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Summary record of the 2494th meeting

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2494th MEETING

Tuesday, 17 June 1997, at 10.10 a.m.

Chairman: Mr. Alain PELLET

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Bennouna, Mr. Candioti, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Thiam, Mr. Yamada.

Welcome to participants in the International Law Seminar

1. The CHAIRMAN welcomed participants in the International Law Seminar, which was being held in accordance with a long-standing tradition. He trusted that they would find their stay with the Commission profitable and urged them not to be diffident in approaching members of the Commission to exchange ideas. It was worth noting that some members of the Commission had themselves attended the Seminar at one time and had found it most beneficial.

Cooperation with other bodies (*continued*)*

[Agenda item 9]

STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

2. The CHAIRMAN extended a welcome to Mr. Tang Chengyuan, Secretary-General of the Asian-African Legal Consultative Committee (AALCC), and invited him to address the Commission.

3. Mr. TANG CHENGYUAN (Observer for the Asian-African Legal Consultative Committee) said it was a singular honour for him to address the Commission, which represented the world's major legal systems. The Asian-African Legal Consultative Committee attached great significance to its long-standing ties with the Commission, which, in the course of his second term as Secretary-General of the Committee, he would endeavour to strengthen for the mutual benefit of both bodies. The Committee was deeply appreciative of the Commission's role in the progressive development and codification of international law and he wished to record his personal admiration for its contribution in that area.

4. In recent years the Commission had been represented at the meeting of the legal advisers of member States of AALCC, convened at United Nations headquarters in New York during the session of the General Assembly. The meeting held in 1996, which had been chaired by Mr. Goco, currently a member of the Commission, had been addressed by Mr. Sreenivasa Rao, speaking on behalf of the Chairman of the Commission at its forty-eighth session, Mr. Mahiou. He looked forward to welcoming the Chairman of the current session to the meeting to be held during the fifty-second session of the General Assembly, later in the year.

5. All the items on the Commission's current agenda were of great interest both to Governments in the African and Asian region and to the Committee itself, and he had been requested at the thirty-sixth session, held at Tehran from 3 to 7 May 1997, to acquaint the Commission with the Committee's views on them. The Committee had learned with appreciation that the formulation of the articles on the draft Code of Crimes against the Peace and Security of Mankind had been completed,¹ but the opinion had been expressed that in reducing the number of crimes, which formed the underlying *ratione materiae* of the Code, the Commission had perhaps sacrificed judicial idealism to political expediency.

6. During the Committee's consideration of the Commission's work on State responsibility, it had been noted that the draft articles included certain controversial aspects involving civil liability and international crimes that would have to be sorted out. One delegate had said that any attempt to expand existing concepts should be made only if that was in the broader interests of all States. Another had taken the view that the Commission's work on countermeasures, particularly in regard to circumstances precluding wrongfulness, would legitimize countermeasures as a tool that could be utilized by some powers and that the weaker States would have to bear the brunt of such measures. It had also been asserted that the principles governing peaceful settlement of disputes need not form an essential part of the draft. Reservations had been expressed about the compulsory arbitration procedures set forth in articles 58, 59 and 60,² on the ground that they ran counter to the principle that arbitration required the consent of the parties concerned and that they were also at variance with the Statute of ICJ, which stipulated that the consent of States constituted the basis of jurisdiction.

7. It had been noted in the Committee that the Commission had yet to find the proper direction in furthering its work on the topic of international liability for injurious consequences arising out of acts not prohibited by international law, but that the working group appointed by the Commission to consider the matter could be expected to chart a course of action.

8. The Committee's secretariat proposed that a special meeting should be organized on the subject of the law and practice relating to reservations to treaties. In that connection, he had requested the Legal Counsel of the United

¹ See *Yearbook* . . . 1996, vol. II (Part Two), paras. 45 and 46.

² For the text of the draft articles provisionally adopted by the Commission on first reading, *ibid.*, chap. III, sect. D.1.

* Resumed from the 2490th meeting.

