Document:-

A/CN.4/SR.2698

Summary record of the 2698th meeting

Topic:

<multiple topics>

Extract from the Yearbook of the International Law Commission:-

2001, vol. I

footnote 13 should be deleted and that the next sentence should begin "In that advisory opinion".

Paragraph (13), as amended, was adopted.

Paragraph (14)

99. Mr. MOMTAZ said that presumably the intervention in question was that undertaken on environmental grounds. In order not to confuse the reader, that fact should be specified. It might also be useful to add a reference to the International Convention on Civil Liability for Oil Pollution Damage.

100. Mr. Sreenivasa RAO (Special Rapporteur) said that paragraph (14), also dated from before his time as Special Rapporteur. However, he understood the type of intervention concerned to be different from any mentioned previously: it was intervention by agreement, under which a State was given control by another for certain purposes. He had assumed that it related to military intervention, where the army of one State was stationed in another. In that situation the incoming State was the "controlling" State. He would add that he endorsed the Chairman's plea for speed in adopting the report. Only a few pages had been adopted at the current meeting and some substantive issues requiring discussion lay ahead. Editing changes should be proposed only if they sought to correct glaring errors.

101. Mr. SIMMA said that second thoughts should not be excluded; shortage of time concentrated the mind. As for Mr. Momtaz's point, environmental disasters were covered by the current wording, even though they could not be said to be subject to an agreement. On the other hand, if "intervention" referred to agreed intervention, the word "ousted" was surely too harsh, implying, as it did, deprivation of jurisdiction.

102. Mr. HAFNER said that, as the comments by other members showed, it was a difficult issue and the Commission was not in a position to cover all cases. He therefore suggested deleting paragraph (14), which only complicated matters. The duty imposed on States under other articles should suffice.

103. Mr. CRAWFORD said he strongly concurred. The draft articles could not deal with extreme situations involving any form of intervention, consensual or otherwise. If the paragraph were to be retained, the phrase "It is the view of the Commission that" should be deleted: the Commission was not making a general point of principle.

104. The CHAIRMAN suggested that paragraph (14) should be deleted.

It was so agreed.

Paragraph (14) was deleted.

Paragraph (15)

105. Mr. HAFNER suggested that the words "the possibility of" should be inserted before "any harm" in the penultimate sentence.

Paragraph (15), as amended, was adopted.

Paragraphs (16) to (18)

Paragraphs (16) to (18) were adopted.

Paragraph (19)

106. Mr. HAFNER asked whether the term "natural law", in the second sentence, was the best expression to use. It seemed ambiguous in a way that the French version did not.

107. Mr. CRAWFORD concurred. The phrase "in response to a natural law" should be deleted. He also suggested deleting, or at least qualifying, the phrase "not from an intervening policy decision", in the third sentence. An intervening policy decision might relate to the way in which the activity was being carried out and therefore be perfectly relevant to risk. He was aware that the draft articles did not cover decisions to use weapons, as distinct from the consequences of storage, but the distinction between the "quality" and a policy decision was too absolute. The simplest solution was to delete the phrase.

108. Mr. Sreenivasa RAO (Special Rapporteur) said that, while the phrase in question might have been misplaced, the intention had been to eliminate decisions that affected other countries because of a policy decision without any physical connection.

109. Mr. CRAWFORD said that that point, with which he agreed, was expressed in the example that had been given. Obviously, a country could not use injurious transboundary consequences as an excuse for a concern that might relate to the actual use of weapons.

The meeting rose at 1.10 p.m.

2698th MEETING

Monday, 30 July 2001, at 3 p.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.

Cooperation with other bodies (*continued*)*

[Agenda item 8]

VISIT BY THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

1. The CHAIRMAN warmly welcomed the President of the International Court of Justice, Mr. Gilbert Guillaume, for an exchange of views in accordance with the well-established practice of the Commission. Under Article 38 of its Statute, the function of the Court was to decide disputes in accordance with international law. It was thus the supreme court of the international community. By contrast, the Commission assisted in the making of international law in accordance with its mandate under Article 13, paragraph 1, of the Charter of the United Nations. There were close links and natural affinities between the two institutions: *ratione personae*, in that many of the judges of the Court were former members of the Commission, and *ratione materiae*, since the Court shaped international law through its judgments.

2. Mr. GUILLAUME (President of the International Court of Justice) said he agreed that the two institutions complemented each other in terms of members and functions. The role of the Commission was to codify and develop international law, while, in handing down judgments or opinions, the Court was sometimes called upon to clarify the content of international law. He had therefore been pleased to respond to the invitation of the Commission to report on what the Court had done in the past year and to inform it about the problems currently being faced and the prospects for the future. He was also prepared to reply to questions, thereby continuing his dialogue with the Commission.

3. The past year had been marked by two important judgments, one in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* and the other in the *LaGrand* case. The two cases were entirely different, but in each of them the Court had had to clarify the law on a number of important points. The case concerning Qatar and Bahrain had been a territorial dispute over islands, low-tide elevations and the maritime areas of the two States. It was an old conflict that had created real problems, including the use of armed force on two occasions. Saudi Arabia had attempted to solve the conflict through mediation, which had unfortunately failed, and the case had been submitted to the Court in 1991.

