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Summary record of the 2491st meeting

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Juridical Committee for participating in what had proved a very productive exchange of views.

The meeting rose at 12.10 p.m.

2491st MEETING

Wednesday, 11 June 1997, at 10 a.m.

Chairman: Mr. Alain PELLET

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

Cooperation with other bodies (*continued*)

[Agenda item 9]

STATEMENT BY THE OBSERVER FOR THE EUROPEAN COMMITTEE ON LEGAL COOPERATION

1. The CHAIRMAN invited Mrs. Requena, Observer for the European Committee on Legal Cooperation, to address the Commission.

2. Mrs. REQUENA (Observer for the European Committee on Legal Cooperation) said that she was also speaking as representative of the Committee of Legal Advisers on Public International Law (CAHDI). The Council of Europe, particularly the intergovernmental committees attached to its Directorate of Legal Affairs, had always endeavoured to cooperate closely with the Commission, which had observer status with the European Committee on Legal Cooperation (CDCJ).

3. The Council of Europe, an intergovernmental organization established by statute,¹ currently had 40 member States. Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, and Georgia had applied for membership. Canada, Japan and the United States of America had observer status with the organization and four countries—Armenia, Azerbaijan, Bosnia and Herzegovina, and Geor-

gia—had special guest status with the Parliamentary Assembly. The special guest status of Belarus had been suspended and was under discussion in the Parliamentary Assembly.

4. The Directorate of Legal Affairs of the Council of Europe was entrusted with a number of functions, in particular providing legal advice to the Secretary-General and other bodies of the Council of Europe, assisting the Secretary-General in his duties as depositary of the 165 European treaties, implementing the Intergovernmental Programme of Activities in the legal field adopted each year by the Committee of Ministers, providing the secretariat for the Venice Commission, and implementing legal cooperation programmes with the new democracies of the countries of Central and Eastern Europe, particularly under the Demo-Droit and Themis programmes. The Programme of Intergovernmental Activities was carried out by four operational divisions.

5. The functions of CDCJ, which came under the direct authority of the Committee of Ministers of the Council of Europe, fell into three main categories: developing European legal cooperation among member States with a view to modernizing private and public law, including administrative and procedural law; examining the functioning and implementation of Council of Europe conventions, agreements and recommendations falling within its competence with a view to adapting them and improving their practical application; and adopting opinions for the Committee of Ministers on legal matters falling within its competence. The meetings of CDCJ were attended by representatives of the 40 member States and observers for non-member States of the Council of Europe or for international intergovernmental or non-governmental organizations.

6. The Committee had adopted a large number of draft international legal instruments, some binding and others not. Its seven subordinate committees included the “Data Protection” project group, which had drafted the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data and several recommendations, including one on the protection of medical data which had recently been adopted by the Committee of Ministers. The Committee of Experts on Family Law had drafted the European Convention on the Exercise of Children’s Rights, which had been opened for signature on 25 January 1996 and whose purpose was, in accordance with article 4 of the Convention on the Rights of the Child, to promote children’s rights taking into account the best interests of the child.

7. The Committee of experts on nationality had drafted the European Convention on Nationality,² which would be opened for signature by States on 7 November 1997. The Convention covered all major aspects of nationality and also sought to guarantee fair and equitable procedures in respect of the processing of requests for nationality and the filing of appeals. In view of the numerous developments in Europe since the drafting of the Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality, the strict application of the principle of avoidance of multiple

¹ Statute of the Council of Europe (London, 5 May 1949) United Nations, *Treaty Series*, vol. 87, p. 103; see also Council of Europe, *European Treaty Series*, No. 1 (London, 1949) (amendments and texts of statutory character adopted later have been numbered 6, 7, 8 and 11).

² See 2477th meeting, footnote 7.

nationality had been reconsidered. The European Convention on Nationality recognized that States should be free to take their particular situation into account in deciding to what extent they would authorize multiple nationality; it therefore did not amend the Convention on the reduction of cases of multiple nationality and military obligations in cases of multiple nationality and was compatible with it. The European Convention on Nationality would enter into force when it had been ratified by three Council of Europe member States. Still on the subject of nationality, three meetings organized in 1996 by the Council of Europe in conjunction with UNHCR had led to the adoption of the Principles on citizenship legislation concerning the Parties to the Peace Agreements on Bosnia and Herzegovina designed to facilitate implementation of the Dayton/Paris Peace Agreements in that area.³

8. CAHDI, which had replaced a subsidiary organ of CDCJ, had been operating under the direct authority of the Committee of Ministers since 1991. Its terms of reference provided for exchanges of views and consideration of matters of public international law at the request of the Committee of Ministers or CDCJ or on its own initiative. Composed of experts appointed by the member States of the Council of Europe and preferably selected from among legal advisers attached to ministries of foreign affairs, it also admitted observers for non-member States of the Council of Europe or for international intergovernmental organizations. The business at CAHDI meetings was generally discussed under three main headings: general questions of international law, such as State succession and reservations to treaties, questions relating to public international law in the context of the United Nations and questions relating to public international law in the European context.

