Provisional

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International Law Commission

Seventy-third session (first part)

Provisional summary record of the 3585th meeting
Held at the Palais des Nations, Geneva, on Wednesday, 1 June 2022, at 3 p.m.

Contents

Present:

Chair:	Mr. Tladi
Members:	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Mr. Forteau
	Ms. Galvão Teles
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Chimimba	Senior Assistant Secretary to the Commission

The meeting was called to order at 3 p.m.

Tribute to the memory of Antônio Augusto Cançado Trindade, member of the International Court of Justice

The Chair said that the Commission had received the sad news that Antônio Augusto Cançado Trindade, a member of the International Court of Justice and an important figure in international law, had died some days previously. There was no question that Judge Cançado Trindade's work had contributed greatly to the advancement of international law and thus to the Commission's own work.

At the invitation of the Chair, the members of the Commission observed a minute of silence.

Cooperation with other bodies (agenda item 10)

International Court of Justice

Judge Donoghue (President of the International Court of Justice), speaking via video link, said that she was honoured to address the International Law Commission at its seventy-third session. She would like to begin by commemorating Judge Antônio Augusto Cançado Trindade, a generous friend and colleague and a prolific scholar, legal adviser and international judge. Judge Cançado Trindade had joined the International Court of Justice in 2009, having previously served as a judge of the Inter-American Court of Human Rights and as its President, as Legal Adviser to the Ministry of Foreign Affairs of Brazil and as a professor at several universities across four continents. Always faithful to his unique, principled outlook as a judge and educator, Judge Cançado Trindade had taken pride in emphasizing the rich Latin American perspective on public international law, while always remaining mindful of the importance of integrating that contribution into the broader framework of international law. Over Judge Cançado Trindade's long and distinguished career, one of the themes closest to his heart had been what he had called the "humanization" of international law as an increasingly "people-centred" discipline. In his general course on public international law, which he had delivered at the Hague Academy of International Law in 2005, and in his judicial opinions and scholarly writings, Judge Cançado Trindade had developed a conception of contemporary international law as "a *corpus juris* increasingly oriented to the fulfilment of the needs and aspirations of human beings, of peoples and of humankind as a whole", overcoming "the purely inter-State dimension" of the discipline in the past. Judge Cançado Trindade would be sorely missed by the Court and by international lawyers around the world.

Since July 2021, when she had last addressed the Commission, the Court had held hearings in six cases and had issued three judgments and three orders on requests for the indication of provisional measures.

On 12 October 2021, the Court had delivered its judgment on the merits in the case concerning *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*. In that judgment, the Court had found that there was no agreed maritime boundary between Somalia and Kenya and had proceeded to delimit the territorial sea, the exclusive economic zone and the continental shelf. One noteworthy feature of the case was that, as requested by both parties, the Court had delimited the continental shelf beyond 200 nautical miles.

Also in 2021, the Court had held hearings on the question of reparations in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*. In its judgment of 19 December 2005 on the merits, the Court had found, *inter alia*, that Uganda had violated various international obligations through its conduct in connection with the armed conflict on the territory of the Democratic Republic of the Congo between 1998 and 2003 and that it was under an obligation to make reparation for the injury caused. The Court had also ruled that, failing agreement between the parties, the question of reparation due would be settled by the Court. That question had eventually fallen to the Court in view of the parties' failure to settle it by agreement. On 9 February 2022, the Court had delivered its judgment on the question, awarding the Democratic Republic of the Congo US$ 225,000,000 for damage to persons, US$ 40,000,000 for damage to property and US$

60,000,000 for damage related to natural resources. The judgment set out the Court's appreciation of the standard of proof for full reparation in a case of large-scale international law violations that had occurred as part of a complex international armed conflict. As to the facts, the inevitable evidentiary challenges had been compounded by the time that had elapsed since the events. In the reparations phase of the proceedings, the Court had arranged for an expert opinion, pursuant to article 67 of its Rules, regarding certain heads of damage alleged by the applicant.

