



General Assembly

Sixty-third session

Official Records

Distr.: General
14 November 2008

Original: English

Sixth Committee

Summary record of the 21st meeting

Held at Headquarters, New York, on Friday, 31 October 2008 at 10 a.m.

Chairperson: Mr. Al Bayati (Iraq)

Contents

Agenda item 75: Report of the International Law Commission on the work of its
sixtieth session (*continued*)

Statement by the President of the International Court of Justice

This record is subject to correction. Corrections should be sent under the signature of a member of the delegation concerned *within one week of the date of publication* to the Chief of the Official Records Editing Section, room DC2-750, 2 United Nations Plaza, and incorporated in a copy of the record.

Corrections will be issued after the end of the session, in a separate corrigendum for each Committee.

08-58011 (E)



The meeting was called to order at 10.15 a.m.

Agenda item 75: Report of the International Law Commission on the work of its sixtieth session
(*continued*) (A/63/10)

1. **Ms. Dascalopoulou-Livada** (Greece), noting that the draft articles elaborated so far on the responsibility of international organizations followed the pattern of the articles on the responsibility of States for internationally wrongful acts, said that there were matters relevant to the current topic, in particular countermeasures, that needed to be viewed in a different light. Her delegation was not convinced that the issue of countermeasures was relevant in relation to international organizations; indeed, it still had doubts about its relevance to State responsibility. It agreed that measures taken by an organization against its members in accordance with its internal rules should be considered sanctions rather than countermeasures. Furthermore, countermeasures should be distinguished from sanctions relating to the maintenance of international peace and security.

2. In connection with the draft article proposed by the Special Rapporteur on the object and limits of countermeasures, her delegation was concerned about recognition of the right of an international organization to resort to countermeasures against its own members and vice versa. In the first situation, it might be more accurate to refer to sanctions rather than countermeasures; in the second, it was doubtful whether a State had a right to take countermeasures against an international organization of which it was a member. The institutional regime of an international organization was by no means analogous to treaty relations between States and usually provided for dispute settlement mechanisms that would not leave room for such drastic action as countermeasures.

3. With regard to draft article 51 on a plurality of responsible States or international organizations, it was difficult to reconcile the idea of subsidiary responsibility with the possibility suggested in the commentary that an injured State or international organization might entertain a claim against either the entity with primary responsibility or the entity with subsidiary responsibility. That treatment was close or identical to a system of joint and several liability. The commentary should instead reflect the ordinary meaning of draft article 51, paragraph 2, which provided that subsidiary responsibility could be invoked only insofar as the invocation of primary

responsibility had not led to reparation. Clearly, the primary responsibility of the organization took precedence over the subsequent responsibility of its member States. Furthermore, the words “as in the case of article 29” in paragraph 2 should be changed to read “subject to the conditions of article 29”.

4. **Mr. Simonoff** (United States of America) said that his delegation was grateful for the scholarship the Special Rapporteur had brought to bear on the important topic “Reservations to treaties” but thought that the subject of reactions to interpretative declarations covered in his thirteenth report (A/CN.4/600) was not ripe for codification and went beyond the original mandate of the project. There was insufficient State practice from which to derive suitable guidelines, and the general regime put forth in the report was not nuanced enough to address what little practice existed. The proposed categories of reactions were too restrictive and did not take into account, for example, reactions to interpretative declarations that were positive but not intended to express agreement, or negative but did not reject the interpretation or propose a concrete alternative. Moreover, the terms “approval” and “opposition” implied that a State’s reaction had legal consequences for the interpretative declaration, which would rarely, if ever, be the case. In that sense, the proposed regime drew far too heavily on the regime for responding to reservations.

5. Although the report in several places noted that silence could not be understood to indicate approval of an interpretative declaration, the second paragraph of proposed draft guideline 2.9.9 stated that in certain circumstances a State could be considered as having acquiesced to an interpretative declaration by reason of its silence or its conduct. Although a State’s conduct might be relevant, it was unclear on what basis a State’s silence would be a consideration. The proposed guidelines went beyond progressive development of international law to promote a new legal regime where one did not exist. They were likely to place a significant burden on the treaty offices of States, which would feel compelled to review all interpretative declarations and respond to them so as not to suggest that they were agreeing to a particular interpretation through lack of response.

6. In sum, his delegation had a great many concerns regarding the work on the topic and thought the Commission should put it aside.

7. Although his delegation appreciated the Commission's desire to generate a common set of articles on the responsibility of international organizations, it remained concerned about the methodology being followed, in particular the key assumption that the articles on State responsibility were an appropriate model for the draft articles on the responsibility of international organizations. While both States and international organizations had international legal personality, they were fundamentally different. Unlike States, which shared a fundamental set of qualities, there was great diversity in the structure, functions and interests of international organizations. In addition, many of the interests of States underpinning the articles on State responsibility — such as sovereignty, citizenship and territorial integrity — did not exist in the case of international organizations.

8. His delegation's comments on the first 45 draft articles had highlighted the problems of treating international organizations as if they were States for the purpose of holding them responsible for internationally wrongful acts. The general obligation to make reparation for injury, for example, might have the effect of diverting the resources of international organizations away from funding the internationally agreed functions of the organization towards protecting against unquantifiable litigation risks, causing States to reconsider the extent to which they wanted to continue to participate in such organizations and undermining the independence of international organizations. The same concerns were raised by the draft articles considered by the Commission pertaining to the admissibility of claims, the invocation of the responsibility of an international organization and countermeasures. His delegation would encourage the Commission to pay particular attention to the pressing problems that arose in the existing practice of international organizations. States could benefit from an expanded study of practical examples illustrating the relevance and application of the draft articles.

9. His delegation appreciated the Special Rapporteur's thorough and thoughtful work on expulsion of aliens, a complex topic that involved the formulation and enforcement of a State's immigration laws as well as national security. The Commission should bear in mind that each State faced delicate and unique legal and political issues. Moreover, the sovereign right of each State to control admission to its territory should be recognized and respected. He would

encourage the Special Rapporteur and the Drafting Committee to examine carefully the scope of the topic and the definitions employed and to consider whether the draft articles reflected well-settled principles of international law and State practice. His delegation agreed with the Special Rapporteur that the issues of non-admission, rendition and other transfers, fell outside the scope of the topic. Issues governed by specialized bodies of international law, such as extradition and expulsion of aliens in situations of armed conflict, should also be excluded. Otherwise, the draft articles could create confusion and be seen as articulating new or alternative rules not well settled in international law and practice that could present an obstacle to broad support.

10. The draft articles should recognize the rights of States to control admission to their borders and to enforce their immigration laws. They should distinguish between aliens lawfully present within a State's territory and those who were not. In particular, they should recognize that aliens not lawfully present could be expelled for that reason alone and might be subject to different removal procedures.

