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Summary record of the 2813th meeting

Topic:
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Extract from the Yearbook of the International Law Commission:-
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might be useful. He agreed with Mr. Brownlie that the recognition of States or Governments should be excluded from any study of the topic, for the reason given by Mr. Brownlie. Lastly, the Ihlen declaration² was not an isolated act and it could be said that there had been prior agreement between the States concerned.

5. Mr. PAMBOU-TCHIVOUNDA congratulated the Special Rapporteur on having fulfilled the mandate that the Commission had given him, that of making as complete a presentation as possible of the practice of States in respect of unilateral acts, and on having submitted an extremely detailed and wide-ranging report. There was, however, every justification for feeling rather confused after the submission of seven reports on the topic³ and for wondering whether the Commission was making any progress or whether it would be able to find a way out of the impasse that it was in. The report under consideration should have been the Special Rapporteur's first or second report, as that would have enabled the Commission to avoid the methodological mistake of dealing with unilateral acts by analogy with treaties and to organize its work differently. The report should now enable the Commission to adjust the definition of unilateral acts that it had adopted somewhat hurriedly.

The meeting rose at 10.40 a.m.

2813th MEETING

Wednesday, 7 July 2004, at 10.05 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

Present: Mr. Addo, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Yamada.

Cooperation with other bodies (*continued*)^{*}

[Agenda item 10]

STATEMENT BY THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

1. The CHAIRPERSON welcomed Judge Shi Jiuyong, President of the International Court of Justice, and invited him to address the Commission.

² See PCIJ judgment in the *Legal Status of Eastern Greenland* case, pp. 69–70.

³ First report: *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/486, p. 319; second report: *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/500 and Add. 1, p. 195; third report: *Yearbook ... 2000*, vol. II (Part One), document A/CN.4/505, p. 247; fourth report: *Yearbook ... 2001*, vol. II (Part One), document A/CN.4/519, p. 115; fifth report: *Yearbook ... 2002*, vol. II (Part One), document A/CN.4/525 and Add. 1–2, p. 91; sixth report: *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/534, p. 53.

^{*} Resumed from the 2799th meeting.

2. Mr. SHI (President of the International Court of Justice) said that his statement at the fifty-fifth session of the Commission had concentrated on the relationship between the International Court of Justice and the Commission, emphasized the respective and complementary roles played by both institutions in promoting and developing international law and underscored the importance of each body being aware of the work accomplished by the other. In an endeavour to enhance the dialogue between the two institutions, he would provide a short but comprehensive review of the judicial decisions taken by the Court over the previous year.

3. The Court had rendered a final judgment in three cases, had issued two orders directing that cases should be removed from the Court's list, and had held five different sets of oral hearings covering no fewer than 12 cases. The hearings of all eight NATO cases concerning the *Legality of Use of Force* had been held simultaneously. One new case had been filed with the Court and an advisory opinion had been requested by the General Assembly, a sure sign of the Court's vitality and the trust States placed in it. The total number of cases on the Court's docket currently stood at 21, three fewer than in 2003.

4. Turning to the judgment delivered by the Court on 6 November 2003 in the case concerning *Oil Platforms*, he explained that, on 2 November 1992, the Islamic Republic of Iran had seized the Court of a legal dispute with the United States which had arisen out of the attack on and destruction of three Iranian offshore oil production platforms by United States warships in October 1987 and April 1988. In its application, Iran had contended that those acts constituted a fundamental breach of international law and of various provisions of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the two countries.¹ The application had invoked article XXI, paragraph 2, of the 1955 Treaty as a basis for the Court's jurisdiction. In a judgment of 12 December 1996 the Court had rejected the preliminary objection raised by the United States as to lack of jurisdiction; but, by an order of 10 March 1998, it had held that the counterclaim contained in the counter-memorial submitted by the United States was admissible and formed part of the proceedings. That counterclaim had alleged Iranian attacks on United States shipping in 1987 and 1988.

5. In its judgment on the merits, the Court had held that, while the attacks on the oil platforms could not be justified as measures necessary to protect the essential security interests of the United States under article XX, paragraph 1 (d), of the Treaty of Amity, Economic Relations and Consular Rights, it could not uphold the submission by Iran that those actions constituted a breach of the obligations of the United States under article X, paragraph 1, of the same Treaty, and that accordingly it could not uphold the Iranian claim for reparation. The Court had also rejected the counterclaim of the United States concerning a breach of obligations by Iran under article X, paragraph 1, of the 1955 Treaty and hence its counterclaim for reparation.

³ Signed at Tehran on 15 August 1955 (United Nations, *Treaty Series*, vol. 284, No. 4132, p. 93).

