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Summary record of the 2988th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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*Downloaded from the web site of the International Law Commission
(<http://legal.un.org/ilc/>)*

63. The ruling rendered by the Spanish criminal court on 28 April 2008, cited in paragraph 88 (c) of the report, was interesting in that it illustrated, in a somewhat novel way, the legal regime applicable in the event of refusal of extradition. It established two conditions: first, that the territorial State must prosecute the suspect in its own courts; and second, that the trial should take place solely if so required by the State requesting extradition. The latter was a condition characterized by the Special Rapporteur as “new and so far unknown”, but it was a condition of which one must be absolutely sure. In conclusion, he noted that the Special Rapporteur was clearly running up against difficulties that were beyond his control. He therefore thought that Mr. Pellet’s idea of setting up a working group to assist the Special Rapporteur was a wise proposal, provided that the group’s terms of reference were specified. In response to the Chairperson’s appeal, he said that he reserved the right to revert to the issues raised and to deal with other issues at the following session.

64. Mr. CANDIOTI, referring to the comments by Mr. Gaja, noted that he had spoken only of the obligation to prosecute, as though it was the sole obligation flowing from the *aut dedere aut judicare* principle. Mr. Fomba had listed four possible options for the obligation to extradite or prosecute. Under the circumstances, he suggested that it might be helpful to adopt a single working definition of the obligation involved; that would facilitate the Commission’s work on the topic and perhaps elicit fresh responses from States.

The meeting rose at 1 p.m.

2988th MEETING

Thursday, 31 July 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

The obligation to extradite or prosecute (*aut dedere aut judicare*) (concluded) (A/CN.4/588, sect. F, A/CN.4/599, A/CN.4/603)

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRPERSON invited the Special Rapporteur to sum up the debate on the obligation to extradite or prosecute (*aut dedere aut judicare*).

2. Mr. GALICKI (Special Rapporteur) thanked all the members of the Commission who had participated in the debate for their constructive and friendly criticism. Most of that criticism had been aimed at the approach he had adopted in his third report, which consisted of the continued consideration of material covered in his preliminary²⁸¹ and second reports,²⁸² and at the slow pace of progress on the topic. While he attributed those shortcomings chiefly to the reluctance or failure of many Governments to submit the comments and information requested of them, he agreed that a more expeditious and proactive approach was needed, and that the situation should not stand in the way of determining the basic structure and content of the topic. At the current stage, input from Governments should be viewed as valuable support, but not as a prerequisite for the further development of the study. In the light of those comments, he would continue his efforts with a view to presenting a more substantive set of draft articles in his next report.

3. With regard to the draft articles proposed in the third report, some members had been of the view that draft article 1 (Scope of application) should not specify the various time periods corresponding to the establishment, operation and effects of the obligation, while others had taken the contrary view that their inclusion would help to provide a structure for the future work of the Commission on the topic. On the question whether the adjective “alternative” should be replaced by “legal”, the prevailing opinion had been that any adjective was redundant, and Mr. Fomba had pointed out that the phrase “alternative obligation” could be interpreted in at least four ways. He would therefore refrain from qualifying the obligation in any way, and would also shorten the title of the draft article to “Scope”.

4. As to the substantive element of draft article 1 and the delimitation of the crimes and offences to be covered by the obligation, the view had been expressed that the obligation, and also the principle of universal jurisdiction, arose only in connection with serious crimes under international law. That view was supported by statements made by the representatives of Sweden and China in the Sixth Committee.²⁸³ Mr. Candiotti had suggested that the Commission’s primary focus should be on determining the exact nature and content of the obligation on the basis of the various opinions expressed by members during the current session. The need for such a determination as a precondition for any further development of the topic had been unconditionally endorsed by all members who had spoken in the debate.

5. With regard to the personal element, there had been fairly widespread support for the formulation “persons under their jurisdiction”, given that the matter was essentially regulated by existing treaties on extradition. The point had also been made that the obligation arose only when the alleged offender was present in the territory of the requested State, which had the discretionary power

²⁸¹ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/571.

²⁸² *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/585.

²⁸³ *Official Records of the General Assembly, Sixty-second Session, Sixth Committee, 22nd meeting (A/C.6/62/SR.22)*, paras. 33 and 62, respectively.

either to prosecute or to extradite the offender. The obligation was thus contingent on there being a request for extradition.

6. Although doubts had been expressed on the matter at previous sessions, there had been some support for his position on the advisability of analysing the “triple alternative” hypothesis, given current developments regarding the complementary character of the Rome Statute of the International Criminal Court. It had also been considered advisable to expand the scope of the current study to include key procedural issues, such as the conditions for extradition and States’ margin of discretion in respect of a refusal to extradite.

7. With regard to draft article 2 (Use of terms), in keeping with the emphasis on the personal element favoured by some members, he would include definitions of the terms “persons”, “persons under jurisdiction”, and also “universal jurisdiction”, as had been suggested by Ms. Escarameia.

8. Regarding draft article 3 (Treaty as a source of the obligation to extradite or prosecute), he endorsed Mr. Dugard’s suggestion that the text would benefit from the inclusion of examples of specific treaties or categories of treaty.

9. It had been stressed that progress on the topic ought to be accelerated, given that sufficient materials had already been collected to provide a basis for drawing some decisive and constructive conclusions. As to the shape that future provisions might take, it had been suggested that draft articles should be elaborated to address each of the following issues: the source of the obligation; its customary nature; and the obligation as a general principle deriving from elements both of national legislation and of practice.

10. As to the methodology, a two-phase approach had been advocated, whereby first the substantive, then the procedural issues would be addressed. Mr. Gaja, however, had suggested that procedural aspects, such as the elements that triggered the obligation, should be addressed before substantive ones such as the source and content of the obligation.

11. It had also been observed that the next report should directly address two fundamental issues: the relationship between the obligation to extradite or prosecute and the principle of universal jurisdiction; and the “triple alternative” hypothesis. Support had been expressed for his proposed approach using the Commission’s 1996 draft code of crimes against the peace and security of mankind²⁸⁴ as a legal background.

12. Members had generally favoured the establishment of a working group entrusted with the specific mandate of analysing the most controversial substantive issues to be addressed in future draft articles, such as the customary nature of the *aut dedere aut judicare* obligation, the relationship between that obligation and the principle of universal jurisdiction, crimes and offences covered by the

obligation, and the role of international criminal jurisdiction in that context.

13. Support had also been expressed for an assessment of other procedural questions, to be undertaken at a subsequent stage of the exercise, including conditions of extradition, grounds for its refusal and legal safeguards available to individuals, concurrent requests for extradition, and the regulation of judicial guarantees. The need for a more pragmatic, rather than an academic or abstract approach to the topic had been stressed, as had the need for more decisive progress in the elaboration of substantive draft articles dealing with specific and clearly delimited aspects of the topic.

14. He was particularly grateful to Mr. Pellet for his frank and constructive comments, and for his suggestion, which had been supported by other members, that a working group be established in order to determine the scope of the obligation to extradite or prosecute and to identify and provide answers to the fundamental questions that it posed. Experience had shown that working groups could provide valuable assistance in developing and accelerating work on a particular topic.

15. The draft articles to be included in his fourth report should deal, first, with such general matters as the sources of the obligation, its content and its extent. At least some of those draft articles could draw on the work of the Commission on its 1996 draft code of crimes against the peace and security of mankind. He looked forward to participating actively in the work of the new working group, and suggested that Mr. Pellet was ideally suited to serve as its chairperson.

