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Summary record of the 2602nd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1999, vol. I

topic. It was a useful contribution to a dialogue that had been going on for a long time in the Sixth Committee.

84. There had been many developments in practice as far as the five substantive issues referred to in the report were concerned. In his view, the subject was not fit for a convention. It had been overtaken by national legislation and would continue to be in the future. Ultimately, it was national jurisdiction that would determine matters, because there was no higher appeal against a court of last decision in a country. National jurisdiction was evolving, and thus it was more difficult to have common international standards in terms of a convention either by way of progressive development or codification.

85. Mr. GAJA said that he had a number of proposals to make, although he realized that it might already be too late and he did not wish to reopen the discussion.

86. Paragraphs 18 et seq. of the report of the Working Group contained a summary of recent relevant case law concerning constituent units. However, the cases mentioned seemed to focus not on constituent units, but on agencies and instrumentalities. Perhaps the heading could be reworded slightly to make it less awkward.

87. With reference to paragraph 30 setting out the reformulation of article 2, paragraph 1 (*b*), he was not happy with the idea that a suggestion by the Commission should include a text in brackets. That kind of addition, although acceptable with regard to immunity from jurisdiction, was not acceptable in the case of immunity to execution, and since a general definition of the State was involved, it would be preferable not to have the addition within the brackets.

88. Perhaps a sentence could be added to paragraph 49 to say that in cases which had used the purpose test, as a supplementary test, reference had not been made to the law of the State concerned, namely the State whose immunity was in question. Since the suggestion was to drop the purpose test, it would add to the argument by saying that the purpose test, within the meaning of what had been suggested early on by the Commission, had not really been accepted in practice.

89. Paragraph 105 was unclear about the status of administrative staff that supported sovereign functions, because the examples given related to diplomatic and consular officers, but in the description of practice, there were also some references to immunity where a high administrative staff member brought a case against a State. A clarification was needed in that regard.

90. Paragraph 106 should be further developed. It spoke of non-discrimination on the basis of nationality, but in fact there were two types of non-discrimination. One was non-discrimination against an employee who was a national of a third State who could not bring a claim against the employing State, and the other was against nationals of the receiving States, because it would naturally be in the interest of the sending State to employ a national of a third State rather than an employee of the local State. Mention should also be made of the fact that the principle of non-discrimination had originated in the European Convention on State Immunity.

91. Paragraph 129 was confusing and it was not clear to what alternatives I and II referred. The important thing was to concentrate on the granting of a grace period, and not imagining a recognition procedure, possibly before the courts of the State whose property would be subject to execution.

The meeting rose at 1.05 p.m.

2602nd MEETING

Wednesday, 14 July 1999, at 10 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Yamada.

Jurisdictional immunities of States and their property (*concluded*) (A/CN.4/L.576)

[Agenda item 9]

REPORT OF THE WORKING GROUP (*concluded*)

1. Mr. SIMMA, commenting on the report of the Working Group on jurisdictional immunities of States and their property (A/CN.4/L.576), said that the reformulation of article 2 (Use of terms), paragraph 1 (*b*), of the draft articles, as proposed by the Working Group in paragraph 30 of the report, would not be an improvement on the draft articles as adopted by the Commission at its forty-third session, in 1991.[1] The first version had been satisfactory because the status of constituent units of federal States had been defined separately from the particular structure of a federal State. The new wording gave the impression that the constituent units of federal States could enjoy jurisdictional immunity only when they exercised the governmental authority of the central State, something which was not in conformity with the constitutions of many federal States. Within the Federal Republic of Germany, for example, Bavaria, where he came from, exercised a large share of what were considered as basic functions of the State, in, for example, the police, education and justice areas, and it did so entirely autonomously.

[1] See 2601st meeting, footnote 18.

