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Summary record of the 2604th meeting

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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).

tion took account of the fact that the legal departments of the ministries of foreign affairs of the member countries of the Council of Europe did not always have the necessary resources to evaluate the complexity of all reservations formulated in respect of international treaties. In the recommendation, the Committee of Ministers recognized that, although the 1969 Vienna Convention was the main reference in that regard, subsequent developments, in particular the formulation of reservations of a general character and the increasing role of the monitoring bodies provided for by certain treaties, had not been envisaged when the Convention had been adopted. On the basis of that finding and taking account of what was known as the “Strasbourg approach”, the Committee of Ministers had appended to its recommendation a set of model response clauses to reservations, which States could use when they had doubts about the admissibility of reservations. It contained a whole range of responses, from the acknowledgement of a reservation to an objection to a reservation regarded as inadmissible, together with a statement either that the reserving State was bound by all the provisions of the treaty or that there could be no treaty relationship between the reserving State and the objecting State. One point worth mentioning was the fact that the Committee of Ministers had also proposed the solution of the establishment of a dialogue with the reserving State in order to determine the underlying reasons for the reservation. In that connection, it should be noted that a number of non-member States of the Council of Europe were taking part in CAHDI activities. During one of its meetings, for example, the Group of Specialists on Reservations to International Treaties had had an exchange of views with an observer from Canada on a reservation by Canada⁴ to the Convention on Environmental Impact Assessment in a Transboundary Context and, more generally, on the question of the consent of federal States to be bound by treaties. In the exercise of its functions as the European observatory of reservations to international treaties, CAHDI focused on reservations formulated by States to multilateral treaties which included human rights elements in the broad sense, as well as on reservations to Council of Europe instruments. During a meeting of the Group of Specialists on Reservations to International Treaties, it had been found that some reservations formulated by the State of Bahrain to several multilateral human rights conventions could give rise to doubts as to their admissibility. The Group had requested the German delegation to establish a dialogue with the authorities of Bahrain in order to determine the underlying reasons for those reservations. CAHDI had also begun considering the document submitted by the Netherlands delegation on “Key elements regarding reservations at the various stages of the process of concluding treaties (negotiation, signature and ratification) and at the post-ratification stage”. That text should be adopted by CAHDI in early September 1999.

4. Another CAHDI activity related to the Pilot Project of the Council of Europe on State practice relating to State succession and issues of recognition. On the basis of information collected as part of that project, CAHDI was

⁴ *Multilateral Treaties Deposited with the Secretary-General* (United Nations publication (Sales No. E.99.V.5), document ST/LEG/SER.E/17), p. 895.

working with three research institutes on a report which would be submitted to the Secretary-General of the Council of Europe in September 1999 and then transmitted to the Secretary-General of the United Nations together with recommendation No. R (99) 13 on responses to reservations as part of the Council of Europe contribution to the United Nations Decade for International Law.⁵ In a third area of activity which related to the consent of States to be bound by treaties, CAHDI had published a report in 1996 describing the relevant practice and legislation of 23 member States. It had begun updating that report to take account, on the one hand, of changes in the situation in some member States and, on the other, of the increase in the number of member States of the Council of Europe. At its meeting in Vienna in March 1999, CAHDI had joined in the celebration of the centennial of the first International Peace Conference.

5. The Council of Europe’s human rights activities had been marked by the start of the work of the new European Court of Human Rights, which still had only 40 judges, since the judge from the Russian Federation had not yet been elected. Paradoxically, the restructuring of the Court had been the result of the increase in the number of cases, but that increase had become even greater since the entry into force of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby establishing the Court. In late June 1999, the Court had had before it nearly 10,000 registered complaints. The President of the Court had therefore conducted an analysis of its operations in order to make it more effective. Moreover, in resolution (99) 50, adopted on 7 May 1999, the Committee of Ministers had decided to establish the Office of the Council of Europe Commissioner for Human Rights, which would be a non-judicial body to promote education in, awareness of and respect for human rights, as provided for in Council of Europe instruments. Since the competence of that body complemented that of the existing human rights monitoring bodies, it would not be authorized to hear individual complaints. The Commissioner was to be elected by late 1999 by the Parliamentary Assembly of the Council of Europe from a list of three candidates drawn up by the Committee of Ministers. The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, which had been opened for signature in Oviedo, Spain, in April 1997, had been signed by 28 member States of the Council of Europe and ratified by four, but had not yet entered into force, since five ratifications were necessary. The Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings had also been adopted, but had not entered into force either.