Programme, procedures and working methods of the Commission and its documentation (A/CN.4/L.742²⁸⁵)

[Agenda item 10]

REPORT OF THE PLANNING GROUP

16. Mr. KOLODKIN (Chairperson of the Planning Group), introducing the report of the Planning Group (A/CN.4/L.742), said that the Planning Group had held five meetings. Included in its agenda had been the following items: Working Group on the long-term programme of work; date and place of the sixty-first session of the Commission; consideration of General Assembly resolution 62/70 of 6 December 2007 on the rule of law at the national and international levels; documentation and publications; dialogue between the Commission and the Sixth Committee; meeting with legal advisers; and other matters. His report was organized around those issues, though not presented in that order. Although it was self-explanatory, he wished to highlight several of its salient aspects.

17. First, it was unanimously agreed that the two-day event commemorating the sixtieth anniversary of the Commission had been one of the highlights of the current session. The Planning Group had considered the meeting with legal advisers held in the context of that

²⁸⁴ *Yearbook ... 1996*, vol. II (Part Two), p. 17, para. 50.

²⁸⁵ Mimeographed; available on the Commission’s website.

event to be a useful forum for interaction and believed that it would be beneficial to hold such meetings at least once during every quinquennium, preferably before its midpoint. Moreover, Member States, in association with existing regional organizations, professional associations, academic institutions and members of the Commission, played an important role in convening national or regional meetings dedicated to the work of the Commission, and they should be encouraged to continue to convene such events as appropriate.

18. Secondly, in its resolution 62/70 on the rule of law at the national and international levels, the General Assembly had, *inter alia*, invited the Commission, in its report on the work of its current session, to comment on its current role in promoting the rule of law. In response to that invitation, the Planning Group had reflected on the matter and had prepared several paragraphs for inclusion in its report. Owing to a heavy translation workload, it had not been possible to include those paragraphs (paragraphs 8 to 13) in the present report. The Secretariat had circulated an informal text containing the relevant paragraphs in English only, for eventual inclusion in the relevant chapter of the Commission's report.²⁸⁶ The Planning Group had been well aware that the agenda item before the General Assembly was multifaceted and had been mindful of that fact in preparing the Commission's contribution. It was indebted to Mr. Vasciannie for preparing the draft used as a basis for formulating its response.

19. Thirdly, the relationship between the Commission and the Sixth Committee remained central to the work of the Commission. From a strategic perspective, it was obviously essential for States to submit evidence of State practice to the Commission, as well as written comments and observations on the work of the Commission. It was nevertheless useful to explore ways and means of harnessing the relationship with the Sixth Committee by encouraging interactive dialogue, either within the framework of the Sixth Committee itself, or in other informal meetings that took place during the International Law Week in New York, so as to redirect the focus towards topics on the Commission's agenda.

20. Fourthly, financial issues that would enable the Commission to discharge its functions more meaningfully had also been discussed. In particular, the Planning Group had once again raised the question of honoraria for special rapporteurs. It had also considered it useful to highlight the importance of ensuring that more than one special rapporteur would be able to attend the meetings of the Sixth Committee when it considered the report of the Commission.

21. Lastly, the Working Group on the long-term programme of work had held several meetings, and on the basis of the report of the Working Group, the Planning Group had endorsed the inclusion of two topics in the long-term programme of work of the Commission: one entitled "Treaties over time", on the basis of a revised and updated proposal by Mr. Nolte,²⁸⁷ the other entitled "Most-favoured-nation clause", on the basis of the

report of the 2007 Working Group on the subject chaired by Mr. McRae.²⁸⁸ Both topics reflected States' needs in respect of the progressive development and codification of international law; they were sufficiently advanced in terms of State practice to permit progressive development and codification; and they were concrete and feasible for progressive development and codification. The syllabuses of the topics would be annexed to the report of the Commission, should it agree to their inclusion. The paper by Mr. Nolte was currently available in English only; it was being translated and would be available in other official languages the following week. The Planning Group had also proposed the inclusion of the two topics in the current programme of work of the Commission and recommended the establishment of study groups on both topics at the sixty-first session of the Commission.

22. As was customary, the report of the Planning Group would be reproduced as part of the last chapter (chapter XII) of the report of the Commission, under "Other decisions and conclusions of the Commission", with the necessary adjustments to reflect the issues covered in the report. He wished to thank the members of the Planning Group for their active participation in the discussions, and the Secretariat for the assistance it had extended to himself and to the Planning Group.

23. The CHAIRPERSON invited the Commission to adopt the report of the Planning Group paragraph by paragraph.

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Paragraph 3

24. Mr. GAJA suggested that the forms of address "Her Excellency" and "His Excellency" were redundant and should be deleted.

Paragraph 3, as amended, was adopted.

Paragraphs 4 to 6

Paragraphs 4 to 6 were adopted.

Paragraph 7

25. Mr. CANDIOTI suggested that, in footnote 5, the phrase "in respect of the Seminar" should be deleted, since the publication by the Argentine Council of Foreign Relations, which was intended as a tribute to the Commission, addressed not only the topic of aquifers but also most of the Commission's current topics.

Paragraph 7, as amended, was adopted.

Paragraphs 8 to 13

26. The CHAIRPERSON suggested that since paragraphs 8 to 13 of the report were not yet available in all official languages, they should be taken up when the

²⁸⁶ *Yearbook ... 2008*, vol. II (Part Two), paras. 341–346.

²⁸⁷ See *Yearbook ... 2008*, vol. II (Part Two), annex I.

²⁸⁸ Document A/CN.4/L.719 (mimeographed; available on the Commission's website, documents of the fifty-ninth session). See also *Yearbook ... 2007*, vol. II (Part Two), p. 98, para. 377.

Commission turned to the consideration of the relevant chapter of the report on the work of its current session.

It was so agreed.

Paragraphs 14 to 20

Paragraphs 14 to 20 were adopted.

27. The CHAIRPERSON said that the text under section A.6 relating to the meeting with members of the Appellate Body of WTO would be prepared in time for consideration and adoption as part of chapter XII of the report of the Commission on the work of its current session.

Paragraph 21

28. Mr. HASSOUNA said that he fully supported paragraph 21, but wished to raise a separate financial issue. In his view, it was unacceptable that a number of members of the Commission and the Secretariat had received their daily subsistence allowance a week late. Since the Commission was requesting that funds should be allocated to allow more special rapporteurs to attend the meetings of the Sixth Committee, it should also, as a matter of principle, express its disappointment concerning that delay.

29. The CHAIRPERSON said that, while he shared Mr. Hassouna's concerns, he did not think the report under consideration was the appropriate place in which to air such a complaint. If members so wished, he would take the necessary measures to contact the authorities in Geneva and in New York to inform them of the problem.

Paragraph 21 was adopted.

Paragraphs 22 to 28

Paragraphs 22 to 28 were adopted.

30. The CHAIRPERSON said that the report of the Planning Group as a whole, as amended, would be adopted once the Commission had considered its paragraphs 8 to 13 in the context of its consideration of chapter XII of its report.

Cooperation with other bodies (continued)*

[Agenda item 12]

STATEMENT BY THE REPRESENTATIVE OF THE
ASIAN–AFRICAN LEGAL CONSULTATIVE ORGANIZATION

31. The CHAIRPERSON invited Mr. Singh to make a brief statement to the Commission on behalf of the Secretary-General of the Asian–African Legal Consultative Organization (AALCO).

32. Mr. PELLET said it was a shame that a statement by the representative of a regional body should be dispatched in indecent haste without the opportunity for a proper dialogue between the representative and the Commission. He suggested that an hour of the programme of work for the following week should be set aside for that purpose.

33. Mr. SINGH, speaking as the representative of AALCO, suggested that he should make a brief statement to the Commission and submit to the Secretariat the detailed report of the Secretary-General of AALCO on the its forty-seventh session,²⁸⁹ held in New Delhi from 30 June to 4 July 2008, for possible inclusion in the Commission's report.

