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Summary record of the 2512th meeting

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82. The CHAIRMAN said that the Special Rapporteur and Francophone members of the Commission would agree with the secretariat on making the requisite change.

The text of the preliminary conclusions on reservations to normative multilateral treaties including human rights treaties, as a whole, as amended, was adopted.

The meeting rose at 1.10 p.m.

2512th MEETING

Monday, 14 July 1997, at 3.10 p.m.

Chairman: Mr. Alain PELLET

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Bennouna, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Mikulka, Mr. Opertti Badan, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam.

Unilateral acts of States (A/CN.4/L.543)

[Agenda item 7]

REPORT OF THE WORKING GROUP

1. Mr. CANDIOTI (Chairman of the Working Group on unilateral acts of States), introducing the report of the Working Group (A/CN.4/L.543), said that it had held three meetings from 22 May to 26 June 1997, at which it had considered the report of the Commission on the work of its forty-eighth session,[1] particularly the general outline set out in annex II, addendum 3. It had also taken into account the written comments by the Chairman, submitted in that capacity and also as a member of the Commission. The Working Group had received other useful contributions, one of which had been on the use of terms to designate unilateral acts, prepared by one of the members of the Working Group itself, as well as preliminary bibliographies and lists of judicial decisions and arbitral awards compiled by the secretariat.

2. The Working Group's discussions had been aimed at responding to the request in General Assembly resolution 51/160, paragraph 13, that the Commission should indicate the scope and content of the topic, and account had been taken of the views expressed by Governments during the discussion in the Sixth Committee (A/CN.4/479, sect. E.6). A number of conclusions and recommendations had emerged from the Working Group's deliberations.

3. As the Commission had suggested in annex II of the report on the work of its forty-eighth session, it was indeed proper and timely to conduct a study of unilateral acts of States with a view to the codification and progressive development of the relevant rules. That conclusion was based on the growing importance of such acts in international relations and the existence of important doctrinal works and judgments of ICJ and other courts that shed light on the matter. A clear statement of the rules of international law applicable to unilateral acts would help bring certainty, predictability and stability to international relations and thus help to strengthen the rule of law in the international community.

4. As for the scope of the study, the Working Group had considered that the unilateral acts to be covered were those that States carried out with the intention of producing legal effects, and creating, recognizing, safeguarding or modifying rights, obligations or legal situations. Emphasis was placed on the importance of the element of intent, the content and the legal effect of such acts, which were essential for them to be characterized as lawful and to be clearly differentiated from other acts and actions, particularly internationally wrongful acts, that were part of the study of international responsibility. The scope of the topic was defined in terms of the unilateral nature of the acts by a single or several subjects of international law acting as a single party, without the participation of other counterpart(s) in the form of acceptance or consent. It was that elementary characteristic that differentiated such acts from bilateral or pluri-lateral legal acts, in other words, treaties.

5. It had been recognized that within the framework of the law of treaties, as in the context of international justice, States carried out many acts which were, prima facie, unilateral, but which, because they were based on a treaty, were not strictly unilateral. It had also been borne in mind that the 1969 Vienna Convention was a highly important precedent for the harmonization and formulation, *mutatis mutandis*, of the rules applicable to unilateral legal acts. It was also agreed that the study should at the current stage focus on unilateral legal acts of States, although later on the Commission could decide to extend the topic to cover rules applicable to the unilateral legal acts of international organizations.

6. With reference to the content of the study, the Working Group had considered the outline in annex II, addendum 3, to the report of the Commission on the work of its forty-eighth session as a useful basis. That outline was redrafted, as shown in section III of the Working Group's report, to include the following chapters: chapter I, Definition of unilateral legal acts of States, and determination of their basic elements and characteristics; chapter II, Criteria for classifying unilateral legal acts of States; chapter III, Analysis of the process of creation, the characteristics and the effects of the most frequent unilateral acts in State practice; chapter IV, General rules applicable

[1] See 2479th meeting, footnote 6.

to unilateral legal acts; and chapter V, Rules applicable to specific categories of unilateral legal acts of States.

7. That description of the topic's scope and content must be understood to be preliminary in nature, because the study's definitive structure could be determined only after detailed analysis of all the aspects of the topic. For those reasons, the Working Group had refrained from considering as yet the form that the Commission's work could take: a doctrinal study, draft articles with commentaries, a set of recommendations or guidelines or a combination of those options.