6. In order to reach its findings, the Court had had to analyse and resolve a number of delicate points of law, first and foremost the question of article XX, paragraph 1 (*d*), of the Treaty of Amity, Economic Relations and Consular Rights, which related to the broader issue of the use of force. That issue had lain at the heart of the original dispute between the parties. The United States had contended that the attacks on the oil platforms had been justified as acts of self-defence in response to what it regarded as armed attacks by Iran. On that basis, it had reported its action to the Security Council in accordance with Article 51 of the Charter of the United Nations. In its written and oral pleadings, the United States had systematically relied on article XX, paragraph 1 (*d*) to deny a breach of its obligations under article X. It alleged that Iran had used the oil platforms to monitor the traffic of and launch attacks against oil tankers; and that destruction of the platforms had consequently been necessary in order to protect essential United States security interests and was therefore not forbidden under the Treaty. The United States had further maintained that, even if the Court were to find that the attacks did not fall within the scope of article XX, paragraph 1 (*d*), those actions had not been wrongful since they had constituted necessary and appropriate actions in self-defence.

7. The first question confronting the Court had been that of the relationship between self-defence and article XX, paragraph 1 (*d*), of the Treaty. In the Court's view, the matter was one of interpretation. The issue turned on whether it had been the intention of the parties to the Treaty not to preclude the application of measures necessary to protect the essential security interests of either party, even when those measures involved the use of armed force; and, if so, whether the parties had assumed a limitation that such use would have to comply with the conditions laid down by international law.

8. The Court had drawn, *inter alia*, on its interpretation of a similar treaty clause in the case concerning *Military and Paramilitary Activities in and against Nicaragua* and on the general rules of treaty interpretation to conclude that article XX, paragraph 1 (*d*), of the Treaty of Amity, Economic Relations and Consular Rights was not intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of treaty, in relation to an unlawful use of force. The Court had therefore considered that its jurisdiction under article XXI, paragraph 2, of the 1955 Treaty to decide any question concerning the interpretation or application of article XX, paragraph 1 (*d*), of the Treaty extended, where appropriate, to the determination of whether actions alleged to be justified under that paragraph were an unlawful use of force by reference to international law applicable to the use of force, namely the provisions of the Charter of the United Nations and customary international law.

9. Having observed that the United States had never denied that its actions against the Iranian oil platforms amounted to a use of armed force, the Court had then examined whether each of those actions met the conditions of article XX, paragraph 1 (*d*), as interpreted by reference to the relevant rules of international law on the use

of force. The Court had recalled that, in order to be legally justified in attacking the oil platforms in exercise of the right of individual self-defence, the United States had to show that it had been subjected to "armed attacks" for which Iran was responsible, within the meaning of Article 51 of the Charter of the United Nations and as understood in customary law on the use of force. The United States had further to show that its actions had been necessary and proportional to those armed attacks and that the platforms had been a legitimate military target open to attack in the exercise of self-defence.

10. Having carefully examined the evidence and arguments presented on each side, the Court had found that the actions in question could not be justified under article XX, paragraph 1 (*d*), of the Treaty of Amity, Economic Relations and Consular Rights as being measures necessary to protect the essential security interests of the United States, since those actions had constituted recourse to armed force not qualifying, under international law, as acts of self-defence and did not therefore fall within the category of measures contemplated, upon its correct interpretation, by the provisions of the Treaty.

11. The Court had also had to decide whether the destruction of the oil platforms could potentially affect the "freedom of commerce" guaranteed by article X, paragraph 1, of the Treaty. For that purpose, it had been necessary to ascertain whether the platforms were covered by the protection afforded by article X, in other words whether they could be said to fall under the concept of commerce. In the light of the conclusions it had reached in its judgment of 12 December 1996 on the preliminary objection of the United States regarding the interpretation of the word "commerce", the protection of freedom of commerce and the importance of oil production for the Iranian economy, the Court had considered in its judgment on the merits that, where a State destroyed another State's means of production and transport of goods destined for export, or means ancillary or pertaining to such production or transport, there was in principle an interference with the freedom of international commerce. Since the destruction of the oil platforms had made commerce in oil impossible at that time and from that source, thereby prejudicing freedom of commerce, the Court had found that the protection of freedom of commerce under article X, paragraph 1, of the 1955 Treaty applied to the platforms attacked by the United States and consequently that the attacks had impeded Iran's freedom of commerce.

12. Given the wording of article X, paragraph 1, of the Treaty of Amity, Economic Relations and Consular Rights, it had then been necessary to consider whether interference with freedom of commerce "between the territories of the two High Contracting Parties" had occurred. The Court had found that there had been no commerce between the territories of Iran and the United States in respect of oil produced by the destroyed platforms, because some of them had been under repair and inoperative at the time of the attacks, while others had been destroyed after the issuance by the United States of an Executive Order which had prohibited the import into the United States of most goods (including oil) and services of Iranian origin. The Court had further found that what Iran regarded as "indirect" commerce in oil between itself and the United States

was in fact commerce between Iran and an intermediate purchaser and commerce between an intermediate seller and the United States. As a result, Iran's entitlement to freedom of commerce *vis-à-vis* the United States could not be regarded as having been violated.

