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Summary record of the 2982nd meeting

Topic:
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rehabilitation should be covered, precedence should be given to the response phase in order to meet the most urgent needs of victims.

77. With regard to the final form of the outcome of the Commission's work, it would be appropriate to begin with the preparation of draft articles and to proceed, in the light of progress achieved and State reactions, with the drafting of a framework convention on the subject.

The meeting rose at 1 p.m.

2982nd MEETING

Tuesday, 22 July 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

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

1. The CHAIRPERSON welcomed Judge Rosalyn Higgins, President of the International Court of Justice, who, following long-established practice, was to address the Commission under the item "Cooperation with other bodies".

Protection of persons in the event of disasters (concluded) (A/CN.4/590 and Add.1–3, A/CN.4/598)

[Agenda item 8]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (concluded)

2. Mr. OJO congratulated the Special Rapporteur on his comprehensive and illuminating report (A/CN.4/598) on a challenging emerging area of international law and commended the Secretariat for its seminal background work on the topic. The debate on the report had been robust, giving the necessary impetus for the Commission to move forward in its consideration of the topic.

3. No State chose to have a natural disaster take place within its borders. Natural disasters could occur at any time and anywhere, as an abundance of recent examples showed: Hurricane Katrina in New Orleans, the earthquake and tsunami in parts of Asia, the more recent earthquake in Sichuan Province of China, and the cyclone in Myanmar in which over 80,000 lives had been lost. Recent man-made disasters included the Chernobyl nuclear accident in Ukraine, ethnic cleansing in Bosnia and Herzegovina, Rwanda and Darfur, and the disaster waiting to happen in Zimbabwe if the current political crisis was not resolved.

4. He agreed with Ms. Escarameia that a broad approach should be adopted in dealing with both natural and man-made disasters. The latter sometimes overlapped with the former, and drawing a strict dividing line between them would not serve any useful purpose. He found it difficult to agree with Mr. Nolte's suggestion that the scope of the topic should extend to man-made disasters only if they acquired the characteristics of natural disasters. Who would make that determination, and what would be the parameters: the number of lives lost or properties destroyed? He agreed with Mr. Dugard's earlier intervention on that point.

5. Article 2, paragraph 7 of the Charter of the United Nations enshrined the fundamental principle of international law that no State should interfere in the internal affairs of another State. As Mr. Vasciannie had pointed out, the consequence of not adhering to that principle when providing assistance in the event of a disaster could be that a stronger State might overthrow the Government of another State: the victim State must unequivocally consent to such assistance before it was provided. Yet what would happen if citizens of a country were clearly in need of aid and would perish if none was forthcoming, yet the Government refused to allow aid to enter the country? A not dissimilar situation had arisen recently in Myanmar.

6. While excesses could be perpetrated in the name of humanitarian assistance, as in Mr. Brownlie's example of the intervention in relation to Kosovo, in the name of which bridges had been blown up and properties destroyed, the way to prevent such excesses had been ably propounded by Mr. McRae: rules of conduct or guidelines to facilitate cooperation and implementation should be fashioned. In other words, a balance should be struck between the principles of sovereignty and non-intervention on the one hand, and the reality of a disaster on the other. Dwelling too much on the theoretical and conceptual aspects of the topic at the initial stage would unduly limit the Commission's scope for action. It must not shy away from recommending changes in existing principles and norms in order to satisfy the international community's aspirations concerning emerging areas of international law. Providing ground rules for a *modus operandi* for international assistance in the event of a disaster was the way forward. It was incumbent on the Commission to provide the guidance that the Special Rapporteur had requested, rather than taking refuge in the principles of sovereignty and non-intervention.

7. Mr. VÁZQUEZ-BERMÚDEZ thanked the Special Rapporteur for his excellent preliminary report and the Secretariat for its memorandum (A/CN.4/590 and Add.1–3), which contained extensive and useful information and helpful suggestions on aspects of the topic that could be taken up by the Commission.

8. The report set out to provide the Commission with the necessary guidance to enable it to delimit the scope of the topic. It would be immensely useful, however, if, in his analysis of international norms and structures, the Special Rapporteur would consider briefly discussing the coordinating role played by the United Nations and its specialized agencies, particularly through the Under-Secretary-General for Humanitarian Affairs and

Emergency Relief Coordinator, OCHA and the Inter-Agency Standing Committee on Post-War and Disaster Reconstruction and Rehabilitation, in which non-State actors such as the ICRC and NGOs participated alongside United Nations agencies. Of particular interest would be information on the problems such bodies faced in practice, to enable the Commission to consider mechanisms for resolving them. Members' views on what should be included in the Commission's project should also be sought. It would also be possible to evaluate the possibility of strengthening that international organizational apparatus.

9. Numerous international instruments, both binding and non-binding, covered disasters and, in particular, disaster response. They had many limitations, however, including their disparate natures, their solely regional or bilateral scope, the relatively small number of States parties in the case of conventions, and their focus on specific types of disasters or single sectors of assistance. There was presently no broad universal instrument covering disasters, hence the need for a broad perspective to be provided by the Commission's exercise in codification and progressive development of that important area of law, to cover all phases of disasters.

10. Every year, millions throughout the world were affected by natural and man-made disasters and urgently required assistance in meeting their basic needs. That was why, with respect to the scope *ratione materiae*, disaster should be construed broadly to include both natural and man-made disasters. The Commission's product would need to be of use to all who urgently required assistance, irrespective of the origin or category of the disaster. The definition of disaster in the 1998 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations served as a good starting point. Furthermore, the fact that it was often impossible to distinguish between natural and man-made disasters argued in favour of addressing them both.

11. Global warming demonstrated that human activity played a major role in climate change, whose long-term effects, for example higher sea levels, threatened the very existence of certain small island developing States. In a recent report, the Under-Secretary-General for Humanitarian Affairs stated that one of the main reasons why more people needed more assistance than in the past was that natural disasters, especially those associated with climate change, appeared to be occurring more often and having a greater impact.²¹² As had been pointed out by UNESCO, natural disasters themselves were not entirely "natural", since human action, too, could provoke disasters: the most severe floods were triggered by deforestation.²¹³ Bad development choices were also responsible for higher risks, for example when towns were built on flood plains, on known fault lines or in areas lacking adequate regional planning schemes. In these situations, even a minor earthquake could have devastating consequences.

²¹² United Nations, Office for the Coordination of Humanitarian Affairs, *OCHA in 2008: Activities and Extrabudgetary Funding Requirements*, p. 6, available from: www.unocha.org/about-us/publications/flagship-publications/*78 (accessed 19 December 2012).

²¹³ See J. Barry, *Disaster Preparedness and Mitigation: UNESCO's Role*, UNESCO, Paris, 2007, p. 13 (<http://unesdoc.unesco.org/images/0015/001504/150435e.pdf>, accessed 18 June 2014).

Risk reduction or prevention could be facilitated through means such as international scientific and technological cooperation, information exchange and early warning systems. Accordingly, he agreed with the Special Rapporteur's view, regarding the scope *ratione temporis*, that a broad approach was indicated concerning the phases which should be covered, including not only disaster response but also the pre-disaster and post-disaster phases, involving prevention, mitigation and rehabilitation. With regard to the scope *ratione materiae*, he agreed on the need to construe the concept of protection broadly as encompassing the more specific areas of response, relief and assistance, and also prevention and rehabilitation.

12. At a later stage, as the Special Rapporteur had pointed out, it would be necessary to define the rights and obligations that entered into play in disaster situations and the consequences that might flow from them. That would require approaching the topic from the standpoint of the victims of disasters and the right to humanitarian assistance, and of the nature and scope of that right. *Prima facie*, it could be seen as a human right, or perhaps as an emerging human right. Although more thorough analysis was needed, he did not think that viewing the right to humanitarian assistance as a human right would create tensions with the basic principles of sovereignty and non-intervention, since it would be implemented in the same way as any other human right. In addition, respect for the right to humanitarian assistance would promote the realization of the human rights affected during a disaster, such as the rights to life, health and physical integrity and dignity; rights relating to fulfilment of basic human needs such as the availability of water, food, sanitation and shelter; and rights that were important in post-disaster situations, such as the rights to education, freedom of expression, work and housing.

13. Yet international human rights law was only one of the sources for the right to protection of persons in the event of disasters. International humanitarian law was also significant, and its rules and principles could be used as inspiration or applied by analogy, as the Special Rapporteur suggested. However, humanitarian assistance to the civilian population in armed conflict should not be included in the scope of the topic, as it was already covered by international humanitarian law, an extensive body of codified international law.

14. He did not consider as applicable to the topic the concept of the "responsibility to protect" outlined in the 2005 World Summit Outcome document. In that document, Heads of State and of Government cited the responsibility of each individual State to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity and referred to the responsibility of the international community, through the United Nations, to take action in accordance with Chapters VI and VIII of the Charter of the United Nations and even to take collective action in accordance with Chapter VII.²¹⁴ The concept was used there in connection with the commission of the most serious crimes of concern to the international community as a whole, and could not be extrapolated to the very different context of the protection of persons in the event of disasters.

²¹⁴ General Assembly resolution 60/1, paras. 138–139.

15. Emphasis must be placed on the basic principles of sovereignty and non-intervention, whereby the State that had suffered the disaster must give its consent and a third State could not impose assistance upon it. It was obvious that the affected State had primary responsibility for protecting the population in its territory and that the victims had the right to receive humanitarian assistance. If, however, the affected or territorial State failed to discharge that responsibility for arbitrary reasons, it would be violating its obligations regarding the protection and enjoyment of the human rights of the population affected by the disaster, such as the right to life, food and health, and the victims' right to receive assistance.