11. Regarding the text of the draft articles, draft article 1 did not make it clear that there were many issues that should be excluded from the scope of the draft articles. In addition to non-admission, rendition and other transfers and matters regulated by the law of armed conflict, extradition should be explicitly recognized as falling outside the scope of the topic. Extradition was not expulsion but rather the transfer of an individual for a specific law enforcement purpose; it was subject to a separate international legal regime dating back centuries; it was not limited to aliens but also applied to nationals. Indeed, draft article 4 would be entirely inconsistent with international law and practice on extradition.

12. The definitions contained in draft article 2 required careful scrutiny, since they would be critical to defining the scope of the draft articles. The definition of territory, for instance, as "the domain in which the State exercises all the powers deriving from its sovereignty" was vague and might be interpreted too broadly.

13. In relation to draft article 4, the Working Group established during the Commission's sixtieth session had concluded that the commentary should indicate that, for the purposes of the draft articles, the principle

of non-expulsion of nationals applied also to persons who had legally acquired one or several other nationalities and make it clear that States should not use denationalization as a means of circumventing their obligations under that principle. His delegation agreed as a general matter with those conclusions, but a careful review of the actual wording of the commentary would be necessary. It did not agree, however, with the view that States had an obligation not to denationalize a citizen who did not have any other nationality and that nationality could not effectively be lost unless the person concerned had effectively adopted another nationality.

14. With regard to draft article 5, the language should more consistently track the provisions of the Convention relating to the Status of Refugees. In that Convention, article 32, which applied only to refugees lawfully in the territory, provided greater protections than those set out in article 33, which applied to refugees generally. Since there were various definitions of “refugee” reflected in international instruments, the Commission should clarify that the term “refugee” should be defined in accordance with each country’s existing obligations.

15. His delegation was concerned that the language in draft article 6 was derived from the Convention relating to the Status of Stateless Persons, which was not widely ratified by States, including the United States, and thus did not reflect a well-established and widely accepted principle of international law.

16. **Ms. Gladstone** (United Kingdom) said that the Guide to Practice on reservations to treaties could be useful in the area of interpretative declarations, as the question was not covered by the Vienna Convention on the Law of Treaties. However, in view of the dearth of State practice, great care should be taken even when formulating non-binding guidelines. It was appropriate to deal with interpretative declarations in conjunction with reservations to treaties, since there were links between them: for example, interpretative declarations might be disguised reservations. In view of the juridical differences between them, however, perhaps the title of the topic should be expanded to refer to both, and separate terminology should be used where possible.

17. Her delegation welcomed the draft guidelines that supported the principles that non-parties could formulate interpretative declarations, at any time and in

writing, with the understanding that the reasons for an interpretative declaration might be complex and not capable of simple definition.

18. Silence as a response to an interpretative declaration did not necessarily constitute acquiescence; hence the second paragraph of draft guideline 2.9.9 should either be deleted, leaving the issue of acquiescence to be ascertained by reference to international law, or further elaborated. Since there was no time limit on reacting to interpretative declarations, it would be hard to determine when the silence of other contracting States could be deemed acquiescence. Acquiescence by silence could be envisaged more readily in the case of a treaty with a small number of parties. Even then, however, there might be motivations other than acquiescence for remaining silent. Silence could not constitute acquiescence when there was no duty to react. In answer to the Commission’s questions in paragraph 26 of its report, therefore, her delegation could not envisage any circumstances in which silence in response to an interpretative declaration could be taken definitively to constitute acquiescence; and she did not think that silence should play a part in the legal effects that the declaration might bring about.

19. With regard to the Commission’s questions in paragraph 27 of its report, on the consequences of an interpretative declaration, for its author or for a State or international organization which had approved it, she felt that the declaration would act as an aid to interpretation; if the declaration was not withdrawn, revised or supplemented, some issues of estoppel might arise. For a State or organization which had been silent or expressed opposition, the declaration would not act as an aid to interpretation, and ordinary principles of treaty interpretation would apply.

20. As for draft guideline 2.1.9, her delegation strongly supported any effort to encourage greater clarity in the formulation of reservations, while recognizing that a State had no obligation to state its reasons. Reservations of a general and unspecific character often resulted in the formulation of objections by other States. The number of such objections might be reduced if the other parties to the treaty had greater insight into the reasons for a State’s reservation.

21. With regard to draft guideline 1.5 on “reservations” to bilateral treaties, her delegation agreed that the

unilateral statements described in the guideline did not constitute a reservation within the meaning of the Guide to Practice. The United Kingdom would normally avoid making such statements, whatever their effect.

22. On the topic “Responsibility of international organizations”, her delegation had in the past expressed concern about how closely the Commission’s work had been following the articles on State responsibility. On some issues it was sensible to have equivalent provisions, but it was questionable that an international organization should have the same entitlement as a State to invoke the responsibility of another international organization if the obligation breached was owed to the international community as a whole, as provided for in draft articles 46 and 52. There was a wide variety of international organizations, some with more limited functions, mandates and membership than others, and it was not clear that all international organizations could properly be considered to be members of the international community. The issue required therefore further consideration.

23. With regard to draft article 48, her delegation agreed that it was important to include a provision dealing with nationality of claims and exhaustion of local remedies and noted that the term “local remedies” referred to “any available and effective remedy provided by that organization”.

24. As for the proposed draft articles on countermeasures, her delegation had previously expressed the view that the provisions on countermeasures in the articles on State responsibility were a striking anomaly. Alone among the circumstances precluding wrongfulness they had been singled out for lengthy elaboration, whereas self-defence, force majeure and necessity had not been. The same comment applied to the work on responsibility of international organizations. The Commission should reconsider whether a separate chapter on countermeasures was necessary.

25. The topic “Expulsion of aliens” was complex and problematic and might not be ripe for codification. Her delegation supported the cautious approach taken by the Special Rapporteur, in particular his conclusion that he remained unconvinced of the advisability of preparing draft articles on issues relating to nationality. Moreover, a draft article on non-expulsion of nationals might not be necessary or appropriate.

26. **Ms. Popova** (Bulgaria) said that the Commission had made commendable progress during its sixtieth

session on the topics “Shared natural resources” and “Effects of armed conflicts on treaties”. Her delegation was also interested in the proposed new topic “Treaties over time”, which would be of substantial help to legal advisers in dealing with practical and theoretical challenges in the dynamic realm of the law of treaties. That topic, together with “Reservations to treaties”, demonstrated that treaties were living instruments and that the Vienna Convention on the Law of Treaties, rather than imposing strict rules, provided solutions that preserved both the integrity and the flexibility of treaty law. The draft guidelines on reservations to treaties sought to strike a balance between universality of treaty membership and integrity of treaty content, and her delegation looked forward to the successful completion of the guidelines. The challenge was to fill the gaps in the Vienna Convention while preserving its provisions intact.