13. On 18 December 2003, a Chamber of the Court had rendered its judgment in the case concerning the *Application for Revision of the Judgment of 11 September 1992*. In that judgment, the Chamber had first recalled that revision could be requested by a party only upon satisfaction of each of the conditions set forth in Article 61 of the Statute of the International Court of Justice and that, if any one of them was not met, the application must be dismissed. It was for the Court to ascertain whether the admissibility requirements had been fulfilled. Accordingly, the Chamber had had to decide whether the two allegedly new facts presented by El Salvador satisfied the conditions laid down in Article 61 of the Statute.

14. El Salvador had first claimed to possess new scientific, technical and historical evidence showing that the Goascorán River, along which it alleged the border should run, had abruptly changed its course in 1762, probably as a result of a cyclone. It had also invoked the discovery of further copies of the *Carta Esférica* and of the report of the 1794 *El Activo* expedition to which the 1992 judgment had referred. As to the allegedly new evidence, the Chamber had observed that the 1992 judgment had not been based on the question of where the original course of the river lay, but on the State's conduct during the nineteenth century having regard to the course followed by the river in 1821. The Chamber had therefore found that the facts asserted by El Salvador in connection with the avulsion of the Goascorán River were not decisive factors in respect of the judgment that it was seeking to have revised.

15. As to the new copies of certain maps and the report referred to in the 1992 judgment, the Chamber had found that they differed from the ones used in 1992 only as to certain details and afforded no basis for questioning the reliability of those documents. The Chamber had therefore concluded that the new facts were also not "decisive factors" in respect of the judgment of which El Salvador was seeking a revision. On those grounds, the Court had concluded that El Salvador's application was inadmissible.

16. In March 2004, the Court had concluded the proceedings between Mexico and the United States in the case concerning *Avena and Other Mexican Nationals*. In January 2003, Mexico had initiated proceedings against the United States regarding alleged violations of articles 5 and 36 of the Vienna Convention on Consular Relations in respect of 54 Mexican nationals (a claim subsequently reduced to 52) sentenced to death in certain states of the United States. On 5 February 2003, the Court had indicated to the United States that it must "take all measures necessary" (pp. 91–92, para. 59) to ensure that three Mexican nationals, for whom it had found that the condition of urgency had been met, were not executed, pending a final judgment of the Court. The Court had also stated that the United States Government should inform it of all measures taken in implementation of that order.

17. The facts alleged by Mexico—some of which had been conceded by the United States and some disputed—were that all the individuals in question had been Mexican nationals at the time of their arrest. Mexico had further contended that the United States authorities that had arrested and interrogated them had had sufficient information at their disposal to be aware of the foreign nationality of the individuals concerned. According to Mexico's account, in 50 of the cases, the individuals had never been informed by the United States authorities of their rights under article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations, while, in the two remaining cases, the information had not been provided "without delay", as required by that provision. Mexico had also indicated that, in 29 of the 52 cases, its consular authorities had learned of the detention of their nationals only after death sentences had been handed down. In the other 23 cases, Mexico had contended that it had learned of the cases through means other than notification to the consular post in accordance with article 36, paragraph 1 (b), of the Convention. In five cases, the information had come too late to affect the trials; in 15 cases, the defendants had already made incriminating statements; and Mexico had become aware of the other three cases only after considerable delay. On that evidence, Mexico contended, the United States had violated the provisions of article 36, paragraph 1, while the fact that no remedy was available in the United States for the violations amounted to a violation of article 36, paragraph 2.

18. In its final judgment of 31 March 2004, the Court had found essentially in favour of Mexico with regard to most of its submissions. Although the Court's findings were too numerous to describe in detail, some of the issues raised would be of particular interest to the Commission. For example, the nature of Mexico's claim, and the inadmissibility of that claim—as alleged by the United States—for lack of exhaustion of local remedies, were of relevance to the topic of diplomatic protection. The Court had observed that the individual rights of Mexican nationals under article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations "are rights which are to be asserted, at any rate in the first place, within the domestic legal system of the United States. Only when that process is completed and local remedies are exhausted would Mexico be entitled to espouse the individual claims of its nationals through the procedure of diplomatic protection. In the present case Mexico does not, however, claim to be acting solely on that basis. It also asserts its own claims, basing them on the injury which it contends that *it has itself suffered, directly and through its nationals*, as a result of the violation by the United States of the obligations incumbent upon it under [a]rticle 36 ..." (pp. 35–36, para. 40). It would be recalled that, in the *LaGrand* case, the Court had recognized that "[a]rticle 36, paragraph 1 [of the Vienna Convention on Consular Relations], creates individual rights [for the national concerned], which ... may be invoked in this Court by the national State of the detained person" (p. 494, para. 77). In the *Avena and Other Mexican Nationals* judgment, the Court had further explained that "violations of the rights of the individual under [a]rticle 36 may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual" (p. 36, para. 40). The Court had stated that "in these

