

Document:-  
**A/CN.4/SR.2504**

**Summary record of the 2504th meeting**

Topic:  
**<multiple topics>**

Extract from the Yearbook of the International Law Commission:-  
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ticularly in relation to maritime demarcation, and the International Tribunal for the Law of the Sea.

70. Mr. SHI (Judge at the International Court of Justice) said that the United Nations was working on an agreement with the International Tribunal for the Law of the Sea that would govern relations between the two institutions and hence between the Court and the Tribunal. With regard to contentious cases, it was for States themselves to decide whether they wished to refer cases to the Court or to the Tribunal. However, the Tribunal would have jurisdiction in all cases relating to the seabed.

71. Mr. CRAWFORD, noting that parties were really kept waiting a long time for oral pleadings after the written pleadings before the Court had been completed, a problem that was not only the result of matters of translation, asked how was the Court proposing to solve the problem.

72. Mr. SHI said that the Court was faced with a heavy order of business and a shortage of legal staff. Aside from those problems, its nature was such that it was difficult for it to work at a faster pace. The Court heard cases involving sovereign States and the pace of proceedings depended to a large extent on the reactions of those States. For example, the Court must request the views of the parties, await the submission of memorials and counter-memorials, consult one party when the other requested an extension of the deadline and, if the extension was granted, give the same extension to the former. Moreover, all 15 judges expressed their views and very lengthy discussions were sometimes necessary, for example in the case concerning the *Legality of the Threat or Use of Nuclear Weapons*, before a majority opinion was reached. The judges came from different countries, different cultures and different systems and mutual respect was essential.

73. It should also be noted that the judges had no legal assistance, which represented a major handicap. In other courts, judges' assistants carried out research and wrote opinions and drafted judgments, whereas judges at the Court must do their own research and read all pleadings, which sometimes ran to thousands of pages. The Court was nevertheless trying to improve its internal procedures and, as its Rules Committee was currently engaged in the task, he was unable to be more specific until the Committee had completed its work.

74. Mr. BENNOUNA said he regretted that the Court's working conditions were so difficult and noted that the Commission suffered the consequences because it referred to the Court's jurisprudence. He therefore proposed that Mr. Shi's comments on the Court's financial difficulties should be transmitted to the Secretary-General, who was scheduled to attend a meeting of the Commission the following Friday. He hoped that the Secretary-General could himself transmit those comments to the Member States of the United Nations that were in arrears so that they would in turn transmit them to their parliaments for appropriate action.

*The meeting rose at 1.10 p.m.*

## 2504th MEETING

*Thursday, 3 July 1997, at 10.05 a.m.*

*Chairman: Mr. Alain PELLET*

*Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Bennouna, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Roscnstock, Mr. Simma.*

### State responsibility (A/CN.4/479/Add.1, sect. A, A/CN.4/L.538)

[Agenda item 2]

#### REPORT OF THE WORKING GROUP

1. Mr. CRAWFORD (Chairman of the Working Group on State responsibility), introducing the report of the Working Group (A/CN.4/L.538), said that the Commission had been considering the topic of State responsibility for nearly the whole of its existence. Some of the issues addressed in the early years, when Mr. García Amador had been Special Rapporteur from 1956 to 1961, were currently to be handled under the topic of diplomatic protection. The topic as dealt with more recently had essentially been defined by the Sub-Committee on State Responsibility, chaired by Mr. Ago in 1962 and 1963, as covering in principle the secondary rules of general international law in relation to the responsibility of States.<sup>1</sup> The Commission had eventually produced a complete set of draft articles at its forty-eighth session in 1996.<sup>2</sup> The work on them had proceeded rather sporadically over three main periods. The draft articles in part one had been adopted with Mr. Ago as Special Rapporteur, from 1973 to 1980 the first five articles of part two with Mr. Riphagen from 1983 to 1985, and the remaining articles of parts two and three with Mr. Arangio-Ruiz from 1992 to 1996. The respective Special Rapporteurs had also submitted reports in years other than those mentioned.<sup>3</sup> From that history of the Commission's consideration of the topic, the Working Group had drawn certain conclusions relevant to the work in the current quinquennium. It was obvious that discontinuities in the consideration of the

<sup>1</sup> See Report by Mr. Roberto Ago, Chairman of the Sub-Committee on State Responsibility, *Yearbook . . . 1963*, vol. II, document A/5509, annex I, p. 227.

<sup>2</sup> For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), chap. III, sect. D.

<sup>3</sup> For the historical review of the work, *ibid.* paras 51-64.

topic had substantially delayed the Commission's work, and that the topic must be given priority if progress was to be made.

2. In the 1980s, States had made a number of comments on earlier versions of the draft articles and they were available from the secretariat for consultation. Although they were not recent, they would have to be taken into account in the work. Comments by States on the latest version of the draft articles as a whole had not yet been received, but they were likely to differ considerably from the earlier comments. Indeed, some of the States that had submitted comments no longer existed, so that the topic of State responsibility had outlived a significant number of the States whose responsibility was at issue.

3. Pending receipt of more recent comments, the Working Group had thought it would be inappropriate to engage in a discussion of substance: that was a matter for future years. It had therefore considered the priority to be given to the topic and a timetable to be followed if significant progress was to be made in the current quinquennium. The Working Group strongly believed that the Commission should seek to complete the draft articles on State responsibility during the quinquennium; the timetable annexed to the report of the Working Group, intended solely for the use of members of the Commission and not for transmission to the General Assembly, was designed with a view to achieving that aim.

4. Certain lacunae in the draft articles meant that the Commission would have to deal with specific subjects, such as interest, quantification of damages, and so on. But by and large, the Group felt that the draft articles required, not redefinition, but rededication. In other words, the Commission needed to commit itself to the task of refining and completing the draft articles in the current quinquennium, using the existing framework, but also addressing the outstanding, controversial issues like the definition, treatment and consequences of crime, countermeasures and dispute settlement.

