

Document:-
A/CN.4/SR.2603

Summary record of the 2603rd meeting

Topic:
<multiple topics>

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

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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).

concluded that the best wording would be “with the intention to produce legal effects on the international plane”.

5. There had been some opposition to the idea of the autonomous nature of acts and two trends had been reflected: that autonomy restricted the concept and scope of the unilateral act, and that the acts should be identified as autonomous. In paragraph 11, the term “autonomous” was included in the definition in square brackets because of the differences of opinion.

6. Paragraph 11 contained a basic text, and not a definition in the strict sense, so that States could respond to the questionnaire, which was spelled out in greater detail in paragraph 16 so that States could inform the Commission about their practice. One of the main difficulties was that there was no systematic study and very few publications on State practice. Hence the importance of the questionnaire.

7. Paragraph 16 contained an enumeration which could be improved upon in consultations with the Secretariat if other elements needed to be introduced, but which already included the basic ideas: the capacity of a representative to act on behalf of the State to commit the State internationally by means of a unilateral act, the formalities to which such acts were subjected, their possible contents, legal effects, the importance that States attached to their own and other unilateral acts, which rules of interpretation applied, the duration of unilateral acts and their possible revocability. Other questions could also be added to the questionnaire. For example, States could say whether they thought that the 1969 Vienna Convention should be applied or whether they should have more specific criteria on such acts and also whether the Commission should consider only “autonomous” unilateral acts or all unilateral acts.

8. The final paragraphs of the report referred to the importance of a better understanding by States of the objective of the questionnaire, namely, to analyse State practice. That would be very useful when the Legal Advisers considered the report of the Commission to the General Assembly on the work of the session in the Sixth Committee. The Special Rapporteur might present the topic at that time to explain the problems encountered and the objectives of the questionnaire.

9. Lastly, the Working Group had considered what questions the Special Rapporteur would address in his next reports. It was proposed that some of the draft articles should be reformulated in the light of the comments made in the Commission and the opinion of Governments expressed in the Sixth Committee, that the Special Rapporteur should present new draft articles on interpretation and effects of unilateral legal acts and that a study should be elaborated on certain aspects it had not yet been possible to address, such as on the revocability of unilateral acts of States, as well as on a number of other subjects.

10. Mr. GOCO commended the Working Group on a comprehensive report which reflected the concerns that had been voiced in the Commission. The main issue was the definition, because the understanding of unilateral acts of States would hinge on that. The points which had been touched upon concerning the use of the words “legal” and “unequivocal”, the need to introduce the

word “publicity” and a reference to those to be affected by unilateral acts, as well as the purpose and intention of such acts were all vital in producing a proper definition.

11. The matters to be brought to the attention of the Sixth Committee included the question of capacity, the formalities required, the distinction between individual and joint acts, the possible contents of unilateral acts and the legal effects the acts purported to achieve. Of particular importance was the point set out in paragraph 16: the extent to which Governments believed that the rules of the 1969 Vienna Convention could be adapted *mutatis mutandis* to unilateral acts. Another key point was whether unilateral acts should be considered independently of the formalities provided for in the law of treaties.

12. Mr. PELLET said that the work of the Working Group would be useful in helping the Special Rapporteur to hone the proposals.

13. Personally, he still encountered the same problem, namely the “autonomy” element, particularly in the context of paragraph 10. The Special Rapporteur seemed obsessed with autonomy. The issue was not as essential as the reports of the Special Rapporteur or the Working Group suggested. In any case, insofar as he had been able to participate in the work, he had indicated that there was a middle road between addressing everything or dealing solely with autonomous unilateral acts, and the acts that had to be excluded were unilateral acts which were subject to a special legal regime. He wanted his view on that point to be reflected in the report of the Working Group, which was not the case at the current time. After paragraph 10, an insertion should be made to the effect that, according to another proposal, only unilateral acts of States subject to special treaty regimes should be excluded, such as, for example, reservations to treaties, the means of expressing consent to be bound by a treaty or declarations of acceptance of the compulsory jurisdiction of an international court. The problem was not one of autonomy: for those various categories of unilateral acts, a special legal regime existed, and they should therefore be excluded from consideration. However, he was opposed to an exclusion on a basis that was very difficult to pinpoint and was most unsatisfactory intellectually, namely that of autonomy. He would like that view to be reflected. Consequently, in the questionnaire he urged the Special Rapporteur and the Secretariat to indicate that that was a possibility, and not to confine themselves to submerging States under the expression “autonomous unilateral act”, which might lead to a negative response, because States would not understand, whereas his own proposal was infinitely clearer.