9. At its March 1997 meeting, CAHDI had adopted a draft recommendation on debts incurred by diplomatic missions, permanent missions and "doubly accredited" diplomatic missions and their staff, which was designed to tackle problems arising from indebtedness of diplomatic missions, which tarnished a country's image abroad and had an adverse impact on the entire diplomatic corps. It was therefore necessary to find solutions under international law that took account of the interests and rights of creditors.

10. CAHDI had also given extensive consideration to the law and practice relating to reservations to treaties. It had noted that, given the major omissions in the 1969 Vienna Convention and pending the emergence of new rules of international law, a coordinated line of action by a large group of States representing different legal traditions such as the member States of the Council of Europe could contribute decisively to the development of more consistent State practice in that area. CAHDI was taking account of the Commission's work on the subject—particularly the questionnaire circulated by its Special Rapporteur, Mr. Pellet⁴—in order to avoid duplication. The role of CAHDI was, in effect, more political than technical.

³ See Council of Europe, Committee of Ministers, 581st meeting of the Ministers' Deputies, decision 581/2.4 (13-15 January 1997). To be distributed as document DIR/JUR (97) 3.

⁴ See 2487th meeting, footnote 16.

11. At its March 1997 meeting, CAHDI had adopted a draft recommendation on the amended model plan for the classification of documents concerning State practice in the field of public international law, which was to replace a 1968 resolution on the subject.⁵ It recommended to Governments of member States of the Council of Europe which had not yet adopted a final plan for their registers of national practice to conform, within the bounds of compatibility of available documents, to the model plan annexed to the draft recommendation. The latter referred explicitly to article 24 of the statute of the Commission and also specified that the Secretary-General of the Council of Europe was to transmit the model plan to the Secretary-General of the United Nations, requesting him to circulate it to competent United Nations bodies, particularly the Commission, as a first contribution by the Council of Europe to the United Nations Decade of International Law.⁶

12. CAHDI had also established a pilot project on the collection and dissemination of documentation concerning State practice with respect to State succession and questions of recognition, covering the period 1989-1994. The pilot project was to be processed by a scientific institute and published.

13. With regard to cooperation between CAHDI and the Commission, she felt it would be desirable for the latter to have observer status with the Committee.

14. Other activities of the Directorate of Legal Affairs of the Council of Europe included the drafting of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, which laid down general principles and rules for the protection of human beings from applications of biology and medicine. Adopted on 19 November 1996 by the Committee of Ministers, the Convention had been opened for signature on 7 April 1997 and had already been signed by 22 States. It was to be supplemented by four protocols, concerning organ transplants, medical research, protection of the human embryo and foetus, and problems related to genetics.

15. In addition, the Multidisciplinary Group on Corruption (GMC) established by the Council of Europe in September 1994 had drawn up a Programme of Action against Corruption and taken first steps to implement some of the programme activities. For example, in December 1996, it had considered the preliminary draft framework convention prepared by the working group on administrative and constitutional law matters (GMCA). Its working group on penal law matters (GMCP) had set about preparing a preliminary draft criminal convention and the working group on civil law matters (GMCC) had carried out a study on the possibility of drafting a convention on civil remedies for compensation of damages resulting from acts of corruption.

16. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, designed to

⁵ See Council of Europe, Committee of Ministers, resolution (68) 17 of 28 June 1968.

⁶ Proclaimed by the General Assembly in its resolution 44/23.

restructure the body responsible for supervising the Convention, had been ratified by 33 States. The single structure, replacing the existing European Commission and Court of Human Rights with a new permanent court, should, in principle, enter into force in 1998.

17. Lastly, the Second Summit of the Council of Europe, of Heads of State and Government of the member States, to be held in Strasbourg in October 1997, would provide an opportunity to focus on the contribution of the Council of Europe to the unity of the continent and its role in the European institutional context.