4. The judgment of the Court had only been issued 10 years later, and there were a number of reasons for that. The first was that its jurisdiction to adjudicate the dispute had been contested by Bahrain, but those objections had been overruled, and the second, that the authenticity of certain documents had been challenged, creating procedural difficulties. The final result had been a major political and diplomatic breakthrough. The judgment had been welcomed by both parties as definitively settling a territorial dispute that had hampered relations between the two countries. New, more satisfactory relations could be entered into at the current time and were symbolized by the planned construction of a bridge to link Qatar with Bahrain through the disputed maritime areas. It was rare indeed that a judgment of the Court satisfied all the parties to a dispute.

5. The case had involved two sets of issues relating to sovereignty over certain islands and low-tide elevations and to maritime boundaries. Interestingly enough, the maritime boundaries could not be determined until territorial sovereignty had been established. That was something that the Court was competent to do, in contrast to the International Tribunal for the Law of the Sea, which had jurisdiction only to determine maritime boundaries. One issue that had long divided the two parties was that of the Hawar islands, which lay in immediate geographical proximity to the Qatar peninsula, but over which Bahrain considered that it had a valid claim through historical ties, by having carried out activities there and under a decision taken by the British authorities in its favour in 1939.

6. The Court had confined itself to examining that decision and had concluded that it did not constitute an arbitral award, after having defining arbitral awards. It had noted that the decision had been requested of the British authorities by the sovereign heads of both countries and had been acknowledged in advance by the two countries as binding. It had found that the decision had been procedurally correct and was binding on the two parties and it had accordingly granted the Hawar islands to Bahrain. By concentrating on the British decision, the Court had left to one side the interesting question whether the rules of *uti possidetis juris* were applicable, given that the parties were States which had been protectorates in colonial times and whose continuity had been ensured over the years, or whether the rules applied only in situations of colonization and subsequent transfer of sovereignty.

7. The Court had granted a number of small islands to one or another of the parties, thereby establishing the basis for maritime delimitation of both the territorial sea and the exclusive economic zone and continental shelf, for which the parties had requested a single maritime boundary. The Court had found that customary international law was the applicable law and that article 15 of the United Nations Convention on the Law of the Sea was part of customary law. Consequently, territorial seas had to be delimited according to the principle of equidistance, taking special circumstances into account, if necessary. The delimitation of the exclusive economic zone and the continental shelf had also been based on customary law, according to which the equidistance line must be found and adjusted to take account of relevant circumstances. That was true, the Court had indicated, not only for opposite coasts, as in the case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen*, but also for adjacent coasts. Those new elements attested to the development of the case law of the Court over the past 30 years.

8. The question had then been how to draw the equidistance line in respect of the territorial sea. The Court had referred to the United Nations Convention on the Law of the Sea, which stated that the equidistance line should be the low-water line along the coast. It had then had to decide how to treat the low-tide elevation, an area of land that was above water at low tide, but submerged at

* Resumed from the 2673rd meeting.

high tide, unlike islands, which were permanently above water. Bahrain had contended that it had appropriated certain low-tide elevations by placing beacons and other installations on them and, consequently, that it exercised sovereignty over them and that the equidistance line should be drawn by taking them into account. Qatar, on the other hand, had maintained that low-tide elevations could not be appropriated as territory or islands could and must be given the same treatment as the maritime areas in which they were located. The low-tide elevations concerned were situated in a spot where the territorial seas of Bahrain and Qatar overlapped and were thus in both territorial seas. The Court had found that, in the particular circumstances, the low-tide elevations could not be appropriated and had the same status, not as islands, but as the territorial sea in which they were located. It had accordingly granted one of them to Qatar. Although its findings had dealt exclusively with low-tide elevations located in areas where territorial seas overlapped, not in areas beyond or on the high seas, they suggested that, in general, the Court was not in favour of appropriation by acquisition of low-tide elevations.

9. Another interesting point had been the argument by Bahrain that straight baselines joining the outermost points of its islands should be drawn, thereby transforming the entire disputed area into an inland sea. The Court had found that the relevant provisions of the United Nations Convention on the Law of the Sea had not been fulfilled and that straight baselines could not be drawn. The disputed area was not an inland sea, but a territorial sea through which Qatar retained the right of innocent passage.

10. Once the equidistance line in the territorial seas had been drawn, the Court had turned to the question whether there were special circumstances requiring its adjustment in order to obtain an equitable result and the short distance between the two coasts had accordingly been taken into account.

11. In dealing with the delimitation of the continental shelf and the exclusive economic zone, the Court had discarded all the relevant circumstances cited by the parties, but had found a new one, a Bahraini low-tide elevation which had not been mentioned by either of the parties, but which gave a definite advantage to Bahrain in the placement of the equidistance line. The Court had determined that the effect of the low-tide elevation on the equidistance line should be adjusted in order to arrive at an equitable result.

12. The most important legal elements in the case were the standardization of the fundamental rules relating to maritime delimitation and the determination of the treatment to be given to low-tide elevations and small islands that might have an inordinate effect on equidistance lines unless adjustments were made. As a result of the judgment, the Hawar islands had been granted to Bahrain and a maritime boundary that was reasonably favourable to Qatar had been drawn in the north.

13. The second case he wished to describe involved two German brothers named LaGrand. In 1984, they had received death sentences in the United States, but had not been duly informed of their right to communicate with German consular authorities. That information had been given them only in 1998, while the German authorities had been informed of their incarceration only in 1992. One of the brothers had been executed in 1999. On 2 March 1999, Germany had instituted proceedings and applied for provisional measures. The response by the Court had come only 24 hours later and, on 3 March 1999, it had issued an order indicating provisional measures according to which the United States Government was to use all means at its disposal to prevent the second brother, Walter LaGrand, from being executed, pending a final decision by the Court. Only a few hours later, however, Walter LaGrand had been put to death.