27. Because States often showed a passive attitude, there were many examples of reservations which could not pass the admissibility test of article 19 (c) of the Vienna Convention but to which only a few States had objected. The rule proposed in draft guideline 2.1.8 to deal with that problem interfered to some extent with the core function of the depositary as a neutral administrator of the treaty. An alternative approach might be a carefully worded rule advising the depositary, when communicating the text of objections made to reservations on the grounds of article 19 (c) of the Vienna Convention, to draw the attention of contracting States, and States entitled to become parties to the treaty, to the reservation in question and the objections to it.

28. It might also be useful to develop a rule indicating to States and organizations that the real scope of the admissibility test included compatibility with customary international law. Often the reason a State chose to make a reservation was because it wished to be part of a treaty regime but to keep its obligations on certain issues at the level of customary international law. If by its reservation, however, the State purported to reduce its obligations below the level of customary international law, it would affect the very foundation on which the treaty regime had been developed.

29. Draft guideline 2.2.2, on instances of non-requirement of confirmation of reservations formulated when signing a treaty, dealt with the situation where a State or international organization expressed by its signature the consent to be bound by

the treaty. However, in the case of a signature and referendum to be confirmed as envisaged in article 12, paragraph 2, of the Vienna Convention, the reservation should also be confirmed when the consent of the State to be bound by the treaty was confirmed.

30. It might be useful to add a second paragraph to draft guideline 2.3.3 (“Objection to late formulation of a reservation”) advising the objecting State to indicate whether it would otherwise consider the objection admissible. That information would help the State making the reservation decide whether to nullify its consent to be bound by the treaty and to reaccede to it immediately, making the same reservation.

31. **Mr. Henczel** (Poland) said his doubts and fears about the practical usefulness of the draft Guide to Practice on reservations to treaties were increasing. So many draft guidelines, and so much detail, could be a source of confusion. Some of them, such as draft guideline 2.6.7, merely repeated corresponding provisions of the Vienna Convention on the Law of Treaties. If the ones which were mere repetitions were eliminated, the others would be easier to use and more effective. The Commission should also reconsider whether it was appropriate to include in the draft guidelines matters relating to other instruments, especially interpretative declarations, which had the result of extending the scope of the topic far beyond what was originally envisaged. It should be borne in mind that States often used interpretative declarations simply to avoid the formal limitations involved when using reservations. If those limitations were also extended to interpretative declarations, States might have difficulty in accepting the draft guidelines.

32. Good progress had been made with the topic of the responsibility of international organizations. He would however warn against the automatic repetition of provisions contained in the draft articles on State responsibility. The present draft did not allow for the possibility that an international organization might invoke the responsibility of a State. He hoped special attention would be paid in future, for example in the context of countermeasures, to specific characteristics which distinguished the responsibility of international organizations from that of States.

33. On the topic of expulsion of aliens, the Working Group had reached some important conclusions concerning the principle of the non-expulsion of nationals legally possessing one or several other nationalities. He

shared those conclusions, and especially the conclusion that States should not use denationalization as a means of circumventing their obligations under the principle of the non-expulsion of nationals.

34. **Ms. Sareakova** (Russian Federation), commenting on the topic of reservations to treaties, queried the approach taken by the Special Rapporteur in draft guideline 2.6.5 of the draft Guide to Practice. According to the commentary, States and international organizations entitled to become parties to the treaty concerned could formulate an objection, since the defining characteristic of an objection was the intention of its author, not its actual or potential legal consequences. She could not disagree with that, but for the sake of legal clarity she would prefer a different approach to the concept of an objection, based on its legal consequences rather than its subjective characteristics in its author’s eyes. Moreover, paragraph (ii) of draft guideline 2.6.5 did not, apparently, cover cases in which a treaty was being applied provisionally, when reservations and objections could also have legal effect. That possibility was only partly excluded by the reference to the time of expressing consent to be bound. Draft guideline 2.6.12 also required confirmation of the objection at that time if the author of the objection had not signed the treaty. She suggested adding in draft guideline 2.6.5, a requirement to confirm the objection at the time of signature.

35. She fully agreed with the provision in draft guideline 2.6.8 (“Expression of intention to preclude the entry into force of a treaty”). The situation covered by that provision would however only arise in the rare event that the lapse of time until the treaty came into force for States parties was similar to the time period for formulating an objection according to draft guideline 2.6.13. In the majority of cases, the treaty came into force very soon after a State had given its consent to be bound by it. The provision in draft guideline 2.6.8 should be clarified, to avoid confusion as to whether the entry into force of a treaty as between authors of a reservation and of an objection would be impossible.

36. It was useful to have a statement of the reasons for both reservations and objections, but it must be borne in mind that in such cases the reasons were often highly political and their authors tended to avoid explaining them. In that connection, she wondered how realistic were the provisions in draft guidelines 2.1.9 and 2.6.10, or indeed the draft guideline 2.9.6, now

referred to the Drafting Committee. The Commission's approach in draft guideline 2.6.14 did not seem altogether logical, because although it was formulated in a similar way to draft guideline 2.6.15 the situations contemplated in the two provisions were quite different. The Commission itself, in the commentary, observed that in a certain sense conditional objections were similar to objections made by States and international organizations before they became parties to the treaty. The two categories of objections should surely be treated in the same way. As the draft guideline 2.6.5 was so specific on the conditions for the formulation of an objection, the conditions for its having consequences should also be spelled out, including in the case of conditional objections. The similarity between draft guidelines 2.6.14 and 2.6.15 prompted the same question. Since conditional objections could produce the same effects as ordinary ones, the same logic should apply to late objections, although the commentary denied that that was so.

37. She did not agree with the title of draft guideline 2.6.15 ("Late objections"). Objections to reservations made after the time period allowed for them were formulated in the knowledge that the State or organization concerned was deemed to have accepted the reservation. Such objections could not alter the legal consequences of the reservation, even if their authors tried to persuade the author of the reservation to accept it. An objection of that kind should perhaps be called a "late notification of an objection".

38. The draft guidelines drew upon many of the terms traditionally used to describe legal obligations. That approach would only be justified where the guidelines reflected the rules of the Vienna Convention on the Law of Treaties; in all other respects it would be better to use the language of recommendations, since the guidelines themselves would be non-binding.