6. With regard to the fight against corruption in which the Council of Europe was interested less because of the need to protect fair international trade than because of the threat corruption posed to the basic principles for which it stood, the new developments which had taken place in the past year included the Criminal Law Convention on

⁵ See 2575th meeting, footnote 4.

Corruption, which had been adopted by the Committee of Ministers on 5 November 1998, opened for signature on 27 January 1999 and signed by 27 States. On 5 May 1998, the Committee of Ministers adopted resolution (98) 7 on Authorizing the Partial and Enlarged Agreement establishing the “Group of States against Corruption—GRECO”. According to articles 1 and 2 of its statute, the aim of GRECO was to improve the capacity of its members to fight corruption by monitoring the implementation, through a dynamic process of mutual evaluation and peer pressure, of the guiding principles for the fight against corruption adopted by the Committee of Ministers of the Council of Europe on 6 November 1997, as well as legal instruments to be adopted in pursuance of the Programme of Action against Corruption. Those instruments were the Criminal Law Convention on Corruption and the draft Civil Law Convention on Corruption,⁶ which was to be adopted by late 1999. A code of conduct for public officials was also to be adopted by the end of the year. GRECO had started operating in 1999.

7. Mr. LUKASHUK said that he was puzzled by the titles “Criminal Law Convention on Corruption” and “draft Civil Law Convention on Corruption”, which implied that there were two branches of international law, namely, international criminal law and international civil law. On the basis of that approach, perhaps a “convention on constitutional law” would one day be drafted. He would like to hear the explanations of the Observer for CAHDI on that point.

8. Since the provisions of the Criminal Law Convention on Corruption were not directly applicable in States, but had to be implemented by internal criminal law, he asked whether that corresponded to a general principle and whether the maxim *nullum crimen sine lege* referred to a *lex* which was national only.

9. According to article 18, paragraph 1, and article 19, paragraph 2, of the Criminal Law Convention on Corruption, the new concept of the criminal responsibility of legal persons which had thus far existed only in United States law, was being introduced in European law. On that point as well, he would like to hear the opinion of the Observer for CAHDI.

10. Mr. SIMMA said that he had been struck by two of the model alternative concluding statements in response to non-specific and specific reservations contained in the appendix to recommendation No. R (99) 13. In alternative (c), the Government of State X objected to the reservations formulated by the Government of State Y, but that objection did not hinder the entry into force of the Convention as between State Y and State X. The same was true in alternative (d). The Convention was thus in force between State X and State Y, but it was indicated that State Y could not benefit from those reservations. The possibility, and even the admissibility, of such responses was very controversial. He wished to know whether those questions had been discussed by CAHDI, whether there had been opposing views or whether the text of the recommendation had been adopted unanimously.

11. Mr. AL-KHASAWNEH said that both article 18 of the draft Civil Law Convention on Corruption and article 34 of the Criminal Law Convention on Corruption provided for partial territorial application limited to the territories designated by the parties. He wished to know whether that was simply a legal device, as well as whether those two instruments would apply to States outside the Council of Europe.

12. Mr. GOCO welcomed the fact that there was increasing recognition of the international dimension of corruption and recalled that work on the question had already been done by the United Nations, OAS and non-governmental organizations such as the International Bar Association and Transparency International. Although a great deal of progress had been made in combating corruption by public servants, there was one area which had not yet been dealt with, that of the theft of a nation’s wealth by an unscrupulous leader. No preventive measure could be taken to combat that problem, which could nevertheless destroy a country. Punitive measures could, however, be envisaged. While it was very important for a code of conduct to define the obligations of officials, it must also be ensured that such a code was respected and any instrument to fight corruption had to be accompanied by the establishment of a monitoring body, for, otherwise, it would remain a dead letter.

13. Mr. DUGARD, referring to the collective action that the Council of Europe was planning to take to ensure that reservations to treaties were not too general and therefore inadmissible, said that he would like to know more about the measures adopted in respect of the reservations formulated by the State of Bahrain and, in particular, whether such measures had taken the form of negotiations or of a declaration. In any event, that showed that progress was being made on the rejection of inadmissible reservations.