special circumstances of interdependence of the rights of the State and of individual rights, Mexico may, in submitting a claim in its own name, request the Court to rule on the violation of rights which it claims to have suffered both directly and through the violation of individual rights conferred on Mexican nationals under [a]rticle 36, paragraph 1 (b). The duty to exhaust local remedies does not apply to such a request" (*ibid.*). The Court had therefore not found it "necessary to deal with Mexico's claims of violation under a distinct heading of diplomatic protection" (*ibid.*).

19. The Court had also had to interpret the text of article 36 of the Vienna Convention on Consular Relations more extensively than it had done in its decision concerning the *LaGrand* case and to clarify some of its findings in that case. Firstly, with regard to the meaning of the expression "without delay" in article 36, paragraph 1 (b), the Court had found that the duty to provide consular information existed once it had been realized that the person was a foreign national or once there were grounds to think so. It had, however, considered that, in the light *inter alia* of the Convention's *travaux préparatoires*, the term "without delay" was not necessarily to be interpreted as meaning "immediately" upon arrest. On the basis of that interpretation, the United States had nonetheless violated its obligation to provide consular notification in all the cases except one.

20. Having found that the United States had breached several of the provisions of the article, the Court had turned to the legal consequences of such breaches and to the question of the legal remedies to be considered. Mexico was seeking reparation in the form of *restitutio in integrum*, or partial or total annulment of the convictions and sentences, as the "necessary and sole remedy" (p. 60, para. 123). Citing the decision of PCIJ in the *Chorzów Factory* case (Jurisdiction), the Court had pointed out that what was required to make good the breach of an obligation under international law was "reparation in an adequate form" (p. 21). In the *Avena and Other Mexican Nationals* case, adequate reparation should mean review and reconsideration of the convictions and sentences of the Mexican nationals by United States courts. The Court had, however, emphasized that such review and reconsideration "should be both of the sentence and of the conviction" (p. 65, para. 138) and should "'tak[e] account of the violation of the rights set forth in [the] Convention' ... and guarantee that the violation and the possible prejudice caused by that violation will be fully examined and taken into account in the review and reconsideration process" (*ibid.*). As the Court had explained, in such a case, "the defendant raises his claim in this respect not as a case of 'harm to a particular right essential to a fair trial'—a concept relevant to the enjoyment of due process rights under the United States Constitution—but as a case involving the infringement of his rights under [a]rticle 36, paragraph 1. The rights guaranteed under the Vienna Convention are [indeed] treaty rights which the United States has undertaken to comply with in relation to the individual concerned, irrespective of the due process rights under United States constitutional law" (p. 65, para. 139).

21. The Court had considered, as it had done in the *LaGrand* case, that the choice of means for review and

consideration should be left to the United States, but specified that the crucial factor was the "existence of a procedure which guarantees that full weight is given to the violation of the rights set forth in the Vienna Convention, whatever may be the actual outcome of such review and reconsideration" (*ibid.*). The Court considered that "it is the judicial process that is suited to this task" (p. 66, para. 140). The United States having argued that executive clemency provided for review and reconsideration, the Court had found that the clemency process, as currently practised within the United States criminal justice system, was not sufficient in itself to serve that purpose, although appropriate clemency procedures could supplement judicial review and reconsideration.

22. Of the many other decisions rendered by the Court over the past year, he wished to draw attention only to two orders of 10 September 2003 recording the discontinuance with prejudice, by agreement of the parties, of the proceedings in the cases concerning *Lockerbie* and directing that the cases should be removed from the Court's list.

23. Despite the activity that he had described, the Court's docket remained overburdened and the high level of activity would have to be maintained. The Court would be delivering its advisory opinion on the case concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* in just two days' time, on 9 July 2004; the proceedings would be broadcast live on the Court's website. The eight cases concerning *Legality of Use of Force* and the case concerning *Certain Property* were currently under deliberation, and hearings would undoubtedly be held in other cases pending before the end of the year.

24. As was indicated by its success, the international community had become increasingly aware of the need for the Court. The confidence placed in it by States was most encouraging and he assured the Commission that the Court would continue to perform its duties to the best of its ability and was ready to fulfil such other duties as might be entrusted to it.

25. The CHAIRPERSON, after thanking the President of the International Court of Justice for his valuable and detailed statement, asked whether the Court's judgments in the *LaGrand* and *Avena and Other Mexican Nationals* cases had established a pattern that States should follow in applying the Vienna Convention on Consular Relations and that could be useful for the Commission's own work.