39. On the topic of responsibility of international organizations, she agreed with the Commission that in the matter of responsibility for internationally wrongful acts there were specific rules applicable only to international organizations, and that draft articles 46, 47, 50 and 51 could be borrowed, *mutatis mutandis*, from the draft on State responsibility. As for draft article 48 ("Admissibility of claims"), she agreed with the thrust of paragraph 1, because the rule in such cases for the responsibility of States and of international organizations was the same. It would have been useful to provide for claims by an international organization, as

it was clear from paragraph (4) of the commentary that in such a case there was no requirement concerning nationality. That should be made clear in the draft itself. It should also be made clear what other requirements applied to such claims. Paragraph 2, on the exhaustion of local remedies, was not entirely clear. In the case of claims against States, that rule required accepting the jurisdiction of the State concerned, a situation which could hardly arise with an international organization. It might be better to stipulate the exhaustion of legal rather than local remedies, and make the rule apply only to claims made by a State or international organization against an international organization to which it belonged.

40. Draft article 49 was acceptable, but the question raised in the commentary as to which organ of an international organization was competent to waive a claim on its behalf was highly relevant, especially in the light of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. A rule should be framed in that light, following further study.

41. Given the increasing role of international organizations, their right to respond, under draft article 52, to breaches of *erga omnes* obligations could not be excluded. She welcomed, however, the inclusion in the draft of a provision that the obligation breached must be among the functions of the international organization invoking responsibility. The Commission's discussion of countermeasures had also been useful. She agreed with the distinction drawn between countermeasures taken by members and by non-members of an international organization. However, the statement that countermeasures must be consistent with the rules of the organization (draft article 52) did not seem appropriate, because countermeasures could only arise from the customary law concerning the obligation in question; they could not be provided for by the rules of international organizations, which invariably called for observance by States of all their obligations towards the organization concerned. It would be better to distinguish countermeasures taken against international organizations by States from those taken by other international organizations. The rights of the latter would be limited by the extent of their particular competence. She was very doubtful about countermeasures taken by organizations other than the injured one. There was no practice in that area apart from the specific practice of the European Union.

42. Paragraph 147 raised the question of implementation by an injured international organization of the responsibility of the wrongdoing State. Although outside the scope of the topic, the question was of considerable interest to the international community, and the Commission should elaborate additional draft articles or commentary on the subject.

43. Turning to the topic of expulsion of aliens, she suggested that in view of its importance the Drafting Committee could perhaps submit draft articles on the topic piecemeal, without waiting for the complete draft to emerge. She doubted whether the issues involved in expelling citizens, including those with dual or multiple nationality, or depriving them of nationality for the purpose of expelling them fell within the scope of the topic as it was defined. She did however support the decisions of the Working Group explained in paragraph 171 of the report, including the extension of the general prohibition against expelling nationals to those possessing more than one nationality, including the nationality of the expelling State. Although there were differences in status between persons with one nationality and those with two or more, she shared the Commission's opinion that the differences were not relevant to expulsion. Otherwise, nationality itself would be broken down into different and unequal categories, in a manner not in keeping with the nature of the concept, although at the present time there was probably no rule of international law to forbid it. She agreed with the Commission's handling of the question as to whether a person could be deprived of his or her nationality for the purpose of expulsion. If that were possible, the prohibition against expelling one's own nationals would become meaningless, since there would be a legal alternative to breaching the prohibition.

44. **Mr. Álvarez** (Uruguay), commenting on the topic of expulsion of aliens, said the overarching theme was nationality. The subsidiary themes of multiple nationality and deprivation of nationality for the purpose of expulsion could be formulated separately, or otherwise made part of one of the draft articles submitted by the Special Rapporteur to the sixty-second session of the General Assembly, such as draft article 4 (A/62/10, footnote 397). It was, however, necessary to clarify the concepts involved in the light of the debate at the Commission's sixtieth session. For example, according to the Commission's current report (A/63/10, para. 210), the Special Rapporteur took the view that a rule prohibiting the expulsion of persons

having dual or multiple nationality who were nationals of the expelling State did not exist as such in international law. He also defended the position, however, that there was a well-established prohibition in international law against denationalizing a person who would be rendered stateless as a result. The conclusion that the principle of non-expulsion of nationals did not apply to persons with dual or multiple nationality unless the expulsion would render them stateless appeared to mean that in such cases, a potentially stateless person would enjoy a kind of protection not afforded to a person deprived of his or her nationality, regardless of whether the nationality concerned was "dominant" or "effective". The Commission must revert to those issues, notwithstanding the views expressed by the Special Rapporteur, with a view to adapting the text of draft article 4 to reflect the various options.

45. Turning to the topic of responsibility of international organizations, he said that disputes between an international organization and its members ought to be settled according to the rules of the organization concerned. Since the relationships of international organizations were limited by their constituent instruments, they could not act outside them, nor apparently could they resort to countermeasures, especially such countermeasures as would jeopardize their relations with their member States, or their own standing or operations. There were other controversial issues to resolve as well: the nature of sanctions adopted by an organization in accordance with its constituent instrument, such as sanctions decided upon by the Security Council, the relationship between those measures and countermeasures, and breaches of treaty obligations governed by the law of treaties.

46. **Mr. Roelants de Stappers** (Belgium), commenting on the topic of reservations to treaties, said that interpretative declarations within the meaning intended by the Special Rapporteur were not reservations in the sense of article 2, paragraph 1 (d), of the Vienna Convention on the Law of Treaties. The interpretative declaration made by Belgium, on its accession to the Rome Statute of the International Criminal Court, stated that in the light of article 21, paragraph 1 (b), of the Statute and the peremptory norms of international humanitarian law, article 31, paragraph 1 (c), of the Statute could be applied and interpreted only in accordance with those rules. That declaration had not produced any particular effect for

Belgium, nor had it prompted any reaction. He questioned the wisdom of giving firm and definitive answers to detailed questions by the Commission about interpretative declarations, since practice on the matter was scarce and opinion within the Commission divided. As for the questions framed in paragraph 26 of the report, the interpretation of treaties was a matter for the parties or for the courts, to be carried out according to the rules in articles 31 and 32 of the Vienna Convention on the Law of Treaties, which themselves reflected customary law in the matter. No decision could be made in the abstract on whether a unilateral interpretative declaration was valid in the light of those rules. A unilateral declaration, even one made at the conclusion of the treaty and not subsequently, could result in an agreement between the parties or a practice whereby they agreed on the meaning of the treaty, but taken on its own it could not determine the meaning of the treaty's provisions.

47. Turning to the topic of responsibility of international organizations, he said that his delegation was satisfied with the current language of draft articles 46 to 53. With respect to countermeasures, in the interests of preventing potential abuse, the matter should be addressed in the draft articles. As to whether the draft articles should cover countermeasures taken by an international organization against a State, his delegation was of the view that such situations should definitely be covered as they represented the majority of current practice with regard to countermeasures adopted outside inter-State relations. The Commission should therefore consider broadening the scope of the draft articles, particularly part three, in order to cover the invocation of the responsibility of a State by an international organization. Draft article 19 could not envisage countermeasures by an international organization in respect of an internationally wrongful act of another international organization or a State unless the legal regime applicable to such countermeasures was covered under part three.

