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Summary record of the 3100th meeting

Topic:
Cooperation with other bodies

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course of action the General Assembly decided to adopt on the 180 guidelines plus commentaries in the Guide to Practice, the text in paragraph 68 could be appended to the Guide or remain separate from it. Thus, while the draft recommendation in paragraph 68 was couched in terms similar to a draft resolution and he hoped the Commission agreed with the contents and that the General Assembly itself would adopt it as a draft resolution, he had deliberately left the question of the final form open.

27. The CHAIRPERSON said he took it that the Commission wished to refer the text in paragraph 68 of the report to the Working Group on reservations to treaties for further consideration.

It was so decided.

28. Mr. PELLET (Special Rapporteur) made a number of suggestions about how the Commission should approach its discussion of chapter IV, on reservations to treaties, of its draft report to the General Assembly on the work of its sixty-third session. The text ran to several hundred pages, so an orderly approach and economy of time were of the essence. He thanked all those who had helped to finalize the voluminous and complex text of chapter IV, including the members of the translation services who had drawn attention to certain problems of concordance.

29. After a procedural discussion in which Sir Michael WOOD, Mr. PELLET (Special Rapporteur) and Mr. NOLTE took part, the CHAIRPERSON suggested that the Working Group on reservations to treaties should convene immediately in order to consider the text in paragraph 68 of the Special Rapporteur's report that had been referred to it earlier in the meeting.

The meeting rose at 11.20 a.m.

3100th MEETING

Thursday, 7 July 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Cooperation with other bodies

[Agenda item 13]

STATEMENT BY THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

1. The CHAIRPERSON welcomed Judge Owada, President of the International Court of Justice, and gave him the floor.

2. Judge OWADA (President of the International Court of Justice) said that he was delighted to address the Commission on the occasion of its sixty-third session. It was the third time that he had had the privilege of addressing that august body, an occasion which provided an opportunity for fruitful interaction between two key legal institutions of the United Nations, one working towards the codification and progressive development of international law, and the other adjudicating upon existing international rules and principles. He wished to take the opportunity to congratulate the members of the Commission who had been recently elected and the newly elected Chairperson, Mr. Maurice Kamto. As had become the custom, he would start his presentation with a report on the judicial activities of the Court over the past year. He would then discuss in more detail some salient legal points likely to be of particular interest to the Commission. Since July 2010, the Court had rendered eight decisions altogether: one judgment on the merits, one advisory opinion, one judgment on preliminary objections, two judgments on applications for permission to intervene, one order on an application for permission to intervene, one order on the admissibility of a counterclaim and one order on a request for the indication of provisional measures. As in previous years, those cases had involved States from all regions of the world and the subject matter had been wide-ranging. Despite the variety in the types of decisions, they all contained issues of substantive importance which shed interesting light on the jurisprudence of the ICJ.

3. On 6 July 2010, the Court had handed down its order on the admissibility of a counterclaim submitted by Italy in the case concerning *Jurisdictional Immunities of the State*. The principal case, filed by Germany in December 2008, concerned a dispute over whether Italy had violated the jurisdictional immunity of Germany by allowing civil claims against it in Italian courts based on violations of international humanitarian law by the German Reich during the Second World War. In its counter-memorial, filed on 22 December 2009, Italy had presented a counterclaim "with respect to the question of the reparation owed to Italian victims of grave violations of international humanitarian law committed by forces of the German Reich".[258] In its order of 6 July 2010, the Court had concluded that the dispute that Italy intended to bring before the Court by way of its counterclaim related to facts and situations existing prior to the entry into force as between the parties of the European Convention for the peaceful settlement of disputes, the compromissory clause of which formed the basis of the Court's jurisdiction on the principal claim. For that reason, the Court had ruled that the counterclaim did not come within its jurisdiction *ratione temporis* as required by article 80, paragraph 1, of the Rules of Court, and was thus inadmissible (paras. 30–33 of the order).

4. On 22 July 2010, the Court had rendered its advisory opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, in response to a request made by the United Nations General Assembly, in its resolution 63/3 of

[258] ICJ, *Jurisdictional Immunities of the State (Germany v. Italy)*, "Counter-memorial of Italy", vol. I, p. 128, para. 7.1 (available from www.icj-cij.org.).

