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Summary record of the 2851st meeting

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the dignity of the alien being expelled was indeed one of the standards guaranteed by international law.

69. The question of the right to expel aliens had to be treated in its entirety, following the Commission's usual approach of codification and progressive development. It was too early to say what form the final product should take but, bearing in mind the sensitive nature of the subject matter, a code of conduct might be more effective than a legally binding text.

70. Mr. KEMICHA said that, although every State had a sovereign right to expel from its territory aliens whose presence it deemed undesirable, that right was not and must not be absolute. The crux of the matter was, as the Special Rapporteur had stated in paragraph 5 of his report, how to reconcile the right to expel, which seemed inherent in State sovereignty, with the demands of international law and, in particular, the fundamental rules of human rights law. That consideration must serve as the starting point for the Commission's work in the years ahead.

71. The minimalist definition of "expulsion" proposed in paragraph 13 of the report, while clear and succinct, did not embrace the full complexity of an act which could have extremely serious consequences, particularly for the person expelled. The grounds given by a State for expulsion must be consonant with and limited by international law and the principles of respect for the rights of individuals. The rights related to expulsion comprised aliens' rights and the rights of their States of origin and raised the two crucial issues of the responsibility of States which had committed a wrongful act and the possible exercise of diplomatic protection by the alien's State of origin in the event of improper or illegal expulsion. The Commission would doubtless be able to apply the rules it had codified on State responsibility and diplomatic protection in its study of the expulsion of aliens. The methodology and work plan proposed were certainly useful at the current stage of the Commission's deliberations and it would also be helpful if the Secretariat were to prepare a documentary study of the subject.

The meeting rose at 12.55 p.m.

2851st MEETING

Thursday, 14 July 2005, at 10 a.m.

Chairperson: Mr. Djamchid MOMTAZ

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabasti, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.

Cooperation with other bodies (*continued*)

[Agenda item 11]

VISIT BY THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

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

2. Mr. SHI (President of the International Court of Justice), noting that it was the third time he had addressed the Commission in his capacity as President of the International Court of Justice, recalled that the intensity of the work accomplished by the Court had been a recurrent theme of his statements. Over the past year, as in previous years, the activity of the Court had been particularly sustained. The Court had rendered one advisory opinion (para. 4 below) as well as final judgments in 10 cases (the judgments in the 8 cases concerning the *Legality of Use of Force* had been rendered simultaneously).[1] That made 11 decisions in one year. The Court had also held oral hearings in three cases. During the same period, one new case had been filed with the Court, by Romania versus Ukraine,[2] attesting to the Court's vitality and the continuing trust States placed in it. As a result of its efforts, the total number of cases on its docket, which had stood at 21 one year earlier, had dropped to 12. He could not but insist on how much had been accomplished since that not too distant time when there had been talk of a serious backlog of cases at the Court.

3. As in the previous year, he wished to brief the Commission on the judgments and other decisions rendered by the Court since his last visit; in view of their number, however, he would confine himself to some of the principal legal findings contained in each of those decisions, in the hope that such a selective overview would prove more interesting to the members of the Commission than a comprehensive presentation.

4. On 9 July 2004, exactly two days after his previous visit to the Commission, the Court had handed down its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. As the members of the Commission would remember, on 8 December 2003, the General Assembly had adopted resolution ES-10/14 in which it had requested the Court, pursuant to Article 65 of its Statute, to "urgently render an advisory opinion on the following question: [w]hat are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General [prepared pursuant to General Assembly

[1] In addition to the final judgments rendered on 15 December 2004 in the 8 cases concerning *Legality of Use of Force*, the ICJ also rendered a decision in *Certain Property* (*Liechtenstein* v. *Germany*) on 10 February 2005 (see paragraph 18 below) and in *Frontier Dispute (Benin/Niger)* (see paragraph 21 below).

[2] *Maritime Delimitation in the Black Sea* (*Romania* v. *Ukraine*), Application instituting proceedings, filed in the Registry of the Court on 16 September 2004, 2004 General List No. 132.

resolution ES-10/13 (A/ES-10/248)], considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?".

5. Before addressing the question posed by the General Assembly, the Court had considered whether it had jurisdiction to respond to the request and had examined the judicial propriety of exercising its jurisdiction in that instance. The Court had unanimously found that it had jurisdiction to give the advisory opinion and had decided, by 14 votes to 1, to accede to the request (para. 163.1–2 of the opinion).

6. The Court had then considered the legality of the construction of the wall before dealing with the legal consequences of its construction. It had found by 14 votes to 1 that "[t]he construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated regime, are contrary to international law" (*ibid.*, para. 163.3 A). With regard to the legal consequences of those violations, the Court had distinguished between the consequences for Israel, those for other States and those for the United Nations. Turning firstly to the consequences for Israel, the Court, by 14 votes to 1, had found that "Israel is under an obligation to terminate its breaches of international law" and that "it is under an obligation to cease forthwith the works of construction of the wall being built in the Occupied Palestinian Territory, including in and around East Jerusalem, to dismantle forthwith the structure therein situated, and to repeal or render ineffective forthwith all legislative and regulatory acts relating thereto" (*ibid.*, para. 163.3 B). The Court had further decided, again by 14 votes to 1, that "Israel is under an obligation to make reparation for all damage caused by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem" (*ibid.*, para. 163.3 C).