5. To move ahead on those issues while attracting the broadest possible support within the Commission, the work should, in the Working Group's opinion, go forward on two, parallel paths. On the one hand, the Commission would operate as usual, considering reports from the Special Rapporteur on the draft articles, referring the draft articles to the Drafting Committee, and so on. At the fiftieth session, in 1998, that procedure would be applied to all of part one, except for the provisions on crimes. Simultaneously, however, and to facilitate resolution of the issues on which no strong consensus had been reached, the Commission would establish, in each of the next two, or perhaps three years, a working group to look at particular topics in an open-ended way. The working group to be established at the next session should concentrate on the subject of crimes and their consequences, and the working group in 1999 on countermeasures. The working groups would operate on the basis of an introduction to the issues by the Special Rapporteur and a debate in plenary.

6. In his initial report on those issues, the Special Rapporteur would not produce the sort of detailed proposals as for the other articles. The report for the fiftieth session should consist of two parts, one dealing in the ordinary

way with the second reading of the articles in part one, with the exception of article 19, and the other introducing the issues associated with State crimes: definition, category, consequences, and so on. The second part would then form the basis for work by the working group, which, it was hoped, would produce a broad consensus on how the Commission could then proceed. The Special Rapporteur would then incorporate detailed articles on State crimes in his report to the Commission at its fifty-first session, in the expectation that the Drafting Committee could deal with them expeditiously owing to the preparations by the working group in the previous year. The same procedure would be adopted for countermeasures at the fifty-first and fifty-second sessions.

7. The Working Group believed that such an approach would combine the advantages of having a Special Rapporteur and the advantages of working groups and that it would mean the draft articles could be completed in good order in the current quinquennium. It would further the current reform of the Commission's procedures and would also be in line with the section on the Commission's working methods in its report on the work of its forty-eighth session.<sup>4</sup> If the Commission was able to complete the consideration of the draft articles on second reading in the current quinquennium, that would give a strong signal to the Sixth Committee and the many Governments that followed with interest the work on State responsibility. It would demonstrate that the Commission continued to be able to deal with topics expeditiously and authoritatively and would greatly enhance the Commission's reputation.

8. The consideration of the draft articles on second reading would require the rededication of the Commission and a serious effort by the Special Rapporteur, but the resulting text had the capacity to stand alongside the 1969 Vienna Convention as one more example of classic work by the Commission and as a contribution to the development of international law and peaceful relations among States. It was against that background that the Working Group presented its recommendations.

9. The CHAIRMAN asked for clarification as to whether the system of specialized working groups was to replace, or to supplement, the generalized system of friends of the Special Rapporteur envisaged in the Commission's report to the General Assembly at its forty-eighth session in 1996.<sup>5</sup>

10. Mr. CRAWFORD (Chairman of the Working Group on State responsibility) said it was an institutionalization of the system of friends of the Special Rapporteur but on a topic by topic basis, so that members of the Commission could choose, from year to year, whether to be closely involved in the work of the Special Rapporteur. The Commission had already seen, in its elaboration of the draft statute for an international criminal court,<sup>6</sup> that a working group was able to gain a general sense of how to proceed more effectively than could a Special Rapporteur working alone.

<sup>4</sup> *Yearbook* . . . 1996, vol. II (Part Two), paras. 202-219.

<sup>5</sup> *Ibid.*, para. 148.

<sup>6</sup> *Yearbook* . . . 1994, vol. II (Part Two), para. 91.

11. Mr. BENNOUNA said that, as he understood the proposed procedure, the Commission would be given a conventional report from the Special Rapporteur on the draft articles with a view to their consideration on second reading—a report that took account of the reactions of Governments to the draft as adopted on first reading. It was essential to take account of the positions taken by States on the draft articles. The Commission would likewise be taking up the most difficult issues and would be receiving reports dealing specifically with those issues. The articles relating to those issues, such as crimes, dispute settlement and countermeasures, would be reformulated.

12. However, new difficult issues might emerge during the discussion, or from the reactions of Governments which were not yet available. He would therefore accept the procedure proposed by the Working Group on the understanding that, at its fiftieth session in 1998, following the debate in plenary, the procedure would be re-evaluated, particularly in the light of the reactions to be received from States.

13. The CHAIRMAN pointed out that the report of the Working Group currently being discussed would, if adopted, be incorporated in the Commission's report to the General Assembly. States would thus have every opportunity to respond to the points raised therein.

14. Mr. LUKASHUK said he entirely agreed with the reasoning advanced in the report of the Working Group, but experienced some concern about the timetable annexed to the report. The Commission's authority and industriousness would be assessed to a large degree on the basis of its work on the topic of State responsibility, which had been before it for virtually its entire existence without any concrete results having been achieved. He agreed with Mr. Crawford that the relevant draft articles would form a classic work in the field of international law. But the articles in part one were at a much more advanced stage of preparation than the rest of the draft, as could be seen from the comments made by States. The procedure whereby, with the appointment of each new Special Rapporteur, the whole draft was reconsidered anew, should be changed. The possibility should be envisaged of completing the draft at the fifty-second session, in the year 2000, one year ahead of the timetable, in case the Commission did not keep to its schedule, as had often been the case in the past.

15. The CHAIRMAN said that the timetable was submitted to facilitate the work of the Planning Group, which had to harmonize the proposals made by the various Working Groups on different topics. He urged members of the Commission to refrain from commenting on it in plenary.

16. Mr. MELESCANU said he endorsed the report of the Working Group and agreed that some priority should be attached to the topic of State responsibility, which represented a major, long-standing effort by the Commission. He also believed that a Special Rapporteur should be appointed as rapidly as possible, for that would help the Commission organize its work.