34. Ms. XUE said it was because the new Secretary-General of AALCO would not take up his duties until late August 2008 that Mr. Singh had been invited to address the Commission on behalf of the Secretary-General. Since the Commission would probably need to devote all the following week's meetings to the adoption of its annual report, she urged the Chairperson to allow Mr. Singh, who had presided over the Organization's forty-seventh session, to report briefly on the activities of AALCO at the current meeting, as there might be no further opportunity for him to do so.

35. The CHAIRPERSON suggested that Mr. Singh should make a brief presentation during the current meeting, on the understanding that, if time allowed, a fuller discussion would take place the following week, as proposed by Mr. Pellet.

36. Mr. HASSOUNA and Mr. PETRIČ endorsed that suggestion.

It was so decided.

37. Mr. SINGH, speaking as the representative of AALCO on behalf of the Secretary-General of AALCO, said it was an honour to address the Commission on the occasion of its sixtieth anniversary session. AALCO recognized the Commission's great contribution, in furtherance of its mandate, to the progressive development and codification of international law over the past 60 years. It attached great importance to its long-standing relationship with the Commission, which involved the statutory obligation to consider the topics under consideration by the Commission and to forward to the Commission the views of its member States. The fulfilment of that mandate over the years had helped to forge a closer relationship between the two bodies.

38. Traditionally, it was the Secretary-General of AALCO who presented highlights of the views of delegations participating in its annual sessions to the Commission. However, since the newly-appointed Secretary-General, Mr. Rahmat Mohamad, would not take up his duties until the following month, he had been requested, as the President of the forty-seventh session of AALCO, to present to the Commission the highlights of its deliberations on matters relating to the Commission's work.

39. He was grateful to the Commission for enabling Mr. Perera to represent it at the forty-seventh annual session of AALCO. Mr. Perera had reported on the work of the Commission at its fifty-ninth session and the first part of its sixtieth session. Mr. Kamto and Ms. Xue had also attended the session, which had taken place in New Delhi, where the headquarters of AALCO were located, from 30 June to 4 July 2008. He himself had been elected President, and Mr. Wanjuki Muchemi, Solicitor General of Kenya, had

* Resumed from the 2985th meeting.

²⁸⁹ Available from www.aalco.int.

been elected Vice-President. In addition to the deliberations on a number of organizational matters and substantive agenda items, a one-day special meeting had been held on the theme of “Contemporary issues in international humanitarian law”, jointly organized by AALCO and ICRC.

40. During discussions on the agenda item relating to the work of the Commission, many delegations had made detailed comments on the topics of shared natural resources, effects of armed conflicts on treaties, reservations to treaties, responsibility of international organizations, expulsion of aliens, and the obligation to extradite or prosecute (*aut dedere aut judicare*). Owing to time constraints, he would submit a detailed summary of those comments to the Secretariat.

41. The forty-seventh session had welcomed the establishment by the Commission of an Open-ended Working Group on the most-favoured-nation clause to examine the possibility of including the topic in its long-term programme of work.²⁹⁰ It had also appreciated the fruitful exchange of views on the items discussed during the meeting between AALCO and the Commission held in conjunction with the AALCO legal advisers’ meeting in New York on 5 November 2007. The member States of AALCO had requested that such meetings should continue to be convened in future. He looked forward to hearing the Commission’s views and suggestions on possible topics for discussion at the next meeting between AALCO and the Commission.

42. On the occasion of the Commission’s sixtieth anniversary, proposals had been made that AALCO should organize a seminar on the work of the Commission, to be held before the end of 2008. He hoped that some members of the Commission would be able to participate in that event.

43. The Secretariat of AALCO would continue to prepare notes and comments on the substantive items considered by the Commission in order to assist the representatives of AALCO member States in the Sixth Committee in their deliberations on the report of the Commission on the work of its sixtieth session. An item entitled “Report on matters relating to the work of the International Law Commission at its sixtieth session” would be considered at the forty-eighth session of AALCO.

44. In closing, he extended an invitation to members of the Commission to attend the forty-eighth session of AALCO, the date and venue of which would be communicated to them in due course, and thanked the Commission for allowing him the opportunity to address it.

Reservations to treaties (concluded)* (A/CN.4/588, sect. A, A/CN.4/600, A/CN.4/L.723 and Corr.1, A/CN.4/L.739 and Corr.1, A/CN.4/L.740)

[Agenda item 2]

REPORT OF THE DRAFTING COMMITTEE (concluded)**

45. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee) introduced the first part of the

final report of the Drafting Committee, which consisted of its third and final report on the topic “Reservations to treaties”, to be found in document A/CN.4/L.740. That document contained the titles and texts of twelve draft guidelines provisionally adopted by the Drafting Committee. The draft guidelines read:

2.8.1 Tacit acceptance of reservations

Unless the treaty otherwise provides, a reservation is considered to have been accepted by a State or an international organization if it shall have raised no objection to the reservation within the time period provided for in guideline 2.6.13.

2.8.2 Unanimous acceptance of reservations

In the event of a reservation requiring unanimous acceptance by some or all States or international organizations which are parties or entitled to become parties to the treaty, such an acceptance once obtained is final.

2.8.3 Express acceptance of a reservation

A State or an international organization may, at any time, expressly accept a reservation formulated by another State or international organization.

2.8.4 Written form of express acceptance

The express acceptance of a reservation must be formulated in writing.

2.8.5 Procedure for formulating express acceptance

Draft guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6, and 2.1.7 apply *mutatis mutandis* to express acceptances.

2.8.6 Non-requirement of confirmation of an acceptance made prior to formal confirmation of a reservation

An express acceptance of a reservation made by a State or an international organization prior to confirmation of the reservation in accordance with draft guideline 2.2.1 does not itself require confirmation.

2.8.7 Acceptance of a reservation to the constituent instrument of an international organization

When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

2.8.8 Organ competent to accept a reservation to a constituent instrument

Subject to the rules of the organization, competence to accept a reservation to a constituent instrument of an international organization belongs to the organ competent to decide on the admission of a member to the organization, or to the organ competent to amend the constituent instrument, or to the organ competent to interpret this instrument.

2.8.9 Modalities of the acceptance of a reservation to a constituent instrument

1. For the purposes of the acceptance of a reservation to the constituent instrument of an international organization, the individual acceptance of the reservation by States or international organizations that are members of the organization is not required.

2. Subject to the rules of the organization, the acceptance by the competent organ of the organization shall not be tacit. However, the admission of the State or the international organization which is the author of the reservation is tantamount to the acceptance of that reservation.

2.8.10 Acceptance of a reservation to a constituent instrument that has not yet entered into force

In the case set forth in guideline 2.8.7 and where the constituent instrument has not yet entered into force, a reservation is considered

²⁹⁰ See footnote 288 above.

* Resumed from the 2978th meeting.

** Resumed from the 2974th meeting.

to have been accepted if no signatory State or signatory international organization has raised an objection to that reservation by the end of a period of 12 months after they were notified of that reservation. Such a unanimous acceptance once obtained is final.

2.8.11 Reaction by a member of an international organization to a reservation to its constituent instrument

Guideline 2.8.7 does not preclude States or international organizations that are members of an international organization from taking a position on the validity or appropriateness of a reservation to a constituent instrument of the organization. Such an opinion is in itself devoid of legal effects.

2.8.12 Final nature of acceptance of a reservation

Acceptance of a reservation cannot be withdrawn or amended.

46. Draft guideline 2.8.1 was entitled “Tacit acceptance of reservations”. It would be recalled that the Special Rapporteur had proposed two alternative texts for the draft guideline in his twelfth report: a shorter version (2.8.1) and a longer version (2.8.1. *bis*).²⁹¹ The latter option had essentially tracked the language of article 20, paragraph 5, of the 1969 and 1986 Vienna Conventions and duplicated draft guideline 2.6.13 concerning the time period for formulating an objection. In the debate in plenary a majority had expressed a preference for the longer option.