14. In debating the merits of the *LaGrand* case, the Court had heard four sets of arguments by Germany. The first was that the United States was guilty because, by not informing the LaGrand brothers of their rights immediately upon their arrest, it had violated its obligations towards Germany. The United States had in fact acknowledged wrongdoing in that regard. Germany had added that the obligations of the United States towards the LaGrand brothers themselves had also been violated, since the Vienna Convention on Consular Relations accorded rights not only to States, but also to individuals. The Court had agreed with Germany on that point, but had refused to classify the rights in question as human rights, as Germany had requested, because that was not germane to the case. It had stated further that, in that case, the fact that the LaGrand brothers had not been informed of their rights had prevented them from receiving the assistance available under the Convention.

15. The second line of argument from Germany had related to the review of the guilty verdict. Based on the procedural default rule in United States domestic law, the courts of that country had found that, since the matter had not been brought before the Arizona courts, it could not be submitted to a federal court and that the verdict must stand. There again, ICJ had refrained from taking a general position, for example, that the procedural default rule was contrary to the Vienna Convention on Consular Relations, but had said that, given the way the trial had been conducted, the sentence should have been reviewed and the fact that it had not was a violation of the Convention.

16. The third submission by Germany had concerned the order by the Court indicating provisional measures. A question that had been under discussion in the literature for decades was whether provisional measures were or were not binding on the parties. It had never been resolved in case law and the Court had had to take a position on it. It had done so by saying that provisional measures were binding. The basis for its decision was Article 41 of its Statute. The Court had also considered the object and purpose of provisional measures:

The context in which Article 41 has to be seen within the Statute is to prevent the Court from being hampered in the exercise of its functions because the respective rights of the parties to a dispute before the Court are not preserved. It follows from the object and purpose of the Statute, as well as from the terms of Article 41 when read in their context, that the power to indicate provisional measures entails that such measures should be binding, inasmuch as the power in question is based on the necessity, when the circumstances call for it, to safeguard, and to avoid prejudice to, the rights of the parties as determined by the final judgment of the Court [para. 102 of the judgment of 27 June 2001].

The Court had then examined the preparatory work and had determined that it corroborated the conclusion in paragraph 102 of its judgment.

17. Next, the Court had considered its order of 3 March 1999 in the *LaGrand* case and had found, in paragraph 110 of its judgment in that case, that it was not a mere exhortation, that it had been adopted pursuant to Article 41 of the Statute and that it was consequently binding in character. In the order itself, the Court had indicated, in paragraph 111, that the United States must take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the Court in the case. The Court had acknowledged that the order did not create an obligation of result, but had nevertheless found that the various competent United States authorities had failed to take all the steps they could to prevent the execution of Walter LaGrand. One interesting point was that the Court had cited the decisions not only of the Governor of Arizona and the federal authorities, but also of the Supreme Court of the United States, thereby confirming the jurisprudence developed in its advisory opinion in the case concerning the *Difference Relating to Immunity From Legal Process of a Special Rapporteur of the Commission on Human Rights*, namely, that courts were part of the domestic legal order and their conduct had to be considered by international courts in the light of the obligations of the State in question.

18. The Court had concluded that the United States had not complied with the order of 3 March 1999. It had observed, however, that the submission by Germany had requested the Court to adjudge a violation, but had not included a claim for indemnification. In view of the facts of the case, particularly the very short time period available for the United States to react, that country would not necessarily have been sentenced to pay indemnification, despite its failure to comply with its obligations. The Court was thus suggesting, without making the point explicitly, that wrongful conduct did not always entail responsibility—something to which further consideration might be given.

19. The fourth submission by Germany had concerned assurances that similar unlawful acts would not be repeated. In that connection, the Court was grateful to the Commission for having left in abeyance, pending the judgment of the Court, the article on non-repetition (art. 30) of the draft articles on the responsibility of States for internationally wrongful acts. It had studied with great interest the various reports on the topic, even if it did not cite them in its judgment. It had concluded that non-repetition was a component of satisfaction, in that Germany had requested a general guarantee that, when persons were imprisoned, the United States would inform them of their right to contact their consular authorities. It had noted that the United States had taken a great many steps to inform local authorities of their duties which must be deemed to meet the request by Germany for a general guarantee of non-repetition. Germany had further requested that, if such an error should occur again, particularly in serious cases such as those involving the death sentence, the proceedings and convictions should be subject to review. The Court had ruled that, if in future German nationals were sentenced to severe penalties in violation of their rights of consular notification, the United States had to allow the review and reconsideration of the conviction and sentence.

20. Most of the findings in the judgment had been adopted by a large majority, usually 14 votes to 1, with Judge Oda dissenting.

21. The Court had also considered the *Arrest Warrant* case, in which a Belgian investigating magistrate had issued an international arrest warrant against the Minister for Foreign Affairs of the Democratic Republic of the Congo. That country had contested the lawfulness of the arrest warrant, claiming that the Belgian magistrate had no jurisdiction to issue it and that the Minister for Foreign Affairs held immunity from jurisdiction. It had also requested the indication of provisional measures in the form of the suspension of the arrest warrant. The Court had rejected that request because the Minister for Foreign Affairs had subsequently become the Minister of Education, which had reduced the urgency connected with his ability to travel. It had, however, determined that the handling of the case should be accelerated in view of the nature and importance of the interests involved. The Democratic Republic of the Congo had recently submitted a Memorial and the Counter-Memorial of Belgium was expected to be received soon, with hearings scheduled for early October 2001.