The Court's third judgment during the period under consideration was a decision on the merits of the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*. As Colombia was not a party to the United Nations Convention on the Law of the Sea, the applicable law in the case had been customary international law, and the Court had been required to consider whether a number of the Convention's provisions reflected customary international law. On 21 April 2022, the Court had found that, in the exclusive economic zone of Nicaragua, Colombia had violated the sovereign rights and jurisdiction of Nicaragua in a number of ways, including by interfering with fishing and marine scientific research activities of Nicaraguan-flagged or Nicaraguan-licensed vessels and with the operations of Nicaraguan naval vessels. The Court had also found that the area that Colombia called its "integral contiguous zone", which the country had established around Colombian islands in the western Caribbean Sea, was not in conformity with customary international law relevant to contiguous zones. Lastly, ruling on a counterclaim made by Colombia, the Court had further found that the straight baselines which Nicaragua had established were not in conformity with customary international law.

In her statement to the Commission in July 2021, she had noted that no new cases had been filed with the Court in 2020 and had speculated as to whether that break from the pattern seen in previous years had been a temporary phenomenon triggered by the coronavirus disease (COVID-19) pandemic. However, between September 2021 and April 2022, four new applications had been filed with the Court, each accompanied by a request for the indication of provisional measures. Of course, continued resort to the Court was welcome, but provisional measures requests, which must always be accorded priority, placed a strain on the Court's schedule and, in particular, on the finite resources of its capable and hard-working Registry.

Following the hostilities that had broken out between Armenia and Azerbaijan in September 2020, each of the two countries had instituted proceedings against the other, on 16 and 23 September 2021, respectively. On 7 December 2021, the Court had indicated provisional measures in both cases. In the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, the Court had ordered Azerbaijan, *inter alia*, to protect all persons captured in relation to the 2020 hostilities between the two countries who remained in detention and to ensure their security and equality before the law; to take all necessary measures to prevent the incitement and promotion of racial hatred and discrimination, including by its officials and public institutions, targeted at persons of Armenian national or ethnic origin; and to take all necessary measures to prevent and punish acts of vandalism and desecration affecting Armenian cultural heritage. In the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)*, the Court had ordered Armenia, *inter alia*, to take all necessary measures to prevent the incitement and promotion of racial hatred, including by organizations and private persons in its territory, targeted at persons of Azerbaijani national or ethnic origin.

On 26 February 2022, two days after the Russian Federation had launched what it had called a "special military operation" against Ukraine, the latter had filed an application in the case concerning *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*. The Court had held a hearing on the request for the indication of provisional measures, at which, regrettably, the Russian Federation had declined to appear. In a document received by the Registry shortly after the closure of the hearing, the Russian Federation had set out its position that the application and request manifestly fell beyond the scope of the Convention and thus the Court's jurisdiction. On 16 March 2022, the Court had indicated provisional measures, ordering the Russian Federation, *inter alia*, immediately to suspend the military operations

that it had commenced on 24 February 2022 in the territory of Ukraine and to ensure that any military or irregular armed units which might be directed or supported by it, as well as any organizations and persons which might be subject to its control or direction, took no steps in furtherance of those military operations.

Lastly, on 29 April 2022, Germany had instituted proceedings, including a request for the indication of provisional measures, against Italy in the case concerning *Questions of jurisdictional immunities of the State and measures of constraint against State-owned property (Germany v. Italy)*. In its application, Germany contended that, since the Court's judgment of 3 February 2012 in the earlier case concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Italian domestic courts had entertained a significant number of new claims against Germany in violation of the latter's sovereign immunity. Prior to the opening of the public hearing on the request for the indication of provisional measures, which had been fixed for 9 and 10 May 2022, Germany had informed the Court that, in the light of the adoption of a decree of relevance to the case and certain statements made by Italy, it had decided to withdraw its request, and the hearing had not been held.

Before offering some remarks on the role of judges *ad hoc* at the Court, she wished to mention the progress that had been made with regard to the trust fund for the Court's Judicial Fellowship Programme, which had been established in 2020 pursuant to General Assembly resolution 75/129. Since 1999, the Court had operated a training programme, which had originally been known as the University Traineeship Programme. Each year, participating universities nominated candidates from among their recent graduates, and 15 of them were selected to join the Court as judicial fellows and were assigned to a judge for a period of about 10 months. Prior to the establishment of the trust fund, participation in the Programme had required financial support from each sponsoring university. That had precluded nominations from less-endowed universities, particularly those in developing countries.