17. Paragraph 5 of the report set out a compromise view, but in fact, the Working Group had had a long discussion about the form to be taken by the draft articles. He for one had been in favour of deciding that issue rapidly, if pos-

sible before the fifty-first session, in 1999, and that view should be noted. The decision on the character of the draft articles would impinge on many other subjects of discussion, including the key issue of dispute settlement.

18. Mr. ROSENSTOCK said he had no difficulties regarding the report and thought it was exactly what was needed. As to Mr. Lukashuk's remarks, it should be recalled that, in the comments of States on part one,<sup>7</sup> it had been suggested that significant simplification was possible. His own understanding, moreover, was that, while article 19 of part one<sup>8</sup> and the question of crime would have to be taken up in some detail, that was without prejudice to the inclusion of the notion of crimes. Nothing in the creation of a working group on crimes prejudged the outcome of the discussion between those who believed the notion of crimes was an indispensable element of the work on the topic, and those, like himself, who did not believe that it was a useful addition to the topic of State responsibility.

19. The CHAIRMAN asked whether the Working Group believed a working group on crimes should be set up at the current time with a view to facilitating the Special Rapporteur's task in drafting his report for the fiftieth session in 1998.

20. Mr. CRAWFORD (Chairman of the Working Group on State responsibility) said most members of the Working Group had felt that the working group on crimes could not begin its work at the fiftieth session until at least some debate had been held in plenary, especially as the Commission's membership had substantially changed and many new members had not yet expressed their views. The relationship between crimes and dispute settlement, for example, had not been extensively considered even at the forty-eighth session in 1996 and would be likely to elicit many comments in future. Hence there seemed to be no advantage in setting up the working group on crimes right away.

21. He entirely accepted Mr. Bennouna's caveat that progress would have to be reviewed in the light of comments made by States. He also agreed with Mr. Lukashuk that the vehicle of the draft articles should not be completely overhauled, but rather, that it should be polished and given a tune-up so that it would run smoothly. That could easily be done by accepting the basic lines of part one, though some simplification might also be possible, and some issues raised by States would have to be addressed, such as the temporal element and the question of responsibility for territorial entities.

22. With reference to the schedule of work, the concerns expressed by Mr. Lukashuk were actually met in the timetable. All of the detailed material would have been covered in 1998 (part one) and 1999 (parts two and three), the only exception being dispute settlement, though an introduction to that issue would already have been provided. As the note prefacing the timetable pointed out, in order to avoid extensive reconsideration of the draft articles

<sup>7</sup> See *Yearbook . . . 1980*, vol. II (Part One), p. 87, document A/CN.4/328 and Add.1-4; *Yearbook . . . 1981*, vol. II (Part One), p. 71, document A/CN.4/342 and Add.1-4; *Yearbook . . . 1982*, vol. II (Part One), p. 15, document A/CN.4/351 and Add.1-3; *Yearbook . . . 1983*, vol. II (Part One), p. 1, document A/CN.4/362; and *Yearbook . . . 1988*, vol. II (Part One), p. 1, document A/CN.4/414.

<sup>8</sup> *Yearbook . . . 1976*, vol. II (Part Two), p. 75.

every year, reports to the Sixth Committee would be brief, except at the fifty-first session in 1999, when a major opportunity would be provided for discussion and feedback.

23. Mr. Melescanu had been quite right in identifying the issues underlying paragraph 5 of the report of the Working Group. It would clearly be necessary to form a consensus out of the differing views within the Commission as to whether the draft articles should become a convention or some other instrument. It would be premature to envisage doing so at the next session, but it should indeed be done as soon as was reasonably possible.

24. What Mr. Rosenstock had said on crimes was, of course, true. The notion had been introduced in the mid-1970s, at a time when no one had had the slightest idea of what the consequences of those crimes would be, and they had only been agreed on after the resignation of the Special Rapporteur, Mr. Arangio-Ruiz, at the forty-eighth session, in 1996. Thus, a category of crimes, without the corresponding consequences, had existed for about 20 years. It meant that the issue had to be weighed up carefully and in the open-minded way that Mr. Rosenstock had mentioned if not displayed.

25. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the report of the Working Group on State responsibility.

*It was so agreed.*

26. Mr. GALICKI (Rapporteur) observed that the report of the Working Group would be incorporated in the report of the Commission to the General Assembly on the work of its forty-ninth session, but the annex to the report of the Working Group, which had been submitted merely for the information of members of the Commission, would not accompany it.

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

[Agenda item 5]

**DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE<sup>10</sup> (*continued*)\***

27. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the second part of its report on the draft articles on nationality of natural persons in relation to the succession of States (A/CN.4/L.535/Add.1).

28. The titles and texts of draft articles 19 to 26 of Part II, text of a preamble and the revised title of Part I of the draft articles on nationality of natural persons in relation to the succession of States as adopted by the Drafting Committee read as follows:\*\*

\* Resumed from the 2499th meeting.

\*\* The number within square brackets indicates the number of the corresponding article proposed by the Special Rapporteur in his third report (A/CN.4/480 and Add.1).

<sup>9</sup> Reproduced in *Yearbook* 1997, vol. II (Part One).

<sup>10</sup> For the titles and texts of draft articles 1 to 18 as adopted by the Drafting Committee, see 2495th meeting, para. 4.

