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Summary record of the 3062nd meeting

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the sake of consistency with the terminology of the 1986 Vienna Convention, the term “contracting international organization” had once again been replaced by “contracting organization”. At the end of paragraph 3, the Drafting Committee had inserted the number of the guideline that reproduced the language of article 20, paragraph 2, of the 1969 and 1986 Vienna Conventions.

57. Draft guideline 5.2.6, the last in that section, was entitled “Objections by a successor State other than a newly independent State in respect of which a treaty continues in force”, as originally proposed. The Drafting Committee had merely replaced the phrase “shall not have the capacity to” with the more succinct wording “may not” and had otherwise kept the text of the original draft guideline 5.15, to which no amendments had been suggested during the plenary debate.

58. Turning to the draft guidelines in section 5.3, “Acceptances of reservations and succession of States”, he said that draft guideline 5.3.1 had retained the original title, “Maintenance by a newly independent State of express acceptances formulated by the predecessor State”. Apart from the deletion of the word “international” before “organization” in the penultimate line in order to secure consistency with the terminology of the 1986 Vienna Convention, the Drafting Committee had retained the text of the corresponding draft guideline 5.16 *bis*, as presented by the Special Rapporteur, to which no changes had been proposed during the plenary debate.

59. Draft guideline 5.3.2 was entitled “Maintenance by a successor State other than a newly independent State of the express acceptances formulated by the predecessor State”, as originally proposed. The Drafting Committee had introduced only minor changes to the corresponding draft guideline 5.17 presented by the Special Rapporteur. In the English text, the phrase “for which a treaty remains in force” in paragraph 1 had been altered to “in respect of which a treaty continues in force” in order to follow the wording of the 1978 Vienna Convention, and the expression “contracting party” in paragraph 2 had been replaced by “contracting State” in order to align it more closely with the French text. As in other draft guidelines, the expression “contracting international organization” had been amended to “contracting organization” in paragraphs 1 and 3.

60. Draft guideline 5.3.3 was entitled “Timing of the effects of non-maintenance by a successor State of an express acceptance formulated by the predecessor State”, as originally proposed. Since the corresponding draft guideline 5.18 presented by the Special Rapporteur had been well received by the plenary Commission, the Drafting Committee had made only minor changes to its text. For the sake of consistency with other draft guidelines, the phrase “in accordance with” had been replaced by “in conformity with” in the first line and the term “contracting international organization” had been altered to “contracting organization”. In the English text, in order to align the wording with that of draft guideline 5.1.8, the phrase “shall take effect for” had been amended to “becomes operative in relation to” and the clause “when that State or that organization has received the notification thereof” had been replaced by “only when notice of it has been received by that State or that organization”. The

cross references had been retained and brought into line with the renumbering of the draft guidelines.

61. The last section of Part 5 of the Guide to Practice, entitled “Interpretative declarations and succession of States”, comprised only one provision, namely draft guideline 5.4.1, which corresponded to draft guideline 5.19 proposed by the Special Rapporteur and was entitled “Interpretative declarations formulated by the predecessor State”. During the plenary debate, it had been suggested that the text proposed by the Special Rapporteur be supplemented by the enunciation of a presumption that a successor State, in the absence of any clarification on its part, should be considered as maintaining the interpretative declarations of its predecessor State. The Drafting Committee had followed that suggestion, which had been accepted by the Special Rapporteur. A sentence to that effect had therefore been added to paragraph 1 of the draft guideline. As a result of that addition, the Drafting Committee had considered that the provision should have a broader title than that originally proposed. For that reason, the words “clarification of the status of” had been omitted from the title, which therefore referred in general terms to interpretative declarations formulated by the predecessor State.

62. He hoped that the Commission would find that it could provisionally adopt the draft guidelines presented by the Drafting Committee.

63. The CHAIRPERSON invited Commission to proceed to adopt the draft guidelines contained in document A/CN.4/L.760/Add.2.

Draft guidelines 5.1.1 to 5.4.1

Draft guidelines 5.1.1 to 5.4.1 were adopted.

64. The CHAIRPERSON said he took it that the Commission wished to adopt the report of the Drafting Committee on reservations to treaties contained in document A/CN.4/L.760/Add.2 as a whole.

The report of the Drafting Committee on reservations to treaties contained in document A/CN.4/L.760/Add.2, as a whole, was adopted.

The meeting rose at 11.30 a.m.

3062nd MEETING

Friday, 9 July 2010, at 10 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Al-Marri, Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Organization of the work of the session (continued)*

[Agenda item 1]

1. The CHAIRPERSON said that in order to take into account the availability of Special Rapporteurs, the Bureau had had to propose several changes to the programme of work. The revised programme of work for the following two weeks having been circulated, he said that if he heard no objection, he would take it that the members of the Commission wished to approve it.

*It was so decided.***Cooperation with other bodies (continued)****

[Agenda item 14]

STATEMENT BY THE PRESIDENT OF THE
INTERNATIONAL COURT OF JUSTICE

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

3. Mr. OWADA (President of the International Court of Justice) said that, as had become the custom, he would start with a report on the judicial activities of the Court over the past year, drawing attention, as appropriate, to aspects of relevance to the work of the Commission.

4. Over the past year, the Court had rendered two judgments on the merits and had also spent much of its time on dealing with the request from the General Assembly for an advisory opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*.²⁵⁰ Another case, concerning *Ahmadou Sadio Diallo*, was nearing conclusion. Those cases had involved States from all regions of the world, and the subject matter had been wide-ranging, from classical questions such as diplomatic protection and sovereign immunity to issues of contemporary relevance, for example the law relating to the use of international waterways and international environmental law.

5. On 13 July 2009, the Court had rendered its judgment in the *Dispute regarding Navigational and Related Rights*. The case had dealt with the navigational and related rights of Costa Rica on a section of the San Juan River, the southern bank of which formed the boundary between the two States as stipulated in an 1858 boundary treaty between them. While it had not been contested that, in accordance with that treaty, the relevant section of the waters belonged to Nicaragua, the parties had differed as to the nature of the legal regime regarding navigational and other related rights under the treaty, especially the issue of the scope of the navigational rights of Costa Rica and the regulatory measures that Nicaragua could exercise as sovereign State over the river. The Court had had to assess in particular the meaning and scope of the right of Costa Rica of “*libre navegación ... con objetos*

de comercio” enunciated in the 1858 Treaty,²⁵¹ a question that had deeply divided the parties.