18. The CHAIRMAN thanked the Observer for the European Committee on Legal Cooperation for the detailed information she had provided. He invited the members of the Commission to speak first on substantive issues and then on modalities for possible cooperation between the Commission and Council of Europe bodies.

19. Mr. SIMMA, recalling the statement made at the preceding meeting by the representative of the Inter-American Juridical Committee on the region's action to combat corruption and on the efforts apparently being made by OECD in the same field, asked about the modalities for and the extent of cooperation and coordination between the Council of Europe and OAS and OECD in combating corruption. Several years before, the Commission on Human Rights had appointed a Special Rapporteur on a topic that at least partially covered that of corruption.

20. Mrs. REQUENA (Observer for the European Committee on Legal Cooperation) said that OECD had already elaborated a draft convention on corruption that should in principle not overlap with the instrument prepared by the Council of Europe, since the Council had been represented at all the OECD meetings. Representatives of OECD had also participated in all the relevant meetings of the Council of Europe and had contributed to the preparation of the framework convention on corruption, as well as to other preliminary draft conventions. OAS representatives had also taken part in those meetings. The Council of Europe thus hoped it was not duplicating work that had already been done, but that it was, rather, building on that work in order to achieve a result that would be acceptable to all States. The basic principle was that corruption was an international problem which affected all countries and could hardly be solved only by means of sectoral arrangements.

21. Mr. SIMMA, referring to the relationship between regionalism and universalism in the development of international law, said that the Commission's work on the two major topics under consideration at the current session was being carried out in parallel with the work being done by the Council of Europe. In the case of nationality in relation to the succession of States, the two types of work were mutually complementary, although there were also some differences, which prompted some persons to say

that the Commission should adopt the solutions worked out at the European level, as in the Venice Declaration.⁷

22. On the topic of reservations to treaties, where the emphasis was on human rights treaties, there were also differences between the solutions proposed by the Special Rapporteur in his report and those found in the Convention for the Protection of Human Rights and Fundamental Freedoms, for example. The community of human rights defenders was somewhat concerned that the solutions which the Commission might adopt on matters such as the distribution of competence between the treaty bodies and States parties might undermine the gains made within the European system for the protection of human rights. The question was therefore whether the work on the development of international law was being regionalized and divided up between the United Nations and European institutions and, if so, whether that was a positive trend.

23. Mrs. REQUENA (Observer for the European Committee on Legal Cooperation) said that regionalism in the field of human rights could be attributed to the fact that it was easier to set standards as between similar legal systems, but that did not mean that agreement at the international level was impossible. She did not believe, however, that the development of international law was being divided up. For example, on the topic of reservations to treaties, the work done by the Council of Europe was not restricted to regional human rights treaties, but covered all of the universal legal instruments, such as the Convention on the Rights of the Child.

24. Mr. LUKASHUK, noting that the Council of Europe had a number of subsidiary bodies involved in action to combat corruption, asked how the Commission could take part in the work of those bodies.

25. Mrs. REQUENA (Observer for the European Committee on Legal Cooperation) said that there was no problem with the principle of such cooperation, but there was a procedure that had to be followed. As a United Nations body, the Commission could officially request the Committee of Ministers to grant it observer status in European bodies. The work of the Multidisciplinary Group on Corruption was open to the largest possible number of international organizations and other interested bodies.

26. Mr. ECONOMIDES, welcoming the wealth of information provided by the Observer for the European Committee on Legal Cooperation on the functioning of two committees of which he had long been a member and of which he had even been privileged to serve as chairman, said that, with regard to regionalism, the Council of Europe had made considerable progress on the question of human rights, as shown, *inter alia*, by the large body of rules which had been drafted by the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment and were already being applied in practice and existed only in Europe. On other questions of public international law, however, the Council of Europe's legal bodies usually followed established trends.

27. The report by the Observer for the European Committee on Legal Cooperation had been very instructive,

⁷ See 2475th meeting, footnote 22.

but had dealt only with two of the Council of Europe's legal bodies. Perhaps in future, information could be given on the activities of other bodies whose work was of interest to the Commission. The Venice Commission, for example, had carried out a comparative study of the relationship between international law and internal law, had looked into the effects of succession of State on the nationality of natural persons and was currently analysing the legal foundations of foreign policy.

28. The CHAIRMAN said that several members of the Commission had told him that they would like to have more information on the Venice Commission. Mr. Economides was in the best position to provide details on that body, of which he was a member.