It would be unacceptable for Germany that the Länder could not enjoy immunity for *acta jure imperii* unless such acts had been performed in the exercise of the governmental authority of the federal State. The European Convention on State Immunity proposed a much more satisfactory solution by providing that the immunity of a constituent unit of a federal State could be recognized on the basis of a declaration by that federal State (art. 28). Paragraph 29, in which an attempt was made to justify the new wording, showed that there was some reluctance to recognize all the alternatives to federalism. The Working Group had gone too far in giving satisfaction to States organized along unitary and centralized lines.

2. The commentary in paragraph 21 on the establishment or refutation of immunity was based exclusively, as the footnote showed, on the case law of the United States of America. However, that was not mentioned anywhere in paragraph 21, which was supposed to be a commentary on the provisions applicable internationally. Decisions taken on the basis of a particular act, such as the United States Foreign Sovereign Immunity Act of 1976,[2] might well lay down limits and conditions which went further or less far than what international law might allow in every respect. He would also like to have some clarifications on the meaning of the last sentence of paragraph 21.

3. With regard to the question of commercial transactions, he shared the preference the Working Group had stated in paragraph 60 for alternative *(f)* contained in paragraph 59. In so doing, however, it was evading the controversial question of the choice between the "nature" and the "purpose" of the transaction. That would be acceptable if the Sixth Committee decided that the draft was to become a convention. He personally supported the idea that the draft should remain as it was or, possibly, take the form of a General Assembly declaration. In that case, there would be no problem if the Commission simply listed the various solutions and left it to national courts to choose from among the various possibilities. Not mentioning any of the possible solutions would mean not giving national courts any guidance. Such courts already knew how to make a distinction between a commercial transaction and a transaction resulting from acts performed in the exercise of governmental authority. If the Commission wanted to be helpful, it should at least list the various possible alternatives. He also noted that paragraph 48 gave no indication about the case referred to in the third sentence, whereas the example given in the following sentence was backed up by a footnote. That imbalance should be corrected.

4. On the concept of a State enterprise or other entity in relation to commercial transactions, paragraphs 73 to 77 again contained references to decisions by United States courts based on the Foreign Sovereign Immunity Act of 1976. What those decisions reflected was not international law, but the attitude of the courts of a particular country which were required to base their decisions not on international law, as the German courts were, but on internal law. That section thus proposed an interpretation of internal legislation, but certainly not an interpretation of the implementation of customary law or general provisions of international law as such.

5. With regard to contracts of employment, he agreed in principle with the opinion expressed by Mr. Gaja (2601st meeting) that the list of groups of employees not covered by article 11 (Contracts of employment), paragraph 1, should include administrative staff in addition to diplomatic staff. It could, however, be considered that the words "in particular" in paragraph 105, before the list of categories covered, implied that administrative staff might come under that safeguard clause. The Working Group was also proposing that paragraph 2 (*c*) should be deleted because of the problems of discrimination to which it might give rise as it was currently worded. It could be asked whether paragraph 2 (*d*) did not also give rise to the same problem.

6. On measures of constraint against State property, the words "Measures involved" should be replaced by the words "Measures involving" in paragraph 127 (*d*). He was, moreover, fully in favour of alternative I proposed by the Working Group in paragraph 129 because alternative II would only complicate matters by paving the way for an inter-State dispute settlement procedure in the event of the non-execution of the judgement.

7. As to the annex to the report, he was one of the members who had stated that they were very much in favour of referring to the new problem of the relationship between State immunity and cases of human rights violations. It had not been easy for the Working Group to deal with that problem, as shown by the convoluted style of the annex. He recalled that the first court rulings which had been handed down in connection with torture committed by State agents had related to cases brought not against Governments, but against individuals who had committed acts of torture or caused disappearances in the exercise of governmental authority. The question had been whether they had done so in the exercise of governmental authority or in a private capacity. A distinction should be made between those two types of cases in paragraph 4 of the annex. With regard to paragraph 9, he wondered whether only claimants and victims who were nationals of the United States could institute proceedings under the Anti-terrorism and Effective Death Penalty Act of 1996.[3] That would be surprising, since United States courts were authorized to hear claims filed by foreigners against foreigners or foreign Governments.