8 October 2008, for an opinion on the following question: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?" In its advisory opinion, the Court had held that the declaration of independence of Kosovo adopted on 17 February 2008 had not violated international law. In dealing with the request from the General Assembly, the Court had first addressed the question of whether it possessed jurisdiction to give the advisory opinion requested. On that preliminary issue, the Court had considered that the question asked had been referred to it by the General Assembly, which was authorized to request it to give an advisory opinion on any legal question under Article 96, paragraph 1, of the Charter of the United Nations, and that because that question was a "legal question" within the meaning of Article 96 of the Charter of the United Nations and Article 65 of the Statute of the International Court of Justice, the Court had jurisdiction to give an advisory opinion in response to the request. The ICJ had then examined the question, raised by a number of participants on various grounds, as to whether it should nonetheless decline, as a matter of discretion, to exercise its jurisdiction to give an advisory opinion. After a detailed examination of the various arguments as to why the Court should exercise that discretion, it had concluded that there were "no compelling reasons for it to decline to exercise its jurisdiction", a conclusion that the ICJ had consistently reached in its advisory jurisprudence. It had then carefully examined the precise scope and meaning of the question put to it by the General Assembly, in particular with regard to the reference to the "Provisional Institutions of Self-Government of Kosovo" in the request for an advisory opinion formulated by the General Assembly. The Court had stated that it was part of its judicial function to examine, *proprio motu*, the presumption of the question asked, namely whether the declaration of independence had been promulgated by the Provisional Institutions of Self-Government of Kosovo. It had also concluded that, in the present case, the question was not whether international law conferred a positive entitlement upon Kosovo to declare independence, but whether the declaration of independence had been adopted in violation of international law. The ICJ had then turned to the question whether the declaration of independence of Kosovo was in accordance with general international law. It had noted that State practice during the eighteenth, nineteenth and early twentieth centuries pointed clearly to the conclusion that international law contained no prohibition of declarations of independence. The Court had declared that the scope of the principle of territorial integrity was confined to the sphere of relations between States. It had then analysed three Security Council resolutions that had been cited by some participants as evidence for the proposition that the declaration of independence was prohibited by international law (para. 81). It had concluded that no general prohibition could be deduced from those resolutions since they addressed specific situations where declarations of independence had been made in the context of an unlawful use of force or a violation of a *jus cogens* norm. The ICJ had thus concluded that general international law contained no applicable prohibition of declarations of independence. The Court had then analysed whether the declaration of independence of Kosovo was in accordance with Security Council resolution 1244 (1999) of 10 June 1999. It had determined that the object and purpose of resolution 1244 was "to establish a temporary, exceptional legal regime which … superseded the Serbian legal order … on an interim basis" (para. 100). In order to determine to what extent the authors of the declaration of independence were bound by that temporary legal regime, the Court had carefully analysed whether the authors of the declaration of independence were, in fact, the "Provisional Institutions of Self-Government of Kosovo" and questioned the accuracy of its formulation. After analysing the content and form of the declaration, as well as the context in which it had been adopted, the Court had concluded that its authors were not the "Provisional Institutions of Self-Government of Kosovo" but rather "persons who acted together in their capacity as representatives of the people of Kosovo outside the framework of the interim administration" (para. 109). On that basis, the Court had come to the conclusion that the adoption of the declaration of independence of Kosovo had not violated resolution 1244 (1999) on the following grounds: first, because the resolution and the declaration of independence operated on a different level (unlike resolution 1244 (1999), which established "a temporary, exceptional legal regime" in Kosovo, the declaration of independence was an attempt to determine the final status of Kosovo); secondly, because resolution 1244 (1999), which addressed "no specific obligations … to other actors", contained no general prohibition on declaring independence. Lastly, since the authors of the declaration of independence were not the Provisional Institutions of Self-Government of Kosovo, they were not bound by the constitutional framework established under resolution 1244 (1999) and, thus, their declaration of independence had not violated the framework established under that resolution. Consequently, the ICJ had held that the adoption of the declaration of independence had not violated any applicable rule of international law (para. 122).

5. On 30 November 2010, the ICJ had rendered its judgment on the merits in the case concerning *Ahmadou Sadio Diallo*. The case had been brought under the law of diplomatic protection, and dealt with the fundamental rights of Mr. Diallo, a Guinean citizen who had settled in the Democratic Republic of the Congo in 1964, as well as his direct rights as *associé* of the companies Africom-Zaire and Africontainers-Zaire, which were registered in the Democratic Republic of the Congo. In a previous judgment of 24 May 2007 on the preliminary objections raised by the Democratic Republic of the Congo, the Court had held that the application of Guinea was admissible "in so far as it concerns protection of Mr. Diallo's direct rights as *associé* in Africom-Zaire and Africontainers-Zaire" (para. 98, (1) (*a*)) and "in so far as it concerns protection of Mr. Diallo's rights, as an individual", but that it was inadmissible "in so far as it concerns protection of Mr. Diallo in respect of alleged violations of rights of Africom-Zaire and Africontainers-Zaire" (*ibid*., (2) (*a*)). In its judgment of 30 November 2010, the ICJ had first examined the admissibility of a claim alleging that Mr. Diallo had been the victim in 1988–1989 of arrest and detention measures. It had concluded that that claim was inadmissible because it had not been raised by Guinea until its reply to the preliminary objections of the Democratic Republic of the Congo, that it was not implicit in the original application and that it did not arise directly out of the question which was the subject matter of that application, which concerned events in 1995