29. Mr. ECONOMIDES said that the Venice Commission had been set up in 1990 by the Council of Europe on the initiative of Italy.⁸ Although it had been established on the basis of a partial agreement, only the United Kingdom did not take part in its work. It also had associate members or observers, including many from the former Soviet republics and a number of non-European States, such as Canada, the United States of America and Japan. All told, about 50 States parties, associate members and observers took part in its work, which was divided up into four three-day sessions each year. Its main activity was to help countries moving towards democracy and a market economy to consolidate their democratic institutions. It provided them with opinions on their constitutions and major legislative texts, such as those establishing constitutional courts, electoral laws, and the like. Constitution-ists accordingly accounted for the majority of the members of the Venice Commission, ahead of international law and private law specialists. The Venice Commission's second activity was the organization of seminars on democratic institutions and the consideration of general questions such as those already mentioned.

30. Mr. MIKULKA said that in his work as Special Rapporteur on the topic of nationality in relation to the succession of States, he had always had very useful contacts with jurists from the Council of Europe and he hoped that that fruitful cooperation would continue. He had noted a discrepancy between the Principles on citizenship legislation concerning the Parties to the Peace Agreements on Bosnia and Herzegovina with a view to the implementation of the Dayton/Paris Peace Agreements⁹ and the principles set out in the European Convention on Nationality. Whereas article 18 of the Convention established the principle that each State party concerned must take account of the criteria, *inter alia*, of genuine and effective link, habitual residence, will of the person concerned and territorial origin of that person, the Principles on citizenship legislation concerning the Parties to the Peace Agreements on Bosnia and Herzegovina contained no reference to the will of the persons concerned or to the right of option and gave considerable weight to secondary nationality as compared to habitual residence. He therefore wondered whether the same experts had drafted both the Convention and the Principles on citizenship legislation concerning the Parties to the Peace Agreements on Bosnia and Herzegovina and whether the absence of the

right of option and the considerable weight given to secondary nationality in the Principles could be explained by the resistance of the States concerned.

31. Mrs. REQUENA (Observer for the European Committee on Legal Cooperation) explained that the European Convention on Nationality had been drafted by an inter-governmental committee of experts, whereas the Principles on citizenship legislation concerning the Parties to the Peace Agreements on Bosnia and Herzegovina had been the work of experts chosen by agreement with the parties. The two groups were therefore not identical. As to the absence of the criterion of the will of the persons concerned, the Principles nevertheless stipulated that no one could be arbitrarily deprived of his or her citizenship or of the right to change it, which was one way of taking into account the will of the persons concerned. The criterion of secondary nationality was an important aspect of the real-life situations to which the Principles were to apply.

32. Mr. GALICKI said that he was a member of the Committee of experts on nationality of the Council of Europe and in that capacity had participated in the drafting of the European Convention on Nationality. There had been no real cooperation between that Committee and the authors of the Principles on citizenship legislation concerning the Parties to the Peace Agreements on Bosnia and Herzegovina. Nevertheless, as Mr. Mikulka had indicated, the Convention did set out the four major criteria in the context of the succession of States. The Committee of experts on nationality was continuing to work on new recommendations aimed at facilitating the implementation of the Convention and at filling in some of its gaps because, in drafting the Convention, political realism had been necessary in order to achieve the largest possible acceptance of that instrument. The relationship between regionalism and universalism reflected a difference of objectives rather than a contradiction and could therefore lead to cooperation and mutual assistance in solving problems. For example, UNHCR had made a useful contribution to the drafting of the European Convention on Nationality.

33. The CHAIRMAN asked whether the revision of the Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality had been assigned to the same Committee of experts on nationality.

34. Mrs. REQUENA (Observer for the European Committee on Legal Cooperation) said that, while some amendments had been made to the Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, there were in principle no plans to revise it.

35. Mr. PAMBOU-TCHIVOUNDA recalled that the Commission was giving some thought to the substance of one of the topics under consideration, namely, international liability for injurious consequences arising out of acts not prohibited by international law. One of the reasons for keeping the topic under review might be the need to control and regulate the transnational networks and information superhighways that were increasingly encircling mankind and having an impact on human rights, States, peoples and the future of everyone. He would

⁸ See 2476th meeting, footnote 10.

⁹ See footnote 3 above.

therefore like to know whether any of the Council of Europe's many committees were considering those issues.

36. Mrs. REQUENA (Observer for the European Committee on Legal Cooperation) said that the question of international liability was dealt with from time to time by various committees when other activities were under consideration, but it was not a subject of separate study. Also, the question of information superhighways was dealt with in the Council's Committee of Experts on Legal Data Processing and other bodies concerned with the new technologies.