8. As to the method of proceeding with the topic, the Working Group had considered it desirable for the Commission to appoint a special rapporteur to prepare an initial report setting out a general introduction to the topic, the practice of States and the opinions of legal writers and jurisprudence, as well as a detailed plan for progress with the study. That objective had at the current time been achieved with the appointment of a Special Rapporteur. The Commission should also appoint a small consultative group to work with the Special Rapporteur on the preparation of the initial report and possibly on other tasks; request Governments, both in the Sixth Committee in the General Assembly at its fifty-second session and separately in writing, to submit information and opinions accompanied by any documentation they deemed relevant; consider the initial report at its fiftieth session and decide on how to continue with the study, recommending, with the necessary guidance and directives, that the Special Rapporteur produce subsequent reports developing the various chapters of the topic; and formulate a calendar of work in such a way as to make it possible to complete consideration of the topic as a whole on first reading by the end of the current quinquennium, in other words, by the fifty-third session, in 2001.

9. He was grateful to the members of the Working Group for their active participation and valuable contributions and, as a new member of the Commission, had found the experience extremely instructive. On behalf of the Working Group, he thanked the secretariat for its efficient assistance during the Working Group's meetings and in the preparation of the report of the Working Group.

10. The CHAIRMAN said the Commission was grateful to the Chairman of the Working Group for his endeavours, which were all the more impressive in that he had selflessly handed over the continuation of the task to Mr. Rodríguez Cedeño, the newly appointed Special Rapporteur.

11. Mr. LUKASHUK congratulated the Chairman of the Working Group and said it had been a pleasure to be a member of the Group. Regarding paragraphs 14 and 15 of the report of the Working Group, he agreed that it was important to look carefully at internal acts of States, laws, and the like, and to analyse the interaction between unilateral acts of States and custom. One minor criticism was that the report emphasized the unilateral nature of acts of States, but the legal consequences of such acts usually arose when other States reacted to them. The effect of reactions by States must therefore be duly taken into account. It would be premature at the current, early stage, to request Governments to provide their opinions and outline their practice in that area. Governments generally had great difficulty responding to the Commission's requests for general information and it would be preferable to await the elaboration of a precise plan of work and, possibly, of a detailed questionnaire, to which the replies by Governments would most likely be more informative.

12. He drew attention to a phrase in the Russian version of the report of the Working Group that did not appear in the English version and was not juridically accurate.

13. The CHAIRMAN said the secretariat would look into the matter.

14. Mr. BAENA SOARES commended the Chairman of the Working Group on the report of the Working Group, which skilfully responded to the issues raised in the Sixth Committee of the General Assembly and established as objectives for the work on the topic. With regard to paragraph 25 of the report, it would not be premature to ask Governments to make known their opinions and provide information they considered relevant for the study of the topic. With all due respect to those who held the opposite view, he did not think that such an initiative should be delayed. Indeed, Governments should be encouraged to contribute to the work on the topic from the very outset. Accordingly, the plan of work set out in section IV of the report should be retained as it stood.

15. Mr. SIMMA pointed out that chapter III of the outline for the study, in section III of the report, was entitled "Analysis of the process of creation . . . of the most frequent unilateral acts in State practice". Unilateral acts were not really created, and the term "creation" was inappropriate. He would also like clarification of the relationship between "material possible content", chapter IV (*d*) (iv), and "substantive content", in chapter II (i). If there was no difference in meaning, he would suggest that the words "material possible content" be replaced by "possible substantive content".

16. Mr. CANDIOTI (Chairman of the Working Group on unilateral acts of States) said it was true that "process of creation" was not a legal term and was inappropriate. He suggested that it should be replaced by "forms". The phrase "material possible content" was either a typographical error or a mistranslation. It should read "materially possible content", meaning that the substantive content of the act must be materially possible. If an act had no materially possible content, then it was not valid. He nonetheless agreed that the phrase should be replaced by "possible substantive content".

17. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to replace the words "process of creation" by "forms" in chapter III of the outline for the study, in section III of the report of the Working Group.

It was so agreed.

18. The CHAIRMAN, speaking as a member of the Commission, said the phrase "lawfulness under international law", chapter IV (*d*) (iii) of the outline, subsumed the phrase "materially possible content" in chapter IV (*d*) (iv). "Lawfulness under international law" meant the conformity of an act with international law and, if transposed

mutatis mutandis to the law of treaties, related to all the causes for considering a treaty invalid set out in the 1969 Vienna Convention. Such causes included error and coercion, which rendered treaties, and by extension unilateral acts, null and void. Also, one of those causes was the possible conflict of the treaty with *jus cogens*, and the phrase "materially possible content", as he understood it, referred to precisely the question of conformity with peremptory norms. Perhaps it should be made clear that the category of "lawfulness under international law" had a subcategory comprising causes of invalidity other than conflicts with *jus cogens*.