14. Similarly, regarding paragraph 16, which enumerated questions to be posed to States, the words “or (c) acts which are not subject to a special regime” should be inserted at the end of the penultimate question. Concerning item (a) in the same question, if the Commission really wished to confine itself to the notion of autonomous unilateral acts, which did meet with his approval, then it was necessary to add the words “or customary” between the words “pre-existing conventional” and “norm”. He saw no reason to single out norms which were based on a treaty.

15. As to paragraph 11, the phrase “legal effects in its relations to one or more States or international organizations” was somewhat premature. He would have preferred a wording such as “legal effects in the international sphere” or “legal effects at the international level”. An additional advantage of that was that it left open the idea of “international community”, which the Working Group had discussed, albeit without reaching a definitive decision.

16. Lastly, in the list of unilateral acts in paragraph 16, another category which should be added to promise, protest, recognition and waiver was that of notification which was very common in international law. It would be useful if examples could be given of State practice in that area.

17. Mr. ROSENSTOCK said it seemed to him that, if an act by a State was unilateral, then the autonomous element was implicit. Presumably Mr. Pellet had in mind situations which could be regarded as unilateral acts, but were not autonomous. It would be helpful if Mr. Pellet could cite a couple of examples hypothetical or not.

18. Mr. LUKASHUK said that he had wanted to ask the same question as Mr. Rosenstock. To his mind, autonomy was an important feature of unilateral acts. Mr. Pellet had spoken about special legal regimes, but that term had a particular meaning. Hence, it would not be useful to employ it in the present case. Also, Mr. Pellet had referred to customary norms, but as he understood it, “customary norms” had been deleted from paragraph 16. Lastly, another question should be included for Governments, namely, what kind of unilateral acts did they formulate in their practice?

19. Mr. PELLET said that there seemed to be a profound misunderstanding as to what was being discussed. The Special Rapporteur’s idea was that any unilateral legal act which was the consequence of a pre-existing treaty or customary rule should be excluded, i.e. virtually all legal acts, and that the only acts the Commission should retain were those which the Special Rapporteur had called “autonomous”. One example was the French declaration in the *Nuclear Tests* cases—in other words, acts which did not have any direct legal justification in a specific pre-existing rule of international law. When France had entered into the commitment, according to the Court, regardless of whether it really had or not, to stop conducting nuclear tests in the atmosphere, it had acted of its own free will, because it had considered it important to do so. Nothing had compelled France to do so, and that had not been linked to a pre-existing rule, according to the Special Rapporteur. In his view, that analysis was wrong; in reality, the declaration had been based on the principle that States, by virtue of their sovereignty, could commit themselves internationally. He did not see what the difference was between that and the idea that States could unilaterally set the limit of their territorial waters at 12 miles. In his opinion, there was always an international rule to which all unilateral legal acts could be linked. Hence, the idea of autonomy was absurd. Mr. Lukashuk and, to a certain extent, Mr. Rosenstock had said that, on the contrary, it was essential, because ultimately all unilateral legal acts were autonomous. The argument was being advanced that once a State formulated something, that commitment became autonomous. It was the result of the unilateral act

that was autonomous. But in his view, that was not very useful for the purposes of the definition. In actual fact, for the purposes of the definition it was the distinction that did not need to be retained. If it was finally kept in the definition, it would create enormous confusion, because it would suggest that there might be unilateral acts which were not autonomous. He would turn the question around and ask Mr. Rosenstock whether he could give an example of a unilateral act which was not autonomous. There were no such examples. That was why he did not like the distinction being drawn and thought the Commission was making matters terribly complicated for States by retaining it. If it was in fact retained, that meant that in the years ahead, the Commission would discuss the *Nuclear Tests* cases endlessly, the only clear precedent, perhaps adding the declaration made by Egypt on the Suez Canal² or the Ihlen declaration on Greenland.³ International practice was, however, rich enough in examples of unilateral acts that were non-autonomous, if one took the meaning employed by the Special Rapporteur. Needless to say, he could not find examples of autonomous unilateral acts, because they did not exist. That distinction was of pedagogical value only; for the purposes of theory or codification, it was pointless.

20. Mr. Lukashuk had the right not to endorse his own distinction between unilateral acts subject to special regimes and others, but he insisted that that possibility be mentioned in the report, because he had defended it with some vigour in the Working Group.

21. Mr. ECONOMIDES said that he had the impression the Commission was going around in circles with the question under discussion and that it was wasting time, because it had made no progress since the previous session. The sole element that he saw in the text was the questionnaire, which could be useful, although he was somewhat sceptical about the effectiveness of such a time-consuming procedure. Everything that had been said at the current meeting had to do with the same problem, namely that the Commission had not yet properly targeted the question which it wanted to consider.

