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Summary record of the 2658th meeting

Topic:
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Extract from the Yearbook of the International Law Commission:-
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62. Mr. TOMKA supported the Chairman's suggestion. The sentence might be worded: "Owing to lack of time, the Drafting Committee was not able to consider the draft preamble and articles". It was also necessary to clarify the status of the annex. There was no clear connection between it and the report, except for the statement in footnote 6. At the least, footnote 9 should be expanded to remind the reader of the status of the annex. As for the draft preamble, he would reiterate his view that the last three paragraphs were inappropriate. They belonged in a draft resolution of the General Assembly and it was not for the Commission to take on the task of drafting such a resolution. The proposal that the title should be placed after the draft preamble was quite acceptable. The draft articles were not a finished product adopted by the Commission, but a text proposed by the Special Rapporteur. Any criticism would be for him to deal with.

63. The CHAIRMAN raised the question of what the annex was annexed to. Its status might be clearer if, following the example of the reports on diplomatic protection and unilateral acts of States, the annex formed a footnote.

64. Mr. Sreenivasa RAO (Special Rapporteur) endorsed that suggestion. The appropriate place would be in footnote 6, which would also make it clear that the draft articles were his responsibility alone.

65. The CHAIRMAN said that the annex was too long for a footnote. The format, however, could be discussed later.

66. Mr. HAFNER supported the view that the status of the annex should be more clearly signposted in a footnote. The suggestion that the title should be moved, however, was more problematic. If it was moved, there would effectively be no preamble and States would justifiably view the existing text as a draft resolution of the General Assembly.

67. Mr. ECONOMIDES said that it would be a pity to lose the positive ideas contained in the draft preamble. He therefore suggested that the phrase "*The General Assembly*" and the "*Adopts*" and "*Invites*" changes should be deleted. What was left would be an appropriate preamble.

68. The CHAIRMAN suggested that, regardless of the status of the annex, the whole text should be referred to the Drafting Committee, which could make the necessary revisions.

69. Mr. ROSENSTOCK said he concurred. Mr. Hafner was correct in saying that the existing text did not constitute the preamble to a convention, but further discussion within the Commission was unnecessary. The text proposed by the Special Rapporteur had been referred to the Drafting Committee and there would be time for the Commission to reach a decision when it went through the final text paragraph by paragraph.

70. Mr. PELLET said that the Commission should not risk reopening the whole discussion. What States wished to see was the text proposed by the Special Rapporteur, which, until the Commission had endorsed it, remained his responsibility alone. A fuller explanation than that suggested by Mr. Tomka should be added to the end of paragraph 54, along the following lines: "However, for the

convenience of States, the Commission annexes to the present chapter the text of the draft preamble and revised articles as proposed by the Special Rapporteur".

71. Mr. BROWNLIE said that it was obviously extremely helpful to have the draft preamble and revised articles available for reference, preferably in an annex, although he endorsed what other members had said about the status of the annex. He trusted that any inconsistencies with other chapters of the report would be tidied up.

Paragraph 54, as amended, was adopted.

Section B, as amended, was adopted.

Chapter VIII, as amended, was adopted.

The meeting rose at 6 p.m.

2658th MEETING

Tuesday, 15 August 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

Cooperation with other bodies (*concluded*)*

[Agenda item 9]

VISIT BY THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

1. The CHAIRMAN extended a welcome to Mr. Guillaume, President of the International Court of Justice, whose visit reflected the close ties between ICJ and the Commission.

2. Mr. GUILLAUME (President of the International Court of Justice) said that he wished first to thank the Chairman for his welcome and, above all, for himself and

* Resumed from the 2655th meeting.

on behalf of the Court, for the invitation to speak to the Commission for the customary exchange of views.

3. Indeed, there was a long tradition of cooperation between ICJ and the Commission. The two bodies were united by personal ties, first because a number of former members of the Commission were now judges at the Court and second because some current members of the Commission sometimes appeared as counsel at the Court. However, above and beyond that, they were united by a common aim—the development of international law, by methods that were admittedly different, since the Court had to decide on particular disputes or to respond to requests for advisory opinions on specific points, whereas the Commission had a much wider role of codification and progressive development of international law. Both functions were obviously complementary in the headway being made in international law. The Court and the Commission had an influence on one another, as had occurred on a number of occasions, for instance in the law of the sea or the law of treaties.

4. It would doubtless be worthwhile for the Commission to learn what the Court was doing at the current time, what cases were on the docket, what the short- and medium-term problems were, and also, more generally, what problems arose because of the phenomenon Mr. Hafner had recently discussed in an interesting study entitled “Risks ensuing from fragmentation of international law”,¹ namely, the fragmentation of international law and international justice, a subject of common interest.