37. Mr. LUKASHUK said he regretted that he was unable to agree entirely with the Observer for the European Committee on Legal Cooperation on forms of interaction between the Commission and the Committee though it was a question that was fundamental for the work of the Commission. Admittedly, the Commission could participate effectively in the work of the Committee as an observer, but the task conferred on it by its mandate was more general, namely, to coordinate activities with the bodies that dealt with the codification and progressive development of international law so as to avoid any fragmentation, or risk of fragmentation, of the codification effort.

38. The CHAIRMAN said that, in his view, it was a good time to reflect on relations between the Commission and the bodies in question. That matter was governed by article 26 of the Commission's statute, on the basis of which the Commission had, over the years, developed somewhat loose cooperative arrangements that were reflected either in the fleeting and temporary presence of representatives of those bodies at a meeting of the Commission or in the equally fleeting and temporary presence of the Chairman of the Commission, or his representative, at their annual meetings. It was not true cooperation, therefore, but at the very most, a mutual exchange of information. That was regrettable, in his view, and he wondered whether the Commission should not make a special effort to step up its cooperation with the bodies with which it already had links and also, where appropriate, to diversify it by extending it to other competent bodies. He noted in that connection that the Observer for the European Committee on Legal Cooperation had stated that CAHDI would like the Commission to apply for observer status with it. That was certainly possible, although the Commission must have the necessary funds. It was not enough for the Commission and the bodies with which it had relations to keep each other mutually informed of their respective work. It would be far more interesting, for example, if the Special Rapporteur for the topic of reservations to treaties could really participate as an observer in the work of CAHDI on that topic and vice versa. Another problem about relations with the European Committee on Legal Cooperation was that tradition dictated that it was an official of the Council of Europe, and not a member of the Committee who addressed the Commission.

39. He invited members' comments on the cooperative arrangements to be established between the Commission and other bodies and, in particular, the European Committee on Legal Cooperation, CAHDI, and the Inter-Ameri-

can Juridical Committee, whose representatives were present at the meeting.

40. Mr. HAFNER said that, admittedly, the question of cooperation between the Council of Europe and the Commission had already been dealt with, but it required further scrutiny for the benefit of both parties.

41. For example, at the beginning of September, CAHDI held one of its annual meetings during which it was also required to consider the work of the Commission. On that date, however, the Commission's report to the General Assembly on the work of its annual session was not yet ready. In recent years, CAHDI had had the benefit of information communicated by a member of the Commission, Mr. Eiriksson. As Mr. Eiriksson had just been elected a judge at ICJ, he wondered what could be done to continue that information process between the Council of Europe and the Commission.

42. Furthermore, it might be useful to intensify, through joint meetings, the exchanges of view between CAHDI and members of the Commission who came from the same region as that covered by the Council of Europe. Such a free exchange of views between an intergovernmental body like CAHDI and the independent experts who made up the Commission was bound to be fruitful.

43. The CHAIRMAN, referring to Mr. Hafner's first comment, said that CAHDI could perhaps plan its work in light of the publication of the Commission's report.

44. The Observer for the European Committee on Legal Cooperation had perhaps answered Mr. Hafner's second comment in part with her statement that CAHDI would like the Commission to be represented as an observer at its meetings. All the Commission had to do was to decide to apply for that observer status. Both personally and as Chairman of the Commission, he was somewhat hesitant about the idea of any undue regionalization of the Commission. It was composed of independent experts, and represented all the legal systems of the world. It would therefore be unwise for regional groups to take an unduly exclusive interest in the work carried out in their respective regions. It would not be a good idea to institutionalize a practice that would aim at reinforcing regional links, for it was the universal nature of the Commission that gave it its special character.

45. Mrs. REQUENA (Observer for the European Committee on Legal Cooperation) said she considered that it was necessary to ensure cooperation between the Commission and CAHDI as a means of avoiding overlap in the work on international law. It was true that, unlike the Commission, which was composed of experts, CAHDI was composed of the representatives of States, but those representatives were mostly, if not all, internationalists. Perhaps working relations could be established between the small CAHDI working groups that dealt with specific issues and the Commission, if the Commission and CAHDI considered that advisable. Obviously, that form of cooperation would have to be made official by according observer status.