8. Mr. MELESCANU suggested that Mr. Simma should read the provisions which he had regarded as being contrary to Bavaria's interests in the light of the provisions of article 2, paragraph 1 (*b*) (ii), which clearly stipulated that the word "State" meant the constituent units of a federal State. In other words, a constituent unit was a State within the meaning of that provision. Paragraph 1 (*b*) (iii) went even further. Moreover, those two provisions went a long way towards meeting Mr. Simma's concerns. The Working Group had tried to strike a balance between the heirs

[2] United States of America, *United States Code*, 1982 edition, vol. 12, title 28, chap. 97 (text reproduced in United Nations Legislative Series, *Materials on Jurisdictional Immunities of States and Their Property* (Sales No. E/F.81.V.10), pp. 55 et seq.).

[3] Ibid., Public Law 104-132, 110 Stat. 1214 (1996) (National Archives and Records Administration, Office of the Federal Register, 1996).

of a long-standing tradition of unitarism and State centralism and the advocates of federalism.

9. Mr. DUGARD, referring to the annex, said that the Working Group's intention had most certainly been to draw attention to that new development, but not to go into details of case law, which was mainly that of courts in the United States and the United Kingdom of Great Britain and Northern Ireland. The Working Group had wanted to focus exclusively on the question of immunity. The provisions of the Antiterrorism and Effective Death Penalty Act of 1996 referred to in paragraph 9 were in fact much more limited than those of other United States acts which allowed foreign victims of torture or crimes committed abroad to institute proceedings in United States territory.

10. Mr. SIMMA said he still thought that the draft articles reflected the typical attitude of officials of centralized States which was shared by the representatives of States in the Sixth Committee, who all came from the ministries of foreign affairs of their Governments, not from a federal entity. That affected the way in which such matters were dealt with in the United Nations.

11. Mr. HE said that the suggestions made by the Working Group on the substantive issues referred to the Commission for its preliminary comments had been carefully thought out and weighed in order to find broadly acceptable solutions. The report of the Working Group and the suggestions it contained should be very helpful to the working group of the Sixth Committee when it came to consider the substantive issues raised in the conclusions of the Chairman of the informal consultations held pursuant to General Assembly decision 48/413.[4] In view of the complexity of those issues, however, it was not surprising that there were still some problems.

12. With regard to the concept of State for the purpose of immunity, the Working Group's suggestion that article 2, paragraph 1 (*b*) (ii), should be deleted and that the words "constituent units of a federal State" should be added to the current paragraph 1 (*b*) (iii), which was apparently unacceptable to Mr. Simma, had nevertheless been regarded by the Working Group as a good basis for a compromise.

13. The Working Group had been aware of the difficulty of the question of criteria for determining the commercial character of a contract or transaction. A contract or transaction made by a State might either be a commercial activity or a manifestation of its sovereign activity. There were thus grounds for taking both the nature and the purpose of the contract as criteria for determining jurisdictional immunity. After having considered the various possible alternatives, the Working Group had decided that alternative (*f*) in paragraph 59 of the report was the most acceptable, as it had been felt that the distinction between the criteria of nature and purpose might be less significant in practice than the lengthy debate about it could imply. On that point, there might be doubts as to whether such an explanation could fully reflect a long-standing practice in international life without giving rise to different and controversial interpretations of the provision in question.

[4] See 2601st meeting, footnote 21.