PART II

PROVISIONS RELATING TO SPECIFIC CATEGORIES OF SUCCESSION OF STATES

*Article 19. Application of Part II*

**In giving effect to the provisions of Part I in specific situations, States shall take into account the provisions of Part II.**

SECTION 1

TRANSFER OF PART OF THE TERRITORY

*Article 20 [17]. Attribution of the nationality of the successor State and withdrawal of the nationality of the predecessor State*

**When part of the territory of a State is transferred by that State to another State, the successor State shall attribute its nationality to the persons concerned who have their habitual residence in the transferred territory and the predecessor State shall withdraw its nationality from such persons, unless otherwise indicated by the exercise of the right of option which all such persons shall be granted.**

SECTION 2

UNIFICATION OF STATES

*Article 21 [18]. Attribution of the nationality of the successor State*

**Without prejudice to the provisions of article 7, when two or more States unite and so form one successor State, irrespective of whether the successor State is a new State or whether its personality is identical to that of one of the States which have united, the successor State shall attribute its nationality to all persons who, on the date of the succession of States, had the nationality of a predecessor State.**

SECTION 3

DISSOLUTION OF A STATE

[Article 19]

[Deleted]

*Article 22 [19/20]. Attribution of the nationality of the successor States*

**When a State dissolves and ceases to exist and the various parts of the territory of the predecessor State form two or more successor States, each successor State shall, subject to the provisions of article 23, attribute its nationality to:**

(a) Persons concerned having their habitual residence in its territory; and

(b) Without prejudice to the provisions of article 7:

(i) Persons concerned not covered by subparagraph (a) having an appropriate connection with a constituent unit of the predecessor State that has become part of that successor State;

(ii) Persons concerned having their habitual residence in a third State, who were born in or, before leaving the predecessor State, had their last habitual residence in

what has become the territory of that successor State or having any other appropriate connection of a similar character with that successor State.

*Article 23 [21]. Granting of the right of option by the successor States*

1. Successor States shall grant a right of option to all persons concerned covered by the provisions of article 22 who are qualified to acquire the nationality of two or more successor States.

2. Each successor State shall grant a right to opt for its nationality to persons concerned who are not covered by the provisions of article 22.

SECTION 4

SEPARATION OF PART OF THE TERRITORY

[Article 22]

[Deleted]

*Article 24 [22/23]. Attribution of the nationality of the successor State*

When part or parts of the territory of a State separate from that State and form one or more successor States while the predecessor State continues to exist, a successor State shall, subject to the provisions of article 26, attribute its nationality to:

(a) Persons concerned having their habitual residence in its territory; and

(b) Without prejudice to the provisions of article 7:

- (i) Persons concerned not covered by subparagraph (a) having an appropriate connection with a constituent unit of the predecessor State that has become part of that successor State;
- (ii) Persons concerned having their habitual residence in a third State, who were born in or, before leaving the predecessor State, had their last habitual residence in what has become the territory of that successor State or having any other appropriate connection of a similar character with that successor State.

*Article 25 [24]. Withdrawal of the nationality of the predecessor State*

1. Subject to the provisions of article 26, the predecessor State shall withdraw its nationality from persons concerned qualified to acquire the nationality of the successor State in accordance with article 24. It shall not, however, withdraw its nationality before such persons acquire the nationality of the successor State.

2. Subject to the provisions of article 26, the predecessor State shall not withdraw its nationality from:

(a) Persons concerned having their habitual residence in its territory;

(b) Persons concerned not covered by subparagraph (a) having an appropriate connection with a constituent unit of the predecessor State that has remained part of the predecessor State;

(c) Persons concerned having their habitual residence in a third State, who were born in or, before leaving the predecessor State, had their last habitual residence in what has remained part of the territory of the predecessor State or having any other appropriate connection of a similar character with that State.

*Article 26 [25]. Granting of the right of option by the predecessor and the successor States*

Predecessor and successor States shall grant a right of option to all persons concerned covered by the provisions of articles 24 and 25 who are qualified to have the nationality of both the predecessor and successor States or of two or more successor States.

PREAMBLE

*The General Assembly,*

*Considering that problems of nationality arising from succession of States are of concern to the international community,*

*Emphasizing that, while nationality is essentially governed by internal law, international law limits the freedom of action of States in this field,*

*Recognizing that in matters concerning nationality, due account should be taken both of the interests of States and those of individuals,*

*Recalling that the Universal Declaration of Human Rights of 1948 proclaimed the right of every person to a nationality,*

*Recalling also that the International Covenant on Civil and Political Rights of 1966 and the Convention on the Rights of the Child of 1989 recognize the right of every child to acquire a nationality,*

*Emphasizing that the human rights and fundamental freedoms of persons whose nationality may be affected by a succession of States must be fully respected,*

*Bearing in mind the provisions of the Convention on the Reduction of Statelessness of 1961, the Vienna Convention on Succession of States in Respect of Treaties of 1978 and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 1983,*

*Convinced of the need for the codification and progressive development of the rules of international law concerning nationality in relation to the succession of States as a means for ensuring greater juridical security in international relations,*

*Proclaims the following:*

*Title of Part I*

PART I

GENERAL PROVISIONS

PART II

29. Mr. Sreenivasa RAO (Chairman of the Drafting Committee), introducing the second part of the report of the Drafting Committee on the draft articles on nationality of natural persons in relation to the succession of States (A/CN.4/L.535/Add.1), said it was gratifying to announce that, with that report, the Drafting Committee had concluded its first reading of the draft articles on nationality in relation to the succession of States. It was the first time in the past two decades that the Drafting Committee had been able to complete, in the same session, the first reading of an entire set of articles referred to it. It was the hope of the Drafting Committee that the Commission would be able to adopt the report at the current session and thus start the new quinquennium on an affirmative and productive note.

30. The Drafting Committee had held 18 meetings on the subject from 21 May to 25 June 1997. Its success in

completing its task was due to the invaluable guidance it had received from the Special Rapporteur and to the hard work of its members. He extended his gratitude to them for their spirit of cooperation and teamwork.