26. Mr. MANSFIELD said he had noted that, in the *Oil Platforms* case, the Court had made use of article 31, paragraph 3 (c), of the 1969 Vienna Convention. That provision had been very seldom used in the past, so its use was of particular interest and significance, not least for the Commission in the context of its work on the fragmentation of international law. He wondered whether the President could make any additional comments. In particular, he wondered whether the provision could be used at the outset of the interpretation process, or only when doubt had arisen as to the meaning of a particular treaty. There appeared not to be total unanimity among the judges themselves on that question.

27. Mr. Sreenivasa RAO said that the concepts of *jus cogens* and *erga omnes* obligations were a matter of particular interest to the Commission in the context of its consideration of the topic of fragmentation of international law, which included the question of the hierarchy of norms. Given that ICJ had, on several occasions, considered the scope, content and impact of the two concepts, he wondered whether the President could give the Commission any further guidance.

28. Mr. SHI (President of the International Court of Justice), replying to the Chairperson's question, said that the Court had indeed not only established a precedent in the *LaGrand* case but had developed it in the *Avena and Other Mexican Nationals* case. While the Court's decisions were, of course, binding only on the States parties and only in the case concerned, the reasoning behind a judgment would nevertheless have an impact on the practice of other States. Some scholars had already acknowledged that the Court had established jurisprudence relating to article 36 of the Vienna Convention on Consular Relations. He doubted that the Court would deviate from the precedent in the future.

29. As for Mr. Mansfield's question, it would be inappropriate for him as President to comment further on the *Oil Platforms* case, since to do so would involve divulging details of the Court's deliberations. As Mr. Mansfield had noted, there had been divergent views.

30. Responding to Mr. Sreenivasa Rao's query, he said that the Court had recognized the *erga omnes* effect of certain international norms in several decisions, one of which was to be made public on Friday, 9 July 2004. As for the concept of *jus cogens*, all he could say at that juncture was that the matter had been discussed formally and informally and that opinion was divided.

31. Mr. CHEE, referring to the Court's finding in the *LaGrand* case that the United States had violated article 36 of the Vienna Convention on Consular Relations, said that a treaty concluded by the United States represented the supreme law of the land under its Constitution. How did the Court expect the United States to respond to its decision, given that what was involved was a violation of its own internal law?

32. Concerning the revision of the Court's judgments, he observed that at the national level there was usually a three-tier system of trial, intermediate and supreme courts. For the Court to revise its judgments would amount to a review process, which might be permitted by the Court's internal rules. The problem was that the same court would be reviewing the same issues.

33. Mr. DAOUDI observed that it had taken the Court some seven months to formulate an advisory opinion in the case concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, which would be rendered public on 9 July 2004. Was that how long it normally took the Court to formulate such opinions, or had the matter been accorded priority in view of its urgency?

34. Mr. MOMTAZ said that while he understood the Court's reluctance to use the concept of *jus cogens* in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* case, the Court had referred to the "intransgressible" norms of international humanitarian law. Could that concept be equated with *jus cogens*? It was also worth noting that the International Tribunal for the former Yugoslavia had referred to the concept of *jus cogens* on several occasions; for instance in connection with the prohibition of torture. Was the fact that it referred to *jus cogens* perhaps not a further example of the fragmentation of international law?

35. Mr. SEPÚLVEDA, taking up Mr. Chee's comment concerning the *LaGrand* case, said that the Court's decision in that case had resulted directly in two entirely separate outcomes. In Oklahoma, where a Mexican national had been sentenced to death, the Oklahoma Court of Criminal Appeals, invoking the ICJ decision, had decided that the sentence should be reviewed. Three hours later, without any knowledge of the decision of the Court of Criminal Appeals, the Governor of Oklahoma had decided to grant the Mexican national in question clemency and to commute his death sentence to a life sentence. Those decisions showed the significance of the Court's judgment in the *LaGrand* case, which had effectively been invoked twice.

36. Mr. SHI (President of the International Court of Justice) said that Mr. Chee's question had been answered in part by Mr. Sepúlveda. The Vienna Convention on Consular Relations was a treaty to which the United States was a party and under the United States Constitution, treaties were indeed the law of the land. There were two categories of treaties in the United States: self-executory treaties that could be implemented with the President's signatures and treaties requiring approval by the Senate. Many treaties to which the United States was party still awaited such approval. In the *LaGrand* and *Avena and Other Mexican Nationals* cases, the United States courts had applied the procedural default rule. Under United States legislation the accused had had the right to apply to the court during the trial stage, alleging violations of the Vienna Convention on Consular Relations. However, because the matter had not been raised at the appropriate time, the United States courts had considered that the claim could no longer be entertained as the cases could be dealt with only under due process of law. It was not for him to say how that view could be reconciled with United States treaty obligations. In the *LaGrand* case the Court had left it to the United States courts to decide how best to implement its decision, whereas in the *Avena and Other Mexican Nationals* case it had recommended review and reconsideration by the domestic courts rather than through the executive clemency process. It was his understanding that the State Department was considering the implementation of such decisions at federal level. On the whole, the Court's decision concerning the *LaGrand* case had been very well received by the United States media, even in states such as Texas where the number of death sentences applied was very high. The Oklahoma Court of Criminal Appeals had clearly accepted that the Convention did indeed impose obligations on the United States.