14. In connection with the concept of a State enterprise or other entity in relation to commercial transactions, it was of great significance to draw a distinction between the legal status of States and that of State-owned enterprises or entities in relation to jurisdictional immunities. State-owned enterprises engaging in commercial activities in the capacity of legal personalities independent of the State could not be considered a component part of the State machinery, either in jurisprudence or in fact. Proceedings arising out of their commercial transactions should therefore not implicate the State of nationality of the enterprises and the jurisdictional immunities of the State must not be affected in any way. In the exceptional cases listed in the conclusions of the Chairman of the informal consultations, where the State enterprise concluded a purely commercial contract on behalf of the Government, moreover, the principle of State immunity did not apply. In the basis for a compromise submitted by the Chairman of the informal consultations and reproduced in footnote 80, he was of the opinion that the question of the liability of the State could arise in situations (*a*) and (*b*), which had been endorsed in the Working Group's suggestions, but not in situation (*c*), where the State enterprise deliberately misrepresented its financial position to avoid satisfying a claim. The Working Group had rightly pointed out that that suggestion by the Chairman of the informal consultations ignored the question whether the State entity, in so acting, had acted on its own, without the knowledge of the Government, or contrary to the Government's instructions. Such a clarification would greatly help to establish a distinction between the legal status of States and that of State enterprises and entities and thus to facilitate the normal development of international relations, including economic and trade relations.

15. With regard to measures of constraint against State property, the immunity of State property from execution was a generally recognized and established principle and an issue that should be dealt with cautiously. Article 18 (State immunity from measures of constraint), paragraph 1, set forth three requirements, which he read out and which must be met for the attachment of State property. The suggestions made in paragraphs 126 to 128 of the report of the Working Group were basically in line with those requirements, but the alternatives contained in paragraph 129 might give rise to problems. In that connection, he recalled the basic principle reflected in article 18, paragraph 2, as adopted by the Commission at its forty-third session, i.e. waiving immunity from jurisdiction did not mean waiving immunity from execution. Execution against the property of a State was possible only with the express consent of that State.

16. Mr. LUKASHUK said that, on the whole, the report of the Working Group was the result of satisfactory work, although its annex called for some comments, and he welcomed the fact that Mr. Simma had drawn the Commission's attention to the wording of the annex, which he also found rather inelegant. The development to which the annex referred was extremely interesting and the ambiguous wording might delay work on the question. The establishment of the International Criminal Court was instructive in that regard. He therefore requested that paragraph 13 of the annex to the report should be amended to indicate that the question with which it dealt

should be a topic for consideration by the Commission in its own right.

17. Mr. ECONOMIDES said he regretted the fact that the French text was not available in time for the consideration of the report of the Working Group. He would like the secretariat to ensure that such a situation did not arise again.

18. As to substance, he had always regarded the draft articles adopted by the Commission at its forty-third session as satisfactory, thanks in particular to the excellent work done by the first Special Rapporteur on the topic, Mr. Sompong Sucharitkul. The treatment which had been given to that draft was not deserved, especially as the Working Group's suggestions were not very different from the provisions it contained. He nonetheless endorsed nearly all of those suggestions.

19. As to the definition of a State for the purpose of jurisdictional immunities, the difference between the draft articles adopted by the Commission at its forty-third session and the Working Group's suggestions was minimal. He would have preferred a more restrictive definition. Immunity was anachronistic, and a necessary evil whose scope practice had gradually tried to reduce. He therefore fully shared the Working Group's position, but would have liked the words "provided that it was established that such entities were acting in that capacity" not to be included in square brackets in article 2, paragraph 1 (*b*) (ii), proposed by the Working Group in paragraph 30 of its report.

20. He also fully agreed with the Working Group on the criteria for determining the commercial character of a contract or transaction; it was better not to broaden the concept and instead to give practice free rein.

21. With regard to contracts of employment, he endorsed Mr. Gaja's comments on the administrative staff of diplomatic and consular missions of States to international organizations, who played a decisive role and should therefore be covered. He did not agree with the Working Group's recommendation that paragraph 2 (*c*) of article 11 should be deleted because he could not find that provision discriminatory: both the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations made the same distinction in respect of nationals of the receiving State employed by diplomatic and consular missions.