22. Strictly speaking, all internal acts were autonomous, but what mattered was the sphere in which that act took place. If it was in the treaty sphere, the act was autonomous: a ratification was an autonomous act which a State carried out in an entirely sovereign manner. But it was an act which had a pre-existing regime, as Mr. Pellet would say, was provided for under the law of treaties and produced certain effects and thus was an act which was part of treaty-related processes. In the case of an act in the sphere of customary law, for example the decision of a State to extend its territorial seas to 12 miles, that was also a totally autonomous act: the State could choose 10 miles or 8 miles or decide not to do so. But that act came under customary international law, and yet it was still an autonomous act.

23. To take another example: an internal act which fell under institutional international law, i.e. an act undertaken to implement the decision of an international organization, that too could be an autonomous act, although a

² See 2594th meeting, footnote 5.

³ *Ibid.*, para. 20.

directive of the European Union might not be an autonomous act, because it was an act which must be undertaken. The same applied to resolutions of the Security Council. In such cases, the States concerned were required to undertake internal acts, which were autonomous, but they must do so to implement the decisions of the Security Council or the European Union. Those acts were of no concern to the Commission, because the legal regimes were known, whether in the case of institutional international acts, customary acts or treaty-related acts.

24. What was important for the Commission was an act which fell under internal law and was not linked to any other source of law. That was the autonomy of the act, an act that did not simply produce legal effects, but also created rights and obligations, essentially for the State making the declaration, and possibly also in its relations with other States or even the international community as a whole. Hence, the weakness of the definition lay in the words “legal effects”. All the acts he had mentioned, whether related to treaty sources, customary sources or international institutional sources, were acts which produced legal effects at the international level, but the Commission wanted to exclude all of them. It was the internal act as a source of autonomous international law that was the subject under consideration. If it was not further delimited, the discussion would continue to go around in circles.

25. Mr. SIMMA said that he was baffled and drew attention to the danger that further deliberation of unilateral acts might rest on barely intelligible notions on which there was no consensus. What did “autonomous” really mean? One possible interpretation was that a statement based on a treaty rule was not an autonomous legal act. Another definition of an autonomous legal act was that it was a unilateral statement which produced the legal effect desired by its author, irrespective of the acceptance or agreement of any other State. Conversely, a statement which required some sort of reaction would not be autonomous. He asked whether the other members agreed?

26. Mr. RODRÍGUEZ CEDEÑO (Chairman of the Working Group) said that the concept of autonomy was of fundamental significance. It was two-fold autonomy—autonomy in relation to a pre-existing rule and the autonomy of the act giving rise to the unilateral act. It was the only means of distinguishing between the various kinds of unilateral acts which existed, only some of which were of interest to the Commission for the purposes of its study. Nevertheless, if the Commission did not pursue its consideration of the topic, it would be necessary to apply the provisions of the 1969 Vienna Convention to all unilateral acts. Autonomy was therefore an essential feature which had to be retained as a criterion forming the basis of the definition.

27. Mr. LUKASHUK said that the Commission seemed to be arguing about terminology, rather than the concept itself. The point at issue was not absolute autonomy, which was as impossible to achieve as absolute sovereignty, but relative autonomy, the aim being to formulate a rule of customary law which would subsequently regulate unilateral acts. The debate also hinged on the two bases on which unilateral obligations could be created:

treaties and custom, although custom could also come into existence through the conclusion of agreements between States. The crux of the matter was, however, the autonomous element of a unilateral act whereby a State acquired obligations, an act which plainly did not depend on any treaty and was legally distinct from ratification, reservations or denunciation. He rejected Mr. Simma’s thesis that legal effects could arise without there being any need for the agreement of another party. If a State acquired an obligation which the other State refused to recognize on the grounds that it was not legal, then the act in question could not give rise to any legal effects. Reciprocity was essential in that context.

28. Mr. CANDIOTI said that “autonomy” basically signified “self-government” or “self-regulation”. He therefore agreed with Mr. Pellet that the notion of autonomy had nothing to do with the definition of a unilateral legal act. The only criteria of any relevance were whether the act was unilateral and whether it produced legal effects in international law. Such an act was not autonomous, but was regulated by law and custom. If a State lodged a protest, it followed certain rules established in existing international law as general principles or customary rules. The same was true of recognition and the assumption of obligations. A body of law existed—for instance, the *Nuclear Tests* cases—and the Commission’s task was to formulate it more clearly. Unilateral acts were governed by principles developed in jurisprudence and practice. He therefore suggested that the Special Rapporteur should abandon the concept of autonomy.