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE (*concluded*)

46. Mr. ZELADA CASTEDO (Observer for the Inter-American Juridical Committee) said that the discussion called to mind a discussion that often took place in the Inter-American Juridical Committee when the question would come up of ways of increasing the effectiveness of cooperation between the bodies that operated in somewhat similar spheres of activity. The starting point and conclusion of such discussions were invariably the same: the exchange of information must be intensified. The question was how.

47. He personally believed that cooperation between the Commission and the Inter-American Juridical Committee, given the very nature of the latter, should go beyond a mere exchange of information, for which, incidentally, the information highways were currently being used. Also, the Committee was soon to have a home page on the Internet. Such cooperation should extend, for instance, to an exchange of experience in specific spheres of activity and to institutional interaction based on the comparative advantages of each of the bodies.

48. For example, because of features inherent in the development of the American system, the concerns of the western hemisphere were totally different from those in Europe. In particular, as America, very fortunately had not known any cases of the break-up or secession of States, it knew nothing of the problems of nationality connected with State succession. Its aim was integration and it would consider the matter in due course. On the other hand, because of its history, it was concerned about solutions that international law could provide to certain problems of migration or movement of persons between States or environmental protection at the transnational level or, again, the institution of a free trade regime in the Western hemisphere.

49. The CHAIRMAN said that the exchange of data necessarily presupposed discussions and meetings, on the basis of modalities and financing to be determined.

50. Mr. SIMMA said that some members of CAHDI had asked him to provide a written report on the Commission's work. If the Commission agreed, he was willing to make such a report available to members of CAHDI, in time for its September meeting, with a view to its publication in an academic journal, appending to it the text of the draft articles the Commission would have adopted.

51. The CHAIRMAN pointed out that it was the Commission that was invited to do so. It must therefore decide on the modalities of such cooperation.

52. Mr. Sreenivasa RAO said that the discussion was very interesting. The formal cooperation between the Commission and the regional legal bodies was certainly mutually beneficial and should be encouraged. But when, in times of financial constraint, that was not possible, it would be a good idea to introduce a system of flexible and informal cooperation under which the members of the Commission would each be required to make their contributions.

53. Mr. KATEKA said that he fully supported cooperation between the Commission and the regional legal bodies, provided, however, that the modalities of such cooperation were standardized and that all the bodies in question had the same status. The members of the Commission were, of course, free to participate in the work of any body, but in their personal capacity and not as representatives of the Commission if they had not received a mandate to do so.

54. The CHAIRMAN said that, to avoid any misunderstanding, he would point out that the Commission already had observer status with the three legal bodies and members of the Commission did participate in their work. CAHDI was, of course, a special case because it was actually a subcommittee governed by special rules. The problem should not be exaggerated, however.

55. He thanked the observer for the European Committee on Legal Cooperation and the observer for the Inter-American Juridical Committee for their contribution.

Mrs. Requena (Observer for the European Committee on Legal Cooperation) and Mr. Zelada Castedo (Observer for the Inter-American Juridical Committee) withdrew.

56. The CHAIRMAN said he regretted that the discussion had not resulted in any definite conclusions. Accordingly, he would propose that, at its next meeting, the Planning Group should consider possible forms of cooperation between the Commission and the regional legal bodies and even world bodies such as ICJ in the light of the exchange of views that had just taken place.

Nationality in relation to the succession of States (*continued*) (A/CN.4/479, sect. B, A/CN.4/480 and Add.1,¹⁰ A/CN.4/L.535 and Corr.1 and Add.1)

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPporteur
(*continued*)

PART II (Principles applicable in specific situations of succession of States) (*continued*)

SECTION 3 (Dissolution of a State) (*continued*)

ARTICLE 19 (Scope of application)

ARTICLE 20 (Granting of the nationality of the successor States) and

ARTICLE 21 (Granting of the right of option by the successor States)

57. The CHAIRMAN invited members' comments on the observation made by Mr. He (2490th meeting) to the effect that, if the Commission wished to retain the concept of secondary nationality in article 20 (Granting of the nationality of the successor States), subparagraph (b) (ii),—a concept alien to many national, even federal systems—it should define that concept in a separate article.

¹⁰ Reproduced in *Yearbook . . . 1997*, vol. II (Part One).

58. Mr. CRAWFORD said that secondary nationality was a concept of internal law which was in the nature of an exception and could be interpreted differently according to each system. It was true that, where a system of secondary nationality existed in a particular State, that secondary nationality was a criterion which could be taken into account in the context of a State succession and which could reflect the existence of a special connection or of an agreement on the distribution of the population as between two entities that separated from each other. But that criterion should not be placed on the same footing as the far more reliable criterion of habitual residence; hence the need to draw a clear distinction between the two subparagraphs in question. Overall, he opposed the inclusion in the body of the article of a definition of secondary nationality, as it was not a general concept.