22. Mr. ROSENSTOCK noted that, at the fiftieth session of the Commission, he had pointed out that it was probably too optimistic to think that the Commission could succeed where years of efforts by Mr. Calero Rodrigues had failed. He could, of course, associate himself with the report of the Working Group, but, in the light of the discussion, it could, at most, be regarded as a *succès d'estime*. As to substance, he was of the opinion that, in the case of State enterprises and other State entities, the draft had to contain provisions to pierce the corporate veil in connection with cases where the State entities were undercapitalized, reduced their assets to avoid satisfying a claim, misrepresented their financial position and comparable situations. He would like the report to give a more accurate picture of the Working Group's discussions on that point. He therefore proposed that the following sentence should be added at the end of paragraph 83: "Some stressed the importance of the draft dealing with the problem in the appropriate place."

23. Mr. PELLET said that, unlike some members, he was glad that the General Assembly had sent the first set of draft articles back to the Commission. That was an interesting precedent, even though it would have been better if the General Assembly had indicated specifically which points it would like the Commission to deal with in greater detail.

24. In terms of procedure, it was difficult to adopt a relatively complete and technical report without considering it paragraph by paragraph. As that appeared to be impossible, the conclusions contained in the report might simply be approved and it might be annexed to the report of the Commission on the work of its fifty-first session.

25. On the whole and even though the results achieved by the Working Group were generally satisfactory, he still had the same reservations he had always had about the fact that the draft articles which had been prepared by the Commission and whose title clearly indicated that they dealt with the jurisdictional immunities of States and their property encroached on the problem of State immunity from execution—and, what was more, dealt with it too timidly. He therefore thought that the General Assembly should choose alternative III proposed in paragraph 129, subject to the possibility of making immunity from execution a topic in its own right.

26. Mr. GOCO said that the concept of State immunity was not unknown in his country, the Philippines, whose Constitution provided that a State could not be prosecuted without its consent (art. XVI, sect. 3).

27. He was surprised that the draft articles under consideration did not view a "court" as a judicial organ as such. In the Philippines, for example, there was a whole range of administrative mechanisms which ruled on rights and duties and before which State immunity could be pleaded. In his opinion, the definition of a "court" should be extended to organs exercising quasi-judicial functions.

28. He regretted that, in the many cases referred to in the footnotes, there was no reference to a dispute in which he had had to become involved as a result of his previous official functions, namely, the proceedings against the Marcos estate which had been instituted in a Hawaiian court by victims of human rights violations. Although the Philippine Government had not been directly involved, it had been able to invoke provisions of the federal law of the United States known as the Foreign Sovereign Immunity Act of 1976 and a California appeal court had accepted that plea.[5]

29. Ms. Rosalyn Higgins, a member of ICJ, had explained how difficult it was to determine to which category, *de jure imperii* or *de jure gestionis*,[6] State acts belonged, as practice in respect of immunity was becom-

[5] United States, Court of Appeals, Ninth Circuit, In re *Estate of Ferdinand Marcos Human Rights Litigation; Hilao and Others* v. *Estate of Marcos*, *International Law Reports* (Cambridge), vol. 104 (1997), p. 119.

[6] See Higgins, op. cit. (2601st meeting, footnote 8), p. 82.

ing more restrictive. The nature and purpose of the operation in question were the two criteria to be used to decide. In his opinion, however, the personality of the parties involved also had to be considered.

30. Mr. KATEKA said that, like Mr. Pellet, he wondered what should be done with the report under consideration. If it could not be considered paragraph by paragraph, the Commission might simply take note of it, drawing particular attention to the Working Group's suggestions.

31. Mr. HAFNER (Chairman of the Working Group), summing up the debate, said that some of the problems, particularly with regard to translation and procedure, which were being faced currently could be explained by the fact that the Working Group had had to work fast and there had not been much time available to the Commission. The best thing would be formally to adopt the Working Group's suggestions, to take note of the rest of the report and to annex the report of the Working Group to the report of the Commission to the General Assembly on the work of its fifty-first session.