5. At the current time, the Court had 23 cases on the docket, an absolute record in the history of international justice, cases in which—a very important fact—all parts of the world, all legal systems and both industrialized and developing countries were represented: 5 cases between African States, 2 Asian States, 10 European States, 1 Latin American State and 5 cases that crossed the continents. The purpose varied considerably. The Court was seized with traditional cases, for example, territorial disputes between neighbouring countries that wanted to establish a common border or determine their sovereignty over certain areas. That was the bulk of the matter in four cases: *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*; *Land and Maritime Boundary between Cameroon and Nigeria*; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*; and *Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea*. The Court was obviously the body to deal with those matters, for it was the type of case which, very often, was difficult to resolve by negotiation, as stated in the old arbitral treaties, for reasons concerning the honour of nations or for political or diplomatic considerations and in which the judge could render real service.

6. The classic type of case also included those in which a State denounced the treatment suffered by one or more of its nationals abroad. The Court was now seized with two cases of that kind: the *LaGrand* case and the *Diallo* case.

7. It was seized with a third kind of case, those cases linked to events brought to the attention of United Nations political bodies, namely the General Assembly or the

Security Council: *Lockerbie*; *Oil Platforms*, a case in which the Islamic Republic of Iran complained of the destruction of oil platforms by the United States of America during the first Gulf war in 1987 and 1988; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, two cases in which Bosnia and Herzegovina and Croatia had, in two separate applications, called for the condemnation of Yugoslavia for a breach of the Convention; *Legality of Use of Force*, cases between Yugoslavia and 10 States members of NATO challenging the legality of their action in Kosovo; and lastly, the *Armed Activities on the Territory of the Congo* cases, in which the Democratic Republic of the Congo claimed to have been the victim of armed aggression by Burundi, Rwanda and Uganda. Clearly, the Court had before it many highly varied cases, often complicated by the fact that the respondents introduced preliminary objections to jurisdiction or inadmissibility or even counter-claims, a rarely-used institution in the Court's practice but one which was starting to gain ground, not to mention requests for indications of provisional measures from applicants and respondents.

8. Over the past year, in other words since 1 August 1999, the Court had been engaged in a number of activities.

9. In December 1999, the Court had settled a dispute between Botswana and Namibia in the *Kasikili/Sedudu Island* case concerning sovereignty over the island by ruling that the island formed part of the territory of Botswana yet specifying that in the two channels around the island the nationals of both States and vessels flying their flag should receive national treatment on an equal footing. It had completed its consideration of the *Aerial Incident of 10 August 1999* case, which Pakistan had submitted to the Court in September 1999 further to the destruction of a Pakistani aircraft by Indian fighter planes, in Indian territory according to India, in Pakistani territory according to Pakistan. Since India had raised an objection to jurisdiction, the Court had settled the case rapidly and said that it had not had jurisdiction, in view of India's reservations to its declaration of acceptance of the compulsory jurisdiction of the Court, and had at the same time reminded the parties of their obligation to settle their disputes by peaceful means, and in particular the dispute which grew from the aerial incident.

10. The Court had also ruled on a request for indications of provisional measures filed by the Democratic Republic of the Congo against Uganda. In an order of 1 July 2000 it indicated a number of measures to be taken by both parties in that regard. The Court had also issued about a dozen orders, relating essentially to procedural issues, and more particularly an order authorizing Equatorial Guinea, which had a legal interest to do so, to participate in the *Land and Maritime Boundary between Cameroon and Nigeria* case. After five weeks of hearings held in May and June 2000, it had started its deliberations on the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case and would probably issue its judgment by the end of the year. In its autumn schedule it had included hearings in the *LaGrand* case. Finally, the Court had succeeded in dealing with cases ready to be adjudicated, but the situation would become much more

¹ For the study see *Yearbook ... 2000*, vol. II (Part Two), annex.

difficult in the first half of 2001, when a number of cases would be ready to be judged at the same time.

11. The Court would then encounter many problems, first, budgetary problems. Its annual budget was slightly higher than US\$ 10 million for a Registry of 62 members, whereas the International Tribunal for the Former Yugoslavia had an annual budget of close on US\$ 100 million and employed 1,000 agents. Admittedly, the functions of the two courts were not quite identical, as the Tribunal, for example, needed on-the-spot investigators. Nevertheless, the Court would be needing more human and financial resources, both for the Registry and also for itself, since it would be good for the judges to have, like those in most international courts, assistants to help them in their task. The Court hoped that its voice would be heard especially as the General Assembly itself had said, in adopting the Court's 1999 budget, that the next one could be increased.

12. Obviously, problems arose regarding the organization of work, both for the parties and for the Court. It was important to limit the volume of the dossiers, which was often excessive, and the United States and Germany had already decided jointly to submit the *LaGrand* case against each other in a memorial and counter-memorial and to cut the number of hearings down to five meetings, two for each of the parties and half a meeting each to respond. Such measures were reasonable as they allowed States to express themselves without unduly burdening the Court with documents and pleadings. For its part, the Court itself had to take action. In particular, it had decided that, in principle, in matters of jurisdiction and admissibility it would cut down on judges' notes, in other words, it would move directly after a phase of further reflection from hearings to deliberations. The list of measures was doubtless not an exhaustive one.