59. Mr. MIKULKA (Special Rapporteur) pointed out that, in the text of article 20, the criterion of secondary nationality came second after the criterion of habitual residence. He recalled that, in the General Framework Agreement for Peace in Bosnia and Herzegovina and the annexes thereto (collectively the "Peace Agreement") (Dayton Agreement),¹¹ the emphasis had been placed on secondary nationality, considered to be a fundamental criterion, whereas, in article 20, the main criterion was habitual residence, secondary nationality being of a purely residual nature.

60. Mr. BROWNLIE said that he shared Mr. Crawford's misgivings about the consequences of introducing the concept of secondary nationality in the body of the article.

61. The CHAIRMAN said that the question boiled down to whether the concept of secondary nationality, which had to be treated with caution even if recent practice, particularly in Eastern Europe, suggested that it already appeared to exist, should be provided for in article 20.

62. Mr. Sreenivasa RAO noted that the criterion was applied mainly in Europe; in other regions, particularly in Asia, the concept of secondary nationality was practically unknown. In reality, even where two nationalities, a federal nationality and a secondary nationality, coexisted within the same system, only the federal nationality counted at the international level. It was, however, clear that secondary nationality could play a role in cases of State succession. As the Special Rapporteur pointed out in paragraph (12) of the general commentary to Part II (Principles applicable in specific situations of succession of States) contained in the third report (A/CN.4/480 and Add.1) of the Special Rapporteur, the application of the criterion of secondary nationality had been viewed in the Sixth Committee as an "option that recommended itself on account of its simplicity, convenience and reliability".¹² Nevertheless, he agreed with Mr. Crawford that the Commission should avoid defining the concept and creating a general category which did not in fact exist.

63. Mr. CRAWFORD explained that he was not proposing that any reference to secondary nationality should be

deleted; the concept could be of some importance when it existed within a specific national legal system and reflected a genuine social link between a group of persons and one of the components of the State concerned. That was precisely the idea that emerged from article 20, subparagraph (b) (ii). The only problem with the text was the use in the English version of the expression "category of secondary nationality", for the reason that no such category existed. That drafting problem apart, he would have absolutely no objection to indicating, for example in the commentary to the article, that, even if the concept did not exist in international law, it was nevertheless used in practice, had indeed been used very recently and should therefore be taken into consideration.

64. Mr. CANDIOTI said that he shared Mr. Crawford's concerns. The concept of secondary nationality was unknown to the countries of Latin America, many of which were federal States, and the Commission should therefore beware of attributing a universal character to it. Suitable wording should be found to reflect the fact that the criterion was applied in certain countries, without making it a general criterion.

65. Mr. GALICKI said he thought that the expression "secondary nationality" should be retained in article 20 because the concept had appeared in international relations and could be a decisive criterion for protecting certain persons against statelessness. However, since the concept was not a general one, it would be dangerous to define it, especially as the term "nationality" itself was not defined. What should be retained was simply the idea that the criterion could be applied in some cases.

66. The CHAIRMAN said that the term "nationality" did not have to be defined because its meaning was known to everyone and it was generally accepted in international law, but that was not the case with the expression "secondary nationality". That was an entirely new concept and it was essential to define it. The point at issue was whether the expression should be retained in the body of article 20 or deleted. The latter course would mean recasting subparagraph (b) (ii), which could be replaced by wording containing a reference to "genuine link", with an explanation in the commentary that "genuine link" should in certain cases be taken to mean "secondary nationality".

67. Mr. MIKULKA (Special Rapporteur) said that the concept of secondary nationality had not been invented in Eastern Europe. It was the criterion used for the granting of nationality when Singapore had separated from the Federation of Malaysia. Citizens of Singapore having both federal and Singaporean nationality had then recovered their Singaporean nationality, which had become their secondary nationality, but which they had already held before Singapore's entry into the Federation of Malaysia. The same thing had happened at the time of the separation of Syria and Egypt. He recalled that, in the earlier reports on nationality, the same importance had been attached to that criterion as to the criterion of habitual residence, whereas it currently took second place, although an essential role had been assigned to it in the Dayton Agreement. The Commission should think carefully before deleting it entirely, as States might be disinclined to accept a declaration which failed to include that element.