32. He reminded Mr. Gaja and Mr. Simma, who had asked about the many cases which had been referred to as examples in the report and some of which they did not think were relevant, that, in view of the gaps in its case law sources, the Working Group had taken care to start each part of the report on the background to the practice of courts with an introductory paragraph clearly stating that it was drawing on a number of conclusions included in a summary of cases prepared by the Secretariat and covering the period 1991-1999. It had been impossible to find better balanced references and hence to give a more complete picture of State practice.

33. As Mr. Economides and Mr. Simma had pointed out, the case of "employees forming part of the administrative or technical staff of a diplomatic or consular mission" was not referred to in paragraph 105, which listed the categories of employees in respect of whom article 11, paragraph 1, did not apply. It would be noted, however, that paragraph 105 clearly stated that the provision did not apply to certain officials, "in particular". The Working Group had considered that it would be too difficult to make an exhaustive list and had preferred that solution. It had, moreover, not seen any reason why administrative staff, for whom the practice of the courts was still not well established, should be included in one particular category.

34. In his opinion, there was no incompatibility between paragraph 106 relating to article 11, paragraph 2 (*c*), and Mr. Gaja's interpretation of the two possible types of discrimination. With regard to Mr. Economides' comment that there would not necessarily be any discrimination, he wondered whether article 47 of the Vienna Convention on Diplomatic Relations, which prohibited the receiving State from discriminating as between States, did not already justify the deletion of article 11, paragraph 2 (*c*).

35. In respect of Mr. Gaja's comment on recognition of judgement, as referred to in alternatives I and II in paragraph 129, he explained that the Working Group had not had time to review the many conditions to which the recognition of a judgement by the State could be subordinated and had therefore simply mentioned such recognition in order to draw the attention of the General Assembly and the Sixth Committee to the problems which might be involved. It was, however, not opposed to the deletion of that reference in either of the alternatives.

36. Referring to Mr. Simma's comment on the definition of a State reproduced in paragraph 30, he stressed that article 2, paragraph 1 (*b*) (ii), dealt with acts in the exercise of the governmental authority of the State, the State being defined in the draft as including, where appropriate, all the constituent units of a federal State. At least the two levels of the governmental authority of a federal State were thus already included in that concept of "State". Nonetheless, the important element in the phrase "acts in the exercise of the governmental authority of the State" was not the State, but governmental authority. Consequently, if Mr. Simma was bothered by the words "of the State", they could be deleted.

37. Replying to the question whether alternative (*f*) in paragraph 59 was genuinely the most acceptable criterion for determining the commercial character of a transaction, he said that, in any event, in view of the many criteria which were applied in practice, in addition to the nature test, the Working Group had had no other choice than to rely on the courts, which could base their rulings on the list prepared by the Institute of International Law, in particular.

38. In his view, the distinction to which Mr. Simma had drawn attention between cases brought against a State and cases brought against persons exercising governmental functions, but not enjoying immunity was duly taken into consideration in the annex to the report of the Working Group.

39. He noted that Mr. He could accept the Working Group's conclusions, but preferred alternative III as far as measures of constraint were concerned.

40. In reply to Mr. Lukashuk's comment on paragraph 13 of the annex, particularly with regard to the need to amend the text by referring to the possibility of a new mandate, he said that the neutral wording with which the Commission drew the General Assembly's attention to recent developments that were undeniably closely linked to immunity tended to make the problem of a new mandate a moot point.

41. On the question whether the words "[provided that it was established that such entities were acting in that capacity]" should be maintained in square brackets, he said that, since opposing points of view had been expressed, the best thing would be to leave the text as it was.

42. Commenting generally on Mr. Goco's request for a precise definition of courts, he said that, since the Working Group had received a mandate from the General Assembly to focus on five issues, it had done so and had deliberately not dealt with certain problems which would otherwise have warranted more detailed consideration.