13. Over the longer term, the problem ahead was that of the fragmentation of international law and of the multiplication of international courts, with repercussions for the ICJ. The fact was that special international courts had increased in number and that, alongside the Court, the only one with universal and general jurisdiction, there were in particular the International Tribunal for the Law of the Sea, the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, several courts with jurisdiction concerning human rights, arbitration tribunals that were often standing tribunals and the WTO Dispute Settlement Body. The situation undeniably had its advantages. The fact that a greater number of disputes could be submitted to the judges certainly marked an advance in justice and law, especially since the phenomenon had not weakened traditional courts; Governments were henceforth more accustomed to turning spontaneously to the judge, who played an increasing role in all fields. But the situation also had its difficulties. The most obvious lay in the risk of the fragmentation of international law, whether of the primary rules, which were of concern to the Commission, or the secondary rules, which were of concern to the Court. As to the secondary rules, the increase in the number of jurisdictions led to a risk of conflicting judgements, rarely in the actual terms of the judgement—because it was unlikely that the identical question would be referred to different judges, but much more likely in the case of the substantiation, of the legal reason-

ing. An example concerned the *Tadić* case, in which the International Tribunal for the Former Yugoslavia, on the question of the attribution to States of certain acts in the case of the intervention of a foreign State in an internal conflict, had knowingly adopted a position different from that taken by the Court itself. The Tribunal had recalled the Court's case law, criticized it and said it would depart from it. It was a serious risk, which had materialized in that particular case, and could happen in many other situations. Was it a bad thing? Was it a good thing? Some people, proponents of market forces, might claim that it was good to make courts compete and to promote the one which would develop the best case law—in other words, it was a matter of applying the laws of natural selection to international justice. But it was not a satisfactory system, and for a number of reasons. First, it brought uncertainty as to the forum—uncertainty likely to lead to conflicts of jurisdiction and above all to States practising forum shopping—and to the content of the law. Second, it could have unfortunate effects in that competition could lead to legal demagoguery, i.e., which was the best court: the one that would best defend the interests of States, the interests of the victims or the interests of the law? The more desirable it was for judges to play an increasing role in international life, the more regrettable it would be to fall into government by judges. Third, and by no means least, it introduced anarchy and chaos in international law. If the contradictions increased it would be very difficult for States to know how to behave and for State legal advisers to perform their task. Such fragmentation of international law and international justice was a real danger to the role of international law in international life.

14. What were the answers? The first would be to transpose the pattern of municipal law to international law, in other words, to turn ICJ into a kind of court of appeal for all specialized international courts. It was an interesting idea, but it was probably not very realistic. States did not seem to be ready to accept such a system, any more than were the specialists in one subject or another. It seemed, on the other hand, that even more international courts were not called for. Indeed, it had been suggested to set up international tribunals for space or for the environment, but it did not seem to be a good idea, as an excessive specialization in international law risked producing mediocre or even incoherent results. The solution to the problem should be sought in another direction, for example, in giving ICJ the possibility of being seized by other international courts with preliminary issues, in other words, transposing to the system of international justice the current European Community law system. The difference was that, in the case of the latter, a national judge could raise preliminary issues in the European Court of Justice, but that would be impossible for the ICJ, as Governments would prove extremely reluctant. On the other hand, to the extent that States had agreed that some cases should be brought before an international court, the latter could raise preliminary issues with the ICJ and that would not mean any additional abandonment of sovereignty. It would simply be a method of organizing international justice, in other words, it would afford international tribunals an opportunity, when grave difficulties arose in the determination, interpretation or application of a treaty or customary rule of public international law, of requesting the Court, before issuing its ruling, to clarify them. The

procedure could be adopted by a straightforward treaty, without any need to revise the Court's Statute, in which Article 36, paragraph 1, stipulated that "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force." Such a solution, not entirely satisfactory in that it still allowed tribunals to decide whether or not to seize the Court, at least opened a door and deserved examination.

15. He was entirely ready to engage in an exchange of views with the members of the Commission.

16. The CHAIRMAN thanked the President of the International Court of Justice for his interesting statement.

17. Mr. HAFNER thanked the President of the International Court of Justice for his explanations about the Court's activities and the thoughts on international law he had shared with members of the Commission. The President had raised a subject which was close to his own heart, namely the risks caused by the fragmentation of international law and international justice, which, along with the fragmentary approach used to create international law and the nature of disputes themselves, made for an increased number of international dispute settlement mechanisms. Those matters were due to the diversity of the parties to the disputes—private individuals, companies against States, etc.—and in particular the emancipation of private individuals in relation to their countries so that they had become independent actors in international relations, whether in making claims or engaging in proceedings. That was how special courts and international criminal courts had developed and he would point out that the Security Council had unanimously adopted resolution 1315 (2000) of 14 August 2000 on the establishment of an ad hoc tribunal for Sierra Leone.