19. Mr. CANDIOTI (Chairman of the Working Group on unilateral acts of States) said the reference was indeed to the material fact that the act was possible as one of the conditions for lawfulness of an act. The act must be both in conformity with international law and possible. But the list in chapter IV of the outline was by no means exhaustive. It was simply a series of examples. He would have no objection to deleting chapter IV (*d*) (iv), "Materially possible content".

20. Mr. SIMMA said he thought "possible substantive content" meant something quite different. For example, when a State renounced territorial sovereignty over the non-existent island of Atlantis, it made a promise of renunciation, but without any substantive content.

21. Mr. ROSENSTOCK said he agreed entirely with Mr. Simma. It might be like a promise by the United States of America to bring back large quantities of blue cheese from Mars. Such a promise could not be thought to obligate the United States to pay damages when it turned out that Mars was not made of blue cheese, since the supply of blue cheese was not a possible material consequence of a mission to Mars. The category in question covered commitments whose performance could not be considered feasible, or which proved to be impossible to perform, in the way that a contract or a treaty could be impossible to perform.

22. The CHAIRMAN said it was true that, in the absence of an object, a commitment could not be made. However, he was not sure the United States would not incur responsibility if it had made a promise.

23. Mr. ECONOMIDES said that he commended the Working Group on its excellent work. The report set out an outline for future work on the topic which was obviously not exhaustive. The question of possible conflicts with *jus cogens* should certainly be considered under chapter IV (*d*) (iii), because one category within "Lawfulness under international law" was lawfulness in relation to peremptory norms. Perhaps the phrase "including in relation to the rules of *jus cogens*" could be appended to "Lawfulness under *jus cogens*".

24. The CHAIRMAN, speaking as a member of the Commission, suggested that "materially possible content" might be replaced by "existence of object". The idea was that a State should not issue rules on whimsical matters.

25. Mr. SIMMA said the important issue was not that an object was present, but that the substantive content of a promise was invalid. He therefore preferred the phrase "possible substantive content", which was broader and covered all cases.

26. The CHAIRMAN, speaking as a member of the Commission, said that he did not agree with Mr. Simma and was convinced that any State that made a promise involving an object and failed to carry out that promise would be liable under international law. Speaking as Chairman, he asked whether there was any opposition to the amendment proposed by Mr. Economides.

27. Mr. ROSENSTOCK said it would be inappropriate to add a reference to peremptory norms within the category of lawfulness under international law, because a fortiori that category covered peremptory norms.

28. The CHAIRMAN said that, if he heard no objection, and subject to the comments made during the discussion, he would take it that the Commission agreed to adopt the outline for the study of unilateral acts of States set out in section III of the report of the Working Group.

It was so agreed.

29. Mr. BENNOUNA congratulated the Working Group and its Chairman on an excellent report which would undoubtedly serve as the prelude to a most useful and interesting codification exercise. The definition of unilateral legal acts in paragraph 10 seemed somewhat confusing or, at any rate, incomplete. What exactly was the difference between "pluri-lateral" international legal acts, which were to be left outside the scope of the study, and the so-called "collective" or "joint" acts referred to in the last sentence of the paragraph? A clearer distinction should perhaps be drawn and greater emphasis placed on the element of will. It was the will of a single State, rather than the legal effects produced, that was the principal distinguishing feature of a unilateral act. In that connection, he referred to the definition of the term "treaty" in article 2, paragraph 1 (*a*), of the 1969 Vienna Convention.

30. As to paragraph 15, it would perhaps be more appropriate to speak of the contribution of unilateral acts of States to custom than of the interaction between them. It was undoubtedly the case that customary international law was often shaped by unilateral acts. Lastly, he wondered whether the final words of paragraph 14, "and are permitted by international law", were entirely appropriate. Such wording was too restrictive. The study should not exclude acts which were neither permitted nor prohibited by international law but belonged, as it were, to an as yet unregulated grey area. That was, surely, particularly true of maritime jurisdiction, the example adduced in the paragraph.