43. Subject to the Commission's agreement, he could accept Mr. Rosenstock's proposal for the addition of a sentence at the end of paragraph 83.

44. On the basis of all those comments and the suggestions by Mr. Pellet on the procedure to be followed, he proposed that the Commission should take note of the report and adopt the suggestions, as amended during the debate.

45. Mr. SIMMA said that, if the Commission took note of the report of the Working Group and adopted the suggestions it contained, it would have to revise the text extensively to correct some weaknesses. With regard to paragraph 30 and the definition of "State", he said that he was in favour of the deletion of the words "of the State" in article 2, paragraph 1 (*b*) (ii).

46. Mr. PELLET said that the weaknesses of the report could be easily explained by the fact that it had been prepared in such a rush. His only reservation related to the imbalance in the case law that had been referred to and the way non-English-speaking sources had been cited. He was therefore prepared to take note of the report as it had been submitted, but requested that the Chairman of the Working Group should read out the amendments to the conclusions that the Commission was expected to adopt together with the conclusions.

47. Mr. HAFNER (Chairman of the Working Group) said that the amendments related to paragraphs 30, 83 and 129. In paragraph 30, the words "of the State" would be deleted in article 2, paragraph 1 (*b*) (ii), after the words "governmental authority". In the English text, the word "the" would be deleted before the words "governmental authority". At the end of paragraph 83, it had been proposed that the following sentence should be added: "Some members stressed the importance of the draft dealing with the matter in the appropriate place." In paragraph 129, the words "recognition of judgement by State and" should be deleted in alternatives I and II.

48. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to take note of the report of the Working Group and to adopt the suggestions which it contained and which had been amended on the basis of the proposals read out by the Chairman of the Working Group.

It was so agreed.

Appointment of a special rapporteur

49. The CHAIRMAN announced that the Commission had to choose a new special rapporteur for the topic of diplomatic protection. The candidacy of Mr. Christopher Dugard had been proposed. If he heard no objection, he would take it that the Commission wished to appoint Mr. Dugard Special Rapporteur on that topic.

It was so agreed.

The meeting rose at 1 p.m.

2603rd MEETING

Thursday, 15 July 1999, at 10 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Goco, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Yamada.

Unilateral acts of States (*concluded*)* (A/CN.4/496, sect. C, A/CN.4/500 and Add.1,[1] A/CN.4/L.588)

[Agenda item 8]

REPORT OF THE WORKING GROUP

1. The CHAIRMAN invited the Chairman of the Working Group on unilateral acts of States to introduce the report of the Working Group (A/CN.4/L.588).

2. Mr. RODRÍGUEZ CEDEÑO (Chairman of the Working Group) said the Working Group had been set up to deal with specific questions on his second report as Special Rapporteur on the topic (A/CN.4/500 and Add.1) and in particular on the definition of a unilateral act. The Working Group's mandate had not been to discuss again the substance of the questions raised on the topic, but to try to prepare a basic text of the definition on the basis of which States could answer a questionnaire prepared by the Working Group, and which was also contained in its report.

3. In paragraphs 5, 6 and 7 of the report of the Working Group, reference was made to the three fundamental elements which had always been felt to be part of the definition of a unilateral act, namely, the legal effect, clarity and publicity. In paragraph 8, mention was made of the international community as a whole, which had been included in the definition presented to the Commission and on which there had been some doubts, in particular as to whether the international community could be considered a subject of international law and could acquire rights through unilateral acts.

4. Paragraph 9 referred to the element "with the intention of acquiring international legal obligations", which had featured in the original definition in draft article 2 (Unilateral legal acts of States). Following the discussion in the Commission and the Working Group, it had been

* Resumed from the 2596th meeting.

[1] Reproduced in *Yearbook ... 1999*, vol. II (Part One).