¹¹ See A/50/790-S/1995/999; and *Official Records of the Security Council, Fiftieth Year, Supplement for October, November and December 1995*, document S/1995/999.

¹² See A/CN.4/472/Add.1, para. 29.

68. In his view, the concept was perfectly clear and even clearer than that of habitual residence. The latter expression was used in international law, but not in the internal law of certain States, which preferred the term “domicile”; neither was it used in the Peace Treaty of Saint-Germain-en-Laye, where the term employed in articles 50, 64 and 70 was that of rights of citizenship (*pertinenza*), a concept based on birth to which the exercise of certain political rights in a specific territory was attached. He had no objection to replacing the expression “secondary nationality” by another, more appropriate one. He maintained, however, that the concept did exist, that it had been accepted and had appeared in practice and that it therefore could not be simply deleted and replaced by wording of a general nature.

69. The CHAIRMAN said that there was no question of completely dropping the reference to secondary nationality, but only of incorporating the concept in a more broadly worded formulation, which would be explained in the commentary.

70. Mr. SIMMA said that the concept of secondary nationality unquestionably existed and could play a role in the event of the dissolution of a State. It should therefore be mentioned directly in the text of article 20 and an attempt should be made to provide a definition. However, in order to avoid any misinterpretation, it might be best not to use the expression “secondary nationality”. The Drafting Committee could be entrusted with finding a more appropriate one.

71. Mr. BROWNLIE said that no one denied the existence of the concept of secondary nationality in practice. The question was whether it could be regarded as a general concept and whether the expression “secondary nationality” was recognized in international law. To his knowledge, it was not to be found anywhere. Clearly, the concept was specific to a small number of constitutional systems and the examples of the United Arab Republic and Singapore cited by the Special Rapporteur merely strengthened that impression. The utmost caution should therefore be exercised in connection with the use of the expression.

72. Mr. PAMBOU-TCHIVOUNDA said that the essential question was whether the concept was accepted in international law. The examples given by the Special Rapporteur were most interesting and it would be useful to hear in what relationship the two systems of nationality—federal and secondary—had operated in the cases in question. Further elucidation of that point would help the Commission to decide precisely how to handle the concept.

73. Mr. CRAWFORD repeated that a category of secondary nationality did not exist in international law and that the word “category” used in the English text of article 20, subparagraph (b) (ii), should be deleted or replaced by, for example, the word “system”. He had the impression that, in cases such as that of Czechoslovakia, where secondary nationality had been considered a relevant criterion, the secondary nationality system had already existed and that, in other contexts, it had simply been a matter of something like belonging to a local community. To propose establishing a new concept would therefore be dangerous. The best course would be to find a way of keeping the idea in the text that there were sys-

tems in which the concept in question, designated by one term or another, played a role and could be considered a relevant criterion for the attribution of nationality.

74. Mr. SIMMA said he thought that the text of article 20, subparagraph (b) (ii), did no more than recognize a concept which existed only in internal law and could be used only as a criterion for granting the nationality of the successor State “where the predecessor State was a State in which the category of secondary nationality of constituent entities existed”. He therefore saw no need to change the current wording of the article.

75. Mr. ROSENSTOCK said that it would be difficult not to take account of a concept which, while it did not exist in all countries, had played a considerable role in cases of State succession in Eastern Europe. Including a reference to the concept in the body of the article would simply mean recognizing that it was a possible solution to the problem of nationality in relation to the succession of States, without turning it into a general rule. The idea should therefore be retained, leaving it up to the Drafting Committee to amend the expression “secondary nationality”, which some members found unacceptable.

76. Mr. HAFNER said that the concept of *pertinenza* related not to nationality or, in other words, to the fact of belonging to a certain nation, but to belonging to a local community. It was therefore clear from the commentary that the Commission had to adopt a flexible approach towards the issue.

77. Mr. DUGARD, agreeing with Mr. Hafner, said that the commentary did not speak of nationality, but of citizenship, which was a concept in national or local law. In the South African Republic at the time of apartheid, for example, South African nationality had been granted to all persons residing in the country except those who had lived in the homelands. Those persons had had only the citizenship of the homeland in which they had resided and that type of citizenship had not been recognized by international law. He was therefore in favour of finding a solution to the problem raised by article 20 that would not give the concept of secondary nationality the status of a general principle.

The meeting rose at 1 p.m.

2492nd MEETING

Thursday, 12 June 1997, at 10.05 a.m.

Chairman: Mr. Alain PELLET

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk,