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Summary record of the 3016th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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organization concerned might have to be taken into account when applying the draft articles. That addition to the commentary should not be interpreted to mean that an organization could plead its specific characteristics in order to claim that it was exempt from responsibility, or to obtain the application of double standards in the implementation of the draft articles.

68. Two issues had been discussed in relation to draft article 62 (Questions of international responsibility not regulated by these articles). The first concerned the words “continue to”, which could be interpreted as freezing the situation in time, so that questions of responsibility would have to be regulated by the rules of international law applicable at the time the articles were adopted. Nevertheless, it had been considered that the use of the phrase in the present tense, which was common in a number of conventions, made it sufficiently plain that the rules covering issues not otherwise regulated in the draft, to which proper consideration had to be given, were the rules in force at the time when the draft articles were applied.

69. The second issue had been the proposed addition, at the end of draft article 62, of an illustrative phrase which would have read “such as the invocation by an international organization of the international responsibility of a State”. The merit of such an addition would have been that it would have drawn attention to the gap existing between matters covered by the draft articles on the responsibility of international organizations and those dealt with by the articles on State responsibility. The Drafting Committee had, however, taken the view that the proposed addition would not fill that lacuna, especially as the draft articles on responsibility of international organizations were not intended to cover questions of State responsibility towards an international organization, which, arguably, had been addressed by analogy in the articles on State responsibility. The commentary to draft article 1 (Scope of the present draft articles) would refer to that lacuna and the possible application by analogy of the articles on State responsibility. The Drafting Committee considered that it would be misleading to add the phrase “of an international organization” after “internationally wrongful act”, because some issues of State responsibility in relation to the action of an international organization were covered in the text.

70. For that reason, draft article 62 as well as draft article 63 (Individual responsibility) and draft article 64 (Charter of the United Nations) remained unchanged. As far as the latter provision was concerned, the Drafting Committee had agreed to refer in the commentary to the effect that obligations under the Charter of the United Nations might have for international organizations, even when they were not formally bound by it. The commentary would also make it clear that draft article 64 was not intended to affect the application of the draft articles to the United Nations.

71. The Drafting Committee recommended that the Commission should adopt the draft articles just introduced.

72. The CHAIRPERSON invited the Commission to proceed to adopt the draft articles contained in document A/CN.4/L.743/Add.1.

Draft article 3 (*Responsibility of an international organization for its internationally wrongful acts*)

Draft article 3 was adopted.

Draft article 3 bis (*Elements of an internationally wrongful act of an international organization*)

Draft article 3 bis was adopted.

Draft article 28 (*Responsibility of a member State seeking to avoid compliance*)

Draft article 28 was adopted.

Draft article 61 (*Lex specialis*)

Draft article 61 was adopted.

Draft article 62 (*Questions of international responsibility not regulated by these articles*)

Draft article 62 was adopted.

Draft article 63 (*Individual responsibility*)

Draft article 63 was adopted.

Draft article 64 (*Charter of the United Nations*)

Draft article 64 was adopted.

The draft articles contained in document A/CN.4/L.743/Add.1, as a whole, were adopted.

The meeting rose at 5.30 p.m.

3016th MEETING

Tuesday, 7 July 2009, at 10.05 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

Cooperation with other bodies

[Agenda item 14]

STATEMENT BY THE PRESIDENT OF THE
INTERNATIONAL COURT OF JUSTICE

1. The Chairperson welcomed Judge Hisashi Owada, President of the International Court of Justice, and invited him to address the Commission.

2. Judge Owada (President of the International Court of Justice) said that, as the new President of the International Court of Justice, he was delighted to address the International Law Commission, in keeping with the decade-long tradition between the two bodies.

3. As had become the custom, he would begin by reporting on the judicial activities of the Court over the past year, drawing attention to those aspects that had particular relevance to the Commission's current programme of work. Following his report, he wished to hold an informal discussion with members of the Commission on certain issues that the Court would have to deal with in coming years and on the relationship between the Court and the Commission. Since his predecessor, Judge Rosalyn Higgins, had addressed the Commission in July 2008, the Court had rendered five decisions: one judgment on the merits, one judgment in a request for interpretation, one judgment on preliminary objections and two orders on requests for the indication of provisional measures. The five cases had involved States of Africa, Asia, Europe and North America. The subject matter varied widely, ranging from established issues such as the delimitation of maritime zones, through contemporary issues such as human rights and the status of individuals, to issues of international criminal law.

4. In chronological order, the first decision was the order on the request for the indication of provisional measures issued by the Court on 15 October 2008 in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*.

5. Georgia had filed its application on 12 August 2008, founding its claim on an alleged violation of the International Convention on the Elimination of All Forms of Racial Discrimination. It had asserted that:

The Russian Federation, acting through its organs, agents, persons and entities exercising elements of governmental authority, and through South Ossetian and Abkhaz separatist forces under its direction and control, has practised, sponsored and supported racial discrimination through attacks against, and mass-expulsion of, ethnic Georgians, as well as other ethnic groups, in the South Ossetia and Abkhazia regions of the Republic of Georgia. [para. 3 of the order]

6. Georgia had claimed that, by those actions, the Russian Federation had violated several provisions of the International Convention on the Elimination of All Forms of Racial Discrimination. As the basis for the jurisdiction of the Court, Georgia had invoked article 22 of the Convention.

7. Two days later, on 14 August 2008, Georgia had filed a request for the indication of provisional measures before the Court, pending the Court's judgment in the proceedings, in order to preserve its rights under the Convention "to protect its citizens against violent discriminatory acts by Russian armed forces, acting in concert with separatist militia and foreign mercenaries" [para. 24]. In particular, Georgia had requested the Court to order the Russian Federation to refrain from any acts of racial discrimination; to prevent groups or individuals from subjecting ethnic Georgians to such acts; to refrain from taking any actions or supporting any measures that obstructed the exercise of

ethnic Georgians' right of return to South Ossetia, Abkhazia and adjacent regions; and to facilitate the delivery of humanitarian assistance to all individuals in the territory under its control.

8. The Russian Federation had taken the position that Georgia's application did not involve a dispute under the Convention; that the relevant provisions of the Convention did not apply extraterritorially; that any breaches that might be found to have occurred could not be attributed to the Russian Federation; and that the preconditions in article 22 of the Convention had not been met. With regard to Georgia's request for the indication of provisional measures, it had furthermore argued that there was no imminent risk of irreparable harm or any urgency that would justify the indication of such measures.

9. In its order on the request for the indication of provisional measures, the Court had held that there was no restriction of a general nature in the Convention relating to its territorial application. The Court had concluded that "there appears to exist a dispute between the Parties as to the interpretation and application of [the Convention]" [para. 112]. It had further found that the procedural conditions laid down in article 22 of the Convention had been met, concluding, in particular, that although article 22 required that some attempt should be made by the parties to initiate talks among themselves on issues that fell under the Convention, it did not require the holding of formal negotiations. On those grounds, the Court had concluded that it had *prima facie* jurisdiction to deal with the case, and accordingly, it had held that "the ethnic Georgian population in the areas affected by the recent conflict remains vulnerable" [para. 143] and that there was thus an imminent risk that it might suffer irreparable prejudice. The Court had issued an order for the indication of provisional measures that required both parties to refrain from creating any impediment to humanitarian assistance to the local population and from engaging in any action that might prejudice the rights of the other party or aggravate the dispute.

10. On 18 November 2008, the Court had delivered a judgment on preliminary objections in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*. The case had been brought before the Court in 1999 by Croatia, which had alleged that Serbia was responsible for violations of the Convention on the Prevention and Punishment of the Crime of Genocide. Serbia had argued that the Court lacked jurisdiction, first, because Serbia did not have *locus standi* before the Court when Croatia had filed its application, and secondly, because the Court lacked jurisdiction under the compromissory clause of the Convention (article IX), as Serbia had not declared its consent to the jurisdiction of the Court under article IX.

11. Concerning the question of *locus standi* access to the Court, members of the Commission would no doubt recall that the Court had concluded in its 2004 judgments in the various cases concerning the *Legality of Use of Force* that Serbia did not have access to the Court in 1999 at the time of the filing of its applications against various NATO member countries. The same issue had arisen in 2007 in the case concerning *Application of the Convention on the*

Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro). The Court had differentiated between that case and the 2004 cases on the issue of access to the Court on the grounds that, with regard to the 2007 case, the Court had already held in its 1996 judgment on preliminary objections that it possessed jurisdiction. In the view of the Court, the 1996 judgment, while not ruling specifically on the issue of access to the Court, contained “as a matter of logical construction” the finding that Serbia had access to the Court under the Statute, and “[t]he force of *res judicata* attaching to that judgment thus extends to that particular finding” [para. 136 of the 2007 judgment]. By contrast, in the 2008 case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, the Court had noted that the *res judicata* principle obviously did not apply as it had in the 2007 Bosnia case.

12. The Court had observed that, while Serbia had not been a member of the United Nations on 2 July 1999, the date Croatia filed its application, it had been a member of the United Nations—and therefore a party to the Statute of the Court—as from 1 November 2000. While accepting that the Court’s jurisdiction was normally assessed on the date of the filing of the act instituting proceedings, the Court had nevertheless stated: “[T]he Court, like its predecessor, has also shown realism and flexibility in certain situations in which the conditions governing the Court’s jurisdiction were not fully satisfied when proceedings were initiated but were subsequently satisfied, before the Court ruled on its jurisdiction” [para. 81 of the 2008 judgment].

13. In that connection, the Court had referred to the 1924 judgment of the Permanent Court of International Justice in *Mavrommatis* case in which the PCIJ had held that “[t]he Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law” [p. 34 of the judgment]. The International Court of Justice had applied that principle to the question of access to the Court in the present case and had concluded that any initial lack of access that it might subsequently be able to establish did not, in itself, bar the claim of Croatia.

14. On the question of whether the Court had jurisdiction under article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, the Court had concluded that the declaration and note dated 27 April 1992¹⁹⁷—in which the Federal Republic of Yugoslavia had agreed to “strictly abide by all the commitments that the [Socialist Federal Republic] of Yugoslavia assumed internationally” [para. 44 of the 2008 judgment] and to “continue to fulfil all ... obligations assumed by the Socialist Federal Republic of Yugoslavia in international relations, including its ... participation in international treaties ratified or acceded to by Yugoslavia” [para. 99]—“had the effect of a notification of succession by the [Federal Republic of Yugoslavia] to the [Socialist Federal Republic of Yugoslavia] in relation to the [Convention on the Prevention and Punishment of the Crime

of Genocide]” [para. 117] and that the Court “had, on the date on which the present proceedings were instituted by Croatia, jurisdiction to entertain the case on the basis of Article IX” of the Convention [*ibid.*].

15. The Court had thus ultimately concluded that it had jurisdiction over the case and that the claim of Croatia was admissible. The case would now move to the merits phase. The Court, in its order of 20 January 2009, had fixed 22 March 2010 as the time limit for the filing of a counter-memorial by Serbia.

16. On 5 June 2008, Mexico had filed a request for interpretation, asking the Court to interpret paragraph 153 (9) of the judgment rendered by the Court on 31 March 2004 in the case concerning *Avena and Other Mexican Nationals (Mexico v. United States of America)*. In its request, Mexico had recalled that in paragraph 153 (9) of the *Avena* judgment, the Court had found “that the appropriate reparation in this case consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the Mexican nationals” referred to in the judgment, taking into account both the violation of the rights set forth in article 36 of the Vienna Convention on Consular Relations and paragraphs 138 to 141 of the judgment [cited in para. 1 of the 2008 order].

17. On the same day, Mexico had also submitted a request for the indication of provisional measures, asking the Court, pending judgment on the request for interpretation of Mexico, to order the Government of the United States to take all measures necessary to ensure that José Ernesto Medellín Rojas and four other Mexican nationals were not executed pending the conclusion of the proceedings before the Court. Mexico had also asked that the Government of the United States be required to inform the Court of all measures it had taken in implementation of the *Avena* judgment and to ensure that no action was taken that might prejudice the rights of Mexico or its nationals with respect to any interpretation the Court might render with regard to paragraph 153 (9) of that judgment. A Texas court had scheduled the execution of Mr. Medellín Rojas for 5 August 2008.

18. The United States had maintained that there was no dispute between the parties as to the meaning and scope of the *Avena* judgment; that the Court was not competent to hear the case on the basis of article 60 of its Statute; and that the Court was therefore not competent to indicate provisional measures in the proceedings.

19. The Court, on the other hand, had found that there appeared to be a difference of opinion between the parties as to the meaning and scope of the Court’s finding contained in paragraph 153 (9) of the judgment. The Court had pointed out that the execution of a national the meaning and scope of whose rights were in question prior to the delivery of the Court’s judgment on the request for interpretation “would render it impossible for the Court to order the relief that [his national State] seeks and thus cause irreparable harm to the rights it claims” [para. 72]. It had found that it was apparent from the information before it that Mr. Medellín Rojas would face execution on 5 August 2008 and that four other Mexican nationals

¹⁹⁷ Letter dated 6 May 1992 from the Chargé d’affaires *ad interim* of the the Permanent Mission of Yugoslavia to the United Nations addressed to the Secretary-General (A/46/915), annex I.

were at risk of execution in the coming months; that their execution would cause irreparable prejudice to any rights, the interpretation of the meaning and scope of which was in question; that it was possible that the said Mexican nationals might be executed before the Court had delivered its judgment on the request for interpretation; and that, consequently, there undoubtedly was urgency. The Court had accordingly concluded that the circumstances required that it should indicate provisional measures to preserve the rights of Mexico, as provided by article 41 of its Statute.

20. On 19 January 2009, the Court had delivered its judgment in the case. A key question at that stage of the proceedings had been to determine definitively, for the purposes of article 60 of the Court's Statute, whether a dispute did in fact exist as to the meaning or scope of paragraph 153 (9) of the *Avena* judgment. The United States had continued to argue at that stage that no dispute existed between it and Mexico for the purposes of article 60, since it shared the position of Mexico that the paragraph in question established an obligation of result. Mexico, on the other hand, had argued that the United States did not share its view of the *Avena* judgment, namely that "the operative language [of the *Avena* judgment] establishes an obligation of result reaching all organs of the United States, including the federal and state judiciaries" [para. 24 of the 2009 judgment].