18. The creation of various types of dispute settlement mechanisms seemed necessary, all the more so since it could lead States to use them instead of settling their disputes by force. Nevertheless, it should not be forgotten that it could also break the harmony and consistency of the entire system of international law. In order to avoid that, the first step should be to institute closer communication between the various tribunals and dispute settlement mechanisms, so that they gained an objective knowledge of the deliberations and decisions handed down by each one. What was the place of ICJ in that process? He noted in that connection that the Rome Statute of the International Criminal Court provided, in article 119, that ICJ could be seized with disputes between States in connection with the interpretation and application of the Statute, unless it was an issue falling directly within the jurisdiction of the International Criminal Court. The question was whether it was a first step towards recognition of a prime role for ICJ among all the international dispute settlement mechanisms and whether that role would have an impact on the jurisdiction of the various dispute settlement mechanisms called upon to adjudicate in litigation not between States but between different actors, on the basis, nonetheless, of international law.

19. Mr. BROWNLIE asked the President of the Court if he considered that oral pleadings were necessary in the Court.

20. Mr. DUGARD, referring to the remarks by the President of the Court on the proliferation of international tribunals, pointed out, like many jurists, he had been surprised that, in the *Tadić* case, the International Tribunal for the Former Yugoslavia itself had ruled on the lawfulness of its establishment by the Security Council. He wondered whether it would not have been preferable for the Council itself to ask the Court for an advisory opinion on that point and whether, generally speaking, the Council should not make more frequent use of its authority to request advisory opinions from the Court.

21. Mr. LUKASHUK asked whether the Court, in view of its workload, did not make more frequent use of the chambers procedure and, in addition, whether it would not be desirable for United Nations bodies to ask the Court more often for advisory opinions, since they had a particular role to play in international relations and had almost as much authority as judgments, even though they were not binding.

22. Mr. ADDO asked the President of the Court whether, in his opinion, the Court was competent to monitor the lawfulness of the decisions of the Security Council.

23. Mr. Sreenivasa RAO, referring to a possibility, mentioned by the President of the Court, of international tribunals referring preliminary issues to the Court, said he feared that, in practice, such a solution would meet with the reluctance of the judges in the various international tribunals. By and large, those judges had the same training and the same skills as the members of the Court and it was unlikely, psychologically, that they would hand an issue over to someone else. It did not seem possible, for the same number of reasons, to turn the Court into an appellate court.

24. Mr. GUILLAUME (President of the International Court of Justice) said he thought, as did Mr. Hafner, that the proliferation of international courts was consonant with the increase in the number of actors in international life, whether individuals, companies or non-governmental organizations, and the consequence was an increase in the number of parties in dispute and a greater variety of decisions to be taken. Nevertheless, the risk of divergences lay not in the terms of the decisions themselves but in the explanatory statements, in other words, in the statement of the rules of law underlying the decisions. The first step was doubtless to establish improved communication between the various courts and tribunals. Then, judges should be better acquainted with the case law of the other courts, and the essential factor was, in the final analysis, the wisdom of the judges. In that regard, judges were men just like others and they might, for example, want to differentiate themselves or to assert themselves as a body. In his opinion, one could not rely entirely on men's wisdom. Institutional training seemed necessary.

25. As to Mr. Brownlie's question, it was a long-standing debate in which the national legal traditions played an important role. In the context of international justice, it was essential in some cases to hold oral hearings for political reasons. Governments wanted to demonstrate to their public and their parliament that they had done everything in their power to succeed. The Court's hearings were some-

times televised and in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case, for example, they had been broadcast direct in the two countries concerned. Another reason was that, in the written procedure, the positions of the parties changed and the oral debate often allowed the case to settle down, with both parties, for instance, giving up certain contentions they had made in their written arguments. In his view, the solution would be, in straightforward cases, for example, where the Court examined its jurisdiction, to cut down on the oral procedure or to limit it to half a day. In more complex cases, and at any rate where the Court was examining the merits, an oral procedure was necessary but it could be cut down considerably and limited, for instance, to a week by making the requisite adjustments.

26. With reference to the question by Mr. Dugard and the second question by Mr. Lukashuk, he thought that increased use of the advisory opinion procedure would fight against fragmentation of the law. As for the case mentioned by Mr. Dugard, it seemed difficult for a court itself to rule on the validity of its establishment. In fact, if the International Tribunal for the Former Yugoslavia had adopted the opposite approach, the situation would have been paradoxical in the extreme. In that case, it would definitely have been better for the Security Council to ask the Court for an advisory opinion on the matter. He intended to enter into contact with the Council in an effort to make it more aware of that possibility, when he visited the General Assembly at the forthcoming session.

27. As for Mr. Lukashuk's first question, increased use of the chambers procedure ran into two obstacles. The first was that the States concerned should concur; when States submitted a case to an international court they were looking for the best possible membership. That was obvious in the arbitration procedure. States often preferred a case to be examined by the Court in plenary rather than by a chamber when it was difficult for them to determine in advance, since they did not know the membership, what the chamber's tendency would be. Second, while chambers did cut down the work of the judges, they did not cut down that of the Registry, and at the current time, a considerable bottleneck lay in the Registry. In his view, therefore, increased use of the chambers procedure did not seem to be the solution.

28. He was unable to answer Mr. Addo's question about monitoring the Security Council's decisions, for the matter was before the Court in the *Lockerbie* cases. The Libyan Arab Jamahiriya was arguing that the Security Council's decisions in that regard were unlawful. The Court could therefore be led to say whether it was competent to monitor the lawfulness of the Council's decisions as a defence, and if so, what the conditions were for such lawfulness, such as conformity with the Charter of the United Nations, but also conformity with general international law.