29. Mr. GAJA said that paragraph 16 contained a comprehensive list of acts, but notification could be added to it, as Mr. Pellet had suggested. He believed that there was general agreement that the Commission did not wish to deal with acts which might well be unilateral although linked to the law of treaties, or with unilateral acceptance of the compulsory jurisdiction of ICJ. The area which might require further discussion was that in which a customary rule existed or where there was a treaty providing for a certain type of act formulated by a State, the effects of which were already defined, when structurally that act was still unilateral. The problems which might occur were those of capacity, competence, interpretation, and so on. Two examples had been discussed in the Working Group: unilateral declarations to extend territorial seas and assurances that capital punishment would not be imposed on persons if they were extradited. The only question which required an immediate decision was whether to include such acts in the ambit of the Commission’s study. He therefore suggested that the Commission should postpone consideration of autonomy until its fifty-second session.

30. Mr. ECONOMIDES said that, if the Commission accepted Mr. Candiotti’s view that the two pertinent elements of the acts which were of interest to them were the unilateral nature of the act and the fact that it produced legal effects, the Commission would have to study all unilateral acts. But that had not been its aim and so the term “autonomous” had been introduced. According to the Special Rapporteur, “autonomous” meant an act not subordinated or linked to other sources of international law. What remained was an exclusively domestic act which created rights and obligations. The question therefore was whether a unilateral act could be a source of international

law and, if so, under what conditions. What procedure should be followed? What legal regime applied to that act? What legal effects did it have? Nevertheless, he would point out that, if the study were to encompass all unilateral acts, the Commission would waste an unconscionable amount of time.

31. Mr. GOCO said that the debate was complicating the issue and he agreed with Mr. Simma's definition of the term "autonomous". Agreement had been reached on the distinction to be drawn between unilateral and political acts, but there had already been prolonged discussion of the definition of the unilateral acts of States. Mr. Candioti had just focused on the question of the intention to produce legal effects and reference had been made to the *Nuclear Tests* cases. His own view was that the French President's announcement that tests were to be halted had indeed created an international legal obligation. Although he was puzzled about the meaning of a "non-autonomous act" and by the wording of paragraph 17, in other respects he considered that the report had covered the subject comprehensively.

32. Mr. ADDO said that he entirely agreed with Mr. Candioti. The crucial point was whether the unilateral act produced legal effects. The autonomous or non-autonomous nature of an act was of secondary importance.

33. Mr. SIMMA asked whether "autonomous" signified an act not based on a treaty. Or did it mean that statements produced legal effects without requiring acceptance by others? Was he right in thinking that the Special Rapporteur agreed with the first definition? Nevertheless, as the term "autonomous" was extremely misleading, he endorsed Mr. Candioti's proposal that the term be eliminated. He also agreed with Mr. Gaja's practical suggestions regarding the content of the questionnaire.

34. Mr. CANDIOTI said he wished to reply to Mr. Economides' argument about the need to include the concept of autonomy in order to define unilateral acts and that everything regulated by treaty law should be excluded from the Commission's study. In order to study unilateral legal acts, they first had to be defined, but the concept of autonomy had no place in that definition. The Commission should then, as the second step, study only those unilateral legal acts which were not regulated by specific regimes and which needed clarification. A general definition was, however, required for that purpose.

35. Mr. PELLET said that he concurred with Messrs Addo, Candioti, Gaja and Simma that the notion of autonomy was highly ambiguous and problematical, since everyone had his own definition of it. He had merely wished to propose that the report should be amended to reflect what he considered to be an important aspect, but reactions to his suggestion had shown that there was a major obstacle, in that no one knew what "autonomy" meant. He therefore proposed the radical solution of getting rid of the term from the report of the Working Group. The practical approach outlined by Mr. Gaja was correct and States should be asked what practice they followed when they made unilateral statements of all kinds. The Special Rapporteur could subsequently select examples of what appeared to be good practice. He therefore supported

Mr. Simma's proposal to delete any references to autonomy from the report.

36. Mr. ECONOMIDES said that he fully agreed with Mr. Candioti. The debate had brought to light a difference of opinion regarding methodology. In Mr. Candioti's view, it was necessary to proceed in two stages: first define unilateral acts in general, then delimit those of interest to the Commission. Nevertheless, he thought that the same result could be achieved in one step.

37. Mr. DUGARD said that he supported Mr. Pellet's view that the word "autonomy" ought to be deleted from the report, as it would only confuse the Sixth Committee and hamper progress on the subject in the future.