22. As to the future, the Court currently had 22 cases before it, a workload that created administrative and financial burdens. Fourteen additional posts had been created in 2001, primarily for translators, since the volume of material submitted for translation plainly exceeded the capacity of the Court. Thirty new posts had been requested for the upcoming biennium, a conservative estimate of staffing needs. Registry staff currently numbered 70, compared to 1,200 for the International Tribunal for the Former Yugoslavia, which had a budget of over US$ 100 million. The budget of the Court stood at US$ 10 million.

23. Because of the financial situation, the Court hoped to improve and accelerate its procedures and, to that end, had already amended two provisions of its Rules, with three more currently being reviewed. It had been working to obtain the best possible cooperation from parties to cases and had frequently been successful. Some parties had submitted their Memorials in the two working languages of the Court, saving time and money that would otherwise be spent on translation. The volume of documentation submitted by parties, particularly in the form of annexes, had been limited, although with differing success depending on the case. The deliberations of the Court in straightforward cases had been streamlined by doing away with judges' Notes, whose translation

regularly took two months. A decision had been taken to notify parties six months in advance as to the scheduling of cases, to enable them to prepare.

24. Of the 22 cases still on the docket, a number were intercontinental, such as those concerning the *Lockerbie*, *Oil Platforms* and *Arrest Warrant* cases. After the hearing of preliminary objections, those cases were currently ready for consideration as to the merits. There were three African cases: *Land and Maritime Boundary between Cameroon and Nigeria*, *Diallo* and *Armed Activities on the Territory of the Congo*. In an Asian case, *Sovereignty over Pulau Ligitan and Pulau Sipadan*, an application for permission to intervene had been received from the Philippines, but opposed by the parties, and hearings on the admissibility of the application had recently been held. In the Americas, there was a case concerning *Maritime Delimitation between Nicaragua and Honduras* in which Colombia had requested and been given access to the case file, something which might indicate that it intended to intervene. There were a number of European cases: the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*, in which the finding of the Court that it was competent to adjudicate was being contested by Yugoslavia. Croatia had brought proceedings against Yugoslavia for genocide in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Yugoslavia)* and the consideration of that case had just begun. Yugoslavia was accusing 10 members of NATO of the illegal use of force in Kosovo in the case concerning the *Legality of Use of Force*, which was in the preliminary objections stage. Pursuant to the judgment in the *Gabčíkovo-Nagymaros Project* case, the Court was receiving regular reports from the parties, Hungary and Slovakia, on the ongoing negotiations. It had also begun to consider the *Certain Property* case between Liechtenstein and Germany concerning property confiscated following the Second World War.

25. That account should give an idea of the variety of subject matter, geographical settings and specific features of the cases before the Court, which was doing its best to cope. Since several cases would be ready for consideration in the next two years, the Court would have to work hard—something that it was perfectly ready to do.

26. The CHAIRMAN thanked the President of the International Court of Justice for his valuable and informative statement. Especially useful had been the account of how the Court had arrived at decisions on the legal regime for maritime delimitation and on the right to consular services and treaty obligations under the Vienna regime. He invited the members of the Commission to respond to the President's statement.

27. Mr. PELLET welcomed the fact that, since the forty-ninth session of the Commission, in 1997, the visit by the President of the International Court of Justice had become a tradition. He had been conversant with some of the cases described, but would like to hear more about the *LaGrand* case. The President had indicated that the Court had noted with interest the work of the Commission on guarantees of non-repetition, but had not cited that work in its judgment. He asked whether paragraphs 123 to 125 of that judgment could be interpreted to constitute recognition of the special nature of the remedy of non-repetition or whether they referred to compensation and, more specifically, to satisfaction. There had been some disagreement among the members of the Commission on that subject.

28. Mr. MELESCANU said that he, too, welcomed the traditional visit by the President of the International Court of Justice, which provided the Commission with inside information about the activities of the Court. In the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, had the Court discussed or resolved the question of how small, uninhabited islands could affect the delimitation of the territorial sea, the exclusive economic zone and the continental shelf?

29. Mr. KAMTO said that the President's accounts of the judgments of the Court shed new light on them. In the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, the Court had declared that customary international law was the applicable law for the delimitation of the territorial sea and of the exclusive economic zone and the continental shelf. In view of the entry into force of the United Nations Convention on the Law of the Sea, had the Court applied the Convention as a valid instrument in force or had it treated it as custom? He also wished to know whether relevant circumstances were those of each specific case or whether some general indications had been given about them.

30. Mr. GUILLAUME (President of the International Court of Justice) said that paragraph 167 of the judgment in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* stated that:

> The Parties are in agreement that the Court should render its decision on the maritime delimitation in accordance with international law. Neither Bahrain nor Qatar is party to the Geneva Conventions on the Law of the Sea of 29 April 1958; Bahrain has ratified the United Nations Convention on the Law of the Sea of 10 December 1982 but Qatar is only a signatory to it.

No conventional act had thus been applicable and customary international law had therefore been the applicable law. In its subsequent investigation of what was customary international law, the Court had reached the conclusion that some of the provisions of the United Nations Convention on the Law of the Sea, including those on the delimitation of territorial seas, were in the nature of customary law.