48. With regard to the issue of countermeasures in the relationship between an international organization and its members, in principle there was no reason to exclude the possibility that a member of an organization might take countermeasures against it or vice versa. The rules of the organization had to be respected, however. A member of an international organization could not take countermeasures against the organization if the rules of the organization

provided reasonable means to ensure its compliance with its obligations under part two of the draft articles. The opposite situation, the imposition of countermeasures by an organization against its members, should also be addressed through the addition of a provision along the lines of draft article 52, paragraph 5, stipulating that an international organization might not take countermeasures against one of its members, whether a State or another international organization, if the rules of the organization provided reasonable means to ensure the member's compliance with its obligations under part two of the draft articles.

49. With regard to the obligation to extradite or prosecute (*aut dedere aut judicare*), his Government had submitted written comments in July 2008. He requested that those comments should be reflected in the documentation on the subject and that the Commission should bear them in mind in its future work on the topic.

50. **Ms. Miculescu** (Romania) said that her delegation welcomed the inclusion of the topics "Treaties over time" and "The most-favoured-nation clause" in the Commission's programme of work and looked forward to the preliminary reports of the respective study groups. With regard to the topic of shared natural resources, her delegation was of the view that the draft articles on the law of transboundary aquifers reflected the main principles of international law on natural resources, including the obligation to cooperate for their efficient utilization. At the same time, further clarification was needed with respect to the relationship between the draft articles and other conventions and international agreements, including existing and future bilateral and regional agreements. In addition, the question of settlement of disputes should be addressed in a new draft article.

51. As for the draft articles on effects of armed conflicts on treaties, her Government welcomed the upholding of the principle of legal stability and continuity of treaty obligations in cases of armed conflict, as reflected in draft article 3. With regard to draft article 1, as her delegation had stated previously (A/C.6/62/SR.21, para. 74), the effects of armed conflict on provisionally applied treaties should be included within the scope of the draft articles. Reference to article 25 of the Vienna Convention on the Law of Treaties would not suffice because the Vienna Convention did not cover exceptional cases in which the exercise of rights, or the performance of

obligations, under a provisionally applied treaty might be affected by armed conflicts.

52. Her delegation understood the rationale for extending the scope of the draft articles to cover effects of internal as well as international armed conflicts on treaties and concurred with the Commission's view that contemporary armed conflicts had blurred the distinction between the two, particularly given the possible involvement of other States, in varying degrees, in such conflicts. Nevertheless, a rather distinct approach was required in the case of exclusively internal conflicts and their effects on international treaties. Such conflicts might make it impossible for the State concerned to perform its treaty obligations, which would trigger the suspension or termination of the treaty, as provided in draft article 17. The issue needed further clarification in the light of those considerations.

53. Her delegation welcomed the revision of draft article 5 and found the indicative list of treaty categories in the annex to be helpful. She wondered whether it might not be best to treat draft article 7 in close connection with draft article 5, since the latter would only apply in cases in which there was no express provision on the operation of treaties in situations of armed conflict. Lastly, the category comprising treaties between States and international organizations, and the effects of armed conflict thereon, should be included within the scope of the draft articles, particularly as such treaties regulated broad aspects of international relations which might be impinged upon by an armed conflict.

54. Turning to the topic of reservations to treaties, she said that the subject of the thirteenth report of the Special Rapporteur (A/CN.4/600), interpretative declarations, was of great importance, given that States often utilized such declarations in cases where the treaty prohibited reservations. Also important was the fact that different legal regimes and rules applied to reservations and to interpretative declarations, as had been emphasized by the Special Rapporteur. Her delegation concurred with the Special Rapporteur's conclusions, particularly those concerning opposition to and reclassification of interpretative declarations. Indeed, there was good reason to assert that the two reactions did not produce similar effects, although reclassification might sometimes be seen as a consequence of opposition to an interpretative declaration. Opposition might lead to disagreement between States regarding the correct

interpretation of a treaty provision without the differing interpretations being seen as modifying the object and purpose of the treaty, whereas reclassification meant that a State party considered that the interpretative declaration of another State party did modify the treaty's object and purpose, and thus considered it a reservation. From that point of view, it was perfectly acceptable to treat the two concepts differently.

55. On the question of whether silence in response to an interpretative declaration amounted to acquiescence, she emphasized that the effects of silence with respect to interpretative declarations were not the same as in the case of reservations to treaties, although silence was *prima facie* evidence of agreement, particularly in the case of treaties the subject matter of which would require a prompt reaction from States parties. More specificity was required in draft guideline 2.9.9 in order to clarify when silence in response to an interpretative declaration might be equated with acquiescence.

56. With regard to responsibility of international organizations, her delegation was in general agreement with the approach taken in the draft articles. The most important issue to be resolved at present was that of countermeasures. Generally speaking, her delegation shared the view that articles on countermeasures should be drafted and that they should be treated independently of, but in close relation to, other types of measures. Although the main issues to be tackled in that regard had been identified, further clarification was needed, especially with respect to the object and limits of countermeasures and their relationship to the internal procedure of the international organization concerned. Clarification was also needed with respect to obligations not affected by countermeasures. Those listed in draft article 53 were, in her view, obligations owed to the international community at large, not to the international organization against which countermeasures might be taken, and therefore obviously could not be affected by countermeasures.

57. As to the topic expulsion of aliens, her delegation believed that, although the principle of non-expulsion of nationals was widely recognized, it could not be considered an absolute rule in the light of the recent practice of States. The Commission should therefore be prepared to consider derogations from that principle in exceptional circumstances. The issues of expulsion of persons having dual or multiple nationalities and deprivation of nationality should be studied further. The right of every person to a nationality and the right

not to be arbitrarily deprived of one's nationality should be reaffirmed.

The meeting was suspended at 11.55 a.m. and resumed at noon.

Statement by the President of the International Court of Justice

58. **The Chairperson**, welcoming the President of the International Court of Justice, said that the Court had served as a paragon in adjudicating disputes among States. The President had been an outstanding advocate for the Court and, throughout her distinguished career as a teacher, writer, human rights activist and judge, had consistently made outstanding contributions to the development and application of international law.