and 1996. The ICJ had then turned to the claims relating to protection of Mr. Diallo's rights as an individual and to the arrest, detention and expulsion measures taken against Mr. Diallo in 1995 and 1996. In that regard, Guinea had argued, first, that Mr. Diallo's expulsion had breached article 13 of the International Covenant on Civil and Political Rights and article 12, paragraph 4, of the African Charter on Human and Peoples' Rights. On that point, the Court had observed that, in order to comply with those provisions, the expulsion of an alien lawfully in the territory of a State which was a party to those instruments must be decided in accordance with applicable domestic law and must not be arbitrary in nature. The ICJ had taken the view that the expulsion decree of 31 October 1995 had not complied with the law of the Democratic Republic of the Congo because it had not been preceded by consultation with the National Immigration Board, whose opinion was required by article 16 of the Legislative Order of 12 September 1983 concerning immigration control, and because it had not been "reasoned", as required by article 15 of the Legislative Order. Thus the Court had held that the expulsion had violated article 13 of the Covenant and article 12, paragraph 4, of the African Charter on Human and Peoples' Rights; that Mr. Diallo's right to have his case reviewed by a competent authority, in accordance with article 13 of the International Covenant on Civil and Political Rights, had not been respected; and that the Democratic Republic of the Congo had not demonstrated "compelling reasons of national security" to justify the denial of that right (para. 74). The Court had also held that Mr. Diallo's arrest and detention had violated article 6 of the Charter, concerning liberty and security of the person. It had found that the deprivations of liberty suffered by Mr. Diallo had not taken place in accordance with the procedure established by law, that they had been arbitrary, and that Mr. Diallo had not been informed, at the time of his arrests, of the reasons for those arrests or the charges against him. The Court had further found that the Democratic Republic of the Congo had violated article 36, paragraph (l) (*b*), of the Vienna Convention on Consular Relations by not informing Mr. Diallo, at the time of his arrest, of his right to request consular assistance from his country. On the other hand, with regard to the claim of Guinea that Mr. Diallo had suffered conditions in detention that constituted inhuman or degrading treatment, the ICJ had concluded that Guinea had failed to establish that such had been the case. The Court had then turned to a set of claims made by Guinea that Mr. Diallo's detention and expulsion had violated his direct rights as *associé* of the two companies he had established in the Democratic Republic of the Congo, Africom-Zaire and Africontainers-Zaire. After clarifying certain matters relating to the legal existence of the two companies and to Mr. Diallo's role and participation in them, the Court had first addressed the claim by Guinea that, in expelling Mr. Diallo, the Democratic Republic of the Congo had violated his right to take part and vote in general meetings. The Court had taken the position that the Democratic Republic of the Congo, in expelling Mr. Diallo, had probably impeded him from taking part in person in any general meeting, but that such hindrance had not amounted to a deprivation of his above-mentioned right. The ICJ had then addressed the argument by Guinea that, by unlawfully expelling Mr. Diallo, the Democratic Republic of the Congo had violated his rights relating to the *gérance* (management) of the companies. The Court had concluded that the claim by Guinea that the Democratic Republic of the Congo had violated Mr. Diallo's right to appoint a *gérant* must fail because the appointment of a *gérant* was the responsibility of the company (the general meeting), not a right of the *associé*. With respect to the claim by Guinea that the Democratic Republic of the Congo had violated Mr. Diallo's right to be appointed *gérant*, as well as his alleged right not to be removed as *gérant*, the Court had concluded that there had been no possible violations because the interested party had in fact been appointed *gérant* and continued to be *gérant* of both companies. The Court had also rejected the claim by Guinea that the Democratic Republic of the Congo had violated Mr. Diallo's right to exercise the functions of a *gérant*, concluding that while the performance of his duties as *gérant* might have been rendered more difficult by his presence outside the country, Guinea had not demonstrated that it had been rendered impossible. Turning to the contention by Guinea that, in expelling Mr. Diallo, the Democratic Republic of the Congo had violated his right to oversee and monitor the management, the Court had rejected that claim, finding that while it might have been the case that Mr. Diallo's detentions and expulsion from the Democratic Republic of the Congo had rendered the business activity of the companies more difficult, they simply could not have interfered with his ability to oversee and monitor the management, wherever he might have been. Lastly, the Court had rejected the claim by Guinea that the Democratic Republic of the Congo had violated Mr. Diallo's right to property over his *parts sociales* in Africom-Zaire and Africontainers-Zaire.

6. In the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area*, Costa Rica had, on 18 November 2010, filed an application invoking, in order to found the jurisdiction of the Court, article XXXI of the American Treaty on Pacific Settlement (Pact of Bogotá) and the declarations made by the two States pursuant to Article 36, paragraph 2, of the Statute of the International Court of Justice. The application had been filed in regard to an alleged "incursion into, occupation of and use by Nicaragua's army of Costa Rican territory as well as breaches of Nicaragua's obligations towards Costa Rica" (para. 1). On 8 March 2011, the Court had handed down its order on the request for the indication of provisional measures in the case. Costa Rica had claimed that Nicaragua had occupied the territory of Costa Rica on two separate occasions in connection with the construction of a canal across Costa Rican territory, as well as certain related works of dredging on the San Juan River. Pending its determination of the case on the merits, Costa Rica had requested the ICJ to order provisional measures indicating: first, that Nicaragua should not station troops or other personnel, engage in the construction or enlargement of a canal, fell trees, remove vegetation or dump sediment in the area concerned; secondly, that Nicaragua should suspend its dredging programme; and thirdly, that Nicaragua should refrain from any other action which might prejudice the rights of Costa Rica.