16. Numerous instruments on assistance in disaster situations emphasized the principles of territorial sovereignty and consent of the affected State to the provision of humanitarian assistance by a third State; the latter had been included as one of the guiding principles in General Assembly resolution 46/182 on strengthening of the coordination of humanitarian emergency assistance of the United Nations and reiterated in General Assembly resolution 57/150 of 16 December 2002 on strengthening the effectiveness and coordination of international urban search and rescue assistance. Those resolutions also referred to important principles applicable to the provision of humanitarian assistance such as neutrality, humanity and impartiality. Other important applicable principles set out in the relevant international instruments were non-discrimination and cooperation. As pointed out in the Secretariat memorandum, a review of the drafting history of pertinent General Assembly resolutions revealed that the principle of non-intervention had routinely been raised by States, which had typically expressly linked their support for General Assembly resolutions to the understanding that such resolutions were not to be interpreted as creating a duty or right to interfere in the domestic affairs of another State.

17. With respect to the Special Rapporteur's question on whether to address the protection of property and of the environment, he believed they should be included in the topic, since their protection influenced, to a greater or lesser degree, the protection of persons. Regarding the final form to be taken by the Commission's work, the best approach would be to adopt draft articles with a view to proposing a framework convention. The adoption of guidelines or some other soft law instrument to be added to those already existing did not seem a useful exercise or one that would represent a substantive contribution by the Commission. Lastly, thanks to the rich debate in plenary, the Special Rapporteur's next report would help the Commission move ahead in the right direction, and he therefore saw no need to establish a working group at the current initial stage of its consideration of the topic.

18. Mr. SINGH commended the Special Rapporteur for his comprehensive, thought-provoking report on a topic of great contemporary relevance and thanked the Secretariat for providing a thoroughly researched memorandum on the subject.

19. According to the Special Rapporteur, the title of the topic suggested a "rights-based" approach, the essence of which was the identification of a specific standard of

treatment to which the individual, the victim of a disaster, was entitled. However, the two international human rights instruments that were expressly applicable in the event of disasters seemed to set public order standards for States that were informed by the principle of humanity rather than that of individual rights. The Guiding Principles on Internal Displacement,²¹⁵ which provided for the protection, *inter alia*, of those displaced by a natural or man-made disaster, expressly stated that the primary responsibility for protection and assistance lay with the national authorities and that internally displaced persons had the right to request and to receive protection and assistance from them (Principle 3). In that context, the problem-based approach suggested by Mr. Brownlie was relevant, as it could focus on the immediate needs of the victims of disaster, leaving aside the issue of rights and obligations.

20. On the categories of disasters to be included within the scope of the topic, while noting that the initial Secretariat study had originally suggested that the topic be limited initially to natural disasters,²¹⁶ based on a perceived more immediate need, the Special Rapporteur was of the view that the title suggested a broader scope covering both natural and man-made disasters, and considered that such an approach would seem best for achieving the underlying objective, namely, fashioning rules for the protection of persons. However, he excluded armed conflicts, as international humanitarian law dealt with that aspect of the matter in great detail.

21. In his own view, the Commission should focus initially on natural disasters, as there were specific legal regimes for dealing with environmental damage from oil spills and nuclear accidents. Preventive action and identification of the root causes of so-called "slow onset" or "creeping" disasters was an area where the Commission must tread carefully, as it might fall within the mandate of other bodies and require specialized responses. That was especially true in the case of nuclear accidents, on which two Conventions had already been adopted by the International Atomic Energy Agency.

22. While the Special Rapporteur had rightly taken a cautious approach to the issue, some members had stressed the relevance of the "responsibility to protect", namely the right of the international community to intervene in a country where a crisis situation demanded drastic action. That raised several fundamental questions. Who would decide on the gravity of the situation, who would determine what was best suited to that country's problem, and how would the intervening country ensure proper functioning within the country concerned if the decision to intervene was a unilateral one? Those were difficult and sensitive questions that could not be dismissed simply by arguing that crises demanded innovative solutions.

23. In several resolutions reaffirming the sovereignty of States, the General Assembly had recognized the primary role of the affected States in the initiation, organization, coordination and implementation of humanitarian

²¹⁵ See footnote 210 above.

²¹⁶ *Yearbook ... 2006*, vol. II (Part Two), annex III, pp. 206 and 210–211, paras. 1, 2 and 26.

assistance within their respective territories. The Secretariat memorandum detailed the strong views expressed by a large number of States on that issue. He supported those members of the Commission who considered that the concept was not appropriate for inclusion within the scope of the topic, as the primary responsibility for the protection of persons in its territory or within its jurisdiction lay with the State concerned.

24. In paragraph 52 of his report, the Special Rapporteur pertinently noted that the areas of law applicable to the protection of persons in the event of disasters underscored the “essential universality of humanitarian principles” and were based on such principles as humanity, impartiality, neutrality, non-discrimination, solidarity and non-intervention.

25. On the question raised in paragraph 53, whether in addition to protection of persons, the topic should also extend to protection of property and the environment, it was his view that the primary focus should remain that of protection of persons, but that in certain situations, protection of property might be necessary to ensure the protection of persons affected by the disaster.

26. Addressing the scope of the topic *ratione personae*, the Special Rapporteur recognized the need to take account of the role of a multiplicity of actors, including international and non-governmental organizations and non-State actors as well as State actors, and raised the question whether there existed a right of initiative in offering assistance. Again, it was essential to emphasize the primary role of the affected State, since international assistance to persons within its territory, as part of international solidarity and cooperation, took place with its consent and under its supervision.

27. Finally, while a final decision on the form of the work should await its completion, it might be more realistic to prepare guidelines rather than a convention. As to the proposal to establish a working group to examine the issues raised, it would be best to wait until further reports on the topic had been submitted.

28. Mr. YAMADA commended the Special Rapporteur on his excellent preliminary report and welcomed the useful study by the Secretariat. The scope of the topic seemed very broad. He supported Mr. Perera’s earlier suggestion of adopting a step-by-step approach, beginning with natural disasters. Thereafter, the Commission could proceed to consider man-made disasters, mainly involving various industrial accidents. It should exclude cases of armed conflict from the scope of the study, even though some natural and industrial disasters might be triggered by armed conflicts.

29. The key to solving the problem of disasters lay in international cooperation. The Commission would have to work out the principles governing the procedures and mechanisms for such cooperation. At the same time, it must formulate the basic legal principles of the rights and obligations of persons and States. The central principle was the right of persons in distress to appropriate relief. The State where the person resided had the obligation to provide appropriate and timely relief and, when it was not

capable of doing so by itself, it must have the obligation to seek outside assistance. The question of sovereignty should not be a taboo subject. The Commission must also formulate the rights and obligations of States and their personnel who were engaging in assistance. In particular, they must be held harmless unless there was gross negligence on their part.

30. He hoped that the Special Rapporteur would propose a comprehensive list of those rights and obligations in his next report and, as the Commission was to work out legal norms, that he would formulate his proposals as draft articles, without prejudice to the final form of the product.

31. The CHAIRPERSON, speaking as a member of the Commission, said that the debate on the topic had got off to a very successful start, thanks to the Secretariat’s outstanding memorandum, the Special Rapporteur’s excellent report and the seminal statements and briefer substantive interventions made by members.

32. The majority view within the Commission appeared to be that the concept of disasters as it related to the topic should be interpreted broadly, to include both natural and man-made disasters. However, it might be advisable, as pointed out by Mr. Yamada, for the Commission initially to turn its attention to natural disasters and to deal with man-made disasters only at a later stage. There was no call for it to consider armed conflict *per se*, an area already covered by a substantial body of international humanitarian law.

33. With regard to the sources of international disaster protection and assistance, the Special Rapporteur’s suggested approach of drawing upon all available sources seemed appropriate; however, given that the main concern was to ensure the protection of persons, special emphasis should be placed on international humanitarian law and international human rights law, without, however, precluding the possibility of recourse to international law on refugees and internally displaced persons and the few applicable instruments that related specifically to assistance in the event of disasters.

34. In its consideration of the topic, the Commission should bear in mind the interdisciplinary nature of the topic by drawing on the contributions that could be made by other institutions and relying on a wide variety of legal precedents. The Commission had already done that successfully in its consideration of the topic of shared natural resources. He commended the Special Rapporteur for the considerable efforts he had made to establish contacts with numerous institutions involved in providing disaster relief to persons, and urged him to maintain those contacts in researching further information pertinent to the topic. The Commission might even wish to consider inviting certain bodies to participate in plenary meetings or meetings of the Drafting Committee. IFRC exemplified the kind of institution that had a vital contribution to make to the Commission’s work in that area.

35. The topic clearly had both *lex lata* and *de lege ferenda* components, though, owing to its nature, there were fewer of the former, which should be retained. He

saw no difficulty in progressively developing norms of international law if in so doing the Commission was able to fill gaps in the law. While the Commission was not a legislative body, it was a subsidiary body of the General Assembly and could submit to it draft articles to enable it subsequently to decide on the final form that those draft articles would take. In that regard, the main challenge facing the Commission was to reconcile the norms derived from the Charter of the United Nations or from resolutions interpreting them (such as the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, adopted by the General Assembly in its resolution 2625/XXV, which referred to such fundamental principles as non-intervention or the prohibition of the threat or use of force) with norms relating to respect for the rights of persons to protection and assistance in the event of disasters. The Commission's efforts in terms of codification and progressive development should cover the three phases of disaster situations: pre-disaster to regulate preventive measures, the disaster proper, and post-disaster to regulate the relief and assistance to be provided.