Nations to consider appointing a person to assist either with a seminar to be convened in New Delhi some time in 1998 or, alternatively, with a special meeting to be organized within the framework of the next session of AALCC.

9. At its thirty-fifth session, the Committee had expressed strong interest in the inclusion on the Commission's agenda of the topic of diplomatic protection, member States considering that it would complement the Commission's work on State responsibility.

10. As in the past, the Committee's secretariat would continue to prepare notes on the substantive items considered by the Commission, with a view to assisting representatives of AALCC member States on the Sixth Committee in the discussion on the Commission's report on the work of the current session. An item entitled "The report on the work of the International Law Commission at its forty-ninth session" would be considered at the Committee's thirty-seventh session, in 1998.

11. He had already mentioned, at the forty-eighth session of the Commission, the proposal of the Committee's secretariat to commemorate the fortieth anniversary of the constitution of the Committee with a special publication. The publication had at the current time been issued,³ and the Committee was very grateful to the many eminent persons, including the Legal Counsel of the United Nations, Mr. Corell, and Mr. Villagrán Kramer, Mr. He and Mr. Sreenivasa Rao, for their valuable contributions. It was his honour to present each member of the Commission with a copy of the commemorative volume. He also wished to extend an invitation to all members of the Commission to participate in the Committee's thirty-seventh session, in 1998.

12. The CHAIRMAN, thanking Mr. Tang Chengyuan for his statement, said it showed the meticulous care with which the Committee followed the work of the Commission. The Observer for the Asian-African Legal Consultative Committee had, however, perhaps been too modest in confining his statement to the Committee's reactions to the Commission's work. Perhaps, therefore, he could give an account of some of the many other activities in which the Committee was engaged, since they too would be of interest to members of the Commission.

13. Mr. TANG CHENGYUAN (Observer for the Asian-African Legal Consultative Committee) said that a number of substantive matters had been discussed at the Committee's thirty-sixth session, the first being the work of the Commission. In that connection, the secretariat had prepared a series of documents on the report on the work of the Commission at its forty-eighth session, together with notes on the five main items on the Commission's agenda at that time. It had also called attention to the fact that the Commission had completed the second reading of the articles of the draft Code of Crimes against the Peace and Security of Mankind.⁴ The Committee had considered: the United Nations Decade of International Law⁵ and had

discussed how member States would celebrate the Decade; the status and treatment of refugees, in which connection it had considered the Report of the Seminar to Commemorate the 30th Anniversary of the Bangkok Principles and had requested the Secretary-General to convene a meeting of experts to study the recommendations of the Seminar in depth, in cooperation with UNHCR; the law of the sea, in which regard it had taken note of the progress of United Nations activities; and the legal protection of migrant workers, in respect of which it had urged member States to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

14. It had further considered a new item proposed by the Government of the Islamic Republic of Iran, namely the extraterritorial application of national laws: sanctions imposed against third parties. On that point, one delegate had said that sanctions could be imposed only by the Security Council after it had determined the existence of a threat to peace, breach of peace and act of aggression, and that unilateral sanctions were in violation of the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993,⁶ which recognized the right to development. It had also been pointed out that unilateral sanctions were in violation of the principle of non-intervention. Moreover, national laws having extraterritorial effect had no basis in international law and such laws, which were aimed primarily at individuals or legal persons, were in violation of the principle of non-intervention, political independence and territorial sovereignty as enshrined in a number of treaties. Such acts, it had been stated, were aimed at the weaker developing countries. Another view was that, in the context of the globalization of trade and privatization of economies, the extraterritorial application of national laws would affect independence. A distinction had been drawn between civil and criminal matters and it had been pointed out that national legislation could be enforced extraterritorially with a view to controlling and sanctioning criminal acts, particularly under the terms of a treaty. In the case of trade and economic matters, however, such legislation should be restricted basically to the territory of the State even though it could have extraterritorial effects.