7. In its order, the Court had determined that the instruments invoked by Costa Rica appeared, *prima facie*, to afford a basis on which the Court had jurisdiction to rule on the merits, enabling it to indicate provisional measures

if it considered that the circumstances so required. The Court had also found that the rights to be protected by those requested measures—in particular the right to assert sovereignty over the disputed territory—were plausible, and that a link existed between the rights whose protection was being sought and the measures requested.

8. Having thus found that it had the power to indicate provisional measures, the ICJ had gone on to examine whether there was a risk that irreparable prejudice might be caused to the rights which were in dispute and whether such a risk was imminent. The Court had found that, given that Nicaragua intended to carry out certain activities, if only occasionally, in the disputed territory, a real risk of irreparable prejudice to title claimed by Costa Rica to sovereignty over the said territory did exist and that it was imminent, to the extent that there was a risk of incidents liable to cause irremediable harm in the form of bodily injury or death.

9. The Court had decided to indicate provisional measures to both parties, calling on each party to refrain from sending to, or maintaining in, the disputed territory any personnel, whether civilian, police or security, until such time as the Court had decided the dispute on the merits or the parties had come to an agreement on the subject.

10. On 1 April 2011, the Court had delivered its judgment on preliminary objections in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*. In the case, Georgia claimed that the Russian Federation had violated the 1965 International Convention on the Elimination of All Forms of Racial Discrimination. Georgia had invoked the compromissory clause in article 22 of that Convention to found the jurisdiction of the Court. The ICJ had already, following a request by Georgia for the indication of provisional measures of protection on the same subject, ordered certain measures of protection in its order of 15 October 2008. The Russian Federation had raised four preliminary objections to the Court's jurisdiction under article 22 of the Convention: that there was no dispute between the parties regarding the interpretation or application of the Convention; that the procedural requirements of article 22 of the Convention had not been fulfilled; that the alleged wrongful conduct had taken place outside the territory of the Russian Federation, and thus the Court lacked jurisdiction *ratione loci*; and that any jurisdiction that the Court might have was limited *ratione temporis* to events which had occurred after the entry into force of the Convention as between the parties, namely after 2 July 1999.

11. The ICJ had examined the first preliminary objection by the Russian Federation in relation to events that had occurred during three distinct time periods. First, with respect to the period before the Convention had entered into force between the parties, namely 2 July 1999, the Court had concluded that even if a dispute about racial discrimination had been found to have existed during that period, it could not have been a dispute with respect to the interpretation or application of the Convention. Secondly, the Court had concluded that none of the documents or statements from the period of time between Georgia and the Russian Federation becoming parties to the Convention and the outbreak of hostilities provided any basis for a finding that there had been a dispute between Georgia and the Russian Federation with respect to the interpretation and application of the Convention. Thirdly, with respect to the events which had taken place in 2008, in particular after the armed hostilities in South Ossetia that had begun during the night of 7 to 8 August 2008, the Court had observed that, while the claims by Georgia were primarily based on allegations of unlawful use of force, they also expressly referred to ethnic cleansing by Russian forces. Those claims had been made against the Russian Federation directly and had been rejected by the latter. The ICJ had therefore found that, on 12 August 2008, there was a dispute between Georgia and the Russian Federation about the latter's compliance with its obligations under the Convention. The Court had accordingly dismissed the first preliminary objection by the Russian Federation.

12. In examining the second preliminary objection by the Russian Federation, concerning the procedural requirements of article 22 of the Convention, the Court had found, based on an analysis of the ordinary meaning of the phrase "[a]ny dispute … which is not settled by negotiation or by the procedures expressly provided for in this Convention", that article 22 established preconditions to be fulfilled before the seisin of the Court (para. 141). It had also noted that the *travaux préparatoires* of the Convention supported the conclusion it had reached when considering the ordinary meaning of the provision.

13. Having concluded that article 22 of the Convention imposed preconditions that had to be satisfied before resorting to the Court, the Court had considered whether those preconditions, including the precondition of negotiations, had been fulfilled. It had observed that, in the light of its finding that a dispute had only arisen in August 2008, immediately before the filing of the application, it had only been possible for the parties to be negotiating the matters in dispute during that period. After reviewing the facts in the record relating to that period, the ICJ had been of the view that, although certain claims and counterclaims made by the parties concerning ethnic cleansing might attest to the existence of a dispute as to the interpretation and application of the Convention, they did not amount to attempts at negotiations by either party. The ICJ had thus concluded that Georgia had not established that, between 9 and 12 August 2008, it had attempted to negotiate matters related to the Convention with the Russian Federation, or that Georgia and the Russian Federation had engaged in negotiations with respect to the latter's compliance with its substantive obligations under the Convention. Thus, the Court had upheld the second preliminary objection by the Russian Federation and held that article 22 of the Convention could not serve to found the Court's jurisdiction and that the case could not proceed to the merits phase, noting that it was not required to consider the third or fourth preliminary objections by the Russian Federation.