36. It did not seem either useful or necessary for the Commission to decide immediately on the methods of work it would use to develop the draft articles. The most appropriate approach would become clearer as the draft articles were submitted to the Commission for its consideration. While the possibility of establishing *ad hoc* groups remained an option, the matter did not have to be decided during the current session. With Mr. Valencia-Ospina as Special Rapporteur, the Commission was in good hands, and its main task would be to support him in his work. The essential objective was to produce a set of draft articles that provided effective protection to persons in the event of disasters, as a right, not as an act of charity, and that made it possible for international assistance to be governed and protected by international law.

37. He invited the Special Rapporteur to sum up the debate and present his conclusions thereon.

38. Mr. VALENCIA-OSPINA (Special Rapporteur) said he was pleased to have been given the opportunity to sum up the debate in the presence of the President of the International Court of Justice, Judge Rosalyn Higgins. He had had the honour, when serving as Registrar to the world's highest judicial body, of sharing many memorable experiences with Judge Higgins in the tasks involved in the administration of international justice. Her presence indeed augured well for his challenging mission as Special Rapporteur.

39. He was grateful to the members of the Commission for the generous welcome they had given to his preliminary report. He was gratified to note that the report had achieved its desired result, namely to stimulate an initial general debate in plenary that would make it possible to delimit the scope of the topic and define its basic concepts and principles, thereby providing guidance to him for his continued study of the subject. More than three quarters of the Commission's full membership had made formal statements or briefer interventions in a lively and scholarly debate, offering valuable contributions in the areas

of law and policy that deserved further consideration. In such a climate of genuine interest and cordial understanding, he himself and the Commission as a whole would surely succeed in accomplishing the difficult task they had undertaken.

40. He did not intend to engage in a detailed analytical summary of the various views expressed on the questions raised in his preliminary report. Such a summary would be included in the relevant chapter of the report of the Commission on the work of its sixtieth session to be submitted to the General Assembly. He would therefore merely highlight the main points that had emerged from the debate, which would assist him in narrowing the focus of the study for the purposes of preparing his next report.

41. In the first place, there was a general feeling among members that, in keeping with its usual practice and working methods, the Commission should proceed to prepare draft articles that might serve as the basis for the adoption of a multilateral convention, possibly in the form of a framework convention, or failing that, of a declaration that included a model instrument or guidelines. In that connection, one member had requested clarification as to the exact nature of a framework convention. An excellent description of a framework convention was to be found in the Secretariat's initial memorandum, which was reproduced in annex III of the report of the Commission on the work of its fifty-eighth session. The Secretariat had proposed the formulation of a framework convention in paragraph 24 of annex III, which read:

The objective of the proposal would be the elaboration of a set of provisions which would serve as a legal framework for the conduct of international disaster relief activities ... creating a legal "space" in which such disaster relief work could take place on a secure footing. A possible model would be the 1946 Convention on the Privileges and Immunities of the United Nations which, on the narrow aspect of privileges and immunities, serves as the basic reference point for the prevailing legal position, and which is routinely incorporated by reference into agreements between the United Nations and States and other entities. Similarly, the envisaged text regulating disaster relief could serve as the basic reference framework for a host of specific agreements between the various actors in the area, including, but not limited to, the United Nations.²¹⁷

42. In addition to the above-mentioned model, he would propose to add a reference to a treaty that had been concluded more recently and was more pertinent to the topic in question: the Framework Convention on civil defence assistance of 22 May 2000.

43. With regard to the scope of the concept of disaster to be covered in the draft articles, the title adopted by the Commission for the topic referred simply to "disasters", without qualifying them any further. However, during its fifty-ninth session, when the Commission had requested the Secretariat to prepare a background study on the topic, it had explicitly stated that the study should initially be limited to natural disasters.²¹⁸ In doing so, it had endorsed the approach taken by the Secretariat in its original proposal, as described in paragraphs 1 and 2 of annex III of the Secretariat's initial memorandum:

²¹⁷ *Yearbook ... 2006*, vol. II (Part Two), p. 210.

²¹⁸ *Yearbook ... 2007*, vol. II (Part Two), p. 101, para. 386.

1. ...The focus of the topic would, at the initial stage, be placed on the protection of persons in the context of natural disasters or natural disaster components of broader emergencies

2. Natural disasters are, however, a subset of a broader range of types of disasters, which include man-made and other technological disasters. ... Furthermore, it is appreciated that such a distinction between natural and other types of disasters, such as technological disasters, is not always maintained in existing legal and other texts dealing with disasters, nor that it is always possible to sustain a clear delineation. Accordingly, while it is proposed that the more immediate need may be for a consideration of the activities undertaken in the context of a natural disaster, this would be without prejudice to the possible inclusion of the consideration of the international principles and rules governing actions undertaken in the context of other types of disasters.²¹⁹

44. From the debate just closed, it could be concluded that the Commission wished to maintain the position it had adopted initially, namely that, although the topic itself encompassed a broad range of disasters, it was understood that the study of such phenomena would initially focus on natural disasters and on others, which, irrespective of their causes, took the form of or had effects comparable to those of natural disasters. With regard to the scope of the term "disaster", reference had been made in the debate to the definition contained in the 1998 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations. Broadly speaking, the Commission's position was to exclude armed conflicts *per se*, although for some members, certain aspects of the relationship between armed conflicts and natural disasters should be given further consideration.

45. The various elements comprising the concept of protection depended to a considerable extent on the branch of law and the context in which the concept was used. When referring to disasters, protection in the broad sense related to aspects such as response, relief, assistance, prevention, mitigation, preparation and rehabilitation. Their applicability depended on where in the three successive phases of a disaster situation they might be situated, regardless of whether that phase was considered in isolation or as partially overlapping with another phase. The approach taken by the Secretariat in its initial study and in its memorandums, which was the same as that taken by IFRC, focused on the law applicable to the aspect of response, although that did not imply that it either ignored or dismissed the increasing importance attached to prevention, mitigation, preparation and rehabilitation. It could be deduced from the debate that members, too, believed that the study should focus initially on the law applicable to the aspect of response, dealing thereafter with those of prevention, mitigation and preparation, and possibly at a later stage, with certain elements of rehabilitation, especially those following in the immediate wake of a disaster.

46. Protection in the event of disasters referred to the protection of persons from the specific standpoint of those persons who were victims of a disaster. That suggested an approach which, if not rights-based, would at the very least take rights into account. Such an approach was implied in the narrower definition of protection. A distinction had been drawn between the broader and narrower definitions of protection simply for interpretative reasons, not as a means of differentiating legal consequences in the context of disasters. However, since certain members

had expressed a desire for greater clarification, he could hardly improve on the comment by another member that protection *stricto sensu* corresponded to a rights-based approach, whereas the *lato sensu* approach relied more closely on other notions, in particular, assistance.

47. Since, as had been stressed by many speakers, the purpose of the Commission's study of protection of persons in the event of disasters was the progressive development and codification of the international law applicable in that field, an approach that focused on victims' rights was perhaps the most solid legal foundation on which to base such protection. The enforceable nature of those rights would entail the corresponding obligation or duty of States and intergovernmental actors, without prejudice to their own rights in their capacity as States or international organizations. The corpus of law underlying the protection of persons in the event of disasters presupposed the unconditional application of the fundamental rules and principles of international law, both conventional and customary. That body of law was based on the recognition of national sovereignty and was reflected in the Charter of the United Nations, international humanitarian law, international human rights law and international law on refugees and internally displaced persons. It followed from the guiding principle of State sovereignty that it was the State that was primarily responsible for affording protection to victims of disasters that affected its territory or to persons living under its jurisdiction or control. From that basic principle it could be deduced that humanitarian assistance could be provided only if the State directly affected by the disaster had consented to such assistance. Essential principles of international law, such as the prohibition of the threat or use of force, non-intervention and international cooperation, which had been codified in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, were at the very top of the list of applicable principles, as were the principles of solidarity, humanity, neutrality, impartiality and non-discrimination and international human rights norms, which included the rights and freedoms enjoyed by a person under international law. Legal regimes that more directly governed the protection of persons were guided by the same basic objective: to provide protection to persons in all circumstances.

48. The body of law he had referred to previously was the backdrop against which specific problems that emerged in providing humanitarian assistance in specific disasters should be seen. A rights-based approach, in other words a legal approach, and a problem-based approach, in other words an operational approach, were not to be seen as opposite, but instead as complementary approaches.

49. Concerning the protection of property and the environment, the view had been expressed that if a disaster affected or threatened the life, physical integrity and basic needs of a person, the Commission's study should not omit those two aspects of protection. If, on the other hand, only their degree of affluence, or the environment in general, was affected, the protection of property and the environment should not fall within the scope of the study.

²¹⁹ *Yearbook ... 2006*, vol. II (Part Two), p. 206.

50. Lastly, while the main actors assisting victims of a disaster were States and intergovernmental bodies, the Commission's study should also take into account the often irreplaceable humanitarian assistance provided by such entities as IFRC and NGOs, and also by enterprises and individuals, in keeping with the principle of subsidiarity.

51. The Commission had clearly demonstrated that it could respond in a constructive and effective way to the invitation he had extended to it in his preliminary report, by providing him with specific guidance that would further his study of the topic when preparing his next report.

