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Summary record of the 3380th meeting

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should be taken into account in the work of the IAJC on the protection of cultural property. As for the question of requests for legal opinions, the Committee had held discussions with the OAS Secretary General on legal aspects of the Inter-American Democratic Charter but had not yet received any specific requests for an opinion on that subject or on the denunciation of the Charter of the Organization of American States. He would not be surprised if the IAJC soon received such a request.

The meeting rose at 1 p.m.

3380th MEETING

Tuesday, 25 July 2017, at 10 a.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Argüello Gómez, Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Gómez Robledo, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Organization of the work of the session (*continued*)*

[Agenda item 1]

1. The CHAIRPERSON invited Mr. Vázquez-Bermúdez to read out the composition of the Working Group on protection of the environment in relation to armed conflicts.

2. Mr. VÁZQUEZ-BERMÚDEZ (Chairperson of the Working Group on protection of the environment in relation to armed conflicts) said that the Working Group would be composed of Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Grossman Guiloff, Mr. Jalloh, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia and Sir Michael Wood.

3. The CHAIRPERSON said that an additional plenary meeting would be held that afternoon to conclude the debate on the topic of succession of States in respect of State responsibility. He proposed that the Bureau meet on Wednesday or Thursday of that week in order to prepare for the final week of the session and the adoption of the report.

4. Ms. ESCOBAR HERNÁNDEZ said that she had expressly called for an urgent meeting of the Bureau to discuss issues related to the content of the chapter on immunity of State officials from foreign criminal jurisdiction.

5. Mr. VALENCIA-OSPINA proposed that the Bureau meet the following day so that it would still have time to hold another meeting that week if necessary.

6. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission agreed that the Bureau meet on Wednesday, 26 July.

It was so decided.

Succession of States in respect of State responsibility (*continued*) (A/CN.4/703, Part II, sect. G, A/CN.4/708)

[Agenda item 8]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

7. The CHAIRPERSON invited the Commission to resume its consideration of the Special Rapporteur's first report on succession of States in respect of State responsibility (A/CN.4/708).

8. Mr. LARABA said that, since the Special Rapporteur had stressed that his first report was preliminary in nature—despite the fact that it included four proposed draft articles—his own comments should also be seen as preliminary. During the debate in the Sixth Committee in 2016, several States, including Austria, Slovakia and Slovenia, had drawn attention to the complexity of the topic, although they supported its inclusion in the Commission's programme of work. That complexity was reflected in the first report in the sense that the Special Rapporteur's general approach to the topic was somewhat difficult to grasp. He agreed with the view expressed by Ms. Brigitte Stern that any reflection on international responsibility and succession of States would necessarily be immersed in the tensions and controversies of international law. It echoed the observations made by Mr. Georges Abi-Saab in 1987 that the succession of States raised questions related to the distribution of values, something which international law had traditionally avoided. Referring to the statement in paragraph 85 of the report that succession of States was of a highly political nature, in particular if contested, he questioned whether there were any cases of succession that were not contested. All cases were obviously contested and negotiated and involved political issues, whether they were explicit or implicit in the relations between the States and/or entities involved. However, the Special Rapporteur seemed to suggest that successions took place in a peaceful context and involved only technical matters. A more detailed and broader examination of State practice, which might reveal the contrary, should be carried out as soon as possible. Now that time had passed, it might be possible to debate issues related to the succession of States that had caused such tensions more calmly.

9. Furthermore, the report was based on an unconvincing and unfounded premise. The Special Rapporteur's thesis essentially centred on two propositions which, when read together, were problematic. In paragraph 83, the Special Rapporteur concluded that the rule of non-succession had been questioned by modern practice, but that did not mean that the opposite thesis—automatic succession in

* Resumed from the 3370th meeting.

all cases—was true. Taken literally, those views seemed to suggest that there was a grey area or even a legal vacuum. It was clear that the only way to proceed was to research the practice and views of States. In that regard, he welcomed the proposals made by Sir Michael Wood. The Special Rapporteur seemed to expect the reader to accept his premise as a starting point, even though he had not studied State practice in any depth.

10. The Special Rapporteur's first argument—which was indisputable—was that the topic had been excluded from previous work concerning the succession of States and the law of responsibility on account of its complexity. Given the importance attached to it by the Special Rapporteur, the second argument necessitated a more detailed analysis. The Special Rapporteur relied on two quotations by Mr. James Crawford. In his 1998 report, Mr. Crawford had written that a new State did not, in general, succeed to any State responsibility of the predecessor State.³⁹⁴ However, according to the commentary to article 11 of the 2001 articles on the responsibility of States for internationally wrongful acts, it was unclear whether a new State succeeded to any State responsibility of the predecessor State with respect to its territory.³⁹⁵ In paragraph 10 of his report, the Special Rapporteur described that change in wording as a “partial rebuttal” of the 1998 position, and in paragraph 35 said that the development of views on whether a new State succeeded to any State responsibility of the predecessor State was well documented in Mr. Crawford's shift from a refusal in 1998 to a partial acceptance in 2001.