The establishment of the trust fund, which was open for contributions from States, international organizations and other entities, had been motivated by a desire to increase the participation of aspiring international lawyers who were nationals of developing countries and were sponsored by universities located in such countries. Under the initiative, the trust fund, rather than the nominating university, would provide funding to a number of selected candidates.

The trust fund had proved to be a great success thus far. Thanks to significant contributions from several States and one professional organization, 3 of the 15 judicial fellows who would arrive at the Court later in 2022 were young lawyers from universities in developing countries whose fellowships would be funded through awards from the trust fund.

Interest in the training programme had been steadily growing and could be said to have exploded during the most recent application period. In 2021, when the current cohort had been selected, the Court had been very pleased that 29 applications – at that time a record – had been received from sponsoring institutions. In 2022, the number of institutions proposing to fund their candidates had grown from 29 to 35, and 71 additional institutions had nominated candidates for whom they had sought trust fund support. In total, 198 young international lawyers had been nominated by 106 universities for the 15 positions available in the 2022/23 cohort. The members of the Court were delighted by the increased interest shown in the Court's work by a diverse range of institutions and applicants.

Turning to the role of judges *ad hoc*, she recalled that Article 31 of the Statute of the Court empowered a State party to a case to choose a person to sit as judge whenever the Court's members did not include a judge of that State's nationality. Once appointed, a judge *ad hoc* took part in the decision in that case on terms of complete equality with the 15 members of the Court.

The Court had inherited that institution from its predecessor, the Permanent Court of International Justice. However, the inclusion of the relevant provision in the Statute of the Permanent Court had not been without controversy. The Advisory Committee of Jurists appointed by the League of Nations to draft the Statute in 1920 had been sharply divided on the issue. Proponents had put forward a number of objectives that would be achieved by allowing a party to appoint an additional judge, sometimes referred to at the time as a

"national judge". It had been suggested that the possibility of such appointments would serve to maintain equality between the parties to a case in circumstances where only one of them had a national among the sitting judges, would ensure representation for "small States" and would allow the people of each State to have the Court's decisions explained to them "in a clear and satisfactory manner" by a fellow national. As the Committee's discussions had progressed, it had become apparent that the key rationale for the institution of the judge *ad hoc* had been to shore up States' confidence in the Court and its judicial processes. As one eminent member of the Committee had noted, the possibility of appointing a judge *ad hoc* would reassure States that their case would be "defended as they would wish it to be done".

However, some of the drafters of the Statute had voiced the concern that the institution of the judge *ad hoc* was a creature of arbitration that had no place in a standing judicial body. Discussions of the proposal had also shed light on more fundamental questions about the ability of all judges to remain impartial in relation to States with which they had ties, such as those of which they were nationals or by which they had been appointed. The idea that a judge *ad hoc* should be included on the bench to "balance" the presence of a sitting judge seemed to be premised on the assumption of some degree of partiality, or at least the appearance of partiality, by the sitting judge in favour of his or her State of nationality.

While ultimately retaining the institution of the judge *ad hoc*, the Advisory Committee of Jurists had sought to dispel concerns about the influence of nationality on judges in its 1920 report to the League of Nations, stating that "the Court is a body of independent judges elected regardless of their nationality … there is no danger that they will fail in their duty by showing any partiality towards the State whose subjects they are".

It was instructive to compare that expression of confidence in judicial impartiality with the views voiced by a committee of judges of the Permanent Court of International Justice appointed in 1927 to consider a proposal to add to the Rules of Court a provision allowing "national judges" to participate in advisory proceedings when the question submitted to the Court related to an actual dispute between two or more States. As that committee had noted: "Of all influences to which men are subject, none is more powerful, more pervasive, or more subtle, than the tie of allegiance that binds them to the land of their homes and kindred and to the great sources of the honors and preferments for which they are so ready to spend their fortunes and to risk their lives. This fact, known to all the world, the Statute frankly recognizes and deals with."

In her opinion, each of those perspectives had something to offer. Like other aspects of a judge's background, such as the legal tradition in which he or she had been trained and his or her prior professional experience and areas of particular expertise and interest, nationality surely did have an impact on the way in which he or she approached adjudication. As Judge Schwebel, a former President of the International Court of Justice, had noted, judges were all prisoners of their own experience, and international judges were no exception.