59. **Ms. Higgins** (President of the International Court of Justice) said that she wished to speak to the Committee on the topic of jurisdiction at the Court. Virtually all the great international institutions of the world had the obligation as a concomitant of membership, to accept the compulsory jurisdiction of the court of that institution. It was so with the Council of Europe, the European Union and the World Trade Organization. But membership in the United Nations did not carry that obligation. Referral of disputes to its primary judicial organ was optional and based upon the consent of both parties. That requirement of mutual consent had necessarily meant that the Court was too often examining objections to its own jurisdiction, rather than addressing the serious substantive problems at issue.

60. The procedure for a respondent to challenge the jurisdiction of the Court or the admissibility of an application was set out in the Rules of Court. Two important changes had been made to the procedure during the Court's periodic reform of the Rules. The Rules applicable until 1972 had given the Court wide discretion in treating preliminary objections, providing that the objection might be joined to the merits of the application, which had resulted in cases with extensive pleadings on the same issue at both the preliminary objections phase and the merits phase. That repetition of arguments, sometimes with several years intervening, had not facilitated efficiency in the administration of justice.

61. During the 1972 revision of the Rules, the concept of "joinder to the merits" had been dropped and a new formula introduced, providing the Court three options: either to uphold the objection, to reject it or to declare that the objection did not possess, in the

circumstances of the case, an exclusively preliminary character. That reform had been directed at avoiding the problem of repetitive pleadings: if an objection did not have an exclusively preliminary character, the Court must deal with it immediately; it could not choose simply to join it to the merits.

62. Until relatively recently, a party could raise preliminary objections up until the date set for the submission of the counter-memorial, which had led to drawn out proceedings in numerous cases. In the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, for example, preliminary objections had been raised 14 months after the delivery of the memorial. In 2000, as one of several efforts in recent years to speed up its throughput, the Court had decided to introduce a strict time limit, requiring preliminary objections to be made "as soon as possible, and not later than three months after the delivery of the Memorial" (art. 79, para. 1, of the Rules of Court). With that compressing of the timeline, the Court could swiftly identify those cases in which issues of jurisdiction and admissibility arose and could thus factor the additional stage of hearings on preliminary objections into its annual strategic planning. In addition, under article 79, paragraph 2, of its Rules, the Court could, when it foresaw the inevitable lodging of preliminary objections, opt not to wait for them to be lodged and instead, with the agreement of the parties, organize a special preliminary hearing immediately.

63. A sizeable portion of the Court's case law had to do with determination of its own jurisdiction. In its 62 years of existence, 113 contentious cases had been referred to it. In 15 of those cases, the so-called "optional clause" declaration, recognizing as compulsory the jurisdiction of the court in accordance with Article 36 (2) of the Statute, had been invoked as the sole basis for jurisdiction. In 45 cases, jurisdiction had been asserted on the basis of a compromissory clause in a bilateral or multilateral treaty. In 26 cases, both the optional clause and a treaty had been invoked. Sixteen cases had come to the Court by special agreement, and two had recently been brought on the basis of *forum prorogatum*. In the other nine cases, dating back to the 1950s, no basis of jurisdiction had been identified.

64. Preliminary objections could arise in respect of any of those bases of jurisdiction. Consent given under the optional clause was almost invariably accompanied

by reservations that had to be interpreted by the Court. Rarely did an optional clause case not require separate hearings on jurisdiction. Where a compromissory clause of a treaty was invoked, it might be argued that consent did not apply in the particular case, perhaps because the subject matter of the dispute was not really related to the treaty or because certain preconditions were claimed to be required under the treaty. Even in special agreement cases, there was potential for controversy as to the meaning and scope of the agreement.

65. Of the 113 contentious cases, some had later been withdrawn. Ninety-seven judgments had been issued since 1946. Of those, nearly half had required separate hearings on jurisdictional issues. That was hardly a model for efficiency in the substantive resolution of disputes.

66. Turning to the specific issues that arose under Article 36, paragraph 2, of the Statute (the optional clause), she explained that 66 States, in other words about one third of the States Members of the United Nations, had made declarations under that provision. In most instances, the declarations had been accompanied by reservations, which often required interpretation. For example, in the *Fisheries Jurisdiction* case (*Spain v. Canada*) Spain had brought proceedings against Canada after officers of a Canadian patrol boat had boarded a fishing vessel flying the Spanish flag on the high seas. Canada had argued that the Court lacked jurisdiction because in the declaration it had made under Article 36, paragraph 2, it had entered a reservation excluding “disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the [Northwest Atlantic Fisheries Organization’s] Regulatory Area”. Having analysed each phrase of the reservation, the Court had ultimately concluded that the dispute did come within the terms of the reservation and that the Court therefore lacked jurisdiction.

67. Another interesting question in relation to Article 36, paragraph 2, was whether other settlement mechanisms could “displace” the optional clause. In the preliminary objections phase of the *Land and Maritime Boundary between Cameroon and Nigeria* case, (*Cameroon v. Nigeria: Equatorial Guinea intervening*), Nigeria had argued that the parties’ practice over many years indicated their acceptance of a duty to settle all their boundary disputes exclusively through bilateral negotiations. It had further drawn the Court’s attention to the Lake Chad Basin Commission, a regional organization which, Nigeria had maintained, had

“exclusive power in relation to issues of security and public order in the region of Lake Chad”. The Court had rejected both arguments by very large majorities, because it had found nothing to indicate that the parties had agreed to forego the use of other procedures. It had further explained that the fact that the parties had undertaken negotiations in boundary matters in the past did not exclude the possibility of referring such disputes to the Court. Moreover, the Court had held that the Lake Chad Basin Commission was neither a judicial body intended to displace the Court nor a regional organization for the purposes of Chapter VIII of the Charter. In any event, the existence of regional negotiation mechanisms could not prevent the Court from performing its functions under the Charter and its Statute.

68. A related question addressed by the Court was how to determine which basis for jurisdiction should take priority when several existed. In the *Territorial and Maritime Dispute* case (*Nicaragua v. Colombia*), on which the Court had issued a judgment on preliminary objections in December 2007, Nicaragua had invoked both Article XXXI of the Pact of Bogotá and the declarations made by the parties under Article 36, paragraph 2, as grounds for the Court’s jurisdiction. Why did that matter? While the two clauses were largely similar — indeed Article XXXI of the Pact of Bogotá used the same wording as Article 36, paragraph 2, of the Statute — Colombia’s declaration under Article 36, paragraph 2, unlike that under the Pact of Bogotá, had expressed a reservation. Furthermore, Colombia had stated that its declaration under the optional clause had been withdrawn very shortly before Nicaragua had filed its Application. For that reason, Colombia had claimed that jurisdiction under the Pact of Bogotá was governing and hence exclusive. In its view, if the Court found that it lacked jurisdiction under the Pact, it must “declare the controversy ended” and not proceed further to consider whether it might have jurisdiction under the optional clause.