31. The judgments of the Court gave some general indications of what constituted relevant or special circumstances, but each individual case also had to be examined. In the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, special circumstances could have been represented by the island of Qit'at Jaradah, which was so small that, at high tide, it measured about 3 by 10 metres. It was nevertheless an island, since it was not submerged at high tide. The Court had said, however, that the island did not have any effect on maritime delimitation. Fasht al Jarim, the maritime formation that had been overlooked by the two parties, had been difficult to classify as either an island or a low-tide elevation, owing to conflicting cartographic

data. The Court had decided that its classification was ultimately irrelevant, as its location gave it a preponderant influence over maritime delimitation, which very small islands or low-tide elevations clearly should not have.

32. It was by no means from lack of respect that the Court had not cited the work of the Commission on non-repetition in its judgment in the *LaGrand* case. The various special rapporteurs had taken different positions on the matter and the Commission itself had not taken a final position, having left the relevant article in abeyance pending the judgment of the Court. As to how paragraphs 123 to 125 of the judgment should be interpreted, he said the Court had definitely left some things unsaid and it had done so, in his view, because it considered the issue of non-repetition to be unimportant in the case at hand. He himself thought that the trend was towards viewing guarantees of non-repetition as a component of satisfaction.

33. Mr. GAJA thanked the President of the Court for his clarifications on a number of points and requested additional information on another. In the *LaGrand* case, the Court had stated that its orders indicating provisional measures were, in principle, binding. That might encourage States to bring proceedings in order to obtain provisional measures and might further inflate the already considerable caseload of the Court. Was the Court planning to take any procedural countermeasures in that regard? Imposing exclusively written proceedings, for example, would have the additional advantage of averting the sometimes excessive publicity surrounding hearings.

34. Mr. GOCO welcomed the opportunity for dialogue with the President of the Court, but assured him he would not raise the issue of Philippine intervention in the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan*. He asked whether the fact that a number of other tribunals were currently discharging judicial functions raised any concern as to the preservation of the status of the Court as the principal judicial organ of the United Nations. He would also like to know whether the issue of denial of justice had come up in the *LaGrand* case.

35. Mr. ROSENSTOCK thanked the President of the Court for visiting the Commission and expressed gratitude to the Court for not getting into issues that it did not need to consider, particularly with regard to guarantees and assurances.

36. Mr. PAMBOU-TCHIVOUNDA joined other speakers in thanking the President of the Court for talking with the Commission about recent cases. The activist approach of the Court to the application of customary law in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* had particularly attracted his attention. The Court had been called upon to delimit the exclusive economic zone and the continental shelf on the basis of the principle of equidistance and, at the same time, with a view to equity, to decide which relevant circumstances could be used to adjust that rule. None of the circumstances put forward by the parties had been deemed worthy of consideration, but the Court had adduced others. Was that normal practice? What documents had the Court used to discover the low-tide elevation that had been unknown even to the parties and were they universally accessible?

37. Mr. CRAWFORD said that he endorsed the comments made by Mr. Rosenstock. The *LaGrand* case illustrated the different roles of the Court and the Commission, that of the Court being to decide cases and that of the Commission to systematize the law by addressing certain unresolved issues. The history of the development of State responsibility showed how much the Commission owed to the Court for the clarification it had provided in deciding such cases as the *Gabčíkovo-Nagymaros Project* and the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*.

38. Mr. GUILLAUME (President of the International Court of Justice) said the danger that States might request provisional measures more often now that they had been declared binding in nature had already materialized. Provisional measures had been requested in the cases concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*; *Legality of Use of Force*; *Land and Maritime Boundary between Cameroon and Nigeria*; and *Armed Activities on the Territory of the Congo*, inter alia. The Court had not, however, considered streamlining the procedures for indicating provisional measures, although that might be worth doing. A precedent existed in the *LaGrand* case, when provisional measures had been ordered in the space of 24 hours and without hearings.

39. Intervention had initially been conceived exclusively as a way of deciding disputes between two States. The growing complexity of international relations meant that disputes were by no means always bilateral, however. The Court would soon be called upon to take a position on the matter in its decision on the admissibility of the Philippine application for permission to intervene in the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan*.

40. Referring to the question on denial of justice, he said that, to his knowledge, the Court had never refused to decide a dispute on grounds of imperfections in international law. As to the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, he said the low-tide elevation that neither of the parties had taken into account for the drawing of the equidistance line had appeared on all the maps produced by the parties. The parties had had opposing views on where the maritime boundary should go, however, and had adopted differing legal strategies. Bahrain had simply wanted the general outline of the coast to be taken into account, even though the effect of the low-tide elevation was advantageous to it. Qatar had had no interest in mentioning the low-tide elevation, for obvious reasons. The Court could, however, not draw the equidistance line without taking the low-tide elevation into account, since it was shown in the maps submitted to it and plainly had an effect on maritime delimitation that did not yield an equitable result.

41. The CHAIRMAN thanked the President of the International Court of Justice for sharing his time with the Commission to discuss important legal issues.

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

Chapter IV. ***International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary harm from hazardous activities)*** **(continued) (A/CN.4/L.607 and Add.1 and Add.1/Corr.1)**

E. Draft articles on prevention of transboundary harm from hazardous activities (*continued*)

2. Text of the draft articles with commentaries thereto (*continued*) (A/CN.4/L.607/Add.1 and Corr.1)

Commentary to article 1 (Scope) (*continued*)

Paragraph (19) (*concluded*)

42. The CHAIRMAN recalled that the Commission had decided to delete the words "in response to a natural law" in the second sentence and the words "not from an intervening policy decision" in the third sentence.

43. Mr. CRAWFORD said that he had proposed the deletion in the third sentence, but the Special Rapporteur had opposed it. He would be happy for the words "not from an intervening policy decision" to stay in, provided it was understood that they referred not to a policy decision as to the way in which the activity itself was carried out, but to an intervening policy decision of the kind referred to in paragraph (19).