37. In response to Mr. Daoudi's question, he said that it usually took the Court one to two years to issue an advisory opinion in contentious cases, although it had sometimes taken as much as 10 years. In order to comply with the General Assembly's request for urgency, the Court had accorded the Palestinian case priority. He considered that it had been dealt with fairly swiftly, given its complexity and political sensitivity. Requests for the indication of provisional measures were sometimes dealt with in as little as one month.

38. In reply to Mr. Momtaz, he said that the question as to whether the intransgressible norms of humanitarian law could be deemed to be *jus cogens* was one of interpretation. There was certainly no mention of it in the Court's judgment.

39. The CHAIRPERSON again thanked Mr. Shi for his valuable and thoughtful statement and wished him a safe journey back to The Hague.

**Unilateral acts of States (continued) (A/
CN.4/537, sect. D, A/CN.4/542²)**

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

40. Mr. GAJA said that, having persistently expressed the wish that the Special Rapporteur should undertake an analysis of State practice, he could not but note with satisfaction that the Special Rapporteur had striven to do so, in compliance with the recommendation made by the Working Group on unilateral acts of States in 2003.³ The collection of materials that the Special Rapporteur had provided in his seventh report (A/CN.4/542) was an indispensable part of the Commission's work, whether the aim was to draft articles or to make an expository study of unilateral acts.

41. The report attempted to classify practice according to the traditional categories of promise, recognition, waiver, protest and notification. The category of "forms of State conduct which may produce legal effects similar to those of unilateral acts" (chapter I of the report) had also been included, with a view to covering cases in which a legal effect of conduct did not correspond to an intention on the part of the author to create that legal effect. Arguably, instances of silence and preclusion or estoppel, considered separately in the report, also fell into that category. There was a distinction between unilateral acts *stricto sensu* and other unilateral conduct which, as had been stressed both by the Working Group and in plenary at the previous session, appeared to be of greater practical importance and on which more materials might usefully have been provided in the report.

42. Other aspects of the classification might be challenged, particularly the Special Rapporteur's inclination to characterize as unilateral acts *stricto sensu* instances that could rather be classified as forms of conduct to which legal consequences similar to those of unilateral

acts were attached. For example, the Special Rapporteur cited a passage from the *Nottebohm* case in paragraph 83 of the section of the report on waiver. ICJ, however, had viewed the case from the standpoint of recognition, asking itself whether legal consequences could be attached to Guatemala's offer to have recourse to negotiations during the proceedings or before their institution. The Court had stated that no recognition was implied in the offer to engage in negotiations and had concluded that no abandonment of any defence had been expressed by or followed from the attitude adopted by Guatemala. It had accordingly been looking at the case from the perspective, not of unilateral acts *stricto sensu*, but of conduct implying recognition although not intended to produce the effect of recognition.

43. The main question to be discussed was what use should now be made of the 80 pages of useful material provided by the Special Rapporteur. A long series of events had been catalogued and some interesting aspects of practice identified, with reference to their political implications and to their possible legal effects. However, further analysis of the material was clearly needed.

44. The report provided some help in answering the first question in the Working Group's recommendation 6,⁴ set out in paragraph 5 of the report: what were the reasons for the unilateral act or conduct of the State? Much less progress had been made, however, on the two other questions in that recommendation: what were the criteria for the validity of the express or implied commitment of the State; and in which circumstances and under which conditions could the unilateral commitment be modified or withdrawn? The report addressed those questions only sporadically, giving the impression that most of the practice listed was unlikely to shed any light on the validity or effects of unilateral acts or equivalent conduct. While the relevant practice necessary to answer those pointed legal questions was probably not abundant, it should nonetheless be sought out. For example, material on the competence of acting State organs had surfaced several times, notably when an application to ICJ by Bosnia and Herzegovina against Yugoslavia on grounds of genocide had been withdrawn by one of the three members of Bosnia's joint presidency. Thus, a State embarrassed by a declaration or act by one of its organs could argue that that organ had no competence to bind the State or engage in any conduct equivalent to a unilateral act. In that connection, he found the list in paragraph 208 of the report of persons authorized to act and make commitments on behalf of the State to be unrealistically long: it would be highly inadvisable for a State to have so many persons authorized to make binding commitments on its behalf.