15. Further study of the topic was recommended, though it was recognized that the Commission was reviewing the question of imposition of sanctions in the context of its work on State responsibility. At the end of the debate, the Committee, recognizing the complexity of the question, had requested its secretariat to monitor and study developments in that regard, urged member States to share such information and materials as might facilitate the secretariat's work, and requested the Secretary-General to convene a seminar or meeting of experts on the subject.

16. The Committee had also discussed the law of international rivers and the framework convention on the law of the non-navigational uses of international watercourses,⁷ as well as the deportation of Palestinians in violation of international law, in particular the Geneva Convention relative to the Protection of Civilian Persons

³ Asian-African Legal Consultative Committee, *Essays on International Law* (New Delhi, Tara Art Press, 1997).

⁴ See footnote 1 above.

⁵ See 2491st meeting, footnote 6.

⁶ A/CONF.157/24 (Part I), chap. III.

⁷ See General Assembly decision 51/206 of 17 December 1996.

in Time of War of 12 August 1949 and the massive immigration and settlement of Jews in the occupied territories. Furthermore, the question of the establishment of an international criminal court had been considered at a special meeting on "interrelated aspects between the international criminal court and international humanitarian law". The Committee had urged member States to participate actively in the Preparatory Committee on the Establishment of an International Criminal Court and to take effective measures to implement international humanitarian law at the national level. The Committee's secretariat had been requested to monitor developments in the Preparatory Committee. Lastly, the Committee had discussed the United Nations Conference on Environment and Development, trade law matters, a progress report on the legislative activities of United Nations agencies, and WTO viewed as a framework agreement and code of conduct for world trade.

17. The CHAIRMAN invited members to engage in an informal discussion with the Observer for the Asian-African Legal Consultative Committee either on substantive issues or on cooperation between AALCC and the Commission.

18. Mr. KATEKA said that the representatives of the Inter-American Juridical Committee and the European Committee on Legal Cooperation had both informed the Commission that the subject of corruption was being addressed in their regions. Did AALCC plan to take up the subject?

19. Mr. TANG CHENGYUAN (Observer for the Asian-African Legal Consultative Committee) said that the issue of corruption had not yet been taken up by the Committee because no member State had suggested including it on the agenda to date. It would be addressed, however, if a suggestion to that effect was approved by the heads of delegations.

20. Mr. HAFNER said he had attended a meeting of the Committee and had been impressed by the broad spectrum of subjects discussed. He wondered whether it was envisageable that the Committee could inform the Commission through the appropriate channels of new topics on its agenda, once it had considered a topic as suitable for being dealt with by the Commission. These topics could then be discussed within the Planning Group on the Commission's future work.

21. Mr. TANG CHENGYUAN (Observer for the Asian-African Legal Consultative Committee) said member States had suggested topics for consideration by the Commission in the past and would be encouraged to continue doing so in the future.

22. Mr. GOCO said that he had chaired the Committee's thirty-fifth session, at Manila in March 1996, at which the Committee had discussed the proposed international criminal court. Many issues such as jurisdiction, procedures and complementarity had been left pending on that occasion and he wondered whether a final position had been adopted at the thirty-sixth session, particularly in the light of the plenipotentiary conference on the proposed international criminal court to be held at Rome in 1998. He asked whether the Committee would be a participant in that forum?

23. Mr. TANG CHENGYUAN (Observer for the Asian-African Legal Consultative Committee) said that AALCC had spent a day during its thirty-sixth session discussing interrelated aspects of the proposed international criminal court and international humanitarian law. Guest academics from the universities of Tehran, Chicago and Bangalore and a representative of ICRC had addressed the Committee. Further discussions were planned prior to the plenipotentiary conference, possibly in the form of a special meeting or seminar.

24. Mr. THIAM said that he had represented the Commission at meetings of AALCC on two occasions and had been struck by the almost total absence of French-speaking member States. He wondered why the French-speaking countries of Africa were not represented in the Committee.

25. Mr. TANG CHENGYUAN (Observer for the Asian-African Legal Consultative Committee) said that, of the 44 member States, only Senegal was French-speaking. Important documents were translated into French, but there were not sufficient funds to provide French simultaneous interpretation facilities at meetings.

26. Mr. KABATSI said that AALCC was open to all States in the African and Asian regions. If French-speaking countries showed little interest in joining, the only course for the Committee was to attract them with appropriate facilities.

27. Mr. THIAM asked whether any steps were being taken to encourage French-speaking countries to join the Committee.

28. Mr. TANG CHENGYUAN (Observer for the Asian-African Legal Consultative Committee) said that the Committee regularly urged French-speaking countries to join but it was, unfortunately, a slow process and he hoped that Mr. Thiam could be of assistance in that regard.

29. Mr. THIAM said he could not recall any initiative designed to arouse the interest of French-speaking African countries in the Committee. Most of them were unaware of its existence. He urged the Secretary-General of AALCC to take more vigorous steps to publicize the Committee's existence among the countries concerned.

30. Mr. Sreenivasa RAO said that, although a previous Secretary-General of AALCC had visited the capital cities of some French-speaking African countries with a view to encouraging them to join, their continued absence meant that the Committee was still not a fully representative body. The Committee was beset with major financial difficulties owing to arrears of contributions, despite the current Secretary-General's valiant efforts to improve the situation. Available resources were therefore used for priority activities such as those described earlier. However, many member Governments hoped that, once the Committee's finances were in a healthier state, the membership would be expanded and French-speaking African countries would be given more encouragement to join, *inter alia*, through the publication of documents in French.

31. Mr. SEPÚLVEDA, noting that AALCC had taken up the issue of legal protection for migrant workers, asked for more information on the nature and scope of its study and the prospective timetable for completion of the work.

32. Mr. TANG CHENGYUAN (Observer for the Asian-African Legal Consultative Committee) said the Committee's work was based on the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and on other similar instruments. It had been decided at the thirty-sixth session to consider the possibility of drafting model legislation and to encourage member States to join the Committee established under the Convention.

33. Mr. SIMMA asked for further details regarding the status of AALCC. He asked if it was an intergovernmental or non-governmental organization or an assembly of legal advisers and other State representatives?

34. He said that he noted that the *Essays on International Law* contained an article by Mr. Hans Kochler⁸ of Innsbruck University, who was the Secretary of the International Progress Organization. He wished to know more about the Organization and asked whether the Committee could count on financial contributions from non-governmental sources such as the Organization to help it out of its financial difficulties?

35. AALCC had discussed the matter of reservations to treaties. The Commission would be considering it in the weeks ahead and might prepare a draft resolution for the General Assembly on the politically sensitive issue of the competence of human rights treaty bodies with respect to reservations deemed to be incompatible with the object and purpose of the treaty concerned. What were the Committee's views on that issue? Had a consensus or a strong majority view emerged that the Commission could take into account in its deliberations?

36. Mr. TANG CHENGYUAN (Observer for the Asian-African Legal Consultative Committee) said that AALCC was a regional intergovernmental organization with 44 member States and permanent observer status at the United Nations. The members were required to make annual financial contributions and the current budget was US\$ 380,000. Owing to the current arrears, the Committee was endeavouring to economize. It received no financial support from non-governmental organizations, but would not turn down such support if it was offered.

37. Mr. Kochler, of the International Progress Organization, had been asked to contribute to the Committee's publication as a professor of law and not in any other capacity. The Committee planned to hold a seminar or special meeting on the topic of reservations to treaties, but no specific views had emerged to date. It would welcome the Commission's support and would be willing to consider any ideas it wished to transmit.

38. Mr. HE thanked the Observer for the Asian-African Legal Consultative Committee for his instructive statement. The views of AALCC on topics under discussion in

the Commission were of great interest and deserved to be taken into consideration in the Commission's deliberations. Notwithstanding the financial difficulties it was currently facing, AALCC remained a regional legal forum of major importance, composed as it was of States from the world's two most populous continents representing different civilizations, legal systems and stages of development. It was therefore important to foster relations between the Committee and the Commission. A question of great concern that had not yet been touched upon by other members was that of the teaching, study and dissemination of international law in the Asian-African region. He asked if the Committee had any plans for activities in that sphere as part of its programme for the United Nations Decade of International Law.

39. Mr. Sreenivasa RAO, referring to points raised by Mr. Simma, said that AALCC was an intergovernmental organization whose members were representatives of States. At the same time, however, they were legal experts and the subjects they discussed were of a legal nature. Therefore, the Committee was not a political body such as other intergovernmental regional organizations might be. The member States could propose subjects for study, but the Committee's resolutions on substantive matters were always purely recommendatory, no resolution, declaration or recommendation being binding upon the members. The Committee was a consultative body whose purpose was to help member States in coordinating their views and consolidating their policies in the legal field. There was no question of the Committee's members presenting a common front on any issue. The Committee provided a unique opportunity for members to exchange their views and experience freely on matters of common interest. That had always been its value in the past, and that was where the emphasis would continue to lie in future.

40. As to the point raised by Mr. He, the question of the dissemination and study of international law represented a major priority for AALCC, which, with improving financial resources, would undoubtedly undertake the task of creating more chairs of international law and providing opportunities for the peoples of the region to improve their knowledge of the subject.

41. Mr. GOCO said he wished to place on record that in 1996 AALCC had, as always, submitted a report on its activities to the General Assembly at its fifty-first session, which had thereupon adopted a resolution encouraging the Committee to continue its work.

42. Mr. TANG CHENGYUAN (Observer for the Asian-African Legal Consultative Committee) said that, as Mr. Sreenivasa Rao had just stated, the Committee was a consultative body whose purpose was to advise Governments in the region on legal matters and to provide a forum for the consideration and discussion of major legal issues by the region's legal scholars. The Committee's resolutions, except on administrative questions, were purely advisory. With reference to Mr. He's question, the Committee's activities in the dissemination of international law took three forms. First, special meetings or seminars were organized to mark specific occasions, such as the Seminar on the "work and role of the International Court of Justice", held at New Delhi on 24 and 25 January 1996, to mark the fiftieth anniversary of ICJ, which had

⁸ "The United Nations and international democracy: The quest for reform", *Essays on International Law*, op. cit. (footnote 3 above), pp. 203-222.

been attended by representatives of 20 member States and had been addressed by a judge of ICJ and other scholars. Other special meetings, as already reported, had been held in connection with trade law. Secondly, every year before the General Assembly was held the Committee prepared a set of comments and notes on all important legal issues on the agenda, for the benefit of the delegations of member States. Lastly, the question of the dissemination of international law would certainly be discussed at the meeting of legal advisers of the Committee's member States to be held in New York during the fifty-second session of the General Assembly in connection with the United Nations Decade of International Law.

43. The CHAIRMAN, on behalf of all members, thanked the Observer for the Asian-African Legal Consultative Committee for his statement and his participation in the ensuing discussion.

Nationality in relation to the succession of States
(*continued*) (A/CN.4/479, sect. B, A/CN.4/480 and Add.1,⁹ A/CN.4/L.535 and Corr.1 and Add.1)

[Agenda item 5]

THIRD REPORT OF THE SPECIAL RAPporteur
(*concluded*)

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

SECTION 4 (Separation of part of the territory) (*concluded*)

ARTICLE 22 (Scope of application)

ARTICLE 23 (Granting of the nationality of the successor State)

ARTICLE 24 (Withdrawal of the nationality of the predecessor State) and

ARTICLE 25 (Granting of the right of option by the predecessor and the successor States)

44. The CHAIRMAN invited the Commission to continue its consideration of section 4 (Separation of part of the territory) of Part II (Principles applicable in specific situations of succession of States) of the draft articles on nationality in relation to the succession of States contained in the Special Rapporteur's third report (A/CN.4/480 and Add.1). As he understood it, there was a clear feeling in the Commission that, the Special Rapporteur's objections notwithstanding, the decision taken with regard to article 20 (Granting of the nationality of the successor States) should also be reflected in section 4.

45. Speaking as a member of the Commission, he said that in connection with articles 23 (Granting of the nationality of the successor State) and 24 (Withdrawal of the nationality of the predecessor State) he had a question to ask of the Special Rapporteur regarding the matter of "secondary nationality", a notion that he did not contest. It seemed to him that the system proposed by the Special Rapporteur could lead in certain cases to situations that would be intolerable in political and human terms. One

could take the example of Bosnia and Herzegovina and leave aside the question whether it had come into being as a result of dissolution or separation, though he took the view that it had involved dissolution of the Socialist Federal Republic of Yugoslavia. Previously, it had been a multi-ethnic society and under the proposed system he asked whether the Bosnian Serbs, with Serbian secondary nationality, would have been able to opt to join the Federal Republic of Yugoslavia, composed of Serbia and Montenegro, and whether the Bosnian Croats, with Croat secondary nationality, would have been able to opt for Croatian nationality. If so, such a result, which would have emptied the new State of more than half of its population, would surely be catastrophic.

46. Mr. MIKULKA (Special Rapporteur) said that he was grateful for the question, which showed the extent of confusion prevailing on the issue. The concept of secondary nationality bore absolutely no relation to ethnic origin. In the former Yugoslavia, persons having their residence in Bosnia and Herzegovina had had the primary nationality of Yugoslavia and the secondary nationality of Bosnia and Herzegovina, without any distinction whatever as to ethnic origin. Thus, far from having the effect of separating the population of Bosnia and Herzegovina into ethnic groups, the concept of secondary nationality ensured that all those who had been citizens of Bosnia and Herzegovina in the former Yugoslavia would continue to remain so, regardless of ethnic origin. However, as a result of inevitable migrations within the Socialist Federal Republic of Yugoslavia during the 40 years of its existence, some persons habitually resident in Bosnia and Herzegovina had not necessarily held the secondary nationality of that part of the Republic. He would reiterate that the link was purely a legal one and had nothing to do with ethnic origin.

47. The CHAIRMAN, speaking as a member of the Commission, said that he was inclined to find the explanation convincing, but wished to ask two supplementary questions. First, he asked in what respect did the concept of secondary nationality as explained by the Special Rapporteur differ from the status of, say, a "citizen" of Texas or of Massachusetts in the United States of America. For example, they had the right to vote and elect the Governor of their particular State. Secondly, in view of the legal, political and human implications, he asked if there was to be no mention, at least in the commentaries, of the problem of "tertiary nationality": a voluntary personal declaration of an ethnic link that had been a legal concept in the former Yugoslavia or the former Union of Soviet Socialist Republics (USSR), for instance. As members of the Commission were no doubt aware, he personally favoured the solution sketched out by the Arbitration Commission of the Conference on the Former Yugoslavia (the Badinter Commission),¹⁰ and partly reflected in the Dayton Agreement, namely, ethnic Serbs and Croats of Bosnia and Herzegovina could have special links with Yugoslavia or Croatia provided they remained loyal to Bosnia and Herzegovina.

48. Mr. MIKULKA (Special Rapporteur), replying to the first question, said that he did not believe a parallel

⁹ Reproduced in *Yearbook* . . . 1997, vol. II (Part One).

¹⁰ *International Legal Materials*, vol. XXXI, No. 6 (November 1992), p. 1497.

could be drawn between the situation in the former Yugoslavia or former Czechoslovakia, on the one hand, and the United States of America, on the other. In the former federal States of Eastern Europe, acquisition of federal nationality had been governed by the laws of the constituent republic; for example, both the Czech and the Slovak Republics constituting Czechoslovakia had had their own nationality laws, which had not necessarily been the same. If a person resident in the Czech Republic had met the necessary conditions for acquiring the citizenship of that Republic, he or she had automatically obtained federal nationality. For that reason, it was in his view inappropriate to speak of secondary nationality in the context of the United States, where citizenship was governed by federal law.

49. Throughout the draft he had scrupulously avoided using the term “tertiary nationality” as a way of designating a person’s ethnic origin. The European Convention on Nationality¹¹ quite rightly stipulated that “nationality” in no way referred to ethnic origin. It was true that the concept had to some extent been applied in the countries of Central and Eastern Europe, but the purpose had been primarily to enable individuals to claim, on the basis of their ethnic background, certain rights reserved under a State’s legislation for linguistic, ethnic, cultural or religious minorities. But that idea of “tertiary nationality” had no relevance to any of the draft articles on nationality currently being considered by the Commission, with the sole exception of article 12 (Non-discrimination).

50. The CHAIRMAN said he was quite persuaded by the explanations given by the Special Rapporteur, but thought they should be incorporated in the commentary in order to make it clear that the Commission had given thought to the matter.

51. Mr. LUKASHUK said that, as time was short, it would be best not to reopen the debate on secondary nationality. At the previous meeting, it had wisely been decided to establish a working group to draft the necessary references to secondary nationality, and that decision should be put into effect.

52. Mr. THIAM agreed that the debate should not be reopened and that the earlier decision should be implemented.

53. Mr. FERRARI BRAVO said that, in Eastern Europe, federations had been based on the nationality of the component entities. The federation itself, in granting nationality, simply took into account the nationality of those entities. In the United States, the opposite situation prevailed: the nationality of the component entities did not exist, and the whole federation conferred its nationality. The arrangements for nationality in Eastern Europe had been aimed at protecting the local identity of the component entities, at preventing the superposition of a higher level of nationality. In the United States, on the other hand, the aim was for the nationality of the federation to be paramount. That distinction should be clearly spelled out in the commentary to prevent confusion.

54. The case of Bosnia and Herzegovina was extremely complex. One individual could have the nationality of Bosnia and Herzegovina but be of Croat extraction, while his neighbour could be deemed to have Croat nationality, not the nationality of Bosnia and Herzegovina, by virtue of not having been born in Bosnia and Herzegovina before, in a fairly arbitrary fashion, the lines of demarcation had been drawn. That second person could change residence and live in Bosnia and Herzegovina for many years, and would still be considered a Croat citizen by the simple fact of his birth in Croat territory, but he would not have the right to be a citizen of Bosnia and Herzegovina. The recent re-election of Franjo Tudjman by Bosnian citizens of Croatian extraction illustrated perfectly the instability that could arise from such situations. As for the Dayton Agreement, they had been developed to put an end to a military conflict, not to set forth general rules for application in other circumstances.

55. The CHAIRMAN pointed out that the example just described by Mr. Ferrari Bravo in connection with Bosnia and Herzegovina could be resolved by the application of articles 20 and 24 of the draft, for persons having habitual residence in the territory would automatically acquire the nationality of the successor State.

56. Mr. ROSENSTOCK suggested that the Commission should, instead of setting up yet another working group, ask the Drafting Committee to bear the entire discussion in mind in dealing with the problem.

57. The CHAIRMAN, referring to Mr. Lukashuk’s comments, said that no decision had been taken regarding the establishment of a working group, but rather, that the Commission had taken a substantive position on what it was appropriate to do.

58. Mr. BENNOUNA suggested that a definition of secondary nationality might be incorporated in the draft.

59. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that that idea had already been thoroughly discussed in plenary and the Commission had been of the view that, in the drafting work, due regard should be given to the consequences deriving from the operation of secondary nationality as a factor in determining nationality in the event of dissolution or separation of a State, without highlighting secondary nationality as a principle of universal application. In the commentary or elsewhere, a suitable explanation would be given of the role of secondary nationality and the circumstances in which it could be taken into consideration. Though the drafting exercise involved was a difficult challenge, he was convinced the Drafting Committee could perform the assignment.

60. Speaking as a member of the Commission, he said he had become much more comfortable with the concept of secondary nationality now that it had been discussed thoroughly. He realized that it had no adverse effect on States that did not make provision for secondary nationality and that, for the protection of populations in States which did make such a provision, the notion of secondary nationality should not be entirely discarded from the draft.

61. Mr. MIKULKA (Special Rapporteur), summing up what had been a very fruitful debate on section 4, said it

¹¹ See 2477th meeting, footnote 7.

had clearly demonstrated the need to keep in mind, when discussing Part II, that the Commission's work was to culminate in the elaboration of recommendations or model provisions, not in the setting forth of customary rules of law.

62. A great many issues had not been raised and he had deliberately refrained from mentioning them, because he believed that they would be best taken up during the consideration of the articles on second reading. The concept of habitual residence, for example, had been taken as one of the most important criteria for the determination of nationality. Yet in recent experiences with State succession in Eastern Europe, that concept had been interpreted in widely varying ways. The time-frame required for establishing habitual residence was far from uniform in the various countries. Some required residence of several years, even decades. The Commission had certainly never intended to condone abusive interpretations of the time element in the concept of habitual residence, and that issue would have to be addressed during the work on the articles on second reading. On first reading, however, the objective should be to resolve general problems and to identify guiding principles.

63. He thanked all members of the Commission for their attentive reading of the articles and analytical efforts, and wished to apologize if, in the heat of the discussion, he had sometimes seemed impatient and discourteous. No incivility towards any member of the Commission had been intended. He had merely been caught up by his desire to move forward with the work on nationality in the best way possible.

64. Mr. THIAM said that, as one of the participants in the sometimes acrimonious discussions on secondary nationality, he, too, apologized for words that might have been somewhat harsh. The Special Rapporteur had in fact done an excellent job on a very difficult subject and was to be commended for it. It was easier to criticize than to make proposals.

65. The CHAIRMAN said the Special Rapporteur's intensity and commitment to his task had served the Commission extremely well.

66. The discussion on articles 22 to 25 having been concluded, he said that, if he heard no objection, he would take it that the Commission wished to refer them to the Drafting Committee, on the understanding that the words "secondary nationality" would be replaced by a new formulation that, while treating the problems posed by secondary nationality, would not highlight that notion, and that the Special Rapporteur would deal with the matter in the commentary.

It was so agreed.

67. The CHAIRMAN announced that, at the next meeting, the Commission would begin its consideration on first reading of the titles and texts of draft articles 1 to 18 on nationality of natural persons in relation to the succession of States as adopted by the Drafting Committee (A/CN.4/L.535). During the discussion, members of the Drafting Committee were requested to exercise restraint, having had the opportunity to express their views in the Drafting Committee, and members of the Commission

were reminded that they were entirely free to propose drafting changes if they so desired. Once the consideration on first reading was completed, the Special Rapporteur would have the task of finalizing the commentary. The entire text would then have to be translated into all working languages with a view to consideration on second reading. The Commission thus had a great deal of work to do before the draft articles could be considered to have been definitively adopted.

68. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) added that, while the draft articles proposed by the Drafting Committee would be discussed singly or in small groups, members of the Commission were urged to bear in mind the entire structure of Part I, to avoid discrepancies or unnecessary repetitions.

The meeting rose at 1 p.m.

2495th MEETING

Wednesday, 18 June 1997, at 10.05 a.m.

Chairman: Mr. Alain PELLET

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Thiam, Mr. Yamada.

Cooperation with other bodies (*continued*)

[Agenda item 9]

1. The CHAIRMAN said that, in his opinion, the Commission was somewhat isolated within the United Nations system. It did, of course, have close relations with the Sixth Committee of the General Assembly, but it did not, for instance, have any organizational link with ICJ; it would certainly be of interest to cultivate relations with that body. If the Commission agreed, he proposed to invite the President of ICJ to attend one of the meetings of the Commission and have an exchange of views with its members, which could only be of benefit.

2. Mr. ROSENSTOCK said he thought that was an excellent idea and would meet with unanimous approval.

It was so decided.