11. That point of view was questionable, as it was based on a forced reasoning of Mr. Crawford's words. An analysis of the minor drafting change in question did not lead to that conclusion. A comparison of the two paragraphs from 1998 and 2001 revealed considerable similarities in content, as both relied on the arbitration in the *Lighthouses case between France and Greece*. Nevertheless, there were no new legal elements or case law that would justify such a development. Furthermore, due importance should be assigned to the words “in general” in the 1998 quotation, which provided for the possibility of the hypothesis of succession. In substance, the same idea was captured in the expression “it is unclear whether a new State” in the 2001 quotation. The use of the negative formulation reflected the fact that no definite conclusion could be reached, but also suggested the possibility of conduct that would support the hypothesis of succession. That formulation also euphemistically confirmed the rule of non-succession because, if it was not clear that there was succession “in general”, it meant there was none. Both the 1998 and 2001 quotations took into account situations in which the successor State agreed to succeed to the responsibilities or assumed them without formally accepting them. However, there was certainly no rebuttal of the rule of non-succession and acceptance of the rule of succession.

12. It was difficult to conclude that the development of views on the issue was demonstrated in Mr. Crawford's

³⁹⁴ See the first report on State responsibility, *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/490 and Add.1-7, pp. 1 *et seq.*, p. 54, para. 279.

³⁹⁵ See *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 52 (para. (3) of the commentary to draft article 11).

writings. Even if that were the case, a drafting change by an author would not be sufficient to support the arguments presented, as State practice was the only determining factor. In fact, the Special Rapporteur himself did not seem to dispute that point, since he stated in paragraph 33 that the view had become more nuanced, to the extent that succession was admitted in certain cases; elsewhere he described both the rebuttal of the rule of non-succession and the acceptance of the rule of succession as “partial”. He questioned the relevance of the sources cited by the Special Rapporteur, in the antepenultimate footnote to paragraph 33 of his report, in support of the theory of succession. For example, the view expressed by Ms. Stern, namely that it could be said that the rule of non-succession, although frequently mentioned in the literature, was not as well established as it seemed, was very cautiously worded. Moreover, the Hague Academy of International Law course given by Mr. O'Connell in 1970³⁹⁶ was cited in that footnote to support theory of succession, whereas in three other footnotes,³⁹⁷ Mr. O'Connell's 1967 work³⁹⁸ was cited to support the theory of non-succession. Those differences in position reflected the nuances in Mr. O'Connell's thinking rather than any evolution in his views; like most of the other authors cited, he tended to ask questions rather than make affirmations on such a sensitive issue. Most of the other sources cited were from the 1990s, a time when other authors supported the theory of non-succession. Had the Special Rapporteur adopted a more logical and rigorous approach, he would have noted the nuances and ambiguities in the literature examined, and would not have argued, as he did in paragraph 33, that points of view had evolved. Such nuances were due to the complexity, diversity and rarity of practice.

13. Both the analysis of practice and the bibliography of the report were incomplete. It was not clear what was understood as practice in the report. For example, in paragraph 24, it was stated that it was time to assess new developments in State practice, while in paragraph 37 reference was made to a preliminary survey of State practice. However, in the following paragraphs, the Special Rapporteur analysed case law related to succession rather than State practice. The title of chapter II, section B, of the report (“Different cases of succession”) drew attention to the diversity of such practice. Nonetheless, the Special Rapporteur had conducted only a partial examination of the cases, and had provided no explanation for the exclusion of the particularly important period in the history of the succession of States in Africa. That matter would no doubt be remedied in the next report. In paragraphs 64 and 85, the Special Rapporteur briefly and cryptically addressed the difference between contested and negotiated successions, of which there were many, as shown by the practice. The history of his own country—Algeria—was an obvious and almost caricatured example of such a succession. He endorsed the distinction drawn by the Special Rapporteur between cases in which the predecessor State disappeared and those in which it continued to exist.

³⁹⁶ D. P. O'Connell, “Recent problems of State succession in relation to new States”, *Collected Courses of the Hague Academy of International Law, 1970-II*, vol. 130, pp. 95–206.

³⁹⁷ See, in the report under consideration, the first footnote to paragraph 32 and the second and third footnotes to paragraph 33.

³⁹⁸ D. P. O'Connell, *State Succession in Municipal Law and International Law*, vol. I, Cambridge University Press, 1967.