29. He agreed with Mr. Sreenivasa Rao's comment. He recognized that it was difficult for a judge, like any other man, not to take the decision himself and to ask someone else to take it for him.

30. Mr. PELLET said it was not surprising that the President of the Court considered that all pleadings before the Court were too long and should be shortened—it could be

hard for judges to experience lengthy pleadings by counsel. Counsel were nonetheless of a different opinion, for the States they represented wanted to be certain that everything had been said to defend their case and the oral proceedings were the last opportunity for them to be heard. He was therefore somewhat disturbed at the fervour with which the Court was trying to shorten the oral proceedings. In his opinion, a balance should be found, as political, diplomatic and psychological problems were at issue.

31. The proliferation of international courts was not, in his opinion, necessarily a bad thing and could be reasonably continued. Nobody could be certain of holding the sole truth and, in that connection, there was nothing to say that the solution adopted by the International Tribunal for the Former Yugoslavia in the *Tadić* case was not as good as that of the Court. Moreover, he was not convinced of the need to stop creating international courts. There were some extremely technical fields and the Court was not necessarily competent in all subjects. The WTO Dispute Settlement Body was a good example in that respect. However, coordination mechanisms were necessary and the preliminary issue procedure, adopted in article 177 of the Treaty on European Union (Maastricht Treaty), was probably the right solution. He would like to know why Mr. Guillaume seemed so hostile to national courts being able to seize the Court with preliminary issues. National judges were often particularly ignorant in matters of international law and, if a State agreed that its courts could refer to the ICJ for its opinion, it was difficult to see why the ICJ would not do so.

32. Mr. ECONOMIDES questioned the moderation, often the extreme moderation, to be seen among the members of the Court. Mr. Guillaume had spoken of the Court's wisdom, but one also heard of its timidity, sometimes even its weakness. One's impression was that, when the Court examined a reservation to an international treaty concerning its jurisdiction, it often tended to interpret the clause extensively, moving in the direction of non-jurisdiction rather than that of jurisdiction. Could Mr. Guillaume confirm that impression?

33. He had also noted that the Court displayed more moderation in its judgments than in its advisory opinions, where it could be somewhat more audacious. In other words, did advisory opinions more than judgments, allow the Court to go further in the development of international law?

34. Lastly, as far as he was aware, the Secretary-General of the United Nations had never asked the Court for an advisory opinion. Should he be authorized, indeed encouraged, to do so? Since he followed international life throughout the world from day to day, the Secretary-General presumably had many legal questions to ask and it would perhaps be normal for him to raise them with the Court. Would that not also be another way of developing international law?

35. Mr. GOCO recalled that, in accordance with the Statute of the Court, the consent of the parties to a dispute was required for the Court to have jurisdiction, but in some cases the consent might be presumed, in other words, regarded as implicit. He would like to know what

the Court thought of tacit consent and whether it had already had an occasion to act in such circumstances.

36. Mr. SIMMA, referring to coverage of the Court's hearings by the media, said he gathered from Mr. Guillaume's statement that Mr. Guillaume had not been hostile to that idea. What, more specifically, did Mr. Guillaume think of television broadcasts of the Court's work?

37. A distinctive feature of the Court, one that was very surprising for lawyers used to national courts, was that whenever a party was asked a question it was given a number of days, sometimes a number of weeks, to reply. That doubtless explained the lifelessness of the proceedings, from which the judges themselves seemed to suffer. Would it not be possible to make the pleadings stage livelier, as was the case, for example, with the European Court of Justice?

38. Mr. GUILLAUME (President of the International Court of Justice) said he agreed with what Mr. Pellet had said, namely, the oral pleadings involved a political, diplomatic and psychological element that could not be ignored. Obviously, such pleadings were intended not only for the judge but for public opinion. There were many instances in which counsel themselves knew that what they were saying had little bearing on the subject and would have no impact on the decision. It was not a contemptible function, as it was sometimes difficult for States to refer matters to an international court. Consequently, it was normal that they should have the opportunity to acquaint their population and their parliament with the fact that they had done everything to defend the national interest. But that did not necessarily imply five weeks of pleadings. From the moment when the judge himself told the parties not to exaggerate because the resources of the Court were not unlimited, there was room for a solution that balanced the needs of justice and those of public opinion.

39. On the other hand, he did not share Mr. Pellet's view that, after all, competition between judges was not such a bad thing, that nobody was infallible and that the International Tribunal for the Former Yugoslavia had perhaps been right to hand down a decision different from that of the Court. It was not whether a solution was right or wrong—a question for doctrine—but whether a question which, once judged, should be challenged. The traditional phrase was *res judicata pro veritate habetur*, in other words, the object of the judgement was held to be the truth. In view of the fragile nature of international law, it was a major consideration, regardless of one's assessment of a particular decision being well-founded.