6. The Court had found, on the one hand, that this right of free navigation applied to the transport of persons as well as to the transport of goods, as the activity of transporting persons, including tourists, could be commercial in nature for the purposes of applying the stipulation “*con objetos de comercio*” (“for purposes of commerce”) [para. 156 of the decision]. On the other hand, following an examination of the basic principles of the regime established under the 1858 Treaty, the Court had defined the specific scope of the regulatory measures which Nicaragua could take as the State with sovereign power over the river. The Court had held that Nicaragua had the right to: (1) require Costa Rican vessels to stop at the first and last Nicaraguan post on the San Juan River; (2) require persons travelling on the San Juan River to carry a passport or an identity document; (3) impose timetables for navigation on the San Juan River; and (4) require Costa Rican vessels fitted with masts or turrets to display the Nicaraguan flag. In the same vein, the Court had held that Nicaragua had the right to issue departure clearance certificates to Costa Rican vessels navigating on the San Juan River, but that it did not have the right to charge for the issuance of such certificates [para. 156 (2) of the judgment]. With regard to the issue of fishing by inhabitants of the Costa Rican bank of the San Juan River for subsistence purposes from that bank, the Court had held that the issue was not covered by the treaty itself, but that such fishing was to be respected by Nicaragua as a customary right [para. 144 of the judgment].

7. On 20 April 2010, the Court had rendered its judgment in the case concerning *Pulp Mills on the River Uruguay*. The case had involved the planned construction, authorized by Uruguay, of the CMB (ENCE) pulp mill and the construction and commissioning, also authorized by Uruguay, of the Orión (Botnia) pulp mill on the River Uruguay.

8. Argentina had argued that the authorization to build, the actual construction and, where applicable, the commissioning of the mills and the associated facilities, constituted violations of obligations arising under the Statute of the River Uruguay,²⁵² a bilateral treaty signed by the parties on 26 February 1975. That had been so because the acts of Uruguay had been in violation of the mechanism for prior notification and consultation created by Articles 7 to 13 of the Statute (the procedural violations). Those allegations had been made in respect of both the CMB mill, whose construction on the River Uruguay had ultimately been abandoned, and the Orión mill, which was currently in operation. Argentina had further contended, on the subject of the Orión mill and its port terminal, that Uruguay had also violated the provisions of the Statute on

²⁵¹ Tratado de límites territoriales entre Costa Rica y Nicaragua (“Tratado de Cañas-Jerez”), San José de Costa Rica, 15 April 1858, *Colección de Tratados*, San José, Secretariat of External Relations, 1907, p. 159 (for the English translation, see Treaty of Territorial Limits between Costa Rica and Nicaragua, *British and Foreign State Papers, 1857–1858*, vol. 48, London, William Ridgway, 1866, p. 1049).

²⁵² Statute of the River Uruguay, signed at Salto, Uruguay on 26 February 1975, United Nations, *Treaty Series*, vol. 1295, No. I-21425, p. 331.

* Resumed from the 3060th meeting.

** Resumed from the 3047th meeting.

²⁵⁰ General Assembly resolution 63/3 of 8 October 2008.

protection of the river environment. Argentina had also asserted that the industrial activities authorized by Uruguay had, or would have, an adverse impact on the quality of the waters of the river and the area affected by it and had caused significant transboundary damage to Argentina (the substantive violations). For its part, Uruguay had argued that it had violated neither the procedural nor the substantive obligations laid down by the Statute.

9. With regard to the procedural violations, the Court had noted that Uruguay had not informed the Administrative Commission of the River Uruguay, a body established under the Statute to monitor the river, including by assessing the impact of proposed projects on the river (known under the Spanish acronym “CARU”). The Court had concluded that by not informing CARU of the planned works before the issuing of the initial environmental authorizations for each of the mills and for the port terminal adjacent to the Orión (Botnia) mill and by failing to notify the plans to Argentina through CARU, Uruguay had violated the Statute [paras. 111 and 122 of the judgment].

10. With respect to the substantive violations, based on a detailed examination of the parties’ arguments, the Court had found “that there is no conclusive evidence in the record to show that Uruguay has not acted with the requisite degree of due diligence or that the discharges of effluent from the Orion (Botnia) mill have had deleterious effects or caused harm to living resources or to the quality of the water or the ecological balance of the river since it started its operations in November 2007” [para. 265 of the judgment].

11. Consequently, the Court had concluded that Uruguay had not breached substantive obligations under the Statute [*ibid.*]. However, it had also stressed that “both Parties have the obligation to enable CARU, as the joint machinery created by the 1975 Statute, to exercise on a continuous basis the powers conferred on it by the 1975 Statute, including its function of monitoring the quality of the waters of the river and of assessing the impact of the operation of the Orión (Botnia) mill on the aquatic environment” [para. 266]. According to the Court, “Uruguay, for its part, has the obligation to continue monitoring the operation of the plant in accordance with Article 41 of the Statute and to ensure compliance by Botnia with Uruguayan domestic regulations as well as the standards set by CARU” [*ibid.*]. The Court had stressed that “[t]he Parties have a legal obligation under the 1975 Statute to continue their co-operation through CARU and to enable it to devise the necessary means to promote the equitable utilization of the river, while protecting its environment” [*ibid.*].

12. The case, which at its core concerned allegations of transboundary harm, highlighted the close synergy between the work of the ICJ and the work of the International Law Commission. He noted in that regard that the parties had made frequent reference to the Commission’s 2001 draft articles on prevention of transboundary harm from hazardous activities,²⁵³ and he hoped that the Court’s judgment would contribute to the work undertaken by the Commission in that area.