14. The Special Rapporteur also drew a distinction between early cases and cases of succession in Central and Eastern Europe in the 1990s by following a historical and descriptive approach that did not reveal much about State practice. Although the Special Rapporteur had stressed that his report was preliminary in nature, there were some glaring omissions in the bibliography. For example, there was no reference to the work of Mr. Bedjaoui, the Special Rapporteur on the topic of succession of States in respect of matters other than treaties, who had provided a detailed analysis of the practice of succession of States in Africa, Asia and Latin America. Nor was there any reference to Mr. Bedjaoui's 1970 course on the succession of States at the Hague Academy of International Law,³⁹⁹ despite the fact that it had been published in the same compilation of courses as Mr. O'Connell's. It would be useful in the next report to contrast different points of view, such as those of Mr. Bedjaoui and Mr. O'Connell, particularly based on an examination of State practice.

15. He endorsed the proposal to present the outcome of the work on the topic in the form of draft articles with commentaries and the text proposed for draft articles 1 and 2. However, he had reservations about draft articles 3 and 4, and believed that it would be preferable to wait for a more in-depth examination of State practice before taking them any further. As for the future programme of work, the Special Rapporteur should clarify the theme for the next report and should ensure that the focus was on State practice in all regions and the analysis of such practice in the literature. He was in favour of referring draft articles 1 and 2 to the Drafting Committee and further examining the issues raised in draft articles 3 and 4.

16. Mr. OUAZZANI CHAHDI said that the Special Rapporteur was to be commended on his first report, which drew on the Commission's earlier work in connection with the 1978 Vienna Convention, the 1983 Vienna Convention as well as its 1999 draft articles on nationality of natural persons in relation to the succession of States⁴⁰⁰ and 2006 articles on diplomatic protection.⁴⁰¹ He agreed with the Special Rapporteur that the outcome of the topic should be both codification and progressive development of international law in order to supplement the law on succession of States. Some delegations in the Sixth Committee had supported the project on the basis that it would fill some of the gaps remaining as a result of the Commission's earlier codification work. He endorsed the suggestion made to amend the title of the topic. As to the form the outcome of the topic should take, he agreed with the Special Rapporteur's proposal, in paragraph 28 of the report, that draft articles with commentaries would be appropriate; the topic was the continuation of work in connection with the 1978 and 1983 Vienna Conventions and might even result in a new convention.

³⁹⁹ M. Bedjaoui, "Problèmes récents de succession d'États dans les États nouveaux", *Collected Courses of the Hague Academy of International Law, 1970-II*, vol. 130, pp. 455–586.

⁴⁰⁰ The draft articles on nationality of natural persons in relation to the succession of States and the commentaries thereto are reproduced in *Yearbook ... 1999*, vol. II (Part Two), pp. 20 *et seq.*, paras. 47–48. See also General Assembly resolution 55/153 of 12 December 2000, annex.

⁴⁰¹ The draft articles on diplomatic protection adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2006*, vol. II (Part Two), pp. 24 *et seq.*, paras. 49–50. See also General Assembly resolution 62/67 of 6 December 2007, annex.

17. Noting that the topic had taken on renewed importance with the recent creation of several new States, he drew attention to the central question posed by the Special Rapporteur: whether a guiding principle of non-succession of State responsibility existed. The Special Rapporteur had largely relied on the literature and case law in answering that question, and it was to be hoped that the focus would turn to State practice in future reports, with a view to considering the situation both where the predecessor State continued to exist and where it did not.

18. The analogy with internal law referred to in paragraph 32 of the report did not seem to be consistent with the Commission's earlier work on the succession of States. In its first report on succession of States and Governments in respect of treaties, Sir Humphrey Waldock had observed that municipal law analogies, however suggestive and valuable in some connections, had always to be viewed with some caution in international law, for an assimilation of the position of States to that of individuals as legal persons might in other connections be misleading even when it was suggestive.⁴⁰² Succession in respect of the responsibility of international organizations, which was mentioned in paragraphs 22 and 23 of the report under consideration, was not directly relevant to the matter at hand. As other members had pointed out, the report concentrated on cases of succession in Central and Eastern Europe. More recent examples of succession in Africa and Asia, such as South Sudan and Timor-Leste, merited greater attention.