40. He had nothing against the principle of referral to the Court of certain cases by national courts, but it was difficult to see how Governments would agree to it. He cited several studies published in the past in specialist magazines in which the idea had been put forward, but it could not be said to have found a favourable echo among Governments. It was unfortunately no more realistic than the solution of transforming ICJ into an appellate court for other international courts. They were intellectually satisfying solutions, but did not seem to be feasible.

41. Mr. Economides had wondered about the "moderation", indeed the "timidity", if not the "weakness" of the Court and in particular had mentioned in that connection

the Court's interpretation of reservations to treaties or declarations concerning its jurisdiction. He did not share that point of view. There were cases in which the Court had declared that it was competent when the solution had not been obvious, for example, in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case. In the *Fisheries Jurisdiction and Aerial incident of 10 August 1999* cases, it had found itself faced with reservations which had been perfectly clear in the minds of States that had formulated them. In the first case, Canada had excluded any North Atlantic fisheries dispute. Spain had complained of Canada's conduct in inspecting Spanish vessels in the North Atlantic. The reservation had obviously been applicable. In the second case, India had excluded any dispute with a State which was or had been a member of the Commonwealth, which had been the case with Pakistan. How could one get round that type of reservation other than by ignoring the explicit will of States? The Court's jurisdiction was based on consensus: that was why States agreed that the Court could adjudicate. When it was faced with a reservation which clearly manifested the will of States, it would be bad legal policy, and above all bad law, to interpret it against the will of the parties. Certainly, a judge always preferred to declare that he had jurisdiction, but there could be wisdom in recognizing that he did not.

42. Like Mr. Economides, he thought that advisory opinions probably afforded better opportunities for the development of international law than did judgments on inter-State disputes. A dispute was very specific, had very precise limits and, something that was sometimes forgotten, it was desirable for the Court's decision to be adopted in these cases by as large a majority as possible in order to be more properly founded and easier to enforce. Consequently, the aim was to get to the point in contentious cases and to justify the solution without accessory substantiation. He cited the example, sometimes regretted by legal writers, of the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* case, in which the Court had held that the Aozou Strip came under the sovereignty of Chad by virtue of the Treaty of friendship and good-neighbourliness, of 1955, between France and the Libyan Arab Jamahiriya.² The Court had not taken a position on the whole of the situation prior to the Treaty because the treaty had justified the accepted solution. The judgment consisted of 23 pages, whereas more than 6,000 pages had been filed by the parties, and it contained a half page for thousands of pages by the parties on problems that did not have to be adjudicated. Publicists had taken the view that the Court had not overtired itself. But if the Court had settled all of it, there might well have been divergences between the members that would have weakened the judgment, whereas the judgment had been unanimous, except for the ad hoc Libyan judge, and it had been executed within three months. The fact that members of the Court had taken up only certain points without going into pointless digressions had played a large part in that fortunate outcome. With advisory opinions, however, it was sometimes possible to achieve more comprehensive developments than with judgments.

² United Nations, *Treaty Series*, vol. 1596, No. 27943, p. 151.

43. The reason why the Secretary-General had never asked the Court for an advisory opinion was simple: he did not have the authority to do so. The question had been discussed, and no agreement had been reached. Personally, he thought it would be conceivable to give the Secretary-General such authority. Politically, it would doubtless be necessary to combine applications for advisory opinions with a particular procedure within the United Nations on which States could come to an agreement.

44. As for Mr. Goco's *forum prorogatum* question, there had been no recent example of such a procedure. The Court was periodically seized with a request by a State that was a kind of offer to another State, specifying that it was ready to come before the Court for a particular case. The Court transmitted the information. If the other State did not reply, or replied in the negative, the case stopped there. It had happened with a request by Eritrea against Ethiopia that had been received by the Court, transmitted to Ethiopia and had gone unanswered. Consequently, there could be no *forum prorogatum*. Caution was required with the concept of implicit consent, for if consent could be implicit, it had to be clear. That was where the difficulty lay.

45. With reference to Mr. Simma's question, he was not opposed to television broadcasts of the Court's hearings, which could perhaps be explained by the fact that the statements by the parties were prepared beforehand and there were no excessively spontaneous proceedings. Accordingly, from the Court's standpoint, or that of the parties, there was no drawback to broadcasts of oral pleadings, because they were organized in advance. The only thing on which the Court made demands was purely material—there should be no technical equipment capable of disturbing its work.

46. On the question of whether oral proceedings could be livelier, there again, there were two traditions: that of very lively discussions, with exchanges of views between the judges and the parties in which the judges did not hesitate to disclose their feelings about the file, and the opposite tradition because, in some States, respect for the confidentiality of the deliberations was much greater and hence there was no question of a judge allowing a glimpse of his reactions. Moreover, the parties themselves were rarely ready to play the game because they greatly feared being unable to weigh up their replies. The proof was that the Court generally gave the parties a choice of an immediate reply, a reply at the following sitting or a written reply, but the parties systematically opted for a written reply. The reason was that States were complex institutions in which a reply sometimes entailed internal consultations, which could not be carried out on the spot. Things could certainly be improved, as in the example of the European Court of Justice. However, it was easier to give an immediate reply in the system of Community law, which was closer to municipal law, than in the more uncertain system of international law. Lastly, the questions raised by judges were a matter for internal discussion: a member of the Court did not raise a question without having spoken about it to his colleagues. That explained why many of the questions raised were purely factual. The system was definitely not perfect, but progress was difficult.