31. Mr. SIMMA said that the idea of interaction was more comprehensive than that of a "contribution" and should be retained. A unilateral act could be negative; it could be contrary to existing customary law and could erode it. Such acts should not be excluded from the scope of the study.

32. Mr. CANDIOTI (Chairman of the Working Group on unilateral acts of States) explained that the term "interaction" had been chosen in order to indicate that custom could influence unilateral acts as well as vice versa, and also to express the point just made by Mr. Simma, namely,

that the effects of unilateral acts could be negative as well as positive.

33. Mr. BENNOUNA said that, in view of those explanations, he would not insist on his suggestion regarding paragraph 15.

34. Mr. HAFNER, said that, as a member of the Working Group, he agreed with the point raised by Mr. Bennouna in connection with paragraph 14 and suggested that the words "and are permitted by international law" should be replaced by "and are explicitly provided with such effect by international law".

35. After an exchange of views in which Mr. BENNOUNA, Mr. HAFNER and the CHAIRMAN took part, Mr. BENNOUNA proposed that the last part of paragraph 14 should read: "which are opposable to other States, in conformity with international law".

It was so agreed.

36. Mr. SIMMA said that he had two problems with the substance of paragraph 10. First, he shared Mr. Bennouna's view that the definition of unilateral legal acts was not entirely satisfactory and wondered, in particular, whether the Working Group had considered including such unilateral acts as, for example, the acceptance or rejection of a reservation to a treaty. However, he had no strong feelings on the subject and was prepared to accept the definition as it stood.

37. His second and more important difficulty was with the last sentence of the paragraph, which spoke of so-called "collective" or "joint" acts performed by a plurality of States which did not intend to regulate their mutual relations by that means. The sentence was apparently designed to distinguish unilateral acts from treaties. If so, the concept underlying the distinction did not seem altogether pertinent or correct. There were many agreements between States, such as human rights treaties, which could hardly be defined as regulating their mutual relations. Further clarification of the precise purport of the sentence would be welcome.

38. Mr. CANDIOTI (Chairman of the Working Group on unilateral acts of States) said it had been decided from the outset that acts resulting from the combined will of a number of States—in other words, acts such as treaties—should be excluded from the scope of the study. The distinction between unilateral and pluri-lateral acts was sometimes extremely difficult to draw. That was true, for example, of the act of withdrawal of a reservation to a treaty. The Working Group had decided to choose the participation, or "will", of another party as the decisive criterion. The last sentence of paragraph 10 referred to cases in which several States agreed to perform an act which expressed the will of each of those States but was not designed to regulate their mutual relations. The decision of the Allied Powers to declare the end of the Second World War was an example of a collective unilateral act of that nature.

39. The CHAIRMAN said that, in his view, members should refrain from going too deeply into the substance of what was, after all, only a preliminary report.

40. Mr. LUKASHUK, responding to one of the points raised by Mr. Simma, said that rules of international law could regulate relations only between subjects capable of exercising the rights and bearing the obligations resulting therefrom, in other words, between States. Mr. Simma had expressed the familiar view that human rights agreements regulated relations not between States but between the State and the individual. In that case, when States concluded agreements between themselves on, say, the protection of seals or fish, did such agreements regulate the relationship between the State and seals or fish? Or did they regulate relations between States? The Charter of the United Nations was perfectly clear on the subject of relations between States in connection with human rights. A human rights treaty placed certain obligations upon States, and States bore the responsibility for the realization of those rights.

41. Mr. THIAM said that discussing such matters at the current stage was, in his opinion, premature.

42. Mr. SIMMA said that States could agree to use a treaty to regulate whatever matter they chose. It was, of course, true that the majority of treaties regulated relations between States, but it was meaningless to assert that, for instance, the Convention for the Protection of Human Rights and Fundamental Freedoms did so.

43. Mr. OPERTTI BADAN suggested that the Working Group might consider expanding the scope of the study to include acts by intergovernmental organizations, particularly in the economic sphere, which belonged to yet another "grey area", an area between unilateral acts of States *stricto sensu* and acts which stemmed from the collective will of States without being acts of a supranational character.

44. The CHAIRMAN said that the suggestion would be noted, and speaking as a member of the Commission, adding that he personally doubted whether acts of that kind should be covered by the study.

45. Mr. ECONOMIDES said that it would be premature at the current time to try to spell out every aspect of the problem. He suggested that the words "do not intend to regulate their mutual relations by this means" in the last sentence of paragraph 10 should be replaced by the words "do not intend to create treaty relations between them".