14. In the case concerning *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, two requests for permission to intervene had been made by Costa Rica and Honduras, and the ICJ had rejected them in two separate judgments of 4 May 2011. On 25 February 2010, Costa Rica had filed an application for permission to intervene,

in which it stated that it sought to intervene as a non-party for the "purpose of informing the Court of the nature of [its] legal rights and interests and of seeking to ensure that the Court's decision regarding the maritime boundary between Nicaragua and Colombia does not affect those rights and interests". In its judgment on the request, the ICJ had begun by discussing the legal framework for intervention, provided for under Article 62 of the Statute of the International Court of Justice and article 81 of the Rules of Court. It had then analysed each of the criteria which a State must meet in order to be permitted to intervene, namely the existence of an interest of a legal nature which might be affected by the decision in the case, the precise object of the intervention and any basis of jurisdiction between the State seeking to intervene and the parties to the case. Following an overview of those constituent elements, the ICJ had examined whether they were present in the case of Costa Rica. With respect to the "interest of a legal nature which may be affected", the Court had noted that, although Nicaragua and Colombia differed in their assessment as to the limits of the area in which Costa Rica might have a legal interest, they recognized the existence of the interest of Costa Rica of a legal nature in at least some areas claimed by the parties to the main proceedings. The ICJ had then examined whether Costa Rica had established that its interest of a legal nature was one which "may be affected" by the decision of the Court in the main proceedings. It had concluded that Costa Rica had not done so, because the Court, when drawing a line delimiting the maritime areas between the parties to the main proceedings, would, if necessary, end the line in question before it reached an area in which the interests of a legal nature of third States might be involved. Thus, the ICJ had concluded that application for permission to intervene in the case filed by Costa Rica could not be granted.

15. As for Honduras, it had applied to the ICJ to be permitted to intervene in the case as a State party, or, if the Court did not accede to that request, as a non-party. After differentiating between the two types of intervention, the ICJ had noted that whatever the capacity in which a State intervened, it had to fulfil the condition laid down by Article 62 of the Statute of the International Court of Justice and demonstrate that it had an interest of a legal nature which might be affected by the future decision of the Court. It had thus turned to an examination of whether Honduras had fulfilled that condition. The area in which Honduras had specified that it had an interest of a legal nature which might be affected by the decision in the main proceedings was an area which had been the subject of the Court's judgment of 8 October 2007 in the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* and the dispute in question had been settled by that judgment as between Honduras and Nicaragua. The ICJ had therefore considered whether the 2007 judgment prevented it from granting Honduras permission to intervene.

16. The Court had decided that, by virtue of the authority of the *res judicata* of the 8 October 2007 judgment, Honduras could not have an interest of a legal nature in the area south of the bisector line established by the ICJ in that judgment. With respect to the area north of that bisector, the Court had concluded that Honduras could have no interest of a legal nature which might be affected by the decision in the main proceedings for the simple reason that its rights over that area had not been contested either by Nicaragua or by Colombia. The ICJ had also found that Honduras had no interest of a legal nature which might be affected in the maritime areas it had identified in its application. The Court had held that Honduras had no interest of a legal nature in the effects that the decision of the Court in the main proceedings might have on the rights of Honduras under the bilateral treaty of 1986 between Honduras and Colombia,[259] since the treaty was a matter between Honduras and Colombia only and it had no relevance to the Court's determination of the maritime boundary between Nicaragua and Colombia. Thus, the Court had rejected the application by Honduras for permission to intervene.

17. On 4 July 2011, the ICJ had issued an order on the application for permission to intervene filed by Greece in the case concerning *Jurisdictional Immunities of the State*, in the context of a dispute between the parties over whether Italy had violated the jurisdictional immunity of Germany by allowing civil claims against it based on violations of international humanitarian law by the German Reich during the Second World War. In its application, Greece had stated that it had an interest of a legal nature which might be affected by the future decision of the Court in the case because, in its view, Germany had "acquiesced to, if not recognized, its international responsibility vis-à-vis Greece for all acts and omissions perpetrated by the Third Reich" during the Second World War (para. 16). Unlike the applications for permission to intervene submitted by Costa Rica and Honduras in the *Territorial and Maritime Dispute (Nicaragua v. Colombia)* case, neither party to the main proceedings had filed an objection to the application by Greece. Thus, the ICJ had, in its order adopted on 4 July 2011, permitted Greece to intervene. With respect to the first criterion for intervention laid down in article 81, paragraph 2, of the Rules of Court, namely that the State seeking to intervene must have an interest of a legal nature which might be affected, the Court had observed that, in the judgment that it would render in the main proceedings, the Court might find it necessary to consider the decisions of Greek courts in the light of the principle of State immunity, for the purposes of making findings with regard to the request in the submissions by Germany concerning the question whether Italy had committed a breach of the jurisdictional immunity of Germany by declaring Greek judgments enforceable in Italy. The ICJ had considered that that was sufficient to conclude that Greece had an interest of a legal nature which might be affected by the judgment that would be handed down in the main proceedings.