31. Article 19 (Application of Part II), the first article in Part II (Provisions relating to specific categories of succession of States) provided that, in giving effect to the provisions of Part I in specific situations, States should take into account the provisions of Part II. In that connection, members would recall that the relationship between Parts I and II of the draft had often been the subject of lengthy discussion in plenary. As originally envisaged by the Special Rapporteur, Part I had set forth non-derogable principles that applied in cases of State succession, while the provisions of Part II had been designed essentially to assist States in their negotiations with regard to different categories of State succession. Suggestions had been made in plenary to clarify the relationship between, and different status of, Parts I and II, as appropriate, by means of a *chapeau*. The Drafting Committee, having examined all the articles in both parts, had come to the conclusion that each article was endowed with its own legal content and that, consequently, it was not possible to confer a particular legal status on one part as opposed to the other without adversely affecting or downgrading their true juridical status or value. The draft articles in Parts I and II, as currently formulated, therefore presented a continuum and were closely interrelated, even though they presented different levels of legal obligations and options for States. Thus, while the provisions in Part I dealt with general principles with respect to problems arising from State succession, those in Part II indicated the manner in which the provisions in Part I could be applied to specific categories of State succession. States were, however, free to agree among themselves on any other manner of implementation so long as they took those general provisions into account. That understanding was currently reflected in new article 19.

32. The CHAIRMAN said that he was undoubtedly speaking for all members of the Commission in expressing great admiration for the Drafting Committee and its Chairman for a remarkable job of work on a highly technical subject done in record time.

#### ARTICLE 19 (Application of Part II)

33. Mr. PAMBOU-TCHIVOUNDA said that the article, which created the impression there was a need to justify Part II, did not enlist his support. Indeed, he wondered what it was doing in the draft at all. In particular, the word *correspondantes*, in the French version, was inappropriate in the context, since the articles in Part II did not necessarily correspond to each and every one of the articles in Part I. Perhaps that word should be replaced by the words *qui suivent* (which follow).

34. Mr. AL-KHASAWNEH said that he would be grateful for clarification on two points. First, the Chairman of the Drafting Committee had referred in his introduction to the juridical status of the articles in Parts I and II. It was not clear to him, however, whether the provisions in Part I were to be regarded as general principles and whether the provisions of Part II were designed to implement those

principles. Secondly, the term "specific situations" seemed to be lacking in clarity, since there were no objective criteria as to what those situations might be.

35. Mr. ECONOMIDES said that, a priori, he shared Mr. Pambou-Tchivounda's views. Article 19 was superfluous and added nothing to the draft, particularly since Parts I and II were to be incorporated in a declaratory instrument. The word "specific", moreover, introduced a note of confusion. Actually, the wording of the article as a whole was very weak though it could perhaps be strengthened, and would be more understandable, if it was reworded to read: "In applying the special provisions of Part II, States shall give full effect to the provisions of Part I". Lastly, as article 19 was the introductory article in Part II of the draft, it should refer to Part II immediately and not to Part I, as was currently the case.

36. Mr. BENNOUNA said that he wondered whether the provision in article 19 would not be more appropriately placed in the preamble, where general principles were proclaimed, rather than having an article that seemed to be something of a legal oddity and would create more problems than it would solve.

37. Mr. AL-BAHARNA said he too considered that the article was out of place and that it could even spoil the structure of the whole draft. If, however, the Commission wished to make a distinction between the status of Part I and of Part II, that point could be covered in the preamble or, better still, by a statement in the commentary to the effect that the articles in Parts I and II had a different status.

38. The CHAIRMAN said that much of what was being said had already been commented on at earlier meetings. It had also already been agreed that the title to Part I of the draft would be reviewed.

39. Mr. HAFNER said that he was a little surprised at the discussion, since it had been made clear from the outset that something would have to be done to clarify the relationship between Parts I and II of the draft. It would not create any problem for him if the provision was incorporated in the preamble, but if it was to be deleted in its entirety a certain confusion would ensue, as it would then be necessary to ascertain to what extent Part II of the draft was compatible with Part I. In the circumstances, he considered that the provision in article 19 was very necessary.

40. The CHAIRMAN said that, with a view to facilitating the discussion, he would invite those members who had not been present for the first round of the discussion to read the relevant summary records before calling into question positions already adopted.

41. Mr. SIMMA said that, with the possible exception of Mr. Hafner, nobody in the Drafting Committee had been strongly in favour of a provision like the one in article 19; a reference to the question in the commentary had been thought sufficient. Consequently, if those members who had not taken part in the Drafting Committee at the current time considered that the article was superfluous, it could perhaps simply be deleted.

42. Mr. LUKASHUK, noting that there was no objection in principle to the content of article 19, said that two

points had been made: first, the text of the article should be incorporated in the preamble and, secondly, no such articles had been included in similar drafts in the past. As to the first point, in his view article 19 was a procedural article and, therefore, could not be incorporated in the preamble. As for the second point, the Commission was dealing with a special case and, in such instances, it was advisable to break with precedent. He agreed fully that article 19 was important for the draft and that it could provide a practical solution to the problems that might arise.

43. Mr. CRAWFORD, agreeing with Mr. Hafner and Mr. Lukashuk, said if it was the case that the articles in Part II had a different normative status from the articles in Part I, then that should be reflected either in the body of the draft or in the preamble. It was not enough to deal with the point in the commentary.

44. Mr. GOCO said that he had no objection to the thrust of the provision. Furthermore, Part II dealt with substantive situations in relation to State succession, whereas Part I of the draft contained what he would term coverage clauses—which were quite normal in statutes and codes of law. The wording of the provision could, however, perhaps be improved.

45. The CHAIRMAN, speaking as a member of the Commission, said that the Drafting Committee had done an excellent job, as many members had felt that the relationship between Parts I and II of the draft was extremely ambiguous and should be clarified. Like Mr. Crawford, he would have no major difficulty if the provision in article 19 was incorporated in the preamble. That provision, however, covered two points in an excellent and concise manner: first, that Part II applied in specific cases while Part I covered all cases of State succession and, secondly and more importantly, in giving effect to the provisions of Part I States parties were required, but not strictly obliged, to take into account the provisions of Part II.

46. The word *correspondantes*, which appeared in the French version and to which Mr. Pambou-Tchivounda had referred, was not very clear and he tended to favour its deletion. The provision itself should, however, stand.