46. The CHAIRMAN, speaking as a member of the Commission, said that a preliminary report should be as uncomplicated and uncontroversial as possible, since it might otherwise prejudge future developments. He therefore proposed removing all controversial points from paragraph 10 so that, as from the second sentence, the middle section would read:

> "They emanate from one single side (from the Latin *latus*). But the Commission does not exclude so-called 'collective' or 'joint' acts, inasmuch as they are performed by a plurality of States which wish to express, simultaneously or in parallel fashion,".

It was so agreed.

47. Mr. BENNOUNA, taking up Mr. Opertti Badan's point concerning international organizations, said it was

regrettable that such bodies had been excluded from the purview of the study. In particular, he wondered about the status of acts by small regional organizations. It seemed anomalous that an act which appeared questionable when performed by an individual State became acceptable when undertaken by a small supranational organization. Regional organizations frequently took direct action against third parties, for example in the form of sanctions or reprisals. There was no difference, in his view, between "collective" acts of States and acts undertaken by small-scale regional organizations. He could live with the proposed restriction, but he had doubts about the underlying logic.

48. The CHAIRMAN said that Mr. Bennouna's point was valid in situations where an organization acted in place of its members. But the Special Rapporteur would be faced with a boundless task if his task was extended to include international organizations. At the same time, there was nothing to prevent him from making comparisons to illustrate a point.

49. Mr. CANDIOTI (Chairman of the Working Group on unilateral acts of States) said that the Working Group had discussed the matter in detail and a future study of unilateral acts by international organizations had not been ruled out. However, it had been decided, in accordance with the guidelines established by the Commission at the previous session and by the General Assembly in resolution 51/160, to focus in the current quinquennium on States rather than other subjects of international law. He drew attention to the General scheme contained in annex II to the report of the Commission on the work of its forty-eighth session which, under section 3 (*b*), Law of unilateral acts listed, *inter alia*, "Unilateral acts of States", "Law applicable to resolutions of international organizations" and "Control of validity of the resolutions of international organizations". As the Commission was embarking on the first attempt ever to codify the law of unilateral acts, it was sensible to begin with unilateral acts of States, which had been addressed most frequently in doctrinal works and on which a certain amount of jurisprudence had been developed. The Working Group did not intend to exclude acts carried out by other subjects of international law, as was noted in the last sentence of paragraph 11.

50. Mr. OPERTTI BADAN said that, in view of the possibility that such acts might be discussed at a later stage, he intended to submit a document on the subject at the next session.

51. The CHAIRMAN said that his successor as Chairman would rule on the matter at the next session. In his view, paragraph 11 clearly ruled out any such discussion.

52. Speaking as a member of the Commission, he proposed that the words "the first report that the Commission could request", at the end of paragraph 19, should be replaced by "the first report to be prepared by the Special Rapporteur". He further proposed that the words "as appropriate" should be deleted from the first sentence of paragraph 26.

It was so agreed.

53. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the report of the Working Group on unilateral acts of States, as amended.

The report of the Working Group on unilateral acts of States, as amended, was adopted.

Draft report of the Commission on the work of its forty-ninth session

CHAPTER IV. *Nationality in relation to the succession of States* (A/CN.4/L.539 and Add.1-7)

54. The CHAIRMAN, drawing the Commission's attention to document A/CN.4/L.539 and Add.1-7, said that he intended to proceed section by section or article by article rather than paragraph by paragraph as was the customary procedure.

55. Mr. GALICKI (Rapporteur) said that document A/CN.4/L.539 had been prepared before the end of the debate on the draft articles. Paragraph 6, for example, referred to 26 draft articles instead of 27, the additional article having been drafted at a plenary meeting rather than in the Drafting Committee. Moreover, as document A/CN.4/L.539/Add.1 concerning the preamble had not yet been issued, he suggested that the Commission should proceed directly to a discussion of the documents dealing with the commentaries to the draft articles.

56. The CHAIRMAN said that the secretariat's workload was already extremely heavy and it would be unable to cope with requests for additional corrigenda. The Commission could rely on the secretariat to make the necessary amendments to paragraphs 6 and 7 in due course.

A. Introduction (A/CN.4/L.539)

Section A was adopted.

B. Consideration of the topic at the present session

57. The CHAIRMAN said that note had been taken of the Rapporteur's comments and inquired about the choice of 1 January 1999, placed in square brackets in paragraph 7, as the deadline for the submission of comments and observations to the Secretary-General.