13. One intriguing aspect of the case was the extensive amount of technical and scientific evidence submitted by the parties. That was an encouraging development, because it showed that States were placing their trust in the Court to decide highly technical disputes. He referred in that connection to the case concerning *Aerial Herbicide Spraying*, which was currently before the Court and was likely to entail a large amount of technical data and arguments on the nature and effects of the aerial herbicide spraying at issue.²⁵⁴ Such cases brought new challenges, to the extent that they involved the Court in a legal assessment of scientific and technical evidence.

14. One difficulty that the extensive scientific evidence had raised in the *Pulp Mills on the River Uruguay* case had been that of how the ICJ should determine the authority and reliability of the studies and reports submitted to it by the parties and which had sometimes been prepared by experts and consultants retained by the parties and at other times by outside experts, such as the International Finance Corporation. Assessing those expert reports could be particularly complicated, because they often contained conflicting claims and conclusions. In the present case, the Court had found that it was not necessary, for the purposes of the judgment, to enter into a general discussion on the relative merits, reliability and authority of the documents and studies prepared by the experts and consultants of the parties. It had concluded that:

despite the volume and complexity of the factual information submitted to it, it is the responsibility of the Court, after having given careful consideration to all the evidence placed before it by the Parties, to determine which facts must be considered relevant, to assess their probative value, and to draw conclusions from them as appropriate [para. 168 of the judgment].

15. The case had been rendered more complicated, however, by the fact that the situation on the ground had continuously evolved: one of the mills had been functioning, and thus follow-up technical reports by experts on each side had continuously become available. Another issue raised in the context of the scientific evidence had been the precise status of scientific experts. The issue had arisen because certain scientific experts had presented evidence to the ICJ as counsel rather than as experts or witnesses. On that issue, the Court had stated the following in paragraph 167 of its judgment:

Regarding those experts who appeared before it as counsel at the hearings, the Court would have found it more useful had they been presented by the Parties as expert witnesses under Articles 57 and 64 of the Rules of Court²⁵⁵, instead of being included as counsel in their respective delegations. The Court indeed considers that those persons who provide evidence before the Court based on their scientific or technical knowledge and on their personal experience should testify before the Court as experts, witnesses or in some cases in both capacities, rather than counsel, so that they may be submitted to questioning by the other party as well as by the Court.

16. With respect to those issues, it might be useful to cite Article 1, subparagraph (i), of the Resolution concerning the Internal Judicial Practice of the Court adopted on 12 April 1976, which read: “After the termination of the written proceedings and before the beginning of

²⁵⁴ Memorial of Ecuador, vols. 1–4 (28 April 2009), and Counter-Memorial of Colombia, vols. 1–3 (29 March 2010).

²⁵⁵ ICJ, *Acts and Documents concerning the Organization of the Court*, No. 6 (2007), pp. 91–155.

²⁵³ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 146.

the oral proceedings, a deliberation is held at which the judges exchange views concerning the case, and bring to the notice of the Court any point in regard to which they consider it may be necessary to call for explanations during the course of the oral proceedings.”²⁵⁶ Such deliberation would likely prove even more important in highly technical cases, because it afforded an opportunity for the ICJ to discuss what further material it would like the parties to produce and whether it would be useful for the Court to hear experts at the oral hearings, and in what capacity.

17. In addition to those two judgments on the merits rendered in the past year, the Court had also held deliberations and hearings in other cases, for example the case concerning *Ahmadou Sadio Diallo*, which involved claims for diplomatic protection by Guinea on behalf of Ahmadou Sadio Diallo, a Guinean businessman who alleged that he had been unlawfully arrested, detained and expelled from the Democratic Republic of the Congo, where he had been living and conducting business for over 30 years. The Court had already addressed, in a judgment of 2007, the issue of preliminary objections raised by the respondent, and it had also settled other issues. On that basis, it had held public hearings on the merits of the case in April 2010. Its judgment would be rendered in due course. One of the topics currently being considered by the Commission, namely “Expulsion of aliens”, was at issue in that case: one of claims by Guinea concerned the expulsion of one of its nationals from the Democratic Republic of the Congo, which it argued was unlawful.

18. The Court was also considering the case concerning *Jurisdictional Immunities of the State*, filed by Germany in December 2008. The dispute involved whether Italy had violated the jurisdictional immunity of Germany by allowing civil claims in Italian courts based on violations of international humanitarian law by the German Reich during the Second World War. Italy had included a counterclaim in its counter-memorial filed on 23 December 2009, and the Court was currently deliberating whether that counterclaim met the requirements of article 80, paragraph 1, of the Rules of Court. The order on the admissibility of that counterclaim by Italy would be delivered in the not-too-distant future.

19. In addition to those contentious cases, the ICJ had been dealing with the request from the General Assembly for an advisory opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*. On 8 October 2008, in resolution 63/3, the General Assembly had decided, pursuant to 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 Member States of the United Nations had filed written statements on the question, and the authors of the unilateral declaration of independence had filed a written contribution. Fourteen States had submitted written comments on the written statements by States and the written contribution

by the authors of the declaration of independence. From 1 to 11 December 2009, the Court had held public hearings on the question, in which 28 States and the authors of the unilateral declaration of independence had participated. The Court was now engaged in the deliberation process.

20. In addition, three new contentious cases had been filed in the past year, and the Court had also received another request for an advisory opinion. On 28 October 2009, an application had been filed by the agent of Honduras whereby the Republic of Honduras had instituted proceedings against the Federative Republic of Brazil. The case (*Certain Questions concerning Diplomatic Relations*) was unique in that the Court had received conflicting messages from different governmental authorities all purporting to be acting on behalf of Honduras. The initial letter of application from Honduras had stated that the

dispute between [the two States] relates to legal questions concerning diplomatic relations and associated with the principle of non-intervention in matters which are essentially within the domestic jurisdiction of any State, a principle incorporated in the Charter of the United Nations.

However, immediately after the filing of the Application, another letter in the name of the Minister for Foreign Affairs of Honduras had reached the Court, informing it that the agents and co-agents of the Republic of Honduras who had co-signed the initial application no longer represented the Government of Honduras. Then, in a letter dated 2 November 2009, the said agent had informed the Court that the Government of Honduras had appointed his co-agent to act as its agent. Faced with those contradictory communications, the Court had decided that no further action would be taken in the case until the situation in Honduras was clarified. The matter had finally been settled when the Court had received a letter dated 30 April 2010, in which the Minister for Foreign Affairs of Honduras had informed the Court that the Government of Honduras was “not going on with the proceedings initiated by the Application filed on 28 October 2009 against the Federative Republic of Brazil” and that “in so far as necessary, the Honduran Government accordingly [was] withdraw[ing] this Application from the Registry”. Consequently, in its order of 12 May 2010, the Court, noting that the Government of Brazil had not taken any step in the proceedings in the case, had officially recorded the discontinuance by Honduras of the proceedings instituted by the application filed on 28 October 2009 and had ordered that the case be removed from its list.

21. In December 2009, Belgium had initiated proceedings against Switzerland (*Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*) relating to a dispute between the main shareholders of Sabena, the former Belgian airline, concerning the interpretation and application of the Convention on jurisdiction and the enforcement of judgements in civil and commercial matters. Belgium argued that Switzerland was breaching the Convention by virtue of the decision of its courts to refuse to recognize, or to stay its proceedings pending, a future decision in Belgium on the liability of the Swiss shareholders to the Belgian shareholders. The parties were now in the process of preparing their written pleadings.

²⁵⁶ *Ibid.*, p. 175.

22. In April 2010, the Court had received a request for an advisory opinion from the International Fund for Agricultural Development (IFAD) concerning *Judgement No. 2867 of the Administrative Tribunal of the International Labour Organization* requiring IFAD to pay a staff member two years' salary plus moral damages and costs for the non-renewal of her contract. The request for an advisory opinion fell within the framework of a rarely used procedure, namely the review of judgements of administrative tribunals, which had given rise to four advisory opinions since 1946. The Court had fixed 29 October 2010 as the time limit for the submission of written statements by IFAD and its member States, the States parties to the Convention to combat desertification in those countries experiencing serious drought and/or desertification, particularly in Africa, entitled to appear before the Court, and those specialized agencies of the United Nations that had made a declaration recognizing the jurisdiction of the Administrative Tribunal of the International Labour Organization. The Court had also fixed 29 October 2010 as the time limit within which any statement by the complainant who was the subject of the judgement could be presented and 31 January 2011 as the time limit within which the parties could submit written comments.

23. Finally, at the end of May 2010, Australia had initiated proceedings against Japan, alleging that "Japan's continued pursuit of a large-scale program of whaling under the Second Phase of its Japanese Whale Research Program under Special Permit in the Antarctic ("JARPA II") [is] in breach of obligations assumed by Japan under the International Convention for the Regulation of Whaling ("ICRW"), as well as its other international obligations for the preservation of marine mammals and marine environment". The parties were now preparing their written pleadings.

24. Sixteen cases, which raised a great variety of issues of public international law, were currently on the docket of the ICJ.

25. Turning to more general challenges facing the Court, he said that the number of cases on the docket of the Court had increased significantly over the past five decades, from 3 cases in the 1960s, to fewer than 5 in the 1980s, to 13 in the 1990s and to an average of more than 20 pending cases each year over the past decade. All 16 cases currently on the Court's docket involved different legal issues.

26. Although the length of the written pleadings had not increased exponentially over time, there had been a marked increase in the overall volume of documents presented by the parties, especially when account was taken of the annexes, which had grown enormously in size.

27. For example, the documents in the case concerning *Pulp Mills on the River Uruguay* contained 14,521 pages with annexes; the documents in the case concerning *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* contained 5,702 pages with annexes; and the documents in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* contained approximately 14,000 pages with annexes.

28. Needless to say, such extensive case files put an enormous strain on the Court, not only in relation to the workload of the judges themselves, but also the burden on the Registry, especially its linguistic department, which had to translate all the documents into the other official language of the Court. Although there had been other cases in the past that had been similar in dimension, such as *South West Africa*, *Barcelona Traction and Military and Paramilitary Activities in and against Nicaragua*, they had been exceptions, whereas in recent years such lengthy cases were becoming the rule rather than the exception. The Court was coping with that situation as best it could, for example through Practice Direction III as modified in 2009, which provided that:

The parties are strongly urged to keep the written pleadings as concise as possible, in a manner compatible with the full presentation of their positions.

In view of an excessive tendency towards the proliferation and protraction of annexes to written pleadings, the parties are also urged to append to their pleadings only strictly selected documents.²⁵⁷

29. In recent years, there had been a marked expansion of the substantive issues coming before the Court, which reflected the globalization of international relations and the proliferation of multilateral legislation in domains which in the past had been regulated at national level. Substantive issues which had recently come before the Court ranged from international human rights law and international humanitarian law, to international criminal jurisdiction and international environmental law. The cases on the Court's docket reflected a welcome trend in the attitude of States in favour of the judicial settlement of legal disputes arising as a result of the rapid process of integration of the international community in areas in which States had previously not tended to submit disagreements to international adjudication. That development could be seen in the increasing prominence of issues relating to the rights of individuals, for example the *LaGrand* and *Avena* cases. Environmental law was also an area in which the Court had been increasingly active. The Court had considered the *Pulp Mills on the River Uruguay* case primarily as a case of the rights and obligations of the States involved in relation to the regime created by an international treaty between the parties.

30. The issue of implementation of and compliance with the decisions of the Court had given rise to comments in international case law. It might surprise many of the observers of the international adjudication process to hear that, in general, the judgments of the Court were complied with. In the nearly one hundred years of existence of either the Permanent Court of International Justice or the International Court of Justice, there had been only a few occasions in which States had willfully chosen to disregard the Court's judgments: *Corfu Channel*, *Fisheries Jurisdiction*, *Military and Paramilitary Activities in and against Nicaragua* and *United States Diplomatic and Consular Staff in Tehran*. Even in those cases, the effects of non-compliance had been mitigated to a certain extent.