Immunity of State officials from foreign criminal jurisdiction²²⁰ (A/CN.4/596 and Corr.1,²²¹ A/CN.4/601²²²)

[Agenda item 9]

PRELIMINARY REPORT OF THE SPECIAL RAPporteur

52. Mr. KOLODKIN (Special Rapporteur), introducing his preliminary report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/601), apologized for its length and, with all due respect to its translators for their excellent work, for some discrepancies with the original Russian text. He thanked the Secretariat for a highly informative memorandum (A/CN.4/596) that gave a good idea of the wealth of material on the topic and also his assistants Ms. Sarenkova, Ms. Shatalova and Ms. Tezikova, without whom he would have had difficulty in sifting through the vast volume of sources used in the report.

53. The text reproduced in annex I to the Commission's report on the work of its fifty-eighth session²²³ had shown the extreme topicality of the issue, a state of affairs that had not changed in the two years since then. New decisions had been handed down by national courts and new scholarly works published. As recently as 4 June 2008, the ICJ had issued a decision in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* in which the topic occupied a prominent place. While that decision was not covered in the report, which had made use only of those materials available at the time of writing, it was taken into account in the latest version of the Secretariat memorandum.

54. As he saw it, the purpose of the preliminary report was, first, to briefly describe the history of the consideration of various relevant issues by the Commission and the Institute of International Law. The Commission was not starting from scratch: it had already discussed the concepts of "immunity", "jurisdiction" and "immunity from jurisdiction" and the question of who could be

considered as a high-ranking official with immunity from foreign jurisdiction, together with a number of other relevant issues. The work of the Institute on the resolution adopted in 2001, entitled "Immunities from jurisdiction and execution of Heads of State and of Government in international law",²²⁴ was also of undoubted interest.

55. Next—and that was the main purpose of the preliminary report—he had attempted to give a rough outline, first, of the issues which should in principle be analysed by the Commission as part of its consideration of the topic; and secondly, of the issues that should probably be addressed by the Commission in formulating an instrument as a result of its consideration of the topic.

56. There was much material of relevance to the topic: State practice, national legislation, the decisions of domestic courts, the case law of international courts and tribunals and, in particular, of the ICJ, including two of its recent decisions, and a massive body of legal literature, especially in the wake of the *Pinochet* case. He had chiefly drawn on materials in English, French and Russian, the languages in which he was well versed, and any gaps were at least partially filled by the Secretariat memorandum.

57. In discussing the various issues in the report, he had tried to represent the different viewpoints, sometimes expressing his own, despite his lack of familiarity with some of the issues. Furthermore, although there were a good many footnotes to the report, he had by no means exhausted the sources on the topic.

58. The report before the Commission, although sizeable, was only part of the preliminary report. It drew attention to some preliminary issues and initiated the consideration of issues directly concerning the scope of the topic, including which State officials should be covered. It did not address the scope of the immunity enjoyed by the State officials to be covered or the so-called "procedural" aspects, for example the waiver of the immunity of a State official. It was his intention to address those two extremely important aspects of the topic in a preliminary manner the following year, in the remainder of his preliminary report.

59. The very title of the topic established its boundaries in the most general terms. First, it concerned only immunity of State officials from foreign criminal jurisdiction. The words "foreign" and "criminal" were important in that they signified that the matters to be studied were not immunity from international criminal jurisdiction or from national civil or national administrative jurisdiction as such, although material relating to the consideration of such issues could be useful in the work on the topic. Secondly, the topic concerned immunity of the officials of one State from the jurisdiction of another State: in other words, the intention was not to consider *per se* questions of immunity of officials from the jurisdiction of their own State. Lastly, the topic covered immunity grounded in international law. Immunity could be granted to officials of another State on the basis of domestic law as well, but such cases were of interest for the purposes of the present

²²⁰ The Commission included the topic in its long-term programme of work at its fifty-eighth session (2006), *Yearbook ... 2006*, vol. II (Part Two), p. 185, para. 257 and annex I. The Commission decided to include the topic in its programme of work in 2007 and appointed Mr. Roman Kolodkin as Special Rapporteur for the topic, *Yearbook ... 2007*, vol. II (Part Two), para. 376.

²²¹ Mimeographed; available on the Commission's website.

²²² Reproduced in *Yearbook ... 2008*, vol. II (Part One).

²²³ *Yearbook ... 2006*, vol. II (Part Two), p. 191.

²²⁴ Institute of International Law, *Yearbook*, vol. 69 (2000–2001), Session of Vancouver (2001), pp. 743 *et seq.*

topic only in that the corresponding provisions of domestic law could be seen as constituting evidence of the existence of customary international law in that sphere.

60. Turning to the so-called “preliminary” issues, he said that in his study of the materials pertaining to the topic, he had searched for evidence that the source of immunity was above all the law, and specifically, international law. Admittedly, in some cases courts considered the question on the basis either of domestic law alone or of domestic law and international comity, but not from the standpoint of international law. In the literature, too, the view was sometimes expressed that the immunity of State officials from foreign jurisdiction was more a matter of international comity, or a manifestation of the goodwill of one State towards another State and its officials than one of international law. However, the immunity of State officials from foreign jurisdiction was a matter of intergovernmental relations. He had needed to be convinced that the predominant position in State practice, the literature and the decisions of the ICJ was that the source of the immunity of State officials from foreign criminal jurisdiction was international law, or more specifically, customary international law. In his view, there was sufficient evidence to show that there was indeed customary international law in that area. That did not mean that international law was the sole source of immunity: questions of immunity could, in addition, be resolved by the rules of domestic law and of international comity, but international law was the primary basic source in that domain.

61. The report described the concepts of “immunity”, “jurisdiction”, “criminal jurisdiction” and “immunity from jurisdiction” as being related but different. For the purposes of the topic, it was important that criminal jurisdiction, as opposed to civil jurisdiction, not be equated with judicial jurisdiction. Criminal jurisdiction often came into play long before the actual trial phase of the legal proceedings, and the question of the immunity of officials from foreign criminal jurisdiction generally arose well before the case went to court. The question was often resolved at the pretrial stage through diplomatic channels as a result of the actions of the executive branch, not of the court. One might speculate that many cases in which States raised the question of the immunity of officials with one another were not made known to the public.

62. In contrast to civil jurisdiction, criminal jurisdiction was exercised solely in respect of individuals, and not of States, yet it could affect the interests and intervene in the affairs of foreign States, albeit indirectly, to a much greater extent than could civil jurisdiction. As it often entailed criminal investigation of high-ranking officials, the exercise of criminal jurisdiction could affect vital areas of State sovereignty and security. That was why the immunity of State officials from foreign criminal jurisdiction was of such crucial importance for intergovernmental relations.

63. The issue of immunity from foreign criminal jurisdiction arose in connection with the exercise of various types of jurisdiction: territorial, extraterritorial and universal, *inter alia*, but it would seem that issues of jurisdiction should be considered solely in preliminary terms and that there was no need for the Commission to formulate draft provisions on jurisdiction.

64. As for immunity, or immunity from jurisdiction, the materials studied confirmed that a legal rule or principle was involved. The rule, and the legal relations to which it gave rise, was a combination of a right, and a corresponding obligation: on the one hand, the right for the foreign State’s criminal jurisdiction not to be exercised over the official who enjoyed immunity, and, on the other, the obligation of the State that had jurisdiction not to exercise it. A further question concerned the precise nature of the obligation of the foreign State that had jurisdiction: was it the so-called “negative obligation” not to exercise jurisdiction, or also the so-called “positive obligation” to take steps to prevent violations of immunity?

65. The following should also be borne in mind. First, according to what seemed to him to be the predominant view, which he shared, immunity did not denote exemption from legislative or prescriptive criminal jurisdiction. In other words, the immunity of State officials did not exempt them from the application of the rules of substantive foreign law, nor, consequently, from the substantive conditions of criminal responsibility. Immunity from foreign criminal jurisdiction consisted solely of immunity from procedural or procedural and judicial jurisdiction (depending on the type of jurisdiction involved). In other words, the immunity of State officials from foreign criminal jurisdiction was immunity from criminal process, from law enforcement actions, but not from the law of the State exercising jurisdiction. Such was the procedural nature of the rules on immunity, although the report noted that there was another viewpoint whereby immunity was not only procedural but also substantive. Immunity was merely a procedural obstacle to the invocation of criminal responsibility. It sufficed for the State to waive the immunity of its official, and of course for the necessary material conditions to apply, and criminal responsibility could then be invoked against that official by and under the law of the foreign State.

66. Secondly, even at the current stage of consideration of the topic, he had the impression that the very way in which the question of immunity from foreign jurisdiction was posed was not very well grounded. It was actually a question, not of immunity from criminal jurisdiction, but of immunity from certain criminal procedural actions, from criminal prosecution by the foreign State. However, clarity on the question of precisely which of those actions were covered by immunity could be provided only after the question of the extent of immunity had been analysed. In that regard, the decision of the ICJ in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* was exceptionally interesting.

67. The report raised the question whether, in formulating draft provisions on immunity, the Commission should try to define the concept of “immunity” for the purposes of the topic. He had no ready reply to that question and wished only to point out that in its work on the topic of jurisdictional immunities of States,²²⁵ the Commission had refrained from doing so.

²²⁵ Draft articles on jurisdictional immunities of States and their property, *Yearbook ... 1991*, vol. II (Part Two), pp. 13 *et seq.* The General Assembly adopted the United Nations Convention on Jurisdictional Immunities of States and their Property in its resolution 59/38 of 2 December 2004.