21. The Court had found that:

The *Avena* Judgment nowhere lays down or implies that the courts in the United States are required to give direct effect to paragraph 153 (9). The obligation laid down in that paragraph is indeed an obligation of result which clearly must be performed unconditionally; non-performance of it constitutes internationally wrongful conduct. However, the Judgment leaves it to the United States to choose the means of implementation, not excluding the introduction within a reasonable time of appropriate legislation, if deemed necessary under domestic constitutional law. Nor moreover does the *Avena* Judgment prevent direct enforceability of the obligation in question, if such an effect is permitted by domestic law. In short, the question is not decided in the Court's original Judgment and thus cannot be submitted to it for interpretation under Article 60 of the Statute. [para. 44]

22. In effect, what the Court had found was that Mexico's request for interpretation dealt, not with the "meaning or scope" of the *Avena* judgment, as required by article 60, but rather with "the general question of the effects of a judgment of the Court in the domestic legal order of the States parties to the case in which the judgment was delivered" [para. 45]. The Court had concluded that "[b]y virtue of its general nature, the question underlying Mexico's Request for interpretation is outside the jurisdiction specifically conferred upon the Court by Article 60" and "[w]hether or not there is a dispute, it does not bear on the interpretation of the *Avena* Judgment, in particular of paragraph 153 (9)" [*ibid.*]. Consequently, the Court had held that it could not accede to Mexico's request for interpretation.

23. However, given that Mr. Medellín was executed on 5 August 2008, before the Court had rendered its judgment on the request for interpretation of Mexico, the Court had added that the United States had not discharged its obligation under the Court's order of 16 July 2008 indicating provisional measures in the case of Mr. José Ernesto Medellín Rojas.

24. On 3 February 2009, the Court had delivered its judgment on the merits in the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*. In that case, the Court had been requested to draw a single maritime boundary delimiting the continental shelf and exclusive economic zones between Romania and Ukraine in the Black Sea. Maritime delimitation, especially in respect of the continental shelf and exclusive economic zone of a given country, had been the subject of many disputes that had come before the Court, beginning with the *North Sea Continental Shelf* cases in 1969. As members of the Commission were no doubt aware, the Court's jurisprudence had evolved considerably over the years since its 1969 judgment, against the background of evolving doctrine and State practice as well as the adoption of the United Nations Convention on the Law of the Sea in 1982. A noteworthy feature of the 2009 judgment was that it presented the current state of the law on the issue of maritime delimitation in a structured manner and applied the law to the specific circumstances of the case, thus offering a specific line of delimitation, as described in the judgment. With regard to that point of the law as it currently stood, the Court had stated that:

In keeping with its settled jurisprudence on maritime delimitation, the first stage of the Court's approach is to establish the provisional equidistance line. At this initial stage of the construction of the provisional equidistance line the Court is not yet concerned with any relevant circumstances that may obtain and the line is plotted on strictly geometrical criteria on the basis of objective data.

...

The course of the final line should result in an equitable solution (Articles 74 and 83 of [the United Nations Convention on the Law of the Sea]). Therefore, the Court will at the next, second stage consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result ... The Court has also made clear that when the line to be drawn covers several zones of coincident jurisdictions, "the so-called equitable principles/relevant circumstances method may usefully be applied, as in these maritime zones this method is also suited to achieving an equitable result" ...

This is the second part of the delimitation exercise to which the Court will turn, having first established the provisional equidistance line.

Finally, and at a third stage, the Court will verify that the line (a provisional equidistance line which may or may not have been adjusted by taking into account the relevant circumstances) does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line ... A final check for an equitable outcome entails a confirmation that no great disproportionality of maritime areas is evident by comparison to the ratio of coastal lengths.

This is not to suggest that these respective areas should be proportionate to coastal lengths—as the Court has said "the sharing out of the area is therefore the consequence of the delimitation, not vice versa". [paras. 118–122]

25. It was the first time that the Court had set out the three principles to be applied in questions of maritime delimitation, in keeping with articles 74 and 83 of the United Nations Convention on the Law of the Sea, and had applied them in an actual dispute. Two specific issues had also arisen in that case and warranted the attention of members of the Commission, given that they had been discussed by the Commission at an earlier stage of the codification exercise.

26. The first issue was the question of whether Sulina dyke—a dyke on the Romanian coast built in 1956 and enlarged several times to its current length of 7.5 kilometres—should be used as a base point in carrying out the delimitation. To answer that question, the Court had examined in great detail article 11 of the United Nations Convention on the Law of the Sea, which provided that:

For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system are regarded as forming part of the coast. Off-shore installations and artificial islands shall not be considered as permanent harbour works. [para. 132]

27. In order to determine whether the Sulina dyke could be considered “harbour works” that formed “an integral part of the harbour system”, the Court had gone quite far back in its legislative history to the *travaux préparatoires* on article 8 of the 1958 Convention on the Territorial Sea and Contiguous Zone, carried out by the Commission in the early 1950s. The Court had noted the following:

In 1954, the Special Rapporteur of the ILC observed that “dykes used for the protection of the coast constituted a separate problem and did not come under either Article 9 (ports) or Article 10 (roadsteads)”¹⁹⁸. Subsequently, the concept of a “dyke” was no longer used, and reference was made to “jetties” serving to protect coasts from the sea.¹⁹⁹ The first sentence of article 11 of [the United Nations Convention on the Law of the Sea] corresponds, apart from one minor change in the wording, to that of Article 8 of the Convention on the Territorial Sea and Contiguous Zone. ... The expert at the 1958 Conference stated that “harbour works such as jetties [are regarded] as part of ... land territory”.²⁰⁰ [para. 134]

28. The Court had gone on to note that the Commission had included the following comment in its report to the General Assembly:

Where such structures are of excessive length (for instance, a jetty extending several kilometres into the sea), it may be asked whether this article [Art. 8] could still be applied ... As such cases are very rare, the Commission, while wishing to draw attention to the matter, did not deem it necessary to state an opinion.²⁰¹ [*ibid.*]

29. The Court had accordingly reasoned that “the ILC did not, at the time, intend to define precisely the limit beyond which a dyke, jetty or works would no longer form ‘an integral part of the harbour system’” [*ibid.*]. The Court had then concluded “that there are grounds for proceeding on a case-by-case basis, and that the text of article 11 of [the United Nations Convention on the Law of the Sea] and *the travaux préparatoires* do not preclude the possibility of interpreting restrictively the concept of harbour works so as to avoid or mitigate the problem of excessive length identified by the ILC” [*ibid.*]. Noting that “[t]his may be particularly true where, as here, the question is one of delimitation of areas seaward of the territorial sea” [*ibid.*], the Court had concluded, in the light of the legislative history of article 11 of the United Nations Convention on the Law of the Sea, that the landward end,

rather than the seaward end, of Sulina dyke should be used as a base point for the delimitation.