47. In view of the adoption by the Commission of draft guideline 2.6.13 on the time period for formulating an objection (see the 2970th meeting above, paragraph 93), the Drafting Committee had preferred to work on the basis of the shorter version. It had been considered that such an approach would avoid duplicating the language of draft guideline 2.6.13.

48. Several changes had nevertheless been introduced to the draft guideline. First, the brackets around the phrase “Unless the treaty otherwise provides” had been deleted, although their inclusion in draft guideline 2.6.13 might seem to render its retention in the present guideline superfluous.

49. Secondly, the words “in accordance with” had been replaced by “within the time period provided for in”, to better reflect the link to the time limit after which a tacit acceptance would be implicated.

50. Thirdly, instead of making reference to guidelines 2.6.1 to 2.6.14, there was only a reference to the guideline relevant to the time period for formulating an objection, namely draft guideline 2.6.13.

51. Draft guideline 2.8.2 was entitled “Unanimous acceptance of reservations” and was intended to cover the specific circumstances in which unanimous acceptance was required. Various situations could arise in that regard, which could not easily be subsumed into a single provision. Accordingly, the commentary would make the necessary distinctions, depending on whether the treaty was already in force when the reservation was notified. It would also make it clear that the reference to “parties” included contracting parties in the sense of article 2, paragraph 1 (*f*), of the 1969 Vienna Convention.

52. The commentary would also emphasize the case in which the reservation required acceptance by particular States or international organizations, which were parties to or entitled to become parties to the treaty. That case, which might for example arise in respect of the acceptance by nuclear powers of a reservation to a nuclear-free-zone treaty, was reflected by the words “some or all” in draft guideline 2.8.2.

53. In those circumstances, it appeared crucial that the participation of the reserving State should be preserved from subsequent challenges of objecting States. Thus, draft guideline 2.8.2 stated that the unanimous acceptance of the reservation “once obtained is final”.

54. Draft guideline 2.8.3 was entitled “Express acceptance of a reservation”. Although acceptance of a reservation in the case of multilateral treaties was almost invariably implicit or tacit, the draft guideline simply covered the situation in which such an acceptance was expressly made. There were isolated examples of such express acceptances.

55. The Drafting Committee had adopted the draft guideline without any change.

56. Draft guideline 2.8.4 was entitled “Written form of express acceptance”. The draft guideline tracked the language of the 1969 and 1986 Vienna Conventions, whose article 23, paragraph 1, stated in part that “an express acceptance of a reservation must be formulated in writing”.

57. The Drafting Committee had adopted the draft guideline without change.

58. Draft guideline 2.8.5 was entitled “Procedure for formulating express acceptance”. It would be recalled that the form and procedure for formulating reservations had been addressed in draft guidelines 2.1.1 to 2.1.7. Draft guidelines 2.1.1 and 2.1.2 dealt with formulation of reservations in writing and their formal confirmation in writing and thus corresponded to the formal requirements of draft guideline 2.8.4. Draft guidelines 2.1.3 on formulation of a reservation at the international level; 2.1.4 on absence of consequences at the international level of the violation of internal rules regarding the formulation of reservations; 2.1.5 on communication of reservations; 2.1.6 on procedure for communication of reservations; and 2.1.7 on functions of depositaries, applied *mutatis mutandis* in relation to express acceptances.

59. The Drafting Committee had adopted the draft guideline without any change.

60. Draft guideline 2.8.6 was entitled “Non-requirement of confirmation of an acceptance made prior to formal confirmation of a reservation”. It reproduced in slightly modified form the provisions of article 23, paragraph 3, of the 1969 and 1986 Vienna Conventions. The reference to draft guideline 2.2.1 was intended to recall the requirement of formal confirmation of a reservation formulated when signing a treaty.

61. The Drafting Committee had adopted the draft guideline without any change.

²⁹¹ *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/584, pp. 38–39, paras. 25–26.

62. Draft guideline 2.8.7 was entitled “Acceptance of a reservation to the constituent instrument of an international organization”. It reproduced the text of article 20, paragraph 3, of the 1986 Vienna Convention. For reasons he had previously explained, the Special Rapporteur had indicated that he was not in favour of making a distinction between reservations to institutional provisions of a constituent instrument and reservations to its substantive provisions. The distinction, while it might be interesting from an academic point of view, was difficult to make in practice and was not drawn in the 1986 Vienna Convention.

63. In the light of that explanation, the Drafting Committee had adopted draft guideline 2.8.7 without any change.

64. Draft guideline 2.8.8 was entitled “Organ competent to accept a reservation to a constituent instrument”. It should be noted that the Drafting Committee had decided to reverse the order of draft guidelines 2.8.8 and 2.8.9, because it had been felt that it would be more logical to address first the issue of the organ and then that of the modalities. Like draft guideline 2.8.9, draft guideline 2.8.8 too dealt with an important issue deriving from article 20, paragraph 3, of the 1986 Vienna Convention, namely the determination of the organ competent to accept the reservation. As indicated by the words “Subject to the rules of the organization”, the issue was primarily to be resolved by the members of the relevant international organization. Accordingly, the three alternative options introduced in the draft guideline had a subsidiary character, insofar as they were to be considered only if the rules of the organization remained silent.

65. As to those various options, the Drafting Committee had concluded that some flexibility should be retained. Acceptance should not be restricted to the organ competent to decide on the admission of members to the organization, as the reserving State or organization could already be a member of the organization and make a reservation to an amendment to its constituent instrument. In addition to the admitting organ, reference was thus made in draft guideline 2.8.8 to the organs having competence to amend or interpret the constituent instrument.

66. Draft guideline 2.8.9 (which had previously been draft guideline 2.8.8) was entitled “Modalities of the acceptance of a reservation to a constituent instrument”. As it dealt with two questions deriving from draft guideline 2.8.7, the Drafting Committee had considered the possibility of merging the relevant provisions into a single guideline, but in the end it had preferred to preserve the integrity of the text of article 20, paragraph 3, of the 1986 Vienna Convention, as reproduced in draft guideline 2.8.7.

67. The first issue addressed in draft guideline 2.8.9 was related to the non-requirement of acceptance, by the members of an organization, of a reservation to its constituent instrument. It was reflected in the first paragraph of the draft guideline. In the case envisaged in that provision, draft guideline 2.8.1 was not applicable; what was actually required was that the reservation should be accepted by the competent organ of the organization. As implied

by article 20, paragraph 5, of the 1986 Vienna Convention, acceptance of the reservation by the members of the organization was not necessary.

68. The second issue addressed in draft guideline 2.8.9 related to the form of acceptance of a reservation by the competent organ of the organization. As had been indicated by one member of the Committee, the point at issue was not that of a presumption of acceptance, but rather the refusal of tacit acceptance. On that basis, the suggestion had been made that the requirement should be for the competent organ expressly to accept the reservation. Other members of the Committee, however, had considered that an element of flexibility was needed. Accordingly, the second paragraph of draft guideline 2.8.9 referred to the rules of the organization; it also lifted the requirement of express acceptance when the reserving State or organization was admitted into the organization.

69. Draft guideline 2.8.10, entitled “Acceptance of a reservation to a constituent instrument that has not yet entered into force”, related to situations in which a constituent instrument had not yet entered into force and where the competent organ referred to in article 20, paragraph 3, of the 1986 Vienna Convention had not yet been established. It sought to provide a *modus vivendi* for an anomaly, thereby complementing draft guideline 2.8.7, which reflected article 20, paragraph 3, of the 1986 Vienna Convention. Its purpose was to address a particular lacuna that existed because there was no mechanism for accepting a reservation to a constituent instrument when the treaty had not yet entered into force, or when the competent organ had not yet been established.