58. Mr. MIKULKA (Special Rapporteur) said that States normally had at least one year to submit comments, but the Sixth Committee might decide otherwise.

59. The CHAIRMAN, speaking as a member of the Commission, proposed that the following new paragraph 6 *bis* should be inserted between paragraphs 6 and 7:

"6 *bis*. At its 2512th meeting, on 14 July 1997, the Commission expressed its deep appreciation for the outstanding contribution the Special Rapporteur, Mr. Václav Mikulka, had made to the treatment of the topic through his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion in a short period of time its first

reading of the draft articles on nationality of natural persons in relation to the succession of States."

He further proposed that a footnote to paragraph 6 *bis*, similar to footnote 291 in the report of the Commission on the work of its forty-eighth session, should refer to a request by the Commission to Mr. Mikulka to attend the fifty-second session of the General Assembly on its behalf in order to follow the debate in the Sixth Committee on the report of the Commission.

It was so agreed.

Section B, as amended, was adopted.

C. Text of the draft articles on nationality of natural persons in relation to the succession of States provisionally adopted by the Commission on first reading (A/CN.4/L.539/Add.1-7)

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (A/CN.4/L.539/Add.2-7)

Commentary to article 1 (Right to a nationality) (A/CN.4/L.539/Add.2)

60. The CHAIRMAN suggested that the word *stipulé* in the French version at the beginning of paragraph (6) of the commentary should be amended to read *mentionné* or *prévu*.

It was so agreed.

The commentary to article 1, as amended, was adopted.

Commentary to article 2 (Use of terms)

61. Mr. MIKULKA (Special Rapporteur) proposed that paragraph (3) of the commentary to article 2 and the footnote thereto should be deleted, because the same point was adequately covered in the commentary to new draft article 27.

It was so agreed.

62. Mr. HAFNER pointed out that the statement at the beginning of paragraph (8) to the effect that the term "person concerned" did not include nationals of third States was incorrect, since a person with dual nationality might be a national both of the predecessor State and of a third State. He proposed replacing the words "nationals of third States" by "persons possessing only the nationality of a third State".

63. Mr. MIKULKA (Special Rapporteur) agreed that the sentence should be reworded along those lines.

64. The CHAIRMAN noted that nationals of third States were also mentioned in paragraphs (6) and (7) and asked why the word "third" in paragraph (7) had been placed in square brackets in a quotation from O'Connell.

65. Mr. MIKULKA (Special Rapporteur) said that paragraph (7) referred to cases of annexation. The word "third" had been inserted to enhance the relevance of the example to the topic under discussion.

66. Mr. ROSENSTOCK said the word "third" had been put in brackets only because the text between quotation marks was based on a quote from O'Connell, who had not used that word. It had been added later, presumably to make the text more comprehensible. Paragraphs (6) to (8), especially with the small change suggested by Mr. Hafner, were fully consistent.

67. The CHAIRMAN said he had a problem with the translation in paragraph (7) of "inchoate" as *rudimentaire* in French. With the Commission's permission, he would discuss it with the secretariat.

68. Mr. ECONOMIDES asked that his minority opinion, referred to in paragraph (13), should be further explained by adding the following:

"One member of the Commission expressed reservations on the definition contained in subparagraph (*f*), particularly on the grounds that it is inaccurate. In his view, 'persons concerned' are, in accordance with international law, either all nationals of the predecessor State, if it disappears, or, in other cases (transfer or separation), only those who have their habitual residence in the territory affected by the transfer. The successor State may, of course, expand the circle of such persons on the basis of its internal law, but it cannot do so automatically since the consent of those persons is necessary."

69. Mr. ROSENSTOCK said Mr. Economides' proposed text sounded more like a summary of the debate than an addition to the comments. He believed the point was covered by the existing formulation.

70. Mr. ECONOMIDES said he had made his point on several occasions during the debate and had the right to express his personal opinion.

71. The CHAIRMAN said that that right was not being denied, but the opinion was that of only one member of the Commission and should therefore be expressed more briefly. It was legitimate to include such an opinion in the report on the first reading of a draft, but not the second. Too much detail should nonetheless be avoided in the commentary, which should simply indicate that there might have been a problem. The report was, after all, not a summary record.

72. Mr. KATEKA said the phrase "One member" should be replaced by "A member", as it was not a matter of counting the number of members expressing reservations.