30. The second issue in relation to which the Court had had to examine the relevance of some provisions of the United Nations Convention on the Law of the Sea was that of Serpents’ Island, a small Ukrainian maritime feature directly off the coast of Romania. The issue raised by the parties in particular had been whether, for the purposes of delimitation, Serpents’ Island was an “island” under article 121, paragraph 1, of the Convention, or merely a “rock” under article 121, paragraph 3. Although both generated a territorial sea, only an island generated a continental shelf and an exclusive economic zone. After reading out article 121, paragraph 3, of the Convention, the President of the International Court of Justice pointed out that Romania had referred to the statement it had made upon signature and ratification of the Convention to the effect that “uninhabited islands without economic life can in no way affect the delimitation of the maritime spaces belonging to the mainland coasts of the coastal States” [para. 35]. Romania had argued, based on the Commission’s work on reservations to treaties, that its statement constituted a declaration interpreting article 121, paragraph 3, of the Convention, which was permitted under article 310 of the Convention, and not a reservation to that article, which was not permitted under article 309 of the Convention. Upon examining the issue, the Court had observed that:

[U]nder Article 310 of [the United Nations Convention on the Law of the Sea], a State is not precluded from making declarations and statements when signing, ratifying or acceding to the Convention, provided these do not purport to exclude or modify the legal effect of the provisions of [the Convention] in their application to the State which has made a declaration or statement. The Court will therefore apply the relevant provisions of [the Convention] as interpreted in its jurisprudence, in accordance with Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969. Romania’s declaration as such has no bearing on the Court’s interpretation. [para. 42]

31. Thus, the Court had considered the statement of Romania to be a declaration rather than a reservation. It had not explicitly set out its views on the role, if any, of the silence of Ukraine in relation to that declaration, but had concluded that the declaration had no bearing on its own interpretation of article 121, paragraph 3.

32. In any case, the Court had held that the issue of whether Serpents’ Island was an island under article 121, paragraph 1, or a mere rock under article 121, paragraph 3, was irrelevant to the case. It had stated the following:

Given this geographical configuration and in the context of the delimitation with Romania, any continental shelf and exclusive economic zone entitlements possibly generated by Serpents’ Island could not project further than the entitlements generated by Ukraine’s mainland coast because of the southern limit of the delimitation area as identified by the Court ... Further, any possible entitlements generated by Serpents’ Island in an eastward direction are fully subsumed by the entitlements generated by the western and eastern mainland coasts of Ukraine itself. The Court also notes that Ukraine itself, even though it considered Serpents’ Island to fall under Article 121, paragraph 2, of [the United Nations Convention on the Law of the Sea], did not extend the relevant area beyond the limit generated by its mainland coast, as a consequence of the presence of Serpents’ Island in the area of delimitation. [para. 187]

33. Lastly, on 28 May 2009, the Court had issued an order on the request for the indication of provisional

¹⁹⁸ *Yearbook ... 1954*, vol. I, 259th meeting, p. 88, para. 23.

¹⁹⁹ See *Yearbook ... 1956*, vol. II, document A/3159, chap. II, commentary to draft article 8, para. (2), p. 270.

²⁰⁰ *Official records of the United Nations Conference on the Law of the Sea, Volume III: First Committee (Territorial Sea and Contiguous Zone), Summary records of meetings and Annexes*, 46th meeting, p. 142, para. 11 (document A/CONF.13/39, United Nations publication, Sales No. 58.V.4, Vol. III).

²⁰¹ *Yearbook ... 1956*, vol. II, document A/3159, chap. II, commentary to draft article 8, para. (3), p. 270.

measures in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*. The application of Belgium of 19 February 2009 concerned Mr. Hissène Habré, the former President of Chad, who had resided on Senegalese territory since 1990. Belgium had submitted that by failing to prosecute or extradite Mr. Habré for certain acts he was alleged to have committed during his presidency, including crimes of torture and crimes against humanity, Senegal had violated the obligation *aut dedere aut judicare* laid down in article 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and established in customary international law.

34. On the same day, Belgium had filed a request for the indication of provisional measures, asking the Court to require Senegal to take “all the steps within its power to keep Mr. H. Habré under the control and surveillance of the judicial authorities of Senegal so that the rules of international law with which Belgium requests compliance may be correctly applied” [para. 15 of the order]. Belgium had justified its request by referring to statements made by Mr. Abdoulaye Wade, President of the Republic of Senegal, which, according to Belgium, indicated that if Senegal could not secure the necessary funding to try Mr. Habré, it could “cease monitoring him or transfer him to another State” [para. 24].

35. Senegal had asserted that, since 2005, it had been willing to try Mr. Habré in the Senegalese courts and thus to comply with its obligations under international law. Although it had not begun to try Mr. Habré, it had taken a number of steps towards that end, “in particular the introduction of offences linked to international crimes into its criminal legislation, the broadening of the jurisdiction of the Senegalese courts and the search for the financial resources needed for the organization of such a trial” [para. 27]. Senegal had argued that no urgency existed that might justify the indication of provisional measures and that Belgium had not identified the rights that it wished to see protected or the irreparable prejudice that might be caused to those rights without the indication of provisional measures. Moreover, in response to a question put by a member of the Court at the hearings, Senegal had made a formal declaration that it would not allow Mr. Habré to leave its territory while the case was pending before the Court.

36. Given those circumstances, the Court had held that there was no risk of irreparable prejudice to the rights claimed by Belgium that warranted the indication of provisional measures. On those grounds, the Court had declined to exercise its power under article 41 to indicate provisional measures.

37. In terms of pending cases, he said the Court had concluded hearings in the case concerning the *Dispute regarding Navigational and Related Rights* and would deliver its judgment at a public sitting on 13 July 2009. After the summer, it would begin hearing arguments on the merits by the parties in the case concerning *Pulp Mills on the River Uruguay*.

38. Four new contentious cases had been filed with the Court in the past year. First, as mentioned previously in

connection with the request of Georgia for the indication of provisional measures, in August 2008, Georgia had instituted proceedings against the Russian Federation. Having disposed of the request of Georgia, for the indication of provisional measures, the Court would now turn its attention to the application itself. Secondly, in November 2008, the former Yugoslav Republic of Macedonia had instituted proceedings against Greece (*Application of the Interim Accord of 13 September 1995*), contending that the latter had violated its rights under an interim accord between the two States by objecting to its application to join NATO. Thirdly, in December 2008, Germany had instituted proceedings against Italy (*Jurisdictional Immunities of the State*), contending that Italy had violated its sovereign immunity by allowing several civil claims in its courts concerning violations of international humanitarian law by the German Reich during the Second World War. Fourthly, as mentioned previously, Belgium had instituted proceedings against Senegal in February 2009 in connection with the obligation to extradite or prosecute the former President of Chad, Mr. Hissène Habré.

39. In addition to those new contentious cases, in October 2008 the Court had received a request from the General Assembly of the United Nations for an advisory opinion on the *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*. In its resolution 63/3 of 8 October 2008, the General Assembly had decided, in accordance with Article 96 of the Charter of the United Nations, to request the Court to render an advisory opinion on the following question: “Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?” Thirty-six States Members of the United Nations had filed written statements on the question. In addition, the authors of the declaration had filed a written contribution. The Court had set 17 July 2009 as the time limit for the submission of written comments on the written statements by States and for a written contribution by the authors of the declaration.

40. With the inclusion of those new cases, the current docket of the Court stood at 15 cases raising a wide variety of issues of public international law. The work of the Court, much like the work of the International Law Commission, genuinely reflected the broad substantive scope of contemporary international law. As was evident from his presentation on the Court’s recent activities, the Commission’s work continued to be very useful to the Court as it took on those new challenges.