70. The draft guideline had been intensely debated. Some members had felt that there was no need for such a guideline on the matter, since the issue could await the entry into force of the treaty, or the establishment of the organization. In addition, it was noted that such a guideline would not resolve every problem, because there might still be a time lag between the entry into force of a treaty and the establishment of a competent organ. Other members had, however, been of the view that such a guideline would provide legal certainty and stability in treaty relations. Moreover, in the practice of the Secretary-General, as depositary, there were instances of consultations being held with all States that were already parties to the constituent instrument.

71. In the final analysis, the formulation of a possible guideline had been generally favoured. At least three aspects had been considered crucial. First, it had been agreed that the phrase “all the States and international organizations” was vague, but that the phrase “all contracting States and organizations” was unduly limited. The Drafting Committee had therefore settled on the formulation “all signatory States and international organizations”.

72. Secondly, it had been considered necessary to ensure that there was some degree of legal certainty. The central question had been, not whether the time period provided for in draft guideline 2.6.13 was complied with, but whether, once acceptance had been given, the time period ought to be varied. It had been agreed that the solution to be followed was that provided for in draft

guideline 2.8.2 relating to the unanimous acceptance of reservations, which stipulated that once such acceptance had been obtained, it was final. Hence there was no need for express acceptance, which rarely occurred in practice. The reservation was considered to have been accepted if no signatory State or organization had raised an objection by the end of the twelve-month period.

73. Thirdly, it had been recognized that the timelines between the entry into force of a treaty and the actual establishment of a competent organ might be different. The commentary would address the various implications of that time lag. The essential consideration was to avoid more than one scheme applying. Once the treaty entered into force, the relevant guidelines relating to article 20, paragraph 3, of the 1986 Vienna Convention, would provide the necessary guidance.

74. Moving to draft guideline 2.8.11, entitled “Reaction by a member of an international organization to a reservation to its constituent instrument”, he explained that it should be read in conjunction with draft guideline 2.8.7 and the first paragraph of draft guideline 2.8.9. The Drafting Committee had retained a deliberately general wording so as not to give the impression that members of the organization would have a right, or “*faculté*”, to accept the reservation. Those words had therefore been deleted from the draft guideline, the title of which now referred to a “reaction” by a member of the organization. The substance of draft guideline 2.8.11 nevertheless remained unchanged.

75. Draft guideline 2.8.12 (“Final nature of acceptance of a reservation”), had originally been entitled “Final and irreversible nature of acceptances of reservations”. The Drafting Committee had discussed at length the categorical nature of the guideline, which had stated that the acceptance of a reservation was final and irreversible and could not subsequently be withdrawn or amended. Attention had been drawn to the fact that, since States or international organizations had a twelve-month period in which to object to a reservation, it would be logical to allow them, during that period, to reverse their acceptance of a reservation, provided that they did not jeopardize treaty relations. In other words, they could reject a reservation that they had previously accepted, but they could not declare that they would not have treaty relations with the reserving State or organization, if they had not already made such a declaration. On the other hand, several members of the Committee had wondered whether the possibility of reversing the acceptance of a reservation would not result in different regimes with respect to tacit acceptances which, by definition, would become operative only after the expiry of the twelve-month period, whereas express acceptances would already have taken place beforehand. It had, however, been recalled that this concern was somewhat theoretical, since there were hardly any examples of express acceptances of reservations. Hence most acceptances would be tacit and become operative after the twelve-month period; in that case they could not, of course, be reversed. Nonetheless, even in the event that an acceptance had been made expressly before expiry of the twelve-month period, it had been felt that such a solemn and formal acceptance could not be reversed.

76. Bearing that in mind, the Committee had decided to keep the draft guideline almost in the form proposed, with only a few changes. It had deleted the word “irreversible” from the title, as it was redundant, and had not maintained the distinction in the text between express and tacit acceptance, which no longer had a *raison d’être*. It had also merged the two sentences of the original draft into one, deleting the word “subsequently”. The guideline stated that acceptance of a reservation could not be withdrawn or amended.

77. He recommended that, at the current stage of its work, the Commission should take note of draft guidelines 2.8.1 to 2.8.12.

78. The CHAIRPERSON said that he took it that the Commission wished simply to take note of draft guidelines 2.8.1 to 2.8.12 contained in the report of the Drafting Committee on reservations to treaties, and that it would resume its consideration of the report of the Drafting Committee on the topics of responsibility of international organizations and expulsion of aliens at its next plenary meeting.

It was so decided.

Cooperation with other bodies (*concluded*)

[Agenda item 12]

STATEMENT BY THE PRESIDENT OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

79. The CHAIRPERSON welcomed Judge Rüdiger Wolfrum, President of the International Tribunal for the Law of the Sea, and Mr. Philippe Gautier, Registrar of the Tribunal, and invited Judge Wolfrum to address the Commission.

80. Judge WOLFRUM (President of the International Tribunal for the Law of the Sea) said he wished to address three legal issues where the work of the International Law Commission and that of the International Tribunal for the Law of the Sea, converged: first, the fragmentation of international law; second, diplomatic protection; and, third, shared natural resources.

81. When Mr. Candiotti, the then-Chairperson of the Commission, had visited the International Tribunal for the Law of the Sea in 2004, the issue of fragmentation of international law had already been high on the agenda of discussions with the representatives of the Tribunal. Since then, the question had received further attention from the academic world and practitioners and had formed the subject of an International Law Week in New York. The Study Group set up by the Commission under the chairpersonship of Mr. Koskienniemi had produced a report²⁹² that had focused mainly on the substantive fragmentation of international law and had left aside institutional aspects. It had therefore not examined the validity of the concern occasionally expressed that the proliferation of specialized international courts and tribunals could also

²⁹² Document A/CN.4/L.682, mimeographed; available on the Commission’s website (see footnote 265 above.)

lead to inconsistencies and contradictions in international jurisprudence, an issue examined during the International Law Week in New York.

82. Nevertheless, the Study Group's conclusions might be useful when assessing the proliferation of institutions. The Commission had found, in paragraph 485 of the report, that "the absence of general hierarchies in international law does not mean that normative conflicts would lead to legal paralysis. The relevant hierarchies must only be established ad hoc and with a view to resolving particular problems as they arise". Although those findings related to conflicts between the norms of international law, not between its institutions, he was convinced that international jurisprudence did not suffer from a perceived lack of a central hierarchy. Undoubtedly, with independent courts and overlapping jurisdictions, the possibility of different interpretations could not be excluded, and had indeed already materialized. Nevertheless, the availability of multiple jurisdictions only reflected the state of current international relations. Global society, far from being homogeneous, was characterized by various international regimes and institutions which were at different stages of evolution and consolidation. At the same time, there was a recognizable need to maintain the coherence of the international legal order. In that respect, comity and dialogue between existing international courts, especially standing courts, might to some extent contribute to the achievement of that goal. Although the Commission was not a court, he would include it in that context.

83. The endeavour to achieve coherence did not, however, completely preclude the possibility of jurisdictional conflicts. For instance, parallel proceedings could be held before international judicial bodies, as the case concerning the *Conservation and Sustainable Exploitation of Swordfish Stocks* had shown. The case had been submitted to a special chamber of the Tribunal and simultaneously to WTO. The dispute before the Tribunal had concerned issues regarding the conservation and management of living resources, as well as the freedom of fishing on the high seas. Trade-related issues, such as the freedom of transit under the General Agreement on Tariffs and Trade 1994, had been submitted to WTO. As the parties' claims before each judicial body clearly differed in nature, he could see no obstacle to their bringing separate aspects of more or less the same case before more than one judicial institution.