19. The three types of succession agreements identified by the Special Rapporteur included devolution agreements, although he had not specifically defined them. Their purpose was primarily to enable the succession of treaties concluded by the predecessor State, but they also gave an indication of the views of States on customary law governing the succession of States in respect of treaties. In paragraph 96 of his report, the Special Rapporteur had stated that such agreements were clearly subject to the *pacta tertiis* rule. However, analysis of some such agreements revealed that they could be framed as declarations with respect to bilateral or multilateral treaties, usually concluded by the predecessor State, and could be extended to the territory of the successor State by means of the extension of territory or "colonial" clause. That gave rise to the question of what would become of those treaties when the successor State achieved independence. In its earlier work, the Commission had taken the view that the question could not be entirely separated from the issue of the effects of such treaties on third States, which had rights and obligations under treaties with which devolution agreements purported to deal, and that it was accordingly important to consider how the general rules of international law concerning treaties and third States applied to devolution agreements, which involved determining the intention of the parties to such agreements. In future reports, it would be useful for the Special Rapporteur to examine how the application of the *pacta tertiis* rule to devolution agreements and other agreements between predecessor and successor States had evolved.

⁴⁰² See *Yearbook ... 1968*, vol. II, document A/CN.4/202, p. 91 (para. (4) of the commentary to article 1).

20. The 1956 Protocol between France and Morocco,⁴⁰³ cited in paragraph 97 of the report, was not a true devolution agreement. The Moroccan authorities had effectively made a declaration under article 11 of that treaty to the effect that Morocco would assume the obligations arising from international treaties that France had concluded on its behalf or from international acts concerning Morocco to which it had not objected. It was on that basis that the Government of Morocco had rejected a Franco-American agreement of 1950 concerning United States Air Force bases in Morocco, which had been concluded against its wishes and the country's laws.

21. With regard to the draft articles, he expressed the view that both their form and their content should be reviewed in terms of the definitions and concepts used. Draft articles 1 and 2 could be referred to the Drafting Committee, where consideration could be given to the title of draft article 1.

Cooperation with other bodies (concluded)

[Agenda item 11]

STATEMENT BY THE PRESIDENT
OF THE INTERNATIONAL COURT OF JUSTICE

22. The CHAIRPERSON welcomed Judge Ronny Abraham, President of the International Court of Justice, and invited him to address the Commission.

23. Judge ABRAHAM (President of the International Court of Justice), welcoming what would be his last opportunity to address the Commission before his term of office ended, said that his visits to the Commission had been some of the most memorable moments of his time as President of the Court. Over the past year, the Court had faced a heavy workload that looked set to continue, with six new cases having been filed. In addition to numerous procedural orders, it had handed down seven substantive rulings, although none of them had involved decisions on the merits of a case: they all related either to competence, admissibility or provisional measures. As such, their impact on the interpretation and clarification of international law was limited.

24. The Court had seen an increasing tendency in recent years for claimants to request provisional measures. Over the previous 12 months, provisional measures had been ordered in three cases. Such a high figure served to confirm that tendency. Orders indicating provisional measures to be taken were never *res judicata*, and consequently contained little substantive case law, but were based on clear criteria developed by the Court. Three cumulative criteria must be satisfied for provisional measures to be indicated: the Court must *prima facie* be competent to examine the merits of the case; the rights for which the claimant sought protection must be plausible; and there must be an imminent risk of irreparable harm to the rights claimed. The Court's most recent orders were fully in line with those criteria. If the Court was called upon to

consider any element of the merits in a case in deciding whether provisional measures should be indicated, it did so prudently and on a strictly *prima facie* basis.

25. In accordance with article 32, paragraph 1, of the Rules of Court, he had not presided in *Immunities and Criminal Proceedings (Equatorial Guinea v. France)* by virtue of his nationality. The Court had partially upheld the claimant's request for provisional measures in that case, ruling on 7 December 2016 that France must guarantee the protection of the premises presented as housing the diplomatic mission of Equatorial Guinea in France. The substance of the case concerned the protection of buildings used for diplomatic purposes and the immunity from criminal jurisdiction claimed by certain political figures, specifically the Vice-President of Equatorial Guinea.

26. On 19 April 2017, the Court had also partially upheld the claimant's request for provisional measures in *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination*, indicating that the Russian Federation must take certain measures in respect of Crimea. It had, however, dismissed the claimant's request for provisional measures to be indicated in respect of the situation in eastern Ukraine, as it did not consider the rights claimed by Ukraine in that regard to be sufficiently plausible.

27. In the *Jadhav* case, in its order of 18 May 2017, the Court had indicated to Pakistan that it must take "all measures at its disposal" to prevent the execution of an Indian national, Mr. Kulbhushan Sudhir Jadhav, pending final judgment of the Court (para. 61). The case resembled the *LaGrand* and *Avena* cases, and the Court had cleaved closely to its previous case law in that regard. It was worth noting that provisional measures in the *Jadhav* case had been indicated exceptionally quickly in view of the particular urgency of the circumstances. Despite the fact that the parties had been invited to make oral observations, rather than simply written, the order indicating provisional measures had been issued less than two weeks after the proceedings had been instituted. The process usually took several months, although the Court made every effort to accelerate proceedings when necessary.