69. The Court had acknowledged that in the 1988 *Border and Transborder Armed Actions* case (*Nicaragua v. Honduras*), in paragraph 27 of the Order of 31 March 1988, it had stated that “[s]ince, in relations between the States parties to the Pact of Bogotá, that Pact is governing, the Court will first examine the question whether it has jurisdiction under Article XXXI of the Pact”. But that statement could not be interpreted in any way other than that the Court, when faced with the two titles of jurisdiction invoked, could not deal with

them simultaneously and had decided to proceed in that case from the particular to the more general, without thereby implying that the Pact of Bogotá prevailed over and excluded the optional clause. Similarly, in the *Territorial and Maritime Dispute* case, the Court had considered jurisdiction under the Pact first, as that had been Colombia's first preliminary objection, and in doing so, it had made it clear that the Pact and the optional clause represented two distinct bases of the Court's jurisdiction which were not mutually exclusive.

70. In the event, the Court had found that there was no extant legal dispute between the Parties on the question of sovereignty over three islands; thus it could not have jurisdiction over that question either under the Pact of Bogotá or on the basis of the optional clause declarations, which also assumed the existence of a dispute.

71. More than one third of cases had been brought before the Court exclusively on the basis of compromissory clauses contained in treaties. Some 300 bilateral or multilateral treaties provided that the Court would have jurisdiction in the resolution of disputes arising out of their application or interpretation. Very occasionally a treaty-based case merged with an advisory opinion, when one of the "parties" to the dispute was not a State but an international organization. That situation could arise when a clause in a treaty provided that, if a difference in interpretation arose, a request must be made for an advisory opinion and the opinion given must be accepted as decisive by the parties. That had been so in the advisory opinion given on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (the *Cumaraswamy* advisory opinion).

72. Treaty-based jurisdiction was becoming increasingly important. Since 1998, all but six of the 40 cases submitted to the Court had been based in whole or in part on jurisdiction under compromissory clauses. It was a reality that applicants would seek out a treaty that might furnish grounds to allow the launching of litigation, especially in the context of requests for the indication of provisional measures, because those requests must relate to an application already in place before the Court. For the purpose of indicating provisional measures, jurisdiction had only to be found on a *prima facie* basis.

73. In the 2002 Order in the *Armed Activities on the Territory of the Congo* case (*Democratic Republic of*

the Congo v. Rwanda), the Court had systematically rejected eight treaties as the basis of its jurisdiction and had found that it did not even have the *prima facie* jurisdiction necessary to indicate the provisional measures requested by the Democratic Republic of the Congo. Nonetheless, that finding had not in itself prejudged the question of the jurisdiction of the Court to deal with the merits of the case, or any questions relating to the admissibility of the Application, or relating to the merits themselves. As the Court had declined to remove the case from its docket on the basis of a claimed manifest lack of jurisdiction, the Democratic Republic of the Congo had had another opportunity at the preliminary objections phase to identify the basis of jurisdiction. It had still been unable to do so, however.

74. It was difficult to explain to the general public why the Court had had jurisdiction to hear the case between the Democratic Republic of the Congo and Uganda on the merits, but not the case between the Democratic Republic of the Congo and Rwanda, although it had related to the same conflict and time period and had concerned similar allegations of gross human rights violations. The answer lay, of course, in the different jurisdictional nexus between the parties in each of the cases. In eight of the *Legality of Use of Force* cases, the Court had rejected the requests made in 1999 for provisional measures, but had remained seized of the cases. There, too, the cases had ultimately failed for want of a consensual basis of jurisdiction. The Court had already removed from the General List two other such cases for manifest lack of jurisdiction.

75. Special agreement cases had some features in common with treaty-based jurisdiction cases in that the Court was locked into a specific arrangement between the parties. A case brought by way of special agreement did not, however, guarantee that there would be no jurisdictional issues for the Court to address, such as questions of applicable law or the scope of the agreement.

76. The *Maritime Delimitation in the Black Sea* case (*Romania v. Ukraine*), while not technically a special agreement case, involved the determination of what the parties had agreed to refer to the Court under a 1997 agreement. In Romania's view, in addition to the United Nations Convention on the Law of the Sea, the principles recognized by the Parties in the 1997 agreement should also be taken into account by the Court when delimiting the continental shelf and the

exclusive economic zone beyond the 12-nautical mile arc around Serpents' Island. According to Ukraine, although the 1997 agreement was an international treaty binding upon the parties, its provisions did not embody an agreement which directed the Court as to the applicable law in the current proceedings. Ukraine thus contended that the Court was obliged to decide disputes in accordance with international law, as laid down in Article 38, paragraph 1, of the Statute. The Court was about to rule on the case.

77. *Forum prorogatum*, long thought in the textbooks on jurisdiction to be a dead letter, had been invoked before the Court in 2003 and 2006 in two cases involving an African State and France. The judgment in the *Certain Questions of Mutual Assistance in Criminal Matters* case (*Djibouti v. France*) had been the first time that it had fallen to the Court to decide on the merits of a dispute brought before it under Article 38, paragraph 5, of the Rules of Court (one way to establish *forum prorogatum*). The history of that provision of the Rules was rather interesting and had been elaborated on in the Court's judgment. The Court had stated in paragraph 62 that "the consent allowing for the Court to assume jurisdiction must be certain. That is so, no more and no less, for jurisdiction based on *forum prorogatum*." It had then examined the extent of the mutual consent of the parties, as evidenced by Djibouti's Application and a letter from the French Minister for Foreign Affairs informing the Court that France "consents to the Court's jurisdiction to entertain the Application pursuant to, and solely on the basis of ... Article 38, paragraph 5", of the Rules of Court, while specifying that that consent was "valid only ... in respect of the dispute forming the subject of the Application and strictly within the limits of the claims formulated therein" by Djibouti.

78. The Court had found that France's letter to the Court did not seek to limit jurisdiction to the main claim — France's refusal to execute a letter rogatory — but accepted jurisdiction over the Application as a whole, including claims relating to summonses sent to the Djiboutian President and other Djiboutian officials. The Court did, however, exclude from its jurisdiction the claims relating to arrest warrants issued for senior Djiboutian officials after the Application had been filed. The Court had found that it was clear from France's letter that its consent did not go beyond what was visible in that Application. Although the arrest warrants could be perceived as a method of enforcing

the summonses (which were within the Court's jurisdiction), they represented new legal acts in respect of which France could not be considered as having implicitly accepted the Court's jurisdiction. In earlier cases based on the optional clause or a treaty clause, when the Court had examined its jurisdiction over facts or events subsequent to the filing of the Application, it had emphasized the need to determine whether consideration of those later facts or events would transform the "nature of the dispute". But in a *forum prorogatum* case that was not the test. In the case between Djibouti and France, where so much had turned upon the consent expressed at the very moment by the Respondent, the question had been whether the subsequent events were visible to France at the time it consented in writing to jurisdiction under Article 38, paragraph 5.

