservations.

4. Mr. LUKASHUK said that he broadly endorsed draft guideline 1.1.9 and appreciated the Special Rapporteur's analysis of State practice in the area of reservations to bilateral treaties. He stressed the importance of the issue of "reservations" to bilateral treaties which had not been addressed either by the Commission or by the 1969 Vienna Convention. Strictly speaking, of course, there was no such thing as a "reservation" to a bilateral treaty, but such reservations nevertheless existed, a fact that had thus far been observed only in the writings of jurists. In practice, new situations might develop, particularly in the light of the growing trend towards parliamentary control over the foreign policy of Governments. The entering of reservations to treaties was an instrument of parliamentary control. He referred in that connection to the fact that the Russian Parliament had attempted to enter reservations to bilateral treaties. It had been necessary to explain to the deputies that reservations were inadmissible in such cases, but the Russian deputies had objected that the United States Senate had made reservations. It had then

<sup>4</sup> Agreement between the Federal Republic of Germany and the European Economic Community, on the one hand, and the Republic of Austria, on the other, on cooperation on management of water resources in the Danube Basin (Regensburg, 1 December 1987), *Official Journal of the European Communities*, No. L 90, vol. 33 (5 April 1990), p. 20.