28. The Court had delivered judgments concerning preliminary objections in four cases, three of which were closely linked. On 24 April 2014, the Marshall Islands had filed separate applications against India, Pakistan and the United Kingdom, which had all been heard as cases entitled *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*. The three cases shared many common elements. On 5 October 2016, the Court had upheld the preliminary objections raised by India, Pakistan and the United Kingdom, finding that it lacked jurisdiction based on the absence of a dispute between the parties in their respective cases. In *Maritime Delimitation in the Indian Ocean*, the Court had rejected the first and second preliminary objections raised by Kenya and found that it had jurisdiction to entertain the application filed by Somalia, which it also found admissible, in a judgment of 2 February 2017. The case raised certain points of interest, particularly with regard to how the Court had determined its

⁴⁰³ Protocol between France and Morocco, signed on 28 May 1956 at Rabat, *American Journal of International Law*, vol. 51, No. 3 (July 1957), pp. 676–682.

competence and to the United Nations Convention on the Law of the Sea, that went beyond its existing case law.

29. Of the six new cases filed with the Court, one had been joined to an existing case. The *Land Boundary in the Northern Part of Isla Portillos* case was closely connected to *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean*, already pending before the Court. Joint hearings had taken place in July 2017; a judgment was expected in late 2017 or early 2018. Two separate cases had been filed by Malaysia, respectively applying for the Court to revise, and requesting it to interpret, its judgment of 23 May 2008 in the case concerning *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*. The Court had yet to decide whether the two cases should be joined. It seemed that such a situation had never previously arisen. The application for revision of the 2008 judgment, while unusual, was provided for under Article 61 of the Statute of the International Court of Justice. Apart from the *Jadhav* case and the case on the *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination* already referred to in the context of provisional measures, the remaining new case involved a request for an advisory opinion by the General Assembly under Article 65 of the Statute of the International Court of Justice. On 22 June 2017, the General Assembly had adopted resolution 71/292, in which it requested the Court to give an advisory opinion on certain questions relating to the Chagos Archipelago, touching on issues of decolonization. The Court had fixed time limits for the presentation of written statements and comments on those statements by Member States of the United Nations and the Organization itself. Once that process had been completed, the Court would be able to decide how to organize the oral submissions, perhaps taking the proceedings in the request for an advisory opinion on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* as a model.

30. With 19 cases pending, the Court's current workload was exceptionally large. The situation called for special efforts to ensure that rulings were delivered in a reasonable time, meeting the legitimate expectations of the parties involved. The Court might reflect on how some procedures could be simplified or shortened so as to make the most efficient use of its time and manage its caseload effectively, avoiding spending excessive time on procedural matters.

31. Mr. RAJPUT asked whether, in view of its increasing workload and the need to streamline procedures, the Court had given any consideration to formalizing guidance on the admissibility of evidence, either in the Rules of Court or in its Practice Directions.

32. Judge ABRAHAM (President of the International Court of Justice) said that the Court had no plans to amend its Rules or Practice Directions substantively at present; rather, it sought to tackle each case in as rational and expedient a manner as possible. The current Rules of Court and Practice Directions enabled it to refuse offers of evidence from a party if they were seriously late or delayed. Above all, it was important to safeguard the rights of parties to present evidence.

33. Mr. MURPHY said that he would welcome further details of the procedure to be followed in the request for an advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* and how closely it would resemble the approach taken in the advisory opinion hearings on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*. He also enquired about the possibility of appointing judges *ad hoc* in the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* proceedings, given that the entities principally concerned—Mauritius and the United Kingdom—were both Member States of the United Nations, unlike in the case on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*.

34. Judge ABRAHAM (President of the International Court of Justice) said that the similarities between the proceedings in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* and *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* were limited to their division into two phases: oral and written. As to the appointment of judges *ad hoc*, it was provided for in the Rules of Court, but had occurred only rarely in advisory proceedings, and thus far the issue had not yet been raised in the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* case. If it were, two questions would need to be answered: whether the right applied *ratione materiae* and whether the States involved wished to exercise it. He emphasized that the appointment of judges *ad hoc* was a right, rather than an obligation.

35. Mr. HASSOUNA said that, in the past, the Court had not always explicitly stated its reasons for not ruling on a given matter, whether in the context of an advisory opinion or a contentious case. It would be interesting to know the reasons for such reserve, for instance, whether it was in order to adopt a neutral stance in controversial situations, such as the request for an advisory opinion on whether the unilateral declaration of independence of Kosovo was in accordance with international law.