68. The report reviewed the well-known division of the immunity of State officials into immunity *ratione personae* and *ratione materiae*. He had the impression that the categorization was widely used for analytical purposes but virtually never in formulating normative provisions. Moreover, despite the differences between those types of immunity, they had much in common. In the final analysis, it was the State that stood behind all types of immunity. Only the State had the right to waive the immunity of its serving or former officials, diplomatic agents, consular officials and members of special missions. The waiver of immunity would be analysed in detail in his next report.

69. The current report also considered the question of the rationale for the immunity of State officials, a question that had a bearing on the determination of which individuals enjoyed immunity and the extent of immunity. Notwithstanding a certain tendency, including in the literature, to give immunity an exclusively functional rationale, he had the impression that the immediate basis was both functional and representative in nature. That immediate rationale was in turn based on more fundamental political and legal grounds. Immunity flowed from the international legal principles of State sovereignty and non-intervention in the internal affairs of States, and, on the political level, from the need to maintain stable and predictable relations among States. All the rationales adduced for immunity were interrelated.

70. A summary of the section of the report dealing with preliminary issues was to be found in paragraph 102.

71. The following points could be made with regard to the scope of the topic. The title referred simply to State officials. An easier approach would have been to narrow the scope to cover only Heads of State, Heads of Government and Ministers for Foreign Affairs. The Commission had done precisely that, for example, in its draft articles on special missions.²²⁶ The Institute of International Law in its 2001 resolution had chosen to confine itself to Heads of State and Heads of Government. Nevertheless, the report proposed that all State officials be dealt with, in full accordance with the title of the topic. It was generally acknowledged that all State officials enjoyed immunity from foreign jurisdiction in relation to actions taken in their official capacity, in other words, immunity *ratione materiae*. Such an approach would be pragmatic, since, in practice, States encountered the issue of the immunity from foreign criminal jurisdiction with respect to various categories of their officials.

72. The term “State official” was widely used in practice and in the literature, but remained undefined, at least in universal international treaties. If the Commission was to formulate draft articles, then a definition or a least a description of the term would have to be given. Perhaps the approach used in drafting article 4, paragraph 2, of the draft articles on responsibility of States,²²⁷ in which an organ of the State was defined, might be useful.

73. A very small circle of officials enjoyed immunity from foreign criminal jurisdiction during their time in office in relation to all acts, irrespective of whether they were committed in a personal or official capacity; in other words, they enjoyed personal immunity or immunity *ratione personae*. However, who precisely fell within that circle of officials was far from clear. Since the recent decision of the ICJ in the *Arrest Warrant* case, it was obvious that the group included Heads of State, Heads of Government and Ministers for Foreign Affairs, but even so, one could not affirm that it was confined to those three categories of high-ranking official.

74. The Commission had already wrestled with the problem of defining the circle of high-ranking State officials enjoying a special status under international law during the preparation of its sets of draft articles on special missions, on representation of States in their relations with international organizations²²⁸ and on the prevention and punishment of crimes against internationally protected persons.²²⁹ It had at that time been unable and unwilling to resolve the problem, and it was unlikely to be solved now by drawing up a list of the officials concerned. In general, such a determination belonged to the realm of States’ domestic law. It would appear to require the definition of criteria which, if met by a State official, gave him or her personal immunity, and in the absence of which that official did not enjoy such immunity. It was his understanding that France, and Mr. Pellet, had referred to such criteria during the oral pleadings in the *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* case, when it had been submitted that personal immunity could be enjoyed only by those high-ranking State officials an essential and predominant part of whose functions was representation of their Government in international relations. The question arose, however, whether that was the sole precondition required to enable such an official to enjoy personal immunity. He was not convinced that it was. For example, representation of the Government in international relations was hardly an essential and predominant part of the functions of a minister of defence. Although, in the modern world, ministers of defence often participated actively in international affairs, their basic function, and that of certain other high-ranking officials who also periodically represented their Government in international relations, was participation in decisions directly relating State sovereignty and security.

75. In the Russian Federation, for example, the First Deputy Head of Government dealt with foreign economic and policy matters along with the President, the Head of Government and the Minister for Foreign Affairs. That was a higher and more important position within the Government than that of Minister for Foreign Affairs. In many instances he represented the Government in the international arena and gave instructions to the Minister for Foreign Affairs, even though foreign policy matters could not be said to predominate among his concerns. Would it not be strange to affirm that the Minister for Foreign Affairs of the Russian Federation enjoyed personal immunity, whereas the First Deputy Head of Government did not? The question arose whether the importance of the functions carried out by a high-ranking official in terms of

²²⁶ *Yearbook ... 1967*, vol. II, document A/6709/Rev.1 and Rev.1/Corr.2, p. 361.

²²⁷ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 26.

²²⁸ *Yearbook ... 1971*, vol. II (Part One), document A/8410/Rev.1, p. 284.

²²⁹ *Yearbook ... 1972*, vol. II, document A/8710/Rev.1, p. 341.

safeguarding State sovereignty should not also be a criterion, in addition to representation of the Government in international relations, for the inclusion of such an official among those who enjoyed personal immunity.

76. Another aspect of the scope of the topic was the temporal factor. The topic should encompass both the immunity of incumbent officials and that of former officials.

77. One of two questions that were at the margins of the topic and could be included if the Commission so desired was that of recognition. It was of some importance to the topic and was sometimes touched on, both in the literature and in practice, in the consideration of the immunity of State officials. One might cite the United States court decisions in the *United States v. Noriega and Others* and *Lafontant v. Aristide* cases in that connection. The issue of recognition arose primarily when there was some doubt to the status of the individual whose criminal prosecution was involved, in other words some doubt, first, as to whether the entity that the individual served was a Government and, secondly, whether the individual was the Head of State. In the context of the topic, the question of recognition arose mainly in exceptional situations. The Institute of International Law had been wise to leave the question to one side, simply incorporating a “without prejudice” clause in article 12 of its 2001 resolution.

78. The second question that sometimes arose in practice and in the literature related to the immunity of members of the families of officials, though it usually concerned the families of high-ranking officials. While he personally did not see that question as falling within the scope of the topic, members of the Commission might take a different view.

79. A summary of that part of the report was contained in paragraph 130.

80. In conclusion, he first reiterated that the Commission did not yet have before it the full preliminary report: the sections on the extent of immunity and procedural aspects, including waiver of immunity, were still lacking. Those key components would be presented at the next session. Secondly, certain political issues and the interrelationship between political and legal interests that formed the backdrop to the topic and made it of such topical interest had not been touched upon. They were discussed in the annex to the Commission’s report on the work of its fifty-eighth session, which showed the immense relevance of the topic; in actual fact, they were most pertinent to the issue of the extent of immunity. Lastly, many members of the Commission themselves had personal experience of the topic in the context of their professional concerns and activities.

Cooperation with other bodies (*continued*)*

[Agenda item 12]

STATEMENT BY THE PRESIDENT OF THE
INTERNATIONAL COURT OF JUSTICE

81. The CHAIRPERSON said that each year the Commission had the honour and privilege to receive a visit

from the President of the International Court of Justice, whose presence was of great significance for the Commission. He invited Judge Rosalyn Higgins to address the Commission.

82. Judge Rosalyn HIGGINS (President of the International Court of Justice) said that she was delighted to address the International Law Commission once again after having spoken at its sixtieth anniversary celebrations two months previously. She extended warm greetings to the Chairperson and to all the members of the Commission. She was especially glad to have been present during the presentations given by Mr. Kolodkin and Mr. Valencia-Ospina, each of which she had found to be of the greatest interest. As she had done for the past two years, she would report on the judgments rendered by the ICJ over the past year, drawing special attention to those aspects that had a particular relevance to the work of the Commission. Since her address to the Commission at its fifty-ninth session, the Court had rendered five decisions: three judgments on the merits, a judgment on preliminary objections and an order regarding provisional measures. The five cases had involved States of Africa, Asia, Europe, Latin America and North America, and the subject matter had ranged from the delimitation of maritime zones, to the determination of sovereignty over maritime features and mutual assistance in criminal matters, and the interpretation of an earlier judgment.

83. She would begin with the judgment on the merits in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, which the Court had delivered on 8 October 2007. Nicaragua had asked the Court to determine the course of the single maritime boundary between the areas of territorial sea, continental shelf and exclusive economic zone appertaining respectively to Nicaragua and Honduras in the Caribbean Sea.

84. In that case, Nicaragua had maintained that the maritime boundary had never yet been delimited, while Honduras had contended that there already existed a traditionally recognized *uti possidetis* boundary running along the 15th parallel. Honduras had argued in the alternative that the 15th parallel had been tacitly agreed between the parties to serve as their maritime boundary. During the oral proceedings, Nicaragua had made a specific request for the Court to pronounce also on sovereignty over cays located in the disputed area north of the 15th parallel. Although that claim was formally a new one, the Court had considered it to be admissible because it was inherent in the original claim. Given the tenet that “the land dominates the sea”, in order to plot the maritime boundary, the Court would first have to decide which State had sovereignty over the islands and rocks in the disputed area—a finding that necessarily had territorial implications.

85. In respect of sovereignty over those four cays, Honduras had relied on the principle of *uti possidetis juris* as the basis of sovereignty. The Court had observed that *uti possidetis juris* might, in principle, indeed apply to offshore possessions and maritime spaces. However, it had to be shown in the present case that the Spanish Crown had allocated the disputed islands to one or the other of its colonial provinces. As the parties had neither provided

* Resumed from the 2978th meeting.

evidence clearly showing whether the islands were attributed to the colonial provinces of Nicaragua or of Honduras prior to or upon independence, nor persuaded the Court of the existence of colonial *effectivités*, the Court had concluded that it had not been established that either Honduras or Nicaragua had title to those islands by virtue of *uti possidetis*. After examining the evidence, the Court had concluded that Honduras had sovereignty over the four islands on the basis of post-colonial *effectivités*.