38. Mr. MELESCANU said that he was also in favour of deleting the word "autonomy", provided Mr. Candioti's proposal was also accepted, namely that the Commission would not concern itself with unilateral acts covered by treaties or customary law, in order to ensure that the scope of the subject was clearly delimited and would not give rise to repeated discussion in the future.

39. Mr. GAJA said he wished to clarify his previous comment concerning discussion of the matter of autonomy at the next session. He had meant to say that it seemed very unlikely that given his views on the concept of autonomy, the Special Rapporteur would not wish to include it in his next report, and so it seemed inevitable that the Commission would revert to the topic. In order to reflect the views of the Special Rapporteur and other members of the Commission, and in view of the time constraints, the important consideration at the current time was to leave aside the discussion on autonomy without, so to speak, killing it off. Accordingly, he proposed that the last two questions of the proposed questionnaire in paragraph 16 should be deleted, that the word "notification" should be inserted after "waiver", as suggested by Mr. Pellet, and that paragraph 10 should be revised to make it clear that the Commission was not seeking information on unilateral acts relating to the law of treaties. The Commission might also wish to indicate in the text whether it wished to exclude from its study other acts such as unilateral declarations of acceptance of compulsory jurisdiction, declarations concerning an extension of an economic zone or assurances on extradition treaties. At the current information-gathering stage of the study, he would rule out only questions relating to the law of treaties. The acts with which the study was concerned were of the simplest kind, and he did not believe that States would provide much information on them. However, it was best to cast the net as widely as possible so as not to rule out any valuable information.

40. Mr. BAENA SOARES said that the Commission was losing sight of the Working Group's purpose, which had been to propose material which would serve as a starting point for obtaining information from States regarding their practice, rather than to impose definitions. The Special Rapporteur had strong reasons for defending his point of view, but the Commission should take care not to complicate the answers to be provided by States. Mr. Melescanu was correct in making a proposal that would help resolve the issue as it stood. As Mr. Gaja had mentioned, the Commission would revert to fuller discussion

of the topic of autonomy in the near future. The important thing was to make progress by organizing consultations with States as soon as possible, providing them with a clear concept to use as a point of departure and limiting the questionnaire by stating the types of reply that were not required. The Commission could discuss autonomy in greater depth at a later stage.

41. The CHAIRMAN said he agreed with Mr. Baena Soares that it was not the Commission's task to undo the work of the Working Group. However, Mr. Pellet's position was somewhat different, in that he could justifiably say that his opinion expressed during the Working Group's deliberations had not been reflected in the report of the Working Group. The amendments proposed for paragraph 16 were appropriate, since they related to the objective necessity of asking States to respond to a number of specific questions. He could thus accept Mr. Pellet's proposal to include the word "notification" and felt it was correct to discuss the deletion of the last two questions on the list in paragraph 16, as many members had proposed.

42. The discussion on "autonomy" was still open. The Working Group's deliberations on the matter must be reflected to some extent in the report—it could hardly be maintained that nothing had been said about it. However, it seemed that the actual term "autonomy" would have to be omitted, since it clearly caused problems for an overwhelming majority of members. The Commission should bear in mind that its main task was to adopt a report that reflected the work of the Working Group; also, it would be well advised to agree on the questions to be addressed to States, since the replies could greatly facilitate the Commission's future work.

43. Mr. RODRÍGUEZ CEDEÑO (Chairman of the Working Group) said that the debate had been an interesting and enriching one. In particular, he agreed with Mr. Baena Soares that the main purpose was to provide a guide for States, and he welcomed Mr. Gaja's comments and proposals. He supported Mr. Pellet's proposal concerning paragraph 10 and agreed with those who felt that the last two questions on the list in paragraph 16 should be deleted in order to avoid misunderstandings. It was not appropriate to include "notification" in the list of unilateral acts given in paragraph 16, as the term did not seem to denote a legal act in the sense intended. In contrast, Mr. Melescanu's proposal was particularly interesting. The concept of autonomy was important in the present context, and his ideas might help to define a more restricted form of autonomy that separated the acts in question from special legal regimes.

The meeting was suspended at 11.30 a.m. and resumed at 12.05 p.m.

44. Mr. RODRÍGUEZ CEDEÑO (Chairman of the Working Group) said that on the basis of the Commission's discussion and the consultations held during the suspension, he wished to submit a number of proposals. First, the fourth sentence of paragraph 10 would be altered to read: "Acts which could reasonably be excluded from the Commission's study were those subject to a specific legal regime." In addition, the last sentence of the paragraph would be replaced by "It was agreed to exclude

from the study unilateral acts that were subject to a special treaty regime, such as those in the sphere of conventional law, reservations to treaties and declarations of acceptance of the jurisdiction of the International Court of Justice, inter alia."