14. Mr. ECONOMIDES said that he had taken note with great interest of recommendation No. R (99) 13, which contained a graduated list of possible responses of States to inadmissible reservations. He did not know whether the purpose of that recommendation was to promote joint action by the member States of the Council of Europe, but it was in any event extremely useful to the legal departments of ministries of foreign affairs, which could use it as a basis for responding to reservations that came close to being inadmissible. He nevertheless regretted that the Observer for CAHDI had not referred to the activities of the European Commission for Democracy through Law (Venice Commission), which had recently conducted a study on the legal foundations of foreign policy⁷ and sent a questionnaire to the member States on the capacity of federated entities to conclude international agreements with third States and the relationship between federal Governments and federated entities as far as the implementation of international agreements was concerned.⁸

15. Mr. BENÍTEZ (Observer for the Ad Hoc Committee of Legal Advisers on Public International Law of the

⁷ Ibid., Report on the legal foundation for foreign policy (Strasbourg, 1998), document CDL-INF(1998)013.

⁸ Ibid., Federal and regional States (Strasbourg, 1997), document CDL-INF(1997)005.

⁶ Council of Europe, Parliamentary Assembly, document 8341.

Council of Europe), replying to Mr. Lukashuk, said that, in choosing the titles “Criminal Law Convention on Corruption” and “Civil Law Convention on Corruption”, the Multidisciplinary Group on Corruption had certainly not intended to create new categories of public international law. It had simply meant to give those texts titles that were as general as possible, while providing an accurate idea of their content and scope. Their scope was very ambitious and went well beyond that of all other international instruments already adopted in that regard. The problems that national authorities would inevitably encounter in translating and explaining those titles would have to be mitigated by the explanations accompanying the text of those instruments.

16. As to whether the provisions of the Criminal Law Convention on Corruption were directly applicable, Mr. Lukashuk was right: in all cases, the Convention left it to the national authorities of the States parties to criminalize the offences it was designed to punish. It must, however, be stressed that, by agreeing to establish GRECO, which was open to participation on an equal footing by member and non-member States of the Council of Europe, the Committee of Ministers had established monitoring machinery which would help guarantee the effectiveness of and respect for that Convention. GRECO met the concerns expressed by Mr. Goco in that regard.

17. The concept of responsibility of legal persons to which Mr. Lukashuk had referred in the context of the Criminal Law Convention on Corruption was new to most continental European systems. It had been included in the Convention because several non-member States of the Council of Europe, more and more of which were taking an interest in its work, had participated actively in its drafting.

18. With regard to Mr. Simma’s comments on alternatives (c) and (d) of the model concluding statement contained in the appendix to recommendation No. R (99) 13, he indicated that those provisions had been discussed at length at all levels, including in the Committee of Ministers. It had been asked, in particular, whether two nearly identical provisions should be retained. Alternative (d) differed from alternative (c) only in its last sentence, the aim of which was to make it slightly more specific, but it thus served an instructive purpose.

19. The negative impact of inadmissible reservations on the effectiveness of international conventions, particularly those relating to human rights, was a matter of constant concern to the Committee of Ministers. CAHDI had, moreover, begun its work in that field with a study of the joint “Strasbourg approach”, the principle of which was referred to in the ninth preambular paragraph of recommendation No. R (99) 13. That approach had already been the subject of far-reaching working group discussions.

20. In reply to Mr. Al-Khasawneh’s questions, he said that the possibility of partial territorial application provided for in the article common to the Criminal Law Convention on Corruption and the Civil Law Convention on Corruption was a standard treaty drafting technique. Although the characteristic features of the territories of the member States of the Council of Europe could not be a pretext for not combating money laundering and corrup-

tion, it must not be forgotten that those texts were the outcome of negotiations in which account had been taken of real situations. Council of Europe instruments, particularly those relating to the fight against corruption were, moreover, open to voluntary accession by non-member States, as was GRECO.

21. Referring to Mr. Dugard’s comments on the principle of collective action against inadmissible reservations, he described a discussion on the consent of federal States to be bound by a treaty which had taken place in the CAHDI Group of Specialists on Reservations to International Treaties in March 1999 and in which the observer for Canada had stated that, in his country, the provinces had legislative jurisdiction and that the federal State could not guarantee the implementation of the Criminal Law Convention on Corruption in their territory. Some delegations had expressed the view that federal States whose federated entities had legislative jurisdiction had to try to ensure in advance that those entities would consent to be bound by a treaty, so that, at the time of accession to the treaty, the consent of the federal State would also be valid for all its constituent units. The discussion was still going on and some members of the Council of Europe had already indicated that it was not to be ruled out that their Governments might formulate reservations of that kind. Any collective action that might be envisaged to deter them could be only of an unofficial nature, the idea being to establish a dialogue with the reserving State to determine the underlying reasons which had prompted it to formulate an inadmissible or nearly inadmissible reservation. It could not be said that that practice had always been successful, but it had proved useful and that was why it was covered in alternative (f) of the model concluding statements contained in recommendation No. R (99) 13. CAHDI was now holding discussions of that kind with Bahrain through the representative of one of its member States. Those were, of course, informal consultations, since States were not obliged to give up the slightest bit of sovereignty—although they could do so—to respond to individual reservations. That method simply made it possible to obtain additional information.