The role of nationality was acknowledged in the Statute and Rules of the International Court of Justice. No two elected members of the Court could be nationals of the same State. The President could not exercise the functions of the presidency in respect of a case to which his or her State of nationality was a party. In addition, it was her impression that, when the Security Council and the General Assembly elected the members of the Court, the candidates' nationality was the dominant consideration for most Member States.

Of course, even if one took the view that nationality could have an impact on a judge's approach to adjudication, it did not automatically follow that the institution of judges *ad hoc* was necessary. An alternative to "adding" one or two judges to the bench would have been to "subtract" them; in other words, members of the Court could have been disqualified from hearing cases involving their State of nationality. Indeed, that possibility had been extensively discussed and ultimately discarded in the process leading to the adoption of the Statute. It was a convincing alternative only if the primary value of the appointment of a judge *ad hoc* was regarded as being the potential to balance, or neutralize, the opposing views of a judge of the nationality of the other party. However, the potential to neutralize another judge's vote had not been the key rationale for the inclusion of provisions concerning judges *ad hoc* in the Statute of the Permanent Court of International Justice and did not satisfactorily explain the continued importance and relevance of that institution. Even assuming that a State

could always name as judge *ad hoc* someone who would slavishly vote in favour of it, a guarantee of 1 vote out of 16 or 17 was of very limited value.

As she saw it, the real value of the institution did not lie in the probability that the judge *ad hoc* would vote in the appointing State's favour. Judge *ad hoc* Elihu Lauterpacht had eloquently explained a very different understanding of the role of judges *ad hoc* in his separate opinion on the Court's order of 13 September 1993 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)*: "consistently with the duty of impartiality by which the *ad hoc* judge is bound, there is still something specific that distinguishes his role. He has, I believe, the special obligation to endeavour to ensure that, so far as is reasonable, every relevant argument in favour of the party that has appointed him has been fully appreciated in the course of collegial consideration and, ultimately, is reflected – though not necessarily accepted – in any separate or dissenting opinion that he may write."

In Judge *ad hoc* Lauterpacht's conception, the possibility of appointing a judge *ad hoc* allowed each State party to the case to be reassured that there would be someone present during the Court's private deliberations who was especially attentive to its interests and equities. If there was a need for balancing, it was not so much in the final vote as in the private exchanges within the Court. If the plenary was moving towards a particular view, the judge *ad hoc* would be in a position to draw attention to considerations that pointed in a different direction. At the same time, judges *ad hoc*, like members of the Court who were nationals of one of the parties, would lose credibility if they constantly intervened to advocate the views of the appointing State. Judge Higgins, a former President of the Court, had noted that the best of the judges *ad hoc* would not be "an extra advocate for the team" and that there was a strong feeling in the Court that seeking to play such a role would be inappropriate for a judge *ad hoc*.

Having examined the appointment of judges *ad hoc* during the life of the Court, she had formed the impression that, in making those appointments, States had increasingly had in mind the role suggested by Judge *ad hoc* Lauterpacht and Judge Higgins. In that connection, a notable trend could be observed in the appointment of judges *ad hoc*. In the *Genocide* case in which Judge *ad hoc* Lauterpacht had participated, Bosnia and Herzegovina had chosen as judge *ad hoc* a non-national with stature and gravitas on par with the members of the Court. In the 1920s, by contrast, the working assumption of the Advisory Committee of Jurists had been that States would invariably choose judges *ad hoc* from among their nationals, as was suggested by the Committee's use of the expression "national judge". That assumption was also reflected in the relevant provisions of the 1922 Rules of the Permanent Court of International Justice and the early judgments of the Court. The reference to nationality had subsequently been removed from the Rules of Court, but, during the era of the Permanent Court and the early decades of the work of the International Court of Justice, States had continued to select their nationals as judges *ad hoc* in the vast majority of cases.