45. In paragraph 11, the word "autonomous" would be deleted from the basic text to be sent to States. In paragraph 16, the word "notification" would be inserted after "waiver". Furthermore, the last two questions in paragraph 16 would be deleted. He believed those changes accurately reflected the general feeling of the Commission. The Special Rapporteur, perhaps in detriment to the independence he normally enjoyed in writing his report, would accept the members' proposals, including the amendments just made during the rapid consultations.

46. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the report of the Working Group on unilateral acts of States with the amendments read out by the Chairman of the Working Group.

It was so agreed.

Draft report of the Commission on the work of its fifty-first session

47. The CHAIRMAN invited the Commission to consider its draft report, starting with chapter IV, on nationality in relation to the succession of States.

CHAPTER IV. Nationality in relation to the succession of States (A/CN.4/L.581 and Add.1)

E. Text of the draft articles on nationality of natural persons in relation to the succession of States adopted by the Commission on second reading (A/CN.4/L.581/Add.1)

1. TEXT OF THE DRAFT ARTICLES

48. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the text of the draft articles.

It was so agreed.

Section E.1 was adopted.

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO

49. The CHAIRMAN invited the Commission to consider the commentaries to the draft articles and suggested that the Commission should proceed commentary by commentary, starting with the commentary to the draft articles as a whole.

General commentary

50. Mr. PELLET said he wished to record his regret that the Commission had not seen fit to deal with the problem of decolonization. The problem concerned not so much to regulate instances that might occur in the future, as to indicate the rules in respect of the cases which had occurred in the past.

51. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the general commentary.

It was so agreed.

The general commentary was adopted.

Commentary to the preamble

The commentary to the preamble was adopted.

Commentary to article 1

The commentary to article 1 was adopted.

Commentary to article 2

52. Mr. ECONOMIDES said he was disappointed to see that an opinion he had expressed about the term “person concerned” in article 2, subparagraph (f), did not appear in the report, although it had been included in the report of the Commission on the work of its forty-ninth session.⁴ Though the opinion had not attracted the support of the majority, he felt that it enriched the text and would like to see it included in the final commentary to article 2. The relevant entry in the report of the Commission on the work of its forty-ninth session had amounted to some six or seven lines, but even if that was cut by half it could still make a useful contribution to the report of the Commission on the work of its fifty-first session.

53. Mr. PELLET pointed out that it was not the Commission’s custom to reflect individual members’ positions during the second reading of the draft, i.e. at the current stage. They were normally reflected on first reading. While it was appropriate to record members’ positions in the summary records of the proceedings, he felt that the custom should be respected.

54. In his opinion, the reader would benefit greatly if the different rules that applied to the individual instances mentioned in paragraphs (8) and (9), were more closely cross-referenced to various categories of “succession of States”, as described in Part II.

55. The CHAIRMAN agreed with Mr. Pellet’s first point. It would be wise to continue with the custom in order to avoid additional misunderstanding. Minority opinions would, in any case, be appropriately reflected in the summary records. He found Mr. Pellet’s proposal on cross-referencing a reasonable one, but it would be a matter for the Rapporteur to decide.

56. Mr. CRAWFORD said he entirely agreed with Mr. Pellet on his first point. Sometimes it was possible to reflect the content of what turned out to be a dissenting view in the commentary, simply by referring to it as a material element. That, however, was a matter of judgement for the person writing the commentary.

⁴ See *Yearbook ... 1997*, vol. II (Part Two), p. 21, commentary to article 2, para. (12).

57. Secondly, he was not very satisfied with paragraph (11) of the commentary, which stated that “The Commission decided not to define the term ‘nationality’ in article 2, given the very different meanings attributable to it”. If so many meanings existed, he would have thought that a definition was called for. He appreciated the thinking behind the paragraph, but felt that a different reason should have been given for not defining the term. In any case, the notion of nationality was central to international law. He therefore proposed that the paragraph be deleted.

58. Mr. ROSENSTOCK (Rapporteur) said he agreed with Mr. Pellet’s comments on the need for cross-references and would undertake to include them in the text, in consultation with the secretariat. He supported the proposal to delete paragraph (11).

59. Mr. ECONOMIDES said it was his impression that in the final report it was often thought appropriate to include even a minority opinion, provided it improved the text. He felt that the opinion he had referred to made the provision clearer. However, if it was the Commission’s custom not to include minority opinions, he would withdraw his proposal.

60. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the commentary to article 2 as amended.