31. In contrast to the situation relating to overall compliance, the Court had recently been faced with some

²⁵⁷ Report of the ICJ, *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 4 (A/64/4)*, p. 50.

increasingly complex questions concerning specific details of compliance. He referred to the implications of the *Avena* case, in which both parties to the dispute, namely Mexico and the United States of America, had pledged to observe the judgment of the ICJ. However, when the Court rendered a judgment that had to be implemented in the domestic legal order of a State, it might happen, depending on the legal system in force in that State, that the latter encountered difficulties in implementing the judgment. The Government of the United States had in fact tried to implement the judgment of the ICJ at both the federal and state level, but that had not been possible because of both the federal system in the United States and its constitutional system, in which the doctrine of “self-executing” treaties had prevented the executive branch from implementing the decisions of the Court at state level. In *Medellín v. Texas*, the Supreme Court of the United States, to which the case had been referred, had held that, for the purposes of the Constitution, the United States was not bound by the *Avena* judgment, because the latter did not automatically become an integral part of the law of the United States. That type of question could arise in other States; the problem was how to harmonize the international legal order and the domestic legal order.

32. The CHAIRPERSON invited the members of the Commission to put questions to Mr. Owada.

33. Mr. DUGARD asked Mr. Owada to comment on the subject of the optional clause on compulsory jurisdiction set out in Article 36, paragraph 2, of the Statute of the International Court of Justice.

34. Mr. OWADA (President of the International Court of Justice) said that at present, 66 States had accepted the optional clause; that constituted a considerable improvement compared to the 48 States which had accepted the optional clause of the Permanent Court of International Justice. However, those figures were misleading, because of 192 States, only 66 had accepted the optional clause, or 34 per cent, as compared to 48 out of 55 States in the days of the League of Nations, or 72 per cent. Moreover, there had been many more substantive reservations attached to the declaration accepting the optional clause, which tended to circumscribe the scope of compulsory jurisdiction, hence the “decline of the optional clause”. That was a situation which the United Nations and the international community as a whole must address.

35. On the other hand, there was a growing tendency to accept the compulsory jurisdiction of the Court, not through the optional clause, but through the use of compromissory clauses, in multilateral conventions in particular. A large number of cases had been referred to the Court on that basis. That was not a substitute for the acceptance of the optional clause, but it had the effect of expanding the scope of the compulsory jurisdiction of the Court and in some cases was more effective.

36. Ms. JACOBSSON, referring to the issue of compliance, enquired whether the nature of disputes, in particular those concerning human or individual rights, might not make it more difficult for States to implement the judgments of the Court.

37. Mr. OWADA (President of the International Court of Justice) said that, in his view, there were two causes for that state of affairs. One was the growing interaction between the domestic legal order and the international legal order. As more and more areas were regulated by international conventions, it was legitimate for disputes in those areas to be brought before the ICJ. The problem was that in many countries, the domestic legal order was not yet able to respond to that situation; that was particularly significant in areas in which States traditionally dealt with issues such as human rights and the environment.

38. The second problem was the more traditional issue of dualism versus monism. The case concerning *Medellín v. Texas* on which the United States Supreme Court had ruled was a good illustration: owing to the federal system in the United States, many states, particularly in the south, had a sense of “independence” *vis-à-vis* the federal Government.

39. Mr. KAMTO asked the following question: if the Court did not have the annexes accompanying the documents and pleadings of the parties, would it not deprive itself of the possibility of verifying some of the information in the annexes? Noting, secondly, that even in a federal system, in most cases only the State itself was concerned and that its federal components were of little importance, he wondered how a State’s domestic legal order could prevent it from implementing a binding decision of the Court.

40. Mr. OWADA (President of the International Court of Justice), replying to Mr. Kamto’s first question, said that the parties to cases brought before the Court were strongly urged throughout the proceedings to make their presentations as short as possible and not to repeat what they had already said. However, that was merely a recommendation, and the Court was not in a position to dictate the conduct of the parties. For its part, the Court must take on a growing workload, and it was the only international jurisdiction in which the judges did not have any assistants. Fortunately, the Fifth Committee of the General Assembly had recently decided that each judge would be provided with the assistance of a P2 law clerk.²⁵⁸ Currently, judges rarely had time to exchange views on a case after the termination of the written proceedings and before the beginning of the oral proceedings, as called for in the resolution adopted in 1976 concerning the internal judicial practice of the Court.²⁵⁹ The additional assistance would allow judges to devote more time to that important phase.

41. On Mr. Kamto’s second question, he said that he had perhaps not been sufficiently precise: the problem that had arisen in the *Avena* case had clearly been an issue of domestic law but had affected the implementation of a judgment rendered at international level. That was not an inevitable consequence of the federal system, but a general problem which that type of system had tended to aggravate. For example, when the Security Council imposed sanctions which, pursuant to Article 25 of the Charter of the United Nations, were legally binding on

²⁵⁸ General Assembly resolution 64/243 of 24 December 2009, part III, section 7, para. 72.

²⁵⁹ See footnote 255 above.

all Member States, it was up to each State to reconcile the problem of the compatibility of sanctions with its domestic law. That was the case with any system of government, but the problem was more complex in a federal system. In *Medellín v. Texas*, the Supreme Court of the United States had held that the Charter of the United Nations and the Statute of the International Court of Justice were not self-executing in domestic law and that, unless the legislative branch at federal level passed laws making their provisions binding, domestic courts did not have to enforce them. Ultimately, it was a question of the constitutional legal order inherent in a federal system.

42. Mr. VALENCIA-OSPINA asked whether the Court had tried to address the problem of the considerable increase in the number of cases brought before it and their growing complexity, as well as the increasing tendency of parties to submit technical and scientific evidence and the reports of experts which inevitably were contradictory. In the past, the Court had usually been able to avoid a detailed analysis of such documents and had focused on legal aspects, but it might happen that the technical and scientific evidence would play a decisive role in the final determination of a case.

43. Mr. OWADA (President of the International Court of Justice) said that in the case concerning *Pulp Mills on the River Uruguay*, the Court had not had to study technical aspects in detail because the main issues had been of a legal nature, but it was clear that this would not always be the case. The Court needed more objective experts than those chosen by the parties, but the question remained as to how such opinions could be obtained. That was an issue to which the Court must give all due attention, but it had not yet found an ideal solution.

44. Mr. NOLTE, referring to the issue of the implementation of the Court's judgments, said that there had been a case a year earlier in Germany that was very similar to the *Avena* case and which had concerned the 1963 Vienna Convention on Consular Relations. Germany also had a federal system, but fortunately a chamber of the German Constitutional Court had interpreted the Constitution as requiring that judgments of the ICJ be duly implemented by the domestic courts. He was concerned that the United States approach might become the model and had cited the above example to show that there were other ways of dealing with the judgments of the ICJ.

45. Mr. OWADA (President of the International Court of Justice) thanked Mr. Nolte for that information. The approach to which Mr. Nolte had referred had been adopted by many other States. Even in the United States, at any rate in jurisprudence, emphasis had been placed on the need to reconcile international obligations with the requirements of domestic law. Although that did not specifically concern the judgments of the ICJ, it was an encouraging sign.

46. Mr. VASCIANNIE, returning to the question of the workload of the Court, welcomed the creation of posts for law clerks to assist the judges and enquired whether other measures had been considered. In the United States, for example, the Supreme Court ultimately decided which cases it would hear. Another possibility would be to increase the number of judges or use more chambers.

47. Mr. OWADA (President of the International Court of Justice) said that various solutions had been examined, but none had been retained for both practical and theoretical reasons. As the world court and the principal judicial organ of the United Nations, the International Court of Justice must represent the world's major legal systems. If the Court was divided into chambers, the legitimacy and credibility of its decisions would no longer be guaranteed. The parties usually wanted the full Court to come to a judgment on behalf of the international legal community as a whole. Moreover, it was not conceivable for the ICJ to decide not to hear a case, as was done by the Supreme Court of the United States, because there were no different degrees of jurisdiction at the international level. States were sovereign, and for them, every case brought before the Court was important. A decision by the ICJ not to hear a given case might seem very arbitrary to the States concerned.

48. Mr. HMOUD asked whether the Court had given consideration to setting a maximum number of pages or documents admissible in each case. Such a solution, which could be applied to future cases, might also help to reduce the number of cases brought before the Court and thus lighten its workload.

49. Mr. OWADA (President of the International Court of Justice) said he thought that he had already answered the second question. On the first question, he reiterated that the Court could only formulate recommendations, but could not impose limitations on parties, because that would be tantamount to restricting their freedom to make their case.

50. The CHAIRPERSON thanked the President of the International Court of Justice for having taken the time to address the members of the Commission and to answer their questions.

Expulsion of aliens (*continued*)* (A/CN.4/620 and Add.1, sect. C, A/CN.4/625 and Add.1–2, A/CN.4/628 and Add.1)

[Agenda item 6]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)*

51. The CHAIRPERSON invited the Special Rapporteur to introduce the second part of his sixth report on the expulsion of aliens on expulsion proceedings (A/CN.4/625/Add.1).

52. Mr. KAMTO (Special Rapporteur) said that when he had introduced his sixth report on expulsion of aliens at the first part of the current session, he had indicated that at the second part of the session he would submit an addendum to the Commission covering the rest of the subject, namely a Part Two on expulsion procedures and a Part Three on the legal consequences of expulsion, in conformity with the provisional workplan.²⁶⁰ That work had been completed, but Part Three had not arrived at the Secretariat in time to be translated and thus would become

* Resumed from the 3044th meeting.

²⁶⁰ See footnote 24 above.

the seventh report, which the Commission could perhaps consider at the first part of its sixty-third session.

53. Addendum 1 to the sixth report on the expulsion of aliens was divided into three sections. Section I was devoted to the distinction between aliens who had legally entered the territory of a State (“legal aliens”) and aliens who had illegally entered the territory of a State (“illegal aliens”) (paras. 278–292) [paras. 2–16],²⁶¹ section II to procedures for the expulsion of aliens illegally entering the territory of a State (paras. 293–316) [paras. 17–40] and section III to an examination of the procedural rules applicable to aliens lawfully in the territory of a State (paras. 317–417) [paras. 41–126 and A/CN.4/625/Add.2, paras. 1–15]. International instruments that expressly stated the principle of a distinction between aliens legally and illegally present in a State were rare. It appeared that the 1951 Convention relating to the Status of Refugees was the only one that explicitly did so. The distinction was, however, implicit in other international conventions, above all on the basis of *a contrario* reasoning, and it was well established in practice. However, regardless of whether it was contemplated in the light of the rules of international law or on the basis of State practice, as it emerged from domestic law in particular, the impact of the distinction was limited, in his view, to the procedural rules of expulsion, because it could not be applicable with respect to the human rights of the expelled persons: whatever the conditions under which they entered and were present in the expelling State, they had the same right to the protection of the fundamental rights inherent to all human beings. Similarly, apart from the right of return of the illegally expelled alien, it did not seem to be legally well founded to apply that distinction in the framework of the legal consequences of expulsion, in particular with regard to the protection of the property of the expelled person, the expelled person’s right to diplomatic protection and the responsibility of the expelling State if the expulsion had been carried out illegally. Having postulated the principle of such a distinction, he had then sought to clarify the meaning of the concepts of a “resident” alien and an alien “lawfully” or “unlawfully” in the territory of a State. The conclusions that he had drawn in paragraph 291 [para. 15] of the report might help improve or enrich the definitions contained in draft article 2, which had been referred to the Drafting Committee in 2007.²⁶²

54. Procedures for the expulsion of aliens illegally entering the territory of a State varied enormously from one State to another, and the study of national legislation showed such diversity that it was not possible to identify a dominant trend. Some laws set different procedures for recent and long-term illegal aliens. In the final analysis, as the question of the expulsion of aliens illegally entering the territory of a State was related to the right of admission, which was a sovereign right of the State, and the right of expulsion, which was the right of the State exercised under international law, he had concluded that it was preferable to leave the establishment of such rules

²⁶¹ The numbers between square brackets refer to the original numbering of the paragraphs in addenda 1 and 2 to the sixth report of the Special Rapporteur (A/CN.4/625), as they appear on the Commission’s website, before their publication in *Yearbook ... 2010*, vol. II (Part One).