36. Judge ABRAHAM (President of the International Court of Justice) said that the Court could refuse to render an opinion or to consider a case only on the basis of a legally valid reason. There were a number of legal or factual reasons for which the Court might choose not to issue a judgment in a contentious case, such as if the Court considered that it did not have jurisdiction over a given matter or that there were sufficient grounds to issue a judgment without the need to rule on a specific aspect of a case. While the latter could be especially frustrating for observers such as academics, it was a question of using the Court's resources wisely and not prolonging proceedings unnecessarily.

37. In advisory proceedings, the Court was obliged to answer questions as they were presented: it could neither expand the question nor answer it partially. The interpretation of the question was a delicate matter; moreover, the Court had discretionary power to refuse to deliver an advisory opinion if it considered that doing so would be inappropriate. Although it had never exercised that

power since 1946, it had not renounced it either. That very point had even been debated before the Court, for instance in the advisory proceedings relating to the unilateral declaration of independence of Kosovo, where some States had maintained that the Court should not deliver an opinion; the same was likely to happen in respect of the request for an advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*.

38. The CHAIRPERSON said that occasional dissatisfaction in the world of academia with the lack of explicit reasoning in the Court's rulings was often mitigated by interesting individual opinions issued by judges on the Court—an option that was not always available in domestic courts.

39. Judge ABRAHAM (President of the International Court of Justice) said that although individual opinions usually sought to clarify a position taken by the Court in a judgment, they also sometimes shed light on a position that was shared by a majority of judges, but that had not been explicitly expressed in the judgment in question. In any case, it was important to recall that such opinions reflected only the positions of individual judges.

40. Responding to a question by Mr. GÓMEZ ROBLEDÓ, he said that in cases of great urgency, the Court could indeed shorten the oral proceedings and take action solely on the basis of written proceedings.

41. Mr. JALLOH said that it would be interesting to know what factors were behind the recent increase in requests for the indication of provisional measures. With regard to the General Assembly's request for an advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, he would like to know whether the Court's recent order inviting States Members of the United Nations to present statements on the question to the Court could be extended to international organizations.

42. Judge ABRAHAM (President of the International Court of Justice) said that although it was difficult to speculate on the reasons for any State practice, one factor that might be driving the trend regarding provisional measures was the Court's finding, in the *LaGrand* case, that orders indicating provisional measures were legally binding. As for the advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* proceedings, the Court's invitation had been extended only to States Members of the United Nations and the Organization itself. That said, if other international organizations considered that they were able to furnish useful information on the question, they could request permission to do so.

43. Mr. VÁZQUEZ-BERMÚDEZ said that he would appreciate more detailed information on the Court's conclusion, in the three cases brought by the Marshall Islands against India, Pakistan and the United Kingdom, that it lacked jurisdiction since it could not be demonstrated that a dispute existed at the time that the applications had been submitted. Referring to the assertion, in the judgments, that the evidence must demonstrate that the respondent

was aware, or could not have been unaware, that its views were "positively opposed" by the applicant, he said that he would welcome Judge Abraham's comments on whether the Court's finding in those cases was expected to have a bearing on the threshold of evidence required in future cases.

44. Judge ABRAHAM (President of the International Court of Justice) said that the Court's findings in the cases concerning the Marshall Islands crystallized and clarified its recent case law. The need to prove the existence of a dispute on the date of the institution of proceedings was now a settled principle and when referring a case to the Court, States would undoubtedly be more careful to produce sufficient evidence in that regard. The application of that principle—whether or not a respondent was aware, or could not have been unaware, of a given dispute—must continue to be analysed on a case-by-case basis. In the cases involving the Marshall Islands, the points of contention had been both the principle, which was still contested by some parties, and its application in the specific cases in question.

45. Mr. PARK said that he would be interested to know Judge Abraham's personal views on the fragmentation of international law, especially with regard to potential conflicts of jurisdiction between the International Court of Justice and other tribunals. For instance, he wondered whether, and if so to what extent, the Court, in considering the recent request for an advisory opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, would refer to other international courts' rulings in related cases, such as in the matter of the *Chagos Marine Protected Area (Mauritius v. United Kingdom)* referred to the Permanent Court of Arbitration.

46. Judge ABRAHAM (President of the International Court of Justice) said that, for various reasons, he would prefer not to comment further on the proceedings in the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*. However, generally speaking, a distinction should be made between conflict of jurisdiction, or competence, and conflict of case law. Despite the large number of international courts and tribunals and the fact that several such instances could be competent to hear a given case, conflict of jurisdiction did not pose a serious risk. States could refer a given case to the court of their choice. Moreover, it was fairly unlikely that two courts would declare themselves competent to hear the same case at the same time; rules existed to prevent such situations. In that connection, there were some interesting developments arising out of the Court's judgment in the case concerning the *Maritime Delimitation in the Indian Ocean* on the competence of the Court and that of the arbitral tribunals provided for under the United Nations Convention on the Law of the Sea.