84. The proliferation of international courts and tribunals was a consequence of the growth of public international law, which encompassed more policy areas than ever before. The creation of specialized tribunals to adjudicate disputes arising in specialized areas of law was a deliberate choice of the community of States and a reaction to those developments. Those courts and tribunals were well aware of the fact that they did not lead completely separate existences, but needed to cooperate, consider one another's work and harmonize their jurisprudence as far as possible. When it came to the settlement of disputes concerning the law of the sea, article 287 of the United Nations Convention on the Law of the Sea offered the option of choosing between the International Tribunal for the Law of the Sea, the ICJ and arbitration. He was quoting the sequence of the text and not speaking *pro domo*.

85. He was glad to note that the report of the Commission's Study Group had also taken the view that the relevant "institutions will seek to coordinate their jurisprudence in the future" in order to avoid jurisdictional conflicts. He was also pleased that when Judge Rosalyn Higgins, President of the International Court of Justice, had addressed the International Law Association in 2006, she had emphasized that judges should regard "this complex world" as "an opportunity rather than a problem" and had called upon international judges to "read each other's judgments ... respect each other's judicial work [and] ... try to preserve unity ... unless context really prevents this".²⁹³

86. Relations between the ICJ and the International Tribunal for the Law of the Sea displayed that spirit of cooperation and mutual respect. The visit of Judge Higgins to the Tribunal on the occasion of its tenth anniversary in 2006 testified to the cordial relations existing between the two institutions. Those relations had been further strengthened when members of the ICJ and of the Tribunal had met recently in The Hague to hold their first exchange of views on issues of common interest. Those issues had pertained to provisional measures, advisory opinions, the relationship between international and national law and the conditions of service of international judges. While the relationship between international and national law might seem an old-fashioned issue, unfortunately the Tribunal had had to deal with it in the "*Hoshinmaru*" case and the "*Tomimaru*" case.

87. In its decisions, the Tribunal had not hesitated to refer, when appropriate, to the precedents set by the ICJ. Under article 293 of the United Nations Convention on the Law of the Sea, the Tribunal was required to apply rules of international law, on the condition that they were not incompatible with the Convention. That was an example of a hierarchy in international law. In such cases, the Tribunal had found it necessary, on a number of occasions, to cite the relevant decision of the ICJ. For instance, the Tribunal had relied on the Court's jurisprudence in respect of issues concerning the state of necessity, the existence of a legal dispute, the ability of a tribunal to examine its jurisdiction *proprio motu*, the exhaustion of negotiations as a precondition for a dispute to be submitted to a court or tribunal, the decisive date for determining issues of admissibility, the notion of acquiescence and the status of a protocol or minutes of meetings. The two latter issues had arisen in the "*Hoshinmaru*" and "*Tomimaru*" cases.

88. The Tribunal did not, however, always agree with the Court, as had been demonstrated by the *Southern Bluefin Tuna Cases*. The jurisprudence of the Court had hitherto not accepted the precautionary approach as a binding principle of international law. The Tribunal, which had been asked to prescribe provisional measures for the protection and conservation of southern bluefin tuna fish stocks, had nevertheless relied upon that principle. In view of the uncertainty of available scientific data, the Tribunal had held that the parties to the dispute should act with "prudence and caution". It had abstained, however, from

²⁹³ "A babel of judicial voices? Ruminations from the bench", *International and Comparative Law Quarterly*, vol. 55, No. 4 (October 2006), pp. 791–804, at p. 804.

expressing general considerations relating to the status of the precautionary principle and had even abstained from explicitly referring to that principle. The Tribunal had therefore effectively used it, but had not overstated it. The President of the Tribunal believed that this approach was exactly within the limits prescribed by Judge Higgins in her speech to the International Law Association.

89. Turning to the exercise of diplomatic protection, another issue of common concern, he said that the impact of the 19 draft articles drawn up under the direction of the Special Rapporteur, Mr. Dugard,²⁹⁴ had been considerable, as they had not only codified existing customary law, but also contained a number of innovative provisions. As a result, as former Commission member James Kateka had observed, a topic which had once been deemed obsolete had become a vibrant and topical one in State practice, jurisprudence and doctrine.

90. The Special Rapporteur's fifth report,²⁹⁵ dealing *inter alia* with the diplomatic protection of ships' crews by the flag State, had made ample reference to the Tribunal's jurisprudence, particularly to the judgment in the "Saiga" case. With regard to the multinational composition of the ship's crew, which had been made up of Russians, Senegalese and Ukrainians, the Tribunal had argued that "undue hardship would ensue" if every crew member had to seek diplomatic protection from his or her home State. He was pleased to note that the report of the Special Rapporteur obviously concurred with those findings.

91. Conversely, the Tribunal had also drawn on the Commission's work in that judgment. When examining the issues of the "genuine link" between a vessel and its flag State, it had consulted the Commission's 1956 draft articles on the law of the sea.²⁹⁶ In assessing whether exhaustion of local remedies was required in that case, the Tribunal had relied on the draft articles on the responsibility of States for internationally wrongful acts adopted by the Commission in 2001.²⁹⁷

92. In the "Saiga" case, the Tribunal had had to examine the question whether a flag State was entitled to protect and bring claims on behalf of non-nationals who were crew members of a ship under its flag. After analysing the United Nations Convention on the Law of the Sea, the Tribunal had found that the Convention "considers a ship as a unit" and therefore "the ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State. The nationalities of these persons are not relevant". Once again, there was a link with the topic of diplomatic protection.

93. In its analysis, the Tribunal had relied *inter alia* on article 292 of the Convention, which provided for the prompt release of vessel and crew from detention by a third State upon the posting of a reasonable bond or other financial security. The flag State might request the

Tribunal to order prompt release with regard to any vessel flying its flag and to any crew member on board such a ship, regardless of the former's nationality.

94. Prompt release cases might be compared with diplomatic protection cases. One of their objectives was to maintain a balance between the interests of the flag State and the coastal State. In addition, they protected the interests of other persons affected by the detention of the vessel and its crew. Apart from the owner of the vessel, it was mainly the crew who would benefit from efficient procedures leading to the ship's comparatively rapid liberation from detention. A distinct humanitarian aspect was therefore attached to prompt release proceedings. That had been clear in the "Tomimaru" case.

95. The availability of prompt release proceedings before the Tribunal placed the individual in an even stronger position than did traditional diplomatic protection. First, there was no requirement to exhaust local remedies before an application was submitted to the Tribunal. With regard to the exhaustion of local remedies, which was often invoked in the context of diplomatic protection, the Tribunal had declared in the "Camouco" case that

[n]o limitation should be read into article 292 that would have the effect of defeating its very object and purpose. Indeed, article 292 permits the making of an application within a short period from the date of detention and it is not normally the case that local remedies could be exhausted in such a short period. [para. 58]

Moreover, in the "Saiga" case, the Tribunal had considered that "[n]one of the violations of rights claimed by Saint Vincent and the Grenadines" relating to several breaches of the Convention "can be described as breaches of obligations concerning the treatment to be accorded to aliens". It had therefore excluded the exhaustion of local remedies clause.

96. Traditional diplomatic protection and prompt release proceedings under the Convention also differed with respect to the availability of international judicial remedies, in that in prompt release cases the Tribunal had compulsory jurisdiction. In its rules and practice, the Tribunal assured their expeditious handling in view of the grave humanitarian consequences of detaining a crew. In the last two prompt release cases which it had handled, the Tribunal had refrained from defining what was meant by the word "detention", for very good reasons.

97. Prompt release proceedings, as provided for by the United Nations Convention on the Law of the Sea, also strengthened the procedural position of the individual. It was not only the flag State that might submit an application to the Tribunal, but also the private party concerned, on behalf of the State and with its authorization. There had already been one such case.