86. As for the delimitation of the maritime areas between the two States, the Court had considered the arguments of Honduras of an *uti possidetis juris* line and tacit agreement. The Court had rejected the *uti possidetis* argument, finding that the *Case concerning the Arbitral Award made by the King of Spain on 23 December 1906*, which was indeed based on the *uti possidetis juris* principle, did not deal at all with the maritime delimitation between Nicaragua and Honduras. As to the argument of tacit agreement, the Court had carefully considered the evidence produced by Honduras, which did include relevant evidence, such as sworn statements by a number of fishermen attesting to their belief that the 15th parallel was understood by all to represent an international boundary. That had given the Court the opportunity, as it had done on previous occasions, as in its 2005 judgment in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, to continue to build up the body of its jurisprudence on evidence. The Court had noted in paragraph 244 of the judgment rendered in the *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* case:

... that witness statements produced in the form of affidavits should be treated with caution. In assessing such affidavits the Court must take into account a number of factors. These would include whether they were made by State officials or by private persons not interested in the outcome of the proceedings and whether a particular affidavit attests to the existence of facts or represents only an opinion as regards certain events. The Court notes that in some cases evidence which is contemporaneous with the period concerned may be of special value. Affidavits sworn later by a State official for purposes of litigation as to earlier facts will carry less weight than affidavits sworn at the time when the relevant facts occurred. In other circumstances, where there would have been no reason for private persons to offer testimony earlier, affidavits prepared even for the purposes of litigation will be scrutinized by the Court both to see whether what has been testified to has been influenced by those taking the deposition and for the utility of what is said.

87. Although there was patchy evidence of some agreements on conduct, in the event the Court had concluded that there was no tacit agreement in effect between the parties of a nature to establish a legally binding maritime boundary. Therefore, the Court had had to proceed to draw the boundary itself. In attempting to do so as succinctly as possible, it certainly would have preferred to use the equidistance method with regard to the territorial seas. Given its recent case law, particularly in the 2001 judgment in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* and the 2002 judgment in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, the Court would have preferred to continue to use that method even beyond the territorial seas, where the formulae of articles 74 and 83 of the United Nations Convention on the Law of the Sea were, of course, much more ambiguous. The Court had, however, essentially been precluded from using that method by the geography and the topography in

question. Cape Gracias a Dios, where the Nicaraguan land boundary ended, was a sharply convex territorial projection, and as if that were not enough, it had concave areas on both sides. That had limited the choice of basepoints that the Court could use, and any variation or error in situating those points would have become disproportionately magnified in any resulting equidistance line. Moreover, the mouth of the Coco River, which joined the sea at Cape Gracias a Dios, was constantly changing its shape, with unstable islands forming and moving and sometimes even disappearing over time. Taking all those factors into account, the Court had found that it could not use the preferred practice of establishing an equidistance line. Thus, as far as the territorial sea was concerned, the Court had found itself in the “special circumstances” referred to in article 15 of the United Nations Convention on the Law of the Sea as an example of when equidistance might perhaps not be used.

88. The Court had thus decided to construct a bisector line, finding that the method would give the delimitation line greater stability as it would be less affected by instability around the area of Cape Gracias a Dios and would also greatly reduce the risk of error. The Court had used the bisector method for the entire boundary. That line had then been adjusted to take into account the territorial seas around the four cays—an adjustment that had been interesting exercise in itself.

89. In her view, one of the most interesting sections of the judgment concerned how to identify the relevant coasts for the drawing of the bisector line. Honduras had suggested very narrow sectors of coast, whereas Nicaragua had contended that the entire coasts of each State facing the Caribbean Sea should be used as the reference point. Ultimately, the Court had focused on selecting coastal fronts that would avoid the problem of “cutting off” Honduran territory while at the same time provide a façade of sufficient length to account properly for the coastal configuration in the disputed area.

90. Two months later, on 13 December 2007, the Court had issued a judgment on preliminary objections in another case brought by Nicaragua, namely in the *Territorial and Maritime Dispute (Nicaragua v. Colombia)*. The underlying dispute concerned sovereignty over islands and cays in the western Caribbean and the course of the single maritime boundary between areas of continental shelf and exclusive economic zones. Colombia had raised two preliminary objections based on the American Treaty on Pacific Settlement (Pact of Bogota) and on Article 36, paragraph 2, of the Statute of the International Court of Justice, the “optional clause”. Given the limited amount of time available, she would focus on some of the more interesting aspects of that case.

91. First, the Court had had to decide what the subject matter of the dispute was. That process had entailed some debate between the parties as to what was already “legally determined” (and therefore could not be the subject of a dispute *de novo* before the Court) and what still remained unsettled. Colombia had claimed that the matters raised by Nicaragua had already been settled by the 1928 Treaty concerning Territorial Questions at issue between the two States and its 1930 Protocol of

Exchange of Ratifications.²³⁰ Nicaragua had replied that the question whether the 1928 Treaty had settled all issues between the parties was “the very object of the dispute” and “the substance of the case”. The Court had considered that the question whether the 1928 Treaty and 1930 Protocol settled certain matters did not form the very subject matter of the dispute between the parties and that, in the circumstances of the case, that question was therefore to be seen as a preliminary one. Rather, the questions that formed the subject matter of the dispute were, first, sovereignty over territory (namely islands and other maritime features claimed by the parties) and, secondly, the course of the maritime boundary between the parties.

92. Having clarified those issues, the Court had proceeded to examine Colombia’s first preliminary objection that, pursuant to articles VI and XXXIV of the American Treaty on Pacific Settlement (Pact of Bogota), the Court was without jurisdiction to hear the controversy submitted to it by Nicaragua under article XXXI of the Pact. Article VI of the Pact provided that the dispute settlement procedures in the Pact “may not be applied to matters already settled by arrangement between the parties”.

93. Colombia was thus arguing that the 1928 Treaty and 1930 Protocol had settled matters between the parties at the date of the conclusion of the Pact in 1948, while Nicaragua contended that the 1928 Treaty was invalid, or had been terminated, and that, even if that were not the case, it did not cover all the matters in dispute between the parties.

94. The Court had held that the 1928 Treaty had still been valid and in force at the date of the conclusion of the Pact of Bogota in 1948. It had then been able to proceed to decide what, if anything, had been settled by the 1928 Treaty. It had found that sovereignty over three named islands, San Andrés, Providencia and Santa Catalina, had been settled by the Treaty. However, various other questions before the Court—the scope and composition of the San Andrés Archipelago, sovereignty over certain cays and the issue of maritime delimitation—had not been settled by the 1928 Treaty and the Court would therefore have jurisdiction to decide them at the merits stage of proceedings.

95. A second key issue in that case, concerning what might be decided at which stage, had been the relationship between two titles of jurisdiction, one based on the Statute of the International Court of Justice and the other based on a treaty. The issue had arisen because Nicaragua had argued that jurisdiction was based on both the Pact of Bogota and the optional clause of the Statute of the International Court of Justice. The Court had concluded that, when it was faced with two titles, it could not deal with them simultaneously and would therefore proceed from the particular to the more general. However, it had clearly and deliberately stopped short of implying that the Pact prevailed over and excluded the optional clause. The

provisions of the Pact and the declarations made under the optional clause represented two distinct bases of the Court’s jurisdiction which were not mutually exclusive.

96. The Court was now moving on to the examination of the merits in that case and had fixed November 2008 as the time limit for the filing of the counter-memorial of Colombia. The Court had three other pending cases on its docket that invoked the Pact of Bogota as a basis of jurisdiction, namely the *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*; the *Maritime Dispute (Peru v. Chile)* and the *Aerial Herbicide Spraying (Ecuador v. Colombia)* case. Throughout the hearings, the Great Hall of Justice had been filled with Latin American ambassadors, who had followed those cases avidly.

97. After that line of cases involving Latin American States, the Court had issued a judgment in May 2008 on the merits in a case between two Asian States, *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, which had been submitted to the Court jointly by Malaysia and Singapore by special agreement between the parties. As she had previously advised one of the parties at an earlier stage in her legal career, she had recused herself from the case and it had been presided over by the Vice-President, Judge Al-Khasawneh. The dispute had once again involved sovereignty over maritime features and had been fact-heavy, with some 4,000 pages of pleadings, many of which had related to diplomatic history.

98. Malaysia’s contention that it possessed original title to Pedra Branca/Pulau Batu Puteh, which dated back from the time of its predecessor, the Sultanate of Johor, had been upheld by the Court, which had found that the Sultanate of Johor had held original title there. It had next studied developments between 1824 and the 1840s, and had concluded that none of those developments had brought any change to the original title.

99. The Court had then examined all the subsequent events between the 1840s and 1952, but had found that none of them affected the original title. The Court had, however, placed great emphasis on a letter written on 12 June 1953 to the British Adviser to the Sultan of Johor, in which the Colonial Secretary of Singapore had asked for information about the status of Pedra Branca/Pulau Batu Puteh in the context of determining the boundaries of the “colony’s territorial waters”. In a letter dated 21 September 1953, the Acting State Secretary of Johor had replied that “the Johore Government [did] not claim ownership” of the island. The Court had found that the reply had shown that, as of 1953, Johor had understood that it did not have sovereignty over Pedra Branca/Pulau Batu Puteh.