7. In respect of the consequences for other States, the Court had found, by 13 votes to 2, that "[a]ll States are under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction", and that "all States parties to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 have in addition the obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention" (*ibid.*, para. 163.3 D). Finally, with regard to the United Nations, the Court had found, by 14 votes to 1, that "[t]he United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated regime, taking due account of the present Advisory Opinion" (*ibid.*, para. 163.3 E).

8. In order to render its advisory opinion, the Court had examined the principles of international law relating to the prohibition of the threat or use of force and the rules governing the acquisition and occupation of territory. It had also addressed the principle of self-determination and had considered the applicability of international humanitarian law and human rights law in the Occupied Palestinian Territory. In addition to reviewing those vital elements of international law, which were enshrined in numerous treaties, including the Charter of the United Nations, and customary law and reflected in various General Assembly resolutions, the Court had also recognized the need for the construction of the wall to be placed in a more general context. In particular, the Court had noted that Israel and Palestine were "under an obligation scrupulously to observe the rules of international humanitarian law", and it had expressed the view that "this tragic situation in the region can be brought to an end only through implementation in good faith of all relevant Security Council resolutions". The Court had also drawn the attention of the General Assembly to the "need for these efforts to be encouraged with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel and its other neighbours, with peace and security for all in the region" (para. 162 of the opinion).

9. On 15 December 2004, the Court had rendered its judgments in the eight cases concerning the *Legality of Use of Force*. In each of those cases it had found unanimously that it had no jurisdiction to entertain the claims made by Serbia and Montenegro. On 29 April 1999, the Government of the Federal Republic of Yugoslavia (as from 4 February 2003, "Serbia and Montenegro") had seized the Court of 10 separate legal disputes against Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the United Kingdom and the United States of America, alleging that those States had participated in the bombing of the territory of the Federal Republic of Yugoslavia in 1999 and in the training, arming, financing, equipping and supplying of the so-called "Kosovo Liberation Army". In its applications, the Government of the Federal Republic of Yugoslavia had contended that, by those acts, each of the 10 States concerned had violated "its international obligation banning the use of force against another State, the obligation not to intervene in the internal affairs of another State, the obligation not to violate the sovereignty of another State, the obligation to protect the civilian population and civilian objects in wartime, the obligation to protect the environment, the obligation relating to free navigation on international rivers, the obligation regarding fundamental human rights and freedoms, the obligation not to use prohibited weapons [and] the obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group" (see paragraphs 1–4 of the judgments rendered in these 10 cases).

10. Although a different basis for the Court's jurisdiction was invoked in each of the 10 cases, the applications relied mainly on Article 36, paragraph 2, of the Statute of the Court, article 38, paragraph 5, of the Rules of Court and article IX of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948. By subsequent letters, the Agent of the Federal Republic of Yugoslavia had submitted a "Supplement to the Application", invoking a further basis for the Court's jurisdiction in

the cases against Belgium[3] and the Netherlands. Each of the 10 defendants had responded by raising preliminary objections relating to the Court's jurisdiction to entertain the case and to the admissibility of the application. Immediately after filing its application, the Federal Republic of Yugoslavia had also submitted a request for the indication of provisional measures pursuant to article 73 of the Rules of Court. By 10 orders dated 2 June 1999 the Court had rejected that request. The Court had further decided that the cases against Spain and the United States of America should be removed from the list for manifest lack of jurisdiction.

11. The most important legal findings in the eight cases essentially concerned the question of the access of Serbia and Montenegro to the Court and the interpretation of Article 35, paragraph 2, of the Statute of the Court.

12. On the first point, as the members of the Commission most certainly knew, the Court had often referred in its jurisprudence to "its freedom to select the ground upon which it will base its judgment" (*Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands* v. *Sweden)*, p. 62). In particular, when the Court's jurisdiction was challenged on diverse grounds, it was free to base its decision on one or more grounds of its own choosing, in particular "the ground which in its judgment is more direct and conclusive".[4] However, in those instances the parties to the cases before the Court had been, without doubt, parties to the Statute of the Court, and the Court had thus been open to them under Article 35, paragraph 1, of the Statute. The situation had been different in the eight cases concerning the *Legality of Use of Force*. As the Court had pointed out in those proceedings, an objection had indeed been made regarding the right of the applicant to have access to the Court. The question whether Serbia and Montenegro was or was not a party to the Statute of the Court at the time of the institution of the proceedings had therefore been fundamental, for if it had not been a party, the Court would not be open to it under Article 35, paragraph 1, of the Statute; in that situation, subject to any application of paragraph 2 of that Article, Serbia and Montenegro could not have properly seized the Court, whatever title of jurisdiction it might have invoked, for the simple reason that it did not have the right to appear before the Court. Only if the answer to that question had been in the affirmative, would the Court have had to deal with issues relating to its jurisdiction as laid down in Articles 36 and 37 of its Statute.