44. Mr. Sreenivasa RAO (Special Rapporteur) thanked Mr. Crawford for his understanding, but said that he had agreed to the deletion in order to remove any ambiguity and because it would not prevent the basic idea from being conveyed.

45. Mr. PAMBOU-TCHIVOUNDA said that the entire second sentence seemed redundant and could perhaps be deleted.

46. Mr. Sreenivasa RAO (Special Rapporteur) said that, to his mind, stating the same thing in two different ways was sometimes helpful in emphasizing certain points. He would prefer to retain the second sentence.

It was so agreed.

Paragraph (19), as amended, was adopted.

Commentary to article 2 (Use of terms)

Paragraph (1)

47. Mr. PELLET proposed that, in the first sentence, the word "and" should be replaced by the word "or", as the subject was two separate elements of article 2, subparagraph (*a*).

48. Mr. GALICKI suggested that the wording of article 2, subparagraph (*a*), should be amended as a consequence of that amendment.

49. Mr. PELLET pointed out that the French version of article 2, subparagraph (*a*), was slightly clearer than the original English text, but proposed that both should be retained unchanged.

Paragraph (1), as amended, was adopted.

Paragraph (2)

50. Mr. PELLET, referring to the first part of the penultimate sentence, said that, in describing the consideration of commentaries on second reading, there was no need to say that something had been the view of the Commission. He therefore proposed that the words "It is the view of the Commission that" should be deleted.

51. Mr. CRAWFORD said that he supported that proposal.

Paragraph (2), as amended, was adopted.

Paragraph (3)

52. Mr. GAJA said that paragraph (3) should be amended to take account of the discussion by the Drafting Committee of the word "pole". The second sentence should read: "The definition refers to two types of activities which fall under these articles". The word "pole" in the third sentence should be deleted and the same word in the fifth sentence should be replaced by the word "one". The discussion by the Committee of the word "spectrum" had not been taken into account in paragraph (3), but he would not press for an amendment on that point.

53. Mr. CRAWFORD said that some or all of the underlining should be deleted as it was superfluous and inelegant.

Paragraph (3), as amended, was adopted.

Paragraph (4)

54. Mr. PAMBOU-TCHIVOUNDA said that, in line with the policy of not having the text refer to the reasoning of the Commission, the first sentence should be amended to read: "The term 'significant' is not without ambiguity and a determination has to be made in each specific case."

55. Mr. CRAWFORD proposed that the secretariat should delete all references in the text to the thinking of the Commission and place the emphasis on objective points.

Paragraph (4), as amended, was adopted.

Paragraph (5)

56. Mr. MELESCANU said the word "tolerable" at the end of the paragraph was inappropriate. The point was that the activities in question did not entail State responsibility.

57. Mr. ROSENSTOCK said that paragraph (5) put the entire exercise in context. It made the point, in a non-judgemental manner, that transboundary harm was an unavoidable fact of life, although it should not be allowed to get out of hand. The wording used was not really prob-

lematic and he appealed for the retention of the paragraph as it stood.

58. The CHAIRMAN recalled that the Commission should concentrate on clarifying specific issues or making suggestions for improvement. He suggested that the English text should be retained unchanged on the understanding that the secretariat would make the necessary corrections to the French text.

Paragraph (5) was adopted.

Paragraph (6)

59. Mr. CANDIOTI said that, in the first sentence, the words "the decision of" or "the award of" should be added before the words "the tribunal".

60. Mr. TOMKA (Chairman of the Drafting Committee) proposed that the words "the tribunal" should be deleted and that the word "arbitration" should be replaced by the word "award".

Paragraph (6), as amended, was adopted.

Paragraphs (7) to (9)

Paragraphs (7) to (9) were adopted.

Paragraph (10)

61. Mr. PELLET suggested that references to commentaries to other articles should be placed in footnotes, not in the text of the commentaries.

Paragraph (10) was adopted subject to the necessary drafting changes.

Paragraphs (11) and (12)

Paragraphs (11) and (12) were adopted.

The commentary to article 2, as amended, was adopted.

Commentary to article 3 (Prevention)

Paragraph (1)

62. Mr. HAFNER asked why principle 2 of the Rio Declaration,[1] which was the more recent instrument, had not also been referred to.

63. The CHAIRMAN said that the appropriate reference would be added.

Paragraph (1) was adopted.

[1] See 2675th meeting, footnote 6.

Paragraphs (2) to (6)

Paragraphs (2) to (6) were adopted.

Paragraph (7)

64. Mr. PELLET said that the footnote at the end of the paragraph should refer to the Convention on the Law of the Non-navigational Uses of International Watercourses. The words *diligence voulue* in the first sentence of the French text meant absolutely nothing and should be replaced by the words *diligence due* or the words *célérité requise* or, preferably, left in English, "due diligence", as had been done in the French text of paragraph (2) of the commentary to article 12.

65. Mr. CRAWFORD said he agreed that there was an element of substance as well as of speed in "due diligence" that the French translation did not convey. A generally acceptable French phrase should be found by looking at existing instruments in the field.

66. The CHAIRMAN said that the secretariat would check on the wording of the relevant international instruments and judgments of ICJ with a view to correcting the French text.

67. Mr. HAFNER proposed that, in the third sentence, the words "the risk of" should be deleted.

68. Mr. SIMMA said that the third sentence described what the duty of due diligence was intended to guarantee, i.e. the risk of significant harm, rather than significant harm itself.