47. Conflict in case law involved situations where two or more courts considered different cases and contradicted each other's decisions on a particular question. Generally, there was no hierarchy between international courts and tribunals and none had the authority of *res judicata* over the others. Consequently, none was bound

to conform to the decisions of the others in cases that raised similar issues. However, based on the practice, it was clear that the international courts endeavoured not to contradict one another. In fact, as a general rule, international judges sought to ensure consistency in international law by referring to decisions made by other courts. For instance, when the International Court of Justice had issued its judgments in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* and, subsequently, in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, it had referred to the rulings of the International Tribunal for the Former Yugoslavia and had abstained, on all but one point, from taking positions that would appear to contradict those rulings. It had established a presumption in favour of those positions and, as mentioned in the judgment of the latter case, they “must be taken into account”. The arbitral tribunals set up under the United Nations Convention on the Law of the Sea also tended to rely heavily on the case law of the International Court of Justice.

48. Mr. MURASE asked whether it was necessary for the Court to elaborate on its existing rules of evidence, especially in view of the increasing number of environmental law cases that were fact-intensive and science-heavy and thus required the assessment of a considerable amount of evidence. During a lecture at an academy of international law in China, students had been disappointed when Mr. Alain Pellet had implied that the Court did not have any standard of proof or rules of evidence beyond those relating to the late submission of evidence. As rules of evidence seemed to be the core of the procedural rules for any court of law and many PhD dissertations were being written on the subject, he would be interested to hear Judge Abraham’s views on the subject.

49. Judge ABRAHAM (President of the International Court of Justice) said he did not believe that it was necessary for the Court to establish new rules of evidence; the current rules were sufficient for the Court to gather all the necessary information and take decisions on each case it heard in a pragmatic way. It was true that the area of environmental law had expanded in recent years, the number of contentious cases was likely to increase in future, and that in cases in environmental and other areas of law technical and scientific evidence played an important role. However, under the Statute of the International Court of Justice and its Rules, the Court had at its disposal all the necessary tools to obtain complete information on each case. Instead of or in addition to examining the expert opinions of the parties, the Court could decide that an expert opinion was necessary on a particularly technical or scientific subject and appoint more than one expert to conduct a related enquiry. For instance, in the recent case concerning *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean*, a group of experts had been appointed to examine a certain part of the coastline in question. Perhaps what Mr. Alain Pellet had meant was that the Court was not bound by rigid rules that must be uniformly applied, but followed a pragmatic approach and took its decisions on a case-by-case basis, with which he could only but agree.

50. Ms. GALVÃO TELES said one important point that Judge Abraham had failed to mention was that in *Maritime Delimitation in the Indian Ocean*, the Court had analysed the legal status of the memorandum of understanding between the two parties and had decided that it was in fact a treaty between the two States. It was a significant decision by the Court and for States parties, which increasingly had recourse to such instruments since they regarded them as non-binding.

51. The relationship between the Court and the Commission had always been very close and they frequently referred to each other’s work. However, she wondered whether the fact that draft articles submitted by the Commission to the General Assembly were now less likely to become conventions and that the Commission’s output was more likely to take another form might alter the working relationship between the two bodies.

52. Judge ABRAHAM (President of the International Court of Justice) said that he had not mentioned the Court’s decision regarding the legal status of the memorandum of understanding because it had not been a controversial decision. There had been no individual or dissenting opinions on the subject and the parties had disputed the interpretation of the memorandum more than its legal status. It was, nonetheless, good to remind Governments and their officials that just because they called a document a memorandum of understanding did not mean that it was not legally binding. As all lawyers were well aware, it was not the title but the contents of a document that determined its legal significance.

53. The Court attached great importance to the Commission’s work and output, but whether that led to a convention was a secondary issue. What was important for the Court was the Commission’s role in clarifying customary international law and to be able to refer to the Commission’s work insofar as it reflected that area of international law. Thus, even a set of draft articles that was not intended to become an international treaty could still be of the utmost importance to the Court and its case law. A prime example were the 2001 articles on the responsibility of States for internationally wrongful acts.⁴⁰⁴

54. Sir Michael WOOD said that it could sometimes be quite difficult for the parties to a case to find an appropriately qualified person who was willing to sit as a judge *ad hoc*. One obstacle was posed by the Court’s current Practice Directions, according to which a person who had acted as counsel in one case could not be nominated as a judge *ad hoc* for another case for a period of three years thereafter. Similarly, a person who had been a judge *ad hoc* could not appear as counsel for three years. Although those Practice Directions had been established for a good reason, he wondered whether any consideration might be given to lifting the restrictions in future. In addition, he would welcome more information on the staff that provided legal assistance at the Court and on traineeships and internships.