22. With regard to Mr. Goco’s question about the possibility of prosecuting leaders for corruption, he said that article 1 of the Criminal Law Convention on Corruption contained a definition of a public official which would, if interpreted broadly, cover the prime minister, i.e. the head of Government. The question of the prosecution of a head of State was, however, an entirely different matter. Although it warranted consideration, it had not been dealt with in the Convention because of the very sensitive issues it raised. The future could not be predicted, however, and there was nothing to indicate that progress could not be made in that regard.

23. Replying to Mr. Economides’ comment, he said that the recommendation in question did not aim to promote collective action, but to help the legal departments of ministries of foreign affairs. He also requested the Commission to forgive him for not having referred to the Venice Commission, which was one of the most important bodies and it was doing remarkable work in the field of constitutional law. He would see to it that the documents it adopted were transmitted to the International Law Commission.

24. Mr. PELLET, referring to Mr. Dugard's question and the reply by the Observer for CAHDI, asked the Observer whether there were cases in which collective action had been successful and had prompted the reserving State to change its position.

25. Mr. BENÍTEZ (Observer for the Ad Hoc Committee of Legal Advisers on Public International Law of the Council of Europe) said that there had been cases in which such action had led the reserving State to change its position, but he could not think of any at the moment. He would stress, however, that the success of such action should not be judged on the basis of whether or not it led the reserving State to amend or withdraw its reservation. The dialogue in question was valuable especially because it gave the other States parties information which they had not had before and on the basis of which they could decide not to formulate objections to reservations.

26. The CHAIRMAN said that, in his excellent statement, the Observer for CAHDI had perhaps not placed enough emphasis on the similarity of the topics which the Council of Europe and the Commission considered and which enabled the two bodies to benefit from each other's work. For example, the chapter of the European Convention on Nationality relating to State succession had been very useful to the Commission in its work on nationality in relation to the succession of States.

27. In conclusion, he once again thanked the Observer for CAHDI and expressed the hope that its cooperation with the Commission would continue.

Draft report of the Commission on the work of its fifty-first session (*continued*)

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

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (*continued*)

Commentaries to articles 9 and 10

The commentaries to articles 9 and 10 were adopted.

Commentary to article 11

28. Mr. PELLET said that the use of the words "grey area" in the last sentence of paragraph (6) was unfortunate because the jurisdictions of States concerned were well established in such a case. He would prefer that sentence to end with the words "to persons concerned within competing jurisdictions of States concerned".

29. Referring to the amendment which he had proposed (2603rd meeting) to paragraph (3) of the commentary to article 7 and which the Commission had adopted, he said that he had suggested that the term "attribution" should be used instead of the term "granting" because it meant a voluntary act by the State. In fact, quite the opposite should be stated, namely, that the Commission had preferred to use the word "attribution" in order to show that the acquisition

of the new nationality was not always the result of an explicit decision by the State. In general, moreover, he continued to regret the fact that the words "effective link" had been replaced by the words "appropriate link".

30. The CHAIRMAN thanked Mr. Pellet for referring back to paragraph (3) of the commentary to article 7. Although his original proposal had been adopted, it had been causing the secretariat problems. The sentence as he had just amended was the one that would be included in the commentary.

31. Mr. ROSENSTOCK (Rapporteur), supported by Mr. KABATSI, said that, in the last sentence of paragraph (6) of the commentary to article 11, it would be better to refer to "overlapping" jurisdictions rather than "competing" jurisdictions.

32. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the commentary to article 11, as amended by Mr. Pellet and the Rapporteur. The last part of the last sentence of paragraph (6) would thus read: "in resolving problems of attribution of nationality to persons concerned falling within an area of overlapping jurisdictions of States concerned."

It was so agreed.

The commentary to article 11, as amended, was adopted.