18. With respect to the second criterion, Greece had stated that the precise object of its intervention was "to inform the Court of the nature of the legal rights and interests of Greece that could be affected by the Court's

[259] Maritime Delimitation Treaty between the Republic of Colombia and the Republic of Honduras (San Andrés, 2 August 1986), *Official Journal (Colombia)*, 135th year, No. 43815, 14 December 1999, p. 1 (Law No. 539 of 13 December 1999) (available from the National Printing Service of Colombia: www.imprenta.gov.co/portal/page/portal/IMPRENTA/Productos/Diario_Oficial).

decision in light of the claims advanced by Germany to the case before the Court" (p. 10 of the application). In its order, the Court had noted that, insofar as the object of Greece's intervention was to inform the Court of its interest of a legal nature which might be affected, that object seemed indeed to accord with the function of intervention. With respect to the third and final criterion contained in article 81 of the Rules of Court, the Court had observed that it was not necessary to establish the existence of a basis of jurisdiction between the parties to the proceedings and the State which was seeking to intervene as a non-party; since Greece had made it clear that it was seeking to intervene as a non-party, it was not necessary for such a basis of jurisdiction to be established. The Court had thus granted Greece's request to intervene.

19. In addition, in the previous year, three new contentious cases and one new application for permission to intervene had been filed. In addition to the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area*, two other contentious cases had been filed before the Court: first, on 20 July 2010, Burkina Faso and Niger had jointly submitted to the Court a territorial dispute relating to the boundary between them, pursuant to a special agreement that had entered into force in 2009 (*Frontier Dispute (Burkina Faso/Niger)*). Secondly, on 28 April 2011, Cambodia had filed a *Request for Interpretation of the Judgment of 15 June 1962 in the case concerning the Temple of Preah Vihear*. In its application, Cambodia had asked the Court to adjudge and declare that "the obligation incumbent upon Thailand to 'withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory' … is a particular consequence of the general and continuing obligation to respect the territorial integrity of Cambodia" (para. 45 of the application). On the same day, Cambodia had filed a request for the indication of provisional measures. The Court was currently deliberating on that request and would issue its order shortly.

20. Lastly, in the previous year, a third contentious case had been submitted to the Court, namely the case concerning *Whaling in the Antarctic*.

21. He would now speak in a personal capacity and his views would not necessarily reflect those of the ICJ. He would cover three points in relation to the cases he had mentioned.

22. The first question he would like to take up was the discretionary power of the Court, which allowed it not to grant a request for an advisory opinion. The Charter of the United Nations, like the Statute of the International Court of Justice, stated that the Court "may" give an advisory opinion. It was therefore not an obligation. The basic criterion that the Court had applied so far was the following: if it considered that there was a compelling reason not to render an advisory opinion, then it would decline to do so.

23. The historical evolution of the advisory opinion procedure showed that its origins lay not in the Statute of the International Court of Justice or in the Charter of the United Nations, but in article 14 of the Covenant of the League of Nations. At that time, the Permanent Court of International Justice was not part of the League of Nations, even though the two bodies were closely linked. It was for the Council of the League of Nations to ask the Permanent Court for an advisory opinion with a view to facilitating the Council's consideration of the matter before it. It was for that reason that the Permanent Court had found it impossible to give an advisory opinion on the *Status of Eastern Carelia*, which was disputed by Finland and Russia. The Permanent Court had given two reasons: the first was that Russia had not given its consent to the League of Nations becoming involved in its dispute with Finland. The second reason was that the Permanent Court would have had to rule on certain questions of fact and that, since Russia had refused to take part in any inquiry, it was doubtful whether there would be available to the Permanent Court materials sufficient to enable it to arrive at a conclusion on those questions.

24. With the establishment of the ICJ, the advisory procedure had been officially incorporated into the Statute of the International Court of the Justice and the Charter of the United Nations and the situation had changed somewhat. First, an advisory opinion could now be requested by the General Assembly or by the Security Council, or by other organs of the United Nations or specialized agencies authorized to do so, provided that the request related to "legal questions arising within the scope of their activities" (Art. 96, para. 2). The aim was to assist the work of those bodies, and the advisory opinion requested might not have a direct link with a particular dispute. Advisory opinions were therefore issued to the requesting bodies and not to the parties to a dispute. In consequence, the fact that a party had not accepted the jurisdiction of the Court was not relevant. The second difference was that under the Charter of the United Nations, the ICJ was the principal judicial organ of the United Nations. It was therefore an integral part of the United Nations system and functioned under Chapter VI of the Charter of the United Nations. Accordingly, it had an additional responsibility, namely the obligation to cooperate with the other parts of the system. Of course, if a matter that had been referred to the ICJ did not pertain to its judicial function, it did not have to consider it.