100. Lastly, the Court had examined the conduct of the parties after 1953 with respect to the island. It had found considerable evidence of conduct *à titre de souverain* on the part of Singapore after that date. The Court had been able to conclude that, by 1980 (the date when the dispute had crystallized), sovereignty over Pedra Branca/Pulau Batu Puteh had passed to Singapore and still lay with Singapore.

²³⁰ Treaty concerning Territorial Questions at issue between the two States (Managua, 24 March 1928) and Protocol of Exchange of Ratifications (Managua, 5 May 1930), League of Nations, *Recueil des Traités*, vol. CV, No. 2426, p. 337.

101. As for Middle Rocks, the Court had observed that the particular circumstances that had led it to find that sovereignty over Pedra Branca/Pulau Batu Puteh rested with Singapore did not apply to Middle Rocks and that original title remained with Malaysia as the successor to the Sultanate of Johor. As for South Ledge, the Court had noted that the low-tide elevation fell within the apparently overlapping territorial waters generated by Pedra Branca/Pulau Batu Puteh and Middle Rocks. As the Court had not been mandated by the parties to draw the line of delimitation with respect to their territorial waters, it had concluded that sovereignty over South Ledge belonged to the State in the territorial waters of which it was located.

102. After that series of territorial and maritime disputes, in June 2008 the Court had delivered a judgment in a very different type of case, that concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, which had raised a number of legal issues that the members of the Commission might find to be pertinent to their work. The Court had found the area of immunity from criminal jurisdiction to be underdeveloped, and it therefore greatly welcomed the fact that it was receiving the Commission's serious attention.

103. Forming a backdrop to the case had been the death of Judge Bernard Borrel, a French national who had been seconded as technical adviser to the Ministry of Justice of Djibouti. On 19 October 1995, the body of Judge Borrel had been discovered 80 kilometres from the city of Djibouti. Various judicial investigations to determine the cause of his death had been opened in Djibouti and France. The case in France had been known as the *Case against X for the murder of Bernard Borrel*. Both parties had concurred that it was not for the ICJ to determine the circumstances in which Judge Borrel had met his death. Rather, the dispute before the Court concerned the resort to bilateral treaty mechanisms that existed between the parties for mutual assistance in criminal matters.

104. On 9 January 2006, Djibouti had filed an application against France in respect of a dispute concerning the refusal by the French governmental and judicial authorities to execute an international letter rogatory regarding the transmission to the judicial authorities in Djibouti of the record relating to the investigation in the *Case against X for the murder of Bernard Borrel*, in violation, it was said, of two bilateral treaties, the Convention concerning judicial assistance in criminal matters of 27 September 1986²³¹ and the Treaty of friendship and co-operation of 27 June 1977.²³²

105. The application had further referred to the issuing, by the French judicial authorities, of witness summonses to the Djibouti Head of State and senior Djibouti officials, allegedly in breach of, among other things, the principles and rules governing diplomatic privileges and immunities.

106. By a letter dated 25 July 2006, the French Minister for Foreign Affairs had informed the Court that

France consented to the Court's jurisdiction to entertain the application on the basis of article 38, paragraph 5, of the Rules of the Court, i.e. *forum prorogatum*, while specifying that the consent was "valid only ... in respect of the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein" by Djibouti.

107. That had been the first time that it had fallen to the Court to decide on the merits of a dispute brought before it on the basis of *forum prorogatum*. Rather as it had done in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, because that procedure was not likely to be used very frequently, the Court had taken the opportunity to fill out as much relevant detail as seemed appropriate in order to provide guidance in the future. The judgment therefore contained some rather detailed paragraphs on points relating to *forum prorogatum* which were relevant to deciding what was, and what was not, on the basis of the way that France had formulated its acceptance in the light of the application, within the Court's jurisdiction.

108. On the merits, the case had raised a number of interesting legal issues, including the role of the internal law of a State when there was a dispute as to compliance with a treaty which itself made reference to internal law; the duty to give reasons for refusal to cooperate as envisaged in a treaty; and the immunities of State officials from foreign criminal jurisdiction.

109. Article 3 of the 1986 Convention concerning judicial assistance in criminal matters provided that a State to which a request for mutual assistance had been made "shall, in accordance with its legislation, cause to be executed letters rogatory relating to a criminal case which are forwarded to it by the judicial authorities of the requesting State". Djibouti had argued that that article created an obligation of result and that the requirement for a State to execute letters rogatory "in accordance with its legislation" merely indicated the procedure to be followed in the performance thereof. According to Djibouti, that interpretation was consonant with article 27 of the 1969 Vienna Convention, which stipulated that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". There were many echoes of that position in the even more recent *Avena* case. France had countered that article 3 of the 1986 Convention in fact constituted a direct reference to the internal law of the requested State and that accordingly, the means would determine the outcome. Put another way, France considered that, provided that the correct internal procedure of a State was followed, the obligation to execute "in accordance with its legislation" under article 3 would be properly met.

110. On that point, the Court had held in paragraph 123 of its judgment that:

the ultimate treatment of a request for mutual assistance in criminal matters clearly depends on the decision by the competent national authorities, following the procedure established in the law of the requested State. While it must of course ensure that the procedure is put in motion, the State does not thereby guarantee the outcome, in the sense of the transmission of the file requested in the letter rogatory.

²³¹ United Nations, *Treaty Series*, vol. 1695, No. 29220, p. 297.

²³² *Ibid.*, vol. 1482, No. 25292, p. 193.

111. The Court had seen no reason why article 27 of the 1969 Vienna Convention would be applicable in that instance, because the requested State, France, was invoking its internal law not to justify an alleged failure to perform its international obligations under the 1986 Convention concerning judicial assistance in criminal matters, but, on the contrary, to apply them according to the very terms of that Convention.

112. The Court had then considered the nature of the duty to give reasons for a refusal of mutual assistance. It had been unable to accept France's contention that the fact that the reasons had come within the knowledge of Djibouti during the proceedings meant that there had been no violation of the duty. A legal obligation to notify reasons for refusing to execute a letter rogatory had not been fulfilled through the requesting State learning of the relevant documents only in the course of litigation, some months later. It had added that the bare reference to the exception contained in the Convention did not satisfy the duty to give reasons; some brief further explanation was called for. That was not only a matter of courtesy, but also served the purpose of allowing the requested State to substantiate its good faith in refusing the request. Conversely, it might also enable the requesting State to see whether its letter rogatory could be modified so as to produce a better outcome, were it to try again.

113. The Court had thus found that France's reasons for refusing to transfer the record of the investigation in the *Borrel* case to the Djiboutian authorities had been in good faith and fell within the provisions of the 1986 Convention concerning judicial assistance in criminal matters, even though those reasons had not been shared with Djibouti. So, on the one hand, France's refusal was within the terms of the Convention but, on the other, France had violated its obligation under the Convention to give reasons for its refusal to execute the letter rogatory.

114. In addition to the claims regarding the letter rogatory, the Court had had to consider Djibouti's claims that the immunities of its Head of State and two senior State officials had been violated by France through the issuance of witness summonses. That was another element which had to be examined in order to determine what amounted to an infringement of immunity, once it had been decided that in principle there were persons who might be entitled to immunity. The immunity of State officials from foreign criminal jurisdiction was a complex matter and the facts in that case had not allowed the Court to enter into a detailed examination of the topic. She hoped that its limited legal findings would, however, be pertinent for the Commission's consideration of that important and difficult issue.

115. With regard to the Head of State, Djibouti had referred to two witness summonses issued by a French investigating judge to President Guelleh on 17 May 2005 and 14 February 2007. As each differed in form, the Court had considered them separately. The 17 May 2005 summons had been issued during President Guelleh's official visit to the President of the French Republic in Paris. The summons inviting President Guelleh to attend in person at the investigating judge's office at 9.30 a.m. the following day had been sent by the judge by facsimile to

the Embassy of Djibouti in France. Djibouti had argued that the summons contained an element of constraint, citing various provisions of the French Code of Criminal Procedure. France had replied that President Guelleh had been summoned as an ordinary witness and not as a "*témoïn assisté*"—a person against whom there was evidence that he or she could have participated as the perpetrator or accomplice in the offence in question. France had admitted that the summons had been issued with procedural defects, but had claimed that it was purely an invitation which imposed no obligation on President Guelleh.

116. The Court had recalled its statement in paragraph 51 of its judgment in the *Arrest Warrant* case "that in international law it is firmly established that ... certain holders of high-ranking office in a State, such as the Head of State ... enjoy immunities from jurisdiction in other States, both civil and criminal", and that a Head of State enjoyed in particular "full immunity from criminal jurisdiction and inviolability" [see paragraph 54]. The Court had recalled in paragraph 174 of the judgment in the *Certain Questions of Mutual Assistance in Criminal Matters* case that "the rule of customary international law reflected in Article 29 of the Vienna Convention on Diplomatic Relations, while addressed to diplomatic agents, is necessarily applicable to Heads of State". The Court had relied on that Convention in order to make that point because of the way in which the case had been pleaded, one party in particular having cited a number of conventions.

117. The Court had found that the summons of 17 May 2005 had not been associated with the measures of constraint provided for in the French Code of Criminal Procedure; it had merely been an invitation to testify, which the Head of State could freely accept or decline. Consequently, there had been no attack by France on the immunities from criminal jurisdiction enjoyed by the Head of State. The Court had nonetheless noted—albeit in the text, not in the *dispositif*, of the judgment—that the summons had not been issued in a manner consistent with the courtesies due to a foreign Head of State and for that "an apology would have been due".