45. What was now needed was for practice relevant to the legal questions about the validity and legal effects of unilateral acts to be selected and analysed in depth. On the basis of that kind of analysis, some proposals should be made to the Commission regarding the way ahead. A working group should again be convened in order to clarify the methodology of the next stage of the study. The Special Rapporteur was in the uncomfortable position of having to try to meet the Commission's insatiable appetite

⁴ Reproduced in *Yearbook ... 2004*, vol. II (Part One).

⁵ See 2811th meeting, footnote 2.

¹ See footnote above.

without knowing exactly whether it wished to be served a first course, a main course or a dessert. He himself would suggest that it was now time for the main course.

46. Mr. KOLODKIN said that, following the recommendation of the Working Group, the Special Rapporteur had collected a great deal of factual material which had the value of revealing the complexity of the task before the Commission, that of determining the direction that further study of the topic should take. In reading the report, he had more than once caught himself thinking that it was difficult to see whether certain examples given were of unilateral juridical acts or of unilateral political acts without legal effects. Perhaps the Special Rapporteur had not intended to give examples solely of unilateral juridical acts: indeed, in paragraph 202 of the report he admitted that some of the acts and declarations cited might not be juridical.

47. The question then arose as to whether it was possible and necessary to draw the boundaries between unilateral juridical and political acts. What were the criteria for determining that a given act was juridical? According to the definition given in recommendation 1 of the Working Group, the main element appeared to be that a unilateral juridical act was one by which a State sought to create obligations or other legal effects under international law. That seemed to him to be a subjective criterion, conditioned by the subjective intention of the State. How could one determine whether the State that formulated a unilateral act had or did not have such an intention? Were there any objective signs to show that an act truly had the aim of creating legal effects under international law?

48. The Special Rapporteur gave many examples of unilateral acts from the practice of the Union of Soviet Socialist Republics and the Russian Federation. He himself had asked his colleagues who had participated in the formulation of unilateral declarations in the disarmament field or on the dismantling of the listening station in Cuba, acts referred to in the report, whether they had been intended to create legal effects. They had responded, in surprise, that the acts had been exclusively political. Their legal consequences had not been discussed or envisaged, and the Government had had no intention of creating legal consequences through them. Could they nevertheless be categorized as legal acts on the basis of the definition given in recommendation 1?

49. The problem of distinguishing between political and legal acts arose also in connection with international agreements. A Government's intention to enter into a treaty relationship rather than a political understanding, or vice versa, was generally expressed in the phraseology of the relevant document. So how then did unilateral acts fit into the picture? Perhaps the very subject matter of the act could play a decisive role in determining whether it was political or juridical in nature. With the formal act of recognition of a State or Government as a successor State, or a declaration of non-recognition of a legal claim, one could with some degree of certainty assume that the act involved was a unilateral act of a juridical nature. The very subject matter of the act in such cases had a manifestly legal nature. However, that was by no means always true, and when the object, content and context of the act

provided no clear grounds for concluding that the act gave rise to legal obligations on the part of the State that had formulated it, then the principle that limitations on sovereignty could not be presumed must also be taken into account. In such circumstances, there must be a presumption that the unilateral act was not of a legal character.

50. Having said that, he did not deny the existence of unilateral legal acts. For example, he did not agree with Professor Hugh Thirlway in an article affirmed that unilateral acts did not exist as a source of law, since, if there was acceptance of a unilateral act by its addressee, there was a bilateral, conventional relationship.⁵ The extensive compilation of unilateral acts presented by the Special Rapporteur had reconfirmed his own view that it would be difficult, indeed perhaps impossible, to identify unilateral acts *stricto sensu* and develop certain general principles and criteria applicable to them. With all due respect to the recommendations of the Working Group, he thought that the proposal of the United Kingdom that the Commission's work should take the form of an expository study rather than of a set of draft articles was worthy of consideration.

51. Referring to recommendation 6 of the Working Group, which had perhaps merited more attention in the report, he said that some of the doctrine indicated that the criteria for validity of the unilateral commitment of the State were similar to the criteria for validity of treaties. It was said, among other things, that, like treaties, unilateral acts must be in accordance with the rules of *jus cogens*. That was true, but one might ask whether, unlike treaties, unilateral acts should be in accordance not only with peremptory norms of international law but also with non-mandatory norms.

52. As to the conditions for modification or withdrawal of a unilateral commitment, there again the question arose as to whether a broad analogy with treaties was appropriate, partly because the principle of reciprocity was unlikely to be applicable in the sphere of unilateral commitments, although the possibility of reciprocal unilateral commitments could not be excluded. Despite their legal nature, then, were unilateral commitments not by definition more flexible than treaties? It would be interesting to look at State practice with regard to modification or withdrawal of unilateral commitments.