13. The Court had noted in that respect that there was no doubt that Serbia and Montenegro was a State for the purpose of Article 34, paragraph 1, of the Statute. However, certain respondents had objected that, at the time of filing its application on 29 April 1999, that State had not met the conditions set down in Article 35 of the Statute, in particular that it had not been a Member of the United Nations and thus not a Party to the Statute of the Court pursuant to Article 93, paragraph 1, of the Charter. The Court had therefore had to assess what had been the status of Serbia and Montenegro in relation to the United Nations at the time it had filed its application.

14. After recapitulating the sequence of events relating to the legal position of the applicant State *vis-à-vis* the United Nations, the Court had concluded that the legal situation within the United Nations during the period 1992–2000 concerning the status of the Federal Republic of Yugoslavia, following the break-up of the Socialist Federal Republic of Yugoslavia, had remained ambiguous and open to different assessments. That had been due to the absence of an authoritative determination by the competent organs of the United Nations defining that status clearly.

15. The Court had considered, however, that that situation of uncertainty had ended with a new development in 2000. On 27 October of that year the Federal Republic of Yugoslavia had requested admission to membership of the United Nations, and it had been admitted on 1 November, by General Assembly resolution 55/12. Serbia and Montenegro had thus had the status of Member of the United Nations as from 1 November 2000. However its admission to the United Nations had not had, and could not have had, the effect of dating back to the time when the Socialist Federal Republic of Yugoslavia had broken up and disappeared. It had become clear that the *sui generis* position of the applicant could not have amounted to its membership of the Organization. In the view of the Court, the significance of that new development in 2000 was that it had clarified the hitherto amorphous legal situation concerning the status of the Federal Republic of Yugoslavia *vis-à-vis* the United Nations.

16. The Court had found that from the vantage point from which it currently viewed the legal situation, and in the light of the legal consequences of the development since 1 November 2000, Serbia and Montenegro was not a Member of the United Nations, and as such a State party to the Court's Statute at the time of filing its application. Since the applicant had not become a party to the Statute on any other basis, it followed that the Court was not open to it under Article 35, paragraph 1, of the Statute. The Court had then had to decide whether it could be open to the applicant under Article 35, paragraph 2, which stipulated:

> The conditions under which the Court shall be open to other states [i.e. States not parties to the Statute] shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in a position of inequality before the Court.

17. The question, put simply, was to determine whether the Convention on the Prevention and Punishment of the Crime of Genocide could be considered as a "treaty in force" in the sense of Article 35, paragraph 2. The Court had started by noting that the words "treaty in force", in their natural and ordinary meaning, did not indicate at what date the treaties contemplated were to be in force. They could therefore be interpreted as referring either to treaties that had been in force at the time the Statute itself had come into force, or to those which had been in force at the date of the institution of proceedings in a case

[3] In his letter of 12 May 1999, the Agent of the Federal Republic of Yugoslavia invoked article 4 of the Convention of Conciliation, Judicial Settlement and Arbitration between the Kingdom of Yugoslavia and Belgium, signed at Belgrade on 25 March 1930 (League of Nations, *Treaty Series*, vol. CVI, No. 2455, p. 343).

[4] See, for example, *Certain Norwegian Loans*, Judgment of 6 July 1957, p. 25. See also, *inter alia*, the judgment of the Court rendered in 2004 in *Legality of Use of Force (Serbia and Montenegro* v. *Belgium)*, p. 298, para. 46.

in which such treaties had been invoked. The Court had pointed out that Article 35, paragraph 2, was intended to regulate access to the Court by States that were not parties to the Statute, and that it would have been inconsistent with the main thrust of the text to make it possible for States not parties to the Statute to obtain access to the Court simply by the conclusion of a special treaty, multilateral or bilateral, containing a provision to that effect. The Court had also found that the interpretation of Article 35, paragraph 2, whereby that paragraph was to be construed as referring to treaties in force at the time the Statute had come into force, was in fact reinforced by an examination of the *travaux préparatoires* of the text. The Court had thus concluded that, even assuming that the applicant had been a party to the Convention on the Prevention and Punishment of the Crime of Genocide at the relevant date, Article 35, paragraph 2, of the Statute did not provide it with a basis for access to the Court under Article IX of that Convention, since the Convention had only entered into force on 12 January 1951, after the entry into force of the Statute. Accordingly, the Court had not considered it necessary to decide whether Serbia and Montenegro had or had not been a party to that Convention on 29 April 1999, when the current proceedings had been instituted.

18. In February 2005, the Court had also concluded the proceedings between Liechtenstein and Germany in the case concerning *Certain Property (Liechtenstein* v. *Germany)* by finding that it had no jurisdiction to consider the application filed by Liechtenstein. The facts of the case were somewhat complicated, but he would endeavour to summarize them. In 1945 Czechoslovakia had confiscated certain properties belonging to Liechtenstein nationals, including Prince Franz Josef II of Liechtenstein, pursuant to the Beneš Decrees, which authorized the confiscation of "agricultural property", including buildings, installations and movable property pertaining thereto, of "all persons of German and Hungarian nationality, regardless of their citizenship".[5] A special regime with regard to German external assets and other property seized in connection with the Second World War had been created under the Convention on the Settlement of Matters Arising out of the War and the Occupation, signed at Bonn in 1952. In 1991, a painting by the Dutch master Pieter van Laer had been lent by a museum in Brno, Czechoslovakia, to a museum in Cologne, Germany, for an exhibition. The painting, which had been the property of the family of the reigning Prince of Liechtenstein since the eighteenth century, had been confiscated in 1945 by Czechoslovakia under the Beneš Decrees. Prince Hans-Adam II of Liechtenstein had then filed a lawsuit in the German courts in his personal capacity to have the painting returned to him as his property, but that petition had been dismissed on the grounds that, under article 3 of chapter six of the Convention on the Settlement of Matters Arising out of the War and the Occupation, no claim or action in connection with measures taken against German external assets in the aftermath of the Second World War was admissible in the German courts. A claim brought by Prince Hans-Adam II before the European Court of Human Rights concerning the decisions by the German courts had also been rejected (see *Prince Hans-Adam II of Liechtenstein* v. *Germany*). Liechtenstein had therefore brought an application to the Court concerning "decisions of Germany, in and after 1998, to treat certain property of Liechtenstein nationals as German assets having been 'seized for the purposes of reparation or restitution, or as a result of the state of war'—i.e. as a consequence of World War II—, without ensuring any compensation for the loss of that property to its owners, and to the detriment of Liechtenstein itself" (*Certain Property*, para. 1). As a basis for the Court's jurisdiction, the application had invoked article 1 of the European Convention for the Peaceful Settlement of Disputes. In response, Germany had raised six preliminary objections to the jurisdiction of the Court and to the admissibility of Liechtenstein's application (see paragraph 19 of the judgment). It was those preliminary objections that the Court had had to deal with.

19. Rejecting Germany's first objection, the Court had found that there existed a legal dispute between the parties, the subject of which was whether, by applying chapter six, article 3 of the Convention on the Settlement of Matters Arising out of the War and the Occupation to Liechtenstein property that had been confiscated by Czechoslovakia in 1945, Germany had been in breach of international obligations it owed to Liechtenstein and, if so, what was Germany's international responsibility (paras. 25–27).

20. Germany's second preliminary objection had required the Court to decide whether, in the light of the provisions of article 27 (*a*) of the European Convention for the Peaceful Settlement of Disputes, the dispute related to facts or situations that had arisen prior to 18 February 1980, the date on which the Convention had entered into force between Germany and Liechtenstein. The Court had noted that it was not contested that the dispute had been triggered by the decisions of the German courts in the aforementioned case. The critical issue, however, had not been the date when the dispute had arisen, but the date of the facts or situations in relation to which the dispute had arisen. In the Court's view, the dispute brought before it could have related to the events that had taken place in the 1990s only if, as Liechtenstein had argued, Germany had during that period either departed from a previous common position that the Convention had not applied to Liechtenstein property, or if the German courts, by applying their earlier case law under the Convention for the first time to Liechtenstein property, had applied that Convention "to a new situation" after the critical date. Having found that neither was the case, the Court had concluded that, "although those proceedings [had] been instituted by Liechtenstein as a result of decisions by the German courts concerning a painting by Pieter Van Laer, these events [had] their source in specific measures taken by Czechoslovakia in 1945, which [had] led to the confiscation of property owned by Liechtenstein nationals, including Prince Franz Josef II of Liechtenstein, as well as in the special regime created by the Settlement Convention", and that the source and real cause of the disputes had accordingly to be found in the Convention and the Beneš Decrees. In the light of the provisions of article 27 (*a*) of

[5] Decree No. 12 on "the Confiscation and Expeditious Redistribution of the Agricultural Property of Germans, Hungarians, and also Traitors and Enemies of the Czech and Slovak Nations", art. 1 (1) a) (Z. Beneš *et al.*, *Facing History: The evolution of Czech–German relations in the Czech provinces, 1848–1948*, Prague, Gallery, 2002, p. 317).

the European Convention for the Peaceful Settlement of Disputes, the Court had therefore upheld Germany's second preliminary objection, finding that it could not rule on Liechtenstein's claims on the merits (paras. 52–53).

21. Lastly, on 12 July 2005, a chamber of the Court had rendered its final judgment in the *Frontier Dispute (Benin/Niger)* case. On 3 May 2002, the Governments of Benin and the Niger had transmitted to the Court a copy of a special agreement whereby they had agreed to submit to a chamber of the Court a boundary dispute. Based on this special agreement of 15 June 2001, the parties had requested the Court to:

"(*a*) determine the course of the boundary between the Republic of Benin and the Republic of Niger in the River Niger sector;

"(*b*) specify which State owns each of the islands in the said river, and in particular Lété Island;

"(*c*) determine the course of the boundary between the two States in the River Mekrou sector" (para. 2 of the judgment).

22. The Court had unanimously decided to accede to the request of both parties that it should form a special chamber of five judges to deal with the case (para. 6).

23. In its judgment, the Chamber had first found that in the River Niger sector, neither Benin nor Niger could provide evidence of a legal title to support their claim as to the precise location of the boundary. It had subsequently found that, although it could be concluded on the basis of several French administrative documents that the course of the River Niger had constituted the intercolonial boundary between Niger and the colony of Dahomey (which had become Benin upon independence), those documents had not helped to determine the precise location of that boundary. The Chamber had therefore considered the *effectivités* invoked by the parties to determine the course of the frontier in the River Niger sector and to which of the two States each of the islands in the river belonged. The Chamber had emphasized in particular in that respect the importance of a letter, dated 3 July 1914, from the *commandant* of the *secteur* of Gaya (Niger) aimed among other things at "delimiting the territorial jurisdiction of the indigenous tribunals in the two colonies". The letter specified that the main navigable channel was "the river's main channel, not the widest channel, but the *only channel navigable at low water*" (emphasis in the original) in order to determine the colony to which each island belonged (para. 83). On the basis of the evidence before it, the Chamber had found that the terms of the *modus vivendi* between the local authorities established by the 1914 letter had in general been respected in subsequent years and that during that period the main navigable channel of the River Niger had been considered by both parties to be the boundary. As a result, administrative authority had been exercised by Niger over the islands to the left, including the island of Lété, and by Dahomey over the islands to the right of that line. The Chamber had noted, however, that on the basis of the same *modus vivendi*, three islands situated opposite the city of Gaya had been considered to fall under the jurisdiction of Dahomey, so that in that sector of the river the boundary had been regarded as passing to the left of those three islands. For all those reasons, the Chamber had concluded that:

the boundary between Benin and Niger follows the main navigable channel of the River Niger as it existed at the dates of independence, it being understood that, in the vicinity of the three islands opposite Gaya, the boundary passed to the left of those islands. Consequently, Benin has title to the islands situated between the boundary thus defined and the right bank of the river, and Niger has title to the islands between that boundary and the left bank of the river [para. 103].

The Chamber had then determined the precise location of the boundary line in the main navigable channel, namely the line of deepest soundings as it had existed at the dates of independence, by indicating the coordinates of 154 specific points positioned all along it. On that basis it had then determined to which of the parties each of the islands in the River Niger belonged, specifying that the determination in regard to the attribution of the islands had been without prejudice to any private law rights which might be held in respect of them. The Chamber had similarly found that the boundary on the bridges between Gaya and Malanville followed the course of the boundary in the river (para. 124).

24. As to the course of the boundary between the two States in the Mekrou River sector, the Chamber had found that, "at least from 1927 onwards, the competent administrative authorities [had] regarded the course of the Mekrou as the intercolonial boundary separating Dahomey from Niger, that those authorities [had] reflected that boundary in successive instruments promulgated by them after 1927", and that that had been the state of the law at the dates of independence in August 1960. The Chamber had thus found it "unnecessary to look for any *effectivités* in order to apply the *uti possidetis* principle, since *effectivités* [could] only be of interest in a case in order to complete or make good doubtful or absent legal titles, but [could] never prevail over titles with which they [were] at variance" (para. 141). With a view to determining the exact location in the River Mekrou of the boundary between Benin and the Niger, the Chamber had recalled that in the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)* it had observed that:

[t]reaties or conventions which define boundaries in watercourses nowadays usually refer to the thalweg as the boundary when the watercourse is navigable and to the median line between the two banks when it is not, although it cannot be said that practice has been fully consistent (p. 1062, para. 24 of the judgment)

25. The Chamber had noted that, in the *Frontier Dispute (Benin/Niger)* case, "in view of the circumstances, including the fact that the river [was] not navigable, a boundary following the median line of the Mekrou would more satisfactorily meet the requirement of legal security inherent in the determination of an international boundary". It had therefore concluded that, in the River Mekrou sector, the boundary between Benin and the Niger was constituted by the median line of that river (para. 145).

26. Having concluded his overview of the decisions and advisory opinions rendered by the Court during the period under review, Mr. Shi said that the Court had also taken a number of other extremely varied decisions. Among other things, it had amended the procedure for promulgating amendments to the Rules of Court and its Practice Direction V, which set a four-month period for the presentation by a party of its observations and submissions on preliminary objections by clarifying that the period ran from the date of filing of the preliminary objections. The

Court had furthermore promulgated three new Practice Directions (Practice Directions X, XI and XII).[6] Practice Direction X enjoined the agents of the parties to attend as early as possible any meeting called by the President of the Court whenever a decision on a procedural issue needed to be made in a case. Practice Direction XI stated that in their oral pleadings on provisional measures, parties should limit themselves to what was relevant to the criteria for the indication of such measures. Lastly, Practice Direction XII established a procedure to be followed with regard to written statements and/or documents submitted by international non-governmental organizations in connection with advisory opinion cases.

27. The Court had been particularly active that year, and it intended to maintain that level of activity. The two cases concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) and Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda) w*ere currently under deliberation. The Court had furthermore already announced that public hearings on the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* would start on 27 February 2006.

28. The coming months would bring many changes to the Court. On 11 February 2005, the former President, Judge Gilbert Guillaume, had resigned and had been replaced by Judge Ronny Abraham, newly elected from France. At the end of 2005 the General Assembly and the Security Council would hold further elections for five members of the Court. Four of the five members whose term was coming to an end had decided not to run for re-election: Judge Elaraby, Judge Kooijmans, Judge Rezek and Judge Vereshchetin.

29. The CHAIRPERSON thanked Mr. Shi for his presentation and invited members of the Commission to ask him questions.

30. Mr. BROWNLIE said he wished to know the opinion of the President of the Court on the practical value of oral arguments, as compared with written pleadings, in contentious cases.

31. Mr. SHI said that the Court attached great importance to the oral arguments of counsels to parties in all of its cases, since very often the parties presented new arguments which were not necessarily in their written pleadings. In some cases new points were stressed during oral arguments.

32. Mr. DUGARD noted that since July 2004, when the General Assembly had approved the Court's advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, neither the Security Council nor the General Assembly had made any further mention of it. There was a real danger that that opinion was being rapidly forgotten, just like the one the Court had handed down on the Western Sahara. He therefore wondered whether the Court was concerned at the fact that the international community was doing so little in respect of that advisory opinion.

33. Mr. ECONOMIDES asked Mr. Shi whether obligations *erga omnes* were identical to or different from obligations of *jus cogens*.

34. Mr. PAMBOU-TCHIVOUNDA said that in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court had had no choice but to call on the parties concerned to apply the resolutions of the Security Council in good faith. He could not help but note, however, that the Security Council had adopted numerous resolutions on the matter which had rarely been applied in good faith.

35. In the cases concerning *Legality of Use of Force*, the Court had taken great pains to determine whether a treaty was or was not in force *vis-à-vis* a State that was or was not a party to the Court's Statute; however, he himself did not feel that the issue had merited so much attention.

36. Lastly, on 12 July 2005, when the Court had handed down its decision in the *Frontier Dispute (Benin/Niger)* case, it had had few options other than to base itself on the 1914 letter from the French colonial authorities. That letter had been destined for a historic fate, since in it, basing itself on the jurisdiction of customary tribunals, France had practically conferred competence for one side of the River Niger on one party and for the other side on another party. Developments in the situation up until the time of independence had ultimately confirmed that premature attribution of competence, and the Court had had little choice in the matter. Even though it had not expressly resolved the issue of *uti possidetis juris*, it had previously observed that that principle had some political merit in that it froze the situation, thereby preventing a number of acts previously adopted by the colonial powers from being questioned. Consequently the Court had not been obliged to give an opinion as to whether the *effectivités* should prevail over *uti possidetis juris* or vice versa, since the *effectivités* had been implicit in the 1914 letter from France. The realism of the Court's decision was thus noteworthy.

37. Mr. CANDIOTI asked whether the Court had ever considered travelling to the site of a dispute in order to obtain a better grasp of the context. He wished also to know what practical implications the decision had for the inhabitants of the islands involved.

38. Mr. KAMTO said that the Court's decisions were of incontestable value for peace among nations, hence the importance of their being precise. In that connection, the manner in which the Court had just decided the *Frontier Dispute (Benin/Niger)* case was to be commended: as the navigable channel selected as the boundary was determined by 154 points whose coordinates had been specified, the two parties would have no difficulty in implementing the judgment. That concern for precision had not, however, always driven the Court, a case in point being its judgment of 10 October 2002 in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, in which, for certain points on the boundary, the Court had merely made reference to watercourses without

[6] The Practice Directions are published in *I.C.J. Reports 2004–2005* and are available on the ICJ website (www.icj-cij.org).

specifying the methodology to be used or giving coordinates. As a result, it was difficult to implement the judgment on site, and no one doubted that if the Court had visited the site, it would have been more precise about certain points. One might then ask whether, in particularly complex cases, the Court ought not to contemplate visiting the sites or send experts there even if the parties made no such request, so that non-compliance with certain judgments did not discourage States from turning to the Court, thereby undermining the position it had acquired throughout its history on the basis of its body of well-grounded decisions.

39. Mr. DAOUDI asked whether the Court had any particular views on the reform of the United Nations, particularly the expansion of the Security Council, and whether it thought that the Council could continue to function with 15 members as it currently did, using the same methods of work.

40. Ms. ESCARAMEIA said that she wished to know whether the Court was concerned at the fact that the Security Council had not requested any advisory opinions of it and what its relations with other international courts were.

41. Mr. SHI (President of the International Court of Justice), replying to Mr. Dugard's question, said that the Court had been glad to see that the General Assembly had adopted with very few alterations the Court's advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, and that it would be happy if the Security Council followed up on the General Assembly's resolution, but that the advisory opinions of the Court were not binding, by virtue of its functions.

42. As to *in situ* visits, he said that the Court had made such a visit only once, in the case concerning the *Gabčikovo–Nagymaros Project (Hungary/Slovakia)*, in order to view the Danube River project at the invitation of the Governments concerned. It must be recalled that the disputes it had to resolve concerned very sensitive matters, and the parties might not agree on the advisability of such on-site visits. It was, however, a good suggestion that was worthy of consideration.

43. Concerning the effects of transfers of territory on local populations, the Court considered that the inhabitants' private rights should not be affected.

44. Once a judgment had been rendered, the Court had no other duties to fulfil. Since its jurisdiction was based on the consent of States, the parties normally implemented its decisions. If they did not, then Article 94 of the Charter of the United Nations, which stipulated that "[i]f any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council", would apply. It was then for the Security Council to decide what measures should be adopted.

45. With regard to the relationship between the reform of the United Nations and the role of the Court, it should be noted that in his report entitled *In Larger Freedom: Towards Development, Security and Human Rights for All*, the Secretary-General of the United Nations had urged those States that had not yet done so to consider recognizing the compulsory jurisdiction of the Court—generally if possible or, failing that, at least in specific situations.[7] He had also urged United Nations bodies to make greater use of the Court's advisory powers.

46. Lastly, the ICJ had minimal relations with the international criminal courts because their jurisdictions were completely different: those courts adjudicated the criminal responsibility of individuals, whereas the ICJ was open only to Member States. Nevertheless, some type of cooperation could be useful, particularly with a view to resolving the worrisome problem of fragmentation of international law.

Expulsion of aliens (*continued*) (A/CN.4/554)

[Agenda item 7]

Preliminary report of the Special Rapporteur (*continued*)

47. Mr. DAOUDI said that paragraph 5 of the report had correctly identified the key problem posed by the topic, which was how States could reconcile the exercise of their sovereign right to expel with their international obligations, notably in the area of human rights. It was on that problem that the Commission must focus its work. The Special Rapporteur had rightly begun by defining the two fundamental terms upon which the study was based: "expulsion" and "alien". As an "alien" was defined as an individual who did not have the nationality of the State in which he found himself, any expulsion measure taken by a State in respect of its own nationals who were of a different ethnic, religious or racial origin from the majority of the population went beyond the scope of the subject. Such a measure would constitute a violation of fundamental human rights norms under the domestic legislation of the State and would be contrary to article 3 of the European Convention on Human Rights.

48. With regard to the cases mentioned in paragraph 10 of the report, namely that of Palestinians who had been forced to leave their country during and after the 1948 war and that of Palestinians and Syrians who had suffered the same fate following the Israeli occupation of the West Bank and the Golan Heights in 1967, they, too, exceeded the scope of the study. It should also be pointed out that any forced transfer of population constituted a war crime under the Geneva Conventions of 1949 and the first Additional Protocol thereto of 1977.

49. The notion of expulsion should be taken in a relatively broad sense: it should cover all cases in which the purpose of a measure was to force an alien to leave the territory of the State in which he found himself, regardless of the reason for his presence. Therefore, *refoulement* and non-admission were excluded from the scope of the topic.

50. In addition, the study of the legal regime of expulsion should take into consideration the status of the alien in the host State. In the case of migrant workers who had

[7] A/59/2005, para. 139.

entered the country without valid documents, the host State was exercising a sovereign right when it expelled them, but it was under an obligation to respect those individuals' fundamental rights. On the other hand, when an alien was legally present in the territory of a State or when his presence was governed by a bilateral or multilateral treaty, as was the case with refugees, the State's power of expulsion was much more limited, as was stipulated, for example, in article 32 of the Convention relating to the Status of Refugees.

51. In the event that the treaty norms governing the status of an alien in the territory of the expelling State were not respected or violations of human rights occurred, provision should be made for a State to be able to exercise diplomatic protection on behalf of its national and, possibly, for the expelling State to be held responsible.

52. Referring to the question raised by the Special Rapporteur in paragraph 30 of his report, he said that the purpose of the study should be to establish the legal regime for the expulsion of aliens. To be complete, such a regime must be based both on existing international rules and on rules which the Commission might propose in the context of the progressive development of international law. If the Commission succeeded in striking an acceptable balance between the sovereign right of States to expel aliens and States' obligations to ensure respect for the fundamental rights of those expelled, it ought to be possible to complete a set of draft articles on the subject.

53. Mr. Sreenivasa RAO said that it was essential to delimit the scope of the subject clearly. Accordingly, a distinction must be drawn between the expulsion of aliens and: (*a*) the non-admission of asylum-seekers; (*b*) internal displacement; (*c*) international displacement in times of armed conflict, following the creation of new States or after the dismemberment of a State or in the wake of natural disasters; and (*d*) refusal to admit aliens to the territory (*refoulement*).

54. Similarly, the topic should not address issues arising from the expulsion of illegal immigrants, other than those who stayed in the territory for long periods and lacked even a valid entry permit. In the latter case, any arbitrary exercise of the right of expulsion could give rise to issues of human rights and humanitarian rights.

55. He agreed with the Special Rapporteur that, in general, the study should avoid dealing with issues of immigration and emigration. Thus the grounds for refusal of entry into a territory referred to in paragraph 18 of the report should not be part of the study.

56. As noted in paragraph 20, the most difficult part of the exercise was to identify which of the many grounds for expelling aliens were admissible under international law and which were prohibited. The study should not, however, simply attempt to draw common denominators from national laws on the subject but should critically examine them with a view to promoting human rights and protecting human dignity. For example, the grounds listed in the draft work plan in annex I under "Contingent grounds debatable under international law" were highly questionable in an era of globalization and mixing populations, and it might be preferable to try to identify procedures applicable to all expulsion decisions rather than grounds for expulsion. Such procedures should be considered from the standpoint of due process, non-discriminatory access to justice for all persons threatened with expulsion, access to consular services or legal assistance, protection of personal property and investments, and respect for applicable international obligations.

57. Any act of expulsion was also subject to the principles of State responsibility and diplomatic protection. Moreover, the expulsion of migrant workers must be in keeping with the principles set out in the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. The Commission should take the opportunity offered by the study to continue developing those standards, amending them to the extent necessary in the light of practice relating to the implementation of the Convention and evolving universal human rights norms. Collective expulsion, which was discussed in paragraph 24, was in principle prohibited under international law. At the very least, a clear presumption in favour of its prohibition must be established. With regard to methodology, there was good reason to develop a comprehensive legal regime drawing from different sources, including international treaties, human rights standards and general principles of international law, which could be derived from a comparative study of national legislation and practice.

58. In the light of the comments made by a number of members of the Commission, the draft work plan in annex I of the report might have to be revised. For example, population displacement, listed in part 1, section I.A.2, should deal only with international displacement and not internal displacement. The case of stateless persons deserved separate treatment and should not be dealt with as part of expulsion of aliens.

59. Lastly, the problem of the discrimination or persecution on account of race, religion, ethnic origin or political opinion that an expellee might face in the country to which he was returned must also be taken into account.

60. Mr. KATEKA drew attention to the definitions of the terms "alien" and "expulsion" in paragraphs 7 and 13 of the preliminary report and noted that "alien" did not cover internally displaced persons. The term should, however, cover stateless persons.

61. As for the term "expulsion", one member of the Commission had found the definition too narrow while for another it was too broad; he himself thought that the Commission should confine itself provisionally to the definition according to which expulsion was "a legal act in which a State compels an individual or group of individuals who are nationals of another State to leave its territory" (para. 13 of the report). The link between the physical crossing and its consequences could be looked at later, as the Special Rapporteur proposed.

62. The fundamental principle which should run through the topic was that under international law, a State had the right to expel aliens, provided that it did not do so arbitrarily. Thus, the study should help to harmonize the different

situations regarding the expulsion of aliens, which had led to varied national legislation and court decisions.

63. For example, there was the so-called "constructive expulsion", in which the person concerned was not the subject of a formal expulsion, yet the conditions in the host country made it impossible for him to stay. It would be interesting to have the Special Rapporteur comment on that type of expulsion in a future report. It would also be useful to give greater attention to situations in which the right of expulsion was exercised to the detriment of human rights.

64. The use of a double standard was also a problem. Developed countries regularly expelled so-called "economic refugees" to developing countries, but when developing countries expelled illegal aliens, they were accused of violating human rights. To cite an example, one African country had generously hosted hundreds of thousands of refugees, some of whom had settled there and refused to leave, even though the conditions in their country of origin had stabilized. Yet their expulsion had incurred protests from UNHCR, which had invoked the principle of *non-refoulement*. The Special Rapporteur should look into such cases in future reports.

65. As for methodology, the Special Rapporteur should deal with existing treaty rules on the question and then formulate basic principles which could guide States. State responsibility and diplomatic protection should be invoked whenever necessary, without repetition or duplication. The draft should also cover the right of return of expellees.

66. Mr. CHEE commended the Special Rapporteur for his concise and well-written preliminary report. He noted that although a State had the sovereign right to admit aliens and to expel them from its territory, that right was qualified by the right of the State to protect its nationals abroad and by international rules for the protection of human rights. He cited a number of court decisions granting compensation to expellees because the right to expel had not been exercised properly. For example, in the *Boffolo* case, the arbitrator had noted that the State possessed the general right of expulsion, but that "expulsion should only be resorted to in extreme instances and must be accomplished in a manner least injurious to the person affected" (p. 537 of the judgement). It should also be borne in mind that in resolution 40/144 of 13 December 1985 the United Nations General Assembly had adopted the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live, article 7 of which provided that, "except where compelling reasons of national security otherwise require, [an alien lawfully in the territory of a State shall] be allowed to submit the reasons why he or she should not be expelled".

67. Migrant workers were currently an important category of aliens, and it would therefore be helpful if the Special Rapporteur devoted more time to analysing the content of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

68. Lastly, he sought clarification from the Special Rapporteur on a number of expressions used in the draft work plan and asked in particular what was meant by the term "extraordinary transfer" in part 1, section I.A.9.

The meeting rose at 1 p.m.

2852nd MEETING

Friday, 15 July 2005, at 10.05 a.m.

Chairperson: Mr. Djamchid MOMTAZ

Present: Mr. Addo, Mr. Al-Marri, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.

Expulsion of aliens (*concluded*) (A/CN.4/554)

[Agenda item 7]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. KABATSI thanked the Special Rapporteur for his extremely interesting and scholarly report (A/CN.4/554), which provided an overview of the topic and the legal issues pertaining to it, and congratulated him on his mastery and grasp of the subject.

2. Unfortunately strangers were sometimes mistrusted, envied for their industriousness and wealth and made scapegoats for all kinds of misfortunes. For that reason, throughout the ages and in all regions of the world, aliens had been and, sadly, still were being expelled. Admittedly a State was entitled, in exercise of its sovereignty, to exclude "undesirable" aliens from its territory in accordance with its authorities' decisions and through the operation of its internal law. Nevertheless the interplay between States and the dictates of globalization demanded the intermixing and interaction of peoples across borders. Rules attempting to introduce some order into that process existed in general customary international law, in treaties and in international agreements, as well as in State practice and internal laws. It was therefore the task of the Commission and the Special Rapporteur to identify carefully the rules from those sources, to develop them further where possible and to codify them with a view to improving their application.

3. The rules should clearly define the term "aliens" and choose the term, or terms, to be used to describe the process for excluding them, a task upon which the Special Rapporteur embarked in section II of the report. It might be wise to omit from the study aliens who wished