47. Mr. CANDIOTI pointed out that the word *correspondantes* appeared only in the French text, no equivalent appearing in the English, Spanish or Russian texts.

48. Mr. Sreenivasa RAO (Chairman of the Drafting Committee), referring to Mr. Al-Khasawneh's point regarding the term "specific situations" in article 19, explained that the word "cases", which had originally been used, had been deemed too specific to refer to the various categories of succession, such as those arising on the unification of States or separation of part of the territory of a State. It had therefore been decided that, in that context, it would be more appropriate to speak of "situations". If article 19 was approved, that point would be explained in the commentary.

49. The CHAIRMAN said that it would pose a problem for the French version, which used the word *cas* (cases). He asked the Special Rapporteur for his comments on the use of the word *correspondantes* in the French text.

50. Mr. MIKULKA (Special Rapporteur) said that the word *correspondantes* had not been added by the Drafting Committee. It was an invention of the translator.

51. It was at the request of the Commission that the Drafting Committee had produced the text of article 19 and, to that extent, it had done what had been asked of it. True, there had been little enthusiasm for the provision, but in the end a consensus had been reached on the text currently before the Commission. In his opinion, the text reflected the wish of the Commission as expressed some weeks earlier.

52. Mr. BENNOUNA said he wished to make it quite clear that his problem was not with the content of the provision in article 19 but with its place in the draft.

53. Mr. CANDIOTI proposed that, for aesthetic purposes, the order of the two clauses constituting article 19, should be reversed, so that the article would read: "States shall take into account the provisions of Part II in giving effect to the provisions of Part I in specific situations."

54. Mr. AL-BAHARNA said he agreed with Mr. Bennouna that the position of article 19 was inappropriate. He proposed a reformulation which could be inserted as the penultimate paragraph of the preamble: "*Recommending* that, in giving effect to the provisions of Part I, States shall, in specific situations, take into account the provisions of Part II".

55. The CHAIRMAN expressed surprise that Mr. Al-Baharna, a member of the Drafting Committee, was proposing such a radical amendment.

56. Mr. KABATSI said that, while he was satisfied with article 19 as it stood, he could appreciate Mr. Bennouna's point regarding its position and wondered whether it could be moved to the end of Part I.

57. Mr. Sreenivasa RAO (Chairman of the Drafting Committee), speaking on a point of order, said that, if the Commission wished to complete the first reading, it should follow the example of the Drafting Committee and focus at that stage of the proceedings on matters of substance rather than on the position of articles or stylistic and aesthetic questions. Otherwise, the Commission would not complete the task it had set itself for the current session. He cautioned against becoming involved in arguments on minor issues.

58. The CHAIRMAN said he associated himself with the advice proffered by the Chairman of the Drafting Committee.

59. Mr. MELESCANU said he endorsed the remarks by the Chairman of the Drafting Committee. The Drafting Committee had discussed the position of article 19 at length and decided that the place it currently occupied was best. It certainly did not belong in the preamble.

60. Mr. LUKASHUK said that he strongly supported the statement by the Chairman of the Drafting Committee. The Commission should not concern itself with editing problems. However, he encouraged the Drafting Committee to consider Mr. Kabatsi's proposal to move article 19 to the end of Part I.

61. Mr. BENNOUNA noted that there was a choice between Mr. Candioti's proposal to leave article 19 in Part II, reversing the order of phrases, and Mr. Kabatsi's proposal to move it to Part I, amending the title to "Application of Part I".

62. The CHAIRMAN observed that the latter proposal would substantially change the meaning of the article. He wondered whether it was feasible to create a third part for article 19, entitled "General provision".

63. Mr. MIKULKA (Special Rapporteur) said that he had made a similar proposal to the Drafting Committee regarding articles 15 and 16 of his original draft and had been persuaded by the arguments of other members to change his mind. He felt the discussion should not be reopened.

64. The CHAIRMAN said he deferred to the Special Rapporteur's opinion.

65. Since Mr. Candioti's proposed rewording of article 19 appeared to be acceptable, he said that, if he heard no objection, he would take it that the Commission agreed to adopt article 19, reversing the order of phrases, on the understanding that, in the French version, the word *correspondantes* would be deleted and the word *cas* changed to *situations*.

*It was so agreed.*

*Article 19, as amended, was adopted.*

#### SECTION I (Transfer of part of the territory)

##### ARTICLE 20 (Attribution of the nationality of the successor State and withdrawal of the nationality of the predecessor State)

66. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that article 20, the only article in section I, corresponded to article 17 proposed by the Special Rapporteur in his third report (A/CN.4/480 and Add.1) and addressed nationality problems that might arise in connection with the transfer of part of a territory. It required the successor State to grant its nationality to the persons concerned who had their habitual residence in the transferred territory and the predecessor State to withdraw its nationality from such persons unless they indicated a preference for retention thereof by exercising the right of option to which they were entitled.

67. An important issue was the determination of the nationality of persons concerned during a period of transition when the right of option could be exercised. It had emerged from a lengthy debate in the Drafting Committee that a great deal depended on the size of the population involved in a transfer, the legislation of States concerned or agreements among them. The Committee had decided to leave the substance of the article unchanged, on the understanding that four points would be explained in the commentary. First, persons concerned who had opted for the nationality of the predecessor State under the terms of article 20 should be deemed to have retained such nationality from the date of the succession. That was to ensure that there would be continuity in the possession of the nationality of the predecessor State. Secondly, the effec-

tive date on which persons concerned who had not exercised the right of option became nationals of the successor State could be determined separately for each case of transfer. In cases of transfers involving a relatively small population, it was recommended for practical purposes that the change in nationality should take place on expiry of the period during which the right of option could be exercised. Where transfers involved a large population, the change of nationality could take effect on the date of the succession. Thirdly, the commentaries to both article 20 and article 4 (Presumption of nationality) should dispel any impression of inconsistency between them, since the latter only established a presumption which was explicitly made subject to the provisions of the draft articles, which of course included article 20. Fourthly, the commentary should explain that the aim of article 20 was not to deal exhaustively with the issue of attribution of the nationality of the successor State but to establish a basic rule concerning the large majority of persons affected by the transfer, that is to say the habitual residents of the transferred territory. The successor State remained free, for example, subject to the provisions of Part I, to offer habitual residents of another State who had an appropriate connection with the transferred territory the possibility to opt for its nationality.