²⁶² See *Yearbook ... 2007*, vol. II (Part Two), p. 61, para. 188, and p. 68, para. 258, footnote 327.

to national legislation, without prejudice to the freedom of the expelling State to apply to “illegal” aliens the procedural rules applicable to the expulsion of “legal” aliens, if it so wished. In the light of the above considerations, he had proposed, in paragraph 316 [para. 40] of his report, draft article A1 (Scope of [the present] rules of procedure), which read:

“1. The draft articles of the present section shall apply in case of expulsion of an alien legally [lawfully] in the territory of the expelling State.

“2. Nonetheless, a State may also apply these rules to the expulsion of an alien who entered its territory illegally, in particular if the said alien has a special legal status in the country or if the alien has been residing in the country for some time.”

55. Basically, he had sought to allow for the various situations under national legislation but without using them to establish a general binding rule for States, because the aliens in question had violated national law, and an obligation could not be imposed on an expelling State when the starting point was a violation of its own law. As to the form, the numbering A1, B1, C1 and so on of the draft articles, which would be continued in the seventh report, was merely intended to avoid confusion with the numbering used in paragraphs 42 and 276 of the first part of his sixth report (A, B). As he had already explained, a numbering which combined a letter and a numeral had come about because of the modification of the initial numbering following the reformulation, at the request of the Commission, of several articles at the previous session in 2009.²⁶³ The numbering would be harmonized by the Drafting Committee once all the draft articles had been considered.

56. With regard to the procedural rules applicable to aliens lawfully in the territory of a State, it was clear that an alien facing expulsion could claim the benefit of the procedural guarantees contained in international human rights conventions. Depending on the State, an expulsion order could be either administrative or judicial. Generally, expulsion procedures were not characterized as criminal proceedings; moreover, they provided significant guarantees based on international law and were solidly anchored in the domestic law of States and in legal theory.

57. The first of those guarantees was the requirement that the expulsion measure must be in conformity with the law. It was found in universal instruments, such as the 1948 Universal Declaration of Human Rights²⁶⁴ and the 1951 Convention relating to the Status of Refugees, and was supported by the jurisprudence of the Human Rights Committee, notably in the case concerning *Anna Maroufidou v. Sweden*. It had also been recognized in regional instruments such as the African Charter on Human and Peoples’ Rights (art. 12, para. 4), the American Convention on Human Rights: “Pact of San José, Costa Rica” (art. 22, para. 6) and Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (art. 1, para. 1). The rule was also

²⁶³ *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/617, and *ibid.*, vol. II (Part Two), p. 129, para. 91.

²⁶⁴ See footnote 22 above.

established in the legislation of many States. The requirement concerning conformity with the law appeared as a principle underpinning the rule of law and according to which a State was expected to observe its own rules—*patere legem* or *patere regulam quam fecisti*—which in a sense was the counterpart of the principle of *pacta sunt servanda*, one of the cornerstones of international law. In the light of those considerations, he had proposed draft article B1 (Requirement for conformity with the law) (para. 340 of the report) [para. 64], which read:

“An alien [lawfully] in the territory of a State Party may be expelled therefrom only in pursuance of a decision reached in accordance with law.”

58. The second procedural rule was the obligation to inform the person subject to expulsion of the expulsion decision. Treaty law required that persons subject to expulsion be informed of the reasons for the expulsion decision as well as any available avenues for review. That obligation was also set out in the law of many States. It should be noted that, whereas international instruments made no distinction as to the requirement of notification of the expulsion decision, national legislation differed depending on whether the alien was lawfully present in a State or had entered the territory of a State illegally. However, according to Richard Plender,²⁶⁵ some authorities upheld the right of an alien, including an illegal alien, to be informed of the reasons for expulsion, because the obligation to inform extended to notification of the reason for expulsion, as confirmed by the African Commission on Human and Peoples' Rights in the *Amnesty International v. Zambia* case and as was also reflected in European Union law, in particular article 30, paragraph 2, of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004.²⁶⁶ The obligation to communicate the reasons for expulsion was not consistently recognized at the national level, but an analysis of all available legal material left little doubt as to the existence in international law of an obligation to inform an alien subject to expulsion of the decision to expel and subsequently of the grounds for expulsion. Thirdly, the right of an alien to submit reasons against the expulsion was a procedural right expressly recognized in article 13 of the International Covenant on Civil and Political Rights, as well as in article 1 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms and in article 7 of the Convention of application of articles 55 and 56 of the Treaty instituting the Benelux Economic Union. It was also recognized in the national law of many States, as explained in paragraph 361 [para. 85] of the report. The right to submit arguments against expulsion could be exercised through the right to a hearing, as indicated in paragraphs 362 to 366 [paras. 86–90], or the right to be present, i.e. the right of the alien concerned to appear personally during consideration of the alien's potential expulsion. Fourthly, the right to effective review was the opportunity that must be given to the alien subject to expulsion to defend himself before a competent body provided by law. However, as was well known, the expelling State could derogate from that rule for “compelling reasons of national security”. The Human Rights Committee had