118. The 14 February 2007 invitation to testify had been issued in accordance with French law. The investigating judge had not approached President Guelleh directly, but had sent a letter to the French Ministry of Justice, expressing the wish to obtain the President's written testimony and asking the Minister to make contact with the Minister for Foreign Affairs of Djibouti. The Court had held that, there again, that invitation to testify could not have infringed the immunities from jurisdiction enjoyed by the Head of State of Djibouti. Again there had been no element of constraint.

119. The leaking of information to the French media regarding the summonses had been raised by Djibouti. For instance, the facsimile containing the 17 May 2005 summons had been sent at 3.51 p.m. and had been publicly reported by Agence France-Presse at 4.12 p.m. on the same day. The Court had observed that if it had been proven by Djibouti that this confidential information had been passed from the offices of the French judiciary to the media, such an act could have constituted not only a violation of French law, but also a violation by France

of its international obligations. However, there had been suggestions that the leak had come from another source.

120. As for the immunities of State officials, Djibouti had claimed that the issuing of summonses as *témoins assistés* to the *Procureur de la République* of Djibouti and the Head of National Security had violated their immunities. The summonses related to allegations of subornation of perjury. Djibouti had initially contended that the *Procureur de la République* and the Head of National Security benefited from personal immunities from criminal jurisdiction and inviolability. In that regard, the Court had noted in paragraph 194 of the judgment that:

there are no grounds in international law upon which it could be said that the officials concerned were entitled to personal immunities, not being diplomats within the meaning of the Vienna Convention on Diplomatic Relations of 1961, and the Convention on Special Missions of 1969 not being applicable in this case.

121. During the oral proceedings, Djibouti had reformulated its claims and had asserted that the *Procureur de la République* and the Head of National Security were entitled to functional immunities. It had therefore requested the Court to acknowledge that “a State cannot regard a person enjoying the status of an organ of another State as individually criminally liable for acts carried out in that official capacity, that is to say in the performance of his duties. Such acts, indeed, are to be regarded in international law as attributable to the State on behalf of which the organ acted and not to the individual acting as the organ.” In essence, that had been a claim of immunity for the State of Djibouti, from which the *Procureur de la République* and the Head of National Security would be said to benefit.

122. France had replied that such a claim would need to be decided on a case-by-case basis by national judges. One could imagine that there would be much interesting debate on that particular issue, where there were widely diverging national points of view as to how immunity from criminal jurisdiction was to be dealt with, in comparison with a large area of consensus so far as civil cases were concerned. As functional immunities were not absolute, France had taken the view that it was for the justice system of each country to assess, when criminal proceedings were instituted against an individual, whether, in view of the acts of public authority performed in the context of his or her duties, that individual should enjoy, as an agent of the State, the immunity from criminal jurisdiction that was granted to foreign States. Since the two senior officials had never availed themselves before the French criminal courts of the immunities which Djibouti was claiming on their behalf before the ICJ, France had argued that the Court did not have sufficient evidence available to it to make a decision. The Court had observed that it had never been verified before it that the acts which were the subject of the summonses as *témoins assistés* issued by France were indeed acts within the scope of the officials’ duties as organs of State. In paragraph 195 of the judgment, it had added that those “various claims regarding immunity [had not] been made known to France, whether through diplomatic exchanges or before any French judicial organ, as a ground for objecting to the issuance of the summonses in question”. At no stage had the French courts (before which the challenge to jurisdiction would

normally be expected to be made), or indeed the ICJ, been informed by the Government of Djibouti that the acts complained of by France were its own acts, and that the *Procureur de la République* and the Head of National Security were its organs, agencies or instrumentalities in carrying out those acts. The Court had observed in paragraph 196 of the judgment that:

[t]he State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned. This would allow the court of the forum State to ensure that it does not fail to respect any entitlement to immunity and might thereby engage the responsibility of that State. Further, the State notifying a foreign court that judicial process should not proceed, for reasons of immunity, against its State organs, is assuming responsibility for any internationally wrongful act in issue committed by such organs.

123. It was therefore important for a State to indicate that the acts in question were its acts.

124. Lastly, the previous week, the Court had issued an order on provisional measures in response to Mexico’s *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*. That request had related to paragraph 153 (9) of that judgment, which laid down the remedial obligations incumbent upon the United States, namely “to provide, by means of its own choosing, review and reconsideration of the convictions and sentences” of each of the named Mexican nationals. Mexico asserted that, since the rendering of the judgment, requests for such review and reconsideration had been repeatedly denied. The case had become urgent because the execution date had been set for one of the named persons. In the meantime, a United States Supreme Court judgement had held that the order of President Bush instructing the State’s courts to comply with the judgment of the ICJ was unconstitutional, although it had recognized the obligation of the United States to comply with the judgment under international law. Against that rather uncertain background, the authorities of the state of Texas had indicated that the execution was to proceed.

125. In the proceedings before the ICJ, the United States had argued that the application of Mexico, which was based upon Article 60 of the Statute of the International Court of Justice, should be dismissed, given that there was no “dispute” between the parties as to the scope and meaning of paragraph 153 (9) of the judgment within the meaning of that article. In its order, the Court had pointed out that the word “dispute” as used in English in Article 60 did not have quite the same force as the same word as used in Article 36 of its Statute: in the latter Article, the French term was *dif-férend*, whereas in the former it was *contestation*, a considerably softer term that referred to a difference of opinion. The Court’s view had been that while both parties agreed as to the existence of an obligation of result, there did seem to be some difference of perception, with Mexico on the one hand insisting that the obligation fell upon each and every element of governmental authority individually and the United States expressing the opinion that it fell upon the federal Government of the United States alone. By early September 2008, the Court would receive the comments of the United States in response to the application of Mexico. In all probability, that matter of interpretation would be dealt with in written form.

126. As to the Court's pending cases, it had concluded hearings on preliminary objections in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*. During the oral proceedings, the parties had made extensive references to the Commission's articles on responsibility of States.²³³ The judgment, which was rather complex, was under preparation. At the beginning of September, the Court would also be hearing arguments on the merits in a case concerning *Maritime Delimitation in the Black Sea*.

127. Three new contentious cases having been filed with the Court in the past year, including the *Maritime Dispute (Peru v. Chile)* and *Aerial Herbicide Spraying (Ecuador v. Colombia)* cases that she had already mentioned in passing. The Court's current docket therefore stood at 12 cases.

128. In closing, speaking on behalf of the entire Court, she wished the Commission every success in its work in the coming weeks.

129. The CHAIRPERSON thanked Judge Higgins, on behalf of the Commission, for her very interesting statement and for the invaluable information she had supplied on cases currently before the Court.

The meeting rose at 1.05 p.m.

2983rd MEETING

Wednesday, 23 July 2008, at 10.15 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

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

Immunity of State officials from foreign criminal jurisdiction (*continued*) (A/CN.4/596 and Corr.1, A/CN.4/601)

[Agenda item 9]

PRELIMINARY REPORT OF THE SPECIAL
RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to continue its consideration of the preliminary report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction.

2. Mr. PELLET said that he had learned of the existence of a memorandum by the Secretariat on immunity of State officials from criminal jurisdiction. Mr. Kolodkin's report was, in his view, both questionable and well drafted. It was of excellent quality, but he also found it to be extremely questionable, both in terms of points that were addressed and in terms of one very important point that was omitted. The general tone of the report was also problematic. Without wishing to judge the Special Rapporteur on his alleged motives, he had the impression throughout that the author of the report was favourably predisposed to the idea of immunity of State officials from jurisdiction, a feeling that he did not share, although he admitted that such immunity was a necessary evil and he had no intention of mounting a crusade against the principle.

3. With regard to methodology, the Special Rapporteur had rightly restricted his presentation of the issues to an overview of existing practice. By adopting a deductive approach, he had avoided engaging in empty speculation and had instead provided a rigorous outline of the issues to be addressed, although one—in his view, essential—issue had been forgotten. Moreover, he was not convinced that there was a fundamental difference between the “preliminary issues” addressed in paragraphs 27 to 102 and the “issues to be considered when defining the scope of the topic” laid out in paragraphs 103 to 130. It was to be hoped that, contrary to the reservation expressed by the Special Rapporteur in presenting his preliminary report, his future reports would be equally learned and well documented.

4. The Special Rapporteur had drawn a number of conclusions from the impressive body of clearly and rigorously presented information, some of which must be deemed irrefutable. First, while courtesy certainly played a role, particularly where immunities were accorded to the entourage of a Head of State, recognition of such immunities fell primarily within the domain of legal obligations—two concepts that were not necessarily irreconcilable. Next, leaving aside existing treaties that had some degree of relevance, the area was largely governed by customary international law, which offered scope for codification and progressive development, since the Commission could draw support from a reasonably solid legal base, which was not the case with regard to, for example, the protection of persons in the event of disasters. He also agreed without hesitation that jurisdiction preceded immunity, that the question of immunity arose only where a court had jurisdiction, that immunity could prevent such a court from exercising its jurisdiction and that the foregoing constituted a preliminary issue, probably of admissibility, although he personally found the distinction between admissibility and jurisdiction to be of little consequence. In that connection, he noted on a point of translation that the concept of “*jurisdiction*” in French did not mean exactly the same thing as “*jurisdiction*” in English, and that the terms “*jurisdiction législative*” and “*jurisdiction exécutive*” in paragraph 45 of the French version were virtually meaningless and should in fact read: “*compétence législative*” and “*compétence exécutive*”. Similarly, the French translation of the term “*act of State*” in the passage beginning with paragraph 71 by “*acte de gouvernement*” was unsatisfactory because that concept, which existed in French administrative law, should not be confused with the “*act of State*” doctrine as applied in the

²³³ See *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, para. 76.