47. Mr. KAMTO said he would like to know the Court's opinion on the legal force of preliminary measures that it indicated. Was it not reasonable to expect that, if such measures had a more strongly asserted binding force, States would ask the Court more often about a number of disputes for which they were obliged to turn to the Security Council or to find other solutions?

48. Mr. MOMTAZ said that ICJ had on two occasions been called on to interpret certain provisions of the Convention on the Privileges and Immunities of the United Nations. It seemed to have placed a broad interpretation on the immunities granted under the Convention to United Nations experts on mission. It had certainly been fully aware of the potential consequences of its interpretation. Proof was to be found in the advisory opinion on the *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, between Malaysia and the United Nations. The Court had said that the principle of immunity did not call into question the principle of the responsibility of international organizations. Yet treaty law, and more particularly the Convention on the Privileges and Immunities of the United Nations, was silent on the major issue of the responsibility of international organizations. He would like to know whether the Court was thus issuing to the international community, legal writers and more particularly the Commission, a kind of invitation to fill that gap by developing international law.

49. Mr. GUILLAUME (President of the International Court of Justice), replying to Mr. Kamto, said there had been a longstanding debate about whether the preliminary measures indicated by the Court were binding. There were textual arguments, particularly in the English version of the Statute in that direction. But the opposite had also been contended. Only one point had perhaps gone unnoticed: the order indicating preliminary measures in the *Armed Activities in the Territory of the Congo* case said "[States] should" in the French version and "[States] must" in the English version, where traditionally the formula was "[States] should". It was an evolution in case law in connection with the English language that might prove interesting.

50. In the *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* case, the Court had specified that, if there was immunity experts could not be held responsible for their remarks in their official capacity, and it was thus the United Nations that became responsible. That seemed quite legitimate, for a vacuum in responsibilities was inconceivable. There had been nothing more in what the Court had written, for the Court had simply emphasized that, where action was taken there was responsibility. Once the expert was not responsible, then the United Nations was. The Court had gone no further, even though one could conceive of developments in international law in that regard. In fact, the paragraph referred to on that point had been more in the nature of an *obiter dictum*.

51. The CHAIRMAN thanked the President of the International Court of Justice for his very useful statement.

Draft report of the Commission on the work of its fifty-second session (*continued*)

CHAPTER V. *Diplomatic protection* (continued)* (A/CN.4/L.594)

B. Consideration of the topic at the present session (*continued*)*

52. The CHAIRMAN invited members to resume consideration of chapter V of the report.

Paragraph 25

Paragraph 25 was adopted.

Paragraph 26

53. Mr. SIMMA said that the paragraph was unclear in that it seemed constantly to change the subject, to such an extent that, in the phrase "However, the right had been greatly abused in the past", it was difficult to see which right was involved. To remove any ambiguity, he proposed that the phrase should be replaced by "However, the right to forcibly protect the rights of its nationals had been greatly abused in the past".

54. Mr. TOMKA said that the words "unilateral intervention", in the second sentence, should be replaced by "unilateral action".

55. Mr. DUGARD (Special Rapporteur) said he agreed to those two proposals.

Paragraph 26, as amended, was adopted.

Paragraph 27

56. Mr. SIMMA said that, subject to the agreement of the Special Rapporteur, he proposed that the first sentence should be supplemented to indicate that it was humanitarian intervention "in the sense of forcible protection of human rights of nationals of foreign countries" that did not fall within the framework of the study. One part of doctrine held that humanitarian intervention covered both forcible protection of a State's nationals and humanitarian intervention to protect foreigners.

57. Mr. RODRÍGUEZ CEDEÑO (Rapporteur), supported by Mr. ECONOMIDES, said that such an explanation could be interpreted *a contrario* as recognition of a link between diplomatic protection and other forms of humanitarian intervention, which was not the case.

58. Mr. DUGARD (Special Rapporteur) said it was enough to refer to paragraph 60 of his first report (A/CN.4/506) to see that the explanation proposed by Mr. Simma was appropriate. He therefore approved of the proposal.

59. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt paragraph 27 as amended by Mr. Simma.

It was so agreed.

Paragraph 27, as amended, was adopted.

Paragraphs 28 to 31

Paragraphs 28 to 31 were adopted.

Paragraph 32

60. Mr. BROWNLIE said that the third sentence in paragraph 32 seemed to contradict the tenor of the first sentence of paragraph 31, which was also taken up at the end of paragraph 34 and set out the idea, expressed by some members, that the topic of diplomatic protection as included on the agenda did not cover the problem of the lawfulness of the threat or use of force by States. However, as now drafted, the third sentence of paragraph 32 wrongly implied that the members who had adopted such a position had in fact endorsed the legal concept expressed by the Special Rapporteur in article 2.