98. The Tribunal had also heard one case in which it had not been certain whether the vessel was flying the flag of a particular State, because in the "Grand Prince" case, Belize had decided to delete the vessel from its national register after it had been arrested by France. Similar situations could arise in respect of diplomatic protection if a person had lost the citizenship of a given State. For the Tribunal, the solution had been clear, and it had decided

²⁹⁴ *Yearbook... 2006*, vol. II (Part Two), pp. 24–26, paras. 49–50.

²⁹⁵ *Yearbook... 2004*, vol. II (Part One), document A/CN.4/538.

²⁹⁶ *Yearbook... 1956*, vol. II, report of the Commission to the General Assembly, document A/3159, pp. 256 *et seq.*

²⁹⁷ See *Yearbook... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, para. 76.

that it had no jurisdiction. It had been a delicate case because the Tribunal's decision meant that the vessel had been without a flag, with all the grave consequences that ensued.

99. Touching briefly on shared natural resources, he said that the Special Rapporteur's work on the subject, especially the draft articles on the law of transboundary aquifers, was a noteworthy achievement, because the draft articles enshrined principles such as the obligation to protect and preserve ecosystems, the duty to cooperate and the obligation to exchange data and information.

100. It had to be remembered that the world's oceans were also in some sense a shared natural resource. In strictly legal terms that was not the case, but from a more functional perspective the similarities were evident. The United Nations Convention on the Law of the Sea clearly held the international community as a whole responsible for the oceans' future. Article 192 of the Convention made it clear that all States had an obligation to protect and preserve the marine environment and article 193 provided for a sovereign right to exploit natural resources only in accordance with that obligation. The Convention focused in particular on the protection of the marine environment against pollution, although the Tribunal had given a broader meaning to Part XII of the Convention and had in particular felt that article 192 also covered living resources. Under article 194, States were obliged to take all the necessary measures to prevent, reduce and control pollution of the marine environment. Pursuant to article 197, States should cooperate on a global and regional basis in the adoption of rules and standards. In accordance with articles 200 and 206, they must exchange relevant information and data and assess the potential effects of planned activities on the marine environment.

101. It was noteworthy that the great significance attached to the protection of the marine environment also had procedural repercussions. Under article 290, paragraph 1, of the Convention, provisional measures might be prescribed by the Tribunal, not only in order to preserve the respective rights of the parties to a dispute, but also to "prevent serious harm to the marine environment". Such measures could likewise be ordered by the International Court of Justice or arbitral tribunals. The procedure for prescribing provisional measures had already been invoked in several cases concerning the protection of the marine environment.

102. In its jurisprudence, the Tribunal mainly emphasized the importance of cooperation. In two judgments, in the *MOX Plant* case and the *Straits of Johor* case, it had held that "the duty to cooperate is a fundamental principle in the prevention of the pollution of the marine environment under Part XII of the Convention and general international law". It had also stressed the need to establish mechanisms for the exchange of information between the parties concerning potential risks or effects of the activities in question.

103. Moreover, in these two cases, the Tribunal had adopted a pragmatic approach and had prescribed measures that, in its view, would assist the parties in finding a solution. For example, in the *Straits of Johor* case,

the Tribunal had requested the parties to set up a joint group of independent experts to advise them. The work of that group and the provisional measures ordered by the Tribunal had been instrumental in providing a diplomatic solution to the dispute.

104. Lastly, article 138 of the Tribunal's Rules offered it the possibility of giving advisory opinions. The Tribunal took the view that not all disputes should be adjudicated as contentious cases. Sometimes it was better for parties to be brought to negotiations at a more informal level, something that could be achieved through advisory opinions. He would very much like to see parties use that instrument of the Tribunal, which had not yet been tested.

105. In closing, he said that his intention had been to share some information on the Tribunal's work but also to indicate to the Commission areas where the two institutions had common concerns and could cooperate easily. Both were guardians of international law, and the United Nations Convention on the Law of the Sea was one important element thereof; historically speaking, the law of the sea stood at the beginning of the development of modern international law.

106. Mr. BROWNLIE said that while the idea that members of international tribunals should meet on a collegial level, as did experts in medical and technical fields, was perfectly unexceptionable *prima facie*, it was extremely important to bear in mind that tribunals did not perform merely expert functions; they engaged in dispositive decision-making. In the case of the International Tribunal for the Law of the Sea, those decisions affected the territorial sea and fisheries resources—in other words, matters of property. There was a danger that any close cooperation among tribunals, desirable as that might be at one level, might impinge upon institutional independence. The operation of international tribunals, especially in inter-State cases, was to a great extent political. A Government might be deterred from bringing a case to a tribunal by the perception that it worked concertedly with other tribunals. Even cooperation on how to deal, not with individual disputes but with patterns of disputes, might raise questions about a tribunal's independence. On the other hand, it had to be acknowledged that the existence of a variety of institutions made it more difficult for outside or special interests to gain effective control.

107. Mr. CAFLISCH noted that article 303, in combination with articles 33 and 149 of the Convention, regulated shipwrecks with specific relation to archaeological and historical objects. There had been some discussion at the Third United Nations Conference on the Law of the Sea, prompted by the "Glomar Explorer" incident, about wrecks of State vessels, particularly warships. At that time, a group of socialist States had called for the immunity of warships to be extended indefinitely to the wrecks of such ships.²⁹⁸ The Nairobi International Convention on the Removal of Wrecks, which had been adopted in 2007 but had not yet entered into force, applied

²⁹⁸ See J. R. Harris, "The protection of sunken warships as gravesites at sea", *Ocean and Coastal Law Journal*, vol. 7, No. 1, pp. 75 *et seq.*, especially p. 83. See also *Official Records of the Third United Nations Conference on the Law of the Sea, Ninth Session, New York, 3 March–4 April 1980*, vol. XIII, document A/CONF.62/L.51.

solely in the exclusive economic zone, leaving all other aspects of wreck removal unregulated despite the considerable theoretical as well as practical interest that the matter presented. Would it be useful for the Commission to take up the issue, either as a whole or with the exception of the aspects he had just mentioned? If so, and if a convention emerged from its efforts, could it be written into the dispute settlement mechanism under Part XV of the United Nations Convention on the Law of the Sea?

108. Ms. ESCARAMEIA welcomed the emphasis placed by Judge Wolfrum on the linkages between the work of the International Tribunal on the Law of the Sea and that of the Commission. Her first question related to the example given of attempts to harmonize the precautionary principle with the *Southern Bluefin Tuna Cases*. Was it possible that harmonization of jurisprudence between courts might prevent substantive issues from being addressed? Had the Tribunal not deliberately refrained from referring to the precautionary principle in the *Southern Bluefin Tuna Cases*, the Commission would have had a much stronger case for including a reference to or even a draft article on the precautionary principle in the draft articles on the law of transboundary aquifers. A hierarchy of international jurisprudence definitely seemed to be forming. Perhaps the Tribunal should lead the way, rather than deferring to the ICJ. Diversity was a good thing, and States might turn to the Tribunal more often if they were aware that it was willing to take an independent line.

109. Her second question related to diplomatic protection: it had not been easy to include in the Commission's draft articles on the topic a provision on protection of ships' crews. Many members had thought the matter was not related to diplomatic protection. In the relevant draft article, the only reference was to protection, not to diplomatic protection. The "*Saiga*" cases had been very important to the Commission's work in that area. She would like to know the President's views on that subject and whether he thought diplomatic protection should be a more all-encompassing concept, not one relating strictly to the nationality of persons.

110. Lastly, she wished to know if there were any topics that the Commission could take up that would be of particular value in furthering cooperation between the Tribunal and the Commission.