79. The final question she addressed was whether only procedural matters might be disposed of at the jurisdiction phase. Did every substantive matter raised in pleadings in a jurisdictional hearing have to be declared "not exclusively preliminary in character"? That was a recurring issue for the Court. As she had mentioned earlier, Article 79, paragraph 9, offered three ways in which the Court might dispose of a preliminary objection: it could uphold or reject it, or declare that the objection did not possess an exclusively preliminary character. In the *Nuclear Tests* cases (*New Zealand v. France*) and (*Australia v. France*) (albeit in slightly different circumstances), the Court had emphasized that while examining questions of jurisdiction and admissibility it was entitled — and in some circumstances might be required — to consider other questions which might not be strictly capable of classification as matters of jurisdiction or admissibility, but were of such a nature as to require examination before those matters.

80. In the *Territorial and Maritime Dispute* case (*Nicaragua v. Colombia*), in paragraphs 50 and 51 of its judgment, the Court had stated its belief as follows:

It is not in the interest of the good administration of justice for it to limit itself at the present juncture to stating merely that there is a disagreement between the Parties as to whether the 1928 Treaty and 1930 Protocol settled the matters which are the subject of the present controversy within the meaning of Article VI of the Pact of Bogotá, leaving every aspect thereof to be resolved on the merits.

In principle, a party raising preliminary objections is entitled to have these objections answered at the preliminary stage of the proceedings unless the Court does not have before it all facts necessary to decide the questions raised or if answering the preliminary objection would determine the dispute, or some elements thereof, on the merits. The Court finds itself in neither of these situations in the present case. The determination by the Court of its jurisdiction may touch upon certain aspects of the merits of the case.

81. The Court had further held that the 1928 Treaty had been valid and in force at the date of the conclusion of the Pact of Bogotá in 1948. It had then decided what had been settled by the 1928 Treaty. Three islands had been specifically named in the 1928 Treaty as belonging to Colombia. The Court had found that the question of their sovereignty had been settled by the Treaty within the meaning of article VI of the Pact of Bogotá, and it had therefore upheld Colombia's first preliminary objection in that respect. That was a finding that the Court needed to and could make at the preliminary objections stage, but various other questions before the Court — the scope and composition of an archipelago, sovereignty over certain cays and the question of maritime delimitation — were held not to have been settled by the 1928 Treaty. Hence the Court would have jurisdiction to decide them, but only at the merits stage of proceedings.

82. Experience had shown that cases brought on the basis of Article 36, paragraph 2, were very likely to occasion extended controversy as to the Court's jurisdiction. Cases coming on the basis of a compromissory clause in a treaty were less controversial. As to cases brought by way of special agreement, they were not immune from that possibility, but jurisdictional matters played a much smaller role. The Court was therefore able to provide more rapid assistance in the resolution of the dispute.

83. An increased number of States making the declarations under the optional clause would, of course, be welcome. It was clear, however, that as far as the contribution of the Court to the resolution of international disputes was concerned, the answer could not lie in States, or groups of States, depositing optional clause declarations containing reservations and conditions that were so carefully worded, with so much legal skill, that they rendered almost nil the

scope of the apparent acceptance of the Court's jurisdiction. That would simply prolong the period that the Court would have to spend on objections to jurisdiction and diminish the time it would have for resolving major substantive disputes. For that reason, it was time for some thinking "outside the box" on that aspect of the Court's jurisdiction.

84. **Mr. Bethlehem** (United Kingdom) said that his question in response to the President's challenge to think "outside the box" was related to the compulsory jurisdiction of national and international courts, which was often characterized by a high degree of predictability with regard to legal decisions and amendments to the law because of the existence of a legislative framework comprising courts, the executive and the legislature. Compulsory jurisdiction was often rooted in a reasonably clear boundary between the competence of the executive and that of the judiciary. He therefore wondered whether debates and appreciations regarding the limits of jurisdiction, even if they were sometimes rejected by the Court, nonetheless helped to ensure that decisions on merits were quite narrowly focused. In view of the fact that many international courts with compulsory jurisdiction often seemed to be drawn more readily to the teleological end of the interpretative spectrum, he wondered if it was not proper for States to be cautious in that respect.

85. **Mr. Witschel** (Germany) said that although Germany had decided in principle in 1973 to accept the Court's jurisdiction under Article 36, paragraph 2, it had taken 25 years for that decision to become a reality, mainly because of the political and legal situation prior to German reunification. Even after that event, many Government departments had been worried that the Court's jurisdiction might be too far-reaching. They had looked at the work of other international courts and had been very critical of any jurisdiction going beyond the exact letter of the court's statute or founding instrument. Nevertheless he asked the President to encourage other States to accept the jurisdiction of the Court under Article 36, paragraph 2, of the Statute.

86. **Mr. Kowalski** (Portugal) said that the increasing number of international dispute settlement bodies might provide different legal solutions to the same case. He was therefore curious to know if the International Court of Justice could be regarded as a "supreme" international court and if its decisions

would take precedence over those of other international judicial bodies.

87. **Mr. Ayok** (Sudan) said that he wished to know if a conflict of jurisdictions could arise between different regional judicial bodies with regard to one country.

88. **Ms. Higgins** (President of the International Court of Justice), responding to the question from the representative of the United Kingdom, said that she hoped that the Court was no less predictable than courts operating in regimes where there was a recognizable legislature. The Council of Europe system, where there was a sort of legislature, was not so far removed from the law-making machinery of the United Nations system. The opinion that acceptance of the optional clause led to more narrowly focused decisions was most interesting.

89. She took note of the information supplied by the representative of Germany.

90. In response to the question from the representative of Portugal concerning overlapping jurisdictions, she said that the International Court of Justice was the senior court in so far as it was the court of the United Nations whose decisions, in some circumstances, were overriding, even though the Court's decisions did not normally fall into that category. It was the only court which had potentially universal jurisdiction and, although its judgments were in principle binding only upon the States concerned, they were pronouncements in law by the highest court. The Court was following with great interest the judgements of the European Court of Justice on the impact of Security Council resolutions in the area under its jurisdiction. If there was judicial review of Security Council resolutions, she was unsure whether it lay with any body other than the International Court of Justice.

91. Lastly, she said that it was impossible to answer the interesting question from the representative of Sudan *in abstracto*. There were no general principles which would allow the Court to say that one possible jurisdiction would prevail over another. The Court would always look at the particular wording or undertaking to discern intentions as to which should prevail in the particular circumstances of a clash.

The meeting rose at 1 p.m.