That was no longer true, as evidenced by the fact that just 18 per cent of the judges *ad hoc* appointed over the last 10 years had been nationals of the appointing State, as against 80 per cent during the first 10 years of the work of the International Court of Justice. That trend seemed to reflect the growing recognition that a State gained little by simply selecting a judge who had specialized knowledge of its domestic laws and circumstances, or one whom it regarded as a reliable vote in its favour. Instead, States increasingly tended to appoint persons with extensive knowledge of the Court and its procedures or with particular expertise relevant to the subject matter of a case, and persons who were likely to be seen as credible and fair by the members of the Court. Judge *ad hoc* Lauterpacht's views, which had been endorsed by several judges *ad hoc* in subsequent cases, were aligned with her own observations about the ways in which judges *ad hoc* could best contribute to the Court's work, although she was not suggesting that a person of the nationality of the appointing State could never have those qualities.

The possibility of naming a judge *ad hoc* was an important feature of the Court's Statute because of its potential to increase States' appetite to entrust their disputes to the Court. Proponents of the Court could never take States' willingness to accept the Court's jurisdiction for granted, either generally or in relation to specific treaties or disputes. The

Court must always strive to demonstrate, through its decisions and procedures, that it could be trusted to settle States' disputes fairly and in accordance with international law.

As for the suggestion, during the drafting of the Statute of the Permanent Court in the 1920s, that the possibility of appointing a judge *ad hoc* would, *inter alia*, assure representation for "small States", it should be recalled that, at the time, a significant part of the world's population had been living in colonies or in non-self-governing territories. A few States had been central to the delineation of the international institutional architecture that included the Permanent Court and it was likely that the "small States" of concern to the Advisory Committee of Jurists had been smaller European States. By contrast, there were now 193 States Members of the United Nations, which were diverse in many ways, including in terms of their cultures, languages, legal traditions, political systems and levels of development. That diversity enriched the field of international law while at the same time complicating the search for common ground. In that context, the appointment of judges *ad hoc* who were impeccably qualified to serve on the bench, who hailed from countries in all regions of the world and who were trained in diverse legal traditions could also help to strengthen the quality of the Court's jurisprudence and the perceived legitimacy of its decisions.

The Chair said that he would like to read out a statement submitted by Mr. Grossman Guiloff, who was unable to attend the meeting. In his statement, Mr. Grossman Guiloff said that he would like to pay tribute to the memory of Judge Cançado Trindade, who had made numerous contributions to international law and human rights. Specifically, he had been instrumental, as Executive Director of the Inter-American Institute of Human Rights, in designing courses and seminars that would go on to benefit thousands of individuals from Latin America and the Caribbean. The Institute's flagship publication that he had overseen had helped to restore belief in democracy, human rights and respect for the rule of law in a hemisphere where mass and gross violations of human rights had cost the lives of hundreds of thousands of individuals. As an educator, a judge and an individual, Judge Cançado Trindade was to be celebrated for his commitment to the rule of law, for the inspiration he instilled in others and for his compassion for people in vulnerable situations.

Mr. Murphy said that two of the outcomes that the Commission was seeking to adopt at its current session, one on first reading and the other on second reading, were likely to include dispute settlement clauses that highlighted the role of the International Court of Justice as a forum in which States could resolve their disputes.

He would like to know whether the Court had seen an increase in the number of requests for the indication of provisional measures of protection and would like to hear more about the burden that such requests placed on the Court. Noting that, on 21 December 2020, the Court had added a new article 11 to its 1976 resolution concerning the internal judicial practice of the Court and that the new article referred to the monitoring of the implementation of provisional measures, he wondered whether those activities, while undoubtedly useful, would also create an additional burden for the Court.

Ms. Galvão Teles said that she too wished to pay tribute to the memory of Judge Cançado Trindade, who had made an enormous contribution to international law, both as an academic and as a judge. She had been encouraged by the update given by the President of the International Court of Justice on the Court's Judicial Fellowship Programme and the associated trust fund, and by the expectation that the trust fund would foster diversity among judicial fellows. The President's comments on recent trends in the appointment of judges *ad hoc* would be worth sharing with States, perhaps in the context of the Sixth Committee. While there were many factors for States to consider, she agreed that the appointment of a non-national as a judge *ad hoc* was often a good choice; indeed, her country of nationality, Portugal, had previously chosen non-nationals as judges *ad hoc* to represent its interests and had been satisfied that they had served effectively in that capacity.