41. He wished to speak briefly about a few issues that the Court would face in the future and on the relationship between the Court and the Commission.

42. First of all, owing to the increase in the number of cases brought before the Court, each judge was increasingly in need of his or her own research assistant. That would help to speed up the work of the Court, since judges currently had to conduct all the necessary research themselves, compile the literature and analyse the case law, which took up a considerable amount of their time.

43. Given its growing caseload, the Court had been looking into ways of expediting its work, something that would require the cooperation of others as well as efforts by the Court itself. A trend towards an increase in the number of preliminary objections had emerged: of the 100 or so judgments issued since the establishment of the Court, nearly half had been preceded by preliminary objections to admissibility and to jurisdiction. Although it was legitimate for parties to formulate preliminary objections, doing so did add to the Court's caseload. Likewise, there had been growing recourse to the Court for the indication of provisional measures. In the past decade, 22 such requests had been made, as compared with 7 from 1988 to 1998. Once again, it was not simply a matter of procedural tactics, since most often the parties had justifiable reasons for requesting such measures. It had sometimes been suggested that requests for the indication of provisional measures were used for extraneous purposes, such as to draw attention to a dispute, largely because such requests were given priority under the Statute of the Court. He did not believe that this was true, but there had certainly been an increase in the number of such requests.

44. In order to expedite proceedings and to deal with the increase in its caseload, the Court had recently revised Practice Direction III, concerning the length of written pleadings; Practice Direction VI, concerning the length of oral proceedings, particularly with regard to the length of pleadings of the parties; and Practice Direction XIII, concerning the views of the parties relating to questions of procedure.

45. Another matter that deserved attention was the jurisdictional basis of the cases on the Court's docket. In the past six years, of the 27 cases brought before the Court, 2 had been brought by special agreement, 5 on the basis of the optional clause, 15 cases through a compromissory clause in a treaty, 2 through *forum prorogatum* and 5 based on the provisions of the Court's Statute concerning advisory procedures or the interpretation of judgments. One could see from those figures that there had been a fairly large increase in the use of the compromissory clause. In order to extend the compulsory jurisdiction of the Court, consideration might be given to encouraging States to make the declaration under article 36, paragraph 2, of its Statute, but also to insert a compromissory clause in the bilateral or multilateral treaties that they concluded, making it obligatory to refer to the Court disputes concerning the interpretation or application of a treaty.

46. The third question, which could be dealt with only in a cursory fashion, concerned the proliferation of international judicial institutions and the fragmentation of jurisprudence. He felt that the fears expressed on that subject were exaggerated and were not borne out by experience. His impression was that the various international courts and tribunals were carefully examining each other's decisions and coming to a largely common understanding of the law in such fields as human rights law and the law of the sea. The International Court of Justice, as the principal judicial organ of the United Nations, occupied a special place, as it was representative of the international community at large. The fact that it was the only universal international judiciary with general jurisdiction over

issues of international law was noteworthy. The Court thus addressed the issue of human rights, for example, within the general framework of the international responsibility of States, rather than in the context of the specific civil or criminal responsibility of the individuals involved. The Court's authority gave its jurisprudence a special measure of respect. That said, he did not think that it was either necessary or desirable to establish a hierarchical order among the various international courts and tribunals.

47. Lastly, with regard to cooperation between the International Court of Justice and the International Law Commission, he said that the Commission's work was extremely useful to the Court in its judicial activities. In fact, in 8 of the 23 cases adjudicated by the Court in the past six years, it had cited positions taken by the Commission in its annual report or codification efforts, such as the draft articles on the responsibility of States for internationally wrongful acts.²⁰² Similarly, the Commission frequently made use of or referred to the Court's judgments. It was to be hoped that the two bodies would not only continue, but also strengthen, their cooperation in the future.

48. The CHAIRPERSON, after thanking the President of the International Court of Justice for his statement, announced that he had agreed to reply to questions from members of the Commission.

49. Ms. ESCARAMEIA said that she had three points to raise. First, with regard to interpretative declarations, she said that many people had been surprised at the radical position adopted by the Court in the case concerning *Maritime Delimitation in the Black Sea*, with its finding that the interpretative declaration by Romania had no effect *vis-à-vis* Ukraine. The Commission was studying interpretative declarations and their effects—after all, States would hardly make them if they had no effect—and she would therefore welcome an explanation by Judge Owada of the Court's position.

50. Secondly, was there any topic that the Commission could take up that might help the Court in its activities?

51. Thirdly, the Court had tended to adopt its judgments with a greater degree of consensus recently and with fewer disagreements among judges, which might lead outside observers to think that its decisions were negotiated. In order to speed up its work, might the Court not consider reverting to its previous practice of putting decisions to the vote?

52. Judge OWADA (President of the International Court of Justice), responding to Ms. Escarameia's first question, explained that he had said, not that interpretative declarations in general had no legal effect, but simply that the declaration by Romania had had no bearing on the Court's interpretation of article 121, paragraph 3, of the United Nations Convention on the Law of the Sea [para. 42]. Speaking in his personal capacity, he noted that during the proceedings, Romania had argued that its declaration was not a reservation and was therefore not contrary to article 310 of the Convention, while at the same time asserting that by its declaration it had reserved its

²⁰² See footnote 10 above.

position and that the failure of Ukraine to object meant that Ukraine had implicitly accepted that position. The Court had thought otherwise: it had ruled that the declaration by Romania was not a reservation and therefore could not have the same legal effect as a reservation in the absence of an objection.

53. In response to Ms. Escarameia's second question, he said that during the seminar to commemorate the sixtieth anniversary of the International Law Commission, many topics had been proposed, but it would be presumptuous of him to tell the Commission which of them it should study.

54. With regard to Ms. Escarameia's third question, he said that, at least since he had been a member of the Court, judges had increasingly been attempting to achieve agreement on cases through persuasion, and there was some convergence of views—not through any political compromise, however. That approach helped them to see the issues more clearly and perhaps to produce better judgments.

55. Mr. MELESCANU applauded the landmark decision of the ICJ on the handling of maritime delimitation cases, a key component of the Court's activities. The judgment in the case concerning *Maritime Delimitation in the Black Sea* was a turning point: it provided a logical, clear and equitable method of resolving such disputes. The comments by the President of the Court on the subject and the judgment itself had dealt a serious blow to the Commission's work on reservations to treaties, however, and in particular, to its efforts to narrow the gap between reservations and interpretative declarations. The Commission would accordingly have to re-examine the issue. Judge Owada had also mentioned an issue that was important for the Court: the use of compromissory clauses as a means of expanding its compulsory jurisdiction. He asked whether, in Judge Owada's opinion, the Commission should contribute in some way to pursuing that objective.

56. Judge OWADA (President of the International Court of Justice) said that in his view, the Court's judgment in the *Maritime Delimitation in the Black Sea* case was not at odds with the Commission's work on reservations to treaties. The Court had simply stated that, irrespective of its legal effects, the interpretative declaration by Romania in no way affected the Court's interpretation of article 121, paragraph 3, of the United Nations Convention on the Law of the Sea. As to the basis for the compulsory jurisdiction of the Court, it would be interesting for the Commission to take up that issue, but it was difficult to say whether that was a task best left to the Commission or to a political organ such as the Sixth Committee of the General Assembly. In any case, it would be interesting for the international legal community to reflect on what means might be used to enhance the Court's effectiveness through the expansion of its compulsory jurisdiction. The subject deserved serious consideration, particularly in view of its relationship with international public order, in which there was currently growing public interest.

57. Sir Michael WOOD said that he fully agreed that the Court's oral proceedings should be shorter and more focused. The Court could move in that direction by clearly indicating to the parties, at least in some cases,

the subjects on which it would be helpful to hear in-depth argument. It could even put questions to the parties, as the European Court of Human Rights routinely did.

58. Judge OWADA (President of the International Court of Justice) said that the issue of the hearings was regularly addressed by the Court through the Rules Committee, whose report was discussed in plenary. Generally speaking, the Court tried to encourage the parties to confine their oral arguments to specific points. The revised version of Practice Direction VI read, in part:

[T]he Court will find it very helpful if the parties focus in the first round of the oral proceedings on those points which have been raised by one party at the stage of written proceedings but which have not so far been adequately addressed by the other, as well as on those which each party wishes to emphasize by way of winding up its arguments.²⁰³

59. One might think that this recommendation was not phrased directly enough, but it should be recalled that the Court always had to take into account the fact that the parties to the proceedings were sovereign States and that the cases with which the Court was dealing were purely international in nature. The Court was continually attempting to strike a balance between the need for rigour in its proceedings and respect for the sovereign character of the parties involved. It should also be recalled that asking the parties questions in order to get them to concentrate on certain points would require some preliminary discussion among judges. That would be a change from the procedures currently followed by the Court, which were based on the principle that judges did not consult with one another before drafting their notes in order not to prejudge the case. There was nothing to prevent the Court from looking into the idea, and it had, in fact, already done so, but certain judges insisted on maintaining their independence until they had drafted their notes.

60. Mr. WISNUMURTI said that the Court's judgment of 3 February 2009 had settled the *Maritime Delimitation in the Black Sea* case very well. As Judge Owada had explained, the Court had proceeded through several stages in order to arrive at an equitable solution: the first stage had consisted of establishing the provisional equidistance line in the areas to be delimited; the second, of taking into account any special circumstances; and the third, of considering coastal lengths. It was his impression, however, that in the past, coastal lengths had never been taken into account in delimiting maritime boundaries, including in the respect of equidistance. He wished to know the grounds on which the Court had decided to adopt the criterion of coastal lengths, whether that had been a main factor in the Court's judgment and whether in relying on coastal lengths, the Court had wished to set a precedent in maritime delimitation.

61. Judge OWADA (President of the International Court of Justice) said that the Court had tried to develop an approach to maritime delimitation based on its evolving jurisprudence and on articles 74 and 83 of the United Nations Convention on the Law of the Sea. As members of the Commission no doubt recalled, after 1969—in other words, after the *North Sea Continental*

²⁰³ Report of the International Court of Justice, 1 August 2008–31 July 2009, *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 4 (A/64/4)*, para. 234.

Shelf cases that the Court had examined—the Court had dealt with many cases of maritime delimitation. The law of the sea had given rise to heated debate, swelling into controversy, when the Convention was adopted in 1982. Since then, the law of the sea had gradually evolved and been consolidated through the jurisprudence of the Court and international arbitral awards. Generally speaking, a great deal of progress had been made on the basis of a growing consensus within the international legal community. In the case concerning *Maritime Delimitation in the Black Sea*, the Court had tried to bring together in a clearly intelligible manner the various points articulated by its jurisprudence and the relevant international arbitral awards without departing from the general trend in the development of the law of the sea. The Court had established three stages for the settlement of maritime delimitation cases, the first stage being to draw a provisional delimitation line based on the equidistance line principle. As the judgment explained, “[a]t this ... stage ... the Court is not yet concerned with any relevant circumstances that may obtain and the line is plotted on strictly geometrical criteria on the basis of objective data” [para. 118]. Thus, the issue of coastal length did not arise at that stage. At the second stage, special circumstances could be taken into account in order to modify the provisional equidistance line in such a way as to produce an equitable solution. Other factors could also be taken into consideration, but in the case in question, the length of the coastline had figured prominently. The Court had therefore taken it into account and, at the second stage, had come to the conclusion that given the specific circumstances of the case, there was no need to change the equidistance line. Lastly, at the third stage, the Court was required to:

verify that the line (a provisional equidistance line which may or may not have been adjusted by taking into account the relevant circumstances) does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line A final check for an equitable outcome entails a confirmation that no great disproportionality of maritime areas is evident by comparison to the ratio of coastal lengths. [para. 122]

62. The third stage thus introduced a negative, rather than positive, criterion for adjusting the equidistance line: finding out whether the difference in coastal lengths was such that the provisional equidistance line established at the first and second stages led to an inequitable result by reason of a marked disproportion between the respective coastal lengths. In the case in question, no such inequitable result had been produced.

63. Mr. FOMBA said that he would like to comment on the proliferation of international judicial institutions and the fragmentation of international law. The year 2009 had been a particularly prosperous one for Africa, since the African Union had just established two extremely important institutions: the African Court of Justice and Human Rights—a merger between the African Court on Human and Peoples’ Rights and the African Court of Justice—and the African Union Commission on International Law, to which 11 members had recently been elected. It would be interesting to hear Judge Owada’s views on those developments, and particularly on the competence of the new Commission to codify and progressively develop international law at the African level.

64. Judge OWADA (President of the International Court of Justice) said that the proliferation of international courts and tribunals and the corresponding risk of fragmentation had been discussed on a great many occasions by the international legal community, including by international judges themselves, and no unanimous opinion had been formed. Personally, he was fairly optimistic about the prospect of developing a more or less consistent practice, for the reasons he had stated previously. The idea of creating a hierarchy among the various tribunals, even on the basis of resolutions by the General Assembly or other United Nations bodies, was unrealistic. The objective must instead be to achieve the overall application of universal principles throughout the global community. That was why the efforts of bodies such as the International Law Commission in the codification of substantive rules were of such great importance. The task of tribunals was to interpret and apply the law, and by so doing, they inevitably clarified the rules of law. However, they could not engage in a full-fledged legislative process, which had to be left to a codification body such as the International Law Commission or to deliberative bodies such as the plenipotentiary conferences convened on particular topics. There were encouraging signs of a convergence in practice; for example, the International Tribunal for the Former Yugoslavia invoked the jurisprudence of the ICJ and, conversely, the ICJ had certainly relied on the judgements of the International Tribunal for the Former Yugoslavia in its own cases concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*. There was thus a productive interplay between the two institutions, which reinforced one another. Human rights was an area that was potentially controversial, owing to cultural diversity and the impact on substantive law. A body like the ICJ could not do much about that because it was primarily a judicial organ, and the bulk of the responsibility lay with the institutions that the international community had vested with legislative functions.

65. Mr. VALENCIA-OSPINA said that, in his statement, Judge Owada had pointed to the increasing use of compromissory clauses in bilateral and multilateral treaties and had expressed the opinion that such clauses were the most effective way to expand the compulsory jurisdiction of the Court. In that connection, and against the background of the relationship between the Commission and the Court, he wondered whether, in the final versions of the draft articles that it recommended to the General Assembly for adoption, the Commission should incorporate final clauses providing for the compulsory jurisdiction of the Court. With regard to its methods of work, the Court could take pride in the fact that it had succeeded in holding or scheduling oral proceedings in all cases in which the written proceedings had been completed, and was therefore up to date in its work. Since that was the case, one might ask whether continued priority needed to be given to changes in the Court’s methods of work, even if such changes were considered on a regular basis. The Court had shortened the time allowed for its deliberations and for handing down its judgments: delays were thus attributable exclusively to the time that the parties took to prepare their written pleadings. Was there any reason to reduce the time the parties were allotted, or as some judges had suggested, to do away with oral proceedings

altogether, now that the Court's existing methods of work had proved to keep it up to date with its caseload? As to the significant increase in the past decade in the number of requests for the indication of provisional measures, perhaps there was a causal relationship between that increase and the fact that the Court had now decided to make provisional measures binding, contrary to its past jurisprudence. It was understandable that States might wish to obtain orders for the indication of provisional measures at a very early stage in the proceedings, since in the past they had had to wait many years for a judgment on the merits before a binding decision was handed down.

66. Judge OWADA (President of the International Court of Justice) said that Mr. Valencia-Ospina's proposal to incorporate compromissory clauses into the final form of draft articles was an interesting idea. Without wishing to suggest that the Commission should take any such action, he said it would be useful for it to consider the matter. In that connection, he wished to draw the Commission's attention to the Court's interesting but also somewhat troubling advisory opinion of 28 May 1951 on *Reservations to the Convention on Genocide*. In it, the Court had concluded that reservations to article IX of the Convention did not affect the object and purpose of the Convention and were therefore permissible. As far as procedural matters were concerned, that was acceptable. However, if a reservation to a compromissory clause set aside an obligation arising from the Court's compulsory jurisdiction over substantive issues in the Convention itself, one might then say that it could indeed affect the object and purpose of a treaty. That was one possible argument, and although he did not necessarily espouse it, he thought the Commission might wish to look into the matter.

67. With regard to the Court's methods of work, he pointed out that it organized a strategic planning meeting each year that had proved to be particularly useful, even though requests for the indication of provisional measures sometimes caused the programme of work to be adjusted. The fact that the Court had decided to operate in parallel on two different cases had also helped to expedite the work and to deal with the considerable increase in the number of cases on the docket. The basic problem, as Mr. Valencia-Ospina had correctly pointed out, was the length of time given to the parties for the preparation of their memorials and counter-memorials. The Court had been trying to curtail it as much as possible, but experience had shown that it was not easy to negotiate on that with States and to dictate changes against their wishes. As to whether there was a causal link between, on the one hand, the Court's position, adopted in the *LaGrand* case, that orders on provisional measures had binding effect, and, on the other, the increase in the number of requests for the indication of provisional measures, he could not say for sure. The increase in the number of requests was not necessarily a bad thing, and his intention had simply been to point out that it had placed an additional burden on the Court, which it must take into account in drawing up its programme of work.

68. Mr. VASCIANNIE, referring to the case concerning *Maritime Delimitation in the Black Sea*, asked whether the Court had not returned, 40 years after the *North Sea Continental Shelf* cases, to the pre-1969 legal situation,

namely, to the approach of establishing an equidistance line and then taking special circumstances into account. How did that method compare with the "equitable solution" approach that had subsequently emerged? With regard to the *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) (Mexico v. United States of America)*, he asked whether Judge Owada considered the result to be satisfactory, given the fact that the Mexican nationals had been executed.

69. Judge OWADA (President of the International Court of Justice) said that he would not go so far as to say that the Court had gone back to the pre-1969 situation. The clear difference was that, because of the way the law had evolved and the adoption of articles 74 and 83 of United Nations Convention on the Law of the Sea, the main objective of delimitation had now become that of achieving an equitable result. The problem of whether such a result had to be obtained by taking a special circumstance into account had to be resolved on a case-by-case basis. In certain cases, the Court might conclude that a given factor would not affect the line it had drawn, but even so, that factor was not necessarily irrelevant. The judgment reflected the Court's determination to conform to the provisions of articles 74 and 83 of the Convention, the Court had also followed the current method of delimitation, with its three stages. As to the *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)*, the request by Mexico concerned only paragraph 153 (9) of the judgment. The Court had concluded that, under article 60 of its Statute, it was not able to provide such an interpretation. It had recognized that there was a problem, but that conclusion did not hinge on paragraph 153 (9). The Court's conclusion might well seem unsatisfactory, in that Mr. Medellín Rojas had been executed, but there had been nothing that the Court could do about that.

70. The CHAIRPERSON thanked Judge Owada for having joined in a dialogue with the members of the Commission.

Protection of persons in the event of disasters (*continued*) (A/CN.4/606 and Add.1, sect. F, A/CN.4/615, A/CN.4/L.758)

[Agenda item 8]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

71. The CHAIRPERSON invited members of the Commission to resume their consideration of the second report on protection of persons in the event of disasters (A/CN.4/615).

72. Ms. ESCARAMEIA said that, first of all, she agreed with the rights-based approach adopted by the Special Rapporteur, since the point of departure of the draft articles was victims of disasters and its purpose was to alleviate their suffering. Secondly, she agreed with the idea that disasters could not be defined strictly as natural or man-made. That was why she disagreed with the delegations

in the Sixth Committee of the General Assembly that had suggested that the Commission should begin by dealing with the first category and subsequently proceed to the second. Thirdly, she only partially agreed with the road map that the Special Rapporteur had outlined in his introduction of the chapter of his second report devoted to future work on the topic (para. 71). In her point of view, after draft article 3 on the duty to cooperate, it would be preferable to include a reference to the main principles on which the draft articles were based, to then refer to the specific rights and duties of States and other entities involved and lastly to deal with operational issues.

73. On the scope of the topic, the Special Rapporteur had examined from specific angles, namely *ratione materiae*, *ratione personae* and *ratione temporis*, the rights and needs of persons in need of protection, which were not distinct elements but rather the same elements seen from a different angle. With reference to the dual nature of the protection of persons in the event of disasters, the Special Rapporteur had referred to two axes, the first being relations between States, and the second, relations between States and persons in need of protection. That view was somewhat restrictive, however, since it failed to take into account relations between the affected States and humanitarian organizations, between other States and humanitarian organizations, or between affected persons and humanitarian organizations, all of which constituted additional axes. It was important for the draft articles to reflect the complexity of those interactions. Also, in emphasizing the importance of the States/persons axis, the Special Rapporteur referred extensively to the jurisprudence of the ICJ, but he could have included many other examples. In fact, there were entire bodies of international law—international human rights law, and, to a certain extent, international humanitarian law and international environmental law—that were based on the relationship between States and persons.

74. With regard to the scope of the topic *ratione personae*, the Special Rapporteur had rightly referred to non-State actors, but given the importance he had attributed to the State/State axis, the role of non-State actors risked not receiving sufficient attention.

75. As to the *ratione temporis* aspect, it was difficult to understand why the pre-disaster phase had been left aside for the time being. Perhaps that had something to do with the argument advanced in paragraph 18 of the second report that, at the present stage, duplication of efforts was to be avoided in view of the work being done in the same area by the ISDR. Yet the focus of that work appeared to be more operational than normative, and she would therefore appreciate an explanation from the Special Rapporteur on that subject. The importance of the pre-disaster phase had been highlighted, *inter alia*, in General Assembly resolution 63/141 (International cooperation on humanitarian assistance in the field of natural disasters, from relief to development), in which the General Assembly had emphasized the responsibility of all States to undertake disaster preparedness. Moreover, in the topical summary of the discussion held in the Sixth Committee of the General Assembly at its sixty-third session, several delegations had spoken in favour of focusing on the three

phases of a disaster, namely, prevention, response and rehabilitation (A/CN.4/606, para. 80).

76. She agreed for the most part with the wording of draft article 1 (Scope), but the expression “adequate and effective” seemed redundant and she would prefer to retain only the adjective “adequate”. More importantly, the phrase “all phases of a disaster” should be replaced by “in all phases related to a disaster”, in order to avoid giving the impression that the pre-disaster phase had been excluded. Alternatively, something to that effect could be included in the commentary.

77. Regarding draft article 2 (Definition of disaster), she said she agreed with Mr. Murase on the need to define some of the adjectives, such as “serious”, “significant” and “widespread”, or at least to clarify their meaning in the commentary. As Mr. Saboia had noted, the threshold conveyed by the phrase “a serious disruption” seemed to be too high.

78. Although her position might not be shared by the majority of members of the Commission, she had a problem with the Special Rapporteur’s reasoning and conclusion that armed conflicts should be excluded from the definition, since the many documents he cited in support of that conclusion were unconvincing. In her view, armed conflicts should be excluded only if they were the sole reason for the disaster and only to the extent that the relevant principles, remedies, rights and duties had not already been covered in another field of international law, namely international humanitarian law. Disasters that had as one of their components an armed conflict, particularly a non-international one, were a very frequent occurrence and should definitely be covered. In its 2003 resolution on humanitarian assistance, the Institute of International Law had explicitly included disasters “caused by armed conflicts or violence”,²⁰⁴ which was a clear indication that other bodies of international law failed to sufficiently cover those situations. Moreover, although the Special Rapporteur had stated that “[t]he exclusion of armed conflict from the subject matter to be studied was supported by all delegations” in the Sixth Committee (para. 6 of the second report), according to the topical summary of the discussion, “[i]t was generally agreed that legal issues already covered by other areas of international law, including international humanitarian law and international environmental law, should be excluded from the purview of the topic” (A/CN.4/606, para. 79)—something which was not quite the same thing.

79. For those reasons, she would prefer the definition in the 1998 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, but she understood why the Special Rapporteur had wished to avoid the difficulty entailed in a reference to causation. She could therefore accept the wording of draft article 2, provided that the words “excluding armed conflict” were deleted and that a clause was added further on in the draft articles indicating that the Commission’s work was without prejudice to the relevant provisions of international humanitarian law or to those of other areas of international law.

²⁰⁴ Institute of International Law, *Yearbook*, vol. 70, Part II, Session of Bruges (2003), pp. 263 *et seq.*, especially p. 267, para. 2.

80. The Special Rapporteur had stated that solidarity and cooperation were the principles underlying the protection of persons in the event of disasters. It therefore was unclear why he should propose a draft article on the latter but not on the former. Apart from solidarity, there were other principles that should be included in the draft articles, such as the dignity and human rights of persons in need of protection and non-discrimination in the protection of individuals.

81. As to draft article 3 (Duty to cooperate), the expression “as appropriate” should not apply to all of subparagraph (a), given that States always had the obligation to cooperate with the United Nations pursuant to Article 56 of the Charter of the United Nations, to which the Special Rapporteur frequently referred. It was regrettable that the expression “non-governmental organizations” had been omitted, replaced by the euphemism “civil society”, in subparagraph (c). She therefore proposed that an additional subparagraph should be inserted between current subparagraphs (b) and (c) in order to designate, not NGOs in general, but rather “relevant humanitarian non-governmental organizations”—an expression used in numerous documents in the field, including General Assembly resolution 63/139 of 11 December 2008 (Strengthening of the coordination of emergency humanitarian assistance of the United Nations). It would also be good to mention cooperation with the least developed countries, as suggested by Mr. Saboia.

82. With regard to terminology, the draft article should refer to States “or other territorial entities”, as the Institute of International Law had in its 2003 resolution. As to the future work of the Commission on the topic, it was useful to keep in mind that, according to the topical summary of the discussion in the Sixth Committee, “[s]everal delegations were of the view that the concept of responsibility to protect was relevant to the topic” (A/CN.4/606, para. 87).

83. Lastly, she was in favour of referring articles 1 to 3 to the Drafting Committee after due account had been taken of the suggestions made.

The meeting rose at 1 p.m.

3017th MEETING

Wednesday, 8 July 2009, at 10.05 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

Protection of persons in the event of disasters (*continued*) (A/CN.4/606 and Add.1, sect. F, A/CN.4/615, A/CN.4/L.758)

[Agenda item 8]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON warmly welcomed Ms. Margareta Wahlström, Assistant Secretary-General for Disaster Risk Reduction and Special Representative of the Secretary-General for the Implementation of the Hyogo Framework for Action, who was attending the meeting as an observer. He then invited the Commission to resume its consideration of the second report on the protection of persons in the event of disasters (A/CN.4/615).

2. Mr. GAJA commended the Special Rapporteur on his second report on the protection of persons in the event of disasters and said that his ability to elicit responses from the main institutional actors had provided the Commission with a wealth of material for consideration. As it was not yet clear what kind of principles and rules the Commission intended to formulate on the subject, it was difficult to express more than tentative views on the matters dealt with in the report.

3. The rights-based approach, which had been advocated by several members of the Commission in 2008 and supported by some States in the Sixth Committee, would seem to necessitate the formulation of a number of obligations for States and other entities, in particular for the State on whose territory the disaster occurred, i.e. the affected State, because rights had their counterpart in obligations. The resolution on humanitarian assistance adopted in 2003 by the Institute of International Law²⁰⁵ could to some extent be used as a model.

4. While there was certainly consensus within the Commission that States and other entities should cooperate in disaster relief, it was unclear what specific international obligations cooperation would entail (cooperation about what, to what extent and with whom), and it was far from obvious what consequences would flow from a failure by States, especially the affected State, to comply with their obligation to protect.

5. It would be difficult for the Commission to outline precise obligations under international law for States other than the affected State and for entities other than States. A number of States and NGOs might be willing to provide assistance, but they could well be reluctant to accept that they were under an obligation to do so. In fact, willing helpers were not usually lacking; what was often needed was the efficient coordination of the disaster response. The role of the affected State was crucial at that juncture. After a disaster, although assistance was available, it was sometimes the affected State that hindered protected persons from exercising their right to receive assistance. The affected State was certainly entitled to ensure the coordination of relief efforts and it might have very good reasons to refuse certain forms of assistance, but according to the Bruges resolution, “[a]ffected States are under the

²⁰⁵ *Ibid.*, pp. 265 *et seq.*