111. Mr. DUGARD asked, first, whether the President found the compromise relating to the protection that could be afforded by a flag State, as reflected in the draft articles on diplomatic protection,²⁹⁹ a helpful one. He personally would have liked to see the relevant draft article brought more directly under the head of diplomatic protection. Secondly, many members were disappointed that the Tribunal had not been more active, and surprised that States frequently preferred arbitration to adjudication by the Tribunal. Could that in some respect be due to the size of the Tribunal, or was there some other explanation?

112. Ms. JACOBSSON said that Judge Wolfrum's presentation had been especially interesting in that it had shown the connections of the Tribunal's work, not only

with the subjects that the Commission covered, but also with the work of the ICJ. One aspect of the Tribunal's work that she wished to discuss was the time factor. The *Southern Bluefish Tuna Cases* dated back to 1999, but there had been changes in customary law and other developments since then. A tribunal did not have to be bound by its past findings: indeed, it was unfortunate that past statements of the law should merely be repeated. She wished to know the President's view on the time element and what would be necessary in order to take a new look at such matters as the precautionary principle.

113. Mr. PELLET said he had an impertinent but relevant question to raise: aside from the *MOX Plant* case and the *Conservation and Sustainable Exploitation of Swordfish Stocks* case, the Tribunal had not had before it any major cases concerning the general international law of the sea and had never adjudicated a problem of maritime delimitation. How did the President account for that situation, which he presumably found disappointing?

114. Judge WOLFRUM (President of the International Tribunal for the Law of the Sea), responding to Mr. Cafilisch's question, said he agreed that the rules on shipwrecks were a patchwork and that the Nairobi International Convention on the Removal of Wrecks did not form a complete regime. The matter should be taken up, perhaps in an even more comprehensive manner than Mr. Cafilisch had suggested. Shipwrecks raised a number of problems: first, the treatment to be given to archaeological treasures; second, environmental protection, since shipwrecks were a source of pollution—the "*Tirpitz*", a German battleship sunk in 1944, could still be located by the oil spills leaking from it; third, State responsibility; fourth, State immunity and how long it lasted; and lastly, the implications of disasters like that of the "*M/S Estonia*" in the Baltic sea—the site had been declared a graveyard, which had repercussions on continental shelf activity, the exclusive economic zone and the like. There was therefore quite a broad regime to be worked on and the Commission would be well advised to do so. He would suggest, however, that close cooperation be established from the very outset with the International Maritime Organization and UNESCO. Regarding Mr. Cafilisch's second question, as to whether such a regime could be written into the dispute settlement mechanism under Part XV of the Convention, the answer was that it could; the same had been done with the Nairobi International Convention on the Removal of Wrecks.

115. Ms. Escarameia was not alone in her disappointment about the absence of any reference to the precautionary principle in the Tribunal's jurisprudence. The compromise wording had taken the best part of a day to negotiate and had been hotly debated, as could be seen from a perusal of the separate opinions. The Tribunal's motive for its restraint had been, not to protect the ICJ, but rather to take account of the fact that in a provisional measures case which, by virtue of its urgent nature, the parties had not had the opportunity to argue fully, it would not be appropriate to develop certain issues in the merits. That would be rushing to judgement and inappropriate conduct for any judge, whether national or international. As to Ms. Jacobsson's question, he was confident that if a similar case came up again, the parties would make the necessary arguments and the Tribunal could then make

²⁹⁹ *Yearbook ... 2006*, vol. II (Part Two), pp. 24–26, paras. 49–50.

more extensive pronouncements. The example showed a form of judicial self-restraint, which occasionally—although perhaps not always—was wise.

116. As to which other issues would be appropriate for consideration by the Commission, one totally uncharted area of the law, surprising as that might seem, was pipelines—not just in a maritime context but generally. Past experience with railways, telegraph and telephone lines, and the relationship to the General Agreement on Tariffs and Trade 1994 and the General Agreement on Trade in Services could be drawn on in considering that very interesting problem. Another fruitful topic was subsequent practice, which had haunted the Tribunal in the “*Hoshinmaru*” case and the “*Tomimaru*” case.

117. On diplomatic protection, the Commission’s solution, namely to refer to protection rather than to diplomatic protection, had been an elegant compromise and was in fact helpful for the Tribunal. His own personal preference, however, was for diplomatic protection to be considered more broadly, with less reference to historical notions and so as to encompass prompt release.

118. As to why so few cases had been brought before the Tribunal, many reasons could be proffered. First, it was a new and comparatively little-known institution. Very recently, for example, he had found that a London law firm that concentrated on law of the sea issues had never even heard of the Tribunal. That was one reason why regional workshops had been developed, not only to make the Tribunal better known but also to explain its fairly complicated procedures. Secondly, many cases were taken to the ICJ on the basis of specific clauses, pacts or treaties of friendship. According to the Tribunal’s own count, more than 100 treaties had been referred to the jurisdiction of the ICJ and only 3 to that of the Tribunals. Thirdly, under article 287 of the Convention, States had the option to declare their preference for one of three mechanisms: the Tribunal, the ICJ or arbitration. Of about 150 States Parties to the United Nations Convention on the Law of the Sea, just over 30 had made such a declaration, 28 of which had opted for the Tribunal. While certain States, for example Norway, had deliberately opted for arbitration, about 120 had done so by default, simply because they had neglected to make a declaration. He did not know whether the framers of the Convention had had such a result in mind, but it certainly disadvantaged the Tribunal. If States were to make a clear choice between the three options, it would be easier for the Tribunal to predict its workload.

119. Fourthly, he believed that the sheer size of the Tribunal, which comprised 21 judges, was a deterrent in itself. The larger the body of judges, the more difficult it was to hazard a guess as to the probable outcome of a case. It could be argued, on the other hand, that a broad spectrum of opinions would ensure a fairer ruling. He was at a loss to understand why States did not use the option available under article 15 of the Statute of the Tribunal to form an *ad hoc* chamber consisting of three, five, seven or any uneven number of judges, which could even include external judges. In the *Conservation and Sustainable Exploitation of Swordfish Stocks* case, there had been four judges from the Tribunal and one *ad hoc* judge. That option combined the merits of arbitration with those of

a standing body and cut down on costs, since no financing had to be provided with respect to either the Tribunal judges or the *ad hoc* judges. Unfortunately, however, that option was little known; he hoped it would be better exploited in the future.

120. Lastly, he wished to assure Mr. Brownlie that, far from compromising its independence, the Tribunal was proud of the positions it had taken. Courts and tribunals needed to be aware of one another’s positions in order to avoid controversies such as the one that had arisen in the *Tadić* case. It should be noted that the ICJ had been in favour of the Tribunal’s findings on provisional measures, totally opposed to its position on advisory opinions, and had found the Tribunal’s handling of the relationship between national and international law interesting in that it had highlighted a relatively unknown feature of the United Nations Convention on the Law of the Sea. In future, the Tribunal would make good use of the jurisprudence of the Court and of the Permanent Court of International Justice, as well as of arbitration where necessary and adequate, but would also deviate therefrom where necessary. Since it had a particular mandate with respect to environmental matters, in the future, its position on such matters was likely to differ significantly from those arrived at through arbitration or by the ICJ or, for instance, the Court of Justice of the European Communities.

121. The CHAIRPERSON thanked the President of the International Tribunal for the Law of the Sea for his presentation and the answers he had given to the numerous questions put by members.

Organization of the work of the session (concluded)*

122. The CHAIRPERSON announced that Mr. Pellet had been appointed to chair the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*).

The meeting rose at 1.05 p.m.

2989th MEETING

Monday, 4 August 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Mr. Kolodkin (Vice-Chairperson) took the Chair.

1. Ms. JACOBSSON, recalling that, for lack of time, the Chairperson had requested her not to take the floor in the debate on the topic of the obligation to extradite

* Resumed from the 2985th meeting.