Sir Michael Wood said that it was sometimes 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 parties, when choosing a judge *ad hoc*, should refrain from nominating persons who had acted as counsel in another case before the Court in the three years preceding the date of the nomination. Although those

Practice Directions had been established for good reason, he wondered whether the Court had any plans to review them, including the restrictions on judges *ad hoc*, in the future.

In situations where the Court included upon the bench no judges of the nationality of either party in a case, the parties could agree between themselves not to appoint any judges *ad hoc*. Such a possibility might be suggested to the parties in relevant cases, not least as a cost-saving measure.

Judge Donoghue (President of the International Court of Justice) said that no proposals to change the Court's Practice Directions were under active review at the current time. As for situations in which the Court included no judges of the nationality of either party in a case, the Court would honour any agreement between the parties not to add any judges *ad hoc*; however, such a scenario was unlikely, as both parties generally added a judge *ad hoc* in such cases.

While she had no specific statistics regarding provisional measures of protection, it seemed that there had indeed been an increase in requests for the indication of such measures. As for the burden that such requests created for the Court and the Registry, she did not wish to suggest that they could not be handled. The Court kept to its schedule of cases, but adjustments often had to be made to its internal plans. She had mentioned the strain on the Registry because its budget was controlled by the General Assembly and its resources were finite. The addition of a new article 11 to the resolution concerning the internal judicial practice of the Court had attracted a certain amount of attention; the Court had wished to make clear externally that it had, as an internal option, the ability to elect judges to form *ad hoc* committees in particular cases. It did not form such committees in every case. In any event, that sort of additional activity for judges did not strike her as adding appreciably to their workload, and that consideration did not influence the Court's decision as to whether such a committee was appropriate in a particular case.

Mr. Saboia, thanking the President for her fine words about his friend and compatriot Judge Cançado Trindade, said that he too wished to pay tribute to his memory. As Legal Adviser to the Ministry of Foreign Affairs of Brazil in the early 1990s, Judge Cançado Trindade had played an important role in the Brazilian Government's ratification of international human rights instruments, which had not been possible previously during the military dictatorship. Then, at the 1993 World Conference on Human Rights, when Judge Cançado Trindade had no longer been Legal Adviser, he had played a catalysing role in promoting the participation of civil society in the Conference – a novelty at the time – and thus further promoting democracy and human rights.

Mr. Murase, recalling his 48-year friendship with Judge Cançado Trindade, said that he had known since their first meeting, at the 1974 session of the Centre for Studies and Research of the Hague Academy of International Law, that the future judge would be a great dissenter. With regard to the appointment of judges *ad hoc* in advisory proceedings, he noted that, in the 1931 proceedings before the Permanent Court of International Justice concerning the *Customs Régime between Germany and Austria*, that question had sparked a considerable controversy that had influenced the decision ultimately taken by the Permanent Court. He would appreciate the views of the President of the International Court of Justice in that regard.

Mr. Rajput said that he wished to join his colleagues in paying tribute to the life and contributions of Judge Cançado Trindade. In connection with Mr. Murase's remarks regarding the appointment of judges *ad hoc*, he noted that it was often unclear to the outside world why an application for the appointment of such a judge was accepted or rejected. The practice seemed to be not to allow the appointment of such judges except in certain situations; often those advisory proceedings tended to be contentious. He would like to know more about the reasoning that lay behind decisions on whether or not to allow such appointments.

Mr. Petrič, echoing his colleagues' sentiments about the loss of Judge Cançado Trindade, said that, although he had not known the judge personally, he had always been impressed by his profound understanding and the humanity evident in his opinions. He greatly appreciated the President's explanations regarding the appointment of judges *ad hoc*. For smaller States such as Slovenia, his home country, selecting a candidate for appointment to an international institution was often problematic, as domestic resources in terms of persons and expertise were very limited. On the other hand, many factors had to be

considered before a decision could be taken to select a foreign expert instead. It was important to bear in mind that such decisions were not always entirely rational and emotions could also play a part. However, while the need for a profound understanding of the background to a case was a consideration in favour of the selection of national judges, ultimately expertise should be the most important selection criterion.