⁴⁰⁴ The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, paras. 76–77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

55. Judge ABRAHAM (President of the International Court of Justice) said that there was no talk of reviewing the Court's Practice Direction relating to the appointment of judges *ad hoc* for the time being. From the Court's perspective, States did not seem to have noticeable problems in finding and nominating judges *ad hoc*, although it did not see the full picture and the real obstacles that States might encounter in the process leading up to their appointment.

56. Judges usually had two assistants, one of whom was a university student selected under the University Traineeship Programme and who remained at the Court for one academic year. Students tended to be from North American universities because those universities had the funds to defray the students' costs; however, an effort had been made in recent years to diversify the pool of universities participating in the Programme. In addition, each judge had a law clerk who was recruited through a regular competitive exam and had a two-year contract that was renewable once only.

57. There was also a legal service in the Registry that provided assistance to the Court in its general judicial and legal work, but the legal experts employed there were not assigned to a specific judge. The President of the Court had a third assistant who was basically a private secretary.

58. The different forms of assistance provided to judges were a fairly recent development. In 2005, there had been only 7 university trainees assisting 15 judges and, until 2000, judges had worked alone except for assistance provided by the legal service of the Registry. The Court encouraged the widest possible selection of applicants in terms of nationality, language and legal background. However, it always chose the best candidates, many of whom would move on to great careers in international law.

59. Mr. Cissé said that in the *Dispute concerning delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean* before the International Tribunal for the Law of the Sea, Côte d'Ivoire had requested that provisional measures be prescribed requiring Ghana to suspend all ongoing oil exploration and exploitation operations and to refrain from granting any new permit for oil exploration and exploitation in the disputed area. Nonetheless, while in its order of 25 April 2015 the Tribunal's Special Chamber had prescribed that Ghana undertake no new drilling activity (para. 102), it had effectively allowed the party to continue its ongoing exploration activities. He had never really understood the rationale behind the Special Chamber's order and asked whether Judge Abraham could shed some light on the matter.

60. Judge ABRAHAM (President of the International Court of Justice) said that he could not answer that question as, first, the dispute was still pending before the Tribunal. The judgment on the merits would be issued shortly and should clarify the parties' differing interpretation of the order prescribing provisional measures: Côte d'Ivoire believed that Ghana had not fully complied with the provisional measures by continuing certain ongoing activities, whereas Ghana held that such activities were

allowed under the order. Second, he sat as a judge *ad hoc* for the Special Chamber—a task he had accepted before his election as President of the Court. It had been a worthwhile experience as interaction between international tribunals fostered greater understanding and helped to avoid the fragmentation of international law.

61. Mr. GROSSMAN GUILOFF asked what the main challenges were for the Court in adapting to the current reality characterized, *inter alia*, by information overload, the transnational character of disputes and a proliferation of jurisdictions.

62. Mr. LARABA said he would appreciate clarification of Judge Abraham's comment in connection with the cases on the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* that the positions of the International Tribunal for the Former Yugoslavia "must" be taken into account.

63. Judge ABRAHAM (President of the International Court of Justice) said that it would be hard to explain the challenges that lay ahead in the short time available. The Court was certainly aware of the need to adapt its working methods to a constantly changing situation and it regularly reflected on such matters. It would continue to make adjustments and introduce reforms, but not attempt a general overhaul of the international judicial system. Changes could not be made to the Statute of the International Court of Justice, but its Rules and Practice Directions were regularly reviewed.

64. He would use the word "must", but not in the sense that the Court was legally bound to refer to decisions of the International Tribunal for the Former Yugoslavia. An international judge could live in a bubble and simply ignore the case law of other courts; however, that would be ill advised from the standpoint of judicial policy. As far as possible, judges should try to ensure consistency between the decisions of different courts and tribunals.

65. The CHAIRPERSON thanked Judge Abraham for his clear but also subtle replies and informative statement.

The meeting rose at 1 p.m.

3381st MEETING

Tuesday, 25 July 2017, at 3 p.m.

Chairperson: Mr. Georg NOLTE

Present: Mr. Aurescu, Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Jalloh, Mr. Kolodkin, Mr. Laraba, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Rajput, Mr. Reinisch, Mr. Ruda Santolaria, Mr. Saboia, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Sir Michael Wood.