25. The ICJ interpreted the permissive wording of Article 65 of the Statute of the International Court of Justice (the Court "may" give an advisory opinion) as granting it the discretionary power to refuse to issue an advisory opinion. In practice, however, the Court had never done so.

26. In its 1956 advisory opinion in the case concerning the *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O.*, the ICJ had raised for the first time the issue of the "compelling reasons" that could prevent it from complying with a request for an advisory opinion (p. 86 of the *Reports*). The Court had later referred repeatedly to the issue, but, since it had never refused to issue an advisory opinion, it had never had to clarify what those reasons might be. On the other hand, it had on more than one occasion rejected certain arguments relating to the existence of "compelling reasons" allegedly preventing it from issuing the advisory opinion requested.

27. The argument that was most often put forward in such cases was that the subject matter of the case about which the Court's advisory opinion had been requested concerned a bilateral dispute. As had been indicated earlier, originally the advisory procedure had been closely related to such disputes. The ICJ had not changed its position that the mere fact that the request related to a bilateral dispute was not a sufficient reason for it to refuse to give an advisory opinion. The reason was that the Court was not really giving its opinion to the parties to a potential dispute but to the requesting organ.

28. Another argument often advanced was the political nature of the dispute. That argument was not relevant to the ICJ, which, as a judicial institution applying international law, did not make judgments on the basis of political criteria. That sometimes created tensions within the Court, but it had always adhered to the strictly judicial character of its functions.

29. Another factor that the ICJ had to consider when deciding whether to give an advisory opinion or not was the issue of the interest of the requesting organ and of other concerned organs of the United Nations system. Since the Court was an integral part of the United Nations system, it was under the obligation to cooperate with the system as a whole in applying Chapter VI of the Charter of the United Nations (Pacific Settlement of Disputes). If the requesting organ was convinced that it needed the Court's opinion, the Court was obliged to take account of that. The ICJ could find itself in a delicate situation when the interests of several organs of the system were involved. In the Court's advisory opinion on the question of *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, requested by the General Assembly, the Court had expressly indicated that the General Assembly was competent to discuss certain issues which were before the Security Council. The General Assembly was therefore empowered to request an advisory opinion on the situation in Kosovo. Consequently, the ICJ had jurisdiction to give an advisory opinion in response to the request made by the General Assembly.

30. The fact that the Court had jurisdiction did not mean, however, that it was obliged to exercise it, because it had the discretionary power to decline to give its opinion, as had been noted previously. The Court had to consider such delicate issues as the separation of powers within the United Nations. Article 12 of the Charter of the United Nations set clear limits on the powers of the General Assembly in relation to those of the Security Council. In that particular case, the ICJ had found that it was competent to interpret Security Council resolution 1244 (1999) at the request of the General Assembly, and the Security Council had raised no objection. One of the judges who had appended a dissenting opinion to the advisory opinion in question had written that it was important to evaluate

> whether the requesting organ has or claims to have a sufficient interest in the subject matter of the request.
>
> In the absence of such an interest, the purpose of furnishing to the requesting organ the elements of law necessary for it in its action is not present. Consequently, the reason for the Court to cooperate does not exist and what is sometimes referred to as its duty to answer disappears. (separate opinion of Judge Keith, paras. 15–16)

Hence, although the Court had always responded favourably to a request for an advisory opinion, such requests often placed the Court in a difficult situation.

31. Turning to the second issue that he wished to raise in a personal capacity, namely applications for permission to intervene submitted by States, Judge Owada said that, in many cases, the Court had declined to grant such applications. The main reason was that it was often difficult to establish that, in the dispute in question, the requesting State had an interest of a legal nature, as required under Article 62 of the Statute of the International Court of Justice. In recent years, the ICJ had received the most applications for permission to intervene in the context of maritime delimitation cases. It had declined to grant applications on two grounds. The first was that, in accordance with Article 59 of the Statute of the International Court of Justice, the decision of the Court had no binding force except between the parties, so that, consequently, the third State that had submitted the application would not be bound by the decision of the Court. That was a formal reason. The second reason was more substantive. The Court could consider that the relevant legal interest of a third State was not likely to be affected by a future decision.

32. The possibility for a State that was not party to the dispute to intervene originated in the Conventions I of 1899 and 1907 for the Pacific Settlement of International Disputes. At that time, although the arbitral award was only binding for the parties who had concluded the "Compromis", when the issue related to the interpretation of a convention in which Powers other than the parties to the dispute had participated, each of those Powers was entitled to intervene in the case. Subsequently, the right to intervene had been extended to any third State that could establish that it had an interest of a legal nature in the case and that this interest might be affected by the Court's decision. One of the arguments put forward was that many countries had adopted an intervention procedure. That was true, but it was important to bear in mind that, in most cases, applications to intervene submitted to domestic courts were filed by parties to the dispute. For several years, the ICJ had chosen to interpret Article 62 of the Statute of the International Court of Justice as neutral with regard to whether the State applying for permission to intervene should be a party to the dispute in question. Nevertheless, the situation remained ambiguous and further reflection on the issue was needed.