69. Mr. Sreenivasa RAO (Special Rapporteur) said that risk could not be totally eliminated because it was inherent in certain activities, but it could be minimized by careful management. If there was no risk whatsoever, then the activity was innocuous and did not need to be covered in the draft articles. He favoured the original wording of the third sentence.

70. Mr. GOCO said that he preferred the original wording, in which the word "risk" was material.

71. Mr. TOMKA (Chairman of the Drafting Committee) suggested that, based on the wording of article 3 and the report of the Drafting Committee, the words "the risk of" should be deleted, but the word "eliminated" should be replaced by the word "prevented".

72. Mr. Sreenivasa RAO (Special Rapporteur) said that he endorsed that proposal.

Paragraph (7), as amended, was adopted.

Paragraph (8)

Paragraph (8) was adopted.

Paragraphs (9) and (10)

73. Mr. CRAWFORD said that paragraphs (9) and (10) did not belong in the commentary and should be deleted

because the *"Alabama"* case had been about something entirely different from what was covered in article 3.

74. Mr. Sreenivasa RAO (Special Rapporteur) said that the principle enunciated by the United States and cited in paragraph (9) was based on a broad standard for due diligence, as opposed to the narrower national standard presented by the United Kingdom. That was an essential historical issue in the evolution of the concept of due diligence and as such deserved to be mentioned in the text. He would not, however, go against the will of the Commission if the members preferred to delete the two paragraphs.

75. Mr. SIMMA pointed out that the literature on due diligence usually referred to the *"Alabama"* case.

76. Mr. TOMKA (Chairman of the Drafting Committee) proposed that paragraphs (9) and (10) should be combined to form a single paragraph devoted to the *"Alabama"* case.

Paragraphs (9) and (10), as amended, were adopted.

Paragraph (11)

77. Mr. CRAWFORD said that he strongly objected to the reference to the *Donoghue* v. *Stevenson* case in paragraph (11), which should be deleted.

Paragraph (11) was deleted.

Paragraphs (12) to (15)

Paragraphs (12) to (15) were adopted.

Paragraph (16)

78. Mr. GAJA proposed that, in the last sentence, the words "more optimum" should be replaced by the word "better".

79. Mr. CRAWFORD said that the entire first part of that sentence was awkward and should be deleted. The word "would" after the word "prevention" should be replaced by the words "may well".

Paragraph (16), as amended, was adopted.

Paragraphs (17) and (18)

Paragraphs (17) and (18) were adopted.

Paragraph (19)

80. Mr. ROSENSTOCK proposed that the words "a minimal degree of" in the last sentence should be deleted because they suggested something that was at variance with article 3.

81. Mr. GALICKI, supported by Mr. Sreenivasa RAO (Special Rapporteur), said that the first sentence of the first footnote to the paragraph repeated the contents of paragraph (14) of the commentary and should be deleted.

Paragraph (19), as amended, was adopted.

Paragraph (20)

82. Mr. GOCO proposed that, in the second sentence, the word "known" should be replaced by the word "foreseen", in line with the use of the word "foreseeable" earlier in the sentence.

83. Mr. Sreenivasa RAO (Special Rapporteur) said that a distinction was being drawn between three different situations: foreseeability, knowledge and constructive knowledge. He would prefer the paragraph to remain unchanged.

Paragraph (20) was adopted.

Paragraph (21)

84. Mr. PELLET said that he was not sure what the paragraph meant.

85. Mr. CRAWFORD said he agreed that the meaning was obscure. "Shouldering a greater degree of burden of proof" was a metaphysical operation that should not be imposed on anyone in the context of articles dealing with substance, not procedure.

86. Mr. Sreenivasa RAO (Special Rapporteur) said paragraph (21) had been intended to indicate that the provision of evidence lay solely within the power of the State of origin and, unless it was brought out by that State, it would never be available for the other State's consideration and comment. If the paragraph was not helpful, however, he would not press for its retention.

87. Mr. ROSENSTOCK said the point was a valid one, but not in connection with article 3. Paragraph (21) should therefore be deleted, on the understanding that the point would be made elsewhere in the text.

Paragraph (21) was deleted.

The commentary to article 3, as amended, was adopted.

Commentary to article 4 **(**Cooperation)

Paragraph (1)

88. Mr. CRAWFORD said that, since the fourth sentence referred to the text of the articles themselves, the words "have been" should be replaced by the word "are".

Paragraph (1), as amended, was adopted.

Paragraph (2)

89. Mr. SIMMA, supported by Mr. Sreenivasa RAO (Special Rapporteur), proposed that, in the fourth sen-

tence, the word "structure" should be replaced by the word "law".

90. Mr. TOMKA (Chairman of the Drafting Committee) said that, in the third sentence, the word "Vienna" should be inserted after "1978".

Paragraph (2), as amended, was adopted.

Paragraph (3)

91. Mr. SIMMA asked what the phrase "on disputes concerning filleting with the Gulf of St. Lawrence *La Bretagne*" meant.

92. Mr. CRAWFORD said the phrase should read: "in the *La Bretagne* case".

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were adopted.

The commentary to article 4, as amended, was adopted.

Commentary to article 5 (Implementation)

Paragraph (1)

93. Mr. TOMKA (Chairman of the Drafting Committee) said that, in the first sentence, the words "by virtue of becoming a party to" should be replaced by the word "under" and the words "would be" by the word "are".

94. Mr. KAMTO proposed that, since the concept of implementation was often invoked without any indication of the distinction between implementation, execution and application, the following second sentence should be added: "Implementation, going beyond formal application, involves the adoption of specific measures to ensure the effectiveness of the provisions of the present articles".