It was so agreed.

The commentary to article 2, as amended, was adopted.

Commentary to article 3

61. Mr. PELLET proposed that the words “military occupation or” in the last sentence of paragraph (2) should be deleted. Article 3 stipulated that the draft articles applied only to cases of lawful succession of States and paragraph (2) of the commentary explained that the Commission had declined to study nationality questions arising in connection with military occupation. But military occupation could be lawful in certain instances, and it could never result in succession of States, by virtue of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949. The reference to military occupation was thus ambiguous and superfluous.

62. As to paragraph (3), the phrase “and article 1 of the present draft” should be inserted at the end, since article 1 echoed the wording of article 15 of the Universal Declaration of Human Rights,⁵ which was cited in paragraph (3), and enunciated the right of everyone to a nationality.

63. Mr. ECONOMIDES said that, when discussing article 3, which had at the time been part of article 27, the Working Group had considered the phrase “without prejudice to the ‘right of everyone to a nationality’” to be ambiguous and potentially misleading, and had deleted it. He was surprised to see that it had resurfaced in para-

⁵ General Assembly resolution 217 A (III) of 10 December 1948.

graph (3) of the commentary and proposed that the entire paragraph be deleted.

64. The CHAIRMAN pointed out that if Mr. Pellet's proposed amendment to paragraph (2) was adopted, the corresponding footnote, which applied to the phrase "military occupation", would likewise be deleted. If he heard no objection, he would take it that the Commission agreed to that amendment.

It was so agreed.

65. The CHAIRMAN, speaking as Chairman of the Working Group, said that, as he recalled the discussion, the Working Group had wished to preserve the reference to protection of the right to a nationality, if not in the draft article, at least in the commentary. Paragraph (3), moreover, was the product of a compromise.

66. Mr. ROSENSTOCK (Rapporteur) said it would be both useful and appropriate to retain the reference to the right to a nationality in paragraph (3) of the commentary. Mr. Pellet's proposed addition to that paragraph posed a problem of logic and consistency. The paragraph stated that, while the draft articles did not apply to cases of unlawful succession, that did not affect the application of the basic right to a nationality as embodied in other instruments. If a reference to article 1 of the draft was added, that would amount to saying that the right to nationality mentioned in that article applied, while the draft articles as a whole did not.

67. Mr. ECONOMIDES said that article 3 prohibited an aggressor State from giving its nationality to the inhabitants of the territory it had acquired by unlawful means, and paragraph (3) of the commentary added that that was without prejudice to the right to a nationality. To take into account Mr. Rosenstock's point, the phrase might be supplemented by the words "provided that such nationality was not acquired in a manner that was not in conformity with the principles of international law incorporated in the Charter of the United Nations, as required by article 3". That would protect the right to nationality, not only in general, but also in the specific case when it was given by an aggressor State.

68. Mr. PELLET said he could not go along with that proposal, which completely distorted the draft article. The whole purpose of the text was to ensure that individuals were not deprived of a nationality, even if their country was illegally annexed. He would prefer to retain the text as it stood, but if Mr. Economides pressed for his proposal, perhaps the best solution would be to delete the paragraph altogether.

69. Mr. ROSENSTOCK (Rapporteur) said he fully endorsed those remarks. He would greatly prefer to retain the paragraph, because it made a useful point. He did not see it as in any way condoning illegal occupation or even addressing the legal aspects of such an action.

70. Mr. KABATSI said he agreed that the paragraph made a very useful point and should not be deleted. Like Mr. Pellet, he thought the objective was to prevent people from becoming stateless in the wake of illegal occupation.

71. Mr. ECONOMIDES said he would like to put a question to Mr. Pellet and Mr. Rosenstock. Did an aggressor State that infringed international law and illegally occupied a territory have the right to give its nationality to the inhabitants of that territory? Article 3 said it did not, but paragraph (3) of the commentary took the reverse stance.

72. The CHAIRMAN said that paragraph (3) did not go any further than to say that article 3 was "without prejudice" to the right of everyone to a nationality.

73. He invited the Commission to indicate, by a show of hands, whether it wished to retain paragraph (3) of the commentary as originally drafted or to delete it.

By 10 votes to five, the Commission decided to retain paragraph (3) as originally drafted.

The commentary to article 3, as amended, was adopted.

Commentaries to articles 4 and 5

The commentaries to articles 4 and 5 were adopted.

Commentary to article 6

74. Mr. PELLET said that, as in the case of paragraphs (8) and (9) of the commentary to article 2, cross-references to the relevant portions of Part II should be inserted.