68. Mr. GOCO, noting that the word "granting" had been changed to "attribution", suggested that the latter concept was inappropriately weak when juxtaposed with the concept of "withdrawal". He asked why the much more emphatic word "granting" was not used.

69. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) explained that the word "attribution" implied that persons concerned who had their habitual residence in the transferred territory would acquire the nationality of the successor State without undue effort on their part. The idea of "granting" implied the existence of procedural formalities or the exercise of a right of option. He said that he had explained the distinction in his introduction (2495th meeting) of the report on Part I of the draft articles on nationality of natural persons in relation to the succession of States as adopted by the Drafting Committee (A/CN.4/L.535 and Corr. 1).

70. Mr. ECONOMIDES said that he had strongly disagreed with the other members of the Drafting Committee during the discussion of article 20, which dealt with a key legal issue that merited further consideration by the Commission in plenary. The Chairman of the Drafting Committee had referred to a distinction in terms of the size of the population of the transferred territory, but that distinction was not reflected in the article. Moreover, the Special Rapporteur and the Chairman of the Drafting Committee had linked the right of option under article 20 to the right of option under article 10 (Respect for the will of persons concerned), in Part I, yet the provisions in question were entirely different. The right of option under article 20 was unlimited for the first time in international law. Although it was not specified in the article, the successor State would obviously be responsible for extending the right of option to all habitual residents without exception. However, the article could also be interpreted as involving the predecessor State in the process by according a "negative" right of option to persons who wished to renounce its nationality. To take a recent practical example, China was

obliged, pursuant to the provisions of article 20, to extend the right to opt for its nationality to all inhabitants of the transferred territory of Hong Kong. The situation in the case of the United Kingdom of Great Britain and Northern Ireland was unclear, but it must presumably take similar action. At all events, article 20 represented a break with precedent. In all other cases of State succession, the right of option was limited. He therefore had serious doubts about the provisions of article 20.

71. Mr. MIKULKA (Special Rapporteur) suggested reverting to the practice recommended by the Chairman during the discussion of Part I of the draft, namely, that when members were unhappy with a particular article, they should propose alternative wording.

72. He could not agree with all of Mr. Economides' conclusions. It was not the first time that the right of option had been granted to the entire population of a transferred territory. The commentary to draft article 17 proposed by the Special Rapporteur in his third report had referred, for example, to the 1848 Treaty of Peace, Friendship, Limits and Settlement between Mexico and the United States of America<sup>11</sup> concerning New Mexico and the 1882 Treaty between Mexico and Guatemala for fixing the Boundaries between the respective States.<sup>12</sup> If the main provision of an article stated that persons concerned acquired the nationality of the successor State, it followed that the right of option could be exercised only with respect to retention of the nationality of the predecessor State. He suggested that Mr. Economides should make a specific proposal for discussion by the Commission.

73. The CHAIRMAN said he agreed that it would be wise to reinstitute the practice of encouraging members to submit counterproposals.

74. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that he had not quite followed Mr. Economides' argument concerning the different nature of the rights of option in Part I and Part II. The provision in article 20 was designed to ensure that there was no gap in the enjoyment of citizenship by the individuals concerned. When a territory was transferred, it was normal for the bulk of habitual residents to acquire the nationality of the successor State. That was stated in unambiguous terms, but an equally unambiguous principle was that persons who wished to retain the nationality of the predecessor State should not be denied that option. Part I dealt with the right of option in general terms and article 20 dealt with a specific case. He could not conceive of a large number of variations on the right of option apart from those explained in a specific context.

75. Mr. ROSENSTOCK said that he fully agreed with the Special Rapporteur and the Chairman of the Drafting Committee. The point should be made that the Commission did not view the people involved in the situations under discussion as flora and fauna. It recognized that the right of option should not be based on ethnic, linguistic or tribal criteria, but that it should be open to all concerned. The specific example given by Mr. Economides was not particularly helpful and mistaken results would be less

likely if one recognized the meaning of the phrase "persons concerned".

76. Mr. CRAWFORD said he agreed with the view that members objecting to any part of the draft proposed by the Drafting Committee should make alternative proposals. In order to test the feeling of the Commission, he proposed that the phrase "exercise of the right of option which all such persons shall be granted", at the end of article 20, should be replaced by "exercise of any right of option which such persons may be granted in accordance with article 10". In his opinion, article 10, which did not go nearly as far as article 20 in the form proposed by the Drafting Committee, reflected the current state of international law and should be expressly mentioned. Article 20 as it stood required that all of the persons concerned be given the right of option. Perhaps an indicative vote on his proposal would settle the matter promptly.

77. Mr. ECONOMIDES said that, while entirely agreeing with Mr. Rosenstock that human beings should not be treated like flora and fauna, he believed that the principle should apply in all cases and not solely in connection with transfers of territory. As to the Special Rapporteur's remarks, he had in fact submitted a proposal in writing to the Drafting Committee with a view to bringing article 20 into line with article 10 by introducing a reference to the "appropriate connection" or "genuine link" criterion, but his proposal had not been accepted. The direct link with article 10 proposed by Mr. Crawford was a good idea, as it would ensure that all types of succession of States were treated in the same way.