95. Mr. ROSENSTOCK said that he endorsed Mr. Kamto's proposal.

Paragraph (1), as amended by Mr. Tomka, was adopted.

Paragraph (2)

96. Mr. CRAWFORD said that the hearings and quasi-judicial procedures mentioned in the first sentence overlapped: hearings were a form of quasi-judicial procedure. It might be better to differentiate between them by replacing the words "hearings to be granted to persons concerned and" by the words "the opportunity to persons concerned to make representations or".

97. Mr. PELLET proposed that, in the third sentence, the word "entirely" should be deleted and that the words "for achieving this objective" should be added at the end.

98. Mr. Sreenivasa RAO (Special Rapporteur) said that paragraph (2) was intended to state that article 5 emphasized a basic obligation, but also indicated that the way in which it was to be fulfilled was to be left to the procedures and practices of the judicial system in each country, which could vary widely. He had no objection, however, to the deletion of the word "entirely".

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

99. Mr. CRAWFORD said paragraph (4), which stated that the States concerned included States that might in future be concerned, sounded a bit odd. What was meant was that the necessary measures, including the appropriate regulatory framework, might need to be established in advance. He could draft a sentence to that effect if the Special Rapporteur agreed.

100. Mr. Sreenivasa RAO (Special Rapporteur) said the paragraph had been intended to reflect comments made by Mr. Hafner and he would welcome Mr. Crawford's assistance in improving it.

101. Mr. CANDIOTI pointed out that the paragraph extended the definition of "States concerned" given in article 2, subparagraph (*f*). The Commission should beware of introducing inconsistency.

102. Mr. CRAWFORD said he agreed that the paragraph expanded the definition of that term and deviated from the general statement made in paragraph (3), which was very well written. He proposed that paragraph (4) should read: "The action referred to in article 5 may appropriately be taken in advance; thus, a State may establish a suitable monitoring mechanism before the activity in question is approved or instituted."

103. Mr. KUSUMA-ATMADJA asked whether paragraph (4) had to be included at all.

104. Mr. HAFNER said the issue was one of substance. Something had to be said about the fact that States had a duty, before the activity occurred, to establish the necessary legislation. He could go along with the text proposed by Mr. Crawford.

105. Mr. TOMKA (Chairman of the Drafting Committee) said that he endorsed Mr. Crawford's proposal. The report of the Drafting Committee had indicated that, in order to allay concerns that article 5 might be misinterpreted to mean that only States that had plans for an activity falling under the scope of the articles would be obliged to take the steps referred to, the commentary should make it clear that the provision was applicable to any State if it was foreseeable that it might be likely to become a State concerned. It had to be made clear that the provision was binding on all States parties with regard to legislative and administrative measures, while the measures for the establishment of monitoring mechanisms would be incumbent only on the States concerned. The

paragraph should reflect that understanding reached in the Committee.

Paragraph (4), as amended by Mr. Crawford, was adopted.

The commentary to article 5, as amended, was adopted.

The meeting rose at 6.10 p.m.

2699th MEETING

Tuesday, 31 July 2001 at 10.05 a.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.

Tribute to the memory of Ignaz Seidl-Hohenveldern

1. The CHAIRMAN said that Ignaz Seidl-Hohenveldern, who had just died, had been an eminent jurist and practitioner of international law who had had many links with the Commission. He had been an emeritus professor in Austria and Germany and a member of the Institute of International Law, as well as the author of numerous learned works on international claims, jurisdictional immunities of States, property and corporation law and protection of private property.

2. Mr. HAFNER, after recalling various aspects of Ignaz Seidl-Hohenveldern's career, paid a special tribute to his qualities as a teacher and friend.

At the invitation of the Chairman, the members of the Commission observed a minute of silence in tribute to the memory of Ignaz Seidl-Hohenveldern.

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

Chapter IV. ***International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary harm from hazardous activities)*** **(continued) (A/CN.4/L.607 and Add.1 and Add.1/Corr.1)**

E. Draft articles on prevention of transboundary harm from hazardous activities (*continued*)

2. Text of the draft articles with commentaries thereto (*continued*) (A/CN.4/L.607/Add.1 and Corr.1)

Commentary to article 6 **(**Authorization)

Paragraph (1)

3. Mr. BROWNLIE said that in the first sentence "undertaken in their territory or otherwise under their jurisdiction or control" should read: "undertaken in its territory or otherwise under its jurisdiction or control". The reference was to the State, not to the plural noun "activities".

Paragraph (1), as amended, was adopted.

Paragraph (2)

4. Mr. PELLET pointed out, in relation to footnote 38 and a number of other footnotes, that "op. cit." was not used in French in referring to a case.

Paragraph (2) was adopted.

Paragraph (3)

5. Mr. BROWNLIE said that the quotation from the *Corfu Channel* case should be checked: the order of words sounded wrong.

Paragraph (3) was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

6. Mr. TOMKA said that the direction of take-off and landing was constantly being changed on airport runways; such a practice could not be called a major change in an activity. The reference to runways in the second sentence should therefore be deleted.

7. Mr. Sreenivasa RAO (Special Rapporteur) said that the provision could usefully be reworded but should be retained, since it was intended to apply to the laying down of new lanes.

8. The CHAIRMAN suggested that in the second sentence, the words "an airport runway changing the direction of takeoff and landing" should be replaced by "or re-routing airport runways".

It was so agreed.

Paragraph (5), as amended, was adopted.