75. Mr. ROSENSTOCK (Rapporteur) said that would be done, with the assistance of the secretariat.

The commentary to article 6, as amended, was adopted.

Commentary to article 7

76. Mr. PELLET said that, in the French version of paragraph (1), the reference to *principes généraux* must be followed by the words *de droit*, not *du droit*.

It was so agreed.

77. Mr. PELLET proposed that, after the third sentence in paragraph (3), further explanation should be given as to why the Commission had preferred the term "attribution" to "granting". A phrase along the lines of "and shows that this attribution is the result of a voluntary action by the State" could be added.

78. Mr. ROSENSTOCK (Rapporteur) said he would undertake to add a sentence to that effect.

The commentary to article 7, as amended, was adopted on that understanding.

Commentary to article 8

79. The CHAIRMAN drew attention to a technical error in the numbering of the English version.

80. Mr. ECONOMIDES proposed that, in paragraph (4), the third to sixth sentences inclusive should be deleted. They set out a hypothesis that went well beyond the terms of article 8, paragraph 2, which indicated that, other than in cases of statelessness, a successor State could not attribute its nationality to persons residing abroad against their will. The third to sixth sentences of paragraph (4) described how States could determine whether such persons desired to acquire their nationality, and even referred to the need to avoid placing a “heavy administrative burden” on the successor State. It implied that the State, to save time and money, could automatically and arbitrarily grant its nationality to persons living abroad, subject to their rejection of that nationality within a reasonable period of time. But what if such persons resided on the opposite side of the globe from the successor State? Would they not be seriously inconvenienced by having to travel to the successor State to decline its nationality? How would illiterate persons be informed of their new nationality? Was such an arrangement really in consonance with basic human rights? States were entirely capable of setting up an administrative system to give effect to article 8, paragraph 2, and there was no need for the Commission to give them the advice contained in the third to sixth sentences of paragraph (4) of the commentary.

81. The CHAIRMAN, speaking as Chairman of the Working Group, said he agreed that the paragraph introduced certain presumptions regarding the consent of the person concerned and had the potential to deprive certain persons of their human right to a nationality if, for example, they were not informed in good time that they had the right to reject the nationality of the successor State. On the other hand, the paragraph represented a final formula arrived at after serious consideration and appeared in the text adopted on first reading.

82. Mr. PELLET said that, while he was not insensitive to Mr. Economides’ arguments, if the third to sixth sentences were deleted, paragraph (4) of the commentary would end in an abrupt manner and lack any elucidation whatsoever of paragraph 2. It should at least be made clear that it was for each State to determine the modalities for implementing the principle set out in article 8, paragraph 2.

83. Mr. ROSENSTOCK (Rapporteur) said that he, too, understood the concerns expressed by Mr. Economides and proposed that, to take them into account, the word “rebuttable” should be inserted in the fifth sentence, before the words “presumption of consent”.

It was so agreed.

The commentary to article 8, as amended, was adopted.

The meeting rose at 1.05 p.m.

2604th MEETING

Friday, 16 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. 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. Sreenivasa Rao, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Mr. Yamada.

Cooperation with other bodies (concluded)*

[Agenda item 11]

STATEMENT BY THE OBSERVER FOR THE AD HOC COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW

1. The CHAIRMAN invited the Observer for the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe to inform the Commission of the new developments of the Council of Europe that had taken place since the fiftieth session of the Commission.

2. Mr. BENÍTEZ (Observer for the Ad Hoc Committee of Legal Advisers on Public International Law of the Council of Europe) said that, in 1999, the year of the celebration of its fiftieth anniversary, the Council of Europe had welcomed its forty-first member State, Georgia. The Committee of Wise Persons, presided over by Mr. Mário Soares, had been requested to review the Council’s structures and activities and, on completing its work, it had prepared a report entitled “Building Greater Europe without dividing lines”,¹ which stressed how valuable an asset legal cooperation activities were.

3. In the field of reservations to treaties, its primary activity, CAHDI had decided at its meeting in Paris in September 1998 to set itself up as the European observatory of reservations to international treaties.² CAHDI was being helped in its work by the Group of Specialists on Reservations to International Treaties, in whose meetings Mr. Hafner and Mr. Pellet had taken part. The main result of the Group’s work had been the adoption by the Committee of Ministers of the Council of Europe of recommendation No. R (99) 13 on responses to inadmissible reservations to international treaties.³ The recommenda-

* Resumed from the 2585th meeting.

¹ Council of Europe (Strasbourg, 1998).

² Ibid., Committee of Ministers, document CM(98)172, appendix VI.

³ Ibid., 670th meeting of the Ministers’ Deputies (18 May 1999).