61. Mr. GAJA, endorsing that comment, proposed that the problem should be remedied by two amendments: replacing the expression "members" by "some members", and the words "would take" by "could take".

62. Mr. TOMKA said that caution called for the whole of the third sentence to be deleted.

63. Mr. GOCO said that, in his opinion, the sentence correctly reflected the discussion and should not be touched.

64. Mr. PELLET said the sentence was incomprehensible in that it mixed legal considerations with factual considerations and the text would be clearer if the expression "would be entitled to take" were substituted for "would take".

65. Mr. SIMMA proposed that the last phrase should simply read: "was correct in the interpretation of Article 51 of the Charter (or the right of self-defence)".

66. Mr. HE said it was important to know the views of the members who had expressed that opinion.

67. Mr. GALICKI proposed that, in order to introduce some logic between the two parts of the sentence, the phrase "but outside diplomatic protection" should be added at the end.

68. Mr. DUGARD (Special Rapporteur) proposed, in the light of the various proposals made, that the sentence should be recast to read: "But some of the members who supported the second view, namely that the question of the use of force fell outside the scope of diplomatic protection, were of the view that the Special Rapporteur was correct in law and that States might use force to protect their nationals in the exercise of the right to self-defence but that this did not fall within the scope of diplomatic protection."

69. Mr. BROWNLIE said the proposal did not sufficiently reflect the view of a third group of members who had simply affirmed that the question of the use of force did not fall within the Commission's mandate and they had deliberately stood aside from the debate on that issue. The Special Rapporteur should therefore be asked to find, in collaboration with the Rapporteur, a formulation that

clearly brought out the existence of three views within the Commission.

70. Mr. Sreenivasa RAO said that he endorsed Mr. Brownlie's proposal.

71. The CHAIRMAN suggested that the Rapporteur, together with the Special Rapporteur and members of the Commission who had expressed reservations regarding the third sentence, should endeavour to find a formulation to be submitted at a later meeting. If he heard no objection, he would take it that the Commission agreed to that suggestion.

It was so agreed.

Paragraph 33

Paragraph 33 was adopted.

Paragraph 34

72. Mr. ECONOMIDES proposed that, in order to restore a balance between the two schools of thought in the Commission, the expression "most members", which implied that there had been a majority and a minority, should be replaced by "other members", in the seventh sentence. He would also point out that, in the discussion, nine members had submitted a written proposal for article "X" which had read: "Diplomatic protection is a peaceful international institution precluding resort to the threat or use of force and to interference in the internal or external affairs of the State." That proposal, which was nowhere noted in the report, should appear somewhere. That, however, was a matter that fell to the Special Rapporteur.

73. Mr. SIMMA said that the whole of the seventh sentence should be recast, as the formulation "most members of the Commission had not taken a firm position on the Charter provisions" clumsily reflected the position of members, including his own and that of Mr. Brownlie, who had been of the opinion that it was necessary to keep to the issue of diplomatic protection and simply state that the question of the use of force did not fall within the topic.

74. Mr. BROWNLIE reaffirmed what he had said in connection with paragraph 32, namely, the text should more clearly reflect the existence of three schools of thought in the Commission, namely of the members who had endorsed article 2, those who had disapproved of article 2 and those whose position was too discreetly reflected in the text or had simply taken the view that the question of the use of force did not fall within the topic.

75. Mr. KAMTO said that a method should be found of recalling the very firm position of the nine members who had made the written proposal for article "X". Again, it was not acceptable to state, as did the fourth sentence of the paragraph, that "In all honesty, [the Special Rapporteur] could not, like his predecessor, contend that the use of force was outlawed in the case of the protection of nationals". It was the expression of an opinion that had to be counterbalanced by very clearly mentioning the view of the members who had firmly said that they were in favour of the prohibition of the use of force by States, even to pro-

tect their nationals abroad, which had been the meaning of the proposed article "X".

76. Mr. ROSENSTOCK pointed out that the paragraph set out the conclusions expressed by the Special Rapporteur. However, a straightforward sentence would be enough to settle the question of the three schools of thought which, according to Mr. Brownlie, had emerged in the Commission.

77. The CHAIRMAN said that consideration of paragraph 34 would be continued at a later meeting, so as to allow the Rapporteur, together with the Special Rapporteur, to review the formulation.

The meeting rose at 1 p.m.

2659th MEETING

Tuesday, 15 August 2000, at 3.05 p.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kusuma-Atmadja, Mr. Momtaz, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

Draft report of the Commission on the work of its fifty-second session (*continued*)

CHAPTER V. *Diplomatic protection (continued)* (A/CN.4/L.594)

B. *Consideration of the topic at the present session (continued)*

Paragraph 32 (concluded)

1. The CHAIRMAN said that, following informal consultations between the Rapporteur, the Special Rapporteur and other members, it was proposed that the third sentence should be split in two and should read: "However, some of the members who supported the second view, namely that the question of the use of force fell outside the scope of diplomatic protection, were of the view that the Special Rapporteur was correct in his interpretation of Article 51 of the Charter and that States would be entitled to use force in the exercise of the right to self-defence if their nationals' lives were at stake. Other