Commentary to article 12

33. Mr. PELLET said that, in view of the very lengthy discussion of the question, it would be going too far to say that "the said problem did not arise" at the end of paragraph (6).

34. Mr. ROSENSTOCK (Rapporteur), referring to the comment by Mr. Pellet, proposed that the end of paragraph (6) should read: "the said problem would not arise with frequency."

35. Mr. CRAWFORD said that the particular features of the family concerned in each case must be taken into consideration. He could nevertheless support the amendment proposed by the Rapporteur.

36. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the commentary to article 12, with the amendment to paragraph (6) proposed by the Rapporteur.

It was so agreed.

The commentary to article 12, as amended, was adopted.

Commentary to article 13

The commentary to article 13 was adopted.

Commentary to article 14

37. Mr. PELLET, supported by Mr. CRAWFORD, said that he disagreed with the excessive and entirely political

caution which seemed to have prevailed during the drafting of the commentary to article 14, and particularly its paragraph (2). Two or three examples must be given of “recent experience”, as referred to in the last sentence, possibly in a footnote.

38. Mr. ROSENSTOCK (Rapporteur) said that he was prepared to work with the Secretary of the Commission to draft a footnote along the lines indicated by Mr. Pellet.

39. Mr. TOMKA, supported by Mr. SIMMA, proposed that the consideration of the commentary to article 14 should be suspended until the footnote had been prepared.

40. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the commentary to article 14 on the understanding that the necessary changes would be made by the secretariat.

It was so agreed.

The commentary to article 14 was adopted on that understanding.

Commentaries to articles 15 to 18

The commentaries to articles 15 to 18 were adopted.

Commentary to article 19

41. Mr. PELLET said that he had a problem with the last sentence of paragraph (1), and especially with the words “negative role”, which were not clear enough. The words “from the standpoint of general principles and custom” were also awkward, since the principles in question derived from custom and there should be no opposition between the two.

42. Mr. ROSENSTOCK (Rapporteur) said that the decision of States to grant their nationality to certain persons depended on their internal law. International law came into play only when that decision gave rise to a problem, for example, when it created cases of statelessness or prevented family reunion. The wording in question was therefore intended to indicate that there was a point where internal law ended and the international law of nationality began. That was how the “negative role” of international law was to be understood.

43. Mr. CRAWFORD recalled that the Commission had had a lengthy substantive debate on that point at the forty-ninth session, in 1997.⁹ It had been shown, for example, that, when State A invaded State B, it could not try to impose its nationality on the inhabitants of State B. The words “In the final analysis” at the beginning of the sentence were not appropriate. They should be replaced by the words “In most cases”.

44. Mr. SIMMA said that he agreed with the Rapporteur’s interpretation of the words “negative role”. With regard to Mr. Pellet’s second comment, if “general principles” meant the principles referred to in Article 38, para-

graph 1 (c), of the Statute of the International Court of Justice, they should be referred to separately.

45. Mr. PELLET said that, in his opinion, the principles in question were the customary principles of international law, not the general principles of law referred to in the Statute of the Court. He would like the last sentence to be replaced by wording which would show that “In the final analysis, the general principles of international law concerning nationality are limitations on the exercise of the discretionary power of States”.

46. Mr. ROSENSTOCK (Rapporteur) said that that wording missed the point of the sentence. It had to be made clear that, although the attribution of nationality was primarily an internal law matter, it was not so in all cases.

47. Mr. PELLET proposed that the last sentence should be amended to read: “In the final analysis, although nationality pertains essentially to the internal law of States, the general principles of the international law of nationality constitute limits to the discretionary power of States.”

48. The CHAIRMAN said that that wording solved the problem and that, if he heard no objection, he would take it that the Commission agreed to that proposal.

It was so agreed.

49. Mr. GAJA said that, in paragraph (3), the words “the successor State may be limited in its discretion to extend its nationality to persons who lack an effective link with the territory concerned” might give the impression that States could refuse their nationality and thus create cases of statelessness, whereas that was exactly what the draft articles were trying to prevent. In order to avoid that impression, he proposed that the following sentence should be added at the end of paragraph (3): “Moreover, the judgment in the *Nottebohm* case dealt only with the admissibility of a claim for diplomatic protection and did not imply that a person could be generally treated as stateless.”

50. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to that proposal.

It was so agreed.

The commentary to article 19, as amended, was adopted.