73. The CHAIRMAN agreed, noting that no change would be required in the French or Spanish versions. He asked whether Commission members agreed to the inclusion of Mr. Economides' proposed addition, as long as it did not constitute a precedent.

74. Mr. SIMMA asked whether there was a guiding principle for deciding on so comprehensive an addition as that proposed by Mr. Economides or whether it was for the Commission to decide on each such case.

75. The CHAIRMAN said members asking for their opposing views to be reflected in the report should be moderate. The Commission should take the decision on a case-by-case basis if a proposal was challenged.

At the suggestion of Mr. Bennouna, the Commission decided to discuss Mr. Economides' proposal at a subsequent meeting.

76. Mr. MIKULKA (Special Rapporteur) said he would have no problem accepting Mr. Economides' proposal, but wondered whether the last part was necessary, as it went beyond the debate on definition of terms to address matters of substance. It also referred to persons having their habitual residence in the transferred territory, but was obviously not just about transfer but also about separation; reference would have to be made to territories subject to State succession. Several other elements should perhaps be included for the sake of uniformity.

77. Mr. THIAM said it was a general rule in the Commission that members had the right for their personal opinions to be reflected in the report.

78. The CHAIRMAN said he agreed, but no member's views should occupy as much space as the commentaries of the Commission itself. Personally he had some doubts about paragraph (10), which was trying too hard to accommodate every possible case of unification or absorption; he wondered whether a predecessor State could disappear.

Commentary to article 3 (Prevention of statelessness)

79. The CHAIRMAN, speaking as a member of the Commission, asked why in the French version of the last sentence of paragraph (2), the phrase *en offrant des solutions qui peuvent être reprises* mutatis mutandis *par le législateur*, used a verb where choice was implied, whereas an imperative was needed. The word *peuvent* should be replaced by *doivent*.

80. Mr. ROSENSTOCK said he suspected the problem was one of translation, as the English phrasing, "which can . . . be used by", was perfectly acceptable.

81. The CHAIRMAN said that "shall" or "must" would be more appropriate, and that the problem was therefore not one of translation but of substance.

82. Mr. MIKULKA (Special Rapporteur) suggested there was a misunderstanding, as the reference was to multilateral conventions on nationality in general, especially from the standpoint of naturalization. He thought the Commission wished to distinguish between naturalization and the solution of problems of nationality in the context of succession of States. States could, of course, be guided by concepts contained in more general conventions, but it would be completely erroneous to say that they "must" be so guided, as in that case the Commission would be contradicting itself. The English text faithfully expressed the intention.

83. The CHAIRMAN said the French phrase *le législateur national à la recherche des solutions*, however, was completely unacceptable in French and should be redrafted by the secretariat.

84. Mr. DUGARD said that the comment on "dual or multiple nationality" in the last sentence of paragraph (6) seemed to imply some criticism of that concept, whereas the Commission had been careful to avoid any judgement on the subject. In the current instance, the concept was being linked with the creation of legal bonds of nationality without appropriate connection, of which the Commission had been critical. It might be better to say, "on an acceptably large scale", so as to differentiate dual or multiple nationality from nationality without appropriate connection.

85. The CHAIRMAN said the Commission had been divided on the issue, with some members feeling that it was not a serious matter to let dual or multiple nationality develop and others, like himself, very hostile to the idea. He was not sure that the proposal had the effect Mr. Dugard was seeking to achieve.

86. Mr. GALICKI (Rapporteur) said he supported the Chairman's position on multiple nationality.

87. Mr. MIKULKA (Special Rapporteur) said the sentence must be read in conjunction with the previous two sentences. It was a statement of fact that could not be changed. If the intention was to say that two given States had the obligation to attribute their nationality, then dual nationality would be inevitable. The Commission was not saying whether it did or did not like dual nationality, but rather that the obligation to attribute nationality could not be interpreted in such a way as to mean that every State was under that obligation. Otherwise, the person concerned would end up with the nationality of all the States concerned.

88. The CHAIRMAN, speaking as a member of the Commission, said that the sentence seemed to suggest condemnation, because of the clause beginning with "otherwise".

89. Mr. MIKULKA (Special Rapporteur) asked whether that connotation would be introduced by Mr. Dugard's proposed amendment. As drafted, however, the text was neutral. It simply stated that multiple nationality would occur frequently and there would be numerous cases of statelessness.

90. Mr. DUGARD withdrew his proposal.

The commentary to article 3 was adopted.