33. The third point deserving of attention related to provisional measures that the ICJ could order under Article 41 of the Statute of the International Court of Justice. When addressing the International Law Commission, one of his predecessors had referred to the problem of the excessive use of provisional measures as a way of obtaining a *de facto* judgment on the merits before reaching the merits phase itself. It was a danger the Court definitely had to guard against. At the preliminary stage of the request for interim measures of protection, it was very difficult for the ICJ to decide whether it had jurisdiction, whether there was a dispute, whether there were rights to be preserved and what their substance might be. In fact, the Court had to make a *prima facie* determination without going into the merits of the case. The Court faced the

same difficulties in the context of preliminary objections, but it could, under article 79 of its Rules, decide to defer its decision until the merits phase. The same was not true in the case of a request for indication of provisional measures, where there might be an element of urgency.

34. The CHAIRPERSON thanked the President of the International Court of Justice for sharing his insights and observations, which would undoubtedly provide members of the Commission with food for thought.

The meeting rose at 12.40 p.m.

3101st MEETING

Friday, 8 July 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escobar Hernández, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Cooperation with other bodies (*continued*)

[Agenda item 13]

STATEMENT BY THE CHAIRPERSON OF THE COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW

1. The CHAIRPERSON welcomed the representatives of the Council of Europe: Ms. Belliard, Chairperson of the Committee of Legal Advisers on Public International Law (CAHDI), and Mr. Lezertua, Director of Legal Advice and Public International Law (Jurisconsult), and invited them to address the Commission.

2. Ms. BELLIARD (Chairperson of the Committee of Legal Advisers on Public International Law) explained that CAHDI had been set up originally as a subcommittee of the European Committee on Legal Cooperation. In 1991, it had become a full committee, reporting directly to the Committee of Ministers of the Council of Europe. CAHDI was responsible for holding exchanges of views on questions of public international law, including the most topical issues. It might be asked to coordinate member States' positions on various topics of international law; on several occasions, the Committee of Ministers and the Steering Committee for Human Rights had requested it to provide legal opinions.

3. The membership of CAHDI was unique in that it brought together the legal advisers to the Ministries of Foreign Affairs of 55 States as well as the representatives of several intergovernmental organizations. A number of observer States and organizations also participated very actively in its work, although they had no voting rights. That diversity greatly enriched its deliberations.

4. CAHDI was more than a coordinating body: it was also a discussion forum. The senior positions occupied by its members and their high level of commitment to the Committee's work lent undeniable credibility to its reports, opinions, comments and recommendations.

5. By convening twice a year, CAHDI was able to keep up to date on the subjects regularly on its agenda. That was particularly true of reservations and interpretative declarations concerning international treaties. Since States had only 12 months in which to react or to make representations to a reserving State after being notified of the latter's ratification of a given treaty, the Committee had to be capable of responding quickly.

6. The CAHDI agenda covered a wide range of subjects, and its meetings provided an opportunity for all the participants to exchange information on current developments and national practices. Based on those exchanges, CAHDI had created databases on such subjects as the organization and functions of the Office of the Legal Adviser in the Ministry for Foreign Affairs; State practice regarding State immunities; and national implementation of United Nations sanctions and respect for human rights.

7. At the 41st meeting of CAHDI—the first she had chaired—held in Strasbourg on 17 and 18 March 2011, a discussion of the immunity of States and international organizations had been particularly instructive. Mr. Joël Sollier, representing the International Criminal Police Organization (INTERPOL), had highlighted the importance of opening up channels of police and judicial cooperation that concorded not only with the neutrality of INTERPOL but also with general principles of international law governing immunity. He had explained that INTERPOL practice in that regard rested primarily on the precedent established by the ICJ in its judgment in the *Arrest Warrant* case, although the scope of that precedent was still unclear. At its 41st meeting, the Committee had also taken note of the rather disappointing level of accession to the United Nations Convention on Jurisdictional Immunities of States and Their Property and had emphasized how vital it was for more States to ratify the Convention.

8. As an advisory body, CAHDI was frequently called on by the Committee of Ministers of the Council of Europe to give an opinion on certain matters. At its 41st meeting, in response to a Committee of Minsters decision of 2 March 2011, CAHDI had held an exchange of views on the draft Council of Europe Convention on preventing and combating violence against women and domestic violence and had examined the compatibility of several of the draft Convention's articles with international law, including human rights law. After a very lively discussion, delegations had agreed that, in view of the Convention's importance, it should be adopted without delay, although some of its wording required clarification.[260] CAHDI had recommended, and achieved, the amendment of the title—no small matter—and the clarification of certain

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[260] CAHDI, Meeting report, 41st meeting, Strasbourg, 17–18 March 2011 [CAHDI (2011) 5], Appendix X.