78. Mr. SIMMA pointed out that Mr. Crawford's proposal was not in conformity with article 19, as just adopted, under which States should take account of the provisions of Part II in specific cases. The reference to the right of option in article 20 was not normative. A majority of members of the Drafting Committee had felt it desirable to go a little further than article 10 in the specific case in which part of the territory of a State was transferred to another State. There appeared to be a clear division of views on the philosophy involved. He agreed with Mr. Crawford that an indicative vote should be taken to decide the issue once and for all.

79. Mr. ROSENSTOCK said that he agreed with Mr. Simma, but had some hesitations about taking last-minute decisions on matters which had been discussed in considerable detail in previous exchanges and on which a conclusion had been reached.

80. Mr. GALICKI said that he agreed with Mr. Crawford that the right of option referred to in article 20 was not the same as that spelled out in article 10. However, he also agreed with Mr. Simma that the difference reflected a deliberate intention on the part of the Drafting Committee to go somewhat further than article 10 in the specific situation of a transfer of territory where both the transferring and the receiving States remained in existence. A valuable element of progressive development of international law would be lost if the Commission decided to adopt Mr. Crawford's proposal.

81. Mr. PAMBOU-TCHIVOUNDA proposed that the word "all", before the words "such persons", at the end of article 20 should be deleted.

<sup>11</sup> See 2488th meeting, footnote 2.

<sup>12</sup> *British and Foreign State Papers, 1881-1882*, vol. LXXIII, p. 273.

82. Mr. MIKULKA (Special Rapporteur) pointed out that article 10 envisaged the right of option if there was a risk that the persons concerned would otherwise become stateless. No such risk existed in the category of cases covered by article 20, under which all persons concerned were entitled to the nationality of the successor State. Mr. Crawford's proposal resolved nothing and its adoption would simply mean that, ultimately, persons affected by a transfer of territory would have no right of option.

83. Mr. ECONOMIDES, reverting to the example of Hong Kong, said that, while the idea of all Hong Kong citizens having the right to opt for United Kingdom nationality was manifestly unthinkable, there was at least a possibility that those having a special connection with the United Kingdom might exercise such a right. Normally, the right of option was limited to certain categories of persons. The deletion of the word "all" from the text went some way towards removing the grounds for his objection and he would agree to the Drafting Committee's text if the word "shall" was replaced by "should" before the words "be granted" at the end of the article.

84. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that the Drafting Committee had thoroughly discussed the relative merits of "shall" and "should" and had come to the conclusion that, in view of article 19, it was currently understood that everything in Part II was recommendatory and that the use of the word "should" would therefore be tautological. He appealed to members to refrain from tinkering with a text to which a great deal of careful thought had been given.

85. The CHAIRMAN said that he would put Mr. Crawford's proposal to an indicative vote. If the result showed that the majority of members were not in favour of the proposal, he would take it that the Commission wished to adopt article 20 with the amendment proposed by Mr. Pambou-Tchivounda.

*An indicative vote was taken on the proposal made by Mr. Crawford.*

*Article 20, as amended, was adopted.*

## SECTION 2 (Unification of States)

### ARTICLE 21 (Attribution of the nationality of the successor State)

86. Mr. Sreenivasa RAO (Chairman of the Drafting Committee) said that Section 2 also consisted of only one article, article 21, which corresponded to article 18 (Granting of the nationality of the successor State) as proposed by the Special Rapporteur in his third report. It provided that the successor State would attribute its nationality to all persons who, on the date of the succession of States, had the nationality of one of the predecessor States. That obligation remained whether, as a result of the unification, a new State was created or whether the personality of the successor State was identical to that of one of the predecessor States. The operation of the article was, of course, without prejudice to article 7, relating to the attribution of nationality to persons concerned having their habitual residence in another State and also having the nationality of that or any other State. The purport of the article was clear and it had not given rise to any objec-

tions in the discussion in plenary. The Drafting Committee had therefore confined itself to some minor linguistic and stylistic changes, replacing, for example, the word "merged" by the word "united", which had the same meaning and which was used in the title of the section. For the sake of simplicity, the Drafting Committee had also replaced the words "at least one of the predecessor States" at the end of the article by "a predecessor State". The commentary would elaborate on the different variations of unification. In cases where there was more than one predecessor State, the requirement of the article was met if the person concerned had the nationality of one of the predecessor States.

87. Further to a comment by Mr. PAMBOU-TCHIVOUNDA, Mr. BENNOUNA proposed that the passage reading "irrespective of whether the successor State is a new State or whether its personality is identical to that of one of the States which have united" should be deleted as being superfluous. In his view, the personality of the successor State was never identical to that of one of the States which had united, but was always changed by the very fact of unification.

88. Mr. MIKULKA (Special Rapporteur) said that the point of the passage could be covered in the commentary.

89. The CHAIRMAN, speaking as a member of the Commission, agreed that the two possibilities envisaged in the passage could be dealt with in the commentary. He was not sure that Germany would agree with Mr. Bennouna that the personality of the successor State was never identical to that of one of the States which had united.

90. Mr. HAFNER said that he had been strongly in favour of including the passage in question as a means of clarifying the question of the applicability of the 1978 and 1983 Vienna Conventions to certain situations which, at the time of the drafting of those Conventions, had not yet arisen.

91. Mr. MIKULKA (Special Rapporteur) said that the 1978 and 1983 Vienna Conventions did in fact envisage the situations referred to in article 21, the text of which was directly derived from the commentaries to the relevant articles of the Conventions.<sup>13</sup> It was because of some confusion with regard to the interpretation of the Conventions that he had thought it opportune to incorporate the reference to those situations in the body of a draft article.

*The meeting rose at 1 p.m.*

<sup>13</sup> See *Yearbook . . . 1974*, vol. II (Part One), pp. 253 et seq., document A/9610/Rev.1; and *Yearbook . . . 1981*, vol. II (Part Two), p. 43, document A/36/10.