Commentary to article 4 (Presumption of nationality)

The commentary to article 4 was adopted.

Commentary to article 5 (Legislation concerning nationality and other connected issues)

91. Mr. HAFNER said that paragraph (6) rightly stated that there had been a different view concerning the use of the word "should" or "shall". It might also be useful to add the reason for emphasizing the use of the word "shall". The last sentence could be reworded to begin, "In light of the obligation incumbent on the State to take the necessary legislative or administrative measures to implement the rules of international law, some members considered . . .".

92. Mr. ROSENSTOCK said he agreed with Mr. Hafner's proposal, but it should be slightly redrafted so as

to begin the sentence with the words "Some members, however,".

93. The CHAIRMAN said that the word "was", in the same sentence, should be replaced by "would have been". Paragraph (3) gave the impression that it applied to the draft articles as a whole. In view of article 19, however, and the distinction drawn between Parts I and II, the explanation was too rigid. It would be better to indicate that, in regard to the obligations—in the strict legal sense—of States under Part I, but not under Part II, reference should be made to article 19.

94. Mr. MIKULKA (Special Rapporteur) asked what would then become of the article on unification. Was it not an obligation, despite the fact that it appeared in Part II?

95. The CHAIRMAN said greater precision was needed. The commentary should spell out that respect for the principles set out in the draft articles was called for when such principles were binding. Often the principles in Part II however, were not binding.

96. Mr. ECONOMIDES said that none of the provisions, either in Part I or in Part II, had binding force.

97. The CHAIRMAN, speaking as a member of the Commission, said he disagreed. What was at issue was the legal value of principles, not of provisions.

98. Mr. ROSENSTOCK said that the English version was quite careful in its use of the word "should". The current discussion was, in fact, either a non-issue or a confusion based on what had originally been concepts of the distinction between Parts I and II but which could not be accurately so described at the current time.

99. The CHAIRMAN, speaking as a member of the Commission, said he would not insist on his objection, but he found the end of paragraph (1) was not clear.

100. Mr. MIKULKA (Special Rapporteur) said the French text did not convey exactly the same meaning as the English. The matter could perhaps be resolved by slightly recasting the French version.

101. Mr. BENNOUNA said he agreed that there was a problem of translation which the secretariat could resolve.

The commentary to article 5, as amended, was adopted.

Commentary to article 6 (Effective date)

102. The CHAIRMAN said that the distinction drawn in the French version of paragraph (1) between *principes généraux de droit* and *principles généraux du droit international* caused a problem. What was intended was the general principles of law, referred to in article 38, paragraph 1 (*c*), of the Statute of ICJ.

The commentary to article 6, as amended in the French version, was adopted.

The meeting rose at 6.05 p.m.

2513th MEETING

Tuesday, 15 July 1997, at 10.05 a.m.

Chairman: Mr. Alain PELLET

Present: Mr. Addo, Mr. Baena Soares, Mr. Bennouna, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Mikulka, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam.

Diplomatic protection (A/CN.4/L.537)

[Agenda item 6]

REPORT OF THE WORKING GROUP

1. Mr. BENNOUNA (Chairman of the Working Group on diplomatic protection), introducing the report of the Working Group (A/CN.4/L.537), said that diplomatic protection was a traditional topic in international law and also one of the oldest institutions, since it was tied in with the very existence of the State and one of those which had made it possible to take individuals and non-State entities into consideration in international life. The Working Group had therefore kept the subject's title, which was the one it had had for centuries. It had sought to distinguish diplomatic protection from certain forms of intervention by diplomatic or consular agents provided for in the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, so as to clearly mark the difference between diplomatic protection and diplomatic and consular relations. It had noted that the institution had evolved and had adapted with time, in order to take account of the fact that individuals had more and more access to international bodies and could even be parties in international courts. The Working Group had considered that, in view of the increased cross-border exchanges in persons and in trade, claims submitted by States on behalf of their nationals would remain an area of significant interest.

2. For the purposes of its work, the Working Group had borne in mind the general outline contained in the report of the Commission to the General Assembly on the work of its forty-eighth session,[1] the topical summary of the discussion held by the Sixth Committee at the fifty-first session of the General Assembly (A/CN.4/479, sect. E.6) and written comments submitted by Governments. It had decided to retain from the general outline only material dealing with diplomatic protection *stricto sensu*, taking

[1] *Yearbook . . . 1996*, vol. II (Part Two), annex II, addendum 1.