Commentary to Part II

51. The CHAIRMAN, replying to a question by Mr. KUSUMA-ATMADJA, said that the Commission had already included some paragraphs of a general nature as a commentary to the draft articles as a whole. The same procedure was being followed at the beginning of part II. The solution was an excellent one.

52. Mr. PELLET, replying to a comment by Mr. KATEKA, proposed that paragraph (1) should be split in two and that paragraph (2) should begin with the words: “As regards the criteria used ...”. That was the point at

⁹ See *Yearbook ... 1997*, vol. I, 2486th meeting, paras. 8 et seq., and 2499th meeting, paras. 50-64.

which the commentary went from general considerations to detailed explanations.

The commentary to Part II, as amended, was adopted.

Commentary to article 20

53. Mr. PELLET said that he had doubts about several footnotes. In his opinion, it was a bad idea, in a final commentary, to refer the reader to earlier reports, which either provided important information and should be reproduced or were not relevant and should be passed over in silence. The commentary must be a text that could stand on its own. Perhaps the Rapporteur could make some changes along those lines.

54. Mr. SIMMA said that Mr. Pellet's point was well taken, but some footnotes referred to over 25 paragraphs. It would be very difficult to summarize, much less reproduce, such lengthy passages of earlier reports. Using "op. cit." was also open to criticism because it was not always easy to know which work was being referred to.

55. Following an exchange of views on the presentation of footnotes and bibliographical references in which Mr. CRAWFORD, Mr. KATEKA and Mr. SIMMA took part, the CHAIRMAN said that the system used in the United Nations was well established and practically impossible to change.

56. Mr. PELLET said that, although it was understandable that the Commission should condense its commentaries as much as possible, they might be less helpful for those in the practice of international law. In any event, referring to lengthy passages of earlier reports was not the usual procedure, since that was tantamount to endorsing paragraphs which had not been reconsidered and on which some members might have reservations to formulate.

57. Mr. ROSENSTOCK (Rapporteur) said that, in his view, the commentary must be easy to use and therefore as concise as possible. Footnotes provided guidance for readers who wanted to go into greater detail on particular points.

58. Mr. SIMMA said that all the footnotes which referred to old reports dealt with paragraphs describing State practice. If every example of such practice was to be included, the commentary would double in volume and would be much less easy to use, as Mr. Rosenstock had pointed out.

59. The CHAIRMAN said that the Commission might adopt the commentary under consideration, on the understanding that the footnotes referring to some passages of earlier reports meant not that it endorsed the contents of those reports, but that it simply wanted to refer to examples illustrating the recent practice of States.

The commentary to article 20 was adopted.

The meeting rose at 1.15 p.m.

2605th MEETING

Monday, 19 July 1999, at 10.05 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Baena Soares, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pellet, Mr. Rosenstock, Mr. Tomka, Mr. Yamada.

State responsibility¹ (continued)* (A/CN.4/492,² A/CN.4/496, sect. D, A/CN.4/498 and Add.1-4,³ A/CN.4/L.574 and Corr.1 and 3)

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. Mr. CANDIOTTI (Chairman of the Drafting Committee), introducing the report of the Drafting Committee on the draft articles on State responsibility (A/CN.4/L.574 and Corr.1 and 3), said that the Committee had held 26 meetings at the current session of the Commission and that 13 of them had been devoted to State responsibility.

2. At the fiftieth session, the Drafting Committee had begun the second reading of the draft articles on State responsibility and had been able to complete work on all the articles referred to it at that session.⁴ It was the Commission's practice not to take action on articles received from the Committee in the absence of commentaries and also to defer the adoption of articles on second reading until the Committee had considered all the articles on the topic. The Committee was thus able to make changes in earlier articles, if necessary, in the light of subsequent articles. It was transmitting the articles to the Commission on that understanding, and recommending that it should take note of its report.

3. At the current session the Drafting Committee had had before it the articles in chapters III (Breach of an international obligation), IV (Responsibility of a State in respect of the act of another State) and V (Circumstances precluding wrongfulness) of part one of the draft. The Commission had discussed those chapters extensively and, in preparing the articles, the Committee had taken account of the comments and decisions made.

* Resumed from the 2600th meeting.

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook ... 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

² Reproduced in *Yearbook ... 1999*, vol. II (Part One).

³ Ibid.

⁴ For the text of the draft articles, see *Yearbook ... 1998*, vol. I, 2562nd meeting, p. 287, para. 72.