53. Mr. BROWNLIE, supplementing the comments that he had made at the previous meeting, said that he had been somewhat depressed by the relative absence of reference in the seventh report to the Commission's own previous discussions on the topic. The Special Rapporteur was not required to agree with members of the Commission, but if they made analytical points, those points should at least be reflected. Otherwise there would be no continuity; the Commission would never be able to build on what had already been said and each comment would, as it were, lie bobbing in the wake of the ongoing vessel. He himself, for example, had made several attempts to get a reasoned

⁵ See H. Thirlway, "The sources of international law", in M. D. Evans (ed.), *International Law*, 2nd ed. (Oxford, Oxford University Press, 2006), pp. 115–140.

explanation as to why silence and estoppel were excluded from the Special Rapporteur's concept of the subject.

54. A second point that he wished to make was that there was no such thing as a unilateral act: that was merely a familiar and convenient label. It was actually a case of legal relationships created by unilateral acts, the mechanics of what States did, or did not do, in reaction to the conduct of other States and whose effects were not unilateral. The *Nuclear Tests* case was a very good example of that phenomenon. The behaviour of French ministers who had made public statements on television had become meaningful because of its context and background. Categories were accordingly useless, because everything depended on the context and antecedents of particular events. Acts meant conduct, and conduct included the very important concepts of silence and acquiescence.

55. As the Working Group's recommendations to the Special Rapporteur indicated, the Commission was looking for some general criteria for identifying the legal relations that resulted from so-called unilateral acts or conduct. There were at least three possibilities. The first was that the precipitating conduct of the individual State showed an intention to create legal relations. That could be called an assurance or a promise, but it need be given no label whatsoever, as it was the conduct that must be analysed. In the *Nuclear Tests* case and others, legal relations had resulted without anyone involved using terms such as "promise". The second possibility, revealed again in the *Nuclear Tests* case, was that the principle of good faith came into play: in all the circumstances, the factor of reliance appeared as a reasonable response to the conduct concerned. A third possibility went back to the *Ihlen* declaration,⁶ which appeared as a unilateral act because PCIJ had invoked it as evidence on the question of title to south-eastern Greenland. In fact, however, it had been part of an exchange between two ministers in which one had undertaken not to create difficulties over eastern Greenland, and the other had said that no difficulties would be made over Spitzbergen. It was perfectly possible to say that that was evidence of an informal agreement.

56. The term "recognition" had no standard content whatsoever: it could mean legal or political recognition. Non-recognition, for its part, could be either legal or political: either the entity in question did not qualify legally as a State, or its existence was deliberately ignored by other States, as a sort of sanction. Everything depended heavily on the factual context, and the application of terms such as "promise" could not be seen as a form of analysis, because it was not. Such categories must be left behind if anything useful was to be achieved, and a possible approach was to look for criteria, as the recommendations had sought to suggest.

57. It was unhelpful that the Special Rapporteur and his assistants insisted on ignoring silence. Silence was acquiescence, which was enormously important in the law. Similarly, with regard to estoppel, it did not matter whether its origin was Anglo-Saxon or Patagonian; the important point was that it was heavily embedded in the case law of ICJ; for example, in the *Gulf of Maine* case.

Trouble lay ahead if the Commission laid aside whole areas of important jurisprudence and experience on the grounds that something was an allegedly Anglo-Saxon concept. It was the experience not just of States but of tribunals that had to be taken into account.

58. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur), responding to the comments made so far, emphasized that the survey had been carried out under his sole responsibility. If no reference had been made to the Commission's previous discussions, that was because it had been taken for granted that everyone was aware of what had been said and recalled the differences of view that had emerged on certain subjects.

59. The most important question was what was to happen next. In his view, reviewing the categories and classifications used in the report was of lesser importance than seeking a definition covering both acts and conduct; concepts which, incidentally, he did not view as synonymous. Silence had been acknowledged in the report to constitute an extremely important form of conduct in international law that had highly significant legal consequences. Estoppel and acquiescence, too, were of fundamental importance in terms of their effects.

60. A working definition must be sought, more specific than the one elaborated in 2003 and covering all acts and also any conduct that was deemed to produce legal effects. The creation of a working group would be an important means of paving the Commission's way in two areas: drafting the definition as just described, and determining whether what was to be elaborated should be a set of draft articles or, as had been recently suggested, a series of guidelines or an expository study.

The meeting rose at 1 p.m.

2814th MEETING

Thursday, 8 July 2004, at 3.05 p.m.

Chairperson: Mr. Teodor Viorel MELESCANU

Present: Mr. Addo, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Mr. Fomba, Mr. Gaja, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Yamada.

Organization of work of the session (*continued*)*

[Agenda item 1]

The CHAIRPERSON announced that the members of the Commission who had planned to speak on unilateral acts of States at the current meeting had agreed to postpone their statements until the following day. The Working Group on the topic of international liability would

³ See 2812th meeting, footnote 2.