At the current session, the Commission had concluded the second reading of its draft conclusions on the very important topic of peremptory norms of general international law (*jus cogens*). Although international law and *jus cogens* norms were created by means of State practice, including treaties, there had always been a question as to whether something beyond the will of States was required to give a certain norm the character of *jus cogens*. In that connection, he would like to know how the International Court of Justice dealt with cases in which *jus cogens* was invoked as taking precedence over positive international law.

Judge Donoghue (President of the International Court of Justice) said that it had been interesting to hear about Judge Cançado Trindade's work in the 1990s, when he had served as Legal Adviser to the Ministry of Foreign Affairs. She was also grateful for Mr. Murase's recollections: to inspire current students at the Hague Academy, she often spoke to them about influential alumni such as Judge Cançado Trindade.

Regarding the role of judges *ad hoc* in advisory proceedings, she had noted that States sometimes did not request the appointment of a judge *ad hoc* even in cases that could be perceived as having a significant bilateral quality. She wondered whether their reluctance was due to caution: it was not always easy to draw a distinction between a situation in which a State was in a position to name a judge *ad hoc* and a situation in which its interests in a bilateral dispute were so concrete and direct that they raised a question over the judicial propriety of such a request.

As to the notion of *jus cogens,* her understanding was that the view referred to in Mr. Petrič's question was that peremptory norms having the character of *jus cogens* had a particular normative force that placed them above positive law. That view differed from the understanding of *jus cogens* as a term that indicated a hierarchy among certain norms of customary international law and certain treaty obligations. The latter characterization was in her view easier to accept and to understand. The broader conception that *jus cogens* norms had a normative force that went beyond positive law would pose greater challenges if a party were to invoke that view before the Court and would need to be very carefully argued if it was to attract strong support among the judges. That said, she was always interested in studying materials, including outputs of the Commission, that might enrich her own ways of thinking.

Mr. Jalloh said that he wished to join his colleagues in paying tribute to Judge Cançado Trindade and expressing gratitude for his contributions to international law, including, in particular, the humanity inherent in his approach. He had been particularly interested in the President's remarks regarding the importance of diversity in international law and the need for diversity among members of the Court and counsel appearing before it. He wondered whether she perceived any signs of progress in States' recognition of the need for diversity in terms of the counsel they chose to represent them before the Court.

Judge Donoghue (President of the International Court of Justice) said that there were no empirical data to show whether there had been an increase in the diversity of counsel before the Court or of the candidates put forward for election to the Court. However, before she herself and Judge Xue Hanqin had joined the Court in 2010, there had been only one previous female member. The fact that four of the five female members appointed over the Court's history were currently serving was a sign of at least some progress. Diversity of membership in all respects, including in terms of representation of different regions and legal systems, was hugely important. With regard to the diversity of State counsel and agents, she always encouraged States, and especially smaller States, to select their own government counsel to appear before the Court. Although some counsel, including members of the Commission, were highly experienced in proceedings before the Court, States should have the confidence to put forward their own nationals even if they had never previously appeared before the Court, did not have English or French as their first language and lacked the polished delivery of the most eloquent barristers and professors. It was the substance of their

arguments that interested the Court. One way to diversify counsel was to encourage lawyers working for smaller States to assume a more senior role within their teams without fear that, in doing so, they might weaken their cases. With regard to the appointment of judges *ad hoc* in particular, she understood that States had multiple factors to take into account when making their selection and that concerns about diversity were not necessarily the foremost consideration. Nonetheless, the presence of persons from different backgrounds was very good for the international law profession and for the legitimacy and credibility of the Court's judgments, and enriched the experience of all.

General principles of law (agenda item 6) (A/CN.4/L.955/Add.1 and A/CN.4/L.955/Add.1/Corr.1 (Spanish only))

The Chair drew attention to draft conclusion 5 of the draft conclusions on general principles of law, entitled "Determination of the existence of a principle common to the various legal systems of the world" (A/CN.4/L.955/Add.1 and A/CN.4/L.955/Add.1/Corr.1 (Spanish only)). Draft conclusion 5 had been provisionally adopted by the Drafting Committee at the seventy-second session and had been presented to the plenary Commission, which had taken note of its content. He took it that the Commission wished to adopt the text and title of draft conclusion 5 so that the Special Rapporteur could proceed to prepare the commentary thereto for adoption at the current session.

Draft conclusion 5 was adopted.

The meeting rose at 4.20 p.m.