regularly examined that justification, including in the case *Eric Hammel v. Madagascar*, in which it had noted that the author had not been given an effective remedy to challenge his expulsion and that the State party had not shown that there had been compelling reasons of national security to deprive him of that remedy [para. 20]. In the case *Mansour Ahani v. Canada*, the Committee had held that the complainant, who had been placed in detention on the grounds that he posed a threat to internal security, had been justified in having the legality of his detention reviewed [para. 10.2]. Fifthly, the rule of non-discrimination in procedural guarantees stemmed in particular from the interpretation by the Human Rights Committee of article 13 of the Covenant to the effect that “[d]iscrimination may not be made between different categories of aliens in the application of article 13”.²⁶⁷ For its part, the Committee on the Elimination of Racial Discrimination had expressed concern regarding cases of racial discrimination in relation to the expulsion of foreigners, including in matters of procedural guarantees.²⁶⁸ Similarly, the Human Rights Committee had stressed the prohibition of gender discrimination with respect to the right of an alien to submit reasons against his expulsion.²⁶⁹ Sixthly, the right to consular protection was set forth in articles 36 and 38 of the Vienna Convention on Consular Relations. The ICJ had applied article 36 in the *Avena* and *LaGrand* cases; in his statement earlier, the President of the Court had referred to the difficulties in its application. That right was also set out in the Declaration on the human rights of individuals who are not nationals of the country in which they live, annexed to General Assembly resolution 40/144 of 13 December 1985, as well as in the legislation of many States. Thus, it was well established in international law. Seventhly, the right to counsel was also recognized in treaty law, notably in article 13 of the Covenant, and found support in international jurisprudence, for example that of the Committee against Torture in the case *Josu Arkauz Arana v. France* (although that “jurisprudence” could not be placed on an equal footing with the jurisprudence of the Court or international jurisdictions), as well as in most national legislation and in legal theory. Eighthly, the right to legal aid was recognized in European Union law, notably in article 12 of Council Directive 2003/109/EC of 25 November 2003 concerning the situation of third-country nationals who were long-term residents.²⁷⁰ The right to legal aid was also provided in the legislation of several States, as indicated in paragraph 388 [para. 112] of the report. Although such a right did not have a clear basis in treaty law or international legal jurisprudence, he believed that such a basis could be established, in line with the progressive development of international law, European Union practice and many national laws. The reasoning behind that proposition was that persons subject to expulsion were usually destitute and were unable to afford the services of counsel. The aim was to extend to them the benefit of judicial assistance

²⁶⁷ General Comment No. 15 [on the position of aliens under the Covenant], Report of the Human Rights Committee, *Official Records of the General Assembly, Forty-first Session, Supplement No. 40 (A/41/40)*, vol. I, Annex VI, p. 119, para. 10.

²⁶⁸ *Ibid.*, *Forty-ninth Session, Supplement No. 18 (A/49/18)*, p. 25, para. 144.

²⁶⁹ General Comment No. 28 concerning article 3 (equality of rights between men and women), *ibid.*, *Fifty-fifth Session, Supplement No. 40 (A/55/40)*, vol. I, annex VI, p. 135, para. 17.

²⁷⁰ *Official Journal of the European Union*, No. L 16, 23 January 2004, p. 34.

²⁶⁵ R. Plender, *International Migration Law*, 2nd rev. ed., Dordrecht, Martinus Nijhoff, 1988, p. 472.

²⁶⁶ *Official Journal of the European Union*, No. L 158, 30 April 2004, p. 77.

provided to indigent persons under the legislation of most States. Lastly, as in the case of the right to legal aid, European Union law and most national legislation provided for the right to translation and interpretation, as shown by the examples cited in paragraph 391 [para. 115] of the report. That was clearly a principle of procedural law recognized by all nations and, unlike legal aid, on which national legislation sometimes differed or contained gaps, there was a general trend in the large majority of cases to recognize that right. If the concept of “the general principles of law recognized by civilized nations” set forth in Article 38 of the Statute of the International Court of Justice had meaning in international law, the right to translation and interpretation could be recognized in that context.

59. In the light of the analysis which he had briefly introduced, he proposed draft article C1 (Procedural rights of aliens facing expulsion), which read:

“1. An alien facing expulsion enjoys the following procedural rights:

“(a) the right to receive notice of the expulsion decision;

“(b) the right to challenge the expulsion [the expulsion decision];

“(c) the right to a hearing;

“(d) the right of access to effective remedies to challenge the expulsion decision without discrimination;

“(e) the right to consular protection;

“(f) the right to counsel;

“(g) the right to legal aid;

“(h) the right to interpretation and translation into a language he or she understands.

“2. The rights listed in paragraph 1 above are without prejudice to other procedural guarantees provided by law.”

60. He had considered inserting the words “in particular” after “enjoys” in the *chapeau* of paragraph 1 to make it clear that the list of rights in question was not exhaustive and that other procedural rights which were not taken into account in the draft article could also be recognized. However, a consideration of the available international legal instruments had shown him that, in reality, only those rights which were enumerated were formally recognized at the current time or were likely to be recognized as part of progressive development. That said, he would have no objection if the Commission introduced the words “in particular” if it wished to specify that the list was not exhaustive.

The meeting rose at 12.35 p.m.

3063rd MEETING

Tuesday, 13 July 2010, at 10.05 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Caflisch, Mr. Candioti, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Saboia, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Expulsion of aliens (*continued*) (A/CN.4/620 and Add.1, sect. C, A/CN.4/625 and Add.1–2, A/CN.4/628 and Add.1)

[Agenda item 6]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the sixth report on expulsion of aliens and the addenda thereto (A/CN.4/625 and Add.1–2).

2. Mr. GAJA said that in this part, the Special Rapporteur viewed procedural guarantees as applying exclusively to regular or lawful aliens. The distinction between regular aliens and irregular or unlawful aliens was of undeniable importance when examining procedural issues. Many instruments were based on that distinction: article 13 of the International Covenant on Civil and Political Rights, for example, provided specific protection for aliens who were “lawfully” within the territory of the expelling State. To leave irregular aliens without any procedural protection, however, might jeopardize some of the substantive requirements that applied to them as well. Irregular aliens included millions of people with significant ties to an expelling State, which might be aware of and tolerate their presence without recognizing them as having lawful status until, because of a change in policy or for other reasons, it decided to target a given group or individual.

3. According to draft article A1, paragraph 2, a State “may also apply” to the expulsion of irregular aliens the procedural rules that protected regular aliens. It was obvious that a State was entitled to give irregular aliens all the protection it wished, but the question was whether it had any obligation to do so. One could argue that the expelling State was required to apply its law, a requirement based not necessarily on a kind of estoppel, as suggested in paragraph 338 [para. 62] of this second part of the report, but rather on the prohibition against the taking of arbitrary measures.

4. One could take the procedural protection of irregular aliens one step further and argue that, although expulsion was generally not characterized as a criminal sanction, it was a harsh measure to which one could apply by analogy the rule concerning the right to a fair trial in order to assert a right to